

The book cover features a blue-tinted historical illustration of soldiers in uniform, some on horseback, in a traditional East Asian setting. A white text box is positioned in the upper right corner. The background is decorated with a repeating pattern of stylized white flowers on a light background.

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# Presidential Use of Force in East Asia

*American  
Constitutional  
Law and the  
U.S.-Japan  
Alliance*

## Introduction

The U.S. Constitution's allocation of military authority has adapted over time to major shifts in American power and grand strategy. This paper explains, with a focus on U.S. military actions in East Asia and possible scenarios of special joint concern to the United States and Japan, that the president in practice wields tremendous power and discretion in using military force. Although formal, legal checks on the president's use of force rarely come into play, Congress nevertheless retains some political power to influence presidential decision-making. The president's powers are also constrained by interagency processes within the executive branch, and alliance relations often feed into those processes.

This paper is mostly focused on U.S. domestic law issues. It also touches, however, on a few key questions of international law, especially as they relate to presidential power to interpret international law and to possible crisis scenarios of current concern.

## The Constitutional Framework

Drafted in the late 18th century, the U.S. Constitution divided responsibility for military affairs between Congress and the president, providing several checks on presidential uses of force. The Constitution vests "executive power" in the president and designates him "commander in chief" of military forces. But it assigns to Congress responsibility for creating, maintaining, and funding those military forces, and gives Congress the power to "[d]eclare war." The constitutional framers generally wanted to give the president unified, tactical control over military forces, but they wanted Congress to retain primary control over decisions to go to war. The framers were also sensitive to political opposition to large, standing military forces,

which many Americans associated at the time with repression and a proclivity toward war.

Even from the start, this division of constitutional authority left ambiguous whether and under what circumstances the president could unilaterally engage in military activities. Although early presidents were usually hesitant to use much military force without explicit congressional backing—particularly since standing U.S. military forces were small and the president therefore relied on Congress to provide continuing financial support for them—over time a practice accumulated of unilateral presidential deployments and limited uses of military force short of all-out war in the absence of legislative prohibitions.

During the first half of the 19th century, for example, presidents authorized punitive raids and shows of military force in Sumatra and Pacific islands, typically to protect American commercial interests. In the 1850s, the president ordered Commodore Matthew Perry to lead a Navy squadron on a diplomatic mission, using a show of military force, to open trade and other relations with Japan. On several occasions during that decade, presidents sent small military forces to defend U.S. interests in China, and likewise in Korea during the decades that followed. In 1900, the president dispatched about 5,000 troops to China, as part of a multinational expeditionary force responding to the “Boxer Rebellion.”<sup>1</sup> Especially after the United States gained territories in Asia following the Spanish-American War—one of only five declared wars in American history, though many other military operations have been authorized by Congress—presidents frequently directed armed forces to intervene in that region to protect American interests.

As Louis Henkin explains in his treatise of U.S. foreign relations law:

By repeated exercise without successful opposition, Presidents have established their authority to send troops abroad, probably beyond effective challenge, where Congress is silent, but the constitutional foundations and the constitutional limits of that authority remain in dispute.<sup>2</sup>

Nevertheless, through the first half of the 20th century, it was still widely agreed that, except in cases of repelling an attack against the United States, only Congress could take the nation to full-blown war (as opposed to much more limited uses of military force, even if they involved some combat).

## Post-World War II Presidential Powers

Several interrelated factors in the years immediately following World War II combined to dramatically increase the president's power to use military force. These factors include more expansive constitutional theory regarding presidential powers, the formation of mutual defense treaties, and the establishment of a permanent, large-scale military force.

First, presidents during most of the Cold War asserted very broad prerogatives to use even relatively large-scale force without congressional authorization. Executive branch lawyers adopted an expansive view of presidential foreign relations and military powers, and Congress largely acquiesced. The Korean War, which was never expressly authorized by Congress but lasted more than three years and cost the lives of over 33,000 U.S. troops, stands out as a turning point. It marked the largest unilateral military action abroad by a president to date and was justified by vigorous and expansive executive branch claims of constitutional power.<sup>3</sup> As Arthur Schlesinger describes the ascendancy of an "imperial presidency" at that time:

The menace of unexpected crisis hung over the world, demanding, it was supposed, the concentration within government of the means of instant decision and response. All this, reinforcing the intellectual doubt about democratic control of foreign relations, appeared to argue more strongly than ever for the centralization of foreign policy in the Presidency.<sup>4</sup>

