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## Syria, Threats of Force, and Constitutional War Powers

*In this Essay, Professor Matthew Waxman argues that debates about constitutional war powers neglect the critical role of threats of war or force in American foreign policy. The recent Syria case highlights the President's vast legal power to threaten military force as well as the political constraints imposed by Congress on such threats. Incorporating threats into an understanding of constitutional powers over war and peace upends traditional arguments about presidential flexibility and congressional checks—arguments that have failed to keep pace with changes in American grand strategy.*

In August 2013, the Syrian government of Bashar al-Assad launched a major sarin gas attack against opponents and civilians inside Syria, flagrantly crossing the “red line”—widely interpreted as an implicit threat to intervene militarily in response to chemical weapons use—that President Obama had previously declared and reiterated in public remarks.<sup>1</sup> Amid widespread suggestions that American credibility was now on the line, President Obama responded on August 31 with two simultaneous announcements: first, he had decided that the United States should respond militarily with limited strikes against Syrian government targets; and, second, notwithstanding his insistence that he had constitutional authority as Commander-in-Chief to take that action unilaterally, he would seek congressional approval to do so.<sup>2</sup> The Obama Administration then began an intensive lobbying campaign to convince

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1. See Michael R. Gordon, *Aim of U.S. Attack: Restore a 'Red Line' That Became Blurred*, N.Y. TIMES, Aug. 29, 2013, <http://www.nytimes.com/2013/08/30/world/middleeast/aim-of-a-us-attack-on-syria-sharpening-a-blurred-red-line.html>.

2. Remarks on the Situation in Syria, 2013 DAILY COMP. PRES. DOC. 1-3 (Aug. 31, 2013).

skeptical legislators and the public that following through on the proposed military strike was necessary not only to deter further chemical weapons attacks by Syrian government forces, but to deter the acquisition and use of weapons of mass destruction by other hostile regimes and terrorist organizations.<sup>3</sup>

Almost two hundred years earlier, another President drew a red line. In his 1823 address to Congress, President Monroe declared to European powers that the United States would oppose any efforts to colonize or reassert control in the Western Hemisphere.<sup>4</sup> Monroe's cabinet had been divided over the wisdom of this implied threat—which the United States at the time lacked capability to enforce without relying on British naval supremacy—but they unanimously understood that military action against any European power that crossed the line would constitutionally require congressional authorization.<sup>5</sup> Monroe's successor, John Quincy Adams, later faced complaints from opposition members of Congress that Monroe's proclamation had exceeded his constitutional authority and had usurped Congress's by committing the United States—even in a non-binding way—to resisting European meddling in the hemisphere.<sup>6</sup>

A lot changed during those two hundred intervening years. As a strategic matter, the United States grew after World War II into a military superpower with global interests and global security commitments. As a legal matter, the President effectively asserted vast powers to use military force since then, too, and neither Congress nor the courts have generally stood in his way. Every student of American constitutional war powers learns that the Framers split them between the political branches: the President is the chief executive and Commander-in-Chief, but Congress has the power to raise and support a military and to declare war. Most scholars interpret the original intent of this division as giving Congress responsibility for deciding if and when the United States should use military force (except for some narrow exceptions like repelling an invasion) and giving the President responsibility for managing the military operations authorized by Congress. At least as interpreted by the

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3. See Address to the Nation on the Situation in Syria, 2013 DAILY COMP. PRES. DOC. 2 (Sept. 10, 2013).

4. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 207-09 (2001).

5. See 6 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 202-08 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

6. See CURRIE, *supra* note 4, at 210-18.

executive branch and as exercised in practice, the President now wields vast unilateral discretion to use military force to protect U.S. interests.<sup>7</sup>

This basic story of American constitutional war powers – divided authority evolving with the vast expansion of U.S. military power into unilateral presidential authority – gives rise to several major debates among scholars and commentators about the functional merits of different constitutional allocations of power.<sup>8</sup> One major dispute concerns what allocation of power best helps to avoid unnecessary and costly wars. “Congressionalists” – or those who favor tight legislative checks on the President’s authority to use force – still rely heavily on logic, invoked by James Madison at the time of the Founding, that the more flexibly the President can use military force, the more likely it is that the United States will find itself in wars; better, therefore, to clog decisions to make war with legislative checks.<sup>9</sup> Their calls for reform usually involve narrowing and better enforcement (by all three branches of government) of purported constitutional requirements for congressional authorization of presidential uses of force, or revising and enforcing the War Powers Resolution or other framework legislation requiring express congressional authorization for military actions.<sup>10</sup> Modern “presidentialist” legal scholars – or those who favor vast unilateral executive authority to use force – usually respond that rapid action is a virtue, not a vice, in exercising

