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## Assessing the Legal Framework for Potential U.S. Conflict with China Over Taiwan

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*Shawn William Brennan*

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# Assessing the Legal Framework for Potential U.S. Conflict with China Over Taiwan

*Shawn William Brennan\**

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\* Lieutenant Commander, Judge Advocate General’s Corps, U.S. Navy. Staff Judge Advocate, Carrier Strike Group Ten; former Deputy Assistant for Legal and Legislative Matters, Office of the Vice Chief of Naval Operations. LL.M., 2022, Harvard Law School; M.A., 2018, U.S. Naval War College; J.D., 2009, Rutgers Law School. The author thanks his family for their consistent support and patience and Professor Jack Goldsmith for his thoughtful critiques and guidance. The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

The Central Military Commission of the People's Republic of China (PRC) gives the order for the People's Liberation Army (PLA) to begin massive missile attacks on Taipei in an attempt to quickly overwhelm and decapitate the Taiwanese government while launching the largest amphibious operation since the Second World War. Beijing's goal: to "reunify" Taiwan with mainland China and forever put to rest the Chinese century of humiliation as President Xi Jinping works toward the final and most important part of his great rejuvenation of China. In Washington, senior national security leaders gather with the President at the White House to determine the U.S. response to this unprovoked attack. With missiles bombarding Taiwan and only eighty miles of water separating mainland China from Taiwan, the speed of the U.S. response is crucial to providing any hope for Taiwan to withstand this assault and preventing a fait accompli. A key question, as officials gather in Washington, is whether there are any legal limits on the President's authority to respond rapidly to this crisis.

Within the next decade, the President of the United States may be faced with this situation and will have to determine whether to use military force to defend Taiwan from aggression by the PRC. When presenting the President with potential military options, senior national security leaders need to understand the capabilities they have at their disposal as well as the authorities the President possesses. In the event of a cross-strait invasion, the PLA will act with speed to rapidly overwhelm Taiwanese defenses and leave little time for the United States to come to its aid, thus limiting the efficacy of any outside intervention while increasing its costs. Consequently, understanding what authority the President currently possesses to order the use of military force abroad and what additional authorities, if any, are needed from Congress to defend Taiwan is crucial to maintaining the U.S. capacity and capability to defend Taiwan. This article seeks to help answer those questions.

By analyzing the existing legal framework for the use of force and how that framework applies to Taiwan in particular, as well as evaluating potential scenarios about how a conflict regarding Taiwan could play out, this article will address whether there are any legal limitations on the President's authority to use military force in defense of Taiwan and, if so, what those limits are. Based on this analysis and evaluation, this article will show that the President currently has sufficient legal authority to defend U.S. interests in the Western Pacific, including the defense of Taiwan in the event of aggression by the PRC, with military force. However, while not legally necessary, as a policy

matter, prior specific congressional authorization for the President to use military force to defend Taiwan may have helpful signaling effects to demonstrate the unity, breadth, and depth of support for Taiwan in the U.S. government and play a role in deterring the PRC from attempting to cross the strait.

The main objective of this article is to assess the existing legal framework for potential U.S. conflict with China. Part II will provide background on PRC and U.S. policies, capabilities, and commitments as they relate to Taiwan. Part III will address the general authorities concerning the use of force, briefly addressing justifications to use force under international law before turning to assess current U.S. domestic authorities, including those deriving from the Constitution and statutory authorities. Part IV will then address whether there are any limitations on exercising those authorities in light of the existing legal framework. It will do this by applying the framework to some hypothetical scenarios. In Part V the article will evaluate whether additional authorities may be needed to confront China and, if so, what those additional necessary authorities are. This evaluation will include a review of some current proposals in Congress at the time of this writing.

Importantly, this article does not advocate what the United States *should* do if China were to invade Taiwan or use any force against the United States or its allied or partner forces. Rather, it discusses what the United States *may* do militarily based on the current understanding of the existing legal framework absent additional authorities from Congress. Of note, there may be a range of non-military options available to respond to any attack on Taiwan, many of which may be preferable to a United States use of force against China.

## II. BACKGROUND

### *A. PRC Intentions and Capabilities—“Reunification” with Taiwan*

The “Taiwan question” is at the forefront of Chinese policy. Chinese leaders view Taiwan as an inextricable part of China. Chinese President Xi Jinping has declared that, “[r]esolving the Taiwan question and realizing China’s complete reunification is a historic mission and an unshakable commitment of the Chinese Communist Party.”<sup>1</sup> The return of Taiwan to mainland China

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1. Xi Jinping, President of the People’s Republic of China, Speech on Chinese Communist Party’s 100th Anniversary (July 1, 2021), <https://asia.nikkei.com/Politics/Full-text-of-Xi-Jinping-s-speech-on-the-CCP-s-100th-anniversary> [<https://perma.cc/Q6E9-ZA53>].

is one of the most significant vestiges of the Chinese century of humiliation that Beijing believes must be rectified before China's recovery will be considered complete and may be the only one they view as non-negotiable.<sup>2</sup> Taking more aggressive steps in the foreign policy arena has been a hallmark of the PRC under President Xi and has contributed to an increasing risk of conflict between China and the United States as China's power and influence on the world stage has grown.<sup>3</sup> This abandonment of "China's longstanding embrace of pragmatic gradualism . . . and Deng [Xiaoping]'s low-profile principle of 'biding time and hiding strengths' has given way to bolder assertions of the need to protect China's interests"<sup>4</sup> and made policy objectives that were once long-term and potentially unattainable (e.g., re-unification with Taiwan) now seem within reach and actionable.

If China decides to take action involving Taiwan, it benefits from being an authoritarian communist dictatorship. The Central Military Commission, chaired by President Xi, does not need to worry about limits on their authority to act nor are they slowed by the need to seek approval, concurrence, or support from another branch of government. President Xi decides to take action and the PLA carries out the action. Consequently, if China decides to invade Taiwan or otherwise take any action involving Taiwan, it will act quickly, without significant external deliberation or potential for leaks, despite the immense consequences their actions will have for the Chinese people, residents of Taiwan, and general global security. Although it is possible the U.S. intelligence community will have indications and warning of impending PRC aggression against Taiwan, particularly any effort by the PLA to invade Taiwan, it is not clear how much advanced warning the United States could expect. Thus, it is important to think about these questions now and be prepared to respond rapidly.

How the United States chooses to respond to any attempt by China to invade Taiwan or to otherwise take action against United States, allied, or partner forces in relation to Taiwan will have significant consequences for

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2. Alison A. Kaufman, China Analyst, Center for Naval Analyses, Written Testimony for U.S.-China Economic and Security Review Comm'n Hearing, *China's Narratives Regarding Nat'l Sec. Pol'y: The "Century of Humiliation" and China's National Narratives* (Mar. 10, 2011).

3. See GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDE'S TRAP?* (2017); Zhiqun Zhu, *Interpreting China's "Wolf-Warrior Diplomacy,"* THE DIPLOMAT (May 15, 2020), <https://thediplomat.com/2020/05/interpreting-chinas-wolf-warrior-diplomacy/> [<https://perma.cc/Y9Q5-EQT4>].

4. Nis Grunberg & Katja Drinhausen, *The Party Leads on Everything: China's Changing Governance in Xi Jinping's New Era*, MERCATOR INSTITUTE FOR CHINA (Sept. 24, 2019), <https://merics.org/en/report/party-leads-everything> [<https://perma.cc/P84V-6WFQ>].

global security. More so than the conflicts the United States has been engaged with over the last twenty years during the Global War on Terrorism, conflict with China has the potential to take place on a scale not seen since World War II and certainly rises at least to the same level of threat faced during the Cold War between the United States and Soviet Union. Considered the most significant strategic competitor by U.S. officials and the only one “potentially capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system,”<sup>5</sup> the PRC has a large and growing military capability in the PLA that it can bring to bear against Taiwan. This includes over 2,000,000 personnel, over 2,500 aircraft, including stealth fighter jets, and the largest navy in the world by number of vessels.<sup>6</sup> In contrast, reports suggest the Taiwanese military has around 175,000 active-duty military personnel, 475 aging combat aircraft, and less than 100 naval and coast guard vessels.<sup>7</sup>

Admiral Phil Davidson, former Commander of U.S. Indo-Pacific Command, testified before Congress in March 2021 that Beijing could have the capability to take control of Taiwan by force as soon as 2027.<sup>8</sup> Other public sources have suggested “the PLA has the military air and sea lift capacity for a first-echelon invasion force of more than 25,000 troops” to include mechanized battalions and hundreds of infantry fighting vehicles and main battle tanks. Inserting troops by helicopter and airborne assault would allow the

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5. Interim National Security Strategic Guidance 8 (Mar. 3, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf> [<https://perma.cc/WZ9S-PYY6>]; see also U.S. DEPARTMENT OF DEFENSE, FACT SHEET: 2022 NATIONAL DEFENSE STRATEGY (Mar. 28, 2022), <https://media.defense.gov/2022/Mar/28/2002964702/-1/-1/1/NDS-FACT-SHEET.PDF> [hereinafter 2022 NATIONAL DEFENSE STRATEGY].

6. See U.S. DEPARTMENT OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING CHINA 2021 ANNUAL REPORT TO CONGRESS (2021); CAITLIN CAMPBELL, CONG. RSCH. SERV., R46808, CHINA’S MILITARY: THE PEOPLE’S LIBERATION ARMY (PLA) (June 4, 2021), <https://crsreports.congress.gov/product/pdf/R/R46808/3>.

7. See U.S. DEPARTMENT OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING CHINA 2021, ANN. REP. TO CONG. (2021); Natalie Tso, *Taiwan’s Civilian Soldiers, Watching Ukraine, Worry They Aren’t Prepared to Defend Their Island*, TIME (Mar. 18, 2022), <https://time.com/6158550/taiwan-military-china-ukraine> [<https://perma.cc/PRW3-YQXV>]; Joyu Wang & Alastair Gale, *Does Taiwan’s Military Stand a Chance Against China? Few Think So*, WALL STREET JOURNAL (Oct. 26, 2021), <https://perma.cc/G5G8-GA4S>.

8. *Hearing to Receive Testimony on U.S. Indo-Pacific Command in Review of the Defense Authorization Request for Fiscal Year 2022 and the Future Years Defense Before the S. Comm. on Armed Service*, 117th Cong. (Mar. 9, 2021), <https://www.armed-services.senate.gov/hearings/21-03-09-united-states-indo-pacific-command> (testimony of Admiral Philip Davidson at 1:20:30).

PLA to establish an airhead and set conditions for follow-on seaborne forces to invade and occupy Taiwan, some of which could also be moved by civilian sealift capacity.<sup>9</sup> Importantly, the PLA has also developed “mature sea denial capabilities that can likely delay U.S. forces approaching the theater.”<sup>10</sup> All of this leads to an increased threat that President Xi will use the combat power the PRC now possesses to achieve his political objective of a unified China as part of his “rejuvenation of the Chinese nation.”<sup>11</sup>

### B. U.S. Strategy and Commitment

The 2022 National Defense Strategy includes “[d]eterring aggression, while being prepared to prevail in conflict when necessary” as one of the Department of Defense’s (DoD) top priorities with a specific emphasis on the PRC.<sup>12</sup> This strategy and the Biden administration’s Interim National Security Strategy released in 2021 assesses the PRC as the United States’ most consequential strategic competitor and pacing challenge for the DoD.<sup>13</sup> However, despite the DoD’s priority focus to deter aggression, the United States-China Economic and Security Review Commission has argued “[t]he PLA’s growing capabilities undermine deterrence because they diminish the credibility of the [United States]’s threat to deny the PLA its objectives through military intervention.”<sup>14</sup> In addition to the threat the PRC poses to the Taiwanese government, a hostile takeover of Taiwan by the PRC would have a significant negative impact on U.S. credibility among allies and partners in the Indo-Pacific region, throwing into question whether the United States will be able to honor its defense commitments as well as the ability of democratic governments generally to compete with autocracies like the PRC. Furthermore, Taiwan is a crucial part of the global economy. A conflict in Taiwan, or simply more robust attempts by the PRC to seize or harm Taiwan’s semiconductor industry, for example, would have massive conse-

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9. U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMM’N, 117th Cong., 2021 REP. TO CONGRESS 395–96 (2021).

10. *Id.* at 399.

11. Xi, *supra* note 1.

12. 2022 NATIONAL DEFENSE STRATEGY, *supra* note 5, at 1.

13. Interim National Security Strategic Guidance, *supra* note 5; 2022 NATIONAL DEFENSE STRATEGY, *supra* note 5.

14. U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMM’N, *supra* note 9, at 411.

quences for global supply chains with 90 percent of the most advanced semiconductor chips made in Taiwan.<sup>15</sup> Consequently, the maintenance of a free and democratic Taiwan is a crucial outcome for U.S. economic and security interests.

Given the reality of the combat power the PLA currently possesses, what it is developing, and the PLA's ability to bring it to bear in any engagement involving Taiwan, deciding to engage China militarily over aggression directed at Taiwan is one of the most consequential decisions the political leadership of the United States can make. This begets questions regarding such decision-making authority in the United States, a representative democracy with three ostensibly co-equal branches of government. Among those questions: Who holds the authority to use force against China within the U.S.'s separation of powers under the Constitution? If the President, as Commander in Chief, holds this authority, what are the limits on the authority (if any)? Does the President possess the authority now or must Congress activate it? If there are limits on any authority the President currently possesses in this context, does the President need to go to Congress now to obtain additional authorities or must the President wait until there is an actual conflict? What additional authorities are needed?

Current U.S. policy on Taiwan is articulated in a number of statements beginning with the Shanghai Communiqué<sup>16</sup> released in connection with President Nixon's visit to China in 1972 and further amplified by additional statements in 1978 and 1982 (collectively referred to as the "Three Communiqués"<sup>17</sup>) as well as the "Six Assurances" made to Taiwan in July 1982.<sup>18</sup>

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15. Julian E. Barnes, *How the Computer Chip Shortage Could Incite a U.S. Conflict with China*, NEW YORK TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/us/politics/computer-chip-shortage-taiwan.html> [<https://perma.cc/HE6P-P3J7>].

16. Joint Statement Following Discussions with Leaders of the People's Republic of China (Feb. 27, 1972), *reprinted in XVII FOREIGN RELATIONS OF THE U.S., CHINA 1969–1972*, at 812–16 (Steven E. Phillips & Edward C. Keefer eds., 2006) [hereinafter *Shanghai Communiqué*].

17. Joint Communiqué on the Establishment of Diplomatic Relations Between the U.S. and the People's Republic of China (Jan. 1, 1979), *reprinted in XIII FOREIGN RELATIONS OF THE U.S., CHINA 1977–1980*, at 652–53 (David P. Nickles & Adam M. Howard eds., 2013); U.S.-China Joint Communiqué on U.S. Arms Sales to Taiwan (Aug. 17, 1982), RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/united-states-china-joint-communicue-united-states-arms-sales-taiwan> [<https://perma.cc/PHC3-LSZQ>].