Since the Korean War, successive presidential administrations have asserted that the president, by virtue of his power to manage foreign relations and his role as commander in chief, has broad authority to initiate military operations that he deems to be in the national interest. The Justice Department has acknowledged in recent years that some large-scale military operations might be of such size, intensity, and nature as to constitutionally require congressional authorization. This point could be important in legal debates about possible military action against North Korea, given the likely large magnitude of such action, but, as explained below, that legal threshold may not in practice be of much consequence.<sup>5</sup>

Second, the United States concluded a set of defense pacts around the world, including with allies in the Asia-Pacific region, and these alliances contributed to a growth of presidential powers. These pacts included the Philippines (1952), Australia and New Zealand (1952), the Republic of Korea (1954), the Southeast Asia Treaty Organization (1954), the Republic of China (1955), and Japan (1960). In the Japan case, the security treaty provides that:

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.<sup>6</sup>

Defense pacts turned the traditional American aversion to “entangling alliances” on its head; whereas for most of its history, American strategic thinking rested on the idea that the alliances might draw the United States into unnecessary wars, post-war thinking rested on the idea that alliances were necessary to prevent wars that would engulf the United States. These defense pacts meant that presidents could, in effect, rely on a pre-commitment of public support for military action to defend these allies. Presidents also justified expansive unilateral power to use force on the need to preserve the credibility of American security guarantees. Bilateral and regional security treaties generally contain a provision specifying that mutual defense will take place in accordance with each party’s own constitutional processes. This allowed the executive and legislative branches to paper over differences about constitutional prerogatives during ratification, but in practice the executive branch has asserted authority to invoke these provisions unilaterally. In other words, whereas one might think of international law as a likely constraint on executive branch discretion to use force, presidents have repeatedly used multilateral or regional security agreements as a basis for defending broader executive power with regard to military force.<sup>7</sup> As Mira Rapp-Hooper and I recently wrote:

Some of the president’s constitutional powers relevant to alliances—such as the power to direct military operations in war and to appoint ambassadors (subject to Senate confirmation)—have always been clear. Starting in the early Cold War, though, the centrality of alliances to U.S. foreign policy contributed to the vast accumulation of additional presidential powers—some of them delegated by Congress and others established through executive branch practice over time. After nearly 70 years, presidential authority over U.S. security guarantees now appears to be almost entirely unilateral.<sup>8</sup>

A third major factor contributing to presidential powers to use force was that the United States maintained large, standing military forces after World War II, and the permanence of these forces diminished constraints on presidential power to

use them. Throughout most of its history, the United States had maintained very small or modest peacetime military forces. It mobilized wartime military forces to meet crises, and then it quickly demobilized them post war. With the advent of the Cold War, however, the United States never demobilized to the extent it had in the past. Large numbers of U.S. troops have for decades been stationed on bases in, for example, Japan and South Korea, in addition to a major U.S. naval presence in the Pacific at all times. Especially when combined with a nuclear arsenal, this large-scale standing military power guarantees that a president, as commander in chief, has had permanently-ready forces at his disposal.

As a result of these and other factors, from the early Cold War onward the president has had wide latitude with regard to initiating force, and Congress has often played a reactive, sometimes even passive, role. For the purposes of this paper, one notable counter-example, in which the president showed significant deference to Congress, was President Dwight Eisenhower's approach toward Taiwan (then Formosa) in 1955. In threatening to use force—possibly including nuclear weapons—to defend Nationalist China-controlled islands against aggression by Communist-China, Eisenhower sought and obtained explicit congressional approval to use whatever military means he deemed necessary. Even in seeking congressional approval, however, Eisenhower asserted that he had independent constitutional power to take some military measures anyway, and this case of seeking congressional approval for military intervention in advance stands out as more an exception than the norm.<sup>9</sup> More typically, in the Vietnam War, for example, presidents slowly escalated U.S. military involvement before requesting and receiving very broad congressional authorization (in the Gulf of Tonkin Resolution) to use military force to defend U.S. and allied interests in Southeast Asia. As public opposition to the war grew, Congress found it difficult to resist presidential requests for additional funds. Eventually, that opposition reached the point that Congress passed or threatened to pass legislative restrictions on the conduct of the war, pushing President Nixon to wind it down.<sup>10</sup>

Following the Vietnam War, Congress tried to adjust the balance of power among the political branches by enacting, over President Nixon's veto, the 1973 War Powers Resolution.<sup>11</sup> Its stated purpose was to defend the constitutional 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>12</sup> The War Powers Resolution stipulates that if the president sends U.S. forces into combat, he must withdraw them within 60 days unless Congress declares war or expressly authorizes the president to use force. Over time that law has been watered down in several ways, however, and Congress

has not proven willing to enforce it strictly by further exercising its legislative powers.<sup>13</sup>

In practice, the president thus has broad unilateral discretion to engage U.S. military forces in hostilities abroad. Examples in the Asia-Pacific region since the Vietnam War include action to retake the captured merchant vessel *Mayaguez*, deployments to the Philippines during the 1989 coup attempt, and contribution to UN efforts to restore peace in East Timor.

