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Nuclear War Powers and Covert War Powers

Between the Korean and Vietnam Wars – the two conflicts that dominate standard war-powers narratives – the United States fought no large-scale wars, yet the decade spanning Dwight Eisenhower's two terms and John F. Kennedy's brief presidency remade the Constitution of war and peace. Because the United States avoided major wars, common accounts – fixated on presidents leading the nation into conflict – tend to skip this interlude. But it matters precisely because peace, not war, drove constitutional change. A peacetime strategy helps determine when, where, and how wars are fought. Here, new technologies and strategies produced war-powers compromises that probably helped keep the Cold War from turning hot, even if just barely.

The Nuclear Age forced the branches to confront strategic dilemmas that stretched their powers in new ways. For the first time since the Civil War, the United States faced the danger of national extinction. Policymakers built strategies on threatening a form of war so catastrophic it would never occur. Those deterrence policies relied on how war powers were allocated and exercised – and on a recurring, often overlooked question: Who has the constitutional authority to *threaten* war? Conventional wisdom holds that nuclear weapons expanded presidential power, since attacks could unfold in minutes. That is true, though the path toward centralization was less linear than later accounts suggest. And it was not just the bomb itself, but American approaches to wielding it, that reshaped constitutional governance and practice.

Washington and Moscow also waged campaigns of covert, proxy warfare across the globe. These operations appealed to policymakers as a way to challenge each other while mitigating escalation risk – the opposite of nuclear logic – but they raised new questions about reconciling secrecy with democratic accountability. The result was a new constitutional track of irregular warfare, subject to thinner and often tacit checks.

In the Eisenhower–Kennedy years, it was the absence of major war – not its presence – that produced the most dramatic adaptations of constitutional practice. Technology, Cold-War containment politics, and nuclear strategy all drove the

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concentration of authority in the presidency. Several constitutional arrangements fashioned then endure today: the President's sole authority to launch nuclear weapons, broad congressional delegations preauthorizing the President to initiate conflict, and a standing covert-warfare apparatus.

NUCLEAR WEAPONS AND THE CONSTITUTION

The Nuclear Age did not simply expand and concentrate war powers; it inverted them, harnessing military authority to prevent war by threatening it. In 1946, the military theorist Bernard Brodie wrote presciently of nuclear weapons: "Thus far the chief purpose of our military establishment has been to win wars. From now on, its chief purpose must be to avert them."[1] This insight held profound significance for constitutional practice, though it would take time to see exactly how.

Earlier chapters have shown that throughout American history, most constitutional thinking had emphasized war-avoidance, but according to varying strategic logics that carried different implications for war powers. Many Founders held that concentrated power in the Executive would tempt presidents to wage unnecessary wars, so the Framers built in multiple checks on making war. For much of the nineteenth century, Congress mostly tolerated small-scale executive uses of force abroad because they protected American interests but had little chance of escalating. In the first decades of the twentieth century, a policy of neutrality to avoid foreign wars favored congressional restraints on presidential action. World War II turned that logic upside down: The United States could best avoid another world war by making collective security pacts credible – including through global deployments and by relying on presidential initiative rather than congressional brakes.

Once the Soviets got the bomb, some American civilian and military planners believed that nuclear war was winnable or inevitable, and they developed strategies to prevail in such a conflict and achieve a postwar peace. Others believed a nuclear exchange would be so horrific and total that U.S. strategy should focus on making it unthinkable – yet doing so paradoxically required planning for it. Each strategic theory – from winning nuclear war to making it unthinkable – forced new adjustments in constitutional machinery.

Many scholars have rightly observed that the advent of nuclear weapons enlarged presidential powers of war and peace. In the nineteenth century, slow communications pushed military authority toward the presidency (see Chapters 3–5); in the twentieth, the accelerating speed of weapons did much the same. Yet, scholars have often disagreed over whether nuclear swiftness and destructive capacity merely strained existing checks or rendered them obsolete. In his influential *Presidential Power*, Richard Neustadt wrote that "when it comes to action risking nuclear war, technology has modified the Constitution: the President, perforce, becomes the only such man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time." Importantly, he noted,

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the risks of nuclear escalation "lurk in high level misjudgments *and* in low level momentum," and that thus the President, by necessity, must have military control in any situation involving potential nuclear engagement.[2] A leading work on war powers countered that "[i]f the framers were chary of permitting the President to wield muskets and sail ships, surely we must pause to consider the wisdom of allowing our presidents to unilaterally control the vast nuclear arsenal."[3]

Assessing whether nuclear strategy can be shared between the President and Congress in practice is difficult because there has never been a nuclear war.[4] Modern-day fixation on which branch of government may start wars also feeds an impression that it was the central war powers issue at the dawn of the Nuclear Age. Many constitutional theorists and political leaders at that time were just as focused, however, on whether a permanent state of nuclear vulnerability would deform the republic into a hyper-militarized warfare state that threatened federalism, individual rights, and free markets.[5]

Whatever the Constitution might have meant at the Founding, the practical needs of war and security in the Nuclear Age did indeed come to favor centralization of decision-making in the presidency. But technological innovation alone did not rewrite constitutional roles; policy choices about how to wield that technology did – including the basic decision to treat them as weapons rather than something new entirely. Some of those choices were taken by the Executive Branch alone. Others were legislated by Congress, or could not have been taken without at least its implicit assent; only Congress, after all, could fund the nuclear arsenal. And still others reflected joint decision-making by the political branches. For example, after World War II, the Executive Branch and Congress together wrestled with a most basic question about the nuclear stockpile: Who should have custody of it? The centralization of presidential power through nuclear policy followed a path that was neither linear nor predetermined.

