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Congress and the Scope of the President's Article II Foreign Policy Authorities

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SUMMARY

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Congress and the Scope of the President's Article II Foreign Policy Authorities

In foreign policy, the executive branch has at times asserted that the President has authority under Article II of the Constitution to take action unilaterally—both independent Article II authority to act in the absence of congressional restriction and exclusive Article II authority that Congress is constitutionally prohibited from restricting. Typically, the focus of commentators following such assertions is on the impact they may have on congressional authority. This report examines the issue from a different constitutional perspective: namely, what impact *Congress's* decisions to exercise—or decline to exercise—its authorities may have on a court's analysis of the scope of Article II authorities under long-standing Supreme Court precedent.

Courts generally have declined to delineate precisely the distribution of foreign policymaking when there is a debate as to the scope of presidential authority, mostly either on the ground that the issue is a political question or that the plaintiffs lack standing or a right to sue. *See e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 288, 297, 302−04 (D.D.C. 2016); Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (2002). Although there is consequently often a lack of directly controlling precedent regarding the President's authority to take action unilaterally, the Supreme Court has provided some broad guidance that may inform Congress's exercise of its foreign policymaking authorities when the executive branch claims Article II authority. *See e.g.*, Dames & Moore v. Reagan, 453 U.S. 654, 668-69, 678-86 (1981). In particular, the Court has recognized that the actions or inactions of Congress regarding the President's claims of Article II authority can inform constitutional analysis to resolve separation of powers questions in at least two ways. *See id.*

First, whether Congress has authorized, prohibited, or remained silent regarding a President's action may determine the level of judicial scrutiny. In reviewing presidential actions, the Court has stated that, when Congress has authorized the action, the President's authority is on its firmest footing. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015). On the other hand, if Congress has prohibited the action, the Court has observed that the President's authority is in its weakest position. *See id.* In such cases, according to the Court, presidential authority may be upheld only if the President has exclusive Article II powers that Congress is "disabl[ed]" from restricting. *See Dames & Moore*, 453 U.S. at 669. For other cases—where Congress has been silent as to the President's action—the Court has been less clear about the appropriate judicial approach. *See id.* at 668-69.

Second, Congress's actions or inactions in response to presidential claims of authority over time may inform courts' constitutional interpretation regarding the scope of Article II authority. In this context, the Court has at times read congressional actions short of express restrictions as acquiescing to the President's claims of power. *See, e.g.*, *Zivotofsky*, 576 U.S. at 23-28. The Court has reasoned, for example, that Congress "may be considered to 'invite'" unilateral action through silence in the face of the President's claims of authority, or by failure to pass restrictive legislation. *Dames & Moore*, 453 U.S. at 678.

The Supreme Court has applied these two analytical approaches to hold that the President has independent Article II authority to enter into certain types of executive agreements, *see id.* at 686-88, and to hold that the President has exclusive Article II authority to recognize foreign states, *see Zivotofsky*, 476 U.S. at 28. In many other areas of foreign policy, such as treaty withdrawal and the use of armed forces, courts have left the distribution of authority uncertain. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 996 (1979); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804). Congress and the executive branch have asserted claims of authority in these areas that may be in tension and could eventually be judicially resolved. Accordingly, as Congress determines whether and how to assert its legislative and oversight authorities in pursuing its foreign policy goals, it may want to consider the broader potential constitutional implications of a given legislative action or inaction. In particular, Congress may want to consider whether its responses to presidential claims of unilateral foreign policy power might be characterized by courts as authorizing the President, acquiescing in or ceding to claims of independent or exclusive presidential authority, or prohibiting presidential action.

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Introduction

In foreign policy, the executive branch has at times claimed that the President has authority under Article II of the Constitution to take action unilaterally—both independent Article II authority to act in the absence of congressional restriction and exclusive Article II authority that Congress is constitutionally prohibited from restricting.[1] Often, the focus in the face of such assertions of presidential authority is on the impact they may have on congressional authority. This report examines the issue from a different constitutional perspective: namely, what impact *Congress's* decisions to exercise—or to decline to exercise—its authorities may have on the scope of the President's Article II authorities under long-standing Supreme Court caselaw on the separation of foreign policymaking powers.

Although the Supreme Court has held that the President has some independent and exclusive Article II foreign policy authorities, courts have generally declined to provide much precision about the scope of the President's authority to act without congressional sanction; courts frequently refuse to decide cases requiring a determination of the scope of the President's Article II foreign policy authority on grounds of justiciability doctrines such as the political question doctrine and standing or a right to sue.[2] Further, in those cases that do reach the merits, courts have tended to base their decisions on qualified grounds and broad reasoning, which makes the precedential import of the case uncertain.[3] As the Supreme Court acknowledged in one of its major foreign policy cases, one "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[4]

At the same time, the Supreme Court has adopted two analytical methods that it has recognized as appropriate for cases raising questions about whether the President has Article II authority to take action unilaterally. These methods may serve as guidance for Congress in the exercise of its foreign policymaking authorities, and in particular in its determinations about whether and how to respond to the President's claims of Article II authority to take action unilaterally. That is because both of these analytical methods depend on what actions Congress has—or has not—made in relation to presidential actions.[5]

First, the Supreme Court had held that the level of judicial scrutiny it will apply in reviewing the constitutionality of a given presidential action depends on whether Congress has authorized, been silent as to, or prohibited that action.[6] Under this approach to review—which is known as the *Youngstown* framework—the Court has instructed that the level of judicial review applied to a presidential action runs along a "spectrum," with the greatest deference accorded in cases in which Congress has authorized the action, and the greatest scrutiny applied where Congress has

[1] *See infra* "Independent Article II Authority to Conclude Certain Types of Executive Agreements"; "Exclusive Article II Authority to Recognize Foreign States"; "Congressional and Presidential Practice"; "War Powers According to the President."

[2] *See infra* "Supreme Court Caselaw"; note 167.

[3] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) ("[T]he decisions of the Court in th[e] area (of foreign policy) have been rare, episodic, and afford little precedential value for subsequent cases.").

[4] *Dames & Moore*, 453 U.S. at 660 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)). As explained below, the Supreme Court has generally relied more on Justice Robert Jackson's concurrence in *Youngstown* than on the majority opinion in assessing presidential assertions of Article II authority. *See infra* "Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework."

[5] *See infra* "The Relevance of Congressional Actions and Inactions."

[6] *See Dames & Moore*, 453 U.S. at 668-69

prohibited the action.[7] Although the Court has been less clear about the appropriate level of review in cases in which Congress has been silent as to the action, this spectrum approach suggests the level of review is somewhere in between.[8]

Second, the Supreme Court has explained that, in interpreting constitutional meaning in separation of foreign policymaking powers cases, it is appropriate for courts to consider Congress's actions or inactions in response to presidential claims of foreign policymaking authority over time.[9] The Court has observed that such congressional actions or inactions coupled with the President's claims of authority constitute historical practice that may serve as a "gloss" on the Constitution's text that elaborates on its meaning.[10] Accordingly, Congress's actions and inactions in response to the President's claims of authority could potentially contribute to a court's interpretation of constitutional meaning that becomes binding on both the legislative and executive branches. In applying this interpretive method based on historical practice, the Court's reasoning suggests that congressional responses to presidential action short of prohibition—including authorizations in related areas as well as silence—may serve as evidence of congressional acquiescence to presidential claims of unilateral Article II authority.[11]

This report begins with an explication of the relevance of congressional actions and inactions to the two analytical methods courts may likely apply in separation of foreign policymaking power cases: first, the level of scrutiny to which courts subject a claim of presidential authority; and second, courts' interpretation of constitutional meaning regarding the scope of the President's Article II authority. Next, this report examines how the Supreme Court has applied those analytical methods to conclude that the President may exercise unilateral Article II authority in two foreign policy areas: the conclusion of executive agreements and the recognition of foreign states. The report then turns to two foreign policy areas in which Congress and the executive branch have sometimes asserted competing claims of constitutional authority, but for which there is no directly controlling judicial precedent: treaty withdrawal and the use of the armed forces. The report examines congressional and presidential assertions of authority in these two areas in light of the two analytical methods described above and other potentially relevant Supreme Court precedents. Finally, this report proffers considerations for Congress, examining the potential constitutional significance of its actions or inactions in exercising its authorities to engage in foreign policymaking.

[7] *Id.* at 669. As explained *infra* "Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework," the Supreme Court derives its approach to reviewing presidential assertions of Article II authority from Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952). While the Court at times relies on portions of the *Youngstown* majority opinion, *see, e.g.*, *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown*, 343 U.S. at 585), the Court has generally found Justice Jackson's concurrence more instructive in determining the scope of the President's Article II authority to take unilateral action, *see infra* "Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework."

[8] *See infra* "Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework."

[9] *See infra* "Congress's Role in the Interpretation of Constitutional Meaning: Historical Practice."

[10] *See Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)); *see also Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

[11] *See infra* "Congress's Role in the Interpretation of Constitutional Meaning: Historical Practice."

The Relevance of Congressional Actions and Inactions

Although there is often a lack of directly controlling precedent regarding the President's authority to take action unilaterally in foreign policy,[12] the Supreme Court has provided some broad guidance that may inform Congress's exercise of its foreign policymaking authorities when the executive branch claims Article II authority. In particular, the Court has repeatedly recognized that the actions or inactions of Congress regarding the President's claims of Article authority can inform constitutional analysis to resolve separation of powers questions in at least two ways. First, whether Congress has authorized, prohibited, or remained silent regarding a President's action may determine the level of scrutiny to examine the executive branch's claim of authority. Second, Congress's actions or inactions in response to presidential claims of authority over time may inform courts' constitutional interpretations regarding the scope of the President's Article II authority to take unilateral action. The following sections discuss each in turn.

Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework

Congressional action or silence in relation to the President's authority is the lynchpin of the well-established *Youngstown* framework that the Supreme Court has deemed appropriate in reviewing presidential claims of authority to take foreign policy actions.[13] Under that framework, which derives from Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[14] courts assess presidential claims of authority based on what Congress has—or has not—said about the matter. As Justice Jackson put it: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[15] Justice Jackson accordingly formulated the *Youngstown* framework in terms of three categories:

The *Youngstown* Tripartite Framework

Presidential Power at its Maximum: Where Congress has expressly or implicitly authorized the President's action, presidential power is at its "maximum" and "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[16]

Zone of Twilight: Cases in which Congress has neither authorized nor prohibited the President's action lie in a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain," and "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[17]

Presidential Power at its Lowest Ebb: Where Congress has expressly or impliedly prohibited the President's action, presidential power "is at its lowest ebb," as it is an assertion of presidential authority "at once so conclusive and preclusive [that it] must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[18]

[12] *See infra*. "Supreme Court Caselaw"; "Supreme Court Caselaw."

[13] *See Dames & Moore*, 453 at 668-69; *see also infra* text accompanying note 15.

[14] 343 U.S. 579 (1952).

[15] *Id.* at 635 (Jackson, J., concurring).

[16] *Youngstown*, 343 U.S. at 637.

[17] *Id.* at 637.

[18] *Id.* at 637–38.

In the 1981 case *Dames & Moore v. Regan*,[19] the Supreme Court elaborated on the *Youngstown* framework by observing that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[20] This *Youngstown* spectrum concept, the Court continued, "is particularly true as respects cases ... involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail."[21] The *Dames & Moore* Court's reasoning thus seems to suggest that Congress would have to restrict a given presidential foreign policy action with a relatively high degree of specificity for the Court to determine that a case lies in *Youngstown*'s category three, where it is subject to a more exacting level of judicial scrutiny than presidential actions falling into the category one-to-two region of the *Youngstown* spectrum.[22]

The Supreme Court appears to have upheld in a single instance a presidential action that it deemed to be in category three because the action contravened a statute—in the 2015 case *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*).[23] In that case, it appears that the Court for the first—and thus far the only—time upheld the executive branch's refusal to comply with a foreign policy statute based on a determination that the President had "exclusive and conclusive" constitutional authority—namely, the power to recognize foreign states.[24] The Court emphasized, however, that its holding was a narrow one and that "it is essential that the congressional role in foreign affairs be understood and respected."[25] As discussed below, the full import of *Zivotofsky II* for the distribution of foreign policy powers between Congress and the President in future cases remains unclear.[26]

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[19] 453 U.S. 654.

[20] *Id.* at 669. The Court observed that "Justice Jackson himself recognized that his three categories represented 'a somewhat over-simplified grouping.'" *Id.* (quoting *Youngstown*, 343 U.S. at 635).

[21] *Id.*

[22] In Medellín v. Texas, 552 U.S. 491 (2008), the Court determined that, where the Senate had provided its advice and consent to a treaty "without provisions clearly according it domestic effect," the Senate had thereby "implicit[ly] prohibit[ed]" the President from taking unilateral action to give the treaty domestic effect. *Id.* at 526–27. The Court thus concluded that such unilateral action was "within Justice Jackson's third category, not the first or even the second." *Id.* at 527. In its reasoning in this case, the Court emphasized the importance Congress's constitutional role in enacting any legislation that might be necessary to give treaties domestic effect. *See id.* at 526–28. The case's significance for instances in which the President asserts unilateral authority outside of this context is unclear.

[23] 576 U.S. 1 (2015).