18. The Six Assurances are: (1) the United States did not agree to set a date certain for ending arms sales to Taiwan, (2) the 1982 joint communiqué should not be read to imply the United States has agreed to engage in prior consultations with Beijing on arms sales to



Together the Three Communiqués and Six Assurances articulate a portion of the relevant policy; however, they must be read in light of the law that sets forth U.S. policy regarding Taiwan since those statements of administration policy are subject to change by the President. The Taiwan Relations Act (TRA),<sup>19</sup> passed in 1979, makes it the policy of the United States:

(1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people of Taiwan, as well as the people on the China mainland . . . ; (2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern; (3) to make clear that the United States decision to establish diplomatic relations with the [PRC] rests upon the expectation that the future of Taiwan will be determined by peaceful means; (4) to consider any effort to determine the future of Taiwan by other than peaceful means . . . a threat to the peace and security of the Western Pacific area and of grave concern to the United States; (5) to provide Taiwan with arms of a defensive character; and (6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of Taiwan.<sup>20</sup>

Subsequent legislation has made clear “the TRA and the Six Assurances ‘are both cornerstones’ of U.S.-Taiwan relations . . . [and] that it is U.S. policy to enforce existing U.S. government commitments to Taiwan, ‘consistent with the [TRA], the 3 joint communiqués, and the Six Assurances.’”<sup>21</sup> This represents the U.S. policy of “strategic ambiguity”<sup>22</sup> that continues to define how the United States balances its relationships with China and Taiwan while

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Taiwan, (3) the United States sees no mediation role for the United States, (4) the United States has no plans to seek any revision to the Taiwan Relations Act, (5) there has been no change in the United States’ longstanding position on the issue of sovereignty over Taiwan, and (6) the United States will not attempt to exert pressure on Taiwan to enter into negotiations with the People’s Republic of China. *See* SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF11665, PRESIDENT REAGAN’S SIX ASSURANCES TO TAIWAN (Oct. 8, 2020).

19. Taiwan Relations Act, 22 U.S.C. §§ 3301–3316 [hereinafter TRA].

20. *Id.*

21. LAWRENCE, *supra* note 18.

22. Jacques deLisle, *The Taiwan Relations Act at 40: A Troubled but Durable Framework for U.S. Policy*, 14 ASIA POLICY 4, 35–42 (2019).

protecting U.S. interests in the Western Pacific and greater Indo-Pacific area.<sup>23</sup>

Although the TRA does not obligate the United States to use force to defend Taiwan from PRC aggression, it does require the United States to “maintain the capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of Taiwan.”<sup>24</sup> Toward that end, U.S. Indo-Pacific Command—the geographic combatant command with responsibility for the area containing China and Taiwan—is assigned approximately 375,000 U.S. military and civilian personnel, 200 naval ships (to include five aircraft carrier strike groups), and over 2,400 aircraft (from the Navy, Army, Marines, and Air Force).<sup>25</sup> Many of these forces are forward deployed throughout the Western Pacific with significant military personnel and assets in Guam, Japan, and South Korea “to prevent conflict through the execution of integrated deterrence, and should deterrence fail, be prepared to fight and win.”<sup>26</sup> The recently released U.S. Indo-Pacific Strategy, re-confirms the U.S. commitment to

work with partners inside and outside of the region to maintain peace and stability in the Taiwan Strait, including by supporting Taiwan’s self-defense capabilities, to ensure an environment in which Taiwan’s future is determined peacefully in accordance with the wishes and best interests of Taiwan’s people . . . consistent with our One China policy and our longstanding commitments under the [TRA], the Three Joint Communiqués, and the Six Assurances.<sup>27</sup>

The forces assigned to U.S. Indo-Pacific Command are at the forefront of executing this strategy and would be the first called on if military options were to be employed in defense of Taiwan. Given the vast distance of the

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23. Richard Haass & David Sacks, *The Growing Danger of U.S. Ambiguity on Taiwan*, FOREIGN AFFAIRS (Dec. 13, 2021), <https://www.foreignaffairs.com/articles/china/2021-12-13/growing-danger-us-ambiguity-taiwan> [<https://perma.cc/8HRB-M6DW>].

24. TRA, *supra* note 19, § 3301(b)(6).

25. U.S. Indo-Pacific Command, About USINDOPACOM, <https://www.pacom.mil/About-USINDOPACOM/> [<https://perma.cc/4G2W-EFAW>] (last visited Dec. 9, 2022).

26. *Hearing to Receive Testimony on the Posture of U.S. Indo-Pacific Command and U.S. Forces Korea Before the S. Comm. on Armed Serv.*, 117th Cong. (Mar. 10, 2022) (statement of Admiral John C. Aquilino, Commander, U.S. Indo-Pacific Command).

27. INDO-PACIFIC STRATEGY OF THE UNITED STATES 13 (Feb. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/U.S.-Indo-Pacific-Strategy.pdf> [<https://perma.cc/G3DX-BX79>].

Pacific and the expected speed of any PRC attack, the ability of forward deployed forces in the region to move at the speed of relevance and get into the fight before the PLA is able to overwhelm Taiwan's organic defenses is crucial to Taiwan's survival. Potential response forces are not the only thing that needs to move fast. Decision makers in Washington, D.C., will also need to move fast to determine how to respond to any PRC aggression. This decision process will involve rapidly assessing available options of current authorities. While the threat posed by China is drastically different from that confronted during the Global War on Terrorism, the legal analysis necessary to assess uses of force and war powers is fundamentally the same despite the prior focus on non-State actors (e.g., al-Qaeda, the Islamic State, and associated forces) and the current focus on State versus State competition and potential conflict. Although the framework may be similar, how it is applied and the facts presented will be different.

Some in the U.S. Congress have sought to proactively provide the President with statutory authority to use force in defense of Taiwan<sup>28</sup> with at least one member advocating for an advance authorization based on a belief the President currently "has no legal authority to react in the time necessary to repel a Chinese invasion of Taiwan and deter an all-out war."<sup>29</sup> As this article will demonstrate, that does not seem to be the case though action from Congress may be helpful as a policy matter.

### III. ASSESSING THE EXISTING LEGAL FRAMEWORK

#### *A. Justifications to Use Force Under International Law*

Prior to the Second World War, States often used force to accomplish their political and policy objectives. However, after the destruction that blanketed most of the world following that war, the Allied nations came together to form the United Nations (UN), determined to "save succeeding generations from the scourge of war,"<sup>30</sup> promote international peace and security, and

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28. See Taiwan Invasion Prevention Act, S. 332, 117th Cong. (2021).

29. Elaine Luria, *Congress Must Untie Biden's Hands on Taiwan*, WASHINGTON POST (Oct. 11, 2021), <https://www.washingtonpost.com/opinions/2021/10/11/elaine-luria-congress-biden-taiwan/> [https://perma.cc/LA63-5E5K].

30. U.N. Charter pmbl.

prohibit the threat or use of force against States.<sup>31</sup> Both the United States and China are signatories to the UN Charter and permanent members of the UN Security Council (UNSC), which is tasked with “primary responsibility for the maintenance of international peace and security.”<sup>32</sup> Therefore, it is clear the UN Charter and the prohibition against the use or threat of force applies to the United States and China, as it does to all States given the universal nature of the UN Charter.<sup>33</sup> Additionally, the prohibition on the threat or use of force is generally considered to be customary international law.<sup>34</sup>

Despite this general prohibition on the threat or use of force as a tool of international relations, the last seventy-five years have seen numerous examples of force being employed by States in pursuit of their political and policy objectives. Although some of these incidents have taken place outside the confines of the UN Charter and cannot be easily reconciled with it, there are exceptions to the prohibition on the use of force and provisions in the UN Charter for when States may lawfully use force under international law. Chief among these exceptions are the self-defense provisions of Article 51<sup>35</sup> and the inherent right of self-defense under customary international law. This section of the paper will briefly address various justifications under international law to use force focusing on self-defense and collective self-defense as the two most-likely arguments to justify any use of force in a conflict involving the United States, China, and Taiwan.

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31. *See* U.N. Charter art. 2, which provides: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” It goes on to state: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

32. U.N. Charter art. 24, ¶ 1.

33. *See infra* note 37 regarding Taiwan’s status at the U.N.

34. *See* Christine Gray, *The Use of Force and the International Legal Order*, in *INTERNATIONAL LAW* 601, 603 (Malcolm Evans ed., 2018).

35. U.N. Charter art. 51. (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

## 1. Self-Defense

Article 51 of the Charter confirms States retain their inherent right of individual or collective self-defense in the event of an armed attack.<sup>36</sup> Although Article 51 caveats this protection of the inherent right of self-defense by stating the right applies when an armed attack occurs against a *member of the UN*, it is reasonable to assume Taiwan will rely on Article 51 and its inherent right of self-defense under customary international law should it be confronted with an attack from the PRC.<sup>37</sup> Consequently, if Taiwan is confronted with aggression from the PRC that rises to the level of an armed attack, it will be legally permissible under international law for Taiwan to threaten or use force to end or repel the attack.

There is no clear definition of what constitutes an armed attack for purposes of Article 51. The determination of what would qualify is left primarily to customary international law.<sup>38</sup> The International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* saw fit to “distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”<sup>39</sup> thus leading to the conclusion that in order to support the exercise of self-defense an armed attack under customary international law must include a sufficiently severe use of force so as to distinguish it from lesser uses of force. However, the United States takes the position that the right of self-defense applies against any illegal use of force.<sup>40</sup>

This threshold question of whether PRC aggression rises to the level that justifies the use of force in self-defense will be particularly important to adjudicate before engaging in any type of military responses involving the use

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36. *Id.*

37. On October 25, 1971 Taiwan (as the Republic of China) was removed from the U.N. and the PRC was recognized as the “only lawful representatives of China.” Thus Taiwan is not a “Member of the U.N.” See G.A. Res. 2758 (XXVI) (Oct. 25, 1971). For purposes of this article, Taiwan’s invocation of its inherent right of self-defense will be considered valid under international law in order to allow for the focus on the U.S. domestic legal framework. For more on this issue, see David J. Scheffer, *Does Taiwan Have the Right of Self-Defense?*, COUNCIL ON FOREIGN RELATIONS (Nov. 23, 2021), <https://www.cfr.org/article/does-taiwan-have-right-self-defense> [<https://perma.cc/8F8W-QCW5>].

38. Gray, *supra* note 34, at 612.

39. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 191 (June 27).

40. OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 1.11.5.2 (rev. ed. Dec. 2016).

of force lest the response be considered a violation of Article 2(4) and the prohibition on the threat or use of force. It is important to note, however, that as a legal matter it may not be necessary for Taiwan to wait to be attacked before engaging in self-defense if it believes an armed attack to be imminent. The contours of the bounds of such an imminence determination are not clear and remain controversial.<sup>41</sup>

## 2. Collective Self-Defense

Additionally, under the Charter and customary international law, Taiwan need not defend itself alone. Instead, Taiwan may invite others to exercise for its benefit the right of collective self-defense to aid it in ending or repelling PRC aggression amounting to an armed attack. In order to exercise the right of collective self-defense, a victim State must be the victim of an armed attack, declare it has been the victim of such an attack, and request assistance from an outside party.<sup>42</sup> Here, were Taiwan to be the victim of aggression by the PRC sufficient to meet the level of an armed attack, it may request assistance from other States to aid it in ending or repelling the attack. Similar to the questions for the use of individual self-defense given Taiwan's status (or lack thereof) at the UN and as a State, there are potential issues for exercising collective self-defense. However, if the PRC were to launch an armed attack against Taiwan, there are reasonable arguments under international law to support the exercise of collective self-defense by the United States and other States.<sup>43</sup> Taiwan could rely on its prior "respect for the peaceful status quo" and that the threat to international peace and security by PRC aggression against Taiwan would entitle Taiwan to the inherent right of individual and collective self-defense.<sup>44</sup> Thus, it may be legally permissible under international law for the United States to use or threaten the use of force against the PRC in any conflict based on PRC aggression against Taiwan, though it is more likely this would be handled as a question of international relations than of law.

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41. Gray, *supra* note 34, at 614.

42. See *Nicar. v. U.S.*, *supra* note 39, at 93–95.

43. For a fuller discussion on how the United States has a valid legal basis under international law to exercise collective self-defense of Taiwan against an armed attack by China, see Ryan M. Fisher, *Defending Taiwan: Collective Self Defense of a Contested State*, 32 FLORIDA JOURNAL OF INTERNATIONAL LAW 101 (2020–2021).

44. See Scheffer, *supra* note 37.

### 3. Other Possible Justifications

Another way in which the threat or use of force could be lawful under international law is for such force to be in support of, or pursuant to, a UNSC Resolution under the provisions of Chapter VII of the Charter. The Korean War and first Gulf War are examples of times when States used force with the authorization of the UNSC.<sup>45</sup> However, given China's status as a permanent member of the UNSC, with its attendant veto, it is a near certainty the UN will be unable to act in any meaningful way during any conflict over Taiwan, particularly in light of increasing cooperation between the PRC and Russia.<sup>46</sup>

There are other arguments that purport to justify the use of force under international law that are not addressed in this article given their lack of general acceptance (e.g., humanitarian intervention<sup>47</sup> and responsibility to protect<sup>48</sup>). Consequently, the only legally available arguments for the use of force that comport with generally accepted understandings of international law likely to play out in a potential conflict between Taiwan and China are ones that rely on self-defense.

China is likely to assert that any use of force it undertakes regarding Taiwan is not contrary to the Charter<sup>49</sup> in that it is not "against the territorial integrity or political independence of any state"<sup>50</sup> because in the PRC's view, "[t]he Taiwan question is purely an internal matter for China, one which brooks no external interference."<sup>51</sup> Moreover, China will claim Taiwan is unable to engage in self-defense because it is not a State, but a province of the PRC, and any attempts to come to Taiwan's assistance will be improper interventions in the internal affairs of a sovereign State. This article will not

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45. See S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); S.C. Res. 84 (July 7, 1950); S.C. Res. 678 (Apr. 29, 1990).

46. See, e.g., Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development (Feb. 4, 2022), <http://en.kremlin.ru/supplement/5770>.

47. See Gray, *supra* note 34, at 606.

48. See Spencer Zifcak, *The Responsibility to Protect*, in INTERNATIONAL LAW 484 (Malcolm Evans ed., 2018).

49. See Gray, *supra* note 34, at 604 ("China does not exclude the right to use force to recover the island of Taiwan on the basis that it is part of China").

50. U.N. Charter art. 2 ¶ 4.

51. Xi Jinping, President of China, Speech at Meeting Marking the 110th Anniversary of the Revolution of 1911 (Oct. 9, 2021), [http://www.china-embassy.org/eng/xnyfgk/202110/t20211010\\_9557330.htm](http://www.china-embassy.org/eng/xnyfgk/202110/t20211010_9557330.htm) [<https://perma.cc/C3TP-HP2R>].

address the unsettled status of Taiwan and the attendant applicability of international law governing the use of force.

Despite China's attempts to preclude Taiwan from availing itself of the tools available to States under international law to defend themselves, the most persuasive, clear, and likely legal justification for the use of force under international law in this scenario remains one based on the inherent right of self-defense. The United States would have the right of self-defense should the PRC attack any U.S. assets and, similarly, Taiwan would if it should come under attack from the PRC. In addition, Taiwan could invoke collective self-defense and request the United States to defend Taiwan against the PRC. Although a more robust analysis under international law is possible and would be warranted in an actual application of these principles to a real-world scenario, the focus of this article is on the domestic legal framework for the use of force. That analysis follows below.

*B. U.S. Domestic Authorities to Use Force*

Whether an action is lawful under international law, however, does not necessarily clarify or dictate who has the power under U.S. domestic law to authorize it. There “has been a long accretion of presidential control over international law since the constitutional Founding” in which “Presidents (and the executive branch more generally) have come to dominate the creation, alteration, and termination of international law for the [United States].”<sup>52</sup> Thus, it may not matter for purposes of domestic law whether a particular action complies with international law.<sup>53</sup> Consequently, the most important considerations under domestic law involving this aspect of international law—the use of military force abroad—involve a constitutional balance of powers question about where the authority to use force resides within the U.S. government—Congress or the President. Although this is not a new question or an unanticipated one, as it goes back at least as far as the drafting

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52. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 *HARVARD LAW REVIEW* 1201, 1204 (2018).