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7. On this evolution, see generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-10 (1993) (describing the original intention of the constitutional framers to place the power to go to war with Congress, and the shift in the exercise of that power in the Cold War to the President); and ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 1-25 (1973) (recounting early debates over the proper balance of executive and legislative war powers). *But see* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) (arguing that the original understanding of the Constitution supports a very broad presidential authority to use force).
  8. For a summary of these debates, see generally STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 11-51 (2013).
  9. See ELY, *supra* note 7, at 3-4; Jules Lobel, *The Relationship Between the Process and Substance of the National Security Constitution*, 15 YALE J. INT’L L. 360, 366-74 (1990) (reviewing HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990)); Michael J. Glennon, *The Gulf War and the Constitution*, FOREIGN AFF., Spring 1991, at 84, 87-88.
  10. See, e.g., ELY, *supra* note 7, at 115-131; Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 496-500 (2011); Glennon, *supra* note 9, at 99-101; *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, CONST. PROJECT (2005), <http://www.constitutionproject.org/pdf/28.pdf>; see also LOUIS FISHER, *PRESIDENTIAL WAR POWER* 261-81 (2d ed. 2004) (discussing frequently raised objections to the War Powers Resolution).

military force.<sup>11</sup> Especially as a superpower maintaining global interests and facing global threats, presidential discretion to take rapid military action—wielded by a branch endowed with what Alexander Hamilton called “[d]ecision, activity, secrecy, and dispatch”<sup>12</sup>—best protects American interests.

Meanwhile, almost no attention has been devoted to an issue highlighted by the Syria case: How does constitutional allocation of power affect the United States’s ability to deter conduct inimical to American interests or to resolve foreign crises by *threatening* force—that is, by communicating through words and deeds the possible future use of armed violence to affect the behavior of other actors, usually other states?<sup>13</sup> This lack of attention to threats of force and constitutional powers is ironic because, since World War II, such threats have formed the backbone of U.S. grand strategy. The United States has relied heavily on the manipulation of risk to deter aggression or other actions by adversaries, to coerce or compel certain actions by other states or international actors, to reassure allies, and to pursue other political designs under the shadow of armed threats.<sup>14</sup> When wars or large-scale force actually have been used, it has been because a prior policy or strategy failed—for instance, because deterrent threats were insufficiently credible, or crises involving U.S. threats of force escalated in ways that were difficult to control. In this regard, most of the time that U.S. military power is “used”—and often when it is most successful—it does not manifest as a war or major military engagement at all. If we are worried ultimately about avoiding wars through

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11. See, e.g., JOHN YOO, *CRISIS AND COMMAND* 401-02 (2009); Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT’L L. 740, 741 (1989).
  12. THE FEDERALIST No. 70, at 128 (Alexander Hamilton) (Richard Beeman ed., 2012).
  13. For some prior discussion of these issues, see Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEG. STUD. 189, 197 (2009) (arguing that democracies may have more credibility than non-democracies in signaling intentions during crises, thereby helping to avoid war); and Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2526-38 (2006) (recognizing the importance of signaling in functional assessments of war powers allocations).
  14. See generally BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* (1977) (analyzing the use of military force or the threat thereof for political ends); DANIEL BYMAN & MATTHEW WAXMAN, *THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT* (2002) (examining U.S. use of coercion as a geopolitical tool); JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY DURING THE COLD WAR* 90 (rev. ed. 2005) (“World order, and with it American security, had come to depend as much on *perceptions* of the balance of power as on what that balance actually was.”).

constitutional design, we should be thinking about threats of war and the Constitution.