[24] *See id.* at 28–32. In a dissent, Chief Justice Roberts stated:

> Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs. We have instead stressed that the President's power reaches "its lowest ebb" when he contravenes the express will of Congress, "for what is at stake is the equilibrium established by our constitutional system."

Id. at 61 (Roberts, C.J., dissenting) (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)). In *Youngstown*, the Court struck down President Truman's order seizing many of the nation's steel mills—which he justified based on the need to ensure the availability of sufficient materiel for fighting the Korean War—on the ground that the President did not have congressional or constitutional authority to take such action. *See Youngstown*, 343 U.S. at 585–89. In his concurrence, Justice Jackson agreed that the seizure was unlawful, concluding that, because "the current seizure [can] be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject," and that the President did not have such power. *See id.* at 640–55.

[25] *Zivotofsky II*, 576 U.S. at 21.

[26] *See infra* "Legal Considerations for Congress."

Congress's Role in the Interpretation of Constitutional Meaning: Historical Practice

In addition to the determination of the type of judicial review that courts may apply to a challenged presidential foreign policy action, congressional actions or inactions may factor into courts' interpretation of constitutional meaning regarding the scope of the President's Article II authority. In cases raising the question of whether the President has Article II authority to take unilateral action, courts may "put significant weight upon historical practice" of the legislative and executive branches.[27] Such practice, according to the Supreme Court, may "be treated as a gloss" that elaborates on the meaning of the Constitution's provisions.[28] In examining historical practice, the Court looks to past instances in which the President has asserted the type of authority at issue in the case and assesses congressional actions or actions in response to such assertions.[29] Such practice, the Court has reasoned, may serve as evidence of the legislative and executive branches' understanding of the scope of the President's authority that courts may find relevant in ascertaining constitutional meaning regarding the separation of foreign policymaking powers.[30]

When considering congressional responses to past claims of presidential authority, the Court in *Dames & Moore* determined that the "failure of Congress specifically to delegate authority does not, '*especially ... in the areas of foreign policy and national security*,' imply congressional disapproval of action taken by the Executive."[31] Instead, according to the Court, certain congressional actions and inactions may manifest implied congressional approval of or acquiescence in the President's assertion of authority, as described below.

Indicators of Congressional Implicit Approval of or Acquiescence in Presidential Authority Recognized by the Supreme Court

1. Statutes that delegate broad authority to the President in related areas[32]
2. The absence of congressional protest in the face of repeated instances of presidential claims of authority to take the action[33]
3. Congressional consideration of but failure to pass legislation limiting the authority of the President to take the action at issue[34]

Although the Court acknowledged that such "[p]ast practice does not, by itself, create power," it reasoned that "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent."[35] Reasoning that

[27] *Zivotofsky II*, 576 U.S. at 23 (quoting NLRB v. Noel Canning 573 U.S. 513, 524 (2014)).

[28] *Dames & Moore*, 453 U.S. at 686 (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)); *see also Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

[29] *See Zivotofsky II*, 576 U.S. at 23-28; *Dames & Moore*, 453 U.S. at 678-82.

[30] *See Zivotofsky II*, 576 U.S. at 28; *Dames & Moore*, 453 U.S. at 686.

[31] *Dames & Moore*, 453 U.S. at 678 (alteration in original) (emphasis added) (quoting Haig v. Agee, 453 U.S. 289, 291 (1981)).

[32] *Id.*

[33] *See id.* at 679–85.

[34] *See id.* at 685–86.

[35] *Id.* at 686 (quoting United States v. Midwest Oil Co., 236 U.S. 259, 474 (1915) (alterations in original)). On the other hand, the Court has determined that such acquiescence did not exist when the executive branch "itself has described [the challenged action] as 'unprecedented,'" and "has not a single instance in which the President has attempted (or Congress acquiesced in)" such action. *Medellín*, 552 U.S. at 532.

"[s]uch practice is present here and such a presumption is ... appropriate," the Court concluded that "Congress may be considered to have consented to the President's [authority],"[36] and "to [have] 'invite[d]' 'measures on independent presidential responsibility.'"[37]

Supreme Court Application of the *Youngstown* Framework and Consideration of Historical Practice

The Supreme Court has applied these two analytical approaches—the *Youngstown* framework and the consideration of historical practice in constitutional interpretation—in holding that the President has independent authority to enter into certain types of executive agreements and exclusive Article II authority to recognize foreign states.

Independent Article II Authority to Conclude Certain Types of Executive Agreements

International agreements that create binding legal obligations on the United States and the other parties fall into one of two categories under U.S. law and practice: treaties and executive agreements.[38] According to a 2020 empirical study conducted by various scholars, "[s]ince the late 1930s," treaties are not the way that the United States creates most of its international commitments.[39] Instead, these scholars asserted, "well over ninety percent of all international agreements concluded on behalf of the United States have been executive agreements rather than treaties."[40] Although the distinction is irrelevant in terms of international law—that is, international agreements are considered to be binding on the United States regardless of whether they were concluded as a treaty or executive agreement under U.S. domestic law[41]—the distinction matters for distribution of foreign policy powers from a U.S. constitutional perspective. Executive agreements are not subject to Senate advice and consent pursuant to the Constitution's Treaty Clause.[42] Moreover, although there may be some congressional involvement in many executive agreements,[43] the Supreme Court has also held that the President has some independent Article II authority to enter into certain types executive agreements, as discussed below.

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[36] *Dames & Moore*, 453 U.S. at 686.

[37] *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (1952).

[38] *See* Restatement (Third) of the Foreign Relations Law of the United States § 303 cmt. *a* (Am. L. Inst. 1987); *see also* Dep't of State, 11 FOREIGN AFFAIRS MANUAL § 723.2-2 (2006); CRS Legal Sidebar LSB11048, *International Agreements (Part I): Overview and Agreement-Making Process*, by Steve P. Mulligan (2023).

[39] Oona A. Hathaway, et al., *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 632 (2020).

[40] *Id.*

[41] Under international law, a "treaty" is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*." Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (emphasis added).

[42] U.S. CONST. art II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."); *see* Cong. Rsch. Serv., *ArtII.S2.C2.1.1 Overview of President's Treaty-Making Power*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-1/ALDE_00012952/ (last visited May 1, 2025).

[43] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303, § 303 cmt. *a* (AM. L. INST. 1987); DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 723.2-2(A)-(B) (2006).

Supreme Court Caselaw

The Supreme Court's principal cases on the constitutionality of executive agreements involve challenges to claims settlement agreements with foreign governments.[44] In most of these cases, the central issue was about the effect of executive agreements on conflicting state laws.[45] Accordingly, although in these cases the Court upheld the President's authority to enter into the executive agreement at issue without Senate advice and consent, it did not directly address the question of the proper distribution of federal powers related to executive agreements.[46] Rather, the Court to a considerable extent relied on the broad foreign policy authority of the national government as a whole to conclude that the executive agreement at issue was a valid exercise of federal power that trumped any contrary state laws pursuant to the Supremacy Clause.[47] In these cases, the Court relied both on what it characterized as the broad authority of the President in

[44] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 405–08 (2003) (German Foundation Agreement, with Germany); *Dames & Moore*, 453 U.S. at 664–65 (1981) (Algiers Accords, with Iran); United States v. Pink, 315 U.S. 203, 211–13 (1942) (Litvinov Assignment, with the Soviet Union); United States v. Belmont, 301 U.S. 324, 326–27 (1937)(also Litvinov Assignment).

Two cases upholding executive agreements dealing with matters other than foreign claims settlement are less frequently cited in the context of questions regarding executive authority to enter into them because the Court's primary focus was on other issues. In *Wilson v. Girard*, 354 U.S. 524 (1957), the Court briefly affirmed the validity an executive agreement governing criminal jurisdiction of military personnel that was made pursuant to the 1952 bilateral security treaty with Japan on the ground that the treaty authorized such an agreement before holding that the agreement should be given effect because it was not prohibited by any constitutional provision or subsequent legislation. *See Wilson*, 354 U.S. at 528–30. In *B. Altman & Co. v. United States*, 224 U.S. 583 (1912), the Court held that an issue of the proper construction of an executive agreement made pursuant to a trade statute was directly appealable to the Supreme Court under the relevant jurisdictional statute because it was sufficiently akin to a treaty for that purpose. *See B. Altman & Co.*, 224 U.S. at 600–01.

In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court held invalid "an executive agreement ... in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents" to the extent that it gave military jurisdiction over the civilian wife of a U.S. servicemember under the Uniform Code of Military Justice. *Reid*, 354 U.S. at 15–18. The Court did not, however, address the question of whether concluding the executive agreement was within the President's power. Rather, the Court held that no federal law of whatever form—statute, treaty, or executive agreement—could violate constitutional prohibitions (which in that case were rights accorded to U.S. civilians in the civilian court system). *See Reid*, 354 U.S. at 16 ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

[45] *See Garamendi*, 539 U.S. at 401 ("The issue here is whether [a California statute] interferes with the National Government's conduct of foreign relations."); *Pink*, 315 U.S. at 233 ("The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system."); *Belmont*, 301 U.S. at 327 (determining that the only issue "necessary to be considered" was whether New York law or an executive agreement was controlling).

[46] *See Garamendi*, 539 U.S. at 415; *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330–31; *see also Garamendi*, 539 U.S. at 427 ("There is ... no need to consider the possible significance ... of tension between an Act of Congress and Presidential foreign policy.").

[47] *See id.* at 419 ("[T]he likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law."); *Pink*, 315 U.S. at 230–31 ("[S]tate law must yield when it is inconsistent with, or impairs ... the superior Federal policy evidenced by a treaty or international compact or agreement."); *Belmont*, 301 U.S. at 331 ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

foreign affairs and on its determination Congress had acquiesced in the practice of presidential entry into executive agreements generally[48] or in the entry into the particular agreement at issue.[49]

The principal Supreme Court case addressing the constitutionality of an executive agreement based on federal separation of powers rather than on federal supremacy over state law is *Dames & Moore v. Regan*.[50] This case also contains reasoning that the Supreme Court has relied on in cases involving other separation of foreign policy powers issues.[51] *Dames & Moore* involved a challenge to the 1981 executive agreement with Iran, concluded by President Carter, that provided for settlement of claims in exchange for the release of U.S. hostages.[52] Specifically, the Court considered a challenge to President Reagan's subsequent suspension, pursuant to this agreement, of pending claims brought by U.S. nationals against Iran in U.S. courts.[53]

The Court explained at the outset of its opinion the applicability of the *Youngstown* framework to assess the President's authority to conclude an executive agreement.[54] The Court seems to have concluded that the challenged action fell somewhere within *Youngstown* category two.[55] The Court did not make explicit the appropriate level of scrutiny, but suggested a relatively high degree of deference to the President was appropriate because of its determination that congressional disapproval should not be inferred from a lack of express delegation, particularly "in areas of foreign policy and national security."[56] The Court's analysis appears to have proceeded on the assumption that the President's conclusion of the executive agreement is entitled to such deference under the *Youngstown* framework because of the existence of related statutes that, although not authorizing the challenged presidential action, were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[57]

In ultimately upholding the President's authority to conclude the executive agreement suspending U.S. claims against a foreign state without congressional approval, the *Dames & Moore* Court relied on what it determined to be "the history of [congressional] acquiescence in executive

[48] *See Garamendi*, 539 U.S. at 415 ("Making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice ... Given the fact that the practice goes back over 200 years and has received congressional acquiescence throughout its history, the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'" (quoting *Pink*, 315 U.S. at 240)).

[49] *See id.* at 429 ("[I]t is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of [the state statute in question] has been introduced in Congress repeatedly, but none of the bills has come close to making it into law."); *Pink*, 315 U.S. at 227–28 (stating that Congress "tacitly recognized th[e] policy effected by the Litvinov Assignment by "authoriz[ing] the appointment of a Commissioner to determine the claims of American nationals against the Soviet Government").

[50] 453 U.S. 654 (1981).

[51] *See, e.g.*, *Zivotofsky II*, 576 U.S. at 21 (holding that the President has exclusive authority power to recognize foreign states); *Medellín*, 552 U.S. at 524, 530, 532 (holding that the President did not have unilateral authority to order states to comply with a judgment of the International Court of Justice); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377, 382 (2000) (holding that a federal sanctions statute preempted a state law restricting state contracting with companies doing business in Burma).

[52] *See Dames & Moore*, 453 U.S. at 664–65.

[53] *See id.* at 675.

[54] *See id.* at 668.

[55] The Court concluded that Congress did "specifically" authorize the President to nullify attachment and transfer assets pursuant to the executive agreement, and thus these actions were "supported by the strongest of presumptions and the widest latitude of judicial interpretation" under *Youngtown* category one. *Dames & Moore*, 453 U.S. at 674. The Court distinguished the suspension of claims pursuant to the agreement, concluding that the statutes relied on by the President did not provide that authority. *See id.* at 675-77.

[56] *Id.* at 669, 678 (quoting *Haig*, 453 U.S. at 291).

