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## The Power to Threaten War

**ABSTRACT.** Existing war powers scholarship focuses overwhelmingly on the President's power to initiate military operations abroad and the extent to which that power is constrained by Congress. It ignores the allocation of legal power to threaten military force or war, even though threats—to coerce or deter enemies and to reassure allies—are one of the most important ways in which the United States government wields its military might. This paper fills that scholarly void, and draws on recent political science and historical scholarship to construct a richer and more accurate account of the modern presidency's powers to shape American security policy.

The swelling scope of the President's practice in wielding threatened force largely tracks the standard historical narrative of war powers shifting from Congress to the President. Indeed, adding threats of force to that story might suggest that this shift in powers of war and peace has been even more dramatic than usually supposed. This Article shows, however, that congressional influence operates more robustly—and in different ways—than usually supposed in legal debates about war powers to shape strategic decision-making. In turn, these mechanisms of congressional influence can enhance the potency of threatened force.

By refocusing the debate on threatened force and its credibility requirements, this Article also calls into question many orthodoxies of the policy advantages and risks attendant to various allocations of legal war powers. Instead of proposing a policy-optimal solution, the Article concludes that the allocation of constitutional war powers is—and should be—geopolitically and strategically contingent. The actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on shifting assumptions and policy choices about how best to secure U.S. interests against potential threats.

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## INTRODUCTION

In September 2012, at Israeli Prime Minister Benjamin Netanyahu's prodding, American policymakers and commentators argued intensely about whether the President of the United States should draw a "red line" for Iranian leaders—a threshold of nuclear weapon development the crossing of which would trigger a U.S. military response.<sup>1</sup> It is easy to imagine that the actual launching of military attacks against Iran would generate intense scrutiny and argument of constitutional issues, most notably whether the President could take such action without congressional authorization. Were military strikes to carry on for months, it is also easy to imagine significant legal discussion of whether the President could continue them, in light of the War Powers Resolution's sixty-day limit on military engagements without express congressional approval.<sup>2</sup> Nobody seriously questioned, though, that as a constitutional matter, the President could unilaterally draw the red line threatening them.<sup>3</sup>

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1. See Mark Landler & Helene Cooper, *Obama Rebuffs Netanyahu on Setting Limits on Iran's Nuclear Program*, N.Y. TIMES, Sept. 13, 2012, <http://www.nytimes.com/2012/09/14/world/middleeast/obama-rebuffs-netanyahu-on-nuclear-red-line-for-iran.html>.

More recently, debate has swirled around President Obama's drawing of a red line with regard to the Syrian government's use of chemical weapons, and whether in doing so the President put U.S. credibility at risk. See Peter Baker et al., *Off-the-Cuff Obama Line Put U.S. in Bind on Syria*, N.Y. TIMES, May 4, 2013, <http://www.nytimes.com/2013/05/05/world/middleeast/obamas-vow-on-chemical-weapons-puts-him-in-tough-spot.html>. In June 2013, the President moved some U.S. military forces to Jordan as an implicit threat of military force against Syria. See Michael R. Gordon & Thom Shanker, *U.S. to Keep Warplanes in Jordan, Pressing Syria*, N.Y. TIMES, June 15, 2013, <http://www.nytimes.com/2013/06/16/world/europe/russia-faults-proof-of-use-of-chemicals-in-syrian-war.html>.

In August 2013, following the Syrian government's major chemical weapons attack against opponents and civilians, President Obama announced his intention to strike Syrian government targets with military force. See Remarks on the Situation in Syria, 2013 DAILY COMP. PRES. DOC. 596 (Aug. 31, 2013). Surprisingly, he also announced that, notwithstanding his view that he had unilateral constitutional authority to take that action, he would seek congressional approval to do so. See *id.*

I discuss the arguments of this Article in relation to the Syria case in Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123 YALE L.J. ONLINE 297 (2013), <http://yalelawjournal.org/2013/11/7/waxman.html>.

2. 50 U.S.C. § 1544(b) (2006).
3. Cf. Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 69 (1995) (“[E]vents [surrounding the 1994 Haiti invasion] raise the important question whether the President can legitimately ‘threaten’ force when he is not yet in a proper constitutional posture to carry out the threat in full.”).

The implicit consensus that the President is constitutionally empowered to threaten military force in this situation is, in my view, correct. But the consensus presents an anomaly. Proponents of drawing a line argued that doing so would prevent a war (or at least a bigger and more destructive war) down the road,<sup>4</sup> while critics argued that it would needlessly provoke or drag the United States into a war<sup>5</sup>—the very sorts of concerns that usually animate strident war powers debates. More generally, legal scholars consider the allocation of constitutional war powers to be of paramount importance because it could affect whether or when the United States goes to war, and because it implicates core questions about how our democracy should decide matters of such consequence.<sup>6</sup> Yet legal discourse in this area excludes almost completely some central ways in which the United States actually wields its military power, namely, *with threats of war or force*. This Article breaks down that barrier and connects the legal issues with the strategic ones.

As to the constitutional issues, there is wide agreement among legal scholars on the general historical saga of American war powers—by which I mean the authority to use military force, and not the specific means or tactics by which war is waged once initiated.<sup>7</sup> Generally speaking, the story goes like this: The Founders placed decisions whether to engage in active military hostilities in Congress's hands, and Presidents mostly (but not always)

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4. See, e.g., Michael Oren, Op-Ed., *Should Israel Have a Red Line on Iran?*, BOS. GLOBE, Oct. 9, 2012, <http://www.bostonglobe.com/opinion/2012/10/08/israel-red-line-iran-lesser-chances-conflict/KLJSeZxodRN8tDmDCDztAl/story.html>.
  5. See Fareed Zakaria, 'Red Line' Folly, WASH. POST, Sept. 12, 2012, [http://articles.washingtonpost.com/2012-09-12/opinions/35495153\\_1\\_defense-minister-ehud-barak-israeli-strike-haaretz](http://articles.washingtonpost.com/2012-09-12/opinions/35495153_1_defense-minister-ehud-barak-israeli-strike-haaretz). On the difficulties of coercive diplomacy in the Iran case, see generally Robert Jervis, *Getting to Yes with Iran: The Challenges of Coercive Diplomacy*, FOREIGN AFF., Jan.-Feb. 2013, at 105.
  6. See William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1333 (2006) ("Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence."). As Justice Story wrote in 1833: "[T]he power of declaring war . . . is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1166 (Boston, Hilliard, Gray & Co. 1833).
  7. For a discussion of the latter, see generally David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (discussing theories of the scope of this power and Congress's power to restrict it).

respected this allocation for the first century and a half of our history.<sup>8</sup> At least by the Cold War, however, Presidents began exercising this power unilaterally in a much wider set of cases, and Congress mostly allowed them to do so.<sup>9</sup> Congress's attempt to realign this power allocation after the Vietnam War failed.<sup>10</sup> Today, the President has a very free hand in using military force that does not rise to the level of "war" in the constitutional sense—that is, force not rising to large-scale and long-duration uses of ground troops. From a functional standpoint, this dramatic shift in constitutional power is seen as either good, because decisions to use force require policy dexterity inherent in the presidency, or bad, because unilateral presidential decisions to use force are more prone to be dangerously rash than those checked by Congress.<sup>11</sup>

With this story and split in resulting views in mind, lawyers and legal scholars continue to debate a series of familiar constitutional questions. Does the historical gloss of practice among the political branches—the patterns of behavior by the President and Congress with respect to using force—provide legal justification for this shift toward executive power? Without requiring congressional authorization before engaging in hostilities, are there sufficient checks on executive action? Does this shift in power lead the United States into needless and costly wars, and if so, should this result be remedied with more potent checks, whether led by Congress or courts, to reestablish a constitutional formula closer to the original one?

The main data set for analyzing these questions is, not surprisingly, actual wars and other hostile engagements of U.S. forces abroad. In ascertaining and

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8. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-10 (1993); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 1-26 (1973); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672 (1972). *But see* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CALIF. L. REV.* 167 (1996) (arguing that an original understanding of the Constitution supports very broad presidential authority to use force). William Michael Treanor summarizes this debate, including scholarship that challenges the assumption that the Founders intended to deny the President significant power to use force. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695, 706-13 (1997).
  9. Some trace the major shift to the McKinley administration and the vastly expanded U.S. power projection that followed the Spanish-American War around the turn of the twentieth century. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 88-89 (1990); David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 *ALA. L. REV.* 499, 509-16 (2012).
  10. On Congress's failed effort to modify this power allocation using the War Powers Resolution, see MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 87-111 (1990).
  11. See generally STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 11-51 (2013).

describing the patterns of executive behavior and congressional responses, legal scholars look at armed conflicts and combat operations of the past. Legal debates heat up during or following wars, especially major ones that go badly, or military combat that extends longer than expected. Proposed solutions focus on the commencement of armed hostilities—military engagement with the enemy—and what, if any, inter-branch actions must precede or accompany it.

There is a major disconnect here, though, between legal scholarship on constitutional war powers—specifically, its predominant focus on actual military engagements—and the way the United States wields its military might, especially since the onset of the Cold War and extending into the twenty-first century. Oftentimes the most important policy tool derived from U.S. military power is not waging war, but threatening war or force. The power to threaten war is closely related to, but analytically distinct from, the power to make it.

By “threats” in this Article, I mean communications of the will and capability to use military force that are employed as a means to induce other actors to change behavior—whether to do something or to not do something.<sup>12</sup> During major periods of American history, including the present one, U.S. strategy has relied heavily on perceptions of U.S. military might and willingness to use it; that is, it has relied on the manipulation of risk to deter aggression or other actions by adversaries, to coerce or compel certain actions by other states or international actors, to reassure allies, and to pursue other political designs in the shadow of armed threats.<sup>13</sup> The primary purpose to which U.S. military might has been directed since World War II has generally been to prevent wars or deter them. When war or large-scale force was actually used, it was because a prior policy or strategy had failed—for instance, threats were insufficiently credible, crises involving U.S. threats of force escalated in ways difficult to control, and so on—rather than because making war was intended as the best approach to a danger or, sometimes, even recognized as a likely result. In this regard, most of the time that U.S. military power is “used”—and often when it is most successful—it does not manifest as a war or major military engagement at all.

There is a basic paradox at work here: if threats of force work, force does not have to be used. Other things being equal, the greater the credibility of the threat, the less likely it will be necessary to make good on it. Because this argument is about wars that *don't* happen, though, it is difficult to develop

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12. See *infra* notes 51-52 and accompanying text (discussing different types of threats).

13. See *infra* Section I.C.

empirical evidence to support it. Accordingly, statesmen cannot be so sure of its validity and constitutional lawyers tend to overlook it entirely.

There is a close parallel in international law to this disconnect between legal discourse and security strategy. Article 2(4) of the United Nations Charter prohibits “*the threat* or use of force against the territorial integrity or political independence of any state.”<sup>14</sup> However, beyond prohibiting the most blatantly aggressive threats, international legal doctrine in this area is not at all well developed,<sup>15</sup> and the regulation of threats of force is not well theorized in international legal scholarship.<sup>16</sup> As with the domestic law of American war powers, the threat element has mostly disappeared from discussion, even though international relations scholars recognize that threatened force is doing so much work.<sup>17</sup>

This Article is not a doctrinal argument. It is an argument about framing and method, intended to fill an analytical gap and therefore to inform understanding of the functional advantages and disadvantages of legal formulas for allocating war powers.<sup>18</sup>

Specifically, Part I of this Article contends that understanding the evolution in constitutional war powers and the merits or dangers of these developments requires both widening the data set and investigative lens to include threats of force and incorporating the insights of the past several decades of analysis by political scientists, historians, and theorists of American grand strategy. Doing so reveals aspects of the war powers story obscured by legal discourse and method focused predominantly on actual uses of force, and it alters and refines the orthodox functional arguments usually relied on by both sides—presidentialist (favoring vast unilateral executive authority to use force) and congressionalist (favoring tight legislative checks on that authority)—of the war powers debate. In game-theoretic terms, the debate between presidentialist

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14. U.N. Charter art. 2, para. 4 (emphasis added).

15. See Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 (1988) (discussing the minimal prohibitions and major areas of uncertainty of the “threats” element in Article 2(4)).

16. See Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 2007 NETH. INT'L L. REV. 229, 231-32 (discussing the dearth of such scholarship).

17. For additional discussion of the relationship between international legal doctrine and threatened force, see Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 184-86 (2013).

18. This Article does not address other modes of constitutional interpretation—such as originalism or textualism—for interpreting constitutional war powers. My intention in putting them aside is not to reject those other interpretive modes but simply to focus on, critique, and refine functional or policy arguments.

and congressionalist legal scholars about functional advantages looks only at the final stage of a decision tree; but the President's ability to threaten force is critically important at earlier stages in determining whether that final stage will occur at all, as well as the payoffs associated with choices.<sup>19</sup>

Part II draws on several strands of political science literature to illuminate the relationship between war powers law and threats of force. As a descriptive matter, the swelling scope of the President's practice in wielding threatened force largely tracks the standard historical narrative of war powers shifting from Congress to the President. Indeed, adding threats of force to that story might suggest that this shift in powers of war and peace has been even *more* dramatic than is usually supposed, at least in terms of how formal congressional checks are exercised.

Part II also shows, however, that congressional influence operates more robustly—and in different ways—than usually supposed in legal debates about war powers to shape strategic decision-making. It also shows that these mechanisms of congressional influence can enhance the potency of threats. This Article thus fits into a broader scholarly debate now raging about the extent to which the modern President is meaningfully constrained by law, and in what ways.<sup>20</sup> Recent political science scholarship suggests that Congress already exerts constraining influences on presidential decisions to threaten force, even without resorting to binding legislative actions.<sup>21</sup> Moreover, credibility of signals is critical to effective threats of force. Whereas it often used to be assumed that institutional checks on executive discretion undermined democracies' ability to threaten military force credibly, some recent political science scholarship also offers reasons to expect that congressional constraints can actually bolster the credibility of U.S. threats.<sup>22</sup>

As a prescriptive matter, Part II also shows that examining threatened force and the credibility requirements for its effectiveness calls into question—and may ultimately upend—many orthodoxies concerning the policy advantages and risks attendant to various allocations of legal war powers, including proposed reforms.<sup>23</sup> Although the President faces no significant and direct legal

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19. Cf. Marc Trachtenberg, *History Teaches*, YALE J. INT'L AFF., Sept. 2012, at 23, 29-30 (arguing that armed conflict should be viewed as an "outcome of a political process, unfolding over time").

20. See *infra* notes 147-149 and accompanying text.

21. See *infra* Section II.A.

22. See *infra* Section II.B.

23. See *infra* Section II.C; see also Jide Nzelibe & John Yoo, *Rational War and Constitutional*



limits on his power to threaten force, the President's flexibility to later use force indirectly affects decision-making about threatening it, with major implications for securing peace or dragging the United States into conflicts. Moreover, allocations of legal powers affect potential conflicts not only because they may constrain U.S. actions but also because they may send signals and shape other states' (including adversaries') expectations of U.S. actions.<sup>24</sup> That is, most analysis of war powers is inward-looking, focused on audiences internal to the U.S. government and polity, but thinking about threatened force prompts us to look outward, at how law affects external perceptions among adversaries and allies. Here, extant political science and studies of American strategy offer few clear conclusions, but they point the way toward more sophisticated and realistic policy assessment of legal doctrine and proposed reform.

More generally, as explained in Part III, analysis of threatened force and war powers exposes an underappreciated relationship between constitutional doctrine and grand strategy. Instead of proposing a permanent, functionally optimal allocation of legal powers, as legal scholars are often tempted to do, this Article in the end denies the tenability of any such claim. Having identified new spaces of war and peace powers that legal scholars need to take account of in understanding how those powers are really exercised, this Article also highlights the extent to which any normative account of the proper distribution of authority over this area depends on many matters that cannot be predicted in advance or expected to remain constant.<sup>25</sup> It concludes that the allocation of constitutional war powers is—and should be—geopolitically and strategically contingent. The actual and effective balance between presidential and congressional powers over war and peace in practice necessarily depends on shifting assumptions and policy choices about how best to secure U.S. interests against potential threats.<sup>26</sup>

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*Design*, 115 YALE L.J. 2512, 2516-38 (2006) (discussing the standard functional accounts of war powers doctrine and suggesting the need to incorporate signaling effects on adversaries).

24. On the relationship between domestic constraints and international bargaining more broadly, see generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988). For a similar discussion in the security crisis context, see Alastair Smith, *International Crises and Domestic Politics*, 92 AM. POL. SCI. REV. 623 (1998).

25. See *infra* Section III.A.

26. See *infra* Section III.B.

## I. CONSTITUTIONAL WAR POWERS AND THREATS OF FORCE

Decisions to go to war or to send military forces into hostilities are immensely and uniquely consequential, so it is no surprise that debates about constitutional war powers occupy so much attention. But one of the most common and important ways that the United States uses its military power is by threatening war or force—to coerce, to deter, to bargain, to reassure—and the constitutional dimensions of that activity have received almost no scrutiny or even theoretical investigation.