The first constitutional test of the bomb was deceptively simple: Who should control the world's most destructive weapon? Amid arguments over whether generals or civilians should hold it, Congress passed the 1946 Atomic Energy Act. Amended many times since, the act regulates nuclear energy, technology, and secrets.[6] It transferred the Army's nuclear responsibilities, inherited from the Manhattan Project, to a new Atomic Energy Commission, led by five civilian appointees but with heavy military influence. As a Senate report accompanying the bill stated: "The decision to limit membership eligibility to civilians was adopted by the committee in keeping with established traditions of our Government."[7] The idea that these arrangements were constitutionally customary isn't true, though: The Act set up a unique panel of experts to manage what is quite literally earth-shattering technology.

Traditionally, weapons were entrusted to military custody and subject to executive branch supervision. Congress, however, decided that the bomb was no ordinary weapon. A totally new system was needed.[8] Despite being the only world leader ever to launch nuclear weapons in war, Truman briefly echoed that sentiment, telling

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the Commission and military leadership: "You have got to understand that this isn't a military weapon…. It is used to wipe out women and children and unarmed people, and not for military uses. So we have got to treat this differently from rifles and cannon and ordinary things like that."[9] Yet Congress's 1946 Act allowed the President to direct the Commission to transfer nuclear materials or weapons to the military "for such use as he deem[ed] necessary in the interest of national defense."[10] In the coming years, when the military began planning for nuclear warfare, that exception to civilian custody became the rule.[11]

The U.S. nuclear stockpile grew from single digits in 1945 to around fifty by 1948 and hundreds by 1952. The Soviet test of its own nuclear weapon in 1949 surprised American officials, most of whom assumed the United States still had years left of its head start.

During those years – amid high anxiety from the Soviet test, the fall of China, and the outbreak of the Korean War – the Executive Branch hammered out policy for the possible use of that arsenal in future war.[12] Its policy for the bomb stressed that it would be used only by the President's direction. Notwithstanding Truman's statements about the bomb's non-military nature, war planning also stressed that nuclear weapons would be used *early* in a superpower conflict.

At a time when Soviet forces in Europe outnumbered American ones, American planners assumed the United States needed to strike first to stop a Soviet attack. Preparations for immediate nuclear escalation were also seen as key to deterring Soviet aggression in Europe and Asia, especially given recent history with surprise attacks – by Japan in World War II and North Korea in 1950.

It was, therefore, not just the nuclear weapons technology itself but budding strategies for using it that shifted so much power to the President. Historian Francis Gavin maps the roads not taken – each a different constitutional world:

> American leaders could have invested their enormous political capital in pursuing nuclear disarmament or international control of the bomb. At the other extreme, the United States might have launched preventive attacks against the Soviet Union and its nascent nuclear capabilities…. In later years, American leaders could have developed policies that relied less on extended nuclear deterrence by building up conventional forces that matched those of the Soviet Union in Central Europe. Or U.S. policymakers might have encouraged Western European and Asian allies to acquire and develop their own nuclear capabilities….[13]

Note that each of these alternative paths – all of which were considered inside the government – would have shifted constitutional balances in different ways.

The first, international control of atomic energy, would have needed Senate approval of an international treaty and congressional legislation to implement it. The United States proposed such an idea – the "Baruch Plan" – at a 1946 session of the UN's atomic energy body, but it foundered amid U.S.–Soviet and internal U.S. government disagreements.[14] The second, preventive war to destroy the

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Soviet's fledgling nuclear arsenal, could only be accomplished at an acceptable cost with unilateral executive war-making. Eisenhower would muse in his diary that it could not work "unless the Congress would meet in a highly secret session and vote a declaration of war which would be implemented before the session was terminated" – and it would be "impossible that any such thing would occur."[15] The third, building up and stationing abroad much larger and more expensive conventional forces, would have required Congress to fund them, perhaps with strings on how they were used. The fourth, encouraging allies to develop their own bomb, would have relieved some pressures on the Executive Branch to make security guarantees credible, and required new legislative frameworks for sharing nuclear information, uranium stockpiles, and test facilities with allies.

Driven by both choice and geopolitical necessity, the United States adopted strategies that emphasized using nuclear weapons in war before the Soviets did, and the military developed targeting plans for that scenario.[16] Those strategic puzzles quickly became constitutional ones, forcing the political branches to decide who would control not only the bomb, but the threats to use it.

EISENHOWER'S "NEW LOOK" AND THE CONSTITUTION

Three days before Eisenhower's 1952 election, the United States detonated a hydrogen, or thermonuclear, bomb. A thousand times more powerful than the bomb dropped on Hiroshima, it vaporized the Pacific island on which it was tested. The Soviet Union followed suit in 1953. The thermonuclear arms race was on, and Eisenhower's presidency would mark the first sustained attempt to translate the new nuclear reality into a durable constitutional practice.