[57] *Id.* at 678.

claims settlement."[58] According to the Court, Congress demonstrated such acquiescence through actions and inactions of the types described in the text box above,[59] including by enacting legislation "involving executive agreements" settling claims against foreign states that "did not question the fact of the settlement or the power of the President to have concluded it."[60]

The Court also concluded that congressional acquiescence in the President's power was demonstrated by a statement in a Senate report regarding the intent of the International Emergency Economic Powers Act (IEEPA).[61] Acknowledging that "IEEPA was enacted to provide for some limitation on the President's emergency powers," the Court observed that, in the Senate report, "Congress stressed that '[n]othing in this act is intended ... to impede the settlement of claims of U. S. citizens against foreign countries.'"[62] The Court further cited the provision in IEEPA that provides that, "notwithstanding" the termination of a national emergency, "any [IEEPA] authorities ... which are exercised ... on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property *if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its national*."[63] The Court did not mention Congress's qualification of this authority granted to the President in IEEPA (i.e., the provision for termination of the national emergency by concurrent resolution, after which "such authorities may not continue to be exercised under this section").[64]

Finally, the Court found that Congress had demonstrated acquiescence in the President's authority to conclude executive agreements by "reject[ing] several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements."[65] This longstanding practice of what the Court concluded to be congressional acquiescence in repeated claims of presidential authority to conclude executive agreements, the Court reasoned, reinforced its conclusion in previous cases that the President "ha[s] some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate."[66] According to the Court, that power, coupled with the President's power to recognize foreign governments, provided further support for the existence of the President's authority to enter into executive agreements settling claims with foreign governments.[67]

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[58] *Id.* at 686.

[59] *See supra* text accompanying notes 32–34.

[60] *Dames & Moore*, 453 U.S. at 681. In particular, the Court pointed out that Congress had enacted the International Claims Settlement Act of 1949, which provided procedures for implementing a settlement agreement with the former Yugoslavia and for implementing future settlement agreements, and subsequently repeatedly amended the statute to address claims against certain other countries. *Id.* 681-82 (citing Pub. L. 453, 64 Stat. 13 (1950) as amended, 22 U.S.C. §§ 1621-45o).

[61] *See id.* at 681-82 (citing 50 U.S.C. § 1706(a)(1)).

[62] *Id.* at 681-82 (citing S. Rep. No. 95-466, at 6 (1977)).

[63] 50 U.S.C. § 1706(a)(1)) (emphasis added); *Dames & Moore*, 453 U.S. at 682 (citing 50 U.S.C. § 1706(a)(1)).

[64] 50 U.S.C. § 1706(b).

[65] *Dames & Moore*, 453 U.S. at 685.

[66] *Id.* at 682 (citing *Pink*, 315 U.S. at 229–30).

[67] *Id.* at 683; *see also id.* at 688 ("[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claim."); *supra* text accompanying note 31 (suggesting that the President's independent authorities in "foreign policy and national security" justifies caution in determining that Congress had disapproved of presidential actions in those areas).

The *Dames & Moore* opinion did not address whether the scope of the President's Article II authority to conclude executive agreements extends beyond foreign claims settlement, and whether any of it is exclusive and thus would preclude congressional restriction. There is no directly controlling precedent in which the Court has elaborated on the extent of the President's Article II authority to conclude executive agreements that it recognized in *Dames & Moore*.[68] For its part, the executive branch maintains that it has authority to conclude some executive agreements based solely on its constitutional authorities, including the President's authorities "as Chief Executive to represent the nation in foreign affairs"; "to receive ambassadors and other public ministers*, and to recognize foreign governments*"; and "as 'Commander-in-Chief.'"[69] Congress has taken various actions that arguably impose some restrictions on the President's authority to conclude some executive agreements, including those described in the next section.

Examples of Congressional Assertions of Authority Related to Executive Agreements

In contrast with treaties, there is no express constitutional requirement that the President submit executive agreements for congressional approval.[70] Congress has, however, periodically imposed such a requirement. For example, the United Nations Participation Act of 1945[71] requires the President to secure congressional approval of any agreement made pursuant to Article 43 of the U.N. Charter making U.S. armed forces available to enforce Security Council resolutions.[72] Similarly, Congress has prohibited the President from concluding agreements establishing international criminal tribunals[73] or requiring the United States to make "militarily significant" reductions in armed forces or weapons[74] without securing Senate advice and consent or statutory authorization. Additionally, Congress in effect prohibited the President from acceding to the international agreement that established the International Criminal Court through executive agreement by enacting a statute requiring Senate advice and consent for the United States to become a party to that agreement.[75]

Congress has also provided for its involvement to varying degrees in statutes addressing several types of executive agreements, including trade agreements, nuclear cooperation agreements, international fishery agreements, and international agreements related to debt relief.[76] Outside of the trade context, most of these statutes do not condition the President's conclusion of the

[68] In a subsequent case not involving an executive agreement, the Court characterized *Dames and Moore* as "involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Medellín*, 552 U.S. at 531.

[69] *See* DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 723.2-2(3) & 723.2.2(C) (2006).

[70] *Cf. supra* note 42.

[71] Pub. L. No. 79-264, 59 Stat. 619 (codified as amended at 22 U.S.C §§ 287–287e-4).

[72] *Id.* § 6, 59 Stat. at 621; 22 U.S.C. § 287d. Article 43 of the U.N. Charter provides: "All Members ... undertake to make available to the Security Council, on its call *and in accordance with a special agreement or agreements*, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security." U.N. CHARTER, art. 43(1) (emphasis added).

[73] *See* 22 U.S.C. § 262-1(a).

[74] 22 U.S.C. § 2573(b); *see also* NDAA for Fiscal Year 2013, P.L. 112-239, § 913(b)(1), 126 Stat. 1632, 1874 (2013) (codified at 51 U.S.C. § 30701 note) (providing that the prohibition extends to U.S. armed forces and weapons in outer space).

[75] *See* 22 U.S.C. § 7401(a) ("The United States shall not become a party to the International Criminal Court except pursuant to a treaty made under Article II, section 2, clause 2 of the Constitution of the United States.").

[76] For a table listing and summarizing several of these types of provisions, see CONG. RSCH. SERV., 106TH CONG., A STUDY PREPARED FOR THE S. COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 236 tbl. X-3 (Comm. Print 2001).

agreement on congressional approval, but rather allow for the agreement to go into effect absent congressional prohibition through a joint resolution after a designated time period.[77]

Congress has also asserted oversight authority regarding the President's conclusion of executive agreements. In the early 1970s, after Congress became concerned about the increase in U.S. international commitments that Presidents had created through executive agreements,[78] Congress enacted what the Senate Foreign Relations Committee characterized as "modest legislation" requiring that the President submit to Congress all international agreements not submitted to the Senate as treaties.[79] "Before undertaking to reexamine and then perhaps to reassert its proper constitutional authority in the area of the treaties," the Committee stated, "Congress must first ascertain that at least it knows of the existence and content of agreements contracted with foreign governments by the executive."[80]

This legislation, enacted in 1972, is known as the Case-Zablocki Act (Case Act),[81] and it has been amended five times to address implementation gaps perceived by Congress.[82] The most recent and substantial amendment, enacted in 2022,[83] requires the Secretary of State to submit to the leadership of both houses and to the Senate Foreign Relations and House Foreign Affairs Committees monthly reports on all international agreements "signed, concluded, or otherwise finalized during the prior month."[84] Additionally, the State Department must provide not only the text of the agreement, as required under the original Case Act, but also "[a] detailed description of the legal authority that, in the view of the Secretary, provides authorization for each international agreement" and that includes citations to specific constitutional, treaty, and statutory articles, sections, or subsections.[85]

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[77] *See id.* For a discussion of Congress's in the context of trade agreements, see CRS Report R47679, *Congressional and Executive Authority Over Foreign Trade Agreements*, by Christopher T. Zirpoli (2024).

[78] *See Congressional Oversight of Executive Agreements: Hearing Before the S. Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 92d Cong. 1 (1972) ("The use of executive agreements as a substitute for treaties has spiraled in recent years, giving rise to increasing concern which has been voiced in Senate hearing rooms, on the Senate floor, and in the national press."); *Transmittal of Executive Agreements to Congress: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong. 2 (1971) ("Matters of weight and substance ... such as the stationing of troops in a foreign country, or the conduct of clandestine warfare on another government's behalf have in recent years been contracted by secret executive agreement without the consent or even the knowledge of the Senate."); *Congressional Review of International Agreements: Hearings Before the H. Comm. on International Relations*, 94th Cong., at V (1976) ("The past few decades have witnessed an overwhelming tendency on the part of the executive branch to conclude so-called executive agreements without proper reference to Congress. Such agreements have become an effective vehicle for developing significant foreign policy commitments.").

[79] *Transmittal of Executive Agreements to Congress: Transmittal of Executive Agreements to Congress: Hearings Before the S. Comm. on Foreign Relations*, *supra* note 78, at 2.

[80] *Id.*

[81] Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified as amended at 1 U.S.C. § 112b).

[82] *See* Hathaway et al., *supra* note 39, at 652–55 (summarizing each amendment).

[83] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, P.L. 117-263, § 5497, 136 Stat. 2395, 3477–82 (codified at 1 U.S.C. § 112b).

[84] 1 U.S.C. § 112b(a)(1)(A)(i). The report must also include all non-binding political instruments, a form of international agreement not addressed in this report. For a discussion of these instruments, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Steve P. Mulligan (2023).

[85] 1 U.S.C. § 112b(a)(1)(A)(iii). Furthermore, "[i[f the authority relied upon is or includes article II of the Constitution of the United States, the Secretary or appropriate department or agency shall explain the basis for that reliance." *Id*. Other changes effected by the 2022 amendment are discussed in Mulligan, *supra* note 84. The State Department began providing Case Act reports to Congress and publishing them on its website pursuant to the new requirements in October of 2023. *See* U.S. Dep't of State, *Information Relating to International Agreements*, https://foia.state.gov/Search/IRIA.aspx (last visited Apr. 27, 2025).

Exclusive Article II Authority to Recognize Foreign States

In *Zivotofsky II*, the Court struck down a federal statute and held, for what appears to be the first time, that the President has an "exclusive" and "conclusive" power that "disabl[es] Congress from acting on the subject"—specifically, the recognition of foreign states.[86] *Zivotofsky II* involved a challenge to the State Department's refusal to comply with a statute requiring the Department to record the birthplace of U.S. citizens born in Jerusalem as "Israel" if requested by the citizen or the citizen's guardian.[87] According to the Department, its long-standing policy of recording the birthplace as "Jerusalem" reflected the executive branch's decision to leave the question of the sovereign status of Jerusalem as a matter to be resolved in negotiations.[88] The government argued that this policy was based on the President's exclusive power to recognize foreign states, and that the statutory requirement impermissibly infringed on that power.[89]

As in *Dames & Moore*, the Court began by observing that "[i]n considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown*."[90] Unlike in *Dames & Moore*, though, the Court concluded that, the President's action at issue—a "refusal to implement" a statute—"falls into Justice Jackson's third category."[91] Accordingly, the Court stated, the President's claim of authority "must be 'scrutinized with caution,' and he may rely solely on powers the Constitution grants to him *alone*."[92]

In *Zivotofsky II*, the Court confirmed the importance of the historical practice of the legislative and executive branches in courts' constitutional analysis in separation of powers cases.[93] Acknowledging that the text of the Constitution does not expressly reference the recognition power,[94] that the Framers' intent was unclear,[95] and that there was not any directly relevant Supreme Court precedent,[96] a five-Justice majority of the Court relied relatively heavily on its determinations about the constitutional import of historical practice since the Founding to hold that the President not only has the power to recognize foreign states, but that that power resides *solely* in the presidency.[97]

In some respects, the majority's approach to historical practice appears to be similar to the approach that the Court took in *Dames & Moore*, which, as discussed above, arguably tends to

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[86] 576 U.S. at 10, 29–30 (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) (alteration in original)).

[87] *Id.* at 7 (citing the Foreign Relations Authorization Act, Fiscal Year 2003, § 214, 116 Stat. 1350 (2002)). For background on this provision and other congressional efforts to shape U.S. policy regarding the status of Jerusalem, see CRS Report R43773, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers*, by Jennifer K. Elsea (2015).

[88] *See Zivotofsky II*, 576 U.S. at 6–7.

[89] *See id.* at 10 ("[T]he Secretary contends that § 214(d) infringes on the President's exclusive recognition power by 'requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns.'") (quoting Brief for Respondent at 48, *Zivotofsky II*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 4726506).

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.* (quoting *Youngstown*, 343 U.S. at 638) (emphasis added).

[93] *See id.* at 23 ("Having examined the Constitution's text and this Court's precedent, it is appropriate to turn to accepted understandings and practice. In separation of powers cases this Court has often 'put significant weight upon historical practice.'") (quoting NLRB v. Noel Canning, 573 U.S. 513, 524 (2014)).

[94] *See id.* at 11.

[95] *See id.* at 12.

[96] *See id.* at 17–19.