By “threatening” force or war I mean communicating the possible future use of armed violence to affect the behavior of other actors, usually other states. Such threats involve the perceptions of violence to come.<sup>27</sup> I exclude from this discussion threats to impose other types of costs—such as economic or diplomatic sanctions—for reasons discussed below.<sup>28</sup> I include the wide range from threats of very limited force to threats of full-scale war because legal scholars often group them together in their own functional arguments about constitutional powers, and many of my own arguments similarly apply across the spectrum. Limited uses of force can also grow into big wars, and big wars can sometimes be averted with threats backed up by very limited applications of force.<sup>29</sup> Such threats are an important and pervasive feature of U.S. foreign policy but attract virtually no legal discussion at all.

### A. War Powers Doctrine and Debates

The Constitution grants Congress the powers to create military forces and to “declare War,”<sup>30</sup> which the Supreme Court early on made clear includes the power to authorize limited uses of force short of full-blown war.<sup>31</sup> The Constitution then vests the President with executive power and designates him

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27. For a discussion of different types of threats, see *infra* notes 51–52 and accompanying text.
28. In short, legal scholars often treat military action as of special constitutional concern but fail particularly in this context to incorporate strategic context and logic. See *infra* Section III.B.
29. I focus only on threats before an armed conflict is already underway, though even in the midst of war, the continuing threat of further violence yet to come is also usually intended to cause the other side to concede.
30. U.S. CONST. art. I, § 8.
31. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–41, 43, 45 (1800).

Commander-in-Chief of the armed forces.<sup>32</sup> It has been well accepted since the Founding that these powers include unilateral authority to repel invasions if the United States is attacked.<sup>33</sup>

Although there is nearly universal acceptance of these basic starting points, there is little legal agreement about how the Constitution allocates responsibility for the vast bulk of cases in which the United States has actually resorted to force. The United States has declared war or been invaded only a handful of times in its history, but it has used force—sometimes large-scale force—hundreds of other times.<sup>34</sup> Views are split over questions like when, if ever, the President may use force to deal with aggression against third parties, and how much unilateral discretion the President has to use limited force short of full-blown war. For many lawyers and legal scholars, at least one important methodological tool for resolving such questions is to look at historical practice, and especially the extent to which the political branches acquiesced in common practices.<sup>35</sup>

Interpretation of that historical practice for constitutional purposes again divides legal scholars, but most would agree at least descriptively on some basic features of the history. In particular, most scholars agree that from the Founding era through World War II, Presidents and Congresses alike recognized through their behavior and statements that, except in certain narrow types of contingencies, congressional authorization was required for large-scale military operations against other states and international actors, even as many Presidents pushed and sometimes crossed those boundaries.<sup>36</sup>

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32. U.S. CONST. art. II, §§ 1-2.

33. See SCHLESINGER, *supra* note 8, at 3-5. This power to repel attacks was most famously recognized by the Supreme Court in *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

34. See BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2013 (2013).

35. On the importance of historical practice in ascertaining constitutional war powers, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 461-68 (2012); and Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 873 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

36. See, e.g., ELY, *supra* note 8, at 3; LOUIS FISHER, *PRESIDENTIAL WAR POWER* 17-80 (2d ed. 2004); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989); Lofgren, *supra* note 8.

Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the Korean War.<sup>37</sup> Congress did not declare war in that instance, nor did it expressly authorize U.S. participation.<sup>38</sup> From that period forward, Presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and neither Congress nor the courts have managed to roll back this expanding power.<sup>39</sup>

Congressional concern with expansive presidential war-making authority spiked during the Vietnam War. In the wind-down of that conflict, Congress passed the War Powers Resolution over President Nixon's veto.<sup>40</sup> Its stated purpose was to defend the Framers' original constitutional vision: that the "collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."<sup>41</sup> Since then, presidentialists have argued that the President still retains expansive authority to use force abroad to protect American interests,<sup>42</sup> and congressionalists argue that this authority is tightly circumscribed.<sup>43</sup>

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37. See GRIFFIN, *supra* note 11, at 32; SCHLESINGER, *supra* note 8, at 135; see also WORMUTH & FIRMAGE, *supra* note 36, at 28 ("Until 1950, no judge, no President, no legislator, no commentator ever suggested that the President had legal authority to initiate war.").
38. See SCHLESINGER, *supra* note 8, at 130-40.
39. See W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 192-95 (1981); Stromseth, *supra* note 35, at 846-47.
40. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).
41. 50 U.S.C. § 1541(a).
42. There is a further divide here between those who argue that the War Powers Resolution implicitly contemplates broad presidential discretion, see Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 110 (1995), and those who argue that the President is constitutionally free to ignore the statute, see Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683, 684 (1984); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1178-79 (1999).
43. See, e.g., *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Louis Fisher, Scholar in Residence, Constitution Project), [http://www.foreign.senate.gov/imo/media/doc/Fisher\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Fisher_Testimony.pdf) [hereinafter *Libya and War Powers Hearing*].

These constitutional debates have continued into the twenty-first century. Constitutional scholars split, for example, over President Obama's power to involve the United States in coalition operations against Libya without congressional authorization in 2011, especially after the War Powers Resolution's sixty-day clock expired.<sup>44</sup> Some argue that President Obama's use of military force without specific congressional authorization in that case reflects the broad constitutional discretion Presidents now have to protect American interests, at least short of full-blown "war," while others argue that it is the latest in a long record of presidential violations of the Constitution and the War Powers Resolution.<sup>45</sup>

### *B. Threats of Force and Constitutional Powers*

These days it is usually taken for granted that—whether or not he can make war unilaterally—the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of force. Nobody seriously questions the President's power to declare that the United States is contemplating military options in response to a crisis, or the President's power to move substantial U.S. military forces to a crisis region or engage in military exercises there.

To take the Libya example just mentioned, is there any constitutional limitation on the President's authority to move U.S. military forces to the Mediterranean region and visibly prepare them to strike?<sup>46</sup> What about his authority to issue an ultimatum to Libyan leaders that they cease their brutal conduct or face military action? Would it matter whether such threats were explicit versus implicit, whether they were open and public versus secret, or

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44. Compare Bruce Ackerman & Oona Hathaway, *The Constitutional Clock Is Ticking on Obama's War*, FOREIGN POL'Y (Apr. 6, 2011), [http://www.foreignpolicy.com/articles/2011/04/06/the\\_constitutional\\_clock\\_is\\_ticking\\_on\\_obamas\\_war](http://www.foreignpolicy.com/articles/2011/04/06/the_constitutional_clock_is_ticking_on_obamas_war) (warning of legal barriers to continuing operations and describing modern presidential discretion to unilaterally launch military actions as "a fundamental breach with constitutional tradition"), with *Libya and War Powers Hearing*, *supra* note 43 (statement of Peter J. Spiro, Charles Weiner Professor of Law, Temple University—Beasley School of Law), [http://www.foreign.senate.gov/imo/media/doc/Spiro\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Spiro_Testimony.pdf) (defending the legality of Libya operations).

45. See Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J., Apr. 14, 2011, at 3, [http://harvardnsj.org/wp-content/uploads/2011/04/Forum\\_Glennon\\_Final-Version.pdf](http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf).

46. The War Powers Resolution's application to presidential military actions in situations where hostilities are "imminent," 50 U.S.C. § 1541, might be read to impose statutory restrictions on some military threats.

whether they were just a bluff? Even if there is no constitutional obstacle, might it be argued that the War Powers Resolution's reporting requirements and limits on operations were triggered by a President's mere ultimatum or threatening military demonstration, insofar as those moves might constitute a "situation where imminent involvement in hostilities is clearly indicated by the circumstances"?<sup>47</sup> These questions simply are not asked, at least not anymore.<sup>48</sup> If anything, most lawyers would probably conclude that the President's constitutional powers to threaten war are not just expansive but largely beyond Congress's authority to regulate directly.

The President's power to threaten force is almost certainly at least as broad as his power to use it. One way to think about it is that the power to threaten force is a lesser-included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the primary issue of the scope of presidential power to actually use it. If one interprets the President's defensive war powers very broadly, to include dealing with aggression against not only U.S. territories but also its distant interests and allies,<sup>49</sup> then it is easy to conclude that the President can also therefore take steps that stop short of actual armed intervention to deter or prevent such aggression. If, however, one interprets the President's powers narrowly—for example, to include only limited unilateral authority to repel attacks against U.S. territory<sup>50</sup>—then one might extend objections to excessive presidential power to include the President's unilateral threats of armed intervention.

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47. *Id.*

48. See Damrosch, *supra* note 3, at 69 ("Relatively little attention has been directed to problems of threats of force, as distinct from consummated uses of force, in either constitutional or international law.").

49. See, e.g., Leonard C. Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T ST. BULL. 474, 484 (1966) (arguing that the President's Article II power extends to defensive actions undertaken in Vietnam); see also *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("I read the *Prize Cases* to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization . . .").

50. See, e.g., Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT'L SECURITY L. & POL'Y 319, 322 (2012); see also Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1623 (2002) ("Among modern academic theories of war power, even the most committed congressionalists accept the President's independent power over some defensive measures. At minimum, the President must have the power to 'repel sudden attacks' . . ." (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., Yale rev. ed. 1937))).

Another way of looking at it is that, depending on how a particular threat is communicated, threats of war or force may fall within even quite narrow interpretations of the President's inherent foreign relations powers to conduct diplomacy or his express Commander-in-Chief power to control U.S. military forces—or some combination of the two. A President's verbal warning, ultimatum, or declared intention to use military force, for instance, could be justified as merely exercising his role as the "sole organ" of U.S. foreign diplomacy, conveying externally information about U.S. capabilities and intentions.<sup>51</sup> A President's movement of U.S. troops or warships to a crisis region or elevation of their alert level could be justified as merely exercising his day-to-day tactical control over forces under his command.<sup>52</sup> Generally, nobody seriously argues that the exercise of these powers alone could so affect the likelihood of hostilities or war as to intrude on Congress's powers over war and peace.<sup>53</sup> But we know from historical examples that such unilateral military moves, even those that are ostensibly defensive ones, can provoke wars—take, for example, President Polk's movement of U.S. forces to the contested border with Mexico in 1846, and the resulting skirmishes that led Congress to declare war.<sup>54</sup>

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51. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see also *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) (observing that the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981))); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1592-93 (2005) (arguing that diplomatic authority is vested in the President); Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750, 755 (1989) (noting that "the President has the exclusive power of official communication with foreign governments").
52. Then-Attorney General Robert Jackson explained more than seventy years ago that the President's authority as Commander-in-Chief "has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting . . . American interests." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941). At various times, though, Congress has placed statutory geographical restrictions on the deployment of U.S. forces. See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 456 (2011).

Note that sometimes discretion to move, deploy, or place on alert U.S. military forces in threatening ways is delegated below the President in the chain of command, for example, to the Secretary of Defense or to regional combatant commanders.

53. See Dellinger, *supra* note 42, at 113-14.
54. See generally AMY S. GREENBERG, *A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO* 95-108 (2012) (describing U.S. military maneuvers just north of the Rio Grande and the Mexican military's reaction).

Coming at the issue from the perspective of Congress's Article I powers rather than the President's Article II powers, the very phrasing of the power "To declare War" most naturally puts all the emphasis on the present tense of U.S. military action, rather than its potentiality. Even as congressionalists advance interpretations of the Clause to include not merely declarative authority but primary decision-making authority as to whether or not to wage war or use force abroad, their modern-day interpretations do not include a power to threaten war (except perhaps through the specific act of declaring it). None seriously argues—at least not any more—that the Declare War Clause precludes presidential threats of war.

In recent decades, only a few prominent legal scholars have addressed the President's power to threaten force, and only in brief terms. Taylor Reveley noted in his volume on war powers the importance of allocating constitutional responsibility not only for the actual use of force but also for "[v]erbal or written threats or assurances about the circumstances in which the United States will take military action . . . , whether delivered by declarations of American policy, through formal agreements with foreign entities, by the demeanor or words of American officials, or by some other sign of national intent."<sup>55</sup> Beyond recognizing the critical importance of threats and measures short of force in affecting war and peace, however, Reveley made little effort to address the issue in any detail.

Louis Henkin—one of the few legal scholars who has attempted to define the limiting doctrinal contours of presidentially threatened force—likewise offered only a brief treatment of the issue. As he wrote in his monumental *Foreign Affairs and the United States Constitution*:

Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war. Even when he does not use military force, the President can incite other nations or otherwise plunge or stumble this country into war, or force the hand of Congress to declare or to acquiesce and cooperate in war. As a matter of constitutional doctrine, however, one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war . . . .<sup>56</sup>

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55. REVELEY, *supra* note 39, at 16.

56. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 101 (2d ed. 1996).



The implication seems to be that the President may not unilaterally threaten force in ways that are dramatically escalatory and could likely lead to war, or perhaps that the President may not threaten the use of force that he does not have the authority to initiate unilaterally.

Finally, Jefferson Powell—who generally takes a more expansive view than Henkin of the President’s war powers—has argued that “[t]he ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy.”<sup>57</sup> For Powell, the President is constantly taking actions as part of everyday international relations that carry a risk of military escalation, and these are well-accepted as part of the President’s broader authority to manage, if not set, foreign policy.

The paucity of these accounts demonstrates how confined our modern discussion of presidential powers really is. Moreover, it is not only in academia that the President’s authority to threaten force is so well accepted these days as to seem self-evident. It is also reflected in the legal debates among and inside all three branches of government. In 1989, Michael Reisman observed:

Military maneuvers designed to convey commitment to allies or contingent threats to adversaries . . . are matters of presidential competence. Congress does not appear to view as within its bailiwick many low-profile contemporary expressions of gunboat diplomacy, i.e., the physical interposition of some U.S. war-making capacity as a communication to an adversary of United States’ intentions and capacities to oppose it.<sup>58</sup>

This was and remains a correct description but understates the pattern of practice, insofar as even *major* and *high-profile* expressions of coercive diplomacy are typically regarded among all three branches of government as solely within presidential responsibility.

In *Dellums v. Bush*—perhaps the most searching judicial examination of presidential power to use large-scale force abroad since the end of the Cold War—the district court dismissed on ripeness grounds a suit by members of Congress challenging President George H.W. Bush’s expected military operations against Iraq in 1991. The plaintiffs sought to prevent the President

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57. H. JEFFERSON POWELL, THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 119 (2002).

58. W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777, 783 (1989).

from initiating an offensive attack against Iraq without first securing explicit congressional authorization for such action.<sup>59</sup> But the court held that, at the time of the suit, the President had openly threatened war—through ultimatums and deployment of several hundred thousand U.S. troops—but had not yet “commit[ted] to a definitive course of action” to carry out the threat, so therefore there was no justiciable legal issue.<sup>60</sup> The President’s threat of war did not seem to give the district court legal pause at all; quite the contrary, the *mere* threat of war was treated by the court as a non-issue entirely.<sup>61</sup>

This unquestioned presidential discretion to threaten force or war was not always the case, however. During the early period of the Republic, there was a powerful view that beyond the limits on the President’s authority with respect to outright initiation of armed hostilities or declaration of war, more broadly the President also could not unilaterally take actions that would likely or directly risk war (putting aside responses to actual military attacks),<sup>62</sup> provoke a war with another state,<sup>63</sup> or change the condition of affairs or relations with another state along the continuum from peace to war.<sup>64</sup> To do so, it was often argued, would usurp Congress’s prerogative to control the nation’s state of peace or war.<sup>65</sup> During the Quasi-War with France at the end of the eighteenth century, for example, some members of Congress openly questioned whether the President, absent congressional authorization, could take actions that visibly signaled an intention to retaliate against French maritime harassment,<sup>66</sup> and even some members of President Adams’s cabinet shared doubts.<sup>67</sup>

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59. 752 F. Supp. 1141, 1149-52 (D.D.C. 1990).

60. *Id.* at 1151-52. The Court also determined the case was not yet ripe because the whole of Congress had not yet voted on the matter. *Id.*

61. As for the legislator-plaintiffs, they too challenged not the President’s authority to make threats but the troop build-up on the grounds that this signaled the President’s intent to engage in hostilities in the near future. *Id.* at 1143-44, 1151; *cf.* Michael J. Glennon, *The Gulf War and the Constitution*, FOREIGN AFF., Spring 1991, at 84, 85-86 (arguing that deployment of troops to defend Saudi Arabia after Iraq’s invasion of Kuwait constitutionally required congressional action).

62. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, at 201-02 (2001); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 157* (1976).