Yet the question facing Eisenhower was not only how to manage nuclear risks, but how to build a constitutional order capable of running a global Cold War without bankrupting the nation or turning it into a garrison state. His answer was a "New Look" for American defense. Instead of spending to keep up with the Soviet bloc's conventional military strength, U.S. policy would rely heavily on cheaper nuclear weapons to wage war and deter aggression. A secret October 1953 National Security Council memorandum asserted that "[i]n the event of hostilities, the United States will consider nuclear weapons to be as available for use as other munitions."[17] His Secretary of State John Foster Dulles bluntly explained in a 1954 address, followed by an article in *Foreign Affairs*, that the United States would not merely repel Communist aggression at the site of attacks but respond at a time, place, and manner of its choosing, including with overwhelming force.[18] Plans for various contingencies were continually revised, but it was understood by all that Eisenhower's New Look might include immediate escalation. Dubbed a "massive retaliation" strategy, this was a threat that the United States would consider nuclear options; there was no nuclear taboo or other limits to how far Eisenhower was willing to go.[19]

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To implement this strategy, Eisenhower took several steps – not only to ensure rapid Executive decisions to use force but to convince adversaries that these decisions would be immediate. Eisenhower and the military leadership streamlined nuclear command processes to minimize the number of links between the President and the commanders who would actually fire the weapons. Beyond accelerating the transmission of his commands, Eisenhower also instituted "predelegation orders" authorizing certain commanders to use nuclear weapons if the President were incapacitated or communications severed.[20] These orders were not meant to give commanders greater discretion, but to ensure that nuclear retaliation would occur automatically under specified conditions. Their purpose was deterrent: to signal that if adversaries crossed certain red lines, not even the President could stop the nuclear response he had already set in motion. Those orders also reflected a new constitutional issue that had never really mattered until the Nuclear Age: The commander in chief, as designated in Article II, might himself be obliterated.[21] This was, thankfully, a war powers dog that didn't bark: were the Executive Branch decapitated, leaving subordinate commanders to launch their nuclear arsenals, scholars might not even be here to reflect on the constitutional issues and upshots.

Along with nuclear strike procedures, the Pentagon also developed a fixed and detailed targeting blueprint expected to cripple the Soviets' ability to launch a nuclear counterstrike. Later institutionalized as the Single Integrated Operational Plan, it was designed to be rigid, rapid, and massive.

While his strategic approach stressed threats of massive retaliation and preemption of enemy nuclear attacks, Eisenhower also generally thought that major wars – and any direct conflict with the Soviet Union or China would quickly be a major one – required Congress's assent. Predisposed against executive overreach, and especially after watching the unauthorized Korean War nearly ruin his predecessor Truman, Eisenhower believed this as a matter of both constitutional principle and political pragmatism. But how to square a constitutional need for congressional approval for war with a strategy that emphasized the possibility of immediate nuclear use to stop aggression? In the age of nuclear deterrence, avoiding war often meant committing to it. Many constitutional Founders believed that legislative checks would advantageously "clog" decisions for war, but the New Look required unclogging them.[22]

Chapter 8 explained one way to credibly assure an immediate U.S. military response to Soviet aggression: The United States could preposition armed forces at the likely points of invasion – and any attacks on them would trigger the President's constitutional power to fight back. Eisenhower had a second answer: The President could obtain standing congressional approval beforehand.

Eisenhower's combined strategic and constitutional thinking was tested in 1954–55 when Communist China shelled tiny coastal islands under control of Nationalist China based in Formosa (today's Taiwan). The United States was in the process of ratifying a mutual-defense treaty with Nationalist China. Not wanting

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war but concerned about appearing unreliable in the face of Communist assaults, Eisenhower engaged in brinkmanship.

To help deter Communist China and reassure Nationalist Chinese leaders, Eisenhower asked Congress in January 1955 to authorize in advance the possible use of force. The situation had become sufficiently dire, he argued, to demand immediate congressional approval for any military action to protect Formosa.[23] Days later, Congress obliged by nearly unanimous votes. Its joint resolution authorized the President "to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa … against armed attack." This resolution would remain in force until the President determined that the area was secure.[24]

In the following months, as tensions simmered, Eisenhower signaled the possibility of major military action – even publicly referencing nuclear options. Cooler heads prevailed, however, and all sides stepped back from the brink – until similar events repeated a few years later. There has been much debate about how effective Eisenhower's threats really were, including whether they were more destabilizing than stabilizing. Regardless, the case marked a constitutional watershed.

Although today the idea of a prospective congressional force authorization is well accepted – later chapters discuss examples, such as resolutions authorizing war in Vietnam and twice in Iraq – this 1955 resolution was a legal innovation in the vast discretion it granted the President to choose future war. Earlier chapters have shown that even legislatively pre-approving the President's option to use small-scale military force was constitutionally suspect in Congress for much of American history, and presidential requests for it were sometimes, but not consistently, opposed for that reason. The 1955 force resolution, however, was far more sweeping than anything ever proposed. Congress pre-authorized whatever force the President deemed necessary to protect a far-flung ally. Multiple times it stressed the President's role as sole judge of necessity, and Congress knew that Eisenhower's strategy emphasized the early use of nuclear weapons in armed conflicts. The resolution's duration was also open-ended; Congress only repealed it twenty years later, during a thaw in U.S. relations with Communist China.