[97] *See id.* at 14–17, 23–28.

read many congressional actions and inactions as acquiescing in claims of presidential authority related to foreign policy.[98] The *Zivotofsky II* majority's reading of historical practice suggests that only congressional action "contrary to" the President's exercise of a power will suffice as evidence of congressional assertion of that power.[99] As the Court observed, "'the most striking thing' about the history of recognition 'is what is absent from it: a situation like this one,' where Congress has enacted a statute contrary to the President's formal and considered statement concerning recognition."[100]

Although the Court acknowledged that there were historical examples involving both congressional and presidential actions related to a recognition decision, the majority found that these practices demonstrated either that "Congress ha[d] acquiesced in the Executive's exercise of the recognition power" or that "the President has chosen, as may often be prudent, to consult and coordinate with Congress."[101] The majority's understanding of the branches' respective practices also appeared to be informed by functional considerations such as the ability of the President to "speak ... with one voice" on behalf of the nation in the international arena.[102] The Court read congressional authorizations or approvals related to Presidents' recognition decisions as acknowledgments of the President's exclusive recognition authority, rather than reading them as congressional exercises of such authority.[103]

After holding that the President has exclusive Article II authority to recognize foreign states,[104] the Court determined that the passport statute required the Secretary of State to "directly contradict[]" the President's recognition decision.[105] As a result, the Court also held that the statute must be struck down because Congress had thereby "improper[ly]" "aggrandiz[e][d] its power at the expense of another branch."[106] Emphasizing that its decision "does not question the substantial powers of Congress over foreign affairs,"[107] the Court suggested that its holding was a narrow one that left room for Congress to "express its disagreement with the President['s]

[98] *See supra* text accompanying notes 31–37, 58–65.

[99] *Zivotofsky II*, 576 U.S. at 24 (quoting *Zivotofsky ex rel. Zivotofsky v. Kerry*, 725 F.3d 197, 221 (2013) (Tatel, J., concurring), *aff'd*, *Zivotofsky II*, 566 U.S. 1 (2015).

[100] *Id*.

[101] *Id.* at 23–28.

[102] *Id.* at 14 (alteration in original) (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)).

[103] In his dissent, Justice Scalia argued that the majority's historical practice analysis was principally driven by functional considerations that improperly minimized congressional actions, explaining that: "In the end, the Court's decision does not rest on text or history or precedent. It instead comes down to 'functional considerations'—principally the Court's perception that the Nation 'must speak with one voice' about the status of Jerusalem." *Id.* at 80 (Scalia, J., dissenting) (quoting Brief for Respondent at 9, 22, Zivotofsky II, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 4726506).

[104] *See id.* at 14–17, 23–28.

[105] The Court determined without much elaboration that the decision not to recognize any state's sovereignty over Jerusalem is part of the President's exclusive recognition power and that the State Department's recording of the birthplace of U.S. citizens born in Jerusalem as "Israel" would contradict that decision. *See id.* at 5 (stating that the Court had two questions before it: "whether the President has the exclusive power to grant formal recognition to a foreign sovereign," and, "if he has that power, ... whether Congress can command the President and his Secretary of State to issue a formal statement that contradicts the earlier recognition"). Chief Justice Roberts and Justices Alito and Scalia disagreed with those conclusions. *See id.* at 64, 66 (Roberts, C.J., dissenting) ("[T]he statute at issue *does not implicate recognition*.... Whatever recognition power the President may have, exclusive or otherwise, is not implicated by [the passport statute]."); *id.* at 76–77 (Scalia, J., dissenting) (criticizing the majority for "conclud[ing] that, in addition to the exclusive power to make the 'formal recognition determination,' the President holds an ancillary exclusive power 'to control ... formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds'") (alteration in original) (quoting *id.* at 32).

[106] *Id.* at 30–32 (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991)) (second alteration in original).

[107] *Id.* at 32.

recognition decision in myriad ways," such as by "enact[ing] an embargo, declin[ing] to confirm an ambassador, or even declar[ing] war."[108] The Court further emphasized that its holding was confined to the President's recognition power and that the case did not require it to address the executive branch's broader claims that that power derives from the President's "exclusive authority to conduct diplomatic relations" and possession of "the bulk of foreign-affairs powers."[109]

Foreign Policy Areas Where Distribution of Authority Is Not Yet Judicially Delineated

Although the *Zivotofsky II* Court drew a constitutional line in holding that the President has exclusive Article II authority to recognize foreign states, the Court did not address questions regarding the constitutional distribution of the "bulk of foreign-affairs powers."[110] This section discusses two foreign policy areas in which Congress and the executive branch have asserted what are arguably competing claims of constitutional authority, but for which there is no directly controlling judicial precedent: treaty withdrawal and the use of the armed forces.

Treaty Withdrawal Powers

As a matter of international law, a country may withdraw from a treaty pursuant to its terms or other international laws[111] with the submission of a written instrument of notification "signed by the Head of State, Head of Government or Minister for Foreign Affairs."[112] As with entering into treaties, international law does not specify the domestic legal processes by which countries authorize executive officials to terminate a country's participation in a treaty, but rather leaves such processes up to each country's particular system of governance.[113] In the United States,

[108] *Id.* at 30.

[109] *Id.* at 20 (quoting Brief for Respondent at 18, *Zivotofsky II*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 5035108).

[110] *Id.*

[111] *See* Vienna Convention on the Law of Treaties, *supra* note 51, arts. 54(a). Treaties typically contain withdrawal provisions, and those that do typically require a waiting period after notification before obligations cease. *See, e.g.*, North Atlantic Treaty art. 13, Apr. 4, 1949, 63 Stat. 241, 34 U.N.T.S. 243 ("After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation ... ").

If a treaty does not expressly provide for withdrawal, the Vienna Convention on the Law of Treaties provides the default rule that the treaty will not be construed to permit withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.

Id. art. 56(1).

In the event that one of these conditions permitting withdrawal is met, the Convention provides that a party must give the other treaty parties at least twelve months' notice of its intent to withdraw before its withdrawal is effective. *Id.* art. 56(2).

[112] *Id.* art. 67(2); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(1) (AM. L. INST. 2018) ("According to established practice, the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from treaties, either on the basis of terms in the treaty allowing for such action (such as a withdrawal clause) or on the basis of international law that would justify such action.").

[113] *See* Vienna Convention on the Law of Treaties, *supra* note 51, art. 67(2); *cf. also id.* art. 2(b) (defining "'ratification', 'acceptance', 'approval' and 'accession'" as "the international act so named whereby a State establishes *on the international plane* its consent to be bound by a treaty") (emphasis added).

termination is not explicit while entering into treaties is specifically delineated in the Constitution.[114]

Supreme Court Caselaw

The Supreme Court has thus far not addressed the question of the distribution of the power to withdraw from treaties. When President Carter did not seek congressional approval before announcing the United States' intent to withdraw from the 1954 mutual defense treaty with Taiwan,[115] twenty-five Members of Congress filed suit challenging the action on the ground that the Constitution does not provide the President with the authority to unilaterally withdraw from treaties.[116] In *Goldwater v. Carter*, a divided Supreme Court declined to answer the question and ultimately remanded the case with instructions to dismiss the complaint.[117]

A four-justice plurality concluded that dismissal was proper because the case presented the Court with a nonjusticiable political question "that should be left for resolution by the Executive and Legislative Branches of the Government."[118] In reaching this conclusion, the plurality reasoned that, "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty," and that the case "involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked."[119] Justice Powell cast the fifth vote in favor of dismissal, but wrote separately to express his disagreement with the plurality's reasoning that the case raised a nonjusticiable political question.[120] Rather, according to Justice Powell, dismissal was proper because the case was not ripe for judicial review, as Congress had not yet "by appropriate formal action ... challenged the President's authority to terminate the treaty with Taiwan."[121] If Congress were to do so, he maintained that the Court "would have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty."[122]

The Supreme Court has not considered the issue of the authority to withdraw from treaties since *Goldwater*, but in the wake of the case, lower courts faced with the issue have generally declined to reach the merits, either on the ground that the case raised a political question or that the plaintiffs lacked standing.[123] In the absence of controlling precedent, it is unclear what the current

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[114] *See* U.S. CONST. art II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

[115] Mutual Defense Treaty Between the United States of America and the Republic of China, December 2, 1954, 6 U.S.T. 433.

[116] *See* Goldwater v. Carter, 481 F. Supp. 949, 950 (1979) ("This suit was brought by eight members of the United States Senate, a former senator, and sixteen members of the House of Representatives seeking declaratory and injunctive relief against the notice given by defendant President Carter ... to terminate the 1954 Mutual Defense Treaty."), *rev'd*, Goldwater v. Carter, 617 F.2d 697 (1979), *vacated*, Goldwater v. Carter 444 U.S. 996 (1979).

[117] 444 U.S. 996, 996 (1979) (Rehnquist, J., concurring, joined by Burger, C.J., Stewart, Stevens, JJ.).

[118] *Id.* at 1003.

[119] *Id.* at 1003–04.

[120] *See id.* at 997–98 (Powell, J., concurring).

[121] *Id.* at 1002.

[122] *Id.*

[123] *See, e.g.*, Kucinich v. Bush, 236 F. Supp. 2d 1, 18 (2002) (dismissing the case both on the ground that the Members of Congress who brought the suit did not have standing and on the ground that the case presented a nonjusticiable political question); Beacon Products Corp. v. Reagan, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986) ("[A] challenge to the President's power vis-a-vis treaty termination raise[s] a nonjusticiable political question."), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987).

Court would do if faced with the issue again.[124] For the time being, the issue is thus one that the political branches may address through the exercise of their respective authorities, which could in turn potentially impact a court's analysis with respect to what level of review courts should apply to a President's claim of authority to unilaterally withdraw from a treaty and its constitutional interpretation to determine whether Article II provides such authority.

Congressional and Presidential Practice

The practice of Congress and the executive branch regarding treaty withdrawal authority have changed over time. In the nineteenth century, treaty termination generally involved joint congressional and executive action—either Congress or the Senate provided the President with prior authorization or subsequent approval for withdrawal.[125] Beginning in the twentieth century, Presidents began withdrawing from some treaties unilaterally, a practice which accelerated during World War II.[126]

This practice of presidential unilateral withdrawal from treaties largely went unopposed until the 1960s and 70s, when Congress began holding hearings and passing legislation in response to what it perceived as a need to reassert its foreign policy authorities in various areas, including those related to international agreements.[127] The possibility of the President's unilateral treaty withdrawal was of particular concern for Congress in the context of the United States' expected withdrawal from the defense treaty with Taiwan once it became clear in the late 1970s that President Carter intended to recognize the government of the People's Republic of China's sovereignty over Taiwan.[128] In response, Congress enacted legislation expressing its sense "that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954,"[129] and the Senate Foreign Relations Committee held three days of hearings on a resolution expressing the sense of the Senate that its "approval . . . is required to terminate any mutual defense treaty between the United States and another nation."[130] A group of Members subsequently brought suit against the President challenging his unilateral withdrawal from the treaty, which, as noted, was dismissed after the Supreme Court deemed it nonjusticiable.[131]

For at least the latter part of the twentieth century, the executive branch has often taken the position asserted by the Carter Administration in withdrawing from the mutual defense treaty with Taiwan: that the President has unilateral power to withdraw from treaties absent

[124] For a discussion of the possible arguments on each side in such a case, see CRS Legal Sidebar LSB11256, *The North Atlantic Treaty: U.S. Legal Obligations and Congressional Authorities*, by Karen Sokol (2025).

[125] *See* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788–801 (2014).

[126] *See id.* at 801–20.

[127] *See supra* notes 78–83 and accompanying text; *infra* "War Powers According to Congress."

[128] *See Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 2 (1979) ("The Committee's consideration of the treaty termination issue was precipitated by President Carter's announcement on December 15, 1978, that he was recognizing the government of the People's Republic of China as the sole legal government of China and withdrawing recognition of the government of the Republic of China on Taiwan."). President Nixon had begun the process of normalizing relations with the People's Republic of China in the early 1970s. Dep't of State, Off. of the Historian, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: China*.

[129] International Security Assistance Act of 1978, P.L. 95-384, § 26(b), 92 Stat. 730, 746 (codified as amended at 22 U.S.C. § 2151 note).

[130] S.Res. 15, 96th Cong. (1979); *Treaty Termination: Hearings Before the S. Comm. on Foreign Relations*, *supra* note 128, at 2. The resolution never passed.

[131] *See supra* notes 117-121 and accompanying text.

congressional restriction, thus apparently leaving open the possibility that Congress may have authority to enact restrictions on unilateral treaty termination.[132] In 2020, the Department of Justice's Office of Legal Counsel (OLC) published an opinion maintaining, for the first time, that the President's treaty withdrawal power is an *exclusive* one that Congress is constitutionally prohibited from infringing upon.[133] The opinion addressed a statutory provision that required the President to provide Congress at least 120 days' notice before withdrawing from the multilateral Treaty on Open Skies.[134] Contending that congressional restrictions on treaty withdrawal interfere with the President's "exclusive authority to execute treaties and to conduct diplomacy," the OLC concluded that the statutory requirement of a congressional-notice period prior to withdrawal was unconstitutional.[135] (Although OLC opinions are legal arguments and not binding on courts or Congress,[136] the executive branch generally treats them as binding on itself.[137])

In 2023, Congress advanced a different constitutional interpretation regarding the distribution of power to withdrawal from a treaty by enacting legislation specifying the terms for withdrawal from the North Atlantic Treaty.[138] This treaty establishes the North Atlantic Treaty Organization (NATO) and obligates the countries that are parties to treat an attack against one as "an attack

[132] *See*, *e.g.* Authority to Withdraw from the North American Free Trade Agreement, 42 Op. O.L.C. 133, 144 (2018) ("[T]here can no longer be serious doubt that the President may terminate a treaty in accordance with its terms."); Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under An Existing Treaty, 20 Op. O.L.C. , 395 n. 14 (1996) ("[T]he executive branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action."); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 reporters' n.6 (AM. L. INST. 2018) ("Although historical practice supports a unilateral presidential power to suspend, terminate, or withdraw the United States from treaties, it does not establish that this is an exclusive presidential power."); Mulligan, CRS Report R44761, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, by Steve P. Mulligan (2023), at nn.65–66 & 70 (citing executive branch memoranda from 1909 to 2001 stating that under established practice the President has unilateral authority to withdraw from treaties).