53. The U.S. Department of Justice Office of Legal Counsel has opined that “the power in the Executive to override international law is a necessary attribute of sovereignty and an integral part of the President’s foreign affairs power.” *See* *Auth. of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 *Op. O.L.C.* 163, 171 (1989). Notably, the office specifically opined that “as a matter of domestic law, the Executive has the power to authorize actions inconsistent with Article 2(4) of the U.N. Charter,” which in this case concerned certain extraterritorial law enforcement actions such as forcible abductions. *Id.* at 178.



of the Constitution, it continues to require careful analysis and thoughtful contemporary consideration.<sup>54</sup>

This section of the article will address the domestic authorities to order the use of force under U.S. law. Starting with the President's inherent authority under Article II of the Constitution, the examination will primarily utilize the U.S. Department of Justice Office of Legal Counsel's (OLC) two-part framework for analyzing the President's legal authority to conduct military operations overseas and whether prior congressional approval is constitutionally required for particular military operations. That discussion will be followed by a review of congressional authorities, both under its power to declare war and other statutory authorizations for the use of force.

#### 1. Inherent Presidential Authority under Article II of the Constitution

The Constitution provides Congress with the power to declare war,<sup>55</sup> raise and support armies,<sup>56</sup> and provide and maintain a navy.<sup>57</sup> However, while Congress passes authorization and appropriation bills annually supporting the army and maintaining the navy (as well as authorizing and funding the rest of the U.S. defense establishment every year through the annual National Defense Authorization Acts and associated appropriations acts), the last time Congress formally declared war was on June 5, 1942 when it recognized a state of war existed between the United States and Bulgaria, Hungary, and Romania during World War II.<sup>58</sup> Despite this nearly eighty-year gap in Congress exercising its authority to formally declare war, the United States has been engaged in multiple significant armed conflicts around the world since the end of World War II without formal declarations of war by Congress and without any specific congressional enactment authorizing the use of force in a way that may be considered functionally a declaration of war for a

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54. Professor Michael Paulsen has described the way the Framers regarded the war power as authority "too important to vest in a single set of hands and so, by conscious design, [the Framers] chopped it up—divided it—and allocated portions of that power to various branches." Michael Stokes Paulsen, *The War Power*, 33 HARVARD JOURNAL OF LAW & PUBLIC POLICY 113, 113 (2010).

55. U.S. CONST. art. I, § 8, cl. 11.

56. *Id.* cl. 12.

57. *Id.* cl. 13.

58. Pub. L. No. 77-563 (1942); Pub. L. No. 77-564 (1942); Pub. L. No. 77-565 (1942).

particular enemy or theater.<sup>59</sup> Consequently, the President, in practice, is persistently and consistently authorizing military operations abroad involving the use of force without the prior approval of Congress. In doing so, the President relies on his constitutional authority as Commander in Chief and Chief Executive and contributes to the development of a “historical gloss”<sup>60</sup> with self-reinforcing effects for future legal interpretations.<sup>61</sup>

Instead of pushing back against this apparent usurpation of congressional power by the executive, this view of unilateral and broad presidential authority has been implicitly accepted by Congress<sup>62</sup> and represents the current understanding of presidential power within the executive branch as evidenced by a broad array of legal opinions from OLC on a wide variety of operations over many years.

OLC has detailed the framework it uses in analyzing the President’s legal authority to conduct military operations overseas and whether to advise that

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59. See, e.g., Paulsen, *supra* note 54, at 123 (characterizing the September 11th Authorization to Use Military Force (“AUMF”) and Iraq AUMF as “fully functional declaration[s] of war for that specific enemy or theater”).

60. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter described

the way the framework has consistently operated fairly establishes that it has operated according to its true nature. . . . In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952). See also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARVARD LAW REVIEW 411, 413, 417–24 (2012).

61. OLC has viewed the “relationship of Congress’s power to declare war and the President’s power as Commander in Chief and Chief Executive [to have] been clarified by 200 years of practice.” Proposed Deployment of U.S. Armed Forces into Bosnia, 19 Op. O.L.C. 327, 331 (1995) (referencing HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 70–71 (1990)) [hereinafter OLC Bosnia 1995 Opinion].

62. See Authority To Use Military Force in Libya, 35 Op. O.L.C. 20, 8 (2011) (“Indeed, Congress itself has implicitly recognized this presidential authority. The War Powers Resolution’s . . . ‘structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces’ into hostilities or circumstances presenting an imminent risk of hostilities.” (citing Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 175 (1994)); see also OLC Bosnia 1995 Opinion, *supra* note 61, at 334. Moreover, Congress retains the power of the purse and ability to not fund operations it finds to have been improperly authorized.

prior congressional approval is constitutionally required for particular military operations.<sup>63</sup> Under OLC's framework, it first considers whether the operations "would serve sufficiently important national interests to permit the President's actions as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations."<sup>64</sup> Second, OLC looks to "whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause."<sup>65</sup> Consequently, if the proposed operations surpass a certain limited nature, scope, and duration the President would have to seek and receive statutory authority before employing forces in the particular military operation under consideration regardless of the presence of a sufficient national interest to justify the President to act as Commander in Chief and pursuant to his authority to conduct U.S. foreign relations.

*i. OLC Framework—National Interest*

For the first prong of this framework, OLC has consistently looked to what interest the President is pursuing when deciding to use force abroad without prior congressional authorization. Notably here, it is typically the executive branch identifying and classifying the relevant interest which justifies the use of force. Identifying such a national interest sufficient to use force is a key aspect of the President's broad foreign policy power and involves considerations of foreign policy, operational and tactical considerations related to his Commander in Chief power and the employment of forces as well as political considerations about what level of risk the American public is willing to accept and support. It may also be important for the President to be confident such a national interest will ultimately be supported by Congress even if he is not seeking prior authorization to use force since the commitment of military forces "cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action."<sup>66</sup>

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63. *See, e.g.*, Authority To Use Military Force in Libya, 35 Op. O.L.C. 20, 6 (2011) [hereinafter OLC 2011 Libya Opinion].

64. *Id.* at 10.

65. *Id.*

66. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 188 (1980).

ii. OLC Framework—Nature, Scope, and Duration.

In the second prong of this framework, OLC’s analysis is based on the long-standing proposition “that not every armed conflict between forces of two sovereigns is ‘war.’”<sup>67</sup> Instead, there are activities that fall below the threshold of “war” as contemplated by the Constitution’s “declare war” clause. OLC has repeatedly chosen to distinguish between limited hostilities and war in a constitutional sense when reviewing anticipated or proposed military operations, noting the U.S. Supreme Court has

distinguished between a declared war (which arises where “one whole nation is at war with another whole nation” with hostilities arising “in every place, and under every circumstance”) and a more limited engagement, an “imperfect war” (in which hostilities are “more confined in its nature and extent; being limited as to places, persons, and things”).<sup>68</sup>

To determine “whether a particular planned engagement constitutes a ‘war’ for constitutional purposes,”<sup>69</sup> OLC conducts “a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.”<sup>70</sup>

For the anticipated nature, scope, and duration to exceed the level at which military operations would rise to the level of war for constitutional purposes, the operation would need to involve “*prolonged* and *substantial* military engagements, typically involving exposure of U.S. military personnel to *significant* risk over a *substantial* period.”<sup>71</sup> When considering the nature and scope of the anticipated operations, it is appropriate to consider whether offensive operations are contemplated or whether operations would be limited to those that are defensive in nature.<sup>72</sup> The type of forces to be employed

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67. The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321, 322 (1970).

68. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 8–9 (2018) (citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–41 (1800)).

69. OLC 2011 Libya Opinion, *supra* note 63, at 31.

70. *Id.*

71. *Id.* (emphasis added).

72. See OLC Bosnia 1995 Opinion, *supra* note 61 (quoting George Washington on whether an operation is of an offensive or defensive nature, “On the other hand, Washington also wrote in 1793 that ‘no offensive expedition of importance can be undertaken [against the Creek Indians] until after [Congress] shall have deliberated upon the subject, and authorized such a measure.’” 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick ed., 1940)).

(e.g., air, naval, ground, special operations) as well as the type of forces expected to be faced are also important considerations in assessing the nature and scope of anticipated operations as they impact on whether military engagements are likely to be prolonged and substantial. In this vein, it may also be appropriate to consider whether operations are directed at another State or a non-state actor in the territory of another State (e.g., would the proposed action be part of an international armed conflict or a non-international armed conflict; is force being used against the organized military of a State or irregular, loosely-organized forces not accountable to a particular government). Likewise, one must assess the objectives of the anticipated military operations and the presence or absence of a desired end-state or exit strategy.

Although no military operations are without risk and “the precise level of risk to U.S. troops is, of course, impossible to specify”<sup>73</sup> for particular operations, OLC has found the President to have authority to engage in military operations without prior congressional approval even where “the deployment of 20,000 troops *on the ground* . . . raises the risk that the [United States] will incur (and inflict) casualties.”<sup>74</sup> This is true even when considering the anticipated increased difficulty in disengaging from a conflict involving ground troops given the inherently different circumstances involved in their eventual withdrawal as opposed to operations involving just “air strikes or naval interdictions.”<sup>75</sup> The threshold of *significant* risk, though not precise, clearly entails the ability to put U.S. forces in considerable danger of injury and death and necessarily contemplates them being able to use force at least in self-defense, if not also in furtherance of their military objectives.

While the OLC framework analysis does not provide a clear guide on how long an anticipated operation must be before its duration alone would cause the operation to rise to a level requiring congressional approval, as a practical matter, the nature of federal appropriations and limited stores of supplies such as arms and ammunition in the military’s inventory at any given time, begets a role for Congress in approving, or at least acquiescing to, ongoing military operations based on their power of the purse. A notable example of this is the Korean War, which represents somewhat of a turning point in congressional authorizations to use force, when “the President asserted much more extensive unilateral powers to use force.”<sup>76</sup> Perhaps “[t]he

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73. OLC Bosnia 1995 Opinion, *supra* note 61, at 329.

74. *Id.* at 333.

75. *Id.*

76. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE LAW JOURNAL 1626, 1637 (2014).

boldest claim of Executive authority to wage war without congressional authorization . . . [the Korean War] ultimately lasted for three years and caused over 142,000 American casualties.”<sup>77</sup> Despite its duration and number of casualties there was never a specific, congressional authorization of the war. Instead, the President appeared to rely primarily on his authority as Commander in Chief and Chief Executive to undertake military operations designed to promote the U.S. interest in establishing a united, self-governing, and sovereign Korea independent of foreign control that was fully representative of the freely expressed will of the Korean people<sup>78</sup> and support the relevant UNSC resolutions.<sup>79</sup> Although President Truman never asked for specific congressional authorization of the Korean War, administration lawyers used various related congressional actions as evidence of their authorization for the conflict.<sup>80</sup> Since the start of the Korean War, OLC has continued to find the existence of the UN as an effective international organization that is paramount and vital to U.S. national interest.<sup>81</sup>

OLC’s two-part framework is used mainly when the President is acting in the “zone of twilight” Justice Jackson described in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>82</sup> Under Justice Jackson’s three-tiered

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77. OLC Bosnia 1995 Opinion, *supra* note 61, at 336 n.5.

78. Draft Memorandum Prepared in the Department of Defense (July 31, 1950), reprinted in VII FOREIGN RELATIONS OF THE U.S., KOREA 1950, Doc. 379, ¶ 29(A) (S. Everett Gleason ed., 1950), <https://history.state.gov/historicaldocuments/frus1950v07/d379>.

79. See S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); and S.C. Res. 84 (July 7, 1950), which authorized provision of assistance to South Korea to repel the attack from the communist North Koreans and restore peace on the Korean Peninsula by establishing and leading a unified command comprised of military forces from U.N. member States operating under the U.N. flag.

80. See Charles A. Stevenson, *The Korea War Powers Precedent*, LAWFARE (July 23, 2020), <https://www.lawfareblog.com/korea-war-powers-precedent> [<https://perma.cc/4MBT-RS-NM>] (“Meanwhile, Congress was already taking action to support and fund the war both directly and indirectly. It passed an extension of the draft on June 28, a temporary appropriations bill on June 29 and a Mutual Defense Cooperation bill that included small sums for operations on the Korean Peninsula. It approved the defense appropriations bill on August 28 and a large supplemental appropriation for defense on September 22. This was business as usual for the Congress, but these actions were later cited by administration lawyers as evidence of Congress’s authorization for the conflict.”).

81. See, e.g., Authority to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6 (1992); OLC Bosnia 1995 Opinion, *supra* note 61; Deployment of U.S. Armed Forces to Haiti, 28 Op. O.L.C. 30 (2004) [hereinafter OLC Haiti 2004 Opinion]; OLC 2011 Libya Opinion, *supra* note 63 (all citing *Authority of the President to Repel the Attack in Korea*, 23 DEPARTMENT STATE BULLETIN 173, 177 (1950)).

82. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

grouping of executive power, the President is at his maximum authority when acting “pursuant to an express or implied authorization of Congress . . . for [his authority] includes all that he possesses in his own right plus all that Congress can delegate.”<sup>83</sup> The President’s authority to act moves into a “zone of twilight in which he and Congress may have concurrent authority” when Congress has not taken affirmative action on a particular matter.<sup>84</sup> When this happens, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”<sup>85</sup> Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . [and] Courts can sustain exclusive presidential control . . . only by disabling the Congress from acting upon the subject.”<sup>86</sup> Given the significant discretion provided the President in the area of foreign affairs and the pace of events on the global stage since the Second World War, many opportunities for the use of military force abroad take place before Congress has acted in one way or the other leaving them in the “zone of twilight.” This zone provides for significant ambiguity in the limits on the President’s authority; ambiguity that has, as Justice Jackson noted, at least enabled if not invited assertions of unilateral presidential authority and responsibility. The executive branch has sought to clarify that ambiguity with OLC’s legal framework while preserving sufficient flexibility to protect the President’s decision space and ability to maneuver through various policy options.

When Congress provides statutory authorization for the use of military force, either proactively or in response to a presidential request, he moves into Justice Jackson’s first grouping where “his authority is at its maximum.”<sup>87</sup> In this area, grants of congressional authority impute the President with significant discretion on when, where, and how to use military force abroad in the national interest—exactly the type of tactical and operational decisions one would expect a Commander in Chief to be able to make. Therefore, determining when Congress has provided statutory support for a particular operation becomes an important task.

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83. *Id.* at 635.

84. *Id.* at 637.

85. *Id.*

86. *Id.* at 637–38.

87. *Id.* at 635.

2. Congressional Authorities

*i. Declaration of War*

Congress has not been completely absent in exercising its constitutional responsibility for the use of force abroad by the military and has a number of legislative vehicles at its disposal to provide authorization for the use of force, with the clearest one being its power to declare war taken directly from the Constitution.<sup>88</sup> The joint resolution declaring war against Japan during World War II, for example, clearly and unequivocally provided President Roosevelt with all the legal authority necessary to prosecute the war within one day of the Japanese attack on Pearl Harbor when it “authorized and directed [him] to employ the entire naval and military forces of the [United States] and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination.”<sup>89</sup> Similarly, congressional declarations of war for World War I and previous declared wars provided the President with all the legal authority necessary to conduct total war utilizing the entirety of the land and naval forces of the United States.<sup>90</sup> However, as noted earlier, the last time Congress exercised this unambiguous authority was in 1942 by formally declaring a state of war existed between the U.S. and Bulgaria, Hungary, and Romania.<sup>91</sup>

*ii. Statutory Authorizations—Generally*

Given the number of conflicts the United States has been engaged in over the last eighty years without objection from Congress or the courts, it is clear a formal declaration of war under the Constitution is not necessary for the

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88. U.S. Const. art. I, § 8, cl. 11.