Although Eisenhower was generally committed to congressional primacy on war-making, the former general was conflicted on questions of emergency presidential power, and his strategic thinking sometimes pulled in directions that differed from his constitutional (and political) principles. In internal discussions months before he went to Congress on Formosa, Eisenhower told members of his cabinet that to launch strikes against Communist China, he "would have to get Congressional authorization, since it would be war. If Congressional authorization were not obtained there would be logical grounds for impeachment."[25] In a later meeting days before seeking congressional approval, Eisenhower stated "that he would do in an emergency whatever had to be done to protect the vital interests of the United States. He would do this even if his actions should be interpreted as acts of war. He would rather be impeached than fail to do his duty."[26]

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Whether Eisenhower believed that the congressional-approval requirement was legal, political, or a combination of both, here was the President himself bringing the constitutional process directly into war planning. Notably, in consulting congressional leaders, Democratic House Speaker Sam Rayburn "had said that the President had all the powers he needed to deal with the situation," and Rayburn even believed "that a joint resolution at this particular moment would be unwise because the President would be saying in effect that he did not have the power to act instantly."[27] Both Eisenhower and Rayburn saw constitutional process and deterrence as entwined, but Eisenhower focused on credibility in the present crisis, and Rayburn focused on credibility vis-à-vis future crises, which could break out in places across the globe where Congress had not so pre-authorized war.

As earlier chapters have shown and later chapters will, too, it is normally members of Congress (especially opposition members) rejecting presidential claims of expansive power to use force. Yet here was the President expressing concern that he lacked constitutional power to act and the opposition leader in Congress urging him otherwise – and even warning him that it would be dangerous to concede the point. Indeed, Eisenhower got more pushback from Congress for seeking authorization at all than for seeking authorization that was too broad.[28] In the shadow of nuclear risks, the principal legal brake on unilateral executive action was the self-denying commitments of a President.

Legal issues aside, the important aspect of the Formosa force resolution is that it was never activated. This resolution's purpose was more about credible deterrent signaling than warfighting. Eisenhower obtained Congress's advance assent to all-out war precisely so that he would not have to wage it.

Two years later, in early 1957, Eisenhower went to Congress for another force authorization for similar reasons, this time asking Congress to delegate power to use any necessary force to resist Communist aggression across the entire Middle East. Like the Formosa measure, the proposed Middle East resolution was open-ended, it deliberately skirted the constitutional questions, and its primary intent was to communicate a threat of major war rather than to fight one. This time, though, the proposal elicited several months of intense debate.

Previewing his request with congressional leadership, Eisenhower privately "reaffirmed his regard for constitutional procedures but pointed out that modern war might be a matter of hours only."[29] In a Senate Foreign Relations Committee meeting the next day, Secretary Dulles was asked why unilateral presidential commitments to defend Middle East partners were not sufficient. He replied: "You may say, 'Why don't we wait until the attack occurs?' Why, then it is too late. The whole purpose of this thing is to be a deterrent, a preventive to war."[30]

Congress, however, was fractured on constitutional war-powers questions, perhaps more so than in the Formosa case because there was not yet an active crisis. Some members supported the proposal, some thought it was unreasonably (and even unconstitutionally) open ended, and others thought it would set a dangerous

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precedent in the opposite direction by suggesting that the President lacked vital unilateral powers. The resulting 1957 congressional resolution stated "if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such [Middle East] nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism."[31] Note that instead of "authorizing" force, the resolution declared an active preparedness to use it. This language had the virtue of painting over questions of the President's unilateral powers. Whether they believed it was constitutionally mandatory or not, members of Congress were backing the President in advance to engage in a superpower war over the Middle East – in order to ensure that such a war never happened.

Three aspects common to both the Formosa and Middle East resolutions are notable. First, whereas today we usually think of congressional force authorizations as legislative backing for military intervention that is already planned or even underway, Eisenhower thought these resolutions actually made war less likely, not more.

Eisenhower did not think this strategic formula fit all cases. In 1958–59, the Soviet Union seemed poised to seize control of divided West Berlin from the Western allies. Contrary to the usual expectation of Congress restraining presidential ambitions toward war, it was hawkish legislators who pushed for a saber-rattling resolution, while the Eisenhower Administration resisted. The Administration viewed such a measure as dangerously provocative at that time, and it tamped down pressure within Congress for it.[32] It is another episode overlooked by constitutional scholars who narrowly focus on force authorizations and conflicts that occurred but ignore instances where they did not.

Second, despite Eisenhower's general commitment to Congress's powers to control going to war, he still carved out space for himself to act unilaterally if absolutely necessary. Eisenhower believed that the President had certain emergency military powers to protect the nation, but where he drew those lines was never clear.

Third, during this period when the political branches were adjusting to the permanent emergency of the Cold War and to new global security responsibilities, legislators pushed back against Eisenhower's force resolution overtures on several different – and antithetical – constitutional grounds: Some thought it gave the President too much power, while some thought it acknowledged too little presidential power. This was a moment of great ferment on Capitol Hill in constitutional arguments over war powers for a new strategic era.

Deterrence – including nuclear brinkmanship – was, however, just one element of a grand strategy to resist Soviet aggression and influence while averting Armageddon. If nuclear strategy sought to keep the Cold War from turning hot by making war unthinkable, covert operations sought to keep it cold by making conflict invisible. Both approaches aimed to manage escalation risk but did so in opposite ways: one through the overt threat of annihilation, the other through

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deniable action beneath the threshold of open hostilities. The latter – designed to be unseen or unacknowledged – would come with its own constitutional challenges and practices.