[133] Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty, 44 Op. O.L.C., slip op. at 14–15 (2020), https://www.justice.gov/olc/file/1348136/dl?inline= [hereinafter OLC Open Skies Opinion]. For more background on the OLC's Open Skies Treaty memorandum and its implications for Congress, see CRS Legal Sidebar LSB10600, *OLC: Congressional Notice Period Prior to Withdrawing from Treaty Unconstitutional*, by Jennifer K. Elsea (2021).

[134] National Defense Authorization Act for Fiscal Year 2020, P.L. 116-92, § 1234, 133 Stat. 1198, 1649 (2019) (codified at 22 U.S.C. § 2593a note).

[135] OLC Open Skies Opinion, 44 Op. O.L.C., slip. op. at 31; *see also id.* at 15, 16–17 (arguing that the notice requirement "contravenes an exclusive power of the President, and it may not be justified as the exercise of any concurrent power of Congress," and that by imposing the requirement, "Congress injected itself into the decision whether and when to terminate a treaty, thereby interfering with the President's ability to take the sort of 'decisive" or 'immediate action' that the Constitution authorizes the President to undertake in the conduct of foreign affairs") (quoting *Zivotofsky II*, 576 U.S. at 15; Goldwater v. Carter, 617 F.2d 697, 706 (D.C. Cir.), *vacate*d, 444 U.S. 996 (1979)).

[136] *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are entitled to some weight but do not have the force of judicial decisions).

[137] *See* MEMORANDUM FROM DAVID J. BARRON, ACTING ASSISTANT ATT'Y GEN., OLC, TO ATT'YS OF THE OFFICE, RE: BEST PRACTICES FOR OLC LEGAL ADVICE AND WRITTEN OPINIONS 1 (July 16, 2010), https://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf. For a discussion of the statutory and historical underpinnings of the authority of OLC opinions for the executive branch, see Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012), which explains: "The foundation of the OLC's authority to issue binding opinions on the rest of the executive branch is based on the [statutory] authority of the Attorney General to issue such opinions, and administrative traditions within the Department of Justice and the executive branch." *Id.* at 237 (citing 28 U.S.C. § 512).

[138] *See* National Defense Authorization Act for Fiscal Year 2024, P.L. 118-31, § 1250A, 137 Stat. 136 (2023) (codified at 22 U.S.C. § 1928f).

against them all."[139] Section 1250A of the 2024 National Defense Authorization Act (NDAA) prohibits the President from "suspend[ing], terminat[ing], denounc[ing], or withdraw[ing] the United States from the North Atlantic Treaty" without Senate advice and consent or an act of Congress.[140] In signing the bill into law, President Biden stated his position was that a number of the NDAA's provisions interfered with the President's constitutional authorities related to foreign affairs, but he did not mention Section 1250A.[141] During his presidency, President Biden did not publicly withdraw the 2020 OLC opinion claiming exclusive presidential power to withdraw the United States from treaties.

Section 1250A appears to be the first, and thus far the only, congressional prohibition of unilateral withdrawal from a treaty by the President. Congress has also enacted other types of restrictions related to treaty withdrawal that arguably reflect a congressional understanding that treaty withdrawal authority is shared rather than exclusive to the President. Potential examples include the statute requiring that the President provide Congress with a notice period before withdrawing from the Open Skies Treaty,[142] statutory restrictions on the President's ability to unilaterally modify treaties,[143] and statutes prohibiting the President from altering U.S. international legal obligations (as treaty withdrawal would) unless through a Senate-approved treaty.[144]

[139] North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 241, 34 U.N.T.S. 243.

[140] P.L. 118-31, § 1250A(a), 137 Stat. 136 (2023) (codified at 22 U.S.C. § 1928f(a)).

[141] *See* Presidential Statement on Signing the NDAA for Fiscal Year 2024, 2023 DAILY COMP. PRES. DOC. 1145 (Dec. 22, 2023).

[142] *See supra* note 134.

[143] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2017, P.L. 114-328, § 1035(3), 130 Stat. 2000, 2391 (2016) (prohibiting the use of funds "to implement a material modification to the Treaty Between the United States of America and Cuba signed at Washington, D.C. on May 29, 1934 that constructively closes United States Naval Station, Guantanamo Bay").

[144] *See, e.g.*, Consolidated Appropriations Act for Fiscal Year 2000, P.L. 106-113, § 705(a), 113 Stat. 1501, 1501A-461 (1999) (codified at 22 U.S.C. § 7401(b)) (prohibiting the United States from "becom[ing] a party to the International Criminal Court except pursuant to a [Senate-approved] treaty"); Arms Control and Disarmament Act, Pub. L. No. 87-297, § 33, 75 Stat. 631, 634 (1961) (codified as amended at 22 U.S.C. § 2753(b)) (prohibiting actions "that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner, except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution or unless authorized by the enactment of further affirmative legislation").

War Powers[145]

Many of the foreign policy powers granted to Congress in Article I concern the use of armed forces: the powers to declare war;[146] to establish, fund, and regulate federal armed forces;[147] to "provide for the common Defence";[148] to "grant Letters of Marque and Reprisal";[149] and to "make Rules concerning Captures on Land and Water."[150] Further, Congress may "make all laws which shall be necessary and proper" to execute the war powers granted to Congress and the President."[151] Article II grants the President power related to the use of armed forces with the designation as the country's "Commander in Chief."[152] Although the Supreme Court decided some early cases about the first two branches' war powers, the implications of those cases in the modern military context is unclear. To varying degrees the President and Congress have weighed in on the extent of their powers through their practice over time.

Supreme Court Caselaw

In some early nineteenth century cases, the Supreme Court discussed congressional war powers in broad terms and focused on statutory authorizations in determining whether the use of force by U.S. naval and private ships to capture French ships was lawful.[153] In one case, the Court held invalid the President's directive to capture U.S. vessels bound *from* a French port to the United States on the ground that it fell outside the scope of authority that Congress had delegated to the President to capture ships bound *to* French ports.[154] The Court explained, however, that its

[145] Since declarations of war are far less common in the post-World War II era, this report uses the broader terminology of "powers related to the use of armed forces" interchangeably with "war powers." *See* U.S. Senate, *Declarations of War by Congress*, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm ("Congress approved its last formal declaration of war during World War II. Since that time, it has agreed to resolutions authorizing the use of military force and continues to shape U.S. military policy through appropriations and oversight."); CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Matthew C. Weed (2014) (discussing every declaration of war and selected key statutory authorizations of the use of military force). The term "war powers" is also sometimes used more broadly to refer to actions taken in the national defense other than the use of force, such as various economic measures taken during war time. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 755 n.3 (1948) (citing all the Constitution's war power clauses as well as the preamble in upholding the constitutionality of a statute granting the executive broad authority to renegotiate contracts for war supplies in order to recover what it deemed to be "excessive profits").

[146] U.S. CONST. art. I, § 8, cl. 11. For an extensive discussion of the Declare War Clause, see the eight-part series of CRS Legal Sidebars summarized and linked in the first installment, *The Declare War Clause, Part I: Overview and Introduction*, by Stephen P. Mulligan (2024).

[147] U.S. CONST. art. I, § 8, 12–14.

[148] *Id.* art. I, § 8, cl. 1.

[149] *Id.* art. I, § 8, cl. 11.

[150] *Id.* art. I, § 8, cl. 11.

[151] *Id.* art. I, § 8, cl. 18.

[152] *Id.* art. II, § 2. For more information on the war powers granted to Congress in Article I, see Cong. Rsch. Serv., *ArtII. S8.C11.1 Sources of Congress's War Powers*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C11-1/ALDE_00013587/ (last visited May 1, 2025).

[153] *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) ("The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be restored to as our guides in this enquiry."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–43 (1800) (recognizing Congress's power to authorize the private capture of French ships based on the existence of hostile relations between the United States and France falling short of war).

[154] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804).

decision left open the question of whether the President would have unilateral constitutional power to take such action absent any congressional restriction.[155]

Some of the Court's later nineteenth century cases include reasoning suggesting that there are two areas in which the President has unilateral Article II authority related to the use of armed force, but the Court provided minimal guidance on the extent the President may exercise authority in these areas. First, in *Ex parte Milligan*,[156] Chief Justice Salmon Chase posited in a concurring opinion joined by three other Justices that the President has some independent—and possibly exclusive—power to direct military campaigns:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success*, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief*.[157]

Second, in the *Prize Cases*[158] the Court upheld President Lincoln's blockade of southern ports on the ground that the President has power to defend U.S. territory against an insurrection or invasion in the absence of a congressional declaration of war or other "special" authorization to use force.[159] The Court was unclear, however, about whether the source of this power was the President's Article II authority alone or that authority combined with broad congressional authorization.[160] The Court observed that the President "is bound to take care that the laws be faithfully executed" and "is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."[161] Although the President "has no power to initiate or declare a war," the Court continued, "by [various] Acts of Congress ... he is authorized to called [sic] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States."[162] Accordingly, the Court concluded: "If a war be made by invasion of a foreign nation, the President *is not only authorized* but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any *special* legislative authority."[163]

Along with these early Supreme Court cases, founding era documents and the War Powers Resolution (WPR), provide some support for the claim that the President has some degree of independent power both to direct military campaigns and to act in defense of the nation against an

[155] *See id.* ("It is by no means clear that the president of the *United States* whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the *United States*, might not, *without any special authority for that purpose*, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels" bound to or from France. (third emphases added)).

[156] 71 U.S. (4 Wall.) 2 (1867).

[157] *Id.* at 139 (Chase, C.J., concurring) (emphasis added).

[158] The Brig Amy Warwick, 67 U.S. (2 Black) 635 (1862) (5–4 decision).

[159] *See id.* at 668.

[160] *See id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* (emphasis added).

invasion or insurrection.[164] These independent powers are also recognized by many commentators,[165] even if their contours are debated.[166] Courts have, however, largely declined to weigh in on challenges to presidential use of the armed forces on nonjusticiability grounds such as standing and the political-question doctrine.[167] As in the context of treaty withdrawal, the actions and inactions of Congress in relation to presidential claims of authority could impact judicial evaluation of powers related to the use of armed forces in any future cases should courts agree to hear them.

War Powers According to Congress

A principal mechanism through which Congress has advanced its interpretation of the division of wars powers is the 1973 WPR,[168] which was enacted after Congress overrode President Nixon's veto.[169] Congress's stated purpose in the WPR is "to fulfill the intent of the framers of the Constitution" by "insur[ing] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations

[164] *See, e.g.*, Scott R. Anderson, *Taiwan, War Powers, and Constitutional Crisis*, 64 VA. J. INT'L L. 171, 192 (2023) ("While it is not expressly provided for in the text of the Constitution, records of the constitutional debates strongly suggest that the Framers also understood the president as having some inherent constitutional authority to defend the United States and repel attacks against it."); Raoul Berger, *War-Making by the President*, 121 U. PENN. L. REV. 29, 39–44 (1972) (discussing Continental Congress deliberations relevant to the extent of the President's powers as Commander in Chief to defend the nation against attacks); *infra* "War Powers According to Congress."

[165] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 97–98 (2d ed. 1996) (characterizing the President's "authority to wage war if the U.S. were attacked" as "the accepted exception" to Congress's "power to decide for war or peace); Rebecca Ingber, *The Insidious War Powers Status Quo*, 133 YALE L.J. FOR. 747, 752 (2024) ("It is well established that the President has some amount of constitutional authority to use force unilaterally. The Framers expected that the President could use force to repel a sudden invasion on the nation.... "); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 696–97 (2008) (in arguing against the position that the President has broad exclusive war powers, recognizing that the President's Commander-in-Chief power at least includes "retain[ing] control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statutory limitations," and "a limited power to act in times of necessity when it would be infeasible to obtain legislative permission because Congress is unavailable").

[166] *See generally, e.g.*, Barron & Lederman, *supra* note 165 (discussing and weighing in on dispute over the scope of the President's Commander-in-Chief power); *infra* "War Powers According to the President."