89. Pub. L. No. 77-328 (1941).

90. See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE 1 (2014) (“From the Washington Administration to the present, there have been 11 separate formal declarations of war against foreign nations enacted by Congress and the President, encompassing five different wars—the War of 1812 with Great Britain, the War with Mexico in 1846, the War with Spain in 1898, the First World War, and the Second World War”).

91. See *supra* note 58, and accompanying text. The Congress also declared war against Germany and Italy shortly after each declared war on the United States following Japan’s attack on the United States. Pub. L. No. 77-331 (1941); Pub. L. No. 77-332 (1941).



President to order the use force in military operations abroad. However, despite expansive interpretations of the President's inherent constitutional authority Congress has passed legislation authorizing the use of force on numerous occasions<sup>92</sup> short of formally declaring a state of war exists. This has had the effect of ensuring the President has the requisite domestic legal authority to use force while also providing an important signal as to the unity of executive and legislative branches concerning U.S. policy. Two of the most recent examples of this are the authorizations to use military force following the terrorist attacks of September 11th, 2001,<sup>93</sup> and preceding the invasion of Iraq in March 2003,<sup>94</sup> though there have been many others over the last eighty years. They have been used to support the use of force in conflicts and in anticipation of potential conflicts across the globe since the end of World War II.

This has been particularly true in cases where massive numbers of U.S. ground troops were anticipated to be involved such as in the first Gulf War<sup>95</sup> and the Vietnam War.<sup>96</sup> While the initial military offensive of the first Gulf War only lasted a short time, it involved massive numbers of U.S. and coalition ground troops and likely would have exceeded the limited nature and scope of military operations that would have been legally permissible for the President to authorize unilaterally. Similarly, while U.S. military advisors had been present on the ground in Vietnam without congressional authorization prior to the Gulf of Tonkin Resolution, the substantial escalation in number

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92. See ELSEA & WEED, *supra* note 90, at 5–18.

93. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

94. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

95. Pub. L. No. 102-1 (1991). However,

[i]t is noteworthy that the President's request for a resolution was a request for congressional "support" for his undertaking in the Persian Gulf, not for "authority" to engage in the military operation. In a press conference on January 9, 1991, President Bush reinforced this distinction in response to questions about the use of force resolution being debated in Congress. He was asked whether he thought he needed the resolution, and if he lost on it would he feel bound by that decision. President Bush in response stated: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions." He added that he felt that he had "the constitutional authority—many attorneys having so advised me."

ELSEA & WEED, *supra* note 90, at 12 (*citing* OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES & RECORDS ADMINISTRATION, PUBLIC PAPERS OF THE PRESIDENTS OF THE U.S. GEORGE BUSH 1991, at 13–14, 19–20 (1992)) (emphasis added).

96. Tonkin Gulf Resolution, Pub. L. No. 88-408 (1964).

of personnel on the ground, the increasing scope of their operations, the significant numbers of U.S. casualties, and the length of time forces were present without a clearly defined end-state likely exceeded the limited nature, scope, and duration that would have allowed the President to continue operations without congressional approval.

Not all congressional authorizations result in an actual use of force however. Prior to Vietnam, President Eisenhower leveraged Congress's role in war powers to assist his efforts to avert armed conflict and sought Congress's support in passing a resolution regarding assistance to nations in the Middle East.<sup>97</sup> The 1955 joint resolution "[t]o promote peace and stability in the Middle East"<sup>98</sup> is "perhaps the most open-ended force resolution in American history . . . and remains formally on the books to this day."<sup>99</sup> Defining "the preservation of the independence and integrity of the nations of the Middle East" as "vital to the national interest and world peace," the 1955 Middle East resolution was without significant limitation and open-ended in that it only expires when the President determines peace and security of the nations in the *general area of the Middle East is* reasonably assured.<sup>100</sup> Notably the President has not made such a determination yet and the resolution technically remains law. Despite the current effect of this resolution however, the President sought—and Congress provided—resolutions authorizing military operations against Iraq in 1991 and 2002. Thus, whether the 1955 Middle East Resolution or the President's inherent authority would have permitted the military operations of the first and second Gulf Wars, the President saw value in obtaining authorization from Congress before carrying out either campaign.

*iii. Statutory Authorizations—The Formosa Resolution*

Most directly related to the particular question in this article is another Eisenhower administration authorization from Congress passed in 1955. The joint resolution "[a]uthorizing the President to employ the Armed Forces of

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97. See Matthew C. Waxman, *Eisenhower and War Powers*, LAWFARE (Sept. 18, 2020), <https://www.lawfareblog.com/eisenhower-and-war-powers> [<https://perma.cc/QL9R-2LXN>].

98. Pub. L. No. 85-7, 71 Stat. 5 (1957).

99. Matthew C. Waxman, *Remembering Eisenhower's Middle East Force Resolution*, LAWFARE (Mar. 9, 2019), <https://www.lawfareblog.com/remembering-eisenhowers-middle-east-for-ce-resolution> [<https://perma.cc/Z25S-5ASV>].

100. Pub. L. No. 85-7, 71 Stat. 5 (1957) (emphasis added).

the [United States] for protecting the security of Formosa, the Pescadores and related positions and territories of that area” was also relatively open-ended and provided the President with significant discretion on when, how, and how much force to employ against the Chinese Communists in order to secure and protect Formosa and the Pescadores.<sup>101</sup>

At the time President Eisenhower requested the resolution, he believed he had inherent authority as Commander in Chief to take “some of the actions which might be required” and was prepared “so far as [his] constitutional powers extend, to take whatever emergency action might be forced upon [the United States] in order to protect the rights and security of the [United States].”<sup>102</sup> Notably, President Truman had previously “ordered the [U.S. Navy’s] 7th Fleet to prevent any attack on Formosa” at the same time he ordered U.S. air and naval forces to provide cover and support to Korean forces following the North Korean aggression against the Republic of Korea in June 1950,<sup>103</sup> both of which were done without any advanced statutory authorization. However, President Eisenhower explained that

a suitable congressional resolution would clearly and publicly establish the authority of the President as Commander in Chief to employ the Armed Forces of this Nation promptly and effectively for the purposes indicated if in his judgment it came necessary. It would make clear the unified and serious intentions of our Government, or Congress, and our people.<sup>104</sup>

This position was echoed by Congress. Both the House and Senate reported their conclusion that they could pass the resolution without delineating the “respective limitations of power in the executive and legislative branches.”<sup>105</sup> Thus, Congress avoided the question of whether the President possessed the inherent authority to take the military actions they were authorizing in order to demonstrate unity and “make unequivocally clear that the Congress supports whatever action the President may find necessary to take to be sure that Formosa and the Pescadores do not fall into unfriendly hands.”<sup>106</sup>

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101. Formosa Resolution, Pub. L. No. 84-4 (1955).

102. S. REP. OF THE COMM. ON FOREIGN REL. AND THE COMM. ON ARMED SERV. ON S.J. RES. 28, at 5–6 (Jan. 26, 1955).

103. *Id.* at 2–3.

104. *Id.* at 6.

105. H.R. REP. TO ACCOMPANY H.J. RES. 159, at 4 (Jan. 24, 1955).

106. S. REP. OF THE COMM. ON FOREIGN REL. AND THE COMM. ON ARMED SERV. ON S.J. RES. 28, at 9 (Jan. 26, 1955).

By authorizing the President to “decide the time, the place, and the substance of defensive action that he may find necessary to take in support of”<sup>107</sup> deterring further Chinese Communist aggression against Formosa, Congress confirmed “vast discretion” to the President without a time limit.<sup>108</sup> As an example, this even included determining the specific geographical limits of the boundaries, violation of which would be met with armed resistance.<sup>109</sup> Moreover, although not known outside of the U.S. Government at the time, the military operations to defend Formosa anticipated by the Eisenhower administration extended even so far as the potential use of nuclear weapons.<sup>110</sup>

Such dramatic escalation in military operations would seem to move beyond the limited nature and scope of military operations OLC has come to believe the President holds the inherent authority to conduct. Therefore such operations would only be legally permissible when Congress has provided statutory authorization for them. However, it is not clear this is necessarily the case; particularly if the nature and scope of the military operation was limited to a defensive measure proportional to the threat faced (e.g., to repel an attack or additional attacks against U.S. or allied forces) instead of an offensive act designed to initiate or escalate a conflict to achieve a particular political outcome.

*iv. Treaties: U.S.-Taiwan Mutual Defense Treaty*

The Formosa Resolution followed the 1954 signing of the Mutual Defense Treaty Between the United States and the Republic of China. Signed in December 1954, prior to passage of the Formosa Resolution in January 1955,

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107. H.R. REP. TO ACCOMPANY H.J. RES. 159, at 4 (Jan. 24, 1955).

108. Matthew C. Waxman, *Remembering Eisenhower’s Formosa AUMF*, LAWFARE (Jan. 29, 2019), <https://www.lawfareblog.com/remembering-eisenhowers-formosa-aumf> [<https://perma.cc/NK6Q-KD8N>].

109. See H.R. REP., *supra* note 107, at 3–4 (“The committee considered in detail the desirability of the establishment of specific geographical limits and giving potential aggressors notice that violation of such boundaries would be met by armed resistance on the part of the [United States]. In their testimony before the committee both Admiral Radford and Secretary Dulles cite specific cases illustrating the impracticability of listing individual islands or delineating in terms of latitude and longitude the areas to be defended.”).

110. Charlie Savage, *Risk of Nuclear War Over Taiwan in 1958 Said to Be Greater Than Publicly Known*, NEW YORK TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/politics/nuclear-war-risk-1958-us-china.html> [<https://perma.cc/4BFB-3C8U>] (noting that military planning during the 1958 Taiwan Strait Crisis included “plans to carry out nuclear strikes on mainland China”).

this treaty was ratified by the Senate in February 1955 and declared the United States “would act to meet the common danger [of an armed attack in the West Pacific Area against the territory of Taiwan] in accordance with its constitutional processes.”<sup>111</sup> The treaty made clear the United States had an obligation to defend Taiwan while the Formosa Resolution confirmed the President had the authority necessary to do so.

However, the Mutual Defense Treaty and Formosa Resolution have been described as a “two-edged sword to the Nationalists’ military and defense policy formulation” by ensuring Taiwan would operate from a purely defensive standpoint going forward, albeit with U.S. security guarantees.<sup>112</sup> The defensive nature of the U.S.-Taiwan military alliance and Taiwan’s declaration in 1958 that their government would “depend on political ideals, rather than upon military force, to recover the Chinese mainland”<sup>113</sup> helped keep the potential for United States involvement in a conflict over Taiwan limited in scope to a defensive one. Thus, the United States was able to make a clear commitment to defend Taiwan without committing itself to become involved in offensive military operations designed by Taiwan to retake mainland China for the Nationalists.

The defensive nature of the U.S.-Taiwan Mutual Defense Treaty was similar to the language of other regional mutual defense treaties entered into during this time such as those with Australia and New Zealand,<sup>114</sup> the

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111. Mutual Defense Treaty Between the United States and the Republic of China art. 5, Dec. 10, 1954, 6 U.S.T. 433.

112. Hsiao-Ting Lin, *U.S.-Taiwan Military Diplomacy Revisited: Chiang Kai-shek, Baituan, and the 1954 Mutual Defense Pact*, 37 *DIPLOMATIC HISTORY* 971, 991 (2013).

113. *Id.* at 993.

114. Security Treaty Between the United States, Australia, and New Zealand (ANZUS) art. 4, Sept. 1, 1951, 3 U.S.T. 3420 (“Each Party recognizes that *an armed attack* in the Pacific Area on any of the Parties 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 processes*” (emphases added)).

Republic of Korea (South Korea),<sup>115</sup> the Philippines,<sup>116</sup> and Japan.<sup>117</sup> All share common language that focuses on responding to an “armed attack”—consistent with Article 51 of the UN Charter—and that the allies would act to meet “the common danger” presented by such an attack. Although there are obvious differences in the relevant geography for each treaty, the treaties all focus on a particular geographic area, either an armed attack in “the Pacific area” or a narrower area like “the territories under the administration of Japan”<sup>118</sup> or “Formosa and the Pescadores . . . such related positions and territories of that area now in friendly hands.”<sup>119</sup>

Like the Middle East authorization to use force, the Formosa Resolution and U.S.-Taiwan Mutual Defense Treaty were never actually invoked by President Eisenhower. The Formosa Resolution was, at least in part, sought by the President “[t]o help deter Communist China and reassure the Nationalist Chinese leadership.”<sup>120</sup> Consequently, the seeking of the Formosa Resolution—like the Middle East Resolution that followed—appears to represent more of a policy choice to go to Congress and seek authorization to demonstrate the unity, breadth, and depth of U.S. support for using force abroad involving a particular area or enemy, rather than a legal imperative to do so.

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115. Mutual Defense Treaty Between the United States and the Republic of Korea art. 3, Oct. 1, 1953, 5 U.S.T. 2368 (“Each Party recognizes that *an armed attack* in the Pacific area on either of the Parties in territories now under their respective administrative control, or hereafter recognized by one of the Parties as lawfully brought under the administrative control of the other, 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 processes*” (emphases added)).

116. Mutual Defense Treaty Between the United States and the Republic of the Philippines art. 4, Aug. 30, 1951, 3 U.S.T. 3947 (“Each Party recognizes that *an armed attack* in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares *that it would act to meet the common dangers in accordance with its constitutional processes*” (emphases added)).

117. Treaty of Mutual Cooperation and Security Between Japan and the United States art. 5, Jan. 19, 1960, 11 U.S.T. 1632 (“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*” (emphases added)).

118. *Id.*

119. Joint Res. Authorizing the President to Employ the Armed Forces of the United States for Protecting the Security of Formosa, the Pescadores and Related Positions and Territories of that Area, H.J. RES. 159 (Jan. 29, 1955).

120. Waxman, *Remembering Eisenhower’s Formosa AUMF*, *supra* note 108.

Unlike the Middle East Resolution that remains on the books today as current law, the Formosa Resolution was repealed as part of the State Department/USIA Authorization Act for Fiscal Year 1973.<sup>121</sup> In addition, the United States began the process in 1978 of formally ending the U.S.-Taiwan Mutual Defense Treaty as part of its efforts to normalize diplomatic ties with the PRC.<sup>122</sup> However, the effect of repealing the Formosa Resolution and ending the Mutual Defense Treaty was not to preclude the President from being able to use force in any military operations to defend Taiwan or move him into Justice Jackson's third grouping where "his power is at its lowest ebb" because he "takes measures incompatible with the expressed or implied will of Congress."<sup>123</sup> Rather, it returned the United States to essentially the same position it was in during 1954 prior to congressional action on the matter when the President believed he had inherent authority as Commander in Chief to take "some of the actions which might be required" and was prepared "so far as [his] constitutional powers extend, to take whatever emergency action might be forced upon [the United States] in order to protect the rights and security of the [United States]."<sup>124</sup> Notably, Congress has not replaced the Formosa Resolution with any legislation contrary to its purposes or inconsistent with the defense of Taiwan by military force; it simply repealed it.

v. *The Taiwan Relations Act*

Indeed, Congress subsequently acted consistent with the Formosa Resolution when it passed the TRA and made clear that peace and stability in Tai-

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121. Pub. L. No. 93-475 (1974).