COVERT WAR POWERS

In the early 1950s, by far the largest landowner and commercial player in Guatemala was the American company United Fruit – *La Frutera* to Guatemalans – thanks to deals negotiated decades earlier by none other than John Foster Dulles, then a young lawyer with a white-shoe New York firm.[33] After Guatemala's leftist president nationalized large plantations, raising specters of Communist alignment, the Central Intelligence Agency (CIA) launched a plan to overthrow him. In 1953, the CIA had successfully fomented a coup in Iran, and the agency's leadership was eager to replicate the feat. When Guatemalan forces repelled CIA-trained local insurgents in 1954, Eisenhower approved the agency's secret use of CIA aircraft and Air Force bombers to hit Guatemalan targets and help turn the tide. Not long after the CIA blasted a capital city military post, the Guatemalan government surrendered to rebel forces.[34] A few years later, the Eisenhower Administration unsuccessfully tried to overthrow Indonesian president Sukarno, who had developed ties with the Soviet Union.[35]

American covert warfare – including paramilitary operations, irregular armed violence, and support to proxy forces, all in which the U.S. government's hand is hidden – has a long history. For example, President Jefferson secretly backed a palace coup in Tripoli during the Barbary Wars.[36] The United States had no peacetime organizations for such activities, though. The largest covert capability before the Cold War was the Office of Strategic Services (OSS), created in World War II to conduct sabotage, launch commando raids, and support resistance fighters behind enemy lines.

What distinguished post-World War II covert warfare was that it now had permanent capability and could be waged at an intense pace even during peacetime through the newly established CIA. Throughout the Cold War, the United States and Soviet Union relied on insurgency and counterinsurgency campaigns by local proxies – often part of much broader "political warfare" campaigns – in their efforts to control the global chessboard. Despite Eisenhower's general solicitude toward Congress when it came to contemplating major wars, he did more than any other President to institutionalize CIA covert activities, leaving Congress with little oversight, let alone control.[37]

Covert military or paramilitary operations were just a very slim subset of CIA activities, but they had major effects. Most intelligence activities are secret and involve information collection – espionage, surveillance, and the like. What distinguishes *covert* operations is, first, the intention to manipulate conditions in another country, and second, efforts to screen the U.S. role behind a curtain of deniability.

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Within that category of covert activities, paramilitary operations – sometimes conducted by civilian personnel, other times by military forces assigned to the CIA – are an even smaller subset, in contrast to nonviolent efforts like spreading subversive propaganda.

How does the Constitution allocate power for armed violence against or within another state when the entire role of the U.S. government is, by design, supposed to be hidden or denied? Is it warfare, but a special type that is incompatible with normal constitutional processes? Or is it outside the constitutional category of war altogether? If the Cold War was not an actual war but was not quite peace either, covert campaigns further blurred that status.[38]

Whatever its constitutional footing, covert warfare poses special challenges to a democratic system in which the political branches are supposed to be publicly accountable – perhaps most so on questions of war and peace. As Eisenhower would later declare in his farewell address: "Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together." Covert warfare is designed to evade the sort of public scrutiny of which he spoke.[39] History shows, however, that secret wars rarely stay secret. Bigger secret wars bring bigger problems for democratic accountability, but they are also harder to keep hidden.

To the extent he thought about it in constitutional terms, Eisenhower may have viewed covert military action as falling beneath a threshold of combat intensity at which congressional approval was required. Covert warfare also posed fewer risks to American personnel and was seen as less likely to trigger a major war. Hiding or disguising American hands helped dodge hawkish political pressure at home – and likewise in Communist capitals – to escalate. For that logic to work, the operations had to stay secret or plausibly deniable to the public.[40]

When Congress created the CIA in the 1947 National Security Act, intelligence matters were overshadowed by questions of military reorganization. It was not clear that Congress even intended to authorize intelligence activities beyond collection and analysis. In creating it, Congress gave the CIA five functions, including the vague catch-all "functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."[41] Legislative history is ambiguous as to whether that was intended to include paramilitary activities. At the CIA's birth, even the agency's top lawyer doubted that it was. He soon came around to the view that such activities were legal if the President and his National Security Council ordered them and if Congress gave the CIA funds to carry them out – which is what happened.[42]

Throughout the CIA's early years, Congress funded intelligence activities without asking many questions, especially when it came to subversive action abroad. A very small cell within the Executive Branch charged with covert campaigns (often at arms' length from the President) was satisfied with the lack of congressional

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oversight, save for informally briefing a handful of legislators responsible for secret funding.[43] Most of those lawmakers also preferred not having to get their hands dirty. As one Senate overseer put it, "It is not a question of reluctance on the part of CIA officials to speak to us. Instead, it is a question of our reluctance, if you will, to seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have."[44] That admission captured the new constitutional reality: Oversight of secret war was less evaded by presidents than surrendered by legislators.

From this point, constitutional war powers ran on two tracks: a set of rules and practices for open use of regular forces, and another for covert use of irregular forces. The well-worn overt track was built on a statutory mix of authorizations and restrictions, a rich body of historical practice, and openly debated claims of presidential authority. The newer and rougher covert track operated through inference and denial. That was not just because decision-making and consultation about covert activities were hidden but also because they were often informal.[45] Later chapters will show how the covert track gets refined and entrenched – and how the two tracks get twisted.

THE CUBAN CRISES

On the eve of John F. Kennedy's inauguration in January 1961, Eisenhower advised the incoming president to do "whatever is necessary" to rid the world of Cuban President Fidel Castro's regime.[46] When Castro had assumed power in 1959, Cuba quickly moved into the Soviet orbit. Within two years, that island would become the crucible of both a failed covert war and a successful nuclear non-war – episodes that tested the dual tracks of war power built in the 1950s. Behind the abortive 1961 Bay of Pigs invasion, the Executive spun a legal theory justifying any covert warfare the President deemed necessary to defend the free world. The 1962 Cuban Missile Crisis showed how nuclear weapons concentrated decision-making in the Executive, but also how different nuclear strategies concentrated it in distinct ways. If Eisenhower's nuclear logic relied on automaticity, Kennedy's depended on control. The contrast between their approaches would reveal different constitutional pressures.