[167] *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 288, 297, 302−04 (D.D.C. 2016) (dismissing on both political question and standing grounds a case challenging the constitutionality of President Obama's military campaign against the Islamic State of Iraq and the Levant (ISIL)), *vacated, appeal dismissed sub nom.* Smith v. Trump, 731 F. App'x 8 (D.C. Cir. 2018); Whitney v. Obama, 845 F. Supp. 2d 136 (D.D.C. 2012); Doe v. Bush, 323 F.3d 133 (1st Cir. 2003) (dismissing a case seeking to prevent President George W. Bush from invading Iraq on the grounds that the dispute was not ripe for review); Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (affirming dismissal for lack of standing a lawsuit by Members of Congress challenging the President's authority to direct the military to participate in hostilities in Yugoslavia); Ange v. Bush, 752 F. Supp. 509, 510 (D.D.C. 1990) (dismissing challenge to President George H.W. Bush's authority to deploy servicemembers to the Persian Gulf during the First Gulf War as a nonjusticiable political question); Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987) (dismissing on political question grounds a suit brought by Members of the House of Representatives seeking declaratory and injunctive relief for President Reagan's failure to submit a WPR report on military operations in the Persian Gulf against Iranian naval vessels); Crockett v. Reagan, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (affirming dismissal on political question grounds of suit brought by Members of Congress challenging President Reagan's deployment of U.S. troops to Nicaragua without providing a WPR notification to Congress), *cert. denied*, 467 U.S. 1251 (1981).

[168] H.R.J. Res. 542, 93d Cong. (1973).

[169] *See* WPR, P.L. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–48); RICHARD NIXON, VETOING HOUSE JOINT RESOLUTION 542, A JOINT RESOLUTION CONCERNING THE WAR POWERS AND THE PRESIDENT, H.R. DOC. NO. 93-171 (1973).

where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[170]

Congress stated its understanding of the scope of the President's independent Article II power "to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" in Section 2(c) of the WPR: Absent "a declaration of war" or "specific statutory authorization," this section provides that the President has authority to take such action only in response to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[171]

Although the WPR does not define "national emergency" or "attack," the law arguably suggests that, whatever the full scope of the President's independent constitutional authority to deploy U.S. armed forces to respond to "a national emergency created by an attack" absent congressional authorization, Congress understands this authority to be temporally limited. In the absence of a declaration of war, the WPR requires the President to submit to Congress a report within 48 hours of introducing U.S. forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[172] The WPR provides that the President must withdraw U.S. forces within 60 days after such a WPR report was submitted or required to be submitted (whichever is earlier) unless Congress "(1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."[173] This 60-day clock may be extended by 30 days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[174]

The WPR elaborates on "specific statutory authorization" by providing that it "shall not be inferred ... from any provision of law ... including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities ... and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution."[175] Additionally, the WPR states that the requisite statutory authorization "shall not be inferred ... from any treaty ... unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities ... and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution."[176]

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[170] WPR, *supra* note 169, § 2(a)(1) (codified at 50 U.S.C. § 1541(a)(1)).

[171] *Id.* § 2(c) (codified at 50 U.S.C. § 1541(c)). The WPR states that it is based on Congress's power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." *Id.* § 2(b) (codified at 22 U.S.C. § 1541(b)).

[172] *Id.* § 4(a)(1) (codified at 50 U.S.C. § 1543(a)(1)). A WPR report is also required whenever U.S. forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces" or "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." *Id.* § 4(a)(2)–(3) (codified at 50 U.S.C. § 1543(a)(2)–(3)). Such reports do not, however, trigger the clock for termination of the use of force or the expedited procedures described *infra* notes 173, 178–181 and accompanying text.

[173] *Id.* § 5(b)(2) (codified at 50 U.S.C. § 1544(b)(2)).

[174] *Id.*

[175] *Id.* § 8(a)(1) (codified at 50 U.S.C. § 1547(a)(1)).

[176] *Id.* § 8(c) (codified at 50 U.S.C. § 1547(a)(2)).

Most of the remainder of the WPR establishes mechanisms that equip Congress to implement its understanding of the two branches' respective war powers by overseeing and potentially constraining the President's use of armed forces in the absence of congressional authorization.[177] Specifically, the submission or required submission of a WPR report because of the introduction of U.S. armed forces into hostilities triggers the applicability of expedited procedures for congressional consideration of the President's action and possible prohibition[178] or authorization[179] before the 60-day (or 90-day if extended by the requisite presidential certification) termination deadline.[180]

In addition to expedited procedures for consideration of whether to require the President to terminate the use of U.S. armed forces, the WPR provides that Congress may require such termination by a concurrent resolution—that is, by a majority vote of both houses of Congress without presidential signature.[181] Ten years after the WPR's enactment, the Supreme Court addressed the constitutionality of what is known as the "legislative veto" provision—which allows one house to invalidate an agency's action by majority vote—in a statute unrelated to the WPR.[182] The executive branch and some commentators have interpreted this decision as also invalidating the WPR's concurrent resolution provision.[183] In response to the Court's decision,

[177] The WPR also requires the President to consult with Congress "in *every* possible instance before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction [to] consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations." *Id.* § 3 (codified at 50 U.S.C. § 1542) (emphasis added).

[178] *Id.* §§ 5(a), 5(c), 7 (codified at 50 U.S.C. § 1546(a), 1546(b), 1548).

[179] *Id.* § 6 (codified at 50 U.S.C. § 1545).

[180] The other two ways that the President's obligation to submit a WPR report are triggered, *see supra* note 172, are not subject to the 60-day termination period (or 90 days if the President submits the requisite certification) or to the expedited procedural process. *See id.* §§ 5(b)–(c); 6(a) (codified at 50 U.S.C. §§ 1544(b)–(c); 1545(a)). For a detailed explanation of the WPR expedited procedures, see CRS Report R47603, *War Powers Resolution: Expedited Procedures in the House and Senate*, by Michael Greene (2024).

[181] *See* WPR, *supra* note 169, § 5(c) (codified at 50 U.S.C. § 1544(c)) ("[A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."). In its report accompanying the WPR, the House Committee on Foreign Affairs characterized the automatic-termination provision of Section 5(b) and the concurrent resolution option in Section 5(c) as "major provisions" of the WPR. *War Powers Resolution of 1973: Report to Accompany H.J. Res. 542*, 93d Cong. 10 (1973).

[182] *See* INS v. Chadha, 462 U.S. 919, 956–59 (1983) The provision at issue—§ 1254(c)(2) of the Immigration and Nationality Act (8 U.S.C. §§ 1104–1401)—allowed either house by a majority vote to overturn a decision by the Attorney General not to deport an individual. *See Chadha*, 462 U.S. at 923 (citing 8 U.S.C. § 1254(c)(2)). The Court held that such action was legislative in character and was thus subject to the bicameralism and presentment requirements of Article I. *See Chadha*, 462 U.S. at 956–59. For a discussion of the bicameralism and presentment requirements, *see* Cong. Rsch. Serv., *ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S7-C2-1/ALDE_00013644 (last visited May 1, 2025).

[183] In a dissent, Justice Powell criticized the majority's decision for "strik[ing] down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history" and attached an appendix with a reprint of a portion of the Senate's brief with a list of statutory provisions authorizing a legislative veto by one or both houses, which included Section 5(c) of the WPR. *Chadha*, 462 U.S. at 1002, 1003 app. 1 (Powell, J., dissenting). Some commentators have argued that Section 5(c) is not impacted by *Chadha* because it is constitutionally distinctive from the provision struck down in that decision. *See, e.g.*, John Hart Ely, *Suppose Congress Wanted a War Powers Resolution That Worked*, 88 COLUM. L. REV. 1379, 1396 (1988) ("Section 5(c) does not fit the profile of a standard 'legislative veto' wherein Congress has delegated certain powers to the executive branch and then attempted to pull them back by reserving a right to veto executive exercises of the delegation. Instead, it should be read ... as part of a package attempting in concrete terms to approximate the accommodation reached by the Constitution's framers, that the President could act militarily in an emergency but was obligated to cease and desist in the event Congress did not approve as soon as it had a reasonable opportunity to do so.").

Congress did not amend the WPR but enacted separate legislation in 1983 providing for expedited procedures in the Senate for "[a]ny joint resolution or bill introduced in either House which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization."[184]

Congress has required additional reporting from the President regarding use of armed forces since enactment of the WPR.[185] No law requiring the President to terminate use of U.S. armed forces engaged in hostilities outside of U.S. territory has ever been enacted, but Congress has periodically used the expedited procedures to consider directing the President to terminate the use of U.S. armed forces.[186] Congress passed such legislation in response to the first Trump Administration's strikes in Iran in 2020,[187] but ultimately failed in its attempt to override President Trump's veto.[188]

Even in the absence of a statutory directive to terminate use of U.S. armed forces, however, the WPR's default provision requiring termination in 60 (or 90) days would arguably render any continued use of U.S. armed forces absent congressional approval in contravention of the WPR. If a court were to make that determination, it would potentially place the President's action in category three of the *Youngstown* framework, where presidential authority is at its "lowest ebb" and will only be upheld if the President's authority exercised is "exclusive and preclusive" of congressional authority.[189] Although some cases have been filed challenging presidential actions on the ground that they violate the WPR, courts have thus far declined to hear them.[190]

War Powers According to the President

The executive branch has advanced its own interpretations of the President's independent Article II war powers, which have generally been more expansive than the interpretation advanced by Congress in the WPR. Two of the primary avenues through which the executive branch has provided arguments for its claims of war powers are OLC opinions and the President's WPR reports to Congress. OLC opinions have played a particularly prominent role in the development of executive branch interpretations of the scope of the President's unilateral war powers because the opinions have analyzed the constitutionality of a wide variety of military actions over time,

[184] Department of State Authorization Act, Fiscal Years 1984 and 1985, P.L. 98-164, 97 Stat. 1017, § 1013, 1062–63 (1983) (codified at 50 U.S.C. § 1543a).

[185] *See, e.g.*, 50 U.S.C. §§ 1549–1550 (requiring the President to submit an annual report to Congress "on the legal and policy frameworks for the United States' use of military force and related national security operations" by March 1 of each year).

[186] See CRS Report R42699, *The War Powers Resolution: Concepts and Practice*, by Matthew C. Weed (2019).

[187] *See* S.J.Res. 68, 116th Cong. § 2(a) (2020). For a discussion of this congressional action and the larger context, see CRS Report R46148, *U.S. Killing of Qasem Soleimani: Frequently Asked Questions*, coordinated by Clayton Thomas (2020).

[188] *All Actions:* S.J.Res. 68—*116th Congress (2019–2020*; Press Release, Donald J. Trump, President of the United States, Presidential Veto Message to the Senate for S.J.Res. 68 (May 6, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/presidential-veto-message-senate-s-j-res-68/.

[189] *See supra* text accompanying note 18.

[190] *See, e.g.*, Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987) (dismissing on political question grounds a suit brought by Members of the House of Representatives seeking declaratory and injunctive relief for President Reagan's failure to submit a WPR report on military operations in the Persian Gulf against Iranian naval vessels); Crockett v. Reagan, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (affirming dismissal on political question grounds of suit brought by Members of Congress challenging President Reagan's deployment of U.S. troops to Nicaragua without providing a WPR notification to Congress), *cert. denied*, 467 U.S. 1251 (1981).

ranging from large-scale and long-term conflicts to short-term bombing campaigns.[191] In many opinions, OLC cites its previous opinions as authority alongside caselaw.[192] In the absence of much directly controlling judicial precedent regarding the use of armed forces, OLC opinions on war powers feature prominently in executive branch interpretations of Article II authorities.

In part based on the position that the WPR's restrictions infringed on the President's constitutional powers, President Nixon vetoed the WPR,[193] and subsequent administrations have continued to contest the constitutionality of the WPR based on the executive branch's interpretations of independent presidential authority to use armed force,[194] which have generally tended to become more expansive over time. In a 1984 opinion, the OLC stated: "Were the Executive to concede that § 2(c) [of the WPR] represented a complete recitation of the instances in which United States Armed Forces could be deployed without advance authorization from Congress, the scope of the Executive's power in this area would be greatly diminished."[195]

Executive branch interpretations of the President's war powers that have been asserted in OLC opinions and WPR Reports generally concern two categories: (1) independent presidential authority to initiate military operations; and (2) independent presidential authority to use force in self-defense.

Executive Branch Claims of Independent Authority to Initiate the Use of Armed Forces

The OLC has never proffered a competing "complete recitation" of its understanding of the President's independent authorities to initiate the use of armed forces in the absence of congressional authorization and has explicitly declined to do so.[196] The OLC has, instead, provided a non-exhaustive list of the situations in which it believes the President has such

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[191] *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 3–4 (2018) ("The President's authority in th[e] area [of war powers] has been elucidated by dozens of occasions over the course of 230 years, quite literally running from the halls of Montezuma to the shores of Tripoli and beyond. Many of those actions were approved by opinions of th[e] [OLC] or of the Attorney General.").

[192] *See, e.g.*, *infra* note 198.

[193] *See* H. EXEC. DOC. NO. 93-171, Message from the President of the United States Vetoing H.J.Res. 542, A Joint Resolution Concerning the War Powers of Congress and the President, at 1 (Oct. 25, 1973) 1 (claiming that the WPR "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years").

[194] *See, e.g.*, Memorandum from Daniel L. Koffsky, Acting Assistant Att'y General, OLC, to Alan Kreczko, Special Assistant to the President and Legal Adviser, Nat'l Sec. Council, Legal Assessment of the WPR 13 (June 9, 1993), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19930609_legal_assessment_of_the_war_powers_resolution.pdf ("Since President Nixon vetoed the WPR, no administration has affirmatively recognized its constitutionality. . . . The controversy over the WPR stems from sharply different views of the constitutional division of war powers.").