122. See Edward Walsh, *U.S. to Normalize Ties With Peking, End Its Defense Treaty With Taiwan*, WASHINGTON POST (Dec. 16, 1978), <https://www.washingtonpost.com/archive/politics/1978/12/16/us-to-normalize-ties-with-pekking-end-its-defense-treaty-with-taiwan/7d53f81a-865d-4a87-8c32-a0f6f343502c/> [https://perma.cc/22MV-PJW8]; Alexander Chieh-cheng Huang, Opinion, *The U.S. and Taiwan's Defense Transformation*, BROOKINGS: TAIWAN-U.S. QUARTERLY ANALYSIS (Feb. 16, 2010), <https://www.brookings.edu/opinions/the-united-states-and-taiwans-defense-transformation/> [https://perma.cc/72CV-SGF7] ("The Carter administration formalized diplomatic relations with the PRC in January 1979, the U.S.-R.O.C. Mutual Defense Treaty terminated one year later, and the security relationship between the [United States] and Taiwan consequently turned into a unique—and unofficial—one").

123. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952).

124. S. REP. OF THE COMM. ON FOREIGN REL. AND THE COMM. ON ARMED SERV. ON S.J. RES. 28, at 5–6 (Jan. 26, 1955).

wan were in the national interests of the United States, declaring that aggression by the PRC towards Taiwan posed a threat to the peace and security of the Western Pacific area and were of grave concern to the United States.<sup>125</sup> Thus, the President's actions with respect to these interests falls at least within Justice Jackson's second grouping where "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law"<sup>126</sup> or even possibly in Justice Jackson's first grouping where the President acts with the "implied authorization of Congress [and] his authority is at its maximum."<sup>127</sup> Consequently, the TRA provides executive branch lawyers with support for arguing peace and stability in Taiwan are significant enough national interests to warrant the President employing force as part of military operations designed to ensure peace and stability in Taiwan and protect Taiwan from aggression by the PRC.

The TRA was passed in 1979 following the U.S. normalization of relations with the PRC, recognition of the PRC as the government of mainland China, and termination of the U.S.-Taiwan Mutual Defense Treaty.<sup>128</sup> While the U.S. termination of the Mutual Defense Treaty with Taiwan had the effect of removing U.S. security guarantees for Taiwan, the security of Taiwan remained a significant concern to Congress,<sup>129</sup> as did the way in which the President terminated the Mutual Defense Treaty.<sup>130</sup> Subsequently, the TRA contained remarkably similar language to the prior Mutual Defense Treaty

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125. TRA, *supra* note 19, § 3301.

126. *Youngstown*, 343 U.S. at 637.

127. *Id.* at 635.

128. Julian Ku, *Taiwan's U.S. Defense Guarantee is Not Strong, But It Isn't That Weak Either*, LAWFARE (Jan. 15, 2016), <https://www.lawfareblog.com/taiwans-us-defense-guarantee-not-strong-it-isnt-weak-either> [<https://perma.cc/PF4W-WSKP>]. See also DAVID TAWEI LEE, *THE MAKING OF THE TAIWAN RELATIONS ACT: TWENTY YEARS IN RETROSPECT* (2000); MARTIN B. GOLD, *A LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT: BRIDGING THE STRAIT* (2017).

129. LEE, *supra* note 128, at 81–131. During floor debate on the TRA an amendment was offered that would have reinstated the part of the U.S.-ROC Mutual Defense Treaty "which could consider an attack on Taiwan as endangering the [U.S.]'s interests and that the United States would act to meet the threat in accordance with its constitutional process." Such an action would have been "completely incompatible" with normalization and seen by Beijing as a "re-adoption of the Mutual Defense Treaty." The amendment was rejected.

130. See GOLD, *supra* note 129, at 289–307.



as well as many other provisions that reflect the U.S. role as “Taiwan’s informal security guarantor.”<sup>131</sup> During the drafting of the TRA, there were significant arguments about the precise nature of the security language proposed and whether it would be “functionally equivalent to a security treaty” or merely “help Taiwan to stand on their feet to defend themselves.”<sup>132</sup> There was also considerable disagreement amongst Senators about whether and under what circumstances the United States would use force to defend Taiwan with many wary to commit the United States automatically to military operations.<sup>133</sup> In light of that wariness, some Senators “requested that wording be added in the security language specifying the sharing of war powers with the President by Congress.”<sup>134</sup> This resulted in inclusion of language that reiterated that any military action taken by the United States regarding threats to Taiwan should comply with constitutional and statutory requirements (i.e., military action would not be automatic). The robust back and forth that occurred between representatives of the executive branch, to include the President and Congress in drafting the TRA and the particularities of the language in the security provisions contained therein, demonstrates the focus they had on that area of the U.S.-Taiwan relationship as well as the importance U.S. leadership ascribed to maintaining strong relations with the government in Taiwan despite U.S. recognition of the reality on mainland China.

The TRA enshrines in law the long-standing U.S. policy that peace and stability in the Western Pacific are in the political, security, and economic interests of the United States and considers any effort to determine the future of Taiwan by other than peaceful means a threat to the peace and security of the Western Pacific area and of grave concern to the United States.<sup>135</sup> It also requires the United States make available to Taiwan arms of a defensive character such that Taiwan can maintain a sufficient self-defense capability, while at the same time requiring the United States to maintain the capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of

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131. *Id.* at xviii. See also Huang, *supra* note 122; U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, *supra* note 9, at 413 (“The TRA describes efforts to determine the future of the people of Taiwan by nonpeaceful means as a matter of ‘grave concern’ to the [United States], language that intentionally evokes similar clauses in mutual defense treaties and implies the potential for military costs”).

132. LEE, *supra* note 128, at 89, 120.

133. *Id.* at 95.

134. *Id.*

135. TRA, *supra* note 19, § 3301.

Taiwan.<sup>136</sup> Additionally, the TRA directs the President to “inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the [United States] arising therefrom.”<sup>137</sup> Although the TRA is not a mutual defense treaty, it does state that the “President and the Congress shall determine, in accordance with constitutional process, appropriate action by the [United States] in response to any such danger.”<sup>138</sup> Nonetheless, the TRA does not elaborate on what that constitutional process is. Again, while not a mutual defense treaty, it has many of the same characteristics of U.S. mutual defense treaties in the region, albeit with more ambiguity that leaves room for interpretation and policy flexibility that may be helpful in accounting for changing factual circumstances over time. However, some have argued “other U.S. defense guarantees in the region are not much more robust than the TRA.”<sup>139</sup>

Indeed, the relevant language from various regional defense treaties and the TRA are remarkably similar in how they address threats to the security of the parties; here, the TRA may even be said to be broader than some regional mutual defense treaties in that it does not require an armed attack, but directs the President to inform Congress promptly of *any* threat to the security, social, or economic system of Taiwan and *any* danger to the interests of the United States.<sup>140</sup> Once informed, the President and the Congress shall determine in accordance with constitutional processes what action is appropriate in response to any such danger—which is no less than what the other regional mutual defense treaties require (i.e., appropriate action).<sup>141</sup> As noted above, this was a key area discussed during the legislation’s drafting—ensuring there was some sharing of war powers with the President by Congress and the United States did not have an obligation to automatically use military force to respond to threats to Taiwan. However, as has also been discussed above, the constitutional process the executive branch has used before when employing military force abroad does not necessarily include seeking prior, specific approval from Congress.

The next part of this article will apply OLC’s two-pronged framework for reviewing anticipated military operations to ensure they comport with

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136. *Id.*

137. *Id.* § 3302.

138. *Id.*

139. Ku, *supra* note 128.

140. TRA, *supra* note 19, § 3302.

141. *Id.* See also discussion regarding various U.S. mutual defense treaties, *supra* sec. III(B)(2)(iii).

the executive's view of constitutional processes. It will include some hypothetical scenarios and assess whether a sufficient national interest exists to justify the use of force in anticipated military operations as well as assess the potential nature, scope, and duration of anticipated military operations to determine whether or when they would exceed that which would permit the President to operate without prior, specific congressional approval. However, before turning to that analysis, it is worth briefly acknowledging congressional attempts to rein in presidential discretion and unilateral authority in using force abroad and any significant effect those attempts have had on this analysis.

### 3. War Powers Resolution

At times Congress has attempted to rein in the President's discretion and ability to unilaterally use force abroad. The War Powers Resolution<sup>142</sup> (WPR) is one such effort. Designed to "fulfill the intent of the framers . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of [U.S.] Armed Forces into hostilities" the WPR became effective "after Congress overrode President Nixon's veto of the Resolution."<sup>143</sup> It followed increasing congressional concern about presidential use of the armed forces abroad without prior congressional authorization during the Korean War<sup>144</sup> and escalation of the conflict during the Vietnam War.<sup>145</sup>

To reassert the role of Congress in determining when the United States should go to war or have the military use force abroad, the main purpose of the WPR "was to establish procedures for both branches to share in decisions that might get the [United States] involved in war" while maintaining enough flexibility to allow the President to respond to an armed attack or other emergencies.<sup>146</sup> The WPR did this by requiring the President to consult

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142. War Powers Resolution, 33 U.S.C. §§ 1541–1550 (1973) [hereinafter WPR].

143. Overview of the War Powers Resolution, 8 Op. O.L.C. 271 (1984).

144. MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1 (2019).

145. H. R. REP. NO. 93-547, at 3–4 (1973) (Conf. Rep.) ("The Cambodian incursion of May 1970 provided the initial impetus for a number of bills and resolutions on the war powers. Many Members of Congress, including those who supported the action, were disturbed by the lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned.").

146. WEED, *supra* note 144.

with Congress before introducing the military “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until [the military is] no longer engaged in hostilities or have been removed from such situations.”<sup>147</sup> Congress also imposed a number of reporting requirements on the President<sup>148</sup> and, most problematically for the exercising of unilateral presidential authority, requires the President to “terminate the use of [U.S.] Armed Forces unless Congress has declared war, enacted a specific authorization for the use of troops, or extended the sixty-day period, or unless the President is unable to do so because of an armed attack on the [United States]”<sup>149</sup> while “purporting to authorize Congress, acting by a concurrent resolution not subject to the President’s veto, to require removal of troops in any situation involving actual hostilities.”<sup>150</sup>

OLC through multiple administrations has concluded the WPR does not provide a legally binding definition of presidential authority to deploy the military and “[a]ny attempt to set forth all the circumstances in which the Executive has deployed or might assert inherent constitutional authority to deploy [the military] would probably be insufficiently inclusive and potentially inhibiting in an unforeseen crisis.”<sup>151</sup> However, “Presidents have for the most part provided Congress with the information required by the WPR, albeit with some important gaps and ambiguities in reporting.”<sup>152</sup> Additionally, attempts to limit the use of force in military operations to the sixty-day termination provision are likely to be met with legal maneuvering by the executive branch that such actions either do not meet the definition of hostilities contemplated by the WPR or don’t extend past the sixty-day clock based on how the start and end dates are calculated. For example, executive branch lawyers asserted that U.S. military operations during the 2011 Libya conflict were “distinct from the kind of ‘hostilities’ contemplated by the [WPR]’s 60 day termination provision” based on the supporting nature of their role at

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147. WPR, *supra* note 142, § 1542.

148. *Id.* § 1543.

149. Overview of the War Powers Resolution, *supra* note 143, at 273.

150. *Id.*

151. *Id.* at 274.

152. Tess Bridgeman, *War Powers Resolution Reporting: Presidential Practice and the Use of Armed Forces Abroad, 1973–2019*, at 28, REISS CENTER ON LAW AND SECURITY (Jan. 2020), <https://warpowers.lawandsecurity.org/wpr-reporting-1973-2019.pdf>.

that time.<sup>153</sup> Consequently, even though the Biden administration has indicated it acts consistent with the WPR,<sup>154</sup> it is unclear how much of an actual, practical restraint this has on the executive if the President makes the decision to use force to defend Taiwan from PRC aggression under his inherent constitutional authority and without prior, specific congressional approval.<sup>155</sup>

The President possesses broad authority under the Constitution to order the use of military force in support of U.S. interests. This authority is limited by Congress's power to declare war; thus, anticipated military operations that rise to the level of war in a constitutional sense require authorization by Congress, either through a declaration of war or with other statutory support. OLC has consistently applied a two-part framework evaluating the national interest and nature, scope, and duration of anticipated military operations when advising the President on his ability to order the use of force. Congress has provided clear guidance on the importance of Taiwan to U.S. national interests in the peace and security of the Western Pacific through the TRA. Similarly, Presidents across multiple administrations have reinforced this policy through a series of policy statements and actions that support the U.S. interest in maintaining the status quo regarding Taiwan. In order to evaluate more fully whether there are any limitations on exercising the President's authorities, the next section of this article will apply the OLC framework to some hypothetical scenarios.

#### IV. APPLICATION AND LIMITATIONS: IS THERE ANYTHING THE PRESIDENT CAN'T DO?

##### *A. The U.S. National Interest in the Peace and Stability of the Western Pacific*

Looking back to OLC's two-pronged framework discussed above—whether operations would serve sufficiently important national interests to permit the President's action and whether the President's military operation would be

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153. RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL33532, WAR POWER RESOLUTION: PRESIDENTIAL COMPLIANCE 13–14 (2012).

154. *Hearing to Receive Testimony on the 2001 AUMF and War Powers: The Path Forward Before the H. Foreign Aff. Comm.*, 117th Cong. (Mar. 2, 2022) (39:00–41:00).

155. For purposes of this article and assessing the limitations and applications of the President's authority to use military force in any conflict involving Taiwan, OLC's interpretation of the WPR and subsequent executive branch practice is accepted. In particular, the sixty-day limit for hostilities without prior, specific congressional approval will be used as a guide when evaluating the duration aspect of OLC's limited nature, scope, and duration framework.

sufficiently extensive in nature, scope, and duration to constitute a war requiring prior specific congressional approval—the TRA and long-standing U.S. policy spanning multiple presidential administrations of both parties provides strong evidence that sufficient national interests exist to satisfy the first prong of OLC’s framework.

OLC has previously identified several national interests that, individually or combined, are sufficient to justify the President unilaterally ordering the use of force abroad. They include protecting the lives and property of Americans living abroad, preserving regional stability and forestalling the threat of a wider conflict, maintaining the credibility of the UNSC and its mandates, enforcing a peace agreement ending a civil war, completing a pattern of inter-allied cooperation and assistance established by prior U.S. participation in NATO air and naval support for peacekeeping efforts, and providing security for American civilians and military personnel involved in UNSC-supported humanitarian relief efforts.<sup>156</sup>

Here, the TRA clearly establishes the United States has several national interests at issue regarding Taiwan. First, the TRA specifically notes “peace and stability in the [Western Pacific] area are in the political, security, and economic interests of the [United States].”<sup>157</sup> Second, the TRA makes clear the United States has an interest in ensuring only peaceful means are used to determine the future of Taiwan, classifying “any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the [U.S.]”<sup>158</sup> In addition to the TRA, the Six Assurances help articulate U.S. policy regarding Taiwan, amplifying U.S. interests vis-à-vis Taiwan.<sup>159</sup> Notably, these Six Assurances are not contradicted by the Three Joint Communiques and are consistent with the requirements of the TRA; maintaining U.S. commitment to these assurances serves another important U.S. national interest.<sup>160</sup>

Beyond specific U.S. policy regarding Taiwan, the United States has important national interests in demonstrating to allies in the region and around

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156. *See, e.g.*, OLC 2011 Libya Opinion, *supra* note 63, at 10 (identifying “a variety of national interests that, alone, or in combination, may justify the use of military force by the President” from a number of previous OLC opinions).