In 1960, Eisenhower had approved the planning of a covert operation to overthrow Castro. Without seriously questioning it – nor any opportunity for Congress to – Kennedy ran with it. The CIA trained and armed Cuban exiles at a training site in Guatemala. In April 1961, the Agency sailed about 1,500 of them to Cuba's Bay of Pigs beaches, following CIA-directed airstrikes by B-26 bombers, flown by exile pilots and disguised as Cuban planes, against nearby airfields. The operation, intended to trigger uprisings across the country, failed instantly due to poor preparation. With the CIA's cover blown wide open, President Kennedy balked at approving further bombings of Cuban forces. Castro's forces then easily overwhelmed the invading rebels.[47] Kennedy publicly acknowledged the U.S. government's role in the failed covert action and accepted personal responsibility for the debacle.

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Just as the Cuba invasion was crafted in the shadows, so was its legal justification. Overt military intervention historically spawned open, detailed legal reasoning by the Executive Branch and exchanges with Congress, but covert intervention did not. Although CIA paramilitary operations have rarely stayed secret, the internal legal advice behind them often has.[48]

In the Bay of Pigs case, however, a Justice Department memo came to light a decade later, when Congress worked to rein in CIA activities. The document, which had been provided to Congress soon after the fiasco, likened covert paramilitary operations to war in some ways while treating them as distinct in others.[49]

The memo contains a questionable syllogism: The President has constitutional power to make war to defend the United States, and the President has power to engage in covert intelligence operations, so therefore the President has power to make covert war through intelligence agencies. In staking this claim, executive branch lawyers asserted a series of analogies between open military force and concealed paramilitary operations. They quoted the Civil War *Prize Cases* maxim that when the United States is attacked, the President may "meet force with force," and they reasoned that so, too, "the President should be deemed to have comparable authority to meet covert activities with covert activities." By "comparable," the lawyers seemed to be saying that CIA paramilitary operations were constitutionally analogous to regular military force – but not quite the same. They further asserted that "the power of the President to conduct foreign relations should be deemed to be the power to conduct foreign relations successfully, by any means necessary to combat the measures taken by the Communist bloc, including both open and covert measures." Written against a historical backdrop on which, until then, presidents had conducted most intelligence activities unilaterally, pursuant to their Article II powers, these parallels have some logic.[50] Yet the memo never acknowledged a crucial difference: Openly visible warfare exposes the President to public accountability, whereas covert warfare largely shields him from it.

The most striking aspect of the Justice Department's claim of the President's own power to engage in covert warfare was its emphasis on Cold War context and dangers. "In waging a world wide contest to strengthen the free nations and contain the Communist nations, and thereby to preserve the existence of the United States," it read, the President's power to match Soviet covert activities with U.S. ones should extend to whatever he deems "necessary and consistent with our national objectives." Colossal Cold War stakes, in other words, yield colossal presidential powers. Assessed in terms of a global conflict for survival, the President's power to wage covert warfare would seem virtually boundless.

Beyond these constitutional arguments, the Justice Department memo argued that while Congress did not explicitly authorize CIA covert operations, including covert warfare, the 1947 National Security Act's ambiguous language implied it.[51] It also claimed that Congress's continued funding, coupled with some leaders' awareness of these operations, acted as legislative ratification. Note that this argument relies on

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an interpretation of Congress's power that went beyond any established congressional power for overt warfare. In essence, this was a claim that legislative acts had indefinitely delegated to the President a broad license to engage in covert warfare without geographic or other limits. As noted in the earlier discussion of force resolutions, the Eisenhower years established, though with some lingering dispute, that Congress could delegate to the President advance authority to wage overt war. Still, those expansive force resolutions were at least bounded in terms of geography and purpose. It is doubtful that the Executive Branch would have argued that Congress could delegate to the President authority to overtly use armed force anywhere, anytime, for any reason, or that Congress would have accepted such an arrangement. But the Executive Branch now claimed that Congress had done so for covert uses of armed force.

It is hard to argue that the Bay of Pigs invasion was not "war" in a meaningful sense, despite efforts to conceal U.S. involvement and the clandestine use of civilian agents and foreign rebels. American officials believed the need to defend the hemisphere from Soviet influence justified overthrowing a neighboring government with armed force. They also thought covert warfare reduced the risk of escalation. In that light, executive branch lawyers must have viewed their claims of vast presidential power to wage covert war as entirely fair. Congress, for its part, did not resist.

The Soviet Union and Cuba were indeed content to let the Kennedy Administration stew in its domestic and international embarrassment rather than retaliate. The U.S. attempt to overthrow Castro, meanwhile, sowed the seeds for the nearly world-ending Cuban Missile Crisis the following year. From the lawyer's usual vantage – fixated on presidential military actions that actually engaged the enemy in combat – one could mistake the doomsday crisis as a constitutionally minor episode. It is a war that did not happen; the only shots U.S. vessels fired were warning ones. But if one focuses instead on nuclear brinkmanship and bargaining, as strategists and political scientists do, the Cuban Missile Crisis was arguably the most significant exercise of constitutional war powers ever.

