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# **PEACE POWERS: Could the President End the Korean War Without Congress?**

Elizabeth Beavers

## ABSTRACT

The Korean War never actually ended. Although largescale hostilities have been suspended for decades under an armistice agreement, a peace agreement was never signed, and there remains a tense posture in which the United States, North Korea, and South Korea continue to prepare themselves for resumed hostilities at any time. The Trump administration indicated a willingness to enter into a peace agreement with North Korea to formally end the war and but did not follow through, and other prior American presidents had also failed to secure normalized relations with North Korea. South Korean President Moon Jae-in continues to advocate fiercely for a formal peace agreement between the warring parties, and given the recent change of political leadership within the United States, the issue is sure to arise again.

But if a U.S. president were to one day succeed in concluding a binding international peace agreement to formally end the Korean War, what should be the role of Congress? Just as the proper division of war powers between the executive and legislative branches of government are hotly contested, so too do the powers to end war and declare peace remain a subject of debate. As a matter of policy, it may be preferable to utilize the most solemn procedure available under U.S. law, the Article II treaty process, for a peace agreement to end the Korean War. Short of that, a congressional-executive agreement could also be used to signal that each of these branches of the American government are committed to forging a new relationship with North Korea and recognizing an end of the war. Nonetheless, there are many reasons that a President may determine that it is more strategic, expedient, or otherwise preferable to act unilaterally. For example, there may be complex political dynamics in Congress that threaten to slow, hamper, or outright impede peace efforts. If that is the case, this Article argues that there is nothing in the text, case law, or past practice under the Constitution that would prohibit the President from ending the Korean War through a sole executive agreement.

## ABOUT THE AUTHOR

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## INTRODUCTION

In June 2018, after a period of escalated rhetoric between the leaders of the United States and the Democratic People's Republic of Korea (North Korea) that many feared would lead to armed conflict,<sup>1</sup> U.S. President Donald Trump and North Korean Chairman Kim Jong Un met in Singapore. At this summit, they signed a declaration calling for “new U.S.-D.P.R.K. relations” in furtherance of a “lasting and stable peace regime on the Korean Peninsula.”<sup>2</sup> Just months earlier, the South Korean and North Korean leaders held a similar summit in which they signed

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1. That escalated rhetoric included President Trump threatening that North Korea would be “met with fire and fury like the world has never seen” and North Korean officials warning of “a nuclear pre-emptive strike” and “all-out war” against the United States, among other threats. See Megan Keneally, *From ‘Fire and Fury’ to ‘Rocket Man,’ the Various Barbs Traded Between Trump and Kim Jong Un*, ABC NEWS (June 12, 2018), [HTTPS://ABCNEWS.GO.COM/INTERNATIONAL/FIRE-FURY-ROCKET-MAN-BARBS-TRADED-TRUMP-KIM/STORY?ID=53634996](https://abcnews.go.com/INTERNATIONAL/FIRE-FURY-ROCKET-MAN-BARBS-TRADED-TRUMP-KIM/STORY?ID=53634996) [<https://perma.cc/BKE6-LT3T>].

2. WHITE HOUSE, JOINT STATEMENT OF PRESIDENT DONALD J. TRUMP OF THE UNITED STATES OF AMERICA AND CHAIRMAN KIM JONG UN OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA AT THE SINGAPORE SUMMIT (June 12, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit> [<https://perma.cc/5CC9-ZFU8>].

a declaration calling for a peace agreement with the United States that would formally end the Korean War.<sup>3</sup>

These summits raised speculation that the American and Korean leaders might then follow through on those commitments by signing a peace agreement to replace the 1953 Armistice Agreement and formally end the Korean War. This was the most recent, but not the first time, there has been discussion by the three parties on seeking a peace agreement to conclude the Korean War.<sup>4</sup> Though as of this writing follow-up talks have fizzled, South Korean President Moon Jae-In used his address before the U.N. General Assembly in 2020 to urge renewed efforts toward such an agreement,<sup>5</sup> and the issue could once again resurface soon given the recent change of political leadership within the United States.