In a forthcoming article, titled *The Power to Threaten War*,<sup>15</sup> I consider in detail the relationship between constitutional powers and strategies of threatened force. This Essay highlights several critical aspects of that relationship, especially as illustrated in the Syria case. In particular, it shows that the President's power to carry out threats is only half the story; the other half is how distributions of constitutional power between the political branches help or impede the President's ability to issue effective threats.

When President Obama remarked in announcing his Syria decisions that although he had the legal authority to take action without congressional authorization, "our actions will be even more effective" by obtaining it,<sup>16</sup> he was probably correct in two narrow senses: yes, presidents have relied on similar authority in the past,<sup>17</sup> and yes, if Congress affirmatively backed his actions at this stage, this military action would likely be more potent. But would commitment—political commitment or even legal commitment—to stronger congressional control over future U.S. decisions to intervene generally enhance the credibility and effectiveness of American threats of force? It is such future effects of any U.S. action, as the President himself acknowledged, that are critical to American strategic interests, and they are also critical to understanding the practical consequences of how constitutional war powers are allocated.

## I. CONSTITUTIONAL POWERS AND THREATS OF FORCE

These days it is usually taken for granted that—whether or not he can make war unilaterally—the President is constitutionally empowered to threaten the use of force, implicitly or explicitly, through diplomatic means or shows of

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15. 123 YALE L.J. (forthcoming 2014).

16. Remarks on the Situation in Syria, *supra* note 2, at 2.

17. Harold Koh argues that this action would be consistent with prior executive branch precedent. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part I: Political Miscues and U.S. Law)*, JUST SECURITY (Sept. 26, 2013, 4:30 AM), <http://justsecurity.org/2013/09/26/koh-syria>. But see Jack Goldsmith, *How Administration Lawyers Are Probably Thinking About the Constitutionality of the Syria Intervention (And a Note on the Domestic Political Dangers of Intervention)*, LAWFARE (Aug. 24, 2013, 11:59 AM), <http://www.lawfareblog.com/2013/08/how-administration-lawyers-are-probably-thinking-about-the-constitutionality-of-the-syria-intervention-and-a-note-on-the-domestic-political-dangers-of-intervention> (arguing that this would be an unprecedented extension of executive power).

force. It is never seriously contested whether the President has full, independent authority to, for example, proclaim that the United States is contemplating military intervention in response to a crisis, or whether the President may move substantial U.S. military forces to a crisis region or engage in military exercises there.

From a constitutional standpoint, the President's power to threaten force is at least as broad as his power to use it. One way to think about it is that the power to threaten force is a lesser-included element of presidential war powers; the power to threaten to use force is simply a secondary question, the answer to which is bounded by the President's vast, primary authority to use force in protecting U.S. national interests. Depending on how a particular threat is communicated, it is likely to fall within even quite narrow interpretations of the President's inherent foreign relations powers to conduct diplomacy or his express Commander-in-Chief power to control U.S. military forces—or some combination of the two. A President's verbal warning, ultimatum, or declared intention to use military force, for instance, could be justified as merely exercising his role as the "sole organ" of U.S. foreign diplomacy (at least so long as he does not formally declare war), conveying externally information about U.S. capabilities and intentions.<sup>18</sup> A president's movement of U.S. troops or warships to a crisis region or elevation of their alert level could be justified as merely exercising his day-to-day operational control over forces under his command.<sup>19</sup>

This virtually unchecked executive authority to threaten force or war has affected U.S. security and foreign policy in ways often neglected by legal scholars, who tend to focus predominantly on actual wars and other hostile engagements of U.S. forces abroad. The Korean and Vietnam Wars are generally considered the most salient events of the Cold War for understanding constitutional allocations of war powers, yet during that time frame presidents

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18. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see also *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (noting the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981))); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1592-93 (2005) (arguing that diplomatic authority is vested in the executive branch); Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750, 755 (1989) (noting that "the President has the exclusive power of official communication with foreign governments").
19. See *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (Robert H. Jackson, Att'y Gen.). At various times, though, Congress has placed statutory geographical restrictions on the deployment of U.S. forces. See Ackerman & Hathaway, *supra* note 10, at 456.