In October 1962, flying 70,000 feet above Earth, a U.S. spy plane spotted Soviet nuclear missiles being secretly assembled in Cuba. American defense planners believed this step – which contradicted Soviet assurances – would gravely heighten American vulnerability. Never before or since the ensuing thirteen-day crisis was there a greater chance of nuclear war. It is no wonder that it strained the constitutional machinery originally designed for a world of muskets and sailing ships.

After weighing options, Kennedy decided to institute a naval blockade of Cuba – the Kennedy Administration called it a "quarantine" to sound less bellicose – to prevent further Soviet missile shipments. He did so knowing that if this effort failed to reverse Soviet nuclearization of Cuba, he would need to take more forceful actions being pushed by advisers. The military Joint Chiefs were strongly urging the President to bomb Soviet missile sites in Cuba, or even to invade and overthrow Castro, before the Soviets had more time to assemble nuclear weapons there. Besides retaliatory strikes from Cuba, the Soviets might have responded to a U.S.

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attack on Cuba with their own attack on West Berlin – until this moment the most burning superpower hotspot – setting off a cataclysmic spiral.

Just before commencing the quarantine, the President briefed congressional leaders on his action plan, though he did not seek Congress's consent. Many members of Congress and the President's inner circle believed that Congress had already blessed the use of force: A congressional resolution enacted earlier that month had declared it the policy of the United States "[t]o prevent by whatever means necessary" Cuba from conducting aggressive or subversive activities in Latin American and "to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States."[52] This was not styled as a force "authorization" per se, but many officials read it that way. In fact, the Kennedy Administration had beaten back tougher-worded resolutions proposed by Republican hawks, believing their explicit calls for armed force to be dangerously provocative.[53] Regardless, most among Kennedy's private congressional audience now pressed the President to take stronger action directly against Cuba.[54] The Democratic Senator from Arkansas and Chairman of the Senate Foreign Relations Committee J. William Fulbright pressed, "I'm in favor, on the basis of this information, of an invasion, and an all-out one, and as quickly as possible."[55] None of the briefing's participants urged Kennedy to go back to Capitol Hill for further approval. In a televised address to the nation later that day, the President revealed that the United States had detected Soviet nuclear missiles in Cuba and announced his plan of action.[56]

Executive branch lawyers had little doubt about the President's constitutional power to enforce a quarantine, with or without Congress's consent. A Justice Department memorandum discussing the plan's legality emphasized the President's unilateral power to institute blockades, and only in passing does it mention the congressional resolution from earlier that month declaring U.S. policy to prevent military threats emanating from Cuba.[57] Neither internal executive branch legal analysis nor Kennedy's public announcement of the quarantine treat the congressional resolution as legislative *authorization* to use force, so much as endorsement of the President's own constitutional power.[58]

With the naval quarantine in place, Kennedy and Soviet Premier Nikita Khrushchev traded a series of threats – that both leaders understood could escalate to nuclear war – until they negotiated a back-channel deal: Soviet withdrawal of nuclear weapons from Cuba in return for a U.S. pledge not to invade Cuba, plus a secret promise by Kennedy to withdraw U.S. nuclear weapons from Turkey. Kennedy's second commitment is never considered a war powers issue, yet here was a President agreeing, unknown to Congress, with an enemy leader on a major change in the U.S. nuclear posture. Similar to the way, as discussed in Chapter 8, Truman exercised commander-in-chief powers to reposition troops around the world to achieve strategic effects, Kennedy was doing so here with nuclear weapons. It is another example of executive unilateralism that helped keep peace – and because it did so, it escapes notice as a constitutional matter. With this bargain, the

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President and his Soviet counterpart both stood down, but later revelations brought to light just how close the world had come to a nuclear exchange. Among other details unknown to the American side at the time, Soviet forces on the island were armed with (and had authority to use) tactical nuclear weapons.[59]

Because in the end the superpowers averted war, legal scholars tend to breeze over the whole affair, almost as a non-event for constitutional powers. To them, there was no real testing of arguments justifying resort to war. But to understand the constitutional workings of the crisis, it makes little sense to focus only on the most visible actions that happened, like the quarantine. One should also focus on the actions that happened in the background or that did not occur at all. As Kennedy and his advisers realized, a quarantine alone could not remove the missiles already in Cuba. They also considered – and expected they might soon need to resort to – major airstrikes and an invasion to topple Castro. During the two-week crisis, tens of thousands of U.S. soldiers and marines visibly assembled in Florida to prepare to invade, and U.S. strategic bombers were placed on high alert.[60] The quarantine was only the lowest rung on an escalatory ladder, and the most consequential presidential military actions were threats of greater force or even nuclear escalation. No one apparently questioned his authority to climb the nuclear ladder if the Soviets tried to run the blockade.

It is also important to put constitutional workings in the context of nuclear strategy at the time. Common wisdom holds that nuclear weapons' speed and magnitude necessarily entailed centralization of government power in the Executive. This is true, but the specific and still-evolving strategic choices about how to use nuclear weapons – and deter use – contributed to that centralization as well and in various ways.

One such choice by Kennedy in this crisis resembles what forty years later – in the George W. Bush Administration – gets dubbed a "preemption doctrine." In his televised address to the nation, Kennedy stated: "Nuclear weapons are so destructive and ballistic missiles are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace."[61] According to the President – as well as Congress's October joint resolution – this new age of nuclear vulnerability was unlike earlier eras when the United States could afford to wait and then respond to first-blows after building up its own military capability. It was also unlike the previous decade, when the United States had time to quickly surge its standing forces to faraway regions to beat back attacking enemy forces. Now both political branches were declaring that the United States should be prepared to strike first to prevent an enemy from even arraying its forces in ways that intolerably endangered the United States.