There remains a lingering question of whether, from a constitutional law perspective, a U.S. president could validly enter into such an agreement without involving Congress. This Article seeks to answer that question in the affirmative by demonstrating that the president could indeed enter into a sole executive agreement to end the Korean War. To do so, this Article will review the relevant history of the Korean War, determine whether it was in fact a war, and discuss whether there is still a state of war. Finally, the Article will analyze the relevant constitutional text, history, and case law regarding sole presidential powers to end wars, declare peace, and conclude executive agreements.

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3. This declaration also raised the possibility of involving China as a party to the peace agreement. PANMUNJOM DECLARATION ON PEACE, PROSPERITY AND REUNIFICATION OF THE KOREAN PENINSULA, (Apr. 27, 2018), [www.mofa.go.kr/eng/brd/m\\_5478/view.do?seq=319130&srchFr=&%3BsrchTo=&%3BsrchWord=&%3BsrchTp=&%3Bmulti\\_itm\\_seq=0&%3Bitm\\_seq\\_1=0&%3Bitm\\_seq\\_2=0&%3Bcompany\\_cd=&%3Bcompany\\_nm=&page=1&titleNm=\[https://perma.cc/N68R-X4ZF\]](http://www.mofa.go.kr/eng/brd/m_5478/view.do?seq=319130&srchFr=&%3BsrchTo=&%3BsrchWord=&%3BsrchTp=&%3Bmulti_itm_seq=0&%3Bitm_seq_1=0&%3Bitm_seq_2=0&%3Bcompany_cd=&%3Bcompany_nm=&page=1&titleNm=[https://perma.cc/N68R-X4ZF]).

4. See generally EMMA CHANLETT-AVERY ET. AL., CONG. RSCH. SERV., R45169, A PEACE TREATY WITH NORTH KOREA? (2018) (documenting prior discussions by the parties regarding the need for a peace agreement, such as the North-South Talks, Four Party Talks, and Six Party Talks), <https://crsreports.congress.gov/product/pdf/R/R45169> [<https://perma.cc/KR9G-S4Z4>]; see also Michael Perry, *Bush Considers Peace Treaty with N. Korea*, REUTERS (Sept. 6, 2007) (describing President George W. Bush's talks with South Korea in which he stated, "We're looking forward to the day when we can end the Korean War."), <https://www.reuters.com/article/us-apec-idUSSP13447620070907> [<https://perma.cc/DA2F-MC6M>].

5. President Moon told the U.N. General Assembly that "[p]eace on the Korean peninsula will guarantee peace in Northeast Asia as a whole and, going one step further, bring positive changes to the world order as well. I believe it begins with declaring an end to the War, an act that can affirm mutual commitments to peace." See *Full Text of President Moon Jae-in's Speech at 75th Session of United Nations General Assembly*, YONHAP NEWS AGENCY (Sept. 23, 2020), <https://en.yna.co.kr/view/AEN20200922010300315> [<https://perma.cc/92SY-6XZQ>].

## I. HISTORY AND BACKGROUND OF THE KOREAN WAR

Often referred to as “the Forgotten War,” the Korean War is the longest overseas war in American history.<sup>6</sup> After Japan’s colonial rule of Korea came to an end post–World War II, the peninsula was split along the 38th parallel by American officials,<sup>7</sup> with the North to be occupied by the Soviet Union and the South by the United States.<sup>8</sup> On June 25, 1950, the Democratic People’s Republic of Korea in the North invaded the Republic of Korea in the South.<sup>9</sup> This quickly launched an international intervention. The United Nations (U.N.) Security Council authorized, and the United States led, a U.N. Command (UNC) to intervene militarily in support of South Korea. After repelling the attack, the U.S.-led UNC then pushed over the 38th parallel into the North, where China joined the conflict in support of North Korea.<sup>10</sup> The fighting fell into a stalemate after three years of combat. Military leaders representing the U.S.-led U.N. Command, China, and North Korea signed what was meant to be a temporary Armistice Agreement on July 27, 1953, to establish a ceasefire that halted combat until a peace treaty could be agreed to in a political conference three months later.<sup>11</sup> Yet, nearly seventy years later, this fragile armistice has never been replaced with a formal peace agreement among the warring parties.

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6. Joshua Keating, *The Longest War*, SLATE (June 8, 2018), <https://slate.com/news-and-politics/2018/06/the-korean-war-might-finally-come-to-an-end-heres-why-it-mattered.html> [<https://perma.cc/GL6G-FW4T>].