also unilaterally wielded threats of nuclear war to deter Soviet aggression, to bargain, and to reassure allies, and they unilaterally (or sometimes with congressional backing) resorted to small-scale shows of force on dozens of occasions in pursuit of U.S. strategic interests. In the 1990s, U.S. presidents wielded threats of force against dictators or militia leaders in places such as Iraq, Haiti, and Bosnia—with varying effectiveness and prior to actual U.S. military operations that attracted the attention of legal scholars. While legal scholars have recently been focused on whether U.S. actions in Iraq and against al Qaida affiliates reflect an imperial executive, presidents have been wielding without direct legal constraint the threat of U.S. military force in East Asia—for example, to deter North Korean aggression and signal to China and restive U.S. allies American intentions to maintain regional security balances—in a manner that is sometimes consistent with defense treaties and sometimes outside them.<sup>20</sup>

The power to threaten force is significant not only for its influence in provoking or defusing crises, and perhaps causing or preventing major wars, but also because threats put American credibility and reputation for resolve on the line, and thereby alter the interests and stakes involved in carrying them out. Constitutional scholars often make much of the fact that Congress ultimately authorized the 1991 Persian Gulf war and declined to authorize the 1999 Kosovo intervention—two of the most significant U.S. military adventures following the end of the Cold War. It is important, however, to understand those congressional decisions as a very late, not early, stage of a decision tree. The President's ability to threaten force was critically important at earlier stages in determining whether that final stage would even occur at all, and what policy payoffs would be associated with different choices.<sup>21</sup> Once President George H.W. Bush placed hundreds of thousands of U.S. troops in the Persian Gulf region and issued an ultimatum to Saddam Hussein in 1990, the credibility of U.S. threats and assurances to regional partners were put on the line.<sup>22</sup> In threatening force against Serbian President Slobodan Milošević over the 1999 Kosovo crisis, President Clinton and allied leaders altered the

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20. See JOINT CHIEFS OF STAFF, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA* 13-14 (2011), [http://www.jcs.mil/content/files/2011-02/020811084800\\_2011\\_NMS\\_-\\_08\\_FEB\\_2011.pdf](http://www.jcs.mil/content/files/2011-02/020811084800_2011_NMS_-_08_FEB_2011.pdf); Jane Perlez, *Cancellation of Trip by Obama Plays to Doubts of Asia Allies*, N.Y. TIMES, Oct. 4, 2013, <http://www.nytimes.com/2013/10/05/world/asia/with-obama-stuck-in-washington-china-leader-has-clear-path-at-asia-conferences.html>.

21. Cf. Marc Trachtenberg, *History Teaches*, YALE J. INT'L AFF., Sept. 2012, at 23, 29-30 (arguing that war should be viewed as an outcome of an extended political process that unfolds over time).

22. See Glennon, *supra* note 9, at 93.

strategic stakes by putting perceptions (among both allies and adversaries) of collective NATO resolve on the line.<sup>23</sup>

In the Syria case, a major argument by executive branch officials lobbying Congress to back military action was that failure to act would have deleterious effects on U.S. capacity to deter hostile actions by Iran, North Korea, and other possible adversaries.<sup>24</sup> They also argued that failure to act, now that the President had stated his intention to do so, would undermine U.S. allies' confidence in American commitments to their defense.<sup>25</sup> Many of the strongest congressional supporters of military action made similar arguments to sway their colleagues.<sup>26</sup>

Especially when taken together, these factors—the president's vast legal authority to make threats, the importance of threats to American security strategy after World War II, and the difficulty of climbing down from threats once they are made—might mean that the shift in powers of war and peace since World War II from Congress to the President has been even *more* dramatic than usually supposed, at least in terms of how formal congressional checks are exercised. Political scientists have often observed, however, that Congress wields considerable political clout over the President's decision whether to threaten force—and in ways that differ from Congress's ability to affect ultimate decisions to use force or ongoing military operations.