63. See CURRIE, *supra* note 62, at 206, 218; SOFAER, *supra* note 62, at 101.

64. See SOFAER, *supra* note 62, at 154, 157, 165.

65. See Stromseth, *supra* note 35, at 862.

66. SOFAER, *supra* note 62, at 157 (“Many legislators contended that the President could use the

Some controversy about the President's power to threaten force arose (belatedly) in relation to the Monroe Doctrine, announced in an 1823 presidential address to Congress, which in effect declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.<sup>68</sup> "Virtually no one questioned [Monroe's proclamation] at the time. Yet it posed a constitutional difficulty of the first importance."<sup>69</sup> Monroe did not actually initiate any military hostilities, but his implied threat—which lacked congressional approval—risked provoking rather than deterring European aggression.<sup>70</sup> Moreover, by putting U.S. prestige and credibility on the line, his threat limited Congress's practical freedom of action if European powers chose to intervene.<sup>71</sup> Monroe's successor, John Quincy Adams, consequently faced complaints from opposition members of Congress that Monroe's proclamation had exceeded his constitutional authority and had usurped Congress's power by committing the United States—even in a non-binding way—to resisting European meddling in the hemisphere.<sup>72</sup>

This debate over the President's authority to unilaterally send militarily threatening signals mirrored an issue raised during the 1793 Neutrality Controversy: whether President Washington could unilaterally declare the United States to be neutral as to the war among European powers. Washington's politically controversial proclamation declaring the nation "friendly and impartial" in the conflict between France and Great Britain (along with other European states) famously prompted a back-and-forth contest of public letters by Alexander Hamilton and James Madison, writing pseudonymously as "Pacificus" and "Helvidius," about whether the President

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frigates as he saw fit, so long as he did not change the 'state of things' or act 'offensively' . . .").

67. Secretary of War James McHenry told President Adams that he could not "'derive authority [from the laws] to do more than employ the ships as convoys,' nor to authorize anything 'further than to repel force by force . . .'" *Id.* at 155 (quoting Letter from James McHenry, Sec'y of War, to President Adams (May 18, 1798)).
68. See CURRIE, *supra* note 62, at 207-10.
69. *Id.* at 207.
70. *Id.* at 208-09.
71. *Id.* The United States would at the time have had to rely on British naval power to make good on that tacit threat. See JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 16-30 (2004).
72. See CURRIE, *supra* note 62, at 215-17.

had such unilateral power or whether it belonged to Congress.<sup>73</sup> Legal historian David Currie points out the irony that the neutrality proclamation was met with stronger and more immediate constitutional scrutiny and criticism than was Monroe's threat. After all, Washington's action accorded with the principle that only Congress, representing popular will, should be able to take the country from the baseline state of peace to war, whereas Monroe's action seemed (at least implicitly) to commit the country to a war that Congress had not approved.<sup>74</sup>

Curiously (but for reasons offered below, perhaps not surprisingly), this issue—whether there are constitutional limits on the President's power to threaten war—has vanished almost completely from legal discussion, and that evaporation occurred even before the dramatic post-war expansion in asserted presidential power to make war. Just prior to World War II, political scientist and presidential-powers theorist Edward Corwin remarked that “[o]f course, it may be argued, and has in fact been argued many times, that the President is under constitutional obligation not to incur the risk of war in the prosecution of a diplomatic policy without first consulting Congress and getting its consent.”<sup>75</sup> “[N]evertheless,” he continued, “the supposed principle is clearly a maxim of policy rather than a generalization from consistent practice.”<sup>76</sup> In his 1945 study *World Policing and the Constitution*, James Grafton Rogers noted:

[E]xamples of demonstrations on land and sea made for a variety of purposes and under Presidents of varied temper and in different political climates will suffice to make the point. The Commander-in-Chief under the Constitution can display our military resources and threaten their use whenever he thinks best. The weakness in the diplomatic weapon is the possibility of dissidence at home which may cast doubt on our serious intent. The danger of the weapon is war.<sup>77</sup>

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73. See WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 59-82 (2006).

74. CURRIE, *supra* note 62, at 207-08 (comparing constitutional questions raised by the Monroe Doctrine to those raised by the neutrality controversy).

75. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* 249 (1940).

76. *Id.*

77. JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION: AN INQUIRY INTO THE POWERS OF THE PRESIDENT AND CONGRESS, NINE WARS AND A HUNDRED MILITARY OPERATIONS, 1789-1945*, at 84 (1945).

At least since then, though, the importance to U.S. foreign policy of threatened force has increased dramatically, while legal questions about it have receded further from discussion.

There are several reasons why constitutional questions about threatened force have dropped out of legal discussions. First, the more politically salient debate about the President's unilateral power to use force has probably swallowed up this seemingly secondary issue. As explained below, it is a mistake to view threats as secondary in importance to uses of force,<sup>78</sup> but they do not command the same political attention and their impacts are harder to measure. Second, the expansion of American power after World War II, combined with the growth of peacetime military forces and a set of defense alliance commitments (developments that are elaborated below) make at least some threat of force much more common—in the case of defensive alliances and some deterrent policies, virtually constant—and difficult to distinguish from other forms of everyday diplomacy and security policy.<sup>79</sup> Besides, for political and diplomatic reasons, Presidents rarely threaten war or intervention without at least a little deliberate ambiguity. As historian Marc Trachtenberg puts it: “It often makes sense . . . to muddy the waters a bit and avoid direct threats . . . .”<sup>80</sup> Any legal lines one might try to draw (recall early attempts to restrict the President's unilateral authority to alter the state of affairs along the peacetime-wartime continuum) have become blurrier and blurrier.

In sum, if the constitutional power to threaten war ever posed a serious legal controversy, it does so no more. As the following Section explains, however, threats of war and armed force have during most of our history become a greater and greater part of American grand strategy, defined here as long-term policies for using the country's military and non-military power to achieve national goals. The prominent role of threatened force in U.S. strategy has become the focus of political scientists and other students of security strategy and crisis bargaining—but constitutional study has not adjusted accordingly.<sup>81</sup>

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78. See *infra* Section I.C.

79. See *id.*

80. Marc Trachtenberg, *Audience Costs: An Historical Analysis*, 21 SECURITY STUD. 3, 39 (2012).

81. Cf. GRIFFIN, *supra* note 11, at 59-98 (situating the development of the president's modern constitutional war powers in the context of Cold War strategy).

### C. *Threats of Force and U.S. Grand Strategy*

While the Korean and Vietnam Wars were generating intense study among lawyers and legal scholars about constitutional authority to wage military actions abroad, during that same period many scholars and strategists—from political scientists, economists, and historians to statesmen and other practitioners of international affairs—turned their focus to the role of threatened force as an instrument of foreign policy. The United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around waging or winning wars but around deterring them and using the threat of war—including demonstrative military actions—to advance U.S. security interests. It was the *potential* use of American military might, not its direct application or engagement with the enemy, that would do much of the heavy lifting. American military power would be used to deter the Soviet Union and other hostile states from taking aggressive action. It would be unsheathed to prompt them to back down over disputes. It would reassure allies that they could depend on U.S. help in defending themselves. All this required that American willingness to go to war be credible in the eyes of adversaries and allies alike.

Much of the early Cold War study of threatened force concerned nuclear strategy, and especially deterrence or escalation of nuclear war. Works by Albert Wohlstetter, Herman Kahn, and others not only studied but shaped the strategy of nuclear threats, as well as how to use limited applications of force or threats of force to pursue strategic interests in remote parts of the globe without sparking massive conflagrations.<sup>82</sup> As the strategic analyst Bernard Brodie wrote in 1946: “Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.”<sup>83</sup>

Toward that end, U.S. government security and defense planners during this time focused heavily on preserving and improving the credibility of U.S. military threats—while the Soviet Union was doing likewise.<sup>84</sup> The Truman Administration developed a militarized version of containment strategy against

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82. See, e.g., HERMAN KAHN, *ON ESCALATION* (1965); HERMAN KAHN, *ON THERMONUCLEAR WAR* (1960); Albert J. Wohlstetter, *The Delicate Balance of Terror*, 37 *FOREIGN AFF.* 211 (1959).

83. Bernard Brodie, *Implications for Military Policy*, in *THE ABSOLUTE WEAPON: ATOMIC POWER AND WORLD ORDER* 70, 76 (Bernard Brodie ed., 1946).

84. See JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT* 90 (rev. & expanded ed. 2005).

the Soviet empire, emphasizing that stronger military capabilities were necessary to prevent the Soviets from seizing the initiative and to resist its aggressive probes: “[I]t is clear,” according to NSC-68, the government document which encapsulated that strategy, “that a substantial and rapid building up of strength in the free world is necessary to support a firm policy intended to check and to roll back the Kremlin’s drive for world domination.”<sup>85</sup>

The Eisenhower Administration’s “New Look” policy and doctrine of “massive retaliation” emphasized making Western collective security both more effective and less costly by placing greater reliance on deterrent threats – including threatened escalation to general or nuclear war. As Eisenhower’s Secretary of State John Foster Dulles explained, “there is no local defense which alone will contain the mighty landpower of the Communist world. Local defenses must be reinforced by the further deterrent of massive retaliatory power.”<sup>86</sup> As described in Evan Thomas’s recent book, *Ike’s Bluff*, Eisenhower managed to convince Soviet leaders that he was ready to use nuclear weapons to check their advance in Europe and elsewhere.<sup>87</sup> In part due to concerns that threats of massive retaliation might be insufficiently credible in Soviet eyes (especially with respect to U.S. interests perceived as peripheral), the Kennedy Administration in 1961 shifted toward a strategy of “flexible response,” which relied on the development of a wider spectrum of military options that could quickly and efficiently deliver varying degrees of force in response to foreign aggression.<sup>88</sup> Throughout these periods, Presidents often resorted to discrete, limited uses of force to demonstrate willingness to escalate. For example, in

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85. *A Report to the National Security Council by the Executive Secretary on United States Objectives and Programs for National Security*, NAT’L SECURITY COUNCIL 55 (1950), [http://www.trumanlibrary.org/whistlestop/study\\_collections/coldwar/documents/pdf/10-1.pdf](http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf) [hereinafter NSC-68].

86. John Foster Dulles, *The Evolution of Foreign Policy*, 30 DEP’T ST. BULL. 107, 108 (1954).

87. See generally EVAN THOMAS, *IKE’S BLUFF: PRESIDENT EISENHOWER’S SECRET BATTLE TO SAVE THE WORLD* (2012).

88. “The weakness of Dulles’s ‘massive retaliation’ strategy of the 1950s,” wrote Henry Kissinger, “[was] that in a crisis it gave us only the choice between nuclear war and doing nothing.” HENRY KISSINGER, *WHITE HOUSE YEARS* 115 (1979). While such inherent inflexibility reduced this strategy’s credibility abroad (and therefore its coercive effectiveness), the massive retaliation doctrine also stood in stark opposition to President Kennedy’s inaugural promises to “pay any price, . . . support any friend, [and] oppose any foe” in defense of international liberty. GEORGE HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 702 (2008). The Kennedy Administration’s adoption of the flexible response strategy can therefore be seen as both a practical and an ideological response to the limitations of massive retaliation.

1961 the Kennedy Administration (mostly successfully in the short-run) deployed intervention-ready military forces immediately off the coast of the Dominican Republic to compel its government's ouster.<sup>89</sup> That same year, it used military exercises and shows of force in ending the Berlin crisis.<sup>90</sup> And in the winter and spring of 1965, the Johnson Administration unsuccessfully used air strikes on North Vietnamese targets following the Tonkin Gulf incidents, failing to deter what it viewed as further North Vietnamese aggression.<sup>91</sup> The point here is not the shifting details of U.S. strategy after World War II—during this era of dramatic expansion in asserted presidential war powers—but the central role of credible threats of war in it, as well as the interrelationship of plans for using force and credible threats to do so.

Also during this period, the United States abandoned its long-standing aversion to “entangling alliances,”<sup>92</sup> and committed to a network of mutual defense treaties with dependent allies. Besides the global collective security arrangement enshrined in the U.N. Charter, the United States committed soon after World War II to mutual defense pacts with, for example, groups of states in Western Europe (the North Atlantic Treaty Organization)<sup>93</sup> and Asia (the Southeast Asia Treaty Organization,<sup>94</sup> as well as bilateral defense agreements with the Republic of Korea,<sup>95</sup> Japan,<sup>96</sup> and the Republic of China,<sup>97</sup> among others).

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89. See Jerome N. Slater, *The Dominican Republic, 1961-66*, in BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 289, 289-303 (1978).
90. See Robert M. Slusser, *The Berlin Crises of 1958-59 and 1961*, in BLECHMAN & KAPLAN, *supra* note 89, at 343, 397-434.
91. See William E. Simons, *The Vietnam Intervention, 1964-65*, in ALEXANDER L. GEORGE ET AL., *THE LIMITS OF COERCIVE DIPLOMACY: LAOS, CUBA, VIETNAM* 144, 195-200 (1971).
92. In his Farewell Address, President Washington famously warned against alliances with major European powers. George Washington, *Farewell Address* (1796), *reprinted in* 1 *DOCUMENTS OF AMERICAN HISTORY* 173 (Henry S. Commager & Milton Cantor eds., Prentice Hall College Div. 10th ed. 1988), *and available at* [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp). President Jefferson did the same in his first inaugural address. Thomas Jefferson, *First Inaugural Address* (1801), *reprinted in* 1 *MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 321 (James D. Richardson ed., Bureau of Nat'l Literature and Art 1908), *and available at* [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp).
93. See GADDIS, *supra* note 84, at 70.
94. See ALEXANDER L. GEORGE & RICHARD SMOKE, *DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE* 271 (1974).
95. See *id.* at 141-42.
96. See GADDIS, *supra* note 84, at 76-77.



These alliance commitments were part of an effort to “extend” deterrence of Communist bloc aggression far beyond America’s own borders.<sup>98</sup> “Extended deterrence” was also critical to reassuring these U.S. allies that their security needs would be met, in some instances to head off their own dangerous rearmament.<sup>99</sup>

Among the leading academic works on strategy of the 1960s and 70s were those of Thomas Schelling, who developed the theoretical framework of coercion, arguing that rational states routinely use the threat of military force—as well as the manipulation of an adversary’s perceptions of future risks and costs with military threats—as a significant component of their diplomacy.<sup>100</sup> Schelling distinguished between deterrence (the use of threats to dissuade an adversary from taking undesired action) and compellence (the use of threats to persuade an adversary to behave a certain way), and he distinguished both forms of coercion from brute force: “[B]rute force succeeds when it is used, whereas the power to hurt is most successful when held in reserve. It is the *threat* of damage . . . to come, that can make someone yield or comply. It is *latent* violence that can influence someone’s choice . . . .”<sup>101</sup>

Alexander George, David Hall, and William Simons then led the way in taking a more empirical approach, reviewing case studies to draw insights about the success and failure of U.S. coercive threats, analyzing contextual variables and their effects on parties’ reactions to threats during crises. Among their goals was generating lessons informed by history for successful strategies that combine diplomatic efforts with threats or demonstrations of force, recognizing that the United States relied heavily on threatened force in addressing security crises. Coercive diplomacy—if successful—offered ways to do so with minimal actual application of military force.<sup>102</sup>

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97. See GEORGE & SMOKE, *supra* note 94, at 271-72.

98. See *id.*

99. A common argument among political scientists is that a formal alliance relationship acts as a commitment device. See, e.g., James D. Morrow, *Alliances: Why Write Them Down?*, 3 ANN. REV. POL. SCI. 63 (2000).

100. See THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 92-125 (1966).

101. *Id.* at 3.

102. See Alexander L. George, *The Development of Doctrine and Strategy*, in GEORGE ET AL., *supra* note 91, at 1, 18 (“In this strategy force plays a modest, and often an inconspicuous, role. And, again, unlike the traditional military strategy, force and threats of force may become part of a carrot and stick approach to the opponent.”).

One of the most influential studies that followed was *Force Without War: U.S. Armed Forces as a Political Instrument*, a Brookings Institution study led by Barry Blechman and Stephen Kaplan and published in 1978.<sup>103</sup> They studied “political use[s] of the armed forces,” defined as actions by U.S. military forces “as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation without engaging in a continued contest of violence.”<sup>104</sup>

Blechman and Kaplan’s work, including their large data set and collected case studies, was important for showing the many ways that threatened force could support U.S. security policy. Besides deterrence and compellence, threats of force were used to reassure allies (thereby, for example, avoiding their own drive toward militarization of policies or crises) and to induce third parties to behave certain ways (such as contributing to diplomatic resolution of crises). The record of success in relying on threatened force has been quite mixed, they showed. Blechman and Kaplan’s work, and that of others who built upon it through the end of the Cold War and the period that has followed,<sup>105</sup> helped explain the factors that correlated with successful threats or demonstrations of force without resort or escalation to war, especially the importance of credible signals.<sup>106</sup>

After the Cold War, U.S. grand strategy continued to rely on coercive force—threatened force to deter or compel behavior by other actors. During the 1990s, the United States wielded coercive power with varied results against rogue actors in many cases that, without the overlay of superpower enmities, were considered secondary or peripheral, not vital, interests: Iraq, Somalia, Haiti, Bosnia, and elsewhere. For analysts of U.S. national security policy, a major puzzle was reconciling the fact that the United States possessed overwhelming military superiority in raw terms over any rivals with its difficult time during this era in compelling changes in their behavior.<sup>107</sup> One important

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103. BLECHMAN & KAPLAN, *supra* note 89.

104. *Id.* at 12 (emphasis omitted).

105. Philip Zelikow updated Blechman and Kaplan’s data set and analysis in 1984. See Philip D. Zelikow, *Force Without War, 1975-82*, 7 J. STRATEGIC STUD. 29 (1984).