[195] *See* Overview of the WPR, 8 Op. O.L.C. 271, 274 (1984), https://www.justice.gov/sites/default/files/olc/opinions/1984/10/31/op-olc-v008-p0271.pdf.

[196] *See id.* ("Any attempt to set forth all the circumstances in which the Executive has deployed or might assert inherent constitutional authority to deploy United States Armed Forces would probably be insufficiently inclusive and potentially inhibiting in an unforseen [sic] crisis."); *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the H. Comm. on International Relations*, 94th Cong. 90–91 (1975) (statement of Monroe Leigh, Legal Adviser, Dep't of State) (after listing certain situations in which the President would have independent authority to use force, noting that "[w]e do not ... believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised").

authority.[197] Further, in more recent years, the OLC has articulated a two-part inquiry for determining the situations where such authority exists. According to that inquiry, the President has independent power to initiate the use of armed forces if: (1) "the President could reasonably determine that the [military] action serves important national interests"; and (2) "the anticipated nature, scope and duration of the conflict [would not] rise to the level of a war under the Constitution."[198] The OLC maintains that the President's independent constitutional authority in situations meeting these two conditions "derives from the President's 'unique responsibility,' as Commander in Chief and Chief Executive, for 'foreign and military affairs,' as well as national security."[199]

According to the OLC, the identification of qualifying "national interests" is largely within the President's discretion as "a question more of policy than of law."[200] "The aim," according to the OLC, "is ... to set forth the justifications for the President's use of military force and to situate those interests within a framework of prior precedents."[201] The OLC has posited that that body of prior precedents is large: "This Office has recognized that a broad set of interests would justify use of the President's Article II authority to direct military force."[202] Interests that the executive branch has maintained amount to "national interests" range from seemingly relatively discrete ones—such as protecting U.S. citizens and property abroad[203]—to ones phrased more broadly—

[197] The OLC has maintained that "the President ha[s] constitutional authority as Commander-in-Chief to direct United States Armed Forces into combat without specific authorization from Congress" in at least six situations:

1. To rescue Americans;
2. To rescue foreign nationals where doing so facilitates the rescue of Americans;
3. To protect U.S. Embassies and legations;
4. To suppress civil insurrection in the United States;
5. To implement and administer the terms of an armistice or cease fire designed to terminate hostilities involving the United States; and
6. To carry out the terms of security commitments contained in treaties.

Overview of the WPR, 8 Op. O.L.C. at 274.

[198] April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op at 9–10. In this 2018 opinion, the OLC stated that it had "distilled" this inquiry from prior OLC opinions that it cited in support of each part of the inquiry. *See id.*

[199] Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 28 (2011) (quoting Sale v. Haitian Ctrs. Council, 509 U.S. 155, 188 (1993)). This determination appears to build on OLC's prior claims that "in establishing and funding a military force that is capable of being projected anywhere around the globe, Congress has given the President, as Commander in Chief, considerable discretion in deciding how that force is to be deployed." Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 174, 177 (1994); *see also, e.g.*, Authority of the President to Use Force Against Iraq, 26 O.L.C. 143, 151–52 (2002) ("Article II vests in the President, as Chief Executive and Commander in Chief, the constitutional authority to use such military forces as are provided to him by Congress to engage in military hostilities to protect the national interest of the United States ... Presidents have long undertaken military actions pursuant to their constitutional authority as Chief Executive and Commander in Chief and their constitutional authority to conduct U.S. foreign relations."); Proposed Bosnia Deployment, 19 Op. O.L.C. 327, 333 (1995) ("[T]he relationship of Congress's power to declare war and the President's authority as Commander in Chief and Chief Executive has been clarified by 200 years of practice," which "supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not 'wars' in either the common meaning or the constitutional sense.").

[200] April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 10; *see also id.* ("These interests understandably grant the President a great deal of discretion ... ").

[201] *Id.*

[202] *Id.*

[203] *See, e.g.*, Authority to Use Military Force in Libya, 35 Op. O.L.C. at 29 ("[T]he President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or (continued...)

such as maintaining regional stability,[204] responding to humanitarian crises,[205] and "preserving the credibility and effectiveness of the United Nations Security Council."[206]

In light of the fact that the OLC understands the answers to the "national interests" inquiry to essentially be within the discretion of the President,[207] the arguably constraining part of the inquiry appears to be the second one: whether the "anticipated nature, scope and duration of the conflict" would amount to "war" in the constitutional sense. The OLC has provided a non-exhaustive set of factors that it maintains are relevant in making this determination, including the "antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment,"[208] whether "the planned deployment ... would ... involve extreme use of force,"[209] whether the operation has a "limited mission,"[210] and whether it is "likely that the United States [would] find itself in *extensive* or *sustained* hostilities."[211]

Such a factor-based analysis arguably affords a considerable amount of discretion to the President. The OLC has stated that the question of whether a military operation amounts to "war"

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rescue, or for the purpose of protecting American lives or property or American interests.") (quoting Training of British Flying Students in the United States, 40 Op. Att'ys Gen. 58, 62 (1941)); Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 8, 9 (1992) (stating that the DOJ and the OLC "have concluded that the President has the [constitutional] power to commit United States troops abroad for the purpose of protecting important national interests," and that [a]t the core of this power is the President's authority to take military action to protect American citizens, property, and interests from foreign threats"); Presidential Powers Related to the Situation in Iran, 4A Op. O.L.C. 115, 121 (1979) ("It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad.").

[204] *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 11 (listing "promoting regional stability" as among the "interests that have supported sending U.S. forces into harm's way," and claiming that this interest supported the President's airstrikes in Syria in 2018); Authority to Use Military Force in Libya, 35 Op. O.L.C. at 36 (concluding that the promotion of regional stability justified the President's military operations in Libya, reasoning that "we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region").

[205] *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 11, 14–16 (identifying "the prevention of a worsening of the region's humanitarian catastrophe," as among the interests that supported the President's ordering of airstrikes in Syria in 2018).

[206] *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. at 37 (noting that the OLC "has recognized that 'maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest' on which the President may rely in determining that U.S. interests justify the use of military force," and maintaining that this interest supported the President's military operations in Libya because the U.N. Security Council's "credibility and effectiveness as an instrument of global peace and stability were at stake in Libya") (quoting Proposed Bosnia Deployment, 19 Op. O.L.C. 327, 333 (1995)); *see also* April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 11 (listing "support for the United Nations" as among the "interests that have supported sending U.S. forces into harm's way"). The OLC also recently identified "deterring the use and proliferation of chemical weapons" as among the national interests that may justify the President's initiation of the use of armed force absent congressional authorization. April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 16. In so doing, it stated: "While we are unaware of prior Presidents justifying U.S. military actions based on this interest as a matter of domestic law, we believe that it is consistent with those that have justified previous uses of force." *Id.*

[207] *Cf.* April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 12 ("[A]s [U.S.] power has grown, the breadth of its regional interests has expanded and threats to national interests posed by foreign disorder have increased.").

[208] Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. at 179.

[209] *Id.*

[210] Authority to Use Military Force in Libya, 35 Op. O.L.C. at 38 (quoting Proposed Bosnia Deployment, 19 Op. O.L.C. at 333).

[211] April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 20.

in the constitutional sense "is highly fact-specific and turns on no single factor.[212] Further, it appears that the executive branch relies almost entirely on its own opinions and interpretation of history in determining whether a military operation would amount to "war."[213] By way of illustration, in at least two instances, the OLC has maintained that operations involving airstrikes and no ground forces fell short of "war" because the risk to U.S. troops was limited.[214] At the same time, the OLC has also claimed that deployment of ground forces does not necessarily make the operation amount to "war" if other factors appear to mitigate the risk to troops, and has further emphasized that the deployment need not be "without some risk" in order to be within the President's independent constitutional authority.[215] Based on such reasoning, the OLC determined in 1994 that the President had unilateral authority to deploy U.S. armed forces in Bosnia, even though the President's "deployment of 20,000 troops *on the ground* ... raise the risk that the United States will incur (and inflict) casualties," and that "[d]isengagement of ground forces can be far more difficult than the withdrawal of forces deployed for air strikes or naval interdictions," because other factors sufficiently mitigated those risks.[216]

It appears that the executive branch has not yet publicly maintained that the President's independent presidential authority to initiate the use of armed forces short of "war" to pursue "important national interests" is necessarily exclusive, but rather only that it "exists *at least insofar as Congress has not specifically restricted it*."[217] It is not clear what position the executive branch would take if pressed to do so by such a congressional restriction.[218] As noted, although

[212] Authority to Use Military Force in Libya, 35 Op. O.L.C. at 37.

[213] *See* John Dehm, *War Is More Than a Political Question: Reestablishing Original Constitutional Norms*, 51 LOY. U. CHI. L.J. 485, 488 (2019) ("What is meant by 'war in the constitutional sense' is not clear and has changed over time.").

[214] *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facility, 42 Op. O.L.C., slip op. at 20 (concluding that the President's ordering of airstrikes in Syria did not amount to "war" for constitutional purposes in part based on the fact that no ground troops were deployed in the operation); Authority to Use Military Force in Libya, 35 Op. O.L.C. at 38(maintaining that "[t]he planned operations ... avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces" because "President Obama determined that the use of force in Libya ... would be limited to airstrikes and associated support missions").

[215] Proposed Bosnia Deployment, 19 Op. O.L.C. 327, 334 (1995).

[216] *Id.* at 333–34. The OLC opined that such factors included that the U.S. forces were part of a NATO operation supporting a peace agreement and that they were there with the consent of the parties to that agreement. *Id.*

[217] Authority to Use Military Force in Libya, 35 Op. O.L.C. at 28 (emphasis added); *cf. also* Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. at 177 ("By declining, in the WPR or other statutory law, to prohibit the President from using his conjoint statutory and constitutional powers to deploy troops into situations like that in Haiti, Congress has left the President both the authority and the means to take such initiatives.").

[218] In some memoranda written during the period from 2001 to 2003 that were subsequently withdrawn, the OLC argued that Congress could not interfere with the President's constitutional authority as Commander in Chief to detain and interrogate "enemy combatants," and that certain statutes would be unconstitutional to the extent that they restricted that authority. *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, OLC, Standards of Conduct for Interrogation under 18 U.S.C §§ 2340-2340A, at 31–39 (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."). Additionally, in a 2009 memorandum, the OLC stated:

> A number of OLC opinions issued in 2002-2003 advanced a broad assertion of the President's Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror. The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President.

Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, Memorandum for the Files, Status of Certain
(continued...)

Congress has passed legislation requiring the President to terminate the use of armed forces,[219] it has never successfully enacted such legislation over the President's veto.[220]

The executive branch's precedent for its assertions of independent authority to initiate the use of armed forces that it deems to be both in the "national interest" and short of "war" has accumulated and tended to expand over time. According to the OLC, "the 'pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, evidences the existence of broad constitutional power.'"[221] This assertion may arguably draw on Supreme Court caselaw recognizing that, in interpreting the constitutional allocation of powers between the political branches, courts often "put significant weight upon historical practice."[222] The executive branch has relied on similar reasoning in making arguments about the scope of the President's independent authority to use armed force in self-defense, as addressed below.

Executive Branch Claims of Independent Presidential Authority to Use Armed Forces in Self-Defense

As discussed, both Supreme Court precedent and the WPR appear to recognize that the President has some independent Article II authority to use armed forces in self-defense—specifically, to defend the nation from an "invasion by a foreign nation" (in the words of the Supreme Court)[223] or in response to a "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces" (in the terms of the WPR).[224] The executive branch's interpretation of its independent authority to use defensive force appears to be broader than that recognized by either the Supreme Court or Congress.[225]

OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, at 2 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf.

The implications of the withdrawal of these opinions and repudiation of statements in others for the OLC's current position regarding the President's unilateral authority to use armed forces abroad is unclear.

[219] *See* S.J.Res. 68, 116th Cong. § 2(a) (2020) ("Congress hereby directs the President to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran.").

[220] *See* Presidential Veto Message to the Senate for S.J.Res. 68 (May 6, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/presidential-veto-message-senate-s-j-res-68/; Role Call Vote 116th Cong-2d Session, *On Overriding the Veto (Shall the Joint Resolution* S.J.Res. 68 *Pass, the Objections of the President of the United States to the Contrary Notwithstanding?)* (May 7, 2020), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1162/vote_116_2_00084.htm.

[221] Authority to Use Military Force in Libya, 35 Op. O.L.C. at 29–30 (quoting Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. at 178); *see also id.* at 29 ("'Our history,' this Office observed in 1980, 'is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.' Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993–1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation.") (quoting Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980)).

[222] *Zivotofsky II*, 576 U.S. at 23 (quoting NLRB v. Noel Canning 573 U.S. 513, 524 (2014)); *see also supra* "Congress's Role in the Interpretation of Constitutional Meaning: Historical Practice."

[223] *See The Brig Amy Warwick*, 67 U.S. (2 Black) at 668; *see also supra* text accompanying notes 158–163.

[224] WPR, *supra* note 169, § 2(c); *see also supra* text accompanying notes 170–171.