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23. See Henry A. Kissinger, *Doing Injury to History*, NEWSWEEK, Apr. 5, 1999, at 38.
  24. See Chuck Hagel, U.S. Sec'y of Def., Statement on Syria Before the Senate Foreign Relations Committee, Testimony Before the U.S. Senate Committee on Foreign Relations (Sept. 3, 2013), available at <http://www.defense.gov/speeches/speech.aspx?speechid=1802>; John Kerry, U.S. Sec'y of State, Opening Remarks Before the United States Senate Committee on Foreign Relations, Testimony Before the U.S. Senate Committee on Foreign Relations (Sept. 3, 2013), available at <http://www.state.gov/secretary/remarks/2013/09/212603.htm>.
  25. See Noah Bierman, *Kerry Urges Congress to OK Strike*, BOS. GLOBE, Sept. 1, 2013, <http://www.bostonglobe.com/news/world/2013/09/01/secretary-state-john-kerry-says-waiting-congress-makes-syria-response-more-powerful-cites-new-evidence-chemical-attack/AJ9VpYro5WbvjxZfznGTRJ/story.html>; Mira Rapp-Hooper, *Do Chemical Weapons Threaten US Extended Deterrence in Asia?*, DIPLOMAT BLOG (Sept. 13, 2013), <http://thediplomat.com/flashpoints-blog/2013/09/13/do-chemical-weapons-threaten-us-extended-deterrence-in-asia>.
  26. See Jonathan Martin, *Vote on Syria Sets Up Foreign Policy Clash Between 2 Wings of G.O.P.*, N.Y. TIMES, Sept. 3, 2013, <http://www.nytimes.com/2013/09/03/us/politics/syria-vote-sets-up-foreign-policy-clash-in-gop.html>; Juliet Eilperin, *McCain Says Rejecting Syria Resolution Would Be 'Catastrophic'*, WASH. POST: POST POLITICS (Sept. 2, 2013, 5:29 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/02/mccain-says-rejecting-syria-resolution-would-be-catastrophic>.

Whereas most lawyers usually begin their analysis of the President's and Congress's war powers by focusing on their formal legal authorities, political scientists usually take for granted these days that the President is—in practice—the dominant branch with respect to military crises and that Congress wields its formal legislative powers in this area rarely or in only very limited ways. Yet a major school of thought holds that Congress nevertheless wields significant influence over decisions about force, and that this influence extends to threatened force, so that Presidents generally refrain from threats that would provoke strong congressional opposition. Even without any serious prospect for legislatively blocking the President's threatened actions, Congress under certain conditions can loom large enough to force Presidents to adjust their policies; when it cannot, congressional members can oblige the President to expend lots of political capital.<sup>27</sup>

Political opponents in legislative bodies have a ready forum for registering dissent to presidential policies of force through such mechanisms as floor statements, committee oversight hearings, resolution votes, and funding decisions.<sup>28</sup> These official actions prevent the President from monopolizing political discourse on decisions regarding military actions and thereby make it difficult for the President to depart too far from congressional preferences with regard to wielding threats of force.<sup>29</sup>

Political opponents within a legislature also have few electoral incentives to collude in an executive's bluff, and they are capable of expressing opposition to a threatened use of force in ways that could expose the bluff to a threatened adversary.<sup>30</sup> Even without exercising formal legislative powers, members of Congress can shape public debate in ways that affect perceptions of U.S. resolve abroad. As William Howell and Jon Pevehouse explain, "Congress

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

28. *See* KENNETH A. SCHULTZ, *DEMOCRACY AND COERCIVE DIPLOMACY* 59-62 (2001). Some legal scholars emphasize these levers of congressional influence over war decisions, too. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411, 468 (2012).

29. *See* SCHULTZ, *supra* note 28, at 57.

30. *See id.* at 95-96.

matters, and matters greatly,” not just to the decision to strike militarily but “to a nation’s ability to credibly convey resolve to enemies and allies alike.”<sup>31</sup>

The strength of these congressional political constraints on presidential threats of force is not well understood, and the Syria case demonstrates their limits. It is impossible even to know with certainty Congress’s position on whether to threaten Syria with military force over chemical weapons at the time President Obama drew a red line—as a general matter, the sprawling institutional structure of Congress and rarity of definitive collective pronouncements make that impossible.<sup>32</sup> President Obama’s difficulty in securing congressional authorization to strike after the August 2013 Syrian gas attacks suggests that the President may have underestimated congressional wariness.<sup>33</sup>

An important question for understanding the practical consequences of war power allocations, then, is whether greater legal constraints on presidential decisions to use force—such as a much stricter requirement for legislative authorization or stronger enforcement of the War Powers Resolution—would indirectly limit even further the President’s actual flexibility in making and wielding threats. Perhaps the marginal and indirect effect of stronger congressional control of force would be substantial. However, the political system already achieves some degree of interbranch checking.