157. TRA, *supra* note 19, § 3301.

158. *Id.*

159. *See* LAWRENCE, *supra* note 18.

160. *See* INDO-PACIFIC STRATEGY OF THE UNITED STATES, *supra* note 27.

the world that it maintains its commitments and will defend democratic partners and allies in the global competition between democracy and autocracy. A PRC takeover of Taiwan would present a significant blow to U.S. credibility and effectiveness with allies and partners in the Indo-Pacific region and call into question the value of American security guarantees. Indeed, Taiwan has particular importance to U.S. and Japanese security and relations that is evidenced by the important role Japan would likely play in any response contingency.<sup>161</sup>

Therefore, peace, security, and stability in the Western Pacific are in the national interest of the United States, efforts to determine the future of Taiwan by other than peaceful means are of grave concern to the United States, and there are important national interests in demonstrating to American partners and allies in the Western Pacific and around the world that the United States will defend democracies in the global competition with autocracies. Consequently, military operations to defend Taiwan with force would serve sufficiently important national interests to permit the President to exercise his constitutional authority as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations.

Given the presence of these sufficiently important national interests, whether the President may order the use of military force without advanced congressional approval turns on the anticipated nature, scope, and duration of any such anticipated military operation. In this next section, various hypotheticals will be analyzed using OLC's framework to determine if they are of such limited nature, scope, and duration that the President may authorize them without advanced congressional approval. The national interest described here is applicable in all four scenarios.

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161. See Adam P. Liff, *The U.S.-Japan Alliance and Taiwan*, 17 ASIA POLICY 125 (2022).

*B. Application of Framework to Hypothetical Scenarios*<sup>162</sup>

1. Full-Scale Invasion of Taiwan with Preparatory Attacks on U.S. Assets in the Region

*i. Situation*

The China Maritime Security Administration issues a notice to mariners warning that military exercises will be taking place in the South China Sea over the next thirty days. Consequently, China declares an exclusion zone and prohibits all maritime traffic from entering the area, effectively closing off access to the Taiwan Strait. As part of this purported military exercise, the PLA assembles a massive invasion force consisting of military personnel, amphibious assault ships, troop carriers, helicopters, and airborne assault forces capable of executing a cross-strait invasion. Taiwan, the United States, and other nations in the region protest the aggressive and intimidating moves by the PRC and the U.S. Navy's Seventh Fleet plans a freedom of navigation operation to send an aircraft carrier strike group to transit the strait.

As U.S. ships approach the exclusion zone they are engaged by PLA(N) warships and suffer multiple casualties. Hoping to disrupt any potential U.S. and other regional allied response to an invasion of Taiwan, the PLA simultaneously launches massive air and missile attacks on Taiwan, U.S. bases in Japan and Guam, and other U.S. ships throughout the Western Pacific. A full-scale, cross-strait invasion begins with PLA amphibious and airborne operations designed to rapidly overwhelm and decapitate Taiwan defenses before Taiwan can fully mobilize its reserve forces and receive outside military assistance.

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162. Inspiration for these scenarios is drawn from a number of places, to include David Lague & Maryanne Murray, *T-Day: The Battle for Taiwan*, REUTERS INVESTIGATES (Nov. 5, 2021), <https://www.reuters.com/investigates/special-report/taiwan-china-wargames/>; ROBERT D. BLACKWILL & PHILIP ZELIKOW, *THE U.S., CHINA, AND TAIWAN: A STRATEGY TO PREVENT WAR* (2021); CHRIS DOUGHERTY ET AL., *THE POISON FROG STRATEGY: PREVENTING A CHINESE FAIT ACCOMPLI AGAINST TAIWANESE ISLANDS* (2021); IAN EASON, *CHINA'S TOP FIVE WAR PLANS* (2019); Joshua Keating, *Imagining the Unimaginable: The U.S., China and War Over Taiwan*, GRID NEWS (Jan. 13, 2022), <https://www.grid.news/story/global/2021/12/28/test-imagining-the-unimaginable-the-us-china-and-war-over-taiwan/> [<https://perma.cc/Q25N-558X>].



*ii. Potential U.S. Response(s) and Analysis*

Commanders of U.S. warships, like all U.S. military unit commanders, retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.<sup>163</sup> As such, facing a direct attack from the PLA(N) they—and other U.S. military forces in the vicinity—will be expected to exercise their right to self-defense without delay or needing to ask permission, and may engage any PLA assets taking part in a hostile act or demonstrating hostile intent using all necessary means available and all appropriate actions in self-defense. While the means and intensity of the force used by U.S. forces in self-defense may exceed that of the hostile act or hostile intent, the nature, duration, and scope of force should not exceed what is required to respond to the hostile act or hostile intent.<sup>164</sup> Additionally, any use of force in self-defense must be necessary, proportional, and comply with the law of armed conflict.

Thus, U.S. military commanders are empowered to use force to counter any hostile act or demonstrated hostile intent without seeking prior, specific approval from higher headquarters, such as a combatant commander, and certainly without asking the President, as Commander in Chief, for the authority to respond, let alone asking the President to go to Congress for the authority to respond. Similarly, the President is not required to ask Congress for permission to act in self-defense of the United States and its armed forces. As such, the President may also authorize the use of force to carry out limited military operations with defensive objectives as long as they are not anticipated to be sufficiently prolonged or substantial enough to rise to the level of war in a constitutional sense. This could move beyond merely engaging PLA assets that take part in a hostile act or demonstrate hostile intent and include declaring certain forces as hostile (i.e., specifically designated units or units meeting certain specified criteria such as being in a particular area at a given time) and ordering U.S. military operations to proactively target them. Notably, the War Powers Resolution recognizes the President's pre-existing constitutional authority as Commander in Chief to introduce the armed forces into hostilities, or into circumstances where imminent

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163. Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement (SROE)/Standing Rules for the Use of Force (SRUF) for U.S. Forces (June 13, 2005), *reprinted in* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 116 (2021) [hereinafter SROE].

164. THE JUDGE ADVOCATE GENERAL'S CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 108 (2021) [hereinafter OPERATIONAL LAW HANDBOOK].

involvement in hostilities is clearly indicated by the circumstances, pursuant to a national emergency created by an attack upon the United States or its armed forces.<sup>165</sup>

Although it is the most dangerous scenario with the greatest risk of potential escalation, this is perhaps the easiest and most straight-forward scenario for purposes of analyzing the legal framework by which the President may order the use of force in support of U.S. interests since his authority is at its highest and most clear here. Particularly where the nature, scope, and duration of military operations are limited to defending U.S. forces from additional attacks by the PLA, the President has clear authority to order the use of force without prior, specific approval from Congress. Military operations designed to protect U.S. forces in the region may involve robust responses that involve significant numbers of troops and military assets and expose U.S. military personnel to considerable risk.

Importantly, the President is not limited to tit-for-tat exchanges between the U.S. military and PLA. Instead, the President may order operations that are proportional to the threat posed by PLA forces to U.S. assets in the region. This threat would include more than just the specific PLA assets that engaged U.S. warships. Any PLA unit with the capability to attack any U.S. unit can also be said to present an imminent threat to those U.S. units given the centralized nature of military decision making within the PLA and the demonstrated intent of the PLA from their initial attack which may be imputed to any PLA units. Consequently, a U.S. response could reasonably include not just surface naval combatants or submarine warfare between the U.S. Navy and PLA(N), but may extend to long-range strike and combat aircraft employed to destroy PLA assets that maintain the capability to attack U.S. forces or were used to support PLA assets that attacked U.S. forces (e.g., command and control nodes). Given the significant reach of some PLA missiles<sup>166</sup> and their demonstrated intent to target U.S. aircraft carriers,<sup>167</sup> appropriate military responses could also include air and missile attacks that

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165. WPR, *supra* note 142, § 1541(c).

166. The Dongfeng-26 (DF-26), dubbed the “Guam killer” or “carrier killer” by some, is a nuclear-capable intermediate-range ballistic missile (IRBM) capable of precision strikes against land and sea-based targets with an estimated range between 3,000–4,000 km. Road-mobile, the DF-26 is operated by the PLA Rocket Force and has been specifically linked to attempts to deter U.S. forces from any involvement in a conflict over Taiwan. *See DF-26 “Guam Express” IRBM*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/wmd/world/china/df-26.htm> (last visited Dec. 12, 2022) [<https://perma.cc/5LBG-RDRE>].

167. Jerry Hendrix, Opinion, *The U.S. Navy’s Range Has Diminished Dangerously*, WALL STREET JOURNAL (Nov. 18, 2021), <https://www.wsj.com/articles/the-navy-range-has-dimi>

extend deep into mainland Chinese territory. Despite the potential for escalation and apparent scale of such operations given possible attacks into mainland Chinese territory, they could still be classified as defensive in nature and involve mainly air and naval assets, vice ground assets; thus, it is less likely such operations will be considered prolonged and substantial. While the risk of escalation and anticipated response must be considered in assessing whether anticipated operations are of a limited nature and scope, narrowly focusing the U.S. response on PLA assets that engaged in attacks on U.S. forces or continue to threaten U.S. forces is helpful in keeping such uses of force within the President's constitutional authority. As described here, the limited nature and scope of these potential U.S. responses—as they relate to defending U.S. personnel and territory from additional attacks—appears to be squarely within the President's authority as Commander in Chief.

Additionally, there is no concrete limit on the duration of anticipated operations in this scenario; instead, the duration could extend for as long as the threat to U.S. personnel in the region exists. While this may provide a potentially long open window to justify military operations under the President's inherent constitutional authority, these operations will in a practical sense be limited logistically as the United States will not be able to carry on a large-scale conflict with the PRC for long without Congress appropriating additional funds for the replacement of munitions, ships, and aircraft that are expended and lost during the operation. Moreover, once the threat to U.S. forces has been eliminated or sufficiently degraded, the impetus for the President to order military operations will have ceased to exist and further operations of a different nature or scope will likely exceed the limits of his authority under this framework (additional discussion and justifications for using force will be discussed below in later scenarios). Finally, as noted earlier the War Powers Resolution requires the President to terminate military operations after sixty days unless Congress has specifically authorized them. While the applicability of this sixty-day termination provision to actual operations has been questionable in its effectiveness, it provides a good guide to what prolonged may mean for purposes of when operations exceed the threshold of "war" for constitutional purposes and, absent legal maneuvering by the executive branch to avoid or challenge its applicability, may provide some limitation on the length of potential military operations.<sup>168</sup>

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nished-dangerously-missile-aircraft-carrier-killer-china-ngad-air-dominance-11637248615 [https://perma.cc/NDY3-MK6L].

168. Internal procedures within the executive branch exist that provide for the review of military operations that may implicate the WPR so that advice can be provided to the

As noted, this scenario is not without risk of significant escalation. While the Formosa Resolution<sup>169</sup> and U.S.-Taiwan Mutual Defense Treaty provided statutory authority for the President to employ the U.S. armed forces to protect the security of Taiwan at the time, they did not dictate, nor limit, the extent of force the President would be authorized to order.<sup>170</sup> Similarly, the level of force to employ continues to be left to the discretion of the Commander in Chief. Applied to the current scenario and legal framework, once the President decides it is necessary to use force in a self-defense scenario involving Taiwan it is within his discretion as Commander in Chief to decide how much force is necessary and appropriate so long as it is limited in its nature and scope to self-defense. Given the increasing lethality of the PLA and the threat it now poses, in contrast to the threat it presented in 1958, and given the PRC's own status as a nuclear power, this has led some to consider the risks of nuclear escalation in a contemporary Taiwan crisis.<sup>171</sup>

As operations escalate, the risk that they exceed the threshold of what is war in a constitutional sense increases. Therefore, a constant re-assessment of operations must be ongoing to ensure the President has the authority to order the operations he and his commanders are contemplating. The ongoing review of the objectives and goals of anticipated operations, assets being employed, targets proposed, and anticipated responses as well as the expected effects on military assets and civilians—even beyond those required by the law of armed conflict—all contribute to the understanding of whether the nature, scope, and duration of anticipated operations remains within the President's authority to order them without the prior, specific approval of Congress.

If the nature of military operations the President decides to order changes or he expands their scope to include other objectives, the analysis

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President regarding the applicability of consultation and reporting requirements of particular operations. See OPERATIONAL LAW HANDBOOK, *supra* note 164, at 8.

169. Formosa Resolution, *supra* note 101.

170. The Formosa Resolution “authorized [the President] to employ the Armed Forces of the [United States] as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack.” *Id.* As previously noted, this planning extended to the potential use of nuclear weapons on mainland China. See Savage, *supra* note 110.

171. See, e.g., Savage, *supra* note 110; Richard Bernstein, *The Scary War Game Over Taiwan That the U.S. Loses Again and Again*, REALCLEAR INVESTIGATIONS (Aug. 17, 2020), [https://www.realclearinvestigations.com/articles/2020/08/17/the\\_scary\\_war\\_game\\_over\\_taiwan\\_that\\_the\\_us\\_loses\\_again\\_and\\_again\\_124836.html](https://www.realclearinvestigations.com/articles/2020/08/17/the_scary_war_game_over_taiwan_that_the_us_loses_again_and_again_124836.html) [https://perma.cc/98HZ-BJLA].

would change. For example, if the President wanted to seek regime change in Beijing or otherwise carry out offensive operations, it would likely exceed the limited nature and scope of operations that are within his inherent constitutional authority to carry out. Any anticipated military operations with such a purpose would therefore need the prior, specific approval of Congress as the operations would exceed the threshold of “war” in a constitutional sense. Similarly, if other States were to become involved in the conflict, such as Russia entering on behalf of the PRC and/or Japan coming to the aid of the United States under the terms of the Mutual Cooperation Treaty<sup>172</sup> it may sufficiently change the scope of anticipated operations such that approval by Congress will become necessary.

*iii. Conclusion*

Under the scenario presented here, the President currently possess sufficient authority to respond to any attacks on U.S. military assets in the region by the PLA. The self-defense authorities implicated with this scenario are very broad and provide the executive with significant leeway to employ force to defeat imminent threats to U.S. units. The President’s ability to order the use of force in this scenario is limited by the law of armed conflict, conditioning the use of force on that which is necessary to defend U.S. personnel, military assets, and territory in the region from imminent attack, and authorizes only that force which is proportional to the threat faced. The nature, duration, and scope of the force ordered is similarly limited to the military objective of defending U.S. personnel, military assets, and territory in the region. It must only extend for as long as is necessary to defeat the present threat to those U.S. units (i.e., PLA units that possess the capability and intent to commit hostile acts against U.S. units) and may not be designed to accomplish objectives other than defending those U.S. units.

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172. *See* Treaty of Mutual Cooperation and Security Between Japan and the United States, *supra* note 117.

2. Invasion of Taiwanese Outlying Islands Without a Preparatory Attack on U.S. Assets

*i. Situation*

Assessing the United States will not want to risk major military conflict with China over far away islands, PRC leadership decides on a strategy that seeks to push Taiwan as far as possible toward “reunification” without engaging U.S. forces directly or inviting an obvious military response from the United States. As part of this strategy, the PRC Central Military Commission orders a significant troop buildup while engaging in increased economic and political intimidation of Taiwan (i.e., various gray zone activities that fall short of a use of force). Under the guise of military exercises, they launch an amphibious and airborne assault to seize the outlying Taiwanese island of Kinmen, close to mainland China off the coast of Xiamen, and Pratas Island in the north of the South China Sea. Importantly, the PLA does not directly attack any U.S. forces as part of their initial military operations.