106. See BLECHMAN & KAPLAN, *supra* note 89, at 519-20.

107. See Barry M. Blechman & Tamara Cofman Wittes, *Defining Moment: The Threat and Use of Force in American Foreign Policy*, 114 POL. SCI. Q. 1, 1-4 (1999). As Daniel Byman and I wrote about that decade in our study of threats of force and American foreign policy:

U.S. conventional and nuclear forces dwarf those of any adversaries, and the U.S. economy remains the largest and most robust in the world. Because of these

factor that seemed to undermine the effectiveness of U.S. coercive threats during this period was that many adversaries perceived the United States as still afflicted with “Vietnam syndrome,” unwilling to make good on its military threats and see military operations through.<sup>108</sup>

Since the turn of the twenty-first century, major U.S. security challenges have included non-state terrorist threats, the proliferation of nuclear and other weapons of mass destruction (WMD), and rapidly changing power balances in East Asia, and the United States has accordingly been reorienting but retaining its strategic reliance on threatened force. The Bush Administration’s “preemption doctrine” was premised on the idea that some dangerous actors – including terrorist organizations and some states seeking WMD arsenals – are undeterrable, so the United States might have to strike them first rather than waiting to be struck.<sup>109</sup> On one hand, this was a move away from reliance on threatened force: “The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit” a reactive posture.<sup>110</sup> Yet the very enunciation of such a policy – that “[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively”<sup>111</sup> – was intended to persuade those adversaries and their supporters to alter their policies that the United States regarded as destabilizing and threatening.

Although the Obama Administration pulled back from this rhetoric and placed greater emphasis on international institutions, it has continued to rely

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overwhelming advantages, the United States can threaten any conceivable adversary with little danger of a major defeat or even significant retaliation. Yet coercion remains difficult. Despite the United States’ lopsided edge in raw strength, regional foes persist in defying the threats and ultimatums brought by the United States and its allies. In confrontations with Somali militants, Serb nationalists, and an Iraqi dictator, the U.S. and allied record of coercion has been mixed over recent years. . . .

Despite its mixed record of success, however, coercion will remain a critical element of U.S. foreign policy.

DANIEL BYMAN & MATTHEW WAXMAN, *THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT* 1 (2002).

108. Blechman & Wittes, *supra* note 107, at 27-28; see BYMAN & WAXMAN, *supra* note 107, at 142-44.

109. *The National Security Strategy of the United States*, WHITE HOUSE 15 (Sept. 2002), <http://www.state.gov/documents/organization/63562.pdf>.

110. *Id.*

111. *Id.*

on threatened force as a key pillar of its strategy with regard to deterring adversaries (such as aggressive Iranian moves), intervening in humanitarian crises (as in Libya), and reassuring allies.<sup>112</sup> With regard to East Asia, for example, the credible threat of U.S. military force is a significant element of U.S. strategy for deterring Chinese and North Korean aggression as well as reassuring other Asian powers of U.S. protection, to avert a destabilizing arms race.<sup>113</sup> In justifying possible military force against Syria in response to its government's use of chemical weapons, President Obama emphasized the credible threat of U.S. military action as necessary to dissuade states and terrorist organizations from acquiring or using WMD.<sup>114</sup>

#### *D. The Disconnect Between Constitutional Discourse and Strategy*

There is a major disconnect between the decades of work by strategists and political scientists on American security policy since the Second World War and legal analysis and scholarship of constitutional war powers during that period. Lawyers and strategists have been relying on not only distinct languages but distinct logics of military force. When it comes to using U.S. military power, students of law think in terms of “going to war” while students of strategy focus on potential war and processes leading to it. These framings manifest in differing theoretical starting points for considering how exercises of U.S. military might affect war and peace, and they skew empirical insights and resulting normative prescriptions about presidential power.

##### *1. Lawyers' Misframing*

Lawyers' focus on actual uses of force—especially engagements with enemy military forces—as constitutionally salient, rather than including threats of force in their understanding of modern presidential powers, tilts analysis toward a one-dimensional strategic logic. It misses a more complex, multi-

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112. *National Security Strategy of the United States*, WHITE HOUSE 22 (May 2010), [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

113. See JOINT CHIEFS OF STAFF, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA: REDEFINING AMERICA'S MILITARY LEADERSHIP* 14 (2011); Jane Perlez, *Cancellation of Trip by Obama Plays to Doubts of Asia Allies*, N.Y. TIMES, Oct. 4, 2013, <http://www.nytimes.com/2013/10/05/world/asia/with-obama-stuck-in-washington-china-leader-has-clear-path-at-asia-conferences.html>.

114. See Address to the Nation on the Situation in Syria, 2013 DAILY COMP. PRES. DOC. 615 (Sept. 10, 2013).

dimensional and dynamic logic in which the credible will to use force is as important as the capacity to do so.

As discussed above, early American constitutional thinkers and practitioners generally wanted to slow down decisions to go to war with institutional checks because they thought that would make war less likely. “To invoke a more contemporary image,” wrote John Hart Ely of their vision, “it takes more than one key to launch a missile: It should take quite a number to start a war.”<sup>115</sup> They also viewed the exercise of military power as generally a ratchet of hostilities, whereby as the intensity of authorized or deployed force increased, so generally did the state of hostilities between the United States and other parties move along a continuum from peace to war.<sup>116</sup>

Echoes of this logic still reverberate in modern congressionalist legal scholarship: the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.<sup>117</sup> Modern presidentialist legal scholars usually respond that rapid action is a virtue, not a vice, in exercising military force.<sup>118</sup> Now that the United States is a superpower with global interests and global security concerns, vesting discretion in the President to take rapid military action—endowed as he is with what Alexander Hamilton called “[d]ecision, activity, secrecy, and dispatch”<sup>119</sup>—best protects American interests. In either case the emphasis tends to be overwhelmingly placed on actual military engagements with adversaries.

Strategists and many political scientists, by contrast, view some of the most significant use of military power as starting well before armed forces clash—and including important cases in which they never actually do. Coercive

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115. ELY, *supra* note 8, at 4.

116. See SOFAER, *supra* note 62, at 154, 157, 165.

117. See, e.g., Glennon, *supra* note 61, at 84, 87-88; Jules Lobel, *The Relationship Between the Process and Substance of the National Security Constitution*, 15 YALE J. INT’L L. 360, 366-74 (1990) (reviewing KOH, *supra* note 9); see also Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 196 (2009) (“In any democratic regime, accountability to political processes—both through elections and the divided authority of the executive and the legislature—makes leaders reluctant to engage in foolhardy military expeditions.”). *But see* Nzelibe & Yoo, *supra* note 23, at 2526 (recognizing the importance of signaling in functional assessments of war powers allocations).

118. See, e.g., JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 401-02* (2009); Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT’L L. 740, 741 (1989).

119. THE FEDERALIST NO. 70 (Alexander Hamilton).

diplomacy and strategies of threatened force, they recognize, often involve a set of moves and counter-moves by opposing sides and third parties before or even without the violent engagement of opposing forces. It is often the parties' perceptions of anticipated actions and costs, not the actual carrying through of violence, that have the greatest impact on the course of events and resolution or escalation of crises. Instead of being a ratchet of escalating hostilities, the flexing of military muscle can decrease as well as increase actual hostilities, stabilize as well as inflame relations with rivals or enemies. Moreover, those effects are determined not just by U.S. moves and countermoves but by anticipation and responses of other parties to them.<sup>120</sup>

Indeed, as Schelling observed, strategies of brinkmanship operate by “the deliberate creation of a recognizable risk of war, *a risk that one does not completely control.*”<sup>121</sup> This insight—that effective strategies of threatened force involve not only great uncertainty about the adversary's responses but also sometimes involve intentionally creating risk of inadvertent escalation<sup>122</sup>—poses a difficult challenge for any effort to cabin legally the President's power to threaten force in terms of likelihood of war or some standard of due care.<sup>123</sup>

## 2. *Lawyers' Selection Problems*

Methodologically, a lawyerly focus on actual uses of force—a list of which would then commonly be used to consider which ones were or were not authorized by Congress—vastly undercounts the instances in which Presidents wield U.S. military might. Some legal scholars already recognize that studying actual uses of force risks ignoring instances in which the President contemplated force but refrained from using it, whether because of political, congressional, or other constraints.<sup>124</sup> The point here is a different one: that some of the most significant (and, in many instances, successful) presidential decisions to threaten force do not show up in legal studies of presidential war powers that consider actual deployment or engagement of U.S. military forces

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120. See BYMAN & WAXMAN, *supra* note 107, at 37-44.

121. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 200 (1960) (emphasis added).

122. Schelling called this “the threat that leaves something to chance.” *Id.* at 187-203 (capitalization altered).

123. See *supra* note 56 and accompanying text (discussing Henkin's view that, “[a]s a matter of constitutional doctrine, . . . one can declare with confidence that a President begins to exceed his authority if he willfully or recklessly moves the nation towards war”).

124. See, e.g., Bradley & Morrison, *supra* note 35, at 468.

as the relevant data set. Moreover, some actual uses of force, whether authorized by Congress or not, were preceded by threats of force; in some cases these threats may have failed on their own to resolve the crisis, and in other cases they may have precipitated escalation. To the extent that lawyers are interested in understanding from historical practice what war powers the political branches thought they possessed and how well that understanding worked, they are excluding important cases.

Consider, as an illustration of this difference in methodological starting point, that for the period of 1946-1975 (during which the exercise of unilateral presidential war powers had its most rapid expansion), the Congressional Research Service compilation of instances in which the United States has conducted military operations abroad to protect U.S. citizens or promote U.S. interests—often relied upon by legal scholars studying war powers—lists only twenty-three incidents.<sup>125</sup> For the same time period, the Blechman and Kaplan study of political uses of force (usually threats accompanied by some movement of military forces)—often relied upon by political scientists studying U.S. security strategy—includes dozens more data-points, because its authors divide up many military crises into several discrete policy decisions, because many crises were resolved with threat-backed diplomacy, and because many uses of force were preceded by overt or implicit threats of force.<sup>126</sup>

Among the most significant incidents studied by Blechman and Kaplan but not included in the Congressional Research Service compilation are the 1958-1959 and 1961 crises over Berlin and the 1973 Middle East War, during which U.S. Presidents signaled threats of superpower war, and in the latter case signaled particularly a willingness to resort to nuclear weapons.<sup>127</sup> Because the Presidents did not in the end carry out these threats, these cases lack the sort of

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125. See TORREON, *supra* note 34, at 11-12. Louis Fisher refers to the use of this list (and its prior editions) “to show that presidents have resorted to force against other countries hundreds of times with Congress neither declaring war nor authorizing military action,” but Fisher criticizes inclusion of many of these cases as weak historical precedent for that practice. See Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1656 (2000).

126. They identify and study 215 incidents for that time period. See BLECHMAN & KAPLAN, *supra* note 89, at 16. This study, while dated, is still relied upon heavily today by political scientists. See, e.g., Todd S. Sechser, *Goliath’s Curse: Coercive Threats and Asymmetric Power*, 64 INT’L ORG. 627, 628 n.3 (2010) (drawing on this data set for its relative completeness).

127. Blechman and Kaplan cite the 1973 war as one of four cases during the period of their study in which the United States wielded a nuclear threat against the Soviet Union. See BLECHMAN & KAPLAN, *supra* note 89, at 47. In his study of nuclear threats and brinkmanship, Richard Betts details these three incidents among others as “higher-risk” cases. See RICHARD K. BETTS, *NUCLEAR BLACKMAIL AND NUCLEAR BALANCE* 82-131 (1987).

authoritative legal justifications or reactions that accompany actual uses of force. It is therefore difficult to assess definitively how the executive branch and Congress understood the scope of the President's war powers in these cases. Historical inquiry, however, would probably show the executive branch's interpretation to be very broad, even to include full-scale war and even where the main U.S. interest at stake was the very credibility of U.S. defense commitments undergirding its grand strategy, not simply the interests specific to divided Germany and the Middle East region. One might argue that because the threatened military actions were never carried out in these cases, it is impossible to know for sure if the President would have sought congressional authorization or how Congress would have reacted to the use of force. Nonetheless, it is easy to see that in crises like these a threat by the President to use force, having put U.S. credibility on the line in addition to whatever other foreign policy stakes were at issue, would have put Congress in a bind.

By focusing so narrowly on actual hostile engagements pitting U.S. and enemy forces against each other—such as the Korean and Vietnam Wars—legal scholars systematically exclude from their functional analysis of war powers significant examples in which the President probably wielded broad unilateral authority in successfully defusing crises. Including them still leaves room to debate whether that unilateral authority was wielded in ways that precipitated the crises in the first place, or whether a stronger role for congressional consultation or authorization would have contributed to or detracted from the likelihood of peaceful resolution—with powerful normative implications—but it provides a much richer and more complete data set.

### 3. *Lawyers' Mis-Assessment*

Empirically, analysis of and insights gleaned from any particular incident—which might then be used to evaluate the functional merits of presidential powers—look very different if one focuses predominantly on the actual use of force instead of considering also the role of threatened force. Take, for example, the Cuban Missile Crisis—perhaps the Cold War's most dangerous event. To the rare extent that they consider domestic legal issues of this crisis at all, lawyers interested in the constitutionality of President Kennedy's actions generally ask only whether he was empowered to initiate the naval quarantine of Cuba, because that is the concrete military action Kennedy took that was



readily observable and that resulted in actual engagement with Soviet forces or vessels – as it happens, very minimal engagement.<sup>128</sup>

To strategists who study the crisis, however, the naval quarantine is not in itself the key presidential action. After all, as Kennedy and his advisers realized, a quarantine alone could not remove the missiles that were already in Cuba. The most consequential presidential actions were threats of military or even nuclear escalation, signaled through various means including putting U.S. strategic bombers on highest alert.<sup>129</sup> The quarantine itself was significant not for its direct military effects but because of its communicative impact in showing U.S. resolve. If one focuses, as lawyers often do, on presidential military action that actually engaged the enemy in combat (or nearly did), it is easy to dismiss this case as not very constitutionally significant. But if one focuses instead on nuclear brinkmanship, as strategists and political scientists often do,<sup>130</sup> the Cuban Missile Crisis is arguably the most significant historical exercise of presidential powers to affect war and peace.

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128. See, e.g., FISHER, *supra* note 36, at 204. Prior to the Cuban Missile Crisis, an October 3, 1962, congressional Joint Resolution declared it the policy of the United States “to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere,” and “to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.” 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).

In some analyses of war power issues, the Justice Department has cited this as authorization for military actions in the Cuban Missile Crisis, but without discussing the scope of that authorization. See, e.g., William H. Rehnquist, *Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area*, U.S. DEP’T JUST. 315 (May 14, 1970), <http://www.justice.gov/olc/1970/cambodia-1.pdf> (“On some occasions in our history, such as . . . the Cuban Missile Crisis, Congress has, in advance, authorized military action by the President without declaring war.”). *But see* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1824-26 (2010) (arguing that Kennedy’s ability to unilaterally take the country to nuclear war in the Cuban Missile Crisis reveals the lack of checks on executive powers).

129. In his televised address to the nation, Kennedy also stated: “It shall be the policy of this Nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union.” President John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba, 485 PUB. PAPERS 806, 808 (Oct. 22, 1962).

130. See Richard E. Neustadt & Graham T. Allison, *Afterword* to ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 134-36 (1971).

Considering again the 1991 Iraq War, most legal scholars would view this instance as constitutionally a pretty uncontroversial military conflict: the President claimed unilateral authority to use force, but he eventually sought and obtained congressional authorization for what was ultimately—at least in the short run—a quite successful war.<sup>131</sup> For the most part, this case is therefore neither celebrated nor decried much by either side of legal war powers debates,<sup>132</sup> though some congressionalist scholars highlight the correlation of congressional authorization for this war and a successful outcome.<sup>133</sup> Political scientists look at the case differently, though. They often study this event not as a successful war but as failed coercive diplomacy, in that the United States first threatened war through a set of dramatically escalating steps that ultimately failed to persuade Saddam Hussein to withdraw from Kuwait.<sup>134</sup> Some political scientists even see U.S. legal debate about military actions as an important part of this story, asserting that adversaries pay attention to congressional arguments and moves in evaluating U.S. resolve (an issue taken up in greater detail below) and that congressional opposition to Bush’s initial unilateralism in this case undermined the credibility of U.S. threats.<sup>135</sup> Whether

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131. See HENKIN, *supra* note 56, at 109-10.

132. See Edward Keynes, *The War Powers Resolution and the Persian Gulf War*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 241, 243 (David Gray Adler & Larry N. George eds., 1996) (noting that the quick victory in this war “stifled . . . debate” about constitutional allocations of war powers).

133. See, e.g., Damrosch, *supra* note 3, at 68 (“[C]ongressional articulation of national interest [in authorizing the 1991 Gulf War] provided authority and credibility not only for the 1991 war, but also for the subsequent reminders to Saddam Hussein that U.S. military power can be invoked to enforce compliance with international norms.”).