7. Neither of the American officials responsible for choosing the line of division was an expert on Korea. One of the officials, Dean Rusk, who would later serve as Secretary of State, recalled that the decision was made “‘late at night[,] in haste and under great pressure’ . . . Using a National Geographic map of ‘Asia and Adjacent Areas’ that lacked provincial borders, the two mid-ranking officers struggled to find a ‘convenient’ boundary—so they settled upon a line at the thirty-eighth parallel north latitude.” See Sebastien Roblin, *How 2 Colonels and a National Geographic Map Divided Korea*, THE NATIONAL INTEREST (Mar. 2, 2018), <https://nationalinterest.org/blog/the-buzz/how-2-colonels-national-geographic-map-divided-korea-24734> [<https://perma.cc/NS59-HYKS>].

8. STANLEY SANDLER, *THE KOREAN WAR: NO VICTORS, NO VANQUISHED*, 22–23 (1999).

9. *Id.* at 47.

10. *Id.* at 99–100.

11. The Korean War Armistice Agreement, art. 4, ¶ 60, July 27, 1953 (“[T]he military Commanders of both sides hereby recommend to the governments of the countries concerned on both sides that, within three (3) months after the Armistice Agreement is signed and becomes effective, a political conference of a higher level of both sides be held by representatives appointed respectively to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc.”), [https://www.usfk.mil/Portals/105/Documents/SOFA/G\\_Armistice\\_Agreement.pdf](https://www.usfk.mil/Portals/105/Documents/SOFA/G_Armistice_Agreement.pdf) [<https://perma.cc/PG8M-QK75>].

## II. IS THE UNITED STATES STILL ACTUALLY IN A STATE OF WAR WITH NORTH KOREA?

Before determining whether the President could end the Korean War through a sole executive agreement, there is a foundational question of whether the United States is still actually in a state of war with North Korea. That analysis must begin with the question of whether they were ever actually at war in the first place.

The question of precisely what level of military activity crosses the threshold of “war” is a complex one, perhaps even more so in the decades since the Korean War originally broke out. With the advent of the United Nations, its Charter, and the law of armed conflict, determining whether there is a “state of war” has today largely been cast aside in favor of assessing permissible “use of force” or the presence of an “armed conflict.”<sup>12</sup> For international law purposes, an armed conflict between two or more states exists when they resort to the use of force against one another, even if they do not describe the fighting as war.<sup>13</sup>

Separately from international law, there is also the matter of a conflict’s status under U.S. domestic law. To be sure, the precise legal threshold for what constitutes a state of war remains a subject of debate. Nonetheless, numerous definitions and interpretations have been put forward by scholars and lawmakers making clear that, whatever a war is, the Korean War was one. Professor Louis Henkin’s analysis is that “however a use of force may be characterized for purposes of international law under the United Nations Charter, its character for constitutional purposes remains what it was: extended hostilities involving large numbers of military personnel are acts of war for constitutional purposes and require Congressional authorization, consent or approval.”<sup>14</sup> The War Powers Resolution (WPR) of 1973, which Congress passed over

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12. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 98 (2d ed. 1996) (“The term ‘war’, enshrined in the Constitution by the Framers, was at the time a fundamental concept in public international law, and it is not implausible to conclude that for the Framers the power given to Congress to make war referred to war as understood in international law. But in the intervening centuries, war changed radically in life, in international relations, in law. The United Nations Charter, designed to abolish war, eschewed the term. The Charter outlaws the use of force against the political independence or territorial integrity of another state, whether or not in an earlier day such use of force would have been *casus belli* (an act of war or a cause of war).”).

13. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 32 (Jean S. Pictet ed., 1952) (“One may argue almost endlessly about the legal definition of ‘war’: A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”).

14. HENKIN, *supra* note 12 at 98.

President Nixon's veto in the post-Vietnam era in an attempt to claw back its constitutional war powers, set the threshold of deployments requiring congressional authorization as "introduction of United States Armed Forces into hostilities."<sup>15</sup> The WPR elaborates further that this includes "assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."<sup>16</sup> The congressional report accompanying passage of the WPR noted that the word "hostilities" was substituted for the term "armed conflict" during the subcommittee drafting process because it was considered to be somewhat broader in scope: "In addition to a situation in which fighting has actually begun, 'hostilities' also encompasses a state of confrontation in which no shots have been fired but where there is clear and present danger of armed conflict. 'Imminent hostilities' denotes a situation in which there is a clear potential either for such a state of confrontation or actual armed conflict."<sup>17</sup> In 2011, justifying the Obama administration's decision to use military force in Libya without first seeking congressional authorization, the Office of Legal Counsel described wars as "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."<sup>18</sup> This remains a controversial and widely-disputed definition, yet it underscores the extent to which it is difficult to characterize what happened in Korea as anything other than a war.