PLA forces are able to quickly seize and take control of Kinmen and Pratas Island, reinforcing their troops with additional supplies and equipment. To deter and prevent Taiwanese attempts to retake the islands, PLA forces launch air and missile attacks against key military targets on Taiwan and deploy additional military forces throughout the Taiwan Strait and South China Sea to prevent United States and other allies from sending additional support to Taiwan. Significant portions of the Taiwanese Navy are destroyed by PLA forces, leaving Taiwan to depend on its well-protected fighter aircraft, air defense system, and land-based missiles to protect the island from additional PLA assaults.

*ii. Potential U.S. Response(s) and Analysis*

While U.S. military commanders retain the inherent right of self-defense, that right only extends to defense of U.S. military forces in the vicinity.<sup>173</sup> The decision to engage in collective self-defense is made by the President or

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173. SROE, *supra* note 163, at 117.

the Secretary of Defense.<sup>174</sup> Although some additional legal analysis is necessary, vis-à-vis collective self-defense of Taiwan due to its unique status,<sup>175</sup> as a general matter a request from the victim State is necessary before a State may lawfully engage in collective self-defense to benefit another.<sup>176</sup> Consequently, to be legally permissible under international law any use of military force by the United States or another State to defend Taiwan requires a request from Taiwan.

Receiving a request for assistance from the Taiwan government, the President could authorize collective self-defense of Taiwan and order the U.S. military to conduct defensive operations to benefit Taiwan. In order to remain below the threshold of war in a constitutional sense, the nature of any U.S. response would again need to focus on defensive objectives (e.g., defense of U.S. or Taiwanese assets) and not “aim at the conquest or occupation of territory nor . . . imposing through military means a change in the character of a political regime.”<sup>177</sup> Limiting operations to using force against PLA assets that attacked Taiwanese naval vessels and shore facilities and those that continue to present an imminent threat to Taiwan (e.g., PLA(N) ships in the Taiwan Strait that have engaged in a hostile act or demonstrated hostile intent) is one way to keep the nature of the defensive operations below the threshold of war in a constitutional sense. Additionally, the types of U.S. forces used to carry out these operations is an appropriate consideration in assessing whether the nature and scope of operations remains below the threshold of war in a constitutional sense. For example, limiting the units conducting operations to air and naval units with long-range strike capabilities vice moving significant numbers of naval assets directly into the Taiwan Strait (e.g., multiple aircraft carrier strike groups) or introducing ground forces onto contested islands would be sufficiently defensive and not require any action by Congress. Although U.S. personnel on ships and aircraft conducting strike missions will be exposed to significant personal risk, particularly as they engage very capable PLA combat aircraft and confront robust air-defense capabilities, such risk does not on its own transform the operation to one that rises to the level of war which would require prior, specific

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174. Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or Secretary of Defense may authorize collective self-defense. *Id.* at 122.

175. See *supra* notes 41 and 48 and accompanying text regarding collective self-defense and Taiwan.

176. See *Nicar. v. U.S.*, *supra* note 39, at 105.

177. OLC Bosnia 1995 Opinion, *supra* note 61, at 332.

approval from Congress. Similarly, the fact that the PLA possesses rockets that hold U.S. forces at risk on Guam and in Japan does not, by itself, transform otherwise limited operations into the type of substantial and prolonged operations that would exceed the President's constitutional authority to authorize collective self-defense of Taiwan.

Were U.S. military operations to go beyond that which were required to repel an attack on Taiwanese territory or defend it from further PLA attacks, or to last for such a prolonged period of sustained operations where U.S. forces were routinely and consistently exposed to significant direct risk of attack, it would be at increased risk of exceeding the threshold under which the President can order force on his own constitutional authority. For example, given "the difficulties of withdrawal and risk of escalation that may attend commitment of ground forces,"<sup>178</sup> operations involving U.S. ground troops attempting to expel PLA forces and retake Kinmen or Pratas Island, if those islands were taken and controlled by PLA forces prior to U.S. assets being able to enter the fight, would be at greater risk of requiring prior, specific approval from Congress than operations designed to keep PLA forces from taking those islands in the first instance, particularly if those operations are limited to air and naval assets.

However, the President could potentially order U.S. military operations that support Taiwanese attempts to retake the islands if he believes such operations are limited in nature, scope, and duration. Constraining U.S. forces to a purely supporting role, similar perhaps to the United States role in Libya in 2011, by only providing intelligence and surveillance capabilities, refueling support, limited strike capability from manned or unmanned aerial systems,<sup>179</sup> or limited use of special operations forces focused on enabling the Taiwan military may allow such narrowly tailored defensive and supporting operations to fall within the President's authority despite the risk to U.S. personnel and potential for escalation in the region.<sup>180</sup>

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178. OLC 2011 Libya Opinion, *supra* note 63, at 13.

179. *Hearing to Receive Testimony on Libya and War Powers Before the S. Comm. on Foreign Rel.*, 112th Cong. (June 28, 2011) (statement of Harold Koh, Legal Advisor, U.S. Department of State).

180. OLC, in evaluating the President's decision to conduct an airstrike targeting Qassem Soleimani, commander of Iran's Islamic Revolutionary Guard Corps-Qods Force, in January 2020 considered "the risk that the operation could escalate into a broader conflict" but determined "the initial intelligence assessment that the strike would not provide an *immediate and substantial* escalation by Iran" and the targeted scope of the mission and efforts to avoid escalation allowed the President to reasonably determine the "nature, scope, and duration of hostilities directly resulting from the strike against Soleimani would not rise



In light of this potential constraint, a key planning consideration for available military responses is how fast U.S. forces can respond to a request by Taiwan for assistance. Given the tyranny of distance in the Pacific theater, it may take considerable time to move assets—particularly naval assets—into the region and employ them to Taiwan’s benefit. An important aspect of PLA strategy is to overwhelm Taiwan defenses before the United States and others have time to respond. The speed of any PLA attack, and Taiwan’s ability to withstand it, may therefore affect not only operational considerations (e.g., what military responses are possible), but legal considerations as well (i.e., who has the power to authorize those responses).

In this scenario, the desired end-state or objective should be the maintenance of U.S. interests in the region and a return to the status quo ante; not creating something that didn’t exist before. Those interests, as identified by the TRA, Three Communiques, and Six Assurances, include a Taiwan free to choose its own fate—as it would have existed prior to any PRC invasion. However, the end-state alone does not dictate the nature and scope of the anticipated operations and all factors must be considered with fact-specific, ongoing assessments of particular operations.

### *iii. Conclusion*

Under the scenario presented here, the President appears to currently possess sufficient authority to authorize collective self-defense of Taiwan and order military operations to exercise self-defense to Taiwan’s benefit so long as such operations remain defensive in nature, are generally limited to operations by naval and air assets, and are not intended to be sustained for a prolonged period of time (i.e., operations are only anticipated to last as long as necessary to defend Taiwan from ongoing attack or accomplish the otherwise limited defensive objectives).

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to the level of a war for constitutional purposes.” See Memorandum from Steven A. Engel, Assistant Attorney General, to John A. Eisenberg, Legal Advisor to the National Security Council, January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020), *reprinted in* Scott R. Anderson, *Justice Department Releases OLC Memo on Soleimani Strike*, LAWFARE (July 19, 2021), <https://www.lawfareblog.com/justice-department-releases-olc-memo-soleimani-strike> [<https://perma.cc/5R4R-28G8>] (emphasis added).

3. Blockade of Taiwan

*i. Situation*

Believing a customs quarantine<sup>181</sup> will take too long to have the desired effect of pressuring the Taiwanese government to enter serious negotiations on “reunification,” the PRC imposes a blockade of Taiwan prohibiting all ships and aircraft from entering any Taiwanese port and disrupting its information networks. Taiwanese attempts to prevent the blockade by attacking PLA forces are ineffective and significant portions of the Taiwanese Navy are destroyed by the PLA leaving Taiwan to rely on fighter aircraft and land-based missiles already on island as well as its air-defense system to protect the island from additional PLA assaults. Global economic disruptions quickly follow and Taiwanese wartime rationing of food and goods begins in earnest while the PRC ratchets up pressure on Taipei to discuss “reunification.” Taiwan requests assistance from the United States and others to obtain needed humanitarian and military supplies. The PLA has made clear that any attempt to break the blockade will be met with force.

*ii. Potential U.S. Response(s) and Analysis*

This scenario presents a number of possible responses. Since Taiwan is certain to resist any attempts to impose a blockade, it is anticipated the PLA will need to resort to force to set and enforce the blockade and is likely to destroy a significant portion of Taiwan’s navy. Given such an attack, one response scenario may see Taiwan request States come to its aid in collective self-defense. Indeed, the declaration of a blockade itself, even without the actual sinking of Taiwanese naval vessels, could be viewed as a belligerent act<sup>182</sup> and sufficient to warrant a response in self-defense under Article 51 of the UN Charter. As discussed above, the President likely possesses the inherent

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181. The U.S. Department of Defense considers a maritime quarantine to be a measured response to a threat to national security or an international crisis designed to de-escalate and return a situation to the status quo ante whereas a blockade is an act of war against an identified belligerent with a goal of denial and degradation of an enemy’s capability designed to achieve capitulation in armed conflict. *See* U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 4.4.8 (2022).

182. *Id.* ¶ 7.7.

constitutional authority to authorize collective self-defense of Taiwan military assets and to order U.S. military operations to benefit them in that respect. Such operations may be designed to repel ongoing attacks on Taiwan (i.e., support the remains of the Taiwanese navy in defeating attempts to impose the blockade in the first instance if temporally possible) or destroy PLA and other PRC assets enforcing the blockade as they undertake hostile acts or demonstrate hostile intent toward Taiwan and U.S. assets. Consequently, the collective self-defense analysis detailed above would be applicable to such a scenario.

Another possible response scenario is one where U.S. options are limited to allowing the blockade to continue or attempting to break the blockade. Military operations limited to breaking the blockade, expected to involve the sinking of PLA(N) ships enforcing the blockade, would likely fall within the President's inherent constitutional authority and not require prior, specific approval from Congress. As with the previous two scenarios, here the nature of the operations must be limited. This would include narrowly tailored operations designed solely to defeat the blockade and provide Taiwan with needed relief supplies, reasonably anticipated to include humanitarian supplies and the types of "defense articles and defense services" the TRA requires the United States make available to Taiwan in order to maintain a sufficient self-defense capability.<sup>183</sup> In fact, the possibility of a blockade was considered during the drafting of the TRA.<sup>184</sup> Although the PRC did not possess the capability at the time, the members of the House Foreign Affairs Committee carefully examined the possibility and it was made clear by the State Department that "a PRC blockade to isolate Taiwan and disrupt its trade would constitute an infringement of these [high seas] freedoms and rights, to which the U.S. and others adversely affected could respond appropriately."<sup>185</sup>

As with the other scenarios, anticipated U.S. response operations should be limited to air and naval assets, possibly including U.S. cargo planes and fighter escorts and/or naval auxiliaries and warship escorts, in order to maintain their limited nature and scope. The limited objective of providing humanitarian aid and defense supplies contemplated by the TRA would not rise to the level of war in the constitutional sense despite the risk to U.S.

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183. TRA, *supra* note 19, § 3302.

184. LEE, *supra* note 128, at 110.

185. *Taiwan Legislation: Hearing Before the H. Comm. on Foreign Affairs, 96th Cong. 17 (1979)* (amended testimony, styled as a "Legal Judgment on Blockade of Taiwan," of Warren Christopher, Deputy Secretary of State).

personnel tasked with breaking the blockade. To the extent an appropriate U.S. authority declares PLA forces hostile, it may be prudent to limit those declared hostile forces only to those forces actually enforcing the blockade, thereby limiting the nature and scope of the anticipated operation solely to breaking the blockade vice expanding to a larger campaign against the PRC. Were the United States to proceed in delivering aid to Taiwan without proactively engaging PLA(N) vessels enforcing the blockade and come under attack (or be confronted with demonstrated hostile intent), they would be entitled to act in self-defense as described in the first scenario and pursuant to the standing rules of engagement.<sup>186</sup>

*iii. Conclusion*

Under the scenario presented here, the President appears to currently possess sufficient authority to authorize the use of military force to break a blockade of Taiwan so long as the nature and scope of the anticipated military operations are narrowly focused on ensuring the provision of humanitarian and defense supplies reach Taiwan. These operations could include naval and air assets using force for mission accomplishment, and not only in self-defense, if necessary to ensure the safe passage of materials through the blockade to Taiwan.

4. Leveraging Gray Zone Tactics to Compel Negotiations

*i. Situation*

The PRC employs increasingly aggressive gray zone tactics against Taiwan designed to stoke social unrest, weaken public confidence in government authorities, and force Taiwan to enter serious negotiations over “reunification” with Beijing. These pressure tactics include economic coercion, persistent cyber operations, and constant military harassment. In their attempt to force Taiwan into negotiations, Beijing significantly scales up their military activities with repeated probing and intimidation operations by PLA aircraft into Taiwan’s air defense identification zone timed to coincide with large-scale military exercising rehearsing amphibious landing operations, engages in cyber operations to disrupt Taiwan internet traffic limiting their ability to communicate off-island, and announces economic sanctions on companies

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186. SROE, *supra* note 163.

that do business with Taiwanese companies. These activities are not limited to operations by the PLA and include a broad array of Chinese actors to include harassment of Taiwanese fishermen by swarms of Chinese maritime militia or fishing vessels and other infringements on commercial shipping interests as well as various information operations enabled by PRC intelligence services. However, no kinetic operations are undertaken and the PLA does not resort to using military force to promote PRC political objectives.

*ii. Potential U.S. Response(s) and Analysis*

Here, gray zone activities not amounting to a use of force may not be enough to warrant a U.S. military response that involves the use of force. Although the TRA requires the United States to maintain the capacity to resist any resort to force *or other forms of coercion* that would jeopardize the security of Taiwan, that does not necessarily provide the President with the authority to use force where he would otherwise have no legal justification to do so (e.g., self-defense, collective self-defense). Even if confronted with a request from Taiwan to engage in collective self-defense, it would be necessary to demonstrate that Taiwan was actually the victim of an armed attack under Article 51 of the Charter before a U.S. response under collective self-defense would be justifiable under international law. Moreover, national interest at issue in this particular circumstance would need to be sufficiently important to justify the ordering of military force by the President. Although OLC has previously assessed that preserving regional stability, when combined with other national interests, provided a sufficient basis for the President to order the use of military force,<sup>187</sup> it may be factually difficult for the President to satisfy the first prong of the OLC framework in a gray-zone campaign by China against Taiwan since the break from the status quo and relative peace would not be as stark as in a scenario involving a kinetic use of force. Instead, the President may look to the range of non-military options, and military options short of force, that are available to respond to any attack on Taiwan, many of which may be preferable to a U.S. use of force against China. Were the President to want to lean forward and proactively use force as part of a U.S. military operation in response to such gray zone activities as described in this scenario, it may be prudent—and perhaps legally necessary—to have the

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187. See OLC Bosnia 1995 Opinion, *supra* note 61; OLC Haiti 2004 Opinion, *supra* note 81; OLC 2011 Libya Opinion, *supra* note 63.

prior, specific support of Congress to clearly demonstrate how the use of force is in the national interest.