Although this paper has mostly focused on U.S. domestic law related to use of force, another quick note about international law is important here and relates directly to these observations about presidential power: the president has wide latitude, domestically, in interpreting international law constraints on force, such as self-defense, and the provisions of security treaties (though usually that interpretive power is delegated to subordinate officers and exercised through interagency processes). Moreover, and as explained further below, the United States has adopted broader interpretations than most states, including close allies like Japan, of self-defense rights under Article 51 of the UN Charter.<sup>14</sup> These include a broader understanding of anticipatory self-defense (though its scope is still a matter of ongoing internal debate) and the view that any use of force—even a small one—against the United States under Article 2(4) could also constitute an “armed attack” triggering self-defense rights. Interpreting these international legal constraints on force is left to the president, with Congress playing little if any formal role and courts regarding international legal issues of force as non-justiciable.

It is, in sum, generally understood that from the Korean War onward, the president has exercised vast unilateral powers to use military force. The sheer scope of this presidential authority to use force obviously contrasts sharply with Japanese government decision-making about force. Moreover, whereas Japan’s approach is generally premised on clear lines of what is or is not permitted in advance, the U.S. approach is premised on the idea that security contingencies are unpredictable, and it is better therefore to vest the government with substantial discretion as new issues arise.

### **Politics, Process, and Diplomacy of Presidential Decisions to Use Force**

In some ways, the standard account of a post-WWII imperial presidency often actually *understates* the president’s power. That is because the actual deployment of forces into hostile situations is only one way in which he can use force. More often, the president wields the threat of force to deter or coerce certain conduct by others. 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>15</sup> This includes explicit or implicit threats of force in response to specific crises or contingencies, such as during diplomatic confrontations with North Korea, in addition to more routine displays of force, such as free navigation exercises in the South China Sea. As I have argued:

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.<sup>16</sup>

There are no formal legal checks on the president's power to threaten force and, given the size of the standing U.S. military arsenal, that power to threaten force is immense.

There are, however, significant political checks on the president's discretion to use military force, and these checks also affect how the president wields threats of force. As Jack Goldsmith and I have argued:

The United States has a long history of presidential military initiative borne of responsibility and opportunity, and congressional acquiescence borne of irresponsibility and collective action hurdles. This historical pattern of executive unilateralism has not meant that the president is unchecked. It has simply meant that the checks were political, not legal, and were imposed by the threat of congressional retaliation if the president's initiatives go terribly wrong, and by the U.S. public through electoral accountability.<sup>17</sup>

In recent years there has been a wave of political science scholarship substantiating these checks.

Douglas Kriner, for example, argues that although there has been much literature devoted to claims of an imperial presidency, Congress exerts significant influence over the use of force. Congressional politics affect both the frequency with which presidents use force abroad and the probability with which they respond militarily to crises. There are many ways in which Congress influences presidential uses of force, and presidents anticipate congressional reactions, such as introduction of legislation to authorize or curtail a use of force; congressional oversight hearings; and public debate over military policymaking.<sup>18</sup> Congressional action or inaction also sends signals about domestic resolve to foreign parties—including adversaries and allies—thereby affecting the president's calculus regarding force.<sup>19</sup>



In their study of congressional efforts to constrain presidential war powers during the post-World War II era, William Howell and Jon Pevehouse “discover considerable evidence that checks and balances, though diminished, persist.”<sup>20</sup> Although they concede the president’s unilateral powers are very substantial, they argue that, under certain conditions, the congressional checks are constraining. Moves by members of Congress to introduce bills, pass resolutions, hold hearings, and make public declarations can increase political costs for presidents, and even sometimes impose legal limits on force.<sup>21</sup> Like Kriner, they also find that congressional opposition to military force reduces the president’s ability to signal resolve to allies and influence public opinion.<sup>22</sup>