President Truman characterized the military action he oversaw in Korea not as a war but a "police action."<sup>19</sup> Those who concur that the activity was something less than outright "war" assert that the United States was merely supporting a narrow U.N.-led international action to restore peace and security by executing its responsibilities under the U.N. Charter and the U.N. Participation Act.<sup>20</sup> But characterizing the American excursion in Korea as a mere supportive endeavor in service of a limited U.N.-led mission does not stand up to scrutiny. President Truman committed U.S. troops to fight in Korea before the Security Council ever issued its authorization.<sup>21</sup> Further, in every respect it was the United

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15. War Powers Resolution, 50 U.S.C. § 1547(c) (1973).

16. *Id.*

17. H.R. REP. NO. 93-287, at 23 (1976) (Conf. Rep.).

18. Memorandum Opinion for the Attorney General, Authority to Use Military Force in Libya (Apr. 1, 2011).

19. *The President's News Conference*, Harry S. Truman Presidential Library & Museum (June 29, 1950), <https://www.trumanlibrary.gov/library/public-papers/179/presidents-news-conference-0> [<https://perma.cc/9PW9-3SSE>].

20. See, e.g., Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533 (1996).

21. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 Am. J. Int'l. L. 21, 33 (1995) ("some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution.").

States and not the United Nations that controlled the U.N. unit established to prosecute the Korean War. The UNC was steered by American General Douglas MacArthur, was supported almost entirely through American tax dollars, was composed almost entirely of American and South Korean forces, and overwhelmingly claimed the lives of American soldiers.<sup>22</sup> Finally, the U.S.-led forces conducted military operations far beyond the mandate of the U.N. Security Council. When they had successfully finished repelling the North Korean attack as authorized, they then pushed further past the 38th parallel and entered into a prolonged, bloody war beyond the scope of defending South Korea against attack by the North.<sup>23</sup>

The Korean War surely was a war, by any metric. The Truman administration's own Secretary of State, Dean Acheson, testified before the Senate in 1951 that "in the usual sense of the word there is a war."<sup>24</sup> Federal courts adjudicating life insurance claims for those who died in the Korean War agreed, with one district court in 1953 noting: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."<sup>25</sup> The idea that the United States was not at war is also quite difficult to reconcile with President Truman's own expansive claims of his wartime Commander-in-Chief power necessary to prosecute the Korean War in the "Steel Seizures Case."<sup>26</sup>

The impact of the conflict both on the Korean peninsula and within the United States further erodes the notion that the Korean War was anything less than a war. According to University of Chicago historian Bruce Cumings, the Korean War "was the occasion for transforming the United States into a very different country than it had ever been before:

22. *Id.* at 34 ("[T]he United Nations exercised no real authority over the conduct of the war. Other than token support from a few nations, it was an American war. The Security Council requested that the United States designate the commander of the forces and authorized the 'unified command at its discretion to use the United Nations flag.' Truman named Gen. Douglas MacArthur to serve as commander of this so-called unified command. Measured by troops, money, casualties and deaths, it remained an American war.").

23. S.C. Res. 83 (June 27, 1950) (detailing the narrow original scope of the Security Council's authorization) ("[H]aving called upon the authorities in North Korea to withdraw forthwith their armed forces to the 38th parallel . . . [r]ecommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore peace and security in the area.").

24. *Military Situation in the Far East (Part 3): Hearings Before the Senate Comms. on Armed Services and Foreign Relations*, 82d Cong., 1st Sess. 2014 (1951) (testimony of Secretary of State Dean Acheson).

25. *Weissman v. Metro. Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953). *See also Gagliormella v. Metro. Life Ins. Co.*, 122 F.Supp. 246 (D.Mass. 1954); *Carius v. New York Life Ins. Co.*, 124 F.Supp. 388 (D. Ill. 1954).

26. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (assessing the President's efforts to seize the steel mills to resolve a labor dispute under the auspices of his Commander-in-Chief power during the Korean War).



one with hundreds of permanent military bases abroad, a large standing army and a permanent national security state at home.”<sup>27</sup> The fighting killed about three million Koreans, mostly civilians, a number that American military leaders estimated to be 20 percent of the population.<sup>28</sup> The bombings also fully flattened the North by reducing every city to rubble and destroying key infrastructure.<sup>29</sup> As Professor Henkin concludes, Korea “became what was surely a war within the meaning of the Constitution, and it was not for the President to wage it on his sole authority.”<sup>30</sup>

If then, the United States was indeed at war in Korea, the next key question is whether that state of war continues today. The question of whether a state of war persists may seem like a technicality, so it is important to review why it matters. As a matter of international law, parties may claim that a continuing state of war justifies the more permissive wartime use of force rules, and that the stricter standards of peacetime use of force rules do not apply.<sup>31</sup> As a matter of domestic law, there is a lengthy collection of statutory authorities that may be activated in times of war or national emergency that a president could rely on for expanded powers by citing the existence of a state of war.<sup>32</sup> In the specific case of Korea, aside from legal technicalities, the continuing state of war plays a dominant role in many people’s daily lives, including families separated by the 38<sup>th</sup> parallel who have still not been reunited.<sup>33</sup>

Legally, determining whether a state of war has ended can be a surprisingly complex endeavor, as it is not solely a question of when

27. BRUCE CUMINGS, *THE KOREAN WAR: A HISTORY* 207 (2011).

28. Blaine Harden, *The U.S. War Crime North Korea Won't Forget*, WASH. POST (Mar. 24, 2015), [https://www.washingtonpost.com/opinions/the-us-war-crime-north-korea-wont-forget/2015/03/20/fb525694-ce80-11e4-8c54-ffb5ba6f2f69\\_story.html](https://www.washingtonpost.com/opinions/the-us-war-crime-north-korea-wont-forget/2015/03/20/fb525694-ce80-11e4-8c54-ffb5ba6f2f69_story.html) [https://perma.cc/8DTG-6HV8?type=image] (“‘Over a period of three years or so, we killed off—what—20 percent of the population,’ Air Force Gen. Curtis LeMay, head of the Strategic Air Command during the Korean War, told the Office of Air Force History in 1984. Dean Rusk, a supporter of the war and later secretary of state, said the United States bombed ‘everything that moved in North Korea, every brick standing on top of another.’ After running low on urban targets, U.S. bombers destroyed hydroelectric and irrigation dams in the later stages of the war, flooding farmland and destroying crops.”).

29. *Id.*

30. HENKIN, *supra* note 12, at 101.

31. GLORIA GAGGIOLI, *THE USE OF FORCE IN ARMED CONFLICTS INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS* 4–9 (Gloria Gaggioli ed.).

32. See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL 31133, *DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS* (Apr. 18, 2014), <https://fas.org/sgp/crs/natsec/RL31133.pdf> [https://perma.cc/GCZ4-2V7J] (listing domestic statutes that may be activated by a sates of war).

33. See Eugene Lee & Paul K. Lee, *70 Years of Separation: The Families Who Remain Divided by the Korean War*, DIPLOMAT (June 25, 2020), <https://thediplomat.com/2020/06/70-years-of-separation-the-families-who-remain-divided-by-the-korean-war> [https://perma.cc/UX9B-S9LG].

hostilities have ended.<sup>34</sup> Looking to international law for guidance, Additional Protocol I of the Geneva Conventions establishes that international armed conflicts continue until “the general close of military operations,” but does not define the term.<sup>35</sup> The International Committee of the Red Cross states that “[e]ven in the absence of active hostilities,” military operations such as “redeploying troops along the border to build up military capacity or mobilizing or deploying troops for defensive or offensive purposes” signifies a continuing state of war between nations.<sup>36</sup> The International Criminal Tribunal for the former Yugoslavia held that international armed conflicts continue “until a general conclusion of peace is reached . . . whether or not actual combat takes place there.”<sup>37</sup> The U.S. Department of Defense’s Law of War Manual interprets the Geneva Convention’s “general close of military operations” standard to mean “the final end of all fighting between all those concerned.”<sup>38</sup> The manual makes clear that an “armistice is not a partial or a temporary peace; it is only the suspensions of military operations to the extent agreed upon by the parties to the conflict. . . [w]ar as a legal state of hostilities between parties may continue, despite the conclusion of an armistice agreement.” The manual goes on to acknowledge that “[i]t may be difficult to determine when an armed conflict has ceased, as opposed, for example, to a lull in hostilities during which opposing forces may simply be reconstituting themselves. Hostilities generally would not be deemed to have ceased without an agreement, unless the conditions clearly indicate that they are not [to] be resumed or there has been a lapse of time indicating the improbability of resumption.”<sup>39</sup>