If the President was able to meet the first portion of OLC's framework and demonstrate adequate legal authority for ordering the use of military force, he would still need to ensure that the anticipated military operations were limited in nature, scope, and duration. Here too, this scenario presents difficulties. Unlike the first three scenarios where the anticipated military operations may be limited by the bounds of self-defense, collective self-defense, and breaking a blockade of Taiwan, it is unclear how the President would limit responding with force to the broad nature of the gray-zone activities at issue. By their very nature, these activities involve a wide variety of actors (air assets, naval assets, Chinese maritime militia, cyber actors, diplomatic efforts, etc.); therefore, limiting the nature and scope of operations to counter them will be exceedingly difficult as such responses will need to counter each line of effort, some of which do not lend themselves well to clear countermeasures that involve the use of force. There may be discrete operations the President can order that do not exceed the threshold of his unilateral authority, however taken cumulatively as part of a broader campaign against the PRC, it may be difficult to constrain them in such a way as to avoid the need for prior, specific approval from Congress and such analysis will be highly fact-specific.

*iii. Conclusion*

In this scenario it may be legally necessary for the President to obtain prior, specific approval from Congress before ordering the use of military force as it is not clear that sufficiently important national interests are served by the use of force and it will be difficult to limit the nature, scope, and duration of anticipated military operations given the broad and shifting threat posed by gray-zone activities. Should the President articulate adequate legal authority to use force by demonstrating the use of military force serves sufficiently important national interests and be able to limit the nature, scope, and duration of the anticipated military operations, then prior, specific approval from Congress would not be legally required.

*C. Summary*

In any scenario involving PRC attempts to take Taiwan by other than peaceful means, the U.S. response will have to be carefully tailored to achieve specific objectives which support U.S. interests. While the general framework for evaluating the President's authority to order the use of force as part of anticipated military operations is fundamentally the same as it has been since the end of the Cold War, the nature of the threat posed by China is significantly different from what the United States has recently confronted. Consequently, the nature and scope of military operations to confront that threat will be different. This must be accounted for in the legal analysis as facts are applied to this framework.

However, the President possesses broad legal authority to defend U.S. interests in the Western Pacific, including to defend Taiwan, under most scenarios currently contemplated involving PRC aggression. Given the strong national interest present here, so long as anticipated military operations remain limited in nature, scope, and duration, the President is constrained only by the law of armed conflict and the operational and logistical limits of the U.S. military. However, while not legally necessary, as a policy matter, prior, specific congressional authorization for the President to use military force to defend Taiwan may have a helpful role to play in deterring future PRC aggression.

V. ARE ADDITIONAL AUTHORITIES NEEDED?  
EVALUATING CURRENT PROPOSALS

As demonstrated above, the President currently has sufficient legal authority to defend U.S. interests in the Western Pacific, including to defend Taiwan in the event of aggression by the PRC using military force. This includes scenarios that involve defense of U.S. assets from attacks by PLA forces, attacks on Taiwan that result in a request for the United States to exercise collective self-defense to benefit Taiwan, and efforts to assist Taiwan in resisting or defeating a naval blockade by the PRC. So long as the President is acting to serve sufficiently important national interests and the anticipated military operations are limited in nature, scope, and duration, he possesses broad authority under the Constitution. Therefore, it does not appear legally necessary for Congress to provide the President with additional statutory authority at this time. However, while not legally necessary, as a policy matter, prior, specific congressional authorization to use military force to defend

Taiwan may have helpful signaling effects to demonstrate the unity, breadth, and depth of support for Taiwan in the U.S. government and play a role in deterring the PRC from attempting to cross the strait. There are currently a number of proposals before Congress that attempt to do this. They will be briefly summarized below.

*A. Taiwan Invasion Prevention Act (Senate Bill 332 / House Bill 1173)*

The Taiwan Invasion Prevention Act, introduced in the U.S. House of Representatives on February 18, 2021 and the U.S. Senate on February 22, 2021, authorizes the President to use the U.S. Armed Forces as he determines to be necessary and appropriate in order to secure and protect Taiwan against (1) direct armed attack by the military forces of the PRC against the military forces of Taiwan, (2) the taking of territory under the effective jurisdiction of Taiwan by the military forces of the PRC, and (3) the endangering of the lives of members of the military forces of Taiwan or civilians within the effective jurisdiction of Taiwan in cases in which such members or civilians have been killed or are in imminent danger of being killed.<sup>188</sup> The bill also contains other provisions such as requiring the Secretary of Defense to convene an annual regional security dialogue with the Government of Taiwan and like-minded security partners to improve security relationships in the Western Pacific; encouraging negotiation with Taiwan to establish a bilateral trade agreement; seeking combined military, disaster, and humanitarian relief exercises; and increased Taiwan Strait transits, freedom of navigation operations (FONOPs), and presence operations by the U.S. Navy.<sup>189</sup>

Regarding the authorization for the use of U.S. armed forces, as demonstrated by the analysis in Scenario 2 above, the President likely already possesses sufficient authority to authorize collective self-defense of Taiwan and order military operations to exercise self-defense to Taiwan's benefit so long as such operations remain defensive in nature, are limited to operations by naval and air assets, and are not intended to be sustained for a prolonged period of time. Such operations would be justified in any of the scenarios presented by the Taiwan Invasion Prevention Act. A direct armed attack by the PLA against Taiwan, the taking of territory under the effective jurisdiction of Taiwan by the PLA, or endangering the lives of Taiwanese military members or civilians within Taiwan, would all be contrary to U.S. policy as

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188. Taiwan Invasion Prevention Act, *supra* note 28, § 102.

189. *Id.* § 203.



articulated in the TRA. Prevention of each would serve sufficiently important national interests to support the President's decision to order military operations that are limited in nature, scope, and duration to counter them.

Although not legally necessary to provide the President with authority to use force to respond to the attacks described, passage of this legislation may have important signaling effects. One of the bill's co-sponsors, Representative Mike Gallagher of Wisconsin, recently noted: "Although an unambiguous U.S. commitment to defend Taiwan may itself be insufficient to deter a PLA invasion, it would at the very least reduce the odds of war through Chinese miscalculation. Congress can take the lead on this front by passing the Taiwan Invasion Prevention Act."<sup>190</sup> This is similar to the signaling effects President Eisenhower intended with the Formosa Resolution, which he sought to deter Chinese Communist aggression against Formosa and the Pescadores. Given his intention to act under his own inherent constitutional authority if required to protect vital U.S. interests, President Eisenhower made clear that "congressional action would eliminate doubt about his powers and strengthen the potency of deterrent threats toward foreign adversaries."<sup>191</sup>

One significant implication of the TIPA, however, is that it would allow the President to order military operations that exceed the threshold of "war" for constitutional purposes. Consequently, there would be no legal limit on the nature, scope, or duration of anticipated military operations beyond any imposed by international law and the law of armed conflict.

*B. Taiwan Defense Act of 2021 (Senate Bill 2073 / House Bill 3934)*<sup>192</sup>

The Taiwan Defense Act, introduced in the U.S. House of Representatives and the U.S. Senate on June 16, 2021, would make it the policy of the United States "to maintain the ability of the [U.S.] Armed Forces to deny a fait accompli by the [PRC] against Taiwan."<sup>193</sup> While it does not purport to provide the President with any additional legal authorities, it does attempt to tell him how he should exercise the authority he currently possesses and what the

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190. Mike Gallagher, *Taiwan Can't Wait: What America Must Do to Prevent a Successful Chinese Invasion*, FOREIGN AFFAIRS (Feb. 1, 2022), <https://www.foreignaffairs.com/articles/china/2022-02-01/taiwan-cant-wait>.

191. Waxman, *Remembering President Eisenhower's Formosa AUMF*, *supra* note 108.

192. S. 2073, 117th Cong. (2021).

193. *Id.* § 5.

expectations, or sense, of Congress is with respect to Department of Defense prioritization in order to meet the requirements of the TRA.<sup>194</sup> Therefore, similar to the Taiwan Invasion Prevention Act, it may have helpful signaling effects even if it lacks significant legal effects. The President currently possesses the legal authority necessary to position U.S. forces in such a manner as to prevent a *fait accompli* and is required by the TRA to make available to Taiwan such defense articles and services “as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.”<sup>195</sup> As such, passage of the Taiwan Defense Act of 2021 is not legally necessary for the President to use force to respond to attempts by the PRC to use military force to compel the unification of Taiwan and the PRC and would not have significant legal effect on how he exercises his authority.

*C. National Security Powers Act of 2021 (Senate Bill 2391)*

One piece of legislation that could have a significant impact on the President’s ability to order the use of military force in defense of Taiwan is the National Security Powers Act of 2021. This legislation, introduced in the U.S. Senate on July 20, 2021, limits presidential authorities regarding war powers and increases congressional oversight generally; it is not specific to Taiwan or the PRC. Introduced by Senator Chris Murphy of Connecticut, Senator Mike Lee of Utah, and Senator Bernie Sanders of Vermont, it is designed to reclaim Congress’s role in national security matters and safeguard congressional prerogatives in the use of military force, requiring the

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194. *Id.* § 4 (“It is the sense of Congress that . . . (3) implementation of the [TRA] requires the [United States] to maintain the ability of the [U.S.] Armed Forces to defeat a *fait accompli* by the [PRC] against Taiwan . . . ; (5) it should therefore be the policy of the [United States] to maintain the ability of the [U.S.] Armed Forces to deny a *fait accompli* by the [PRC] against Taiwan in order to—(A) ensure the Department of Defense adequately prioritizes maintaining the ability to deny a *fait accompli* by the [PRC] against Taiwan as it develops strategies and plans and designs, postures, and employs the [U.S.] Armed Forces; and (B) by doing so, clarify for the Government of the [PRC] and other governments in the Indo-Pacific region that the [United States] maintains and will continue to maintain the ability of the [U.S.] Armed Forces to deny a *fait accompli* by the [PRC] against Taiwan, as required by the [TRA] Act and in order to strengthen deterrence in the Indo-Pacific region”).

195. TRA, *supra* note 19, § 3302.

President to consult congressional leaders and obtain congressional authorization before exercising his authority in this area.<sup>196</sup> Included in the legislation's war powers reform section are provisions to define key terms left undefined in the original War Powers Resolution such as "hostilities"; shorten the sixty-day "termination clock" after which the President must terminate hostilities not authorized by Congress; automatically cut off funding of unauthorized military action if the President does not secure the necessary congressional authorization (vice Congress obtaining a veto-proof majority to terminate unauthorized military actions under the current construct); and outline requirements for future authorizations for use of military force such as including clearly defined mission and operational objectives and a two-year sunset to authorizations.<sup>197</sup>

While the Taiwan Invasion Prevention Act and Taiwan Defense Act are not inconsistent with the President exercising his unilateral authority under the Constitution to order the use of force in support of Taiwan, the National Security Powers Act of 2021 appears to significantly impact the President's authority to order the use of force in any military operation, including those involving Taiwan and the PRC. Consequently, it would also likely undercut OLC's two-pronged legal framework for assessing proposed military operations. If entered into law, it would require a new and substantially altered legal analysis to determine the President's authority to defend Taiwan using force.

## VI. CONCLUSION

The PRC is rapidly increasing its military and economic power, presenting itself as the most significant strategic competitor to the United States today. President Xi has set a newly aggressive tone in the PRC's relations around the world and specifically with regard to Taiwan. The PLA will soon possess the capability to launch a cross-strait invasion of Taiwan and already presents a challenge to the United States in the Indo-Pacific. The prospects of a conflict over Taiwan increase as the PRC continues to strengthen its military and economy. The United States must be prepared to act quickly and decisively

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196. Press Release, Senator Chris Murphy, Murphy, Lee, Sanders Introduce Sweeping, Bipartisan Legislation to Overhaul Congress's Role in National Security (July 20, 2021), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-lee-sanders-introduce-sweeping-bipartisan-legislation-to-overhaul-congresss-role-in-national-security> [<https://perma.cc/RCY6-XHBP>].

197. *Id.*

in order to protect its interests in the region. Understanding the President's authority to order the use of military force in support of U.S. interests, including the defense of Taiwan, is crucial to ensuring the Government is prepared to act quickly. While the President may possess the authority to act when required, a whole of Government approach that involves all instruments of national power, engages both the executive and legislative branches to demonstrate unity of purpose and broad support, and leverages our allies and partners in the region presents the United States and Taiwan with the best chance of success in defeating PRC aggression.

Despite possessing sufficient legal authority to adequately respond to most scenarios involving PRC aggression against Taiwan, there may be beneficial policy reasons for Congress to act proactively on an authorization for military force regarding Taiwan. While some may be skeptical of providing the President with increased authority enabling him to exceed the limited nature, scope, and duration of operations available to him unilaterally, as a policy matter the potential deterrent effects of a clear U.S. position may outweigh that risk. Although it may also present escalatory risk, being seen as U.S. interference in the regional (or internal) affairs of the Western Pacific, the clear U.S. interests articulated most definitively in the TRA demonstrate the important national interests at stake.

On the other hand, a lack of action by Congress may also represent an important constraint on potential escalation. Without statutory authorization, the President is limited from ordering operations that are offensive in nature or that involve objectives unrelated to the defense of Taiwan and maintenance of the status quo (e.g., regime change in the PRC). He is also likely precluded from using ground troops to take, re-take, or hold territory and allowing the United States to become entangled in a land war in Asia without a clear exit strategy. Additional analysis on the policy implications of congressional involvement may be useful.

Another constraint or limitation on the President's ability to use force is not an authority issue per se, but a resource one. Congress maintains the power to declare war, but perhaps more significantly given the expansive authority of the President in practice discussed above, Congress maintains the power of the purse and funds the military so it can purchase the ships, submarines, aircraft, long-range fires, and other munitions it would need in such a conflict. There is not an unlimited supply of missiles in inventory and it is not an insignificant expense to use them in a fight over Taiwan, especially in the numbers that would likely be expended in such a high-end fight.

An additional, more subtle constraint is that of the executive branch lawyers that review proposed military operations and advise senior Government leaders on the options available to them. Without clear engagement by the courts, or Congress affirmatively prohibiting funding for operations, it is left to the executive branch to restrain itself and act in accordance with the law and its own thoughtfully framed interpretations of it. The role of executive branch lawyers in evaluating proposed operations and ensuring they comply with existing authorities is crucial and difficult.<sup>198</sup> Effective executive branch lawyers must conduct rigorous legal analysis, review prudential considerations, communicate courageously, encourage transparency, and provide a bottom-line recommendation that presents a practical and implementable solution to the problem at hand. These recommendations must clearly distinguish between the legal advice provided and any policy considerations offered.

Understanding in advance the contours of the President's authority and where it intersects with that of Congress is crucial for legal advisors to be able to provide senior leaders with well-formed implementable courses of action in a timely manner that respect the balance of power under the Constitution and comport with the law. This is particularly true given the PRC's stated intention to act, their increasing capability, and the nature of their autocratic government that allows them to act quickly without debate or concerns over checks and balances. This review of the current legal framework demonstrates the President has broad authority to act in support of U.S. interests, including the defense of Taiwan. A review of policy considerations may provide clarity on potential responses to PRC aggression and show that additional engagement with Congress and a clear statement of U.S. policy, authority, and intentions is helpful to deter future aggression and signal U.S. commitment to fellow democracies in the fight against autocracies.

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198. For a discussion on the role and importance of executive branch lawyers, see, e.g., Jack Goldsmith, *Reflections on Government Lawyering*, 205 *MILITARY LAW REVIEW* 192 (2010); Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 *UCLA LAW REVIEW* 2 (2021); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA LAW REVIEW* 1559 (2007); Jeh C. Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, Dean's Lecture at Yale Law School (Feb. 22, 2012), in 31 *YALE LAW & POLICY REVIEW* 141 (2012).