Besides congressional political checks, internal process within the U.S. executive branch exerts significant influence on presidential use of force. The same post-World War II period in which constitutional practice shifted toward unilateral presidential power also included the creation and institutionalization of formal interagency deliberative processes for national security and crisis decision-making. The 1947 National Security Act created the modern Department of Defense, Central Intelligence Agency, and National Security Council (NSC). Although the NSC has evolved, and the details of its composition and organization vary from presidential administration to administration, it helps structure deliberation on possible uses of force to ensure participation of key departments and agencies, as well as the president’s principal military advisers.<sup>23</sup>

It is also through these interagency processes that the executive branch interprets international law in this area. The recently published Department of Defense Law of War manual describes the process this way:

*Jus ad bellum* issues might raise questions of national policy that, in the Executive Branch, would be decided by the President. In U.S. practice, legal advice provided to national-level principal officials on such issues generally would need to be addressed through interagency discussions coordinated by the legal adviser to the National Security Council, including consultation and coordination among senior counsel of relevant U.S. departments and agencies.<sup>24</sup>

Alliance relationships also influence presidential uses of force and are among the considerations that inform executive branch deliberations. On the one hand, a general approach to defense planning that emphasizes military primacy has meant that the United States has great flexibility in wielding its armed might.<sup>25</sup> Moreover, the U.S. executive branch can make decisions on the use of force more quickly and dexterously than can allies with more cumbersome approval processes or, as in the case of Japan, stricter restrictions on what military forces can or cannot be called upon to do.

On the other hand, coalition building and maintenance is often an important strategic and political concern, constraining U.S. military actions or threats of military force. Military-to-military ties mean that allies' interests will also generally exert constant, even if sometimes subtle or indirect, influence on executive branch deliberations through the departments involved in maintaining and exercising those relationships. This is a ripe area for further research, especially with regard to how different alliance relationships and structures feed into U.S. decision-making processes, particularly during crises.

### **North Korea and Taiwan Strait Tensions**

Recent tensions and negotiations over North Korea's nuclear weapons development, as well as concerns about China's ambitions toward Taiwan, help illustrate many of the issues discussed above.

As to North Korea, although each of the previous three presidents has reportedly considered military strikes against North Korea's nuclear capabilities, president Trump was initially, and prior to his summits with Kim Jong Un, much more open about the possibility of such action than his predecessors. Some members of Congress publicly questioned or pushed back against Trump's bellicosity, including suggesting that he lacks constitutional authority to take actions without congressional authorization, but Congress as a body showed little willingness or capacity to apply more than informal and diffuse political pressure against a possible rush to war.<sup>26</sup>

As to the international law dimensions of the North Korea situation, the Trump administration has been publicly reticent.<sup>27</sup> At a 2017 Senate hearing, the Secretaries of Defense and State confirmed under questioning that the United States lacked international legal authority to strike North Korea absent an "imminent threat," but they declined to clarify how they interpreted that standard in the North Korea context.<sup>28</sup> President Trump's advisors had—again, prior to the presidential summit meetings between the American and North Korean leaders—emphasized that the window is closing for action before North Korea develops the capability to attack the continental United States with nuclear weapons. It seems likely that the current U.S. administration interprets "imminence" significantly more broadly than its East-Asian allies, especially Japan.

Besides the prospect of actual military intervention abroad, the North Korea situation also illustrates related presidential powers for managing alliances that can have signaling effects. As commander in chief who can deploy forces abroad, the president can also withdraw them. President Trump has hinted at his interest in bringing U.S. troops home from South Korea, though Congress recently passed a statute limiting his ability to do so (and the constitutionality of that restriction is uncertain). The president can also cancel or downgrade military exercises, as President Trump has done with U.S.-South Korean military exercises as part of his

diplomacy toward the peninsula.<sup>29</sup>

The Taiwan Strait is another hotspot that highlights the vast scope of presidential powers, and especially the wide latitude presidents have to engage in demonstrative shows of force. Ever since the United States normalized relations with China in the 1970s, Congress has generally taken a hard line in favor of defending Taiwan, so there has not been much political or legislative constraint from Congress on strong executive action. In 1995, for example, after China engaged in missile tests and other actions to intimidate Taiwan, President Clinton ordered additional naval forces to the Taiwan area and sent some of them through the Taiwan Strait. The Trump administration has also used naval deployments to reinforce and signal American commitments to prevent Chinese military actions against Taiwan (as well as China's assertions of control in areas of the South China Sea). As with South Korean military exercises, displays of force like this can reassure and bolster defense of partners, but they can also provoke escalatory responses. Such moves are almost exclusively within the president's discretion, at least in the absence of direct legislative restrictions to the contrary.