Amid the crisis, how could the President, constitutionally speaking, be empowered to carry out such a policy? He could, as Eisenhower had mused, go to Congress for some sort of secret war authorization, but that was infeasible. He could approach Congress openly, but that might have goaded the Soviets to strike first. Involving lawmakers more deeply in decisions to wield nuclear options risked boxing Kennedy in politically, and a more explicit congressional force authorization might inadvertently

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have been read abroad as too bellicose. Congress could have delegated to the President very broad war authority in advance, as it did at some of Eisenhower's requests and as it may have done with regard to Cuba (depending on how one reads the Joint Resolution that Congress passed prior to the crisis). Or the President could assert unilateral constitutional power. Kennedy chose the last option.

Kennedy's approach to nuclear strategy centralized power in the presidency in another way. Eisenhower's massive retaliation approach had attempted to convince enemies that he might respond to aggression with overwhelming force, and if any conflict went nuclear, it might be with no restraints. Kennedy's approach emphasized a more "flexible response." Not only did Kennedy's closest civilian aides worry that the threat of all-out retaliation lacked credibility; they also wanted to arm the President with a wider range of nuclear options that he could tailor to specific situations. His Secretary of Defense, Robert S. McNamara, had been pushing military leaders to offer the President a wider and more graduated set of alternatives to the rigid and all-or-nothing plans on the shelf.[62] "If we are talking about nuclear war," Kennedy told congressional leaders when briefing them on the Cuba quarantine, "the escalation ought to be at least with some degree of control."[63] General nuclear war should be a last resort, not a first option.

During the Cuban Missile Crisis, this meant calibrating leader-to-leader diplomacy with signaling through military actions, including moves like changing the alert status of nuclear forces – though historical evidence now reveals how easy it was for leaders to misread one another's intentions.[64] Eisenhower had wanted resort to nuclear weapons in some war scenarios to be virtually automatic – enough so that he pre-authorized certain commanders to launch – and he wished to show adversaries that his nuclear options were rigid and unstoppable. Kennedy, instead, sought nuclear dexterity not only to credibly threaten escalation but to credibly offer de-escalation as well; he wanted license but also brakes and off-ramps. If Eisenhower's strategy depended on automaticity, Kennedy's depended on discretion. The strategic logic of both, driven by the bomb's unprecedented speed and destructiveness, pointed toward vast presidential authority – but for opposing reasons. Eisenhower sought to make nuclear use automatic and thus credible, while Kennedy sought to make it controllable and thus survivable. In either case, the bomb's logic demanded that decisive authority rest in a single pair of hands.

Once the thermonuclear arsenals of superpowers could obliterate the other side, their primary use was not fighting wars but threatening them. Whether for massive retaliation or flexible response options, and whether through legislative delegations of power or assertions of inherent executive power, a constant risk of national extinction was thought within both political branches to compel presidential license for nuclear use.

CONCLUSION

In the absence of overt war, the Eisenhower and Kennedy years saw rapid adjustments in war powers, above all the authority to threaten war. Nuclear strategy and

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constitutional arrangements were evolving together: The President gained the power to instantly launch nuclear war, Congress asserted power to broadly pre-authorize war, and the Executive built a secret warfare apparatus based on ambiguous constitutional grounds. Chapter 10 shows how some of these adjustments would be tested in Vietnam.

Shortly after the 1961 Bay of Pigs debacle, Senator Fulbright gave a little-noticed speech that captured much constitutional thinking of the time. "The question we face," he asked:

> is whether our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century, is adequate for formulation and conduct of the foreign policy of a 20th-century nation, pre-eminent in political and military power and burdened with all the enormous responsibilities that accompany such power.[65]

Echoing earlier American leaders who worried that divided constitutional power left the United States ill-equipped to compete with centralized foreign regimes, Fulbright envied the British parliamentary system and the Soviet communist one, which he thought provided leaders with the unified control needed to formulate and execute grand strategy.

But Fulbright mistook adaptation for paralysis, believing that war powers were still operating much like they had in the 1790s and that further adjustments entailed clean breaks from inflexible constitutional origins. Earlier chapters have shown that throughout American history, flexible constitutional adaptation had continually bested stubborn rigidity. The period between the Korean War, discussed in Chapter 8, and the Vietnam War, discussed in Chapter 10, was one of strategic shifts, and constitutional interpretations and applications were flexing again – yet still within the Constitution's basic framework.

Custody of the nuclear stockpile created by Congress was governed by legislated controls, though practical demands of nuclear war planning – once the political branches made some strategic choices about the bomb – greatly loosened those restraints. Presidents wielded threats of nuclear war, which they had practical power to launch, but for the most part, they did so with express or implied support from Congress. All the while, Congress had helped create and then sustained a capability for covert warfare as an alternative to major war. In all of this, Congress did not so much lose its war powers as yield them, but often with cross-branch agreement that doing so was necessary. The Executive and Congress cooperated, even as authority increasingly accumulated in the former.

This was a period of high-stakes experimentation in strategy and law – experimentation conducted not in a major war, but in a period between major wars. In assessing those trials, Fulbright also misjudged the virtues of checks on presidential power. In the years that followed, Fulbright himself would convert to one of the strongest checkers. His transformation mirrored the nation's: from fearing executive weakness to fearing its excess.

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