134. See, e.g., Richard Herrmann, *Coercive Diplomacy and the Crisis over Kuwait, 1990-1991*, in ALEXANDER L. GEORGE & WILLIAM E. SIMONS, *THE LIMITS OF COERCIVE DIPLOMACY* 229, 229-54 (2d ed. 1994) (characterizing the 1991 Gulf War as a failure of coercive diplomacy); Janice Gross Stein, *Deterrence and Compellence in the Gulf, 1990-91: A Failed or Impossible Task?*, 17 *INT’L SECURITY* 147 (1992) (same).

135. See, e.g., DAVID P. AUERSWALD, *DISARMED DEMOCRACIES: DOMESTIC INSTITUTIONS AND THE USE OF FORCE* 91-97 (2000); see also Blechman & Wittes, *supra* note 107, at 13-14. I have seen no good empirical evidence to support this claim, though; to the contrary, there is good empirical evidence that the Iraqi government was very poor at reading American politics. See generally Charles Duelfer & Stephen Benedict Dyson, *Chronic Misperception and International Conflict: The U.S.-Iraq Experience*, 36 *INT’L SECURITY* 73 (2011). Some political scientists speculate that, once the President had already sent significant forces to the region, Congress’s rejection of an authorization to use force might have increased the likelihood of war. See James M. Lindsay & Randall B. Ripley, *How Congress Influences Foreign and Defense Policy*, *BULL. AMER. ACAD. ARTS & SCI.*, Mar. 1994, at 7, 11.

one sees the Gulf War as a case of successful war, as lawyers usually do, or unsuccessful threatened war, as political scientists usually do, colors how one evaluates the outcome and the credit one attaches to factors such as vocal congressional opposition to initially unilateral presidential moves.

Notice also that legal analysis of presidential authority to use force is sometimes thought to turn partly on the U.S. security interests at stake, as though those interests are purely contextual and exogenous to U.S. decision-making and grand strategy. In justifying President Obama's 2011 use of force against the Libyan government, for example, the Justice Department's Office of Legal Counsel concluded that the President had such legal authority "because he could reasonably determine that such use of force was in the national interest," and it then went on to detail the U.S. security and foreign policy interests.<sup>136</sup>

The interests at stake in crises like these, however, are altered dramatically if the President threatens force. Doing so puts the credibility of U.S. threats at stake, which is important not only with respect to resolving the crisis at hand but with respect to other potential adversaries watching U.S. moves.<sup>137</sup> The President's power to threaten force means that he may unilaterally alter the costs and benefits of actually using force through his prior actions.<sup>138</sup> Consider, for example, that once President George H.W. Bush placed hundreds of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to

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136. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).

137. Such reputation effects feature prominently in international relations deterrence and coercion theory, see SCHELLING, *supra* note 100, at 124, though firm understanding of how reputations are created and how they function has lagged. See Robert Jervis, *Deterrence and Perception*, 7 INT'L SECURITY 1, 8-9 (1982). U.S. political leaders and government policy-makers place great emphasis on the importance of maintaining credibility of threats, whereas some political scientists have called its importance into doubt. See Daniel Drezner, *Swing and a Miss*, FOREIGN POL'Y, Sept. 16, 2013, [http://www.foreignpolicy.com/articles/2013/09/16/swing\\_and\\_a\\_miss\\_credibility\\_syria](http://www.foreignpolicy.com/articles/2013/09/16/swing_and_a_miss_credibility_syria). Some scholars have argued that no strong links exist between states' actions and their reputations for resoluteness. See JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS 1-43 (1996); see also DARYL G. PRESS, CALCULATING CREDIBILITY: HOW LEADERS ASSESS MILITARY THREATS (2007) (arguing, based on empirical case studies from the Cold War, that backing down in a particular crisis did not diminish credibility in later crises). For a discussion of this literature and its relationship to constitutional war powers, see Ganesh Sitaraman, *Credibility and War Powers*, 127 HARV. L. REV. F. 123 (2014), [http://www.harvardlawreview.org/media/pdf/forvol127\\_sitaraman.pdf](http://www.harvardlawreview.org/media/pdf/forvol127_sitaraman.pdf).

138. Political scientists refer to this in economic terms as a "costly signal," or an action that changes one's own payoffs for subsequent actions. See Robert F. Trager, *Diplomatic Calculus in Anarchy: How Communication Matters*, 104 AM. POL. SCI. REV. 347, 348 (2010).

Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional partners were put on the line;<sup>139</sup> or that in threatening force against Serbian President Slobodan Milosevic over the 1999 Kosovo crisis, President Clinton and allied leaders altered the strategic stakes by putting perceptions (among both allies and adversaries) of collective NATO resolve on the line.<sup>140</sup>

In other words, the U.S. security interests in carrying through on threats are partly endogenous to the strategy embarked upon to address crises. Moreover, interests at stake in any one crisis cannot simply be disaggregated from broader U.S. grand strategy: If the United States generally relies heavily on threats of force to shape the behavior of other actors, then its demonstrated willingness or unwillingness to carry out a threat and the outcomes of that action may affect its credibility in the eyes of other adversaries and allies, too.<sup>141</sup>

It is remarkable, though in the end not surprising, that the executive branch does not generally cite these credibility interests in justifying its unilateral uses of force. It does cite when relevant the U.S. interest in sustaining the credibility of its formal alliance commitments or U.N. Security Council resolutions, as reasons supporting the President's constitutional authority to use force.<sup>142</sup> The executive branch generally refrains from citing

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139. See Glennon, *supra* note 61, at 93 (noting that the executive branch argued in the *Dellums* litigation that American credibility would be undercut by judicial intervention, but arguing that the executive had created this problem for itself).

140. See Henry A. Kissinger, *Doing Injury to History*, NEWSWEEK, Apr. 5, 1999, at 38.

141. See Robert J. Art, *Coercive Diplomacy: What Do We Know?*, in THE UNITED STATES AND COERCIVE DIPLOMACY 359, 408-09 (Robert J. Art & Patrick M. Cronin eds., 2003).

142. Since the Korean War, the executive branch has frequently cited the importance of maintaining the credibility of the U.N. system—especially through the enforcement of Security Council resolutions—as an integral U.S. interest when justifying the use of force internationally, and one closely linked to the President's foreign relations powers. See, e.g., Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 10 (2011) (“In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC’s credibility and effectiveness—provided a sufficient basis for the President’s exercise of his constitutional authority to order the use of military force.”); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 333 (1999) (making the same argument); Authority of the President to Use United States Military Forces for Protection of the Relief Effort in Somalia, 16 Op. O.L.C. 8, 12 (1992) (“Maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest, and will promote the United States’ conception of a ‘new world order.’”); Authority of the President to Repel the Attack in Korea, 23 DEP’T ST. BULL.

the similar interests in sustaining the credibility of the President's own threats of force, however, probably in part because doing so would so nakedly expose the degree to which the President's prior unilateral strategic decisions would tie Congress's hands on the matter.

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In sum, lawyers' focus on actual uses of force—usually in terms of armed clashes with an enemy or the placement of troops into hostile environments—does not account for much vaster ways that Presidents wield U.S. military power, and it skews the claims legal scholars make about the allocation of war powers between the political branches. A more complete account of constitutional war powers should incorporate the significant role of threatened force in American foreign policy.

## II. DEMOCRATIC CHECKS ON THREATENED FORCE

Thus far, this Article has shown that, especially since the end of World War II, the United States has relied heavily on strategies of threatened force—for which credible signals are a critical element—in wielding its military might, and that the President is not constrained legally in any significant, formal sense in threatening war. Drawing on recent political science scholarship, this Part takes some of the major questions often asked by students of constitutional war powers with respect to the actual use of force and reframes them in terms of threatened force.

First, as a descriptive matter, in the absence of formal legal checks on the President's power to threaten war, is the President nevertheless informally but substantially constrained by democratic institutions and processes, and what role does Congress play in that constraint? Second, as a normative matter, what are the merits and drawbacks of this arrangement of democratic institutions and constraints with regard to strategies of threatened force? Third, as a prescriptive matter, since it is not really plausible that Congress or courts would ever erect direct legal barriers to the President's power to threaten war, how might legal reform proposals to more strongly and formally constrain the President's power to *use* force indirectly impact his power to *threaten* it effectively? For reasons discussed below, I do not consider whether Congress

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173, 177 (1950) (“The continued existence of the United Nations as an effective international organization is a paramount United States interest.”).

could legislatively restrict the President's power to threaten force or war; in short, I set that issue aside because even if doing so were constitutionally permissible, ardent congressionalists have exhibited no interest in doing so, and instead have focused on legally controlling the actual use of force.

Political science insights that bear on these questions emerge from several directions. One is from studies of Congress's influence on decisions to use force, which usually assume that Congress's formal legislative powers play only a limited role in this area, and the effects of this influence on presidential decision-making about threatened force. Another is international relations literature on bargaining,<sup>143</sup> as well as literature on the theory of democratic peace, the notion that democracies rarely go to war with one another.<sup>144</sup> In attempting to explain the near-absence of military conflicts between democracies, political scientists have examined how particular features of democratic governance—electoral accountability, the institutionalized mobilization of political opponents, and the diffusion of decision-making authority regarding the use of force among executive and legislative branches— affect decision-making about war.<sup>145</sup> These and other studies, in turn, have led some political scientists (especially those with a rational choice theory orientation) to focus on how those features affect the credibility of signals about force that governments send to adversaries in crises.<sup>146</sup>

My purpose in addressing these questions is to begin painting a more complete and detailed picture of the way war powers operate, or could operate, than one sees when looking only at actual wars and use of force. This is not intended to be a comprehensive account, but is instead an effort to synthesize

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143. See *supra* note 24.

144. For a summary of this literature, see David L. Rousseau et al., *Assessing the Dyadic Nature of the Democratic Peace, 1918-88*, 90 AM. POL. SCI. REV. 512 (1996).

145. I am focused here on rational-institutionalist approaches to democratic peace and international relations, and the work derived from it, but there are other strands of democratic peace theory that emphasize the importance of liberal norms. See Vesna Danilovic & Joe Clare, *The Kantian Liberal Peace (Revisited)*, 51 AM. J. POL. SCI. 397 (2007); Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463 (2005).

146. See KENNETH SCHULTZ, *DEMOCRACY AND COERCIVE DIPLOMACY* (2001) [hereinafter SCHULTZ, *DEMOCRACY*]; James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994); Kenneth Schultz, *Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War*, 53 INT'L ORG. 233 (1999); Kenneth Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829 (1998) [hereinafter Schultz, *Domestic Opposition*]. Jide Nzelibe and John Yoo draw on this body of scholarship in their argument about rational war and constitutional design. See Nzelibe & Yoo, *supra* note 23.

some strands of scholarship from other fields regarding threatened force in order to inform legal discourse about how war powers function in practice and the strategic implications of reform.

The answers to these questions also bear on debates raging among legal scholars on the nature of American executive power and its constraint by law. Initially, they seem to support the views of those legal scholars who have long believed that, in practice, law no longer seriously binds the President with respect to war-making.<sup>147</sup> That view has been taken even further recently by Eric Posner and Adrian Vermeule, who argue that “[l]aw does little to constrain the modern executive” at all, but also observe that “politics and public opinion” operate effectively to cabin executive powers.<sup>148</sup> The arguments offered here, however, support the position of those legal scholars who describe a more complex relationship between law and politics, including that law is constitutive of the processes of political struggle.<sup>149</sup> That law helps constitute the processes of political struggles is true of any area of public policy, though, and what is special here is the added importance of foreign audiences—including adversaries and allies alike—observing and reacting to those politics, too.

#### A. *Democratic Constraints on the Power to Threaten Force*

At first blush, including the power to threaten war or force in our understanding of how the President wields military might seems to suggest a conception of presidential war powers even more expansive in scope and less checked by other branches than often supposed, especially since the President can by threatening force put the United States on a path to war that Congress

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147. See, e.g., Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 426 (2011) (reviewing YOO, *supra* note 118; JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006); and JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)) (“[M]ost scholars would agree that . . . advocacy of presidential preeminence in starting hostilities finds ample precedent in post-Truman executive practice.”).

148. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15 (2010).

149. See Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1409 (2012) (reviewing POSNER & VERMEULE, *supra* note 148); see also Bradley & Morrison, *supra* note 35, at 468 (discussing ways that Congress leverages its legal powers to shape politics on war decisions); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 795-96, 833 (2012) (describing how a combination of law and politics constrains executive war powers).

will have difficulty resisting. That is partially true. But recent political science scholarship reveals that democratic politics significantly constrain the President's decisions to threaten force. It also shows that Congress plays an important role in shaping those politics even in the absence of binding legislative action.

Whereas most lawyers usually begin their analysis of the President's and Congress's war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is—in practice—the dominant actor with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. A major school of thought, however, holds that members of Congress nevertheless wield significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President's intended threats, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; even when it cannot, members of Congress can oblige the President to expend much political capital. As Jon Pevehouse and William Howell explain:

When members of Congress vocally oppose a use of force, they undermine the president's ability to convince foreign states that he will see a fight through to the end. Sensing hesitation on the part of the United States, allies may be reluctant to contribute to a military campaign, and adversaries are likely to fight harder and longer when conflict erupts—thereby raising the costs of the military campaign, decreasing the president's ability to negotiate a satisfactory resolution, and increasing the probability that American lives are lost along the way. Facing a limited band of allies willing to participate in a military venture and an enemy emboldened by domestic critics, presidents may choose to curtail, and even abandon, those military operations that do not involve vital strategic interests.<sup>150</sup>

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150. WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* 223 (2007); *see also* DOUGLAS L. KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS AND THE POLITICS OF WAGING WAR* 285 (2010) (noting that “members of Congress have historically engaged in a variety of actions from formal initiatives, such as introducing legislation or holding hearings that challenge the President's conduct of military action, to informal efforts to shape the nature of the policy debate [about military conflict]”).



This statement also highlights the important point, alluded to earlier, that force and threatened force are not neatly separable categories. Limited uses of force are often intended as signals of resolve to escalate, and most conflicts involve bargaining in which the threat of future violence—rather than what Schelling calls “brute force”<sup>151</sup>—is used to try to extract concessions.

The formal participation of political opponents in legislative bodies provides them with a forum for registering dissent to presidential policies of force through such mechanisms as floor statements, committee oversight hearings, resolution votes, and funding decisions.<sup>152</sup> These official actions prevent the executive branch, even if it can be considered a unitary body, “from monopolizing the nation’s political discourse” on decisions regarding military actions and can thereby make it difficult for the President to depart too far from congressional preferences when weighing strategic choices about threats.<sup>153</sup> Members of the political opposition in Congress also have access to resources for gathering policy-relevant information from the government that informs their policy preferences. Their active participation in specialized legislative committees similarly gives opponent party members access to fact-finding resources and forums for registering informed dissent from decisions within the committee’s purview.<sup>154</sup> As a result, legislative institutions within democracies can enable political opponents to have a more immediate and informed impact on the executive’s decisions regarding force than can opponents among the general public. Furthermore, studies suggest that Congress can actively shape media coverage and public support for a president’s foreign policy engagements.<sup>155</sup> Under this logic, Presidents, anticipating dissent, will be more selective in issuing threats in the first place, making only those commitments that would not incite widespread political opposition should the threat be carried through.<sup>156</sup>

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151. See *supra* note 101 and accompanying text.

152. Some legal scholars emphasize these levers of congressional influence over war decisions, too. See, e.g., REVELEY, *supra* note 39, at 133.

153. Cf. SCHULTZ, DEMOCRACY, *supra* note 146, at 57 (describing institutional mechanisms that prevent monopolization of political discourse by any single government actor in a democratic state).

154. See *id.* at 64.

155. William G. Howell & Jon C. Pevehouse, *Presidents, Congress and the Use of Force*, 59 INT’L ORG. 209, 214 (2005).

156. This logic does not require opposition parties to be predisposed to oppose the use of force systematically because of dovish preferences; it assumes only that opposition parties are motivated by their desire to increase their electoral advantage over incumbents rather than

Moreover, with regard to the signaling so critical to effective threats, “Congress matters, and matters greatly[,] to a nation’s ability to credibly convey resolve to enemies and allies alike.”<sup>157</sup> Political opponents within a legislature have few electoral incentives to collude in an executive’s bluff, and they are capable of expressing opposition to a threatened use of force in ways that could expose the bluff to a threatened adversary.<sup>158</sup> This again narrows the President’s range of viable policy options for brandishing military force. Having called for tougher action in Bosnia during the 1992 presidential campaign, for instance, President Clinton delayed coercive military threats against Serb forces once in office, due in part to congressional opposition and infighting.<sup>159</sup>

Counterintuitively, given the President’s seemingly unlimited and unchallenged constitutional power to threaten war, it may in some cases be easier for members of Congress to influence presidential decisions to threaten military action than presidential war decisions once U.S. forces are already engaged in hostilities. It is widely believed that once U.S. armed forces are fighting, congressmembers’ hands are often tied: policy opposition at that stage risks being portrayed as undermining our troops in the field.<sup>160</sup> Perhaps the President takes this phenomenon into account and discounts political

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by a particular preference on substantive matters. See SCHULTZ, *DEMOCRACY*, *supra* note 146, at 66-67, 72-73.