## II. CONSTITUTIONAL CHECKS AND CREDIBLE THREATS

Whereas legal scholars are usually consumed with the internal effects of war powers law on actors within the U.S. government, the Syria case highlights a question about their possible external effects: how, if at all, does the legal allocation of power between the President and Congress affect the credibility of U.S. threats among adversaries, allies, and other international actors? In prescriptive terms, if the President’s power to use force is linked to his ability to threaten it effectively, then any consideration of the impact of war powers reform on policy outcomes and long-term interests should include the important secondary effects on deterrent and coercive strategies—and on how

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31. HOWELL & PEVEHOUSE, *supra* note 27, at xi.

32. *Cf.* Bradley & Morrison, *supra* note 28, at 438-47.

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

U.S. legal doctrine is observed and understood abroad.<sup>34</sup> Would stronger requirements for congressional authorization to use force reduce a president's opportunities for bluffing, and, if so, would this improve U.S. coercive diplomacy by making ensuing threats more credible? Or would it undermine diplomacy, including deterrence of adversaries and reassurance of allies, by taking some threats off the table as viable policy options? Would stronger formal legislative powers with respect to force have significant marginal effects on the ability to signal abroad dissent within Congress, beyond that already resulting from open American political discourse?

Intuitively, greater congressional veto power over the use of force would seem generally to undermine the credibility of threats. For this reason, it has long been assumed that democracies are at a disadvantage relative to autocracies when it comes to threats of force and saber-rattling bargaining contests under the shadow of possible war. Quincy Wright speculated in 1942 that autocracies "can use war efficiently and threats of war even more efficiently" than democracies,<sup>35</sup> especially democracies like the United States, in which vocal public and congressional opposition may undermine threats.<sup>36</sup>

Additional, formal legal powers over war or force in the hands of Congress would, it might seem, further disable the President from wielding threats effectively, because opponents and other players in the international system might doubt not only his willingness but his ability to carry them out. This was a common policy argument during the War Powers Resolution debates in the early 1970s. Eugene Rostow, an advocate inside and outside the government for executive primacy, remarked during consideration of legislative drafts that serious restrictions on presidential use of force would mean that, in practice, "no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations."<sup>37</sup> This view holds that the merits of Madisonian "clogging" with regard to waging

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34. One of the few pieces of legal scholarship to engage in this sort of analysis is Nzelibe & Yoo, *supra* note 13 (arguing that credible signaling is an important element of rational constitutional design of war powers). For a critique, see Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT'L L. 1239 (2006).

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

36. *See id.* at 842.

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

eighteenth century wars are liabilities with regard to deterring twentieth and twenty-first century wars.<sup>38</sup>

The Syria case would seem to bear out these concerns. By giving Congress a vote, the President appears not only to have tied his own hands in carrying out his threat, but to have tipped off American rivals and partners that congressional support for new military actions (for which the President might also seek congressional authorization) is generally frail.

On the other hand, some recent strands of political science have called into question the value of presidential flexibility in wielding threats. Some of this work concludes that the institutionalization of political debate in democracies makes threats to use force rare but especially credible and effective in resolving international crises without resort to actual armed conflict.

In other words, recent arguments turn some old claims about the strategic disabilities of democracies on their heads. Whereas it used to be generally thought that democracies were ineffective in wielding threats because they are poor at keeping secrets and their decision-making is constrained by internal political pressures, a current wave of scholarship in political science accepts this basic description but argues that these democratic features are really strategic virtues.<sup>39</sup> If that view is correct, a question for constitutional scholars is how, specifically, legal doctrine and allocations of power strengthen or weaken these features.

Some political scientists argue that democracies are less likely to bluff because transparency makes it harder to do so.<sup>40</sup> To the extent that adversaries and allies understand this, threats will seem more serious than bluster. Informational asymmetries also increase the potential for misperception and thereby make some wars more likely; war, consequentially, can be thought of in these cases as a “bargaining failure,” and greater transparency about American policy preferences may help avoid unnecessary escalation of crises.<sup>41</sup> For the reasons discussed in the previous section, legislative politics may already contribute to this credibility-enhancing and conflict-avoiding

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38. See William P. Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194, 1210-11 (1971) (arguing that requirements of congressional authorization to use force would undermine presidential flexibility and the necessary credibility of threats).