### **Conclusion**

However the U.S. constitutional system was originally intended to constrain formally the president's military authority, the modern president in practice wields tremendous power and discretion to initiate military operations. The system has adapted over time to major shifts in American power and grand strategy. Although formal, legal checks on the president's use of force rarely come into play, Congress nevertheless retains some political power to influence presidential decision-making, and internal bureaucratic processes also constrain presidential action. ■

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- 1** For a compilation of uses of U.S. military force, see Barbara Salazar Torreon, Cong. Research Serv. Report, *Instances of Use of United States Armed Forces Abroad, 1789-2016* (2016).
- 2** Louis Henkin, *Foreign Affairs and the U.S. Constitution* 49 (2d ed. 1996).
- 3** See Stephen M. Griffin, *Long Wars and the Constitution* 11–51 (2013); Arthur M. Schlesinger, Jr., *The Imperial Presidency* 135 (2004).
- 4** Schlesinger, *supra* note 3, at 128.
- 5** See Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011).
- 6** Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Japan-U.S., art. V, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509.
- 7** Mira Rapp-Hooper & Matthew C. Waxman, *Presidential Alliance Powers*, 42 Wash. Q. 67 (2019).
- 8** *Id.* at 68.
- 9** See Matthew C. Waxman, *Remembering Eisenhower's Formosa AUMF*, Lawfare Blog (Jan. 29, 2019), <https://www.lawfareblog.com/remembering-eisenhowers-formosa-aumf>.
- 10** See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 12–46 (1993).
- 11** War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2006).
- 12** *Id.* § 1541(a).
- 13** On Congress's failed effort to correct this with the War Powers Resolution, see Michael J. Glennon, *Constitutional Diplomacy* 87–111 (1990); Jack Goldsmith & Matthew C. Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 Wash. Q. 7, 13–14 (2016).
- 14** Matthew C. Waxman, *Regulating Resort to Force: Form and Function of the UN Charter*, 24 Eur. J. Int'l L. 151 (2013).
- 15** 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), <https://www.nytimes.com/2013/10/05/world/asia/with-obama-stuck-in-washington-china-leader-has-clear-path-at-asia-conferences.html>.
- 16** Matthew C. Waxman, *The Power to Threaten War*, 123 Yale L.J. 1635 (2014).
- 17** Goldsmith & Waxman, *supra* note 13, at 17.
- 18** Douglas L. Kriner, *After the Rubicon: Congress, Presidents, and the Politics of Waging War* 12 (2010).
- 19** *Id.*
- 20** William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* 6 (2011).
- 21** *Id.* at 10.
- 22** *Id.* at 32.
- 23** For a comparison discussion of Japanese government decision-making structures, see Adam P. Liff & Andrew S. Erickson, *From Management Crisis to Crisis Management? Japan's Post-2012 Institutional Reforms and Sino-Japanese Crisis (In)stability*, 40 J. Strategic Stud. 604 (2017).
- 24** Dep't of Def., *Law of War Manual* 39–40 (2016).

- 25** Hal Brands, *Choosing Primacy: U.S. Strategy and Global Order at the Dawn of the Post-Cold War Era*, 1 *Tex. Nat'l Security Rev.* 9 (2018), available at <https://tnsr.org/2018/02/choosing-primacy-u-s-strategy-global-order-dawn-post-cold-war-era-2/>.
- 26** Amber Philips, *Can Congress Stop Trump from Launching a Nuclear Attack on North Korea?*, *Wash. Post* (Aug. 11, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/08/11/can-congress-stop-trump-from-launching-a-nuclear-attack-on-north-korea/?utm\\_term=.41e8fec04d73](https://www.washingtonpost.com/news/the-fix/wp/2017/08/11/can-congress-stop-trump-from-launching-a-nuclear-attack-on-north-korea/?utm_term=.41e8fec04d73).
- 27** For a discussion of Japanese government positions on some of these issues, see Masahiro Kurosaki, *The 'Bloody Nose' Strategy, Self-Defense and International Law: A View from Japan*, *Lawfare Blog* (Feb. 15, 2018), <https://www.lawfareblog.com/bloody-nose-strategy-self-defense-and-international-law-view-japan>.
- 28** Rebecca Kheel, *Mattis, Tillerson: No Authority for Military Action in North Korea Outside 'Imminent Threat'*, *The Hill* (Oct. 30, 2017), <http://thehill.com/policy/defense/357927-mattis-tillerson-no-authority-for-military-action-in-north-korea-outside>.
- 29** Rapp-Hooper & Waxman, *supra* note 7, at 76.