The Supreme Court has previously looked at several factors to determine whether the United States has been in a legal state of war. In *Bas v. Tingy*, 4 U.S. 37 (1800), Justice Washington determined that the United States was in a state of “imperfect war” with France because of

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34. Jann K. Kleffner, Peace Treaties, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW 7 (2011) (“The function of peace treaties *stricto sensu* is, first and foremost, to terminate the ‘state of war’ between the belligerent States and to restore amicable relations between them. According to the ‘state of war doctrine’, the existence of a ‘state of war’ in the formal sense depends on the intention of one or more of the States concerned and commonly commences with a declaration of war. It is not dependent on the actual occurrence of hostilities.”).

35. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 3(b), June 8, 1977, 1125 U.N.T.S. 3. Though the United States is not a party to Additional Protocol I, it generally accepts its provisions to be binding customary international law.

36. INT’L COMM. RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 279 (2d ed. 2016).

37. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

38. U.S. DEP’T OF DEF., LAW OF WAR MANUAL § 10.3.4 (2016).

39. *Id.* at § 3.8.1.2.

the absence of all intercourse, dissolutions of agreements between them, and clashes between their warships: “They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.”<sup>40</sup> In determining the applicability of a wartime prohibition law in *Hamilton v. Kentucky Distilleries*, 251 U.S. 146 (1919), the Court determined that though there had been a cease-fire and armistice with Germany and many war activities had ceased, the President and Congress were still in a dispute over the Treaty of Versailles, the President was still exercising Commander-in-Chief powers under the auspices of the state of war, troops remained in occupied territory, and demobilization was far from complete.<sup>41</sup> The Court has also distinguished ceasefires or armistice agreements that halt hostilities from binding peace agreements that legally terminate a state of war.<sup>42</sup> In the context of World War II, President Truman at one point explicitly noted that the state of war had not ended between the United States and Germany, even though Germany had surrendered and President Truman had declared an end of hostilities.<sup>43</sup>

Accordingly, the 1953 Armistice Agreement<sup>44</sup> suspended hostilities but did not conclusively end the Korean War, as the parties have not demonstrated a final end of all fighting, a general close of military operations, normalized relations, or the establishment of a general peace. The armistice was not negotiated and signed by heads of state, but instead was a military agreement negotiated and signed only by military leaders.<sup>45</sup> In the decades since it was established, the likelihood of its failure has only grown. In 2013, North Korea withdrew from the Armistice Agreement, saying, “From this time on, the North-South relations will be entering the state of war and all issues raised between the North and the South will be handled accordingly. The long-standing situation of the Korean peninsula being neither at peace nor at war is finally over.”<sup>46</sup>

The parties’ behavior indicates that they each see the war as merely on pause and ready to erupt again at any moment. The United States maintains tens of thousands of troops in South Korea and leads a U.S.-R.O.K. Combined Forces Command in preparation for renewed combat.<sup>47</sup> This

40. *Bas v. Tingy*, 4 U.S. 37, 40–41 (1800).

41. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 160–61 (1919).

42. *See id.*; *see also Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904).

43. Proclamation No. 2714, 61 Stat. 1048 (Dec. 31, 1946) (“Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.”).

44. The Korean War Armistice Agreement, *supra* note 11.

45. CHANLETT-AVERY ET. AL, *supra* note 4 at 2.

46. Madison Park, *North Korea declares 1953 armistice invalid*, CNN (Mar. 11, 2013), <https://www.cnn.com/2013/03/11/world/asia/north-korea-armistice/index.html> [<https://perma.cc/QW6R-CJ67>].