39. See Marc Trachtenberg, *Audience Costs: An Historical Analysis*, 21 SECURITY STUD. 3, 4-5 (2012) (explaining and critiquing these arguments).

40. See, e.g., Issacharoff, *supra* note 13, at 197.

41. SCHULTZ, *supra* note 28, at 24.

transparency.<sup>42</sup> Perhaps stricter legal requirements for congressional approval of military action would push even more information about American political and policy inclinations to the surface and into the open. For example, turning more media attention to congressional opinion and elevating the significance of congressional hearings or other maneuvers might make it more difficult to conceal or misrepresent American preferences about war and peace with regard to specific crises or threats. Moreover, especially if presidentialists are correct about the importance of flexibility to credibility, in a hypothetical world of very stringent congressional force-authorization requirements, Congress might be inclined to delegate or pre-authorize some discretion back to the President.

As mentioned above, political transparency stemming from congressional debate about Syria strikes likely weakened the President's coercive leverage abroad rather than strengthening it. But, for those interested in whether stronger inter-branch checks are inherently disadvantageous to strategies of threatened force, an important question is whether, *ex ante*, a legal requirement for congressional approval to launch strikes would have caused the President to be more cautious in drawing a red line to begin with and, if he did so, would have made any threat backing it especially credible in the eyes of intended audiences abroad.

#### **CONCLUSION: THE CONSTITUTION AND AMERICAN GRAND STRATEGY**

The recent Syria case has inspired much discussion about constitutional war powers and much discussion about the credibility of threats. Those two conversations should be combined because the issues are tightly linked.<sup>43</sup>

Lawyers think “war powers” are about making war or conducting military operations. They therefore examine wars and military operations to describe how war powers are exercised and they often defend various interpretations of these powers with functional arguments about how best to wage war or conduct military operations. Focusing on decisions to use force—the actual engagement of military operations in armed violence—and formal legal constraints on them misses the many decision points that lead up to them. War

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

43. For commentary that combines both conversations, see Rapp-Hooper, *supra* note 25; Ganesh Sitaraman, *Credibility and War Powers*, 127 HARV. L. REV. F. (forthcoming Dec. 2013).

powers decisions—in a practical sense, not a formal sense—occur earlier along the foreign policy decision tree than is generally acknowledged or understood in legal debates. Because the United States is a superpower that plays a major role in sustaining global security, its ability to threaten war is in some respects a much more policy-significant constitutional power than its power to actually make war.

Despite the intense emphasis on it in discussions of foreign policy, knowledge of how states acquire, maintain, or lose credibility to use force remains severely limited.<sup>44</sup> In thinking about the future of American constitutional war powers, legal scholars need to update their thinking about the strategic virtues of deliberative checks versus presidential flexibility to better account for what is known and is not known about these phenomena.

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44. Such reputation effects feature prominently in international relations deterrence and coercion theory, though firm understanding of how reputations are created and how they function has lagged. See Robert Jervis, *Deterrence and Perception*, INT'L SECURITY, Winter 1982/1983, at 3, 9. U.S. political leaders and government policymakers place great emphasis on the importance of maintaining credibility of threats, whereas some political scientists have been calling it into doubt. See Daniel Drezner, *Swing and a Miss*, FOREIGN POL'Y (Sept. 16, 2013), [http://www.foreignpolicy.com/articles/2013/09/16/swing\\_and\\_a\\_miss\\_credibility\\_syria](http://www.foreignpolicy.com/articles/2013/09/16/swing_and_a_miss_credibility_syria). For a critique denying strong links between states' actions and their reputations of resoluteness, see generally JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS 1-13 (1996); DARYL G. PRESS, CALCULATING CREDIBILITY: HOW LEADERS ASSESS MILITARY THREATS (2005) (arguing, based primarily on empirical case studies from the Cold War, that backing down in a particular crisis did not diminish credibility in later crises).