157. HOWELL & PEVEHOUSE, *supra* note 150, at xi.

158. SCHULTZ, *DEMOCRACY*, *supra* note 146, at 95-96.

159. See HOWELL & PEVEHOUSE, *supra* note 150, at 143; Ann Devroy & Daniel Williams, *Clinton Backs Balkan Action; Consultation with Hill Leaders Sparks Spirited Debate*, WASH. POST, Apr. 28, 1993, at A1; Helen Dewar, *Congress Torn over Balkan Role*, WASH. POST, Apr. 29, 1993, at A1.

160. See HOWELL & PEVEHOUSE, *supra* note 150, at xix (“The terms of debate shift the moment that troops are put in harm’s way, as the exigencies of protecting American lives drown out many of the prior reservations raised about a military action. The domestic political world changes . . . the instant that presidents formally decide to engage an enemy.”); KOH, *supra* note 9, at 133. As the D.C. Circuit explained in *Mitchell v. Laird*:

This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting.

488 F.2d 611, 615 (D.C. Cir. 1973).

opposition to threatened force, assuming that such opposition will dissipate if he carries it through or announces his firm intention to do so. It is also likely that actual use of force generally attracts much more interest in Congress than threats of force, so members of Congress may be much less inclined to exercise their influence when actual military action seems remote. These factors may help explain how President Obama seemingly misjudged congressional reluctance toward armed intervention in Syria when he called on Congress to authorize strikes in August 2013.<sup>161</sup> Nonetheless, well before a final decision-point to use force occurs, members of Congress may communicate messages domestically and convey signals abroad that the President will find difficult to counter.<sup>162</sup>

In some cases, Congress may communicate *greater* willingness than the president to use force, such as through non-binding resolutions. For example, in May 2013, the Senate, invoking constitutional war powers as its basis, passed a resolution 99-0 calling for the United States to support Israel against Iran if it were to take military action against Iran's nuclear weapons program.<sup>163</sup> A generation earlier, many members of Congress publicly opposed President Jimmy Carter's termination of the Mutual Defense Treaty with Taiwan directed at Communist China.<sup>164</sup> Congress passed, despite the President's

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161. See Peter Baker, *Russian Proposal Could Offer Obama Escape from Bind*, N.Y. TIMES, Sept. 9, 2013, <http://www.nytimes.com/2013/09/10/world/middleeast/surprise-russian-proposal-catches-obama-between-putin-and-house-republicans.html>; Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES, Sept. 10, 2013, <http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html>.

162. On the other hand, perhaps the President would use public articulation of a threat as part of an effort to build public support for an operation, and in that regard Congress's capacity to constrain the President may be very uncertain.

163. See Timothy R. Homan, *Senate Endorses Continuation of Sanctions Against Iran*, BLOOMBERG, May 22, 2013, <http://www.bloomberg.com/news/2013-05-22/senate-endorses-continuation-of-sanctions-against-iran.html>. Some argued that this resolution would undermine the Obama administration's diplomacy toward Iran. See Editorial, *Congress Gets in the Way*, N.Y. TIMES, Mar. 8, 2013, <http://www.nytimes.com/2013/03/09/opinion/congress-gets-in-the-way-on-iran.html>.

164. Many members of Congress, including powerful Democratic senators, disputed the wisdom of completely withdrawing the American defense commitment to Taiwan. See Robert G. Kaiser, *Woodcock Nomination Is Supported*, WASH. POST, Feb. 9, 1979, at A1 ("[M]any . . . members of Congress want[ed] to restore the impact if not the reality of the old U.S.-Taiwan defense treaty."). Senators held up the confirmation of the new ambassador to Beijing to force legislation restoring some aspects of the treaty commitment. *Senate Panel Backs Woodcock as Envoy*, N.Y. TIMES, Feb. 9, 1979, at A13 (noting that Senator Church pledged not to put the ambassador's nomination to a floor vote until the Taiwan legislation

objections, the Taiwan Relations Act, which was in part intended to signal a strong commitment to defend Taiwan.<sup>165</sup> Such efforts, in addition to showing that the President and his agents do not completely control communication of threats, put pressure on the President to act while also conveying to foreign audiences a sturdy political foundation for threats the President may make along those lines.

The upshot is that a body of recent political science, while confirming the President's dominant position in setting policy in this area, also reveals that policy-making with respect to threats of force is significantly shaped by domestic politics and that Congress is institutionally positioned to play a powerful role in influencing those politics, even without exercising its formal legislative powers. The President's exercise of war powers—including powers to threaten war—is not as unfettered as many assume.

### *B. Democratic Institutions and the Credibility of Threats*

A central question among constitutional war powers scholars is whether robust checks—especially congressional ones—on presidential use of force lead to “sound” policy decision-making. Congressionalists typically argue that legislative control over war decisions promotes more thorough and valuable deliberation, including more accurate weighing of consequences and gauging of political support for military action.<sup>166</sup> Presidentialists usually counter that the executive branch has better information and therefore better ability to

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was resolved). Other members of Congress brought suit against President Carter, albeit unsuccessfully, to enjoin his termination of the treaty. See *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir. 1979) (en banc) (Wright, C.J., concurring in the result), *vacated*, 444 U.S. 996 (1979).

165. Pub. L. No. 96-8, § 2(b)(4), 93 Stat. 14 (1979) (codified at 22 U.S.C. § 3301(b)(4) (2012)) (declaring that any attack, boycott, or embargo on Taiwan would be “a threat to the peace and security of the Western Pacific area and of grave concern to the United States”); *id.* § 2(b)(5) (allowing the U.S. to provide arms “of a defensive character” to Taiwan); *id.* § 2(b)(6) (declaring that the U.S. “maintain[ed] the capacity . . . to resist any resort to force . . . [against] the people of Taiwan”); see also John H. Averill, *Compromise on Taiwan Reached*, L.A. TIMES, Feb. 22, 1979, at B1 (quoting Republican Senator Javits’s description of the law as “the equivalent of the security blanket” the Mutual Defense Treaty had provided Taiwan, and the statement of Assistant Secretary of State Douglas J. Bennet, Jr. that “[w]e can live with it, but I’m not saying I’m happy with it”); Kaiser, *supra* note 164 (“An administration official said last night, ‘We still prefer no language, but now we face the political reality that we’re going to have something. We want it to be something that doesn’t disrupt the normalization process.’”).
166. See ELY, *supra* note 8, at 3-5; see also Treanor, *supra* note 8, at 700.

discern the dangers of action or inaction, and that quick and decisive military moves are often required to deal with security crises.<sup>167</sup>

If we are interested in these sorts of functional arguments—and we should be—then reframing the inquiry to include threatened force prompts critical questions as to whether such checks also contribute to or detract from effective deterrence and coercive diplomacy and therefore positively or negatively affect the likelihood of achieving aims without resort to war. Here, recent political science provides some reason for optimism, though the scholarship in this area is neither well-developed nor conclusive.

To be sure, “soundness” of policy with respect to force is heavily laden with normative assumptions about war and the appropriate role for the United States in the broader international security system, so it is difficult to assess the merits and disadvantages of constitutional allocations in the abstract. That said, whatever their specific assumptions about appropriate uses of force, constitutional war powers scholars usually evaluate the policy advantages and dangers of decision-making allocations too narrowly in terms of the costs and outcomes of actual military engagements with adversaries.

The importance of credibility to strategies of threatened force adds important new dimensions to this debate. On the one hand, one might intuitively expect that robust democratic checks would generally be ill-suited for coercive threats and negotiations—that institutional centralization and secrecy of decision-making might better equip non-democracies to wield threats of force in support of foreign policy ambitions. As Quincy Wright speculated in 1942, autocracies “can use war efficiently and threats of war even more efficiently” than democracies,<sup>168</sup> especially the American democracy in which vocal public and congressional opposition may undermine threats.<sup>169</sup> Moreover, proponents of democratic checks on war powers usually assume that careful deliberation is a virtue in preventing unnecessary wars, but strategists of deterrence and coercion observe that perceived *irrationality* is sometimes important in conveying threats: “Don’t test me, because I might just be crazy enough to do it!”<sup>170</sup>

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167. See Nzelibe & Yoo, *supra* note 23, at 2522-25.

168. QUINCY WRIGHT, A STUDY OF WAR 847 (1942).

169. See *id.* at 842.

170. See SCHELLING, *supra* note 100, at 37 (“Another paradox of deterrence is that it does not always help to be, or to be believed to be, fully rational, cool-headed, and in control of oneself or of one’s country.”).

On the other hand, some political scientists have recently called this view into question. They have concluded that the institutionalization of political contestation and some diffusion of decision-making power in democracies of the kind described in the previous Section make threats especially credible and effective in resolving international crises without actual resort to armed conflict. Recent arguments in effect turn some old claims about the strategic disabilities of democracies on their heads: whereas it used to be generally thought that democracies are ineffective in wielding threats because they are poor at keeping secrets and their decision-making is constrained by internal political pressures, a new wave of political science accepts this basic description but argues that these democratic features are really strategic virtues.<sup>171</sup>

Rationalist models of crisis bargaining between states assume that because war is risky and costly, states will be better off if they can resolve their disputes through bargaining rather than by enduring the costs and uncertainties of armed conflict.<sup>172</sup> Effective bargaining during such disputes—that which resolves the crisis without a resort to force—depends largely on states' perceptions of their adversary's capacity to wage an effective military campaign and its willingness to resort to force to obtain a favorable outcome. A state targeted with a threat of force, for example, will be less willing to resist the adversary's demands if it believes that the adversary intends to wage and is capable of waging an effective military campaign to achieve its ends. If a state perceives that the threat from the adversary is credible, that state has less incentive to resist such demands if doing so will escalate into armed conflict.

The accuracy of such perceptions, however, is often compromised by informational asymmetries that arise from private information about an adversary's relative military capabilities and resolve that prevents states from correctly assessing each other's intentions, as well as by the incentives states have to misrepresent their willingness to fight—that is, to bluff.<sup>173</sup> Informational asymmetries increase the potential for misperception and

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171. See Trachtenberg, *supra* note 80, at 4; see also Issacharoff, *supra* note 117, at 197 (arguing that democracies may have more credibility than non-democracies in signaling intentions during crises, thereby helping to avoid inadvertent war). As noted below, Trachtenberg himself is critical of much of such theory. See *infra* note 182 and accompanying text.

172. See SCHULTZ, *DEMOCRACY*, *supra* note 146, at 24; James D. Fearon, *Rationalist Explanations for War*, 49 *INT'L ORG.* 379, 380 (1995).

173. See Fearon, *supra* note 172, at 381; James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 *J. CONFLICT RESOL.* 68, 69 (1997); Schultz, *Domestic Opposition*, *supra* note 146, at 829.

thereby make war more likely; war, consequentially, can be thought of in these cases as a “bargaining failure.”<sup>174</sup>

Some political scientists have argued in recent decades—contrary to previously common wisdom—that features and constraints of democracies make them better suited than non-democracies to credibly signal their resolve when they threaten force. To bolster their bargaining position, states will seek to generate credible signals by making “hand-tying” commitments from which leaders cannot back down without suffering considerable domestic political costs.<sup>175</sup> These domestic audience costs, according to some political scientists, are especially high for leaders in democratic states, where they may bear them at the polls.<sup>176</sup> Given the potentially high domestic political and electoral repercussions democratic leaders face from backing down from a public threat, they have significant incentives to refrain from bluffing. An adversary that understands these political vulnerabilities is thereby more likely to perceive a threat that a democratic leader does issue as highly credible, in turn making it more likely that the adversary will yield.<sup>177</sup>

Other scholars have recently pointed to the special role of legislative bodies in signaling and threatening force. This is especially interesting from the perspective of constitutional powers debates, because it posits a distinct role for Congress—and, again, one that does not necessarily rely on Congress’s ability to pass binding legislation that formally confines the President.

Kenneth Schultz, for instance, argues that the open nature of competition within democratic societies ensures that the interplay of opposing parties in legislative bodies over the use of force is observable not just to their domestic publics but to foreign actors; this inherent transparency within democracies—magnified by legislative processes—provides more information to adversaries regarding the unity of domestic opponents around a government’s military and

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174. SCHULTZ, *DEMOCRACY*, *supra* note 146, at 24.

175. *See* Schultz, *Domestic Opposition*, *supra* note 146, at 829-30.

176. Fearon, *supra* note 146, at 577, 581-82. Nondemocratic regimes are not impervious to audience costs themselves; popular dissatisfaction with a leader’s decision can be expressed through less formalized mechanisms for accountability with potentially more devastating consequences, such as popular overthrow through revolution, a military coup, or assassination. *See* SCHULTZ, *DEMOCRACY*, *supra* note 146, at 14-15. Others dispute the notion that democracies have any significant signaling advantage over most autocracies. *See* Jessica L. Weeks, *Autocratic Audience Costs: Regime Type and Signaling Resolve*, 62 *INT’L ORG.* 35, 35 (2008). Audience cost theory, however, is subject to much dispute. *See infra* notes 181-184 and accompanying text.

177. *See* Fearon, *supra* note 146, at 585-86.

foreign policy decisions.<sup>178</sup> Political opposition parties can undermine the credibility of some threats by the President to use force if they publicly voice their opposition in committee hearings, public statements, or through other institutional mechanisms. Furthermore, legislative processes—such as debates and hearings—make it difficult to conceal or misrepresent preferences about war and peace.

Faced with such institutional constraints, Presidents will incline to be more selective about making such threats and avoid being undermined in that way.<sup>179</sup> This restraining effect on the ability of governments to issue threats in turn makes those threats that the government does issue more credible because observers will likely assume that the President would not issue it if he anticipated strong political opposition. Especially when legislative members of the opposition party publicly support an executive's threat to use force during a crisis, their visible support lends additional credibility to the government's threat by confirming that domestic political conditions favor the use of force should it be necessary.<sup>180</sup>

The credibility-enhancing effects of legislative constraints on threats are disputed. Some studies question the assumptions underpinning theories of audience costs—specifically the idea that democratic leaders suffer domestic political costs to failing to make good on their threats, and therefore that their threats are especially credible<sup>181</sup>—and others question whether the empirical data support claims that democracies have credibility advantages in making threats.<sup>182</sup> Other scholars dispute the likelihood that leaders will really be

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178. See SCHULTZ, *DEMOCRACY*, *supra* note 146, at 60; see also David P. Auerswald, *Inward Bound: Domestic Institutions and Military Conflicts*, 53 INT'L ORG. 469, 494-98 (1999) (detailing congressional moves and some of their effects on coercive diplomacy during the Bosnian crisis).

179. See Schultz, *Domestic Opposition*, *supra* note 146, at 830.

180. See *id.* (“[T]he opposition party can lend additional credibility to a government's threats by publicly supporting those threats in a crisis.”).

181. There has been some evidence offered from experimental settings suggesting that members of the public would be willing to punish a leader for failing to follow through on threats—even when the leader had strategically significant reasons for backing down—because they worried that inconsistencies between threats and actions would weaken the country's reputation and credibility in future crises. See Michael Tomz, *Domestic Audience Costs in International Relations: An Experimental Approach*, 61 INT'L ORG. 821, 833-36 (2007).

182. See Alexander B. Downes & Todd S. Sechser, *The Illusion of Democratic Credibility*, 66 INT'L ORG. 457, 474-83 (2012); Trachtenberg, *supra* note 80, at 3-32.



punished politically for backing down, especially if the threat was not explicit and unambiguous or if they have good policy reasons for doing so.<sup>183</sup>

Additionally, even if transparency in democratic institutions allows domestic dissent from threats of force to be visible to foreign audiences, it is not clear that adversaries interpret these mechanisms as political scientists expect in their models of strategic interaction, in light of various common problems of misperception in international relations.<sup>184</sup> These disputes are not just between competing theoretical models but also over the links between any of the models and real-world political behavior by states. At this point there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force.

Nevertheless, at the very least, strands of recent political science scholarship cast significant doubt on the intuition that democratic checks are inherently disadvantageous to strategies of threatened force. Quite the contrary, they suggest that the types of legislative political checks discussed in the previous Section—including the signaling functions that Congress is institutionally situated to play with respect to foreign audiences interpreting U.S. government moves—can be harnessed in some circumstances to support such strategies.

### C. Legal Reform and Strategies of Threatened Force

Among legal scholars of war powers, the ultimate prescriptive question is whether the President should be constrained more formally and strongly than he currently is by legislative checks, especially a more robust and effective mandatory legal requirement of congressional authorization to use force. Calls for reform usually involve narrowing the circumstances in which congressional authorization is not constitutionally required, tightening enforcement of these purported requirements (by all three branches of government), or revising and enforcing the War Powers Resolution or other framework legislation requiring express congressional authorization for military actions.<sup>185</sup> Under these sorts of

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183. Jack S. Levy, *Coercive Threats, Audience Costs and Case Studies*, 21 SECURITY STUD. 383, 386 (2012); Jack Snyder & Erica D. Borghard, *The Cost of Empty Threats: A Penny, Not a Pound*, 105 AM. POL. SCI. REV. 437, 439 (2011).