[225] *See generally, e.g.*, Jack Goldsmith, *The Middle East and the President's Sweeping Power Over Self-Defense*, LAWFARE, Oct. 23, 2023, https://www.lawfaremedia.org/article/the-middle-east-and-the-president-s-sweeping-power-over-self-defense (arguing that the "self-defense-at-home notion [recognized by the Supreme Court] has expanded dramatically over the centuries to include various rationales that apply to self-defense abroad").

Post-World War II, the executive branch has sometimes incorporated broad interpretations of when nation states may use force in self-defense under international law into the President's claimed Article II authority to use armed forces without congressional authorization. Using such reasoning, the executive branch has argued that the President's independent constitutional authority to use defensive force encompasses both "collective self-defense"—defending partner forces[226]—and "anticipatory" self-defense—"preemptive" self-defense to prevent anticipated attacks.[227] Additionally, the executive branch has maintained that the United States has the right under international law to use armed forces against non-state actors within another state's territory without that state's consent if that state is "unwilling and unable" to counter the threat posed by the non-state actors.[228] Although Presidents have sometimes justified the use of armed forces in such circumstances based on statutory authorizations for the use of military force as well

[226] *See, e.g.*, Press Release, U.S. Africa Command, *U.S. Africa Command Conducts Strike Against al-Shabaab* (Aug. 24, 2021) (announcing that "U.S. Africa Command conducted a collective self-defense strike against al-Shabaab fighters engaged in active combat with our Somali partners in the vicinity of Cammaara, Somalia, on Aug. 24, 2021"); Permanent Representative of the United States of America to the United Nations, Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, [hereinafter U.S. 2014 Article 51 Letter] ("ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations.").

[227] *See, e.g.* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 9 (2016), [hereinafter 2016 LEGAL AND POLICY FRAMEWORK REPORT ON USE OF FORCE] ("Under [international law governing the use of force], a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to imminent attacks before they occur.... [A]s is now increasingly recognized by the international community, the traditional conception of what constitutes an "imminent" attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations."); NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002) (arguing that, in the post-Cold War era, "[w]e must adapt the concept of imminent threat" in international law to allow for "anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack," and thus that, "[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively").

The executive branch has stated that it uses "a variety of factors" in "considering whether an armed attack is imminent . . . for purposes of the initial use of force against another State or on its territory," including:

> the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.

2016 LEGAL AND POLICY FRAMEWORK REPORT ON USE OF FORCE, *supra* note 227, at 9 (quoting Daniel Bethlehem, Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors, 106 AM. J. INT'L L. 769, 775 (2012)).

[228] *See* 2016 LEGAL AND POLICY FRAMEWORK REPORT ON USE OF FORCE, *supra* note 227, at 10 ("Under international law, states may defend themselves [individually or collectively] ... [in] cases in which there is a reasonable and objective basis for concluding that the territorial State is unable or unwilling to confront effectively a non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State's territory without its consent."); U.S. 2014 Article 51 Letter, *supra* note 226 (in justifying the United States' military actions in Syria, maintaining that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence ... when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks").

as on Article II authority,[229] they also appear to have done so based on Article II authority alone.[230]

In recent years, the executive branch has advanced another theory of the President's independent authority to use defensive force. Under this theory, which executive branch officials have referred to as "ancillary defense,"[231] when the United States is engaged in military operations, the President has independent Article II authority to use armed forces in self-defense or to defend partners, even against threats that may be largely unrelated to the primary mission and the authorities underlying it. Thus far, it appears that the executive branch has asserted "ancillary defense" authority in the context of military operations that it has maintained it carried out pursuant to statutory authorizations for the use of military force (AUMFs).[232] According to the executive branch, "[s]tatutes that authorize the use of necessary and appropriate force, including the 2001 AUMF and 2002 AUMF,[233] encompass the use of force both to carry out the missions under the statutes and to defend U.S. or partner forces as they pursue those missions."[234]

It is unclear whether the executive branch would argue that this "ancillary defense" theory applies not only in cases involving statutory authorizations, but also in cases involving military operations that the executive branch initiated based on its asserted independent Article II authority to use armed forces (i.e., to use armed forces in the "national interest" if it anticipates that the operation will fall short of "war" in the constitutional sense). Such an argument would

[229] *See e.g.*, Letter from Barack Obama to Congressional Leaders Reporting on the Commencement of United States Military Operations in Syria (Sept. 23, 2014).

[230] *See e.g.*, Letter from Joseph R. Biden to the Speaker of the House and President pro tempore of the Senate consistent with the WPR (P.L. 93-148) (Feb. 26, 2024).

[231] *Authorizations of Use of Force-Administration Perspectives: Hearings Before the S. Comm. on Foreign Relations* 44, 117th Cong. 2, 44 (2021), (suggesting that based on "when our military engages in authorized missions," "the concept of ancillary self-defense" permits the use of force to defend against "attack[s] from whatever source collaterally").

[232] *See* Authorization for Use of Military Force, P.L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons"); Authorization for Use of Military Force Against Iraq Resolution of 2002, P.L. 107-243, § 3(a), 116 Stat. 1488, 1501 (2002) (authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq"). For further discussion of the executive branch's interpretations of these two AUMFs, see CRS Legal Sidebar LSB11157, *Assessing Recent U.S. Airstrikes in the Middle East Under the War Powers Framework*, by Jennifer K. Elsea and Karen Sokol (2024).

[233] *See* Authorization for Use of Military Force, P.L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons"); Authorization for Use of Military Force Against Iraq Resolution of 2002, P.L. 107-243, § 3(a), 116 Stat. 1488, 1501 (2002) (authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq"). For further discussion of the executive branch's interpretations of these two AUMFs, see CRS Legal Sidebar LSB11157, *Assessing Recent U.S. Airstrikes in the Middle East Under the War Powers Framework*, by Jennifer K. Elsea and Karen Sokol (2024).

[234] REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 1, n.2 (2024); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 2, n.3 (2019).

arguably represent an expansion in the executive branch's claimed presidential authority to use armed forces without congressional authorization.

Although executive branch assertions of presidential Article II authority to use the armed forces without congressional authorization are not binding on either the courts or Congress,[235] it is possible that, if a court were to agree to hear a case challenging the President's use of the armed forces, it may find such executive branch assertions of authority and contemporaneous congressional responses legally relevant.

Legal Considerations for Congress in the Exercise of Foreign Policymaking Authorities

As discussed, the Supreme Court has held that the President has some independent Article II authority in some foreign policy areas, including executive agreements[236] and the use of the armed forces in self-defense,[237] and that the President has exclusive Article II authority to recognize foreign states.[238] The Court has not precisely delineated the scope of these authorities, however, and has struck down a statute on the ground that it interfered with a foreign policy authority exclusive to the President only once—in 2015 in *Zivotofsky II*.[239] Additionally, in *Zivotofsky II*, the Court emphasized that "it is essential the congressional role in foreign affairs be understood and respected,"[240] and declined to address the executive branch's claims that the President has exclusive authority not only to recognize foreign states, but also "to conduct diplomatic relations" and to exercise "the bulk of foreign affairs powers."[241]

There consequently remain many areas of foreign policymaking for which there is no directly controlling judicial precedent, such as treaty withdrawal and war powers.[242] In these areas, Congress may continue to exercise what it understands to be its foreign policymaking authorities in light of the Constitution's text and relevant judicial precedent, such as *Youngstown*, *Dames & Moore*, and *Zivotofsky II*.[243] Such congressional decisions may, in turn, eventually inform courts' analysis of the constitutional distribution of foreign policy powers.[244]

As Congress determines whether and how to exercise its legislative and oversight authorities in foreign policymaking, it may consider how its decisions to take or not take action may impact courts' determinations about the scope of the President's Article II authority in the long term, across administrations. As discussed in this report, Supreme Court precedent makes clear that congressional actions and inactions may factor into courts' assessment of the contours of

[235] *See supra* notes 136–137 and accompanying text.

[236] *See supra* "Supreme Court Caselaw."

[237] *See supra* "Supreme Court Caselaw."

[238] *See supra* "Exclusive Article II Authority to Recognize Foreign States."

[239] *See supra* notes 23–24 & 86 and accompanying text.

[240] *Zivotofsky II*, 576 U.S. at 21; *see also supra* text accompanying notes 107–108.

[241] *Id.* at 19–20 (quoting Brief for Respondent at 18, *Zivotofsky II*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 5035108); *see also id.* at 20 ("A formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case.").

[242] *See supra* "Foreign Policy Areas Where Distribution of Authority Is Not Yet Judicially Delineated."

[243] *See supra* "The Relevance of Congressional Actions and Inactions"; "Supreme Court Application of the *Youngstown* Framework and Consideration of Historical Practice."

[244] *See supra* "The Relevance of Congressional Actions and Inactions."

independent and exclusive Article II authority. In particular, Supreme Court caselaw suggests that:

- Delegations of broad authority to the President in foreign policy may place the President's claim of authority in *Youngstown* category one or category two, where the Supreme Court has reviewed presidential actions with a relatively high level of deference.[245] On the other hand, clear statutory restrictions on the President's authority may place the President's claim of Article II authority to act in contravention of the statute in category three, where the Court has instructed that presidential actions should be subject to a relatively high level of scrutiny.[246]
- Broad delegations of authority in foreign policy may also impact courts' interpretations of the constitutional meaning of Article II by contributing to historical practice.[247] In particular, the Supreme Court has read broad statutory grants of authority as evincing congressional acquiescence to the President's claims of authority.[248] Conversely, clear restrictions, and particularly prohibitions, may clarify *Congress's* assertions of its authority and, relatedly, assertions that the President does not possess unilateral authority—whether independent or exclusive.[249]
- Courts may also consider Congress's failure to enact legislation as demonstrating congressional acquiescence in a President's claim of authority.[250]

Additionally, Congress may consider whether it would be desirable for courts to hear challenges to the President's foreign policy actions on the ground that they exceed the President's authority. Supreme Court precedent suggests that congressional actions may impact the likelihood that courts would be willing cases regarding separation of powers foreign policymaking. For example, courts may be more likely to find standing if Congress has enacted a statute providing for a private right of action[251] or, in the case of congressional plaintiffs, if Congress or one chamber authorized them to bring suit on its behalf on the ground that its constitutional authority was infringed.[252] Further, the Supreme Court has also suggested that courts should be more willing to hear foreign policy cases involving the President's refusal to comply with a statutory directive, reasoning that such cases are more likely to be appropriate for judicial resolution rather than to present political questions.[253]

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[245] *See supra* "Congress's Role in the Level of Judicial Review Applied: The Youngstown Framework"; "Independent Article II Authority to Conclude Certain Types of Executive Agreements."

[246] *See supra* "Congress's Role in the Level of Judicial Review Applied: The *Youngstown* Framework"; "Exclusive Article II Authority to Recognize Foreign States."

[247] *See supra* "Congress's Role in the Interpretation of Constitutional Meaning: Historical Practice."

[248] *See supra* notes 32 & 61–64 and accompanying text.

[249] *See supra* text accompanying notes 99–100.

[250] *See supra* text accompanying notes 34 & 65–67.

[251] *See* Spokeo v. Robbins, 578 U.S. 330, 340–41 (2016).

[252] *See* Raines v. Byrd, 521 U.S. 811, 829 (1997) (in concluding that Members of Congress did not have standing, observing that "[w]e attach some importance to the fact that [they] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."); *cf. also* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802−03 (2015) (in holding that the Arizona Legislature had standing to sue, explaining that the body "is an institutional plaintiff asserting an institutional injury, and it commenced the action after authorizing votes in both of its chambers").

[253] *See* Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (in holding that a separation of foreign policymaking powers case did not present a nonjusticiable political question, reasoning that, because the case involved a challenge to the President's violation of a statute, "the Judiciary must decide if [the plaintiff's] interpretation of the (continued...)

statute is correct, and whether the statute is constitutional," which "is a familiar judicial exercise"). The OLC has argued that it is appropriate for the executive branch to resist judicial intervention in separation of foreign policy powers cases. *See, e.g.*, Authority to Use Military Force in Libya, 35 Op. O.L.C. at 29 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.") (quoting *Haig*, 453 U.S. at 292); Overview of the WPR, 8 Op. O.L.C. at 278 ("In this Office's view, the Administration would generally have to resist, on constitutional and jurisprudential grounds, the bringing of such issues (regarding the distribution of war powers) before the federal courts.").

Accordingly, the actions and inactions of Congress in foreign policymaking may have constitutional significance for at least four reasons. First, if a court does not intervene, Congress and the President are the principal governmental interpreters of constitutional meaning of the scope of Article II. Second, congressional actions could impact the likelihood that courts may be willing to hear challenges to Presidents' assertions of unilateral Article II authority. Third, should a court exercise judicial review, it may consider congressional actions and inactions related to a given presidential foreign policy action in determining how much deference or scrutiny to give to the President's claim of Article II authority. Finally, a court may consider congressional actions and inactions in response to presidential claims of authority over time in determining constitutional meaning of Article II that is binding on both branches.

Thus, as Congress determines whether and how to exercise its legislative and oversight authorities in foreign policy, it may consider the broader or longer-term potential constitutional implications of a given action or inaction for the scope of the President's Article II authority. In particular, Congress may consider whether courts might understand a given congressional action or inaction as authorizing the President, acquiescing in or conceding claims of independent or exclusive presidential authority, or prohibiting or otherwise restricting presidential action.

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