184. See Snyder & Borghard, *supra* note 183, at 440-41; see also Jervis, *supra* note 137, at 8 (“[S]cholars know remarkably little about how [judgments of credibility] are formed and altered.”).

185. See, e.g., THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005); ELY, *supra* note 8, at 115-31; FISHER, *supra* note 36, at 261-81; Ackerman & Hathaway, *supra* note 52; Glennon, *supra* note 61, at 99-100; see also

proposals, the President would often lack authority to unilaterally make good on threats except in narrow circumstances (such as stopping imminent attacks on the United States).

Whereas legal scholars are consumed with the internal effects of war powers law, such as whether and when it constrains U.S. government decision-making, the analysis contained in the previous Section shifts attention externally to whether and when U.S. law might influence decision-making by adversaries, allies, and other international actors. In prescriptive terms, if the President's power to use force is linked to his ability to threaten it effectively, then any consideration of war powers reform on policy outcomes and long-term interests should include the important secondary effects on deterrent and coercive strategies—and how U.S. legal doctrine is perceived and understood abroad.<sup>186</sup> Would stronger legal requirements for congressional authorization to use force reduce a president's opportunities for bluffing? If so, would such requirements improve U.S. coercive diplomacy by making ensuing threats more credible? Or would they undermine diplomacy by taking some threats legally off the table as viable policy options? And would stronger formal legislative powers with respect to force have significant marginal effects on the signaling effects of dissent within Congress, beyond those already resulting from open political discourse? These are difficult questions, but the analysis and evidence above help generate some initial hypotheses and avenues for further research and analysis.

One might ask at this point why, having exposed as a hole in war powers legal discourse the tendency to overlook threatened force, this Article does not take up whether Congress should assert some direct legislative control of threats—perhaps statutorily limiting the President's authority to make them or establishing procedural conditions like presidential reporting requirements to Congress. This Article puts such a notion aside for two reasons. First, for reasons alluded to above, such limits would be constitutionally suspect and

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Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 476 (1971) (“The treaty-enforcing power of the President and the war-declaring power of Congress are accommodated if the President may independently deploy armed forces as a deterrent prior to hostilities . . . but must promptly request congressional approval for American combat—when it impends, if possible, otherwise when it begins.”).

186. One of the few pieces of legal scholarship to engage in this sort of analysis is Nzelibe & Yoo, *supra* note 23, at 2526–38 (arguing that credible signaling is an important element of rational constitutional design of war powers). For a critique, see Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239 (2006).

difficult to enforce.<sup>187</sup> Second, even the most ardent congressionalists do not contemplate such direct limits on the President's power to threaten. Direct limits are therefore not a realistic option for reform. Instead, this Article focuses on the more plausible—and much more discussed—possibility of strengthening Congress's power over the ultimate decision whether to use force, but augments the usual reform debate with appreciation for the importance of credible threats.

A claim previously advanced from a presidentialist perspective is that stronger legislative checks on war powers could be harmful to coercive and deterrent strategies, because they establish easily visible impediments to the President's authority to follow through on threats: legal constraints trade off with credibility. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that any serious restrictions on presidential use of force would mean in practice that “no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations.”<sup>188</sup> He continued:

In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the most important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. . . .

. . . .

. . . [I]t is the diplomatic power the President needs most under the circumstance of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.<sup>189</sup>

In his veto statement on the War Powers Resolution, President Nixon echoed these concerns, arguing that the law would undermine the credibility of U.S. deterrent and coercive threats in the eyes of both adversaries and allies—they

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187. See *supra* notes 49–53 and accompanying text.

188. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 838 (1972).

189. *Id.* at 895–96; see also William P. Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194, 1210–11 (1971) (arguing that requirements of congressional authorization to use force would undermine threats' necessary credibility).

would know that presidential authority to use force would expire after sixty days, so absent strong congressional support they could assume U.S. withdrawal at that point.<sup>190</sup>

In short, those who oppose tying the president's hands with mandatory congressional authorization requirements to use force sometimes argue that doing so incidentally and dangerously ties his hands in threatening it. Their position assumes that presidential flexibility to act militarily, preserved in legal doctrine, enhances the credibility of presidential threats to escalate.

A second argument, this one advanced by some congressionalists, is that stronger legislative checks on presidential uses of force would improve deterrent and coercive strategies by making them more selective and credible. The most credible U.S. threats, this argument holds, are those that carry formal approval by Congress, which reflects strong public support and willingness to bear the costs of war.<sup>191</sup>

A frequently cited case for this claim is President Eisenhower's request (soon granted) for standing congressional authorization to use force in the Taiwan Strait Crises of the mid- and late-1950s—an authorization he claimed at the time was important to bolstering the credibility of U.S. threats to protect Formosa from Chinese aggression.<sup>192</sup> “It was [Eisenhower's] seasoned judgment . . . that a commitment by the United States would have much greater impact on allies and enemies alike because it would represent the collective judgment of the President and Congress,” concludes Louis Fisher. “Single-handed actions taken by a President, without the support of Congress and the people, can threaten national prestige and undermine the presidency.

190. See 119 CONG. REC. 34,990 (1973); see also Reisman, *supra* note 58, at 784-85 (“Trends in the application of the War Powers Resolution may be viewed not only as communications to the President but also as messages to adversaries that persistent resistance will be rewarded rather quickly.”).

191. See Damrosch, *supra* note 3, at 68; cf. ELY, *supra* note 8, at 4-5 (arguing that congressional authorization is a strong signal to enemies and allies of national resolve with respect to conflicts); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 94 (1991) (“[T]here is an appealing rationale for why Congress's support for the use of force should be recorded in a formal declaration of war: A credible threat of the sort found in the declaration of war on Japan represents to America's enemy as well as to its own people that the United States is willing to subordinate to the war effort all preferences for other public goods.”).

192. FISHER, *supra* note 36, at 119. However, Eisenhower did not go so far as to suggest that congressional authorization ought to be legally required. See *id.* If it had been evident to China's leadership at the time that members of Congress were pressured to sign on to the resolution for signaling purposes—rather than having done so out of a substantive commitment to war—the resolution's strategic value might have been undermined.

Eisenhower's position was sound then. It is sound now."<sup>193</sup> An important assumption here is that legal requirements of congressional participation in decisions to use force filter out unpopular uses of force, the threats of which are unlikely to be credible and which, if unsuccessful, undermine the credibility of future U.S. threats.

A third view is that legal *clarity* is important to U.S. coercive and deterrent strategies; that ambiguity as to the President's powers to use force undermines the credibility of threats. Michael Reisman observed in 1989, for example, that ambiguity "in the allocation of competence and the uncertain congressional role will sow uncertainty among those who depend on U.S. effectiveness for security and the maintenance of world order. Some reduction in U.S. credibility and diplomatic effectiveness may result."<sup>194</sup> Such stress on legal clarity is common among lawyers, who usually regard it as important to planning, whereas strategists tend to see possible value in "constructive ambiguity," or deliberate fudging of drawn lines as a negotiating tactic or for domestic political purposes.<sup>195</sup> A critical assumption here is that clarity of constitutional or statutory design with respect to decisions about force exerts significant effects on foreign perceptions of U.S. resolve to make good on threats, if not by affecting the substance of U.S. policy commitments with regard to force, then by pointing foreign actors to the appropriate institution or process for reading them.

Political scientists almost never directly engage these questions of constitutional design and reform (it is difficult, in fact, to find even passing references to questions of legal doctrine or reform in political science scholarship on threats of force). Partly this may reflect a general scholarly disposition favoring descriptive over normative or prescriptive analysis—the opposite of most American legal scholarship. Partly, though, it also reflects a difference in emphasis between legal scholars and political scientists with respect to democratic institutions. Whereas legal scholars tend to focus on formal legal powers and checks—such as binding legislative control and judicial review—political scientists focus on the political interactions that these

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193. *Id.* at 124-25.

194. Reisman, *supra* note 58, at 784; *see also* 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, 1382 (1994) (book review) (discussing the prudential constitutional argument that legal restrictions on presidential use of force may vitiate security guarantees to allies).

195. *See* Trachtenberg, *supra* note 80, at 39.

institutional arrangements facilitate.<sup>196</sup> Political scientists tend to concentrate on the legal allocation of powers between branches of government only to the extent that such arrangements reinforce or provide a forum for political contestation and competition among domestic political opponents. As a result, they rarely examine how the sorts of constitutional and legislative reforms so often put forward by legal thinkers would affect the credibility of threats.

That said, political science contributions in this area suggest that all three of the views common among legal theorists probably contain some truth in some cases, but also that all three are exaggerated. They are exaggerated to the extent that they fail to account for the political checks imposed by Congress that Presidents already internalize and that foreign actors already perceive; they tend to consider formal legal checks in absolute terms rather than their marginal effects relative to baseline politics, which operate quite robustly as constraints. Furthermore, any reading of signals by foreign audiences would have to take account of the possibility that a President might act outside the law, especially in a grave national security crisis. On balance and in general, though, the political science scholarship surveyed above suggests that a result of stronger formal congressional checks on force would likely be restricted reliance on threatened force, but at least some of the ensuing threats would probably in turn be more credible.

Even if Congress already wields informal political influence over threatened force, more potent and formal requirements of legislative force authorization or stricter enforcement of existing ones would probably push U.S. policy toward a narrower set of commitments and more reserved use of threats—a more selective coercive and deterrent strategy—in several ways. For a President, knowing that he requires legal authorization from Congress to follow through on threats raises the expected political costs of making them (even very popular ones would require spending some political capital to obtain formal legislative backing). A more formal and substantial role for Congress in authorizing the carrying out of threats would also probably amplify some of the informational effects of executive-legislative dialogue and congressional debate described in the previous Section: these processes—which could become more prominent if they have greater legal significance—make it difficult to conceal or

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196. Cf. PAUL K. HUTH & TODD L. ALLEE, *THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY* 14 (2002) (discussing international relations scholarship's emphasis on comparing democracies and non-democracies, rather than comparing types of democracies).

misrepresent preferences about war and peace, and therefore reduce opportunities for bluffing.

If stronger legislative checks on war and force likely mean a more narrowly selective policy of threatened force, then the previous Sections' analysis also suggests—contrary to the common wisdom among presidentialists that tying the executive's hands necessarily undermines the effectiveness of threats—that the credibility of those select threats may in some cases be enhanced. Returning to the Iran example with which this Article began, although a presidency that is more legally constrained in using force would have less flexibility to dictate U.S. actions, a President's decision to draw a red-line threat could send an even more potent signal of resolve if legislation were ultimately required to carry it out, because it might more clearly communicate projected inter-branch unity behind the threat.

As the next Part will explain, whether more narrowly selective—but perhaps more credible—threats would result in an overall improvement from a policy standpoint depends on shifting geopolitical context and other balances in U.S. strategy. The general point here is that the ultimate effects of any legal reform on war and peace will depend not just on the internal effects on U.S. government decision-making but the external perceptions of actors reading U.S. signals.

### III. CONSTITUTIONAL WAR POWERS AND AMERICAN GRAND STRATEGY

One broad implication of this analysis is that the true allocation of constitutional war powers is—in anything but a formalistic sense—geopolitically and strategically contingent. It is often believed that the power to go to war is one of the most important constitutional powers because wars put American blood and treasure at risk.<sup>197</sup> But even assuming as a normative matter that this means that our constitutional law should be structured to be war-averse,<sup>198</sup> this principle does not provide as much guidance about legal doctrine as often supposed unless integrated with ideas about how the United States can and should pursue that agenda in relation to other actors pursuing theirs and amid a changing international context.

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197. See *supra* note 6.

198. See, e.g., Lobel, *supra* note 117, at 374-81.

A. *Threats of War and Presidential Powers in Historical and Strategic Context*

Thinking generally about the “powers of war and peace,” the power to decide to go to war was a much more significant one relative to the power to threaten war—as well as other foreign relations powers—when the United States was a small, militarily weak power, and when our strategy was avowedly to stay out of foreign disputes, or when coercive diplomacy and deterrence that extended to protecting distant allies abroad was not a serious strategic option.<sup>199</sup> If a major component of grand strategy is hiding behind geographical barriers and avoiding conflict by not taking sides in disputes among other powers—as it was during the infancy of the Republic and as it was again in the interwar years—then the power to threaten war is not often very consequential and an allocation of powers that makes it difficult to engage in military conflicts or even threaten to do so is consistent with that strategic vision.<sup>200</sup> Note, too, that the lack of a very potent standing military force during these periods limited options for coercive and deterrent strategies anyway and made the President heavily dependent on Congress to furnish the means to initiate them.<sup>201</sup>

Because the importance for the United States of threatened force—to coerce or deter adversaries and to reassure allies—in affecting war and peace grew so substantially after World War II, the constitutional decision-making about using force has been relegated in large degree to a mechanism for implementing grand strategy rather than setting it.<sup>202</sup> For a superpower that

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199. See RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY*, at xiv (1973).

200. Cf. THE FEDERALIST NO. 4 (John Jay) (arguing that a minimum level of military power made war less likely through deterrence, rather than more likely); KOH, *supra* note 9, at 77 (“America’s geographical separation from the rest of the world . . . figured . . . prominently in the development of America’s constitutional traditions.”).

201. See ELY, *supra* note 8, at 7.

202. Of course, threats of force have played many roles in American foreign policy that are not discussed here. For example, during the late nineteenth and early twentieth century, the United States practiced “gunboat diplomacy” as an instrument of power projection, especially in Latin America and Asia. See KENNETH J. HAGAN, *AMERICAN GUNBOAT DIPLOMACY AND THE OLD NAVY 1877-1889*, at 110 (1973) (documenting American gunboat diplomacy in the late nineteenth century); KENNETH J. HAGAN, *THIS PEOPLE’S NAVY: THE MAKING OF AMERICAN SEA POWER 235-41* (1991) (outlining the history of American gunboat diplomacy and the related phenomenon of “naval imperialism” at the turn of the twentieth century). A prominent theorist of gunboat diplomacy defines it as “any use or threat of limited naval force, otherwise than as an act of war . . . committed either in the furtherance



plays a major role in sustaining global security, threatening war is in some respects a much more policy-significant constitutional power than the power to actually make war.

Moreover, the functional benefits or dangers attendant to unilateral presidential discretion to use force and to formulas for ensuring congressional involvement cannot be separated from the means by which the United States pursues its desired geopolitical ends. Those merits are inextricably linked to substantive policy goals associated with its military capacity, such as whether the United States is pursuing an aggressively expansionist agenda, a territorially defensive one, a globally stabilizing one, or something else. They also depend greatly on how the United States seeks to wield its military power—as much its potential for armed force as its engagement of the enemy with it—toward those ends.

### *B. Reframing “War Powers” Scholarship*

One might object to the main point of this Article—that constitutional allocations of power to use force cannot meaningfully be assessed either descriptively or normatively without accounting for the way U.S. military power is used—by arguing that it succumbs to its own critique. If the American condition of war and peace is determined by more than just decisions to commence hostilities or resist actual force with force, why stop at threats of war and force? Why not extend the analysis even further, to include the many other presidential powers—like diplomatic communication and recognition, intelligence activities, negotiation, and so on—that could affect the course of events in crises?<sup>203</sup>

This Article has focused on the way Presidents wield U.S. military force not because analysis of those powers can be neatly separated from other ones or decisions about war but to show how widening the lens even a little bit reveals a much more complex interaction of law and strategy than often assumed in war powers debates and opens up new avenues for analysis and possible reform. Military force is also an important place to start because it has always

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of an international dispute or else against foreign nationals within the territory of their own state.” JAMES CABLE, *GUNBOAT DIPLOMACY: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* 18 (1971).

203. As Taylor Reveley wrote introducing his treatise on constitutional war powers, “[t]he breadth of policy pertinent to American war and peace . . . runs from use of all possible armed force through limited military measures to unarmed action (diplomatic, economic, and the like).” REVELEY, *supra* note 39, at 14.

carried special political and diplomatic salience.<sup>204</sup> Moreover, many types of non-military moves a President might take to communicate threats, such as imposing economic sanctions or freezing financial assets,<sup>205</sup> rest on express statutory delegations from Congress.<sup>206</sup> Military threats, by contrast, often rest primarily on the President's independent constitutional powers, perhaps buttressed by implicit congressional assent, and therefore pose the most fundamental questions of constitutional structure and power allocation in relation to strategy.

A next step, though, would incorporate into this analysis other instruments of statecraft, such as covert intervention or economic and financial actions—recognizing that their legal regulation could similarly affect perceptions about U.S. power abroad as well as the political and institutional incentives that shape presidential decision-making. Moreover, sometimes coercive strategies involve both carrots and sticks—threats as well as positive inducements<sup>207</sup>—and Congress's powers may be dominant with regard to the latter elements of that formula, perhaps in the form of spending on offered benefits or lifting of economic sanctions.<sup>208</sup> Further study might focus on such strategies and the way they necessarily require inter-branch coordination, not only in carrying out positive inducements but in credibly signaling an intention to do so.

At this point, many legal scholars reading this (yet another) Article on constitutional war powers are bound to be disappointed that it proposes neither a specific doctrinal reformulation nor offers an account of optimal

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204. See *supra* note 6 and accompanying text.

205. See David L. Asher et al., *Pressure: Coercive Economic Statecraft and U.S. National Security*, CENTER FOR NEW AM. SECURITY 5-9 (2011), [http://www.cnas.org/files/documents/publications/CNAS\\_Pressure\\_AsherComrasCronin\\_1.pdf](http://www.cnas.org/files/documents/publications/CNAS_Pressure_AsherComrasCronin_1.pdf).

206. The International Economic Emergency Powers Act (IEEPA) grants the President broad economic powers, including the authority to freeze assets and prohibit certain international transactions. Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706 (2006)). This general statutory power is supplemented with many specific statutory delegations or mandates to the President with respect to particular threats or states. See, e.g., Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482 (codified at 22 U.S.C. § 2151 (2012)).

207. On the role of positive inducements in coercive diplomacy, see generally David A. Baldwin, *The Power of Positive Sanctions*, 24 WORLD POL. 19 (1971). See also Jervis, *supra* note 5 (discussing the importance of positive inducements in resolving the Iranian nuclear problem).

208. See, e.g., Megan K. Stack, *Libya's Slow Trek Out of the Shadows*, L.A. TIMES, Dec. 12, 2003, <http://articles.latimes.com/2003/dec/12/world/fg-libya12> (discussing the importance of Congress's potential decision to lift sanctions against Libya).

legal-power allocation to achieve desired results. One reason for that is that the evidence surveyed in Part II is inconclusive with respect to some key questions, especially with regard to how international credibility is earned and maintained. Another, however, is that the very quest for optimal allocation of these powers is generally misframed, because “optimal” only makes sense in reference to some assumptions about strategy, which are not themselves fixed. By tying notions of optimal legal allocations to strategy I do not simply mean the basic point that we need prior agreement on desired ends (in the same sense that economists talk about optimality by assuming goals of maximizing social welfare), but the linking of means to ends. As the Article tries to show throughout, even if one agrees that the desired ends are peace and security, there are many strategies to achieve it— isolation, preventive war, deterrence, and others— and variations among them, depending on prevailing geopolitical conditions.

A more productive mode of study, then, recognizes the interdependence of the allocation of war-related powers and the setting of grand strategy. Legal powers and institutions enable or constrain strategies, and they also provide the various actors in our constitutional system with levers for shaping those strategies. At the same time, some strategies either reinforce or destabilize legal designs.

### *C. Threats, Grand Strategy, and Future Executive-Congressional Balances*

Having homed in here on threatened war or force, this Article might suggest to some yet another indication of expanding or constitutionally “imperial” power of the U.S. President. That is, beyond the President’s wide latitude to use military force abroad, he can take threatening steps that could provoke or prevent war and even alter unilaterally the national interests at stake in a crisis by placing U.S. credibility on the line—the President’s powers of war and peace are therefore even more expansive than already generally supposed.

It is also important to see this analysis, however, as showing a more complex dependency of presidential powers on Congress with respect to setting and sustaining American grand strategy. Philip Bobbitt was quite correct when he decried lawyers’ undue emphasis on the Declare War Clause and the commencement of armed hostilities as the critical legal events in thinking about constitutional allocations and U.S. security policy:

Wars rarely start as unexpected ambushes; they are usually the culmination of a long period of policy decisions. . . . If we think of the declaration of war as a commencing act—which it almost never is and which the Framers did not expect it to be—we will not scrutinize those

steps that bring us to war, steps that are in the main statutory in nature. Moreover, we will be inclined to pretend . . . that Congress really has played no role in formulating and funding very specific foreign and security policies.<sup>209</sup>

The foreign and security policies to which Bobbitt refers include coercive and deterrent strategies.

Indeed, it is important to remember that the heavy reliance on threatened force, especially after World War II, has itself been a strategic choice by the United States—not a predestined one—and one that could only be made and continued with sustained congressional support. Since the beginning of the Cold War period, the reliance on deterrence and coercive diplomacy became so deeply ingrained in U.S. foreign policy that it is easy to forget that the United States had other strategic options open to it. One option was war. Some senior policy-makers during the early phases of the Cold War believed that conflict with the Soviet Union was inevitable, so better to seize the initiative and strike while the United States held some advantages in the balance of strength.<sup>210</sup> Another option was isolation. The United States could have retracted its security commitments to its own borders or hemisphere, as it did after World War I, ceding influence to the Soviet bloc or other political forces.<sup>211</sup> These may have been very bad alternatives, but they were real ones and were rejected in favor of a combination of standing threats of force and discrete threats of force—sometimes followed up with demonstrative uses of force—that was only possible with congressional buy-in. That buy-in came in the form of military funding for the standing forces and foreign deployments needed to maintain the credibility of U.S. threats, as well as in Senate support for defense pacts with allies.<sup>212</sup> While a strategy of deterrent and coercive force has involved significant unilateral discretion as to how and when specifically to threaten military action in specific crises and incidents, the overall strategy rested on a foundation of executive-congressional collaboration and dialogue that played out over decades.

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209. Bobbitt, *supra* note 194, at 1386.

210. See MARC TRACHTENBERG, *THE COLD WAR AND AFTER: HISTORY, THEORY, AND THE LOGIC OF INTERNATIONAL POLITICS* 252-53 (2012).

211. These options are outlined in NSC-68, *supra* note 85, at 44.

212. *Cf. supra* notes 152-159 and accompanying text (discussing various ways in which Congress can affect the credibility of U.S. threats).

Looking to the future, the importance of threatened force relative to other foreign policy instruments will inevitably shift again—and so, therefore, will the balance of powers between the President and Congress. U.S. grand strategy in the coming decades will be shaped by conditions of fiscal austerity and war weariness, for example, which may mean cutting back on some security commitments or reorienting doctrine for defending them toward greater reliance on less-expensive means (such as, perhaps, a shift from large-scale military forces to smaller ones, or greater reliance on high-technology, or even revised doctrines of nuclear deterrence).<sup>213</sup>

One possible geostrategic outlook is that the United States will retain its singular military supremacy, and that it will continue to play a global policing role. Another outlook, though, is that U.S. military dominance will be eclipsed by other rising powers and diminished U.S. resources, political will, and influence.<sup>214</sup> The latter scenario might mean that international relations will be less influenced by credible threats of U.S. intervention, and perhaps more so by the actions of regional powers and political bodies, or by institutions of global governance like the U.N. Security Council.<sup>215</sup> These possibilities could entail a practical rebalancing of powers wielded by each branch of government, including the power to threaten force and other foreign policy tools.

Were the United States to retreat from underwriting its allies' security and some elements of the global order with strong coercive and deterrent threats, one should expect different patterns of executive-congressional behavior with respect to threatening and using force, because wars and threats of wars will come about in different ways: less often as a breakdown of U.S. hegemonic commitments, for example. A hypothesis for further consideration is that reduced requirements of maintaining credible U.S. threats would also likely reduce pressure on the President to protect prerogatives to threaten force and to make good on those threats. A foreign policy strategy of more selective and reserved military engagement may be one more accommodating to case-by-

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213. See Andrew F. Krepinevich, Jr., *Strategy in a Time of Austerity: Why the Pentagon Should Focus on Assuring Access*, FOREIGN AFF., Nov.–Dec. 2012, at 58; Joseph S. Nye, Jr., *American Power in the 21st Century Will Be Defined by the 'Rise of the Rest,'* WASH. POST, June 28, 2013, [http://www.washingtonpost.com/opinions/american-power-in-the-21st-century-will-be-defined-by-the-rise-of-the-rest/2013/06/28/f5169668-dced-11e2-9218-bc2ac7cd44e2\\_story.html](http://www.washingtonpost.com/opinions/american-power-in-the-21st-century-will-be-defined-by-the-rise-of-the-rest/2013/06/28/f5169668-dced-11e2-9218-bc2ac7cd44e2_story.html).

214. See Robert Kagan, *Why the World Needs America*, WALL ST. J., Feb. 11, 2012, <http://online.wsj.com/news/articles/SB10001424052970203646004577213262856669448>.

215. See CHARLES A. KUPCHAN, NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN 182–86 (2012).

case, joint executive-legislative deliberation as to the threat or use of U.S. military might, insofar as U.S. strategy would self-consciously avoid cultivating foreign reliance on U.S. power.

Besides shifting geostrategic visions, ranging from a global policing role to receding commitments, the set of tools available to Presidents for projecting power will evolve, too, as will the nature of security threats, and this will produce readjustments of the relative importance of constitutional powers and inter-branch relations. Transnational terrorist threats, for example, are sometimes thought to be impervious to deterrent threats, whether because they may hold nihilistic agendas or lack tangible assets that can be held at risk.<sup>216</sup> Technologies like unmanned weapon systems may make possible the application of military violence with fewer risks and less public visibility than in the past.<sup>217</sup> While discussion of these developments as revolutionary is in vogue, they are more evolutionary and incremental; their purported effects are matters of degree. Such developments will, however, retune strategies for brandishing and exercising military capabilities and the politics of using them. As an initial hypothesis, these factors may reduce the influence of congressional politics on the President's strategic decision-making if he views foreign perceptions of American public resolve as less important to successful military strategies.

Whatever the future of U.S. power, my analysis points toward a revised agenda for thinking about war powers and their reform. If legal discourse of war powers is too narrowly focused on actual wars and forceful military engagements to the exclusion of threats of them, then so too is discussion of reforms too narrowly focused on congressional involvement at the end stages of coercive diplomacy—often long after threats have been issued and responded to, positively or negatively—rather than at earlier ones.

A more productive reform agenda (and by no means a mutually exclusive one) would focus on strengthening Congress's role in shaping U.S. grand strategy more broadly. Rather than devoting its institutional energy to reasserting its control over decisions to engage the enemy with military force in particular circumstances, Congress would work to engage the executive branch more seriously and continually with regard to the general policy circumstances

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216. See AUSTIN LONG, *DETERRENCE: FROM COLD WAR TO LONG WAR: LESSONS FROM SIX DECADES OF RAND RESEARCH* 80 (2008).

217. See Peter W. Singer, *Opinion, Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 21, 2012, <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html>.

under which force might be contemplated. This would require Congress to do something it is not disposed to do, namely, use its other powers—such as hearings, control of funds, and statutory delegations of bounded policy discretion—to engage the executive branch on strategic questions about the way force may be wielded in advance of, or at the earliest stages of, crises. Proposals to restructure congressional national security committees include the idea of creating more consolidated, joint House-Senate national security committees, which would have greater leverage, expertise, and oversight responsibility and which would tie together the elements of U.S. power more effectively.<sup>218</sup> These proposals should be viewed not simply as means for Congress to consult with the Executive once large-scale military intervention is imminent, but also as mechanisms enabling Congress to coordinate with the Executive on the matching of foreign policy means and ends well in advance of crises.

Knowledge of how states acquire, maintain, or lose credibility to use force remains severely limited, despite the intense emphasis on this subject in discussions of American strategy.<sup>219</sup> A research agenda for constitutional scholars and political scientists alike could more thoroughly explore links between different internal legal arrangements within democracies and different strategies for using military power.<sup>220</sup> Among other major questions, for instance, is whether clear legal rules or predictable and transparent decision-making processes—while constraining—can mitigate the endemic problems of misperception in international affairs that sometimes contribute to violent escalation of crises or undermine the credibility and potency of threats.<sup>221</sup> Moreover, these coercive or deterrent threats occur within a complex international legal and diplomatic system, including the U.N. Security Council and alliance or coalition relationships, so such analysis should consider the overlapping effects of doctrine and processes of the domestic and international regimes.<sup>222</sup>

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218. See KOH, *supra* note 9, at 167-68; MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT 36-37 (2008).

219. See *supra* Section II.B.

220. Cf. Tom Ginsburg, *War and Constitutional Design* (Univ. Chi. Law Sch. Working Paper, 2013) (on file with author) (drawing on political science scholarship to analyze which democratic institutions and aspects of constitutional design affect war-making).

221. See *supra* note 181 and accompanying text (discussing chronic problems of misperception in international crisis diplomacy); see also Duelfer & Dyson, *supra* note 135 (detailing mutual U.S. and Iraqi leadership misperceptions leading up to the 2003 Iraq War).

222. Cf. Waxman, *supra* note 17, at 184-86 (outlining a research agenda relating international

From a comparative perspective, the different roles played in the international security system by the United States and its allies in Western Europe might help explain why the United States government places so much power over force decisions in the executive while its democratic allies have generally moved toward greater parliamentary control.<sup>223</sup> The credible threat of their own military intervention plays a less significant role in the foreign and security policy of many American allies (and they generally expect to use significant force only as part of a broad coalition of partners including the United States).<sup>224</sup> This difference in strategic reliance on credible threats may help explain why many democratic allies incline toward different constitutional divisions of power than the United States.

Looking internally, a question for future study of interest to both political scientists and legal scholars is whether Congress is as institutionally suited or inclined as the executive branch to consider the credibility effects of threatened or actual military actions in one case on other or future cases.<sup>225</sup> In other words, an important issue when considering war powers reform is Congress's capacity and desire to take account of and give substantial weight to the signals it sends to other international actors with grants or denials of authorization to use force.<sup>226</sup> A related question is whether Congress's inclinations with regard to credibility effects would shift were it to assume a more significant and sustained formal role in decision-making about war and force – that is, whether

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legal doctrine regulating force to the credibility of deterrent threats).

223. Lori Damrosch argues that this general trend toward parliamentary checks among other democracies reflects commitment to certain normative values, notably democratic accountability. See Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. MIAMI L. REV. 181, 183 (1995). My point here is that security strategy, and how a state wields or does not wield military force, may have much to do with this trend.
224. See Sebastian Rosato, *Europe's Troubles: Power Politics and the State of the European Project*, 35 INT'L SECURITY 45, 71-72 (2011) (discussing the European Union's inability to develop a credible integrated defense community); James Blitz, *NATO Chief Warns on Europe's Gaps in Mali*, FIN. TIMES, Feb. 3, 2013, <http://www.ft.com/cms/s/0/b1d56foa-6e07-11e2-983d-00144feab49a.html> (discussing shortfalls in European allies' military capabilities exposed by their Libya and Mali interventions).
225. A complicating factor mentioned earlier is that the U.S. Congress (or blocs of it) sometimes tries to push the President to adopt a more hardline stance or to send its own threatening signals independent of the executive branch. See *supra* notes 163-165 and accompanying text.
226. As discussed above, some political scientists have recently called into question the reputational effects of military action in one crisis on perceptions of American resolve in other crises. See *supra* note 137.



any such congressional policy biases are structurally inherent or a function of reigning legal doctrine.

In a hypothetical world of very stringent congressional force authorization requirements, congressional practice might shift toward more common reliance on standing authorizations regarding specific threats or categories of threats, rather than the customary practice of specific authorizations usually based on presidential requests during crises or after military operations begin. Especially if presidentialists are correct to view flexibility as critical to credibility, Congress might under such legal circumstances be inclined to authorize some wide discretion back to the President. Any analysis of substantial legal and institutional reform must consider not only whether Congress would play a more significant role but perhaps also changes in the typical form of its legislative involvement.

Finally, this analysis could be extended further by disaggregating types of threatened force. This Article groups together many types of threatened force – to deter aggression, to compel compliance with U.S. demands, to reassure allies, and so on – in making a set of general points about constitutional power allocations and strategy. Further inquiry could examine how domestic legal constraints on force enhance or inhibit particular categories of threats. For example, research could explore whether the credibility effects of legal processes vary with different types of audiences (adversaries versus allies, or closed political systems versus other democracies), or whether some particular strategies – such as extending U.S. security guarantees to allies against contemporary threats – require more or less presidential legal flexibility to be effective.<sup>227</sup> Such examination would be useful in understanding how future directions of U.S. strategy or shifts in geopolitics may influence, or should influence, inter-branch divisions of power over decisions about force.

## CONCLUSION

It is often said that our eighteenth-century Constitution is ill-suited for twentieth-century (and now twenty-first-century) threats.<sup>228</sup> This Article

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227. Philip Bobbitt, for example, argues that Cold War extended deterrence, in particular, required vast unilateral executive authority to be effective. See Philip Bobbitt, *The Power to Make War in an Age of Global Terror*, HOOVER INST. 7-8 (2010), [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Bobbitt.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Bobbitt.pdf).

228. See J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 1 (1961); Oren Gross, *Chaos and Rules: Should Responses to*

shows that changing threats are only half the story, and that the other half has been evolving strategy for confronting them.

Lawyers think “war powers” are about making war or conducting military operations. They therefore examine wars and military operations to describe how war powers are exercised, and they defend various interpretations of these powers with functional arguments about how best to wage war or military operations. However, a major component of American strategy has long been and remains the threat of war or military intervention. Expanding analysis of war powers to include the important role of credible threats, and incorporating insights from the political science of threatened force, reveals weaknesses in the orthodoxies of both presidentialists and congressionalists, and it forms the basis for a much richer understanding of the interrelationship of constitutional law and grand strategy.

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*Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1026-27 (2003); Meeker, *supra* note 49, at 484.