47. *Combined Forces Command*, U.S. FORCES KOREA, <https://www.usfk.mil/>

Combined Command is an outgrowth of the alliance “forged by blood” at the time of the armistice, continues to conduct military exercises that simulate invading the North to prepare for renewed hostilities, and operates with the stated goal of preparing to “fight tonight.”<sup>48</sup> The UNC also was never dissolved. As previously discussed, it was set up in 1950 ostensibly as a coordinated international unit fighting in Korea, but in reality has always been led and controlled by the United States.<sup>49</sup> Today, the UNC continues to conduct day-to-day operations monitoring the armistice, coordinating military-to-military contact in the Demilitarized Zone (DMZ) that separates North and South Korea, and preparing for potential resumption of hostilities.<sup>50</sup> North Korea frequently issues invasion threats against South Korea and the United States, and consistently cites the ongoing war and resulting need to protect itself against resumed hostilities as justification for its nuclear weapons buildup.<sup>51</sup> Though most of the other parties involved in the Korean War—including China and the “U.N. sending states” who contributed to the UNC—have since

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About/Combined-Forces-Command [https://perma.cc/Q3VU-6KNE]; see also Clint Work, *How to Constructively and Safely Reduce and Realign US Forces on the Korean Peninsula*, 38 NORTH (Aug. 25, 2020), https://www.38north.org/2020/08/cwork082520 [https://perma.cc/A6Y3-QC3B].

48. See, e.g., *Command Philosophy*, U.S. FORCES KOREA, https://www.usfk.mil/About/Command-Philosophy [https://perma.cc/H3CX-F35N]; Press Release, U.S. Dep’t of Def., Joint Statement in Commemoration of the 70th Anniversary of the Outbreak of the Korean War by United States Secretary of Defense Dr. Mark T. Esper and Republic of Korea Minister of Defense Jeong Kyeong-doo (June 24, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2231102/joint-statement-in-commemoration-of-the-70th-anniversary-of-the-outbreak-of-the [https://perma.cc/K25M-BUTE]; William Stueck & Boram Yi, *An Alliance Forged in Blood: The American Occupation of Korea, the Korean War, and the US-South Korean Alliance*, 33 J. STRATEGIC STUD. 177 (2010); Eric Talmadge, *Are the US and South Korea Really Planning to Assassinate Kim Jong-Un?*, INDEPENDENT (Mar. 8, 2016), https://www.independent.co.uk/news/world/asia/north-korea-kim-jong-un-assassinate-us-south-korea-a6919011.html [https://perma.cc/7ZFY-T2HJ].

49. Patrick M. Norton, *Ending the Korean Armistice Agreement: The Legal Issues*, NE. ASIA PEACE & SEC. NETWORK POL’Y F. ONLINE (1997) (“[B]ased in large part on this lack of operational U.N. control over any aspect of the hostilities, most observers, including the leading U.S. government expert on the law of war at the time, have concluded that the forces under the UNC, ‘although endowed with the name and flag of the United Nations troops, cannot in strict law be said to comprise United Nations troops. . . . [and] the acts of the Unified Command and the United Nations Command are not the acts of the United Nations itself.’”); see also Robert Bejesky, *Dubitable Security Threats and Low Intensity Interventions As the Achilles’ Heel of War Powers*, 32 MISS. C. L. REV. 9, 36 (2013) (noting that 96 percent of forces were sent by the United States and South Korea).

50. CHANLETT-AVERY ET. AL, *supra* note 4 at 3.

51. Brian Padden, *North Korea Threatens Pre-emptive Nuclear Strike*, VOICE OF AMERICA (Mar. 7, 2016), https://www.voanews.com/east-asia-pacific/north-korea-threatens-pre-emptive-nuclear-strike [https://perma.cc/Z7MB-5YDX]; Geoffrey Cain, *Full War Declaration Statement from DPRK*, REUTERS (Apr. 2, 2013), http://live.reuters.com/Event/North\_Korea/70001409 [https://perma.cc/Y4YU-M6YQ].

normalized relations with North Korea, the United States has not done so.<sup>52</sup> Instead, South Korea, North Korea, and the United States have all identified the need for a peace agreement to formally end the war, indicating that they all recognize the state of war to be ongoing.<sup>53</sup>

To be sure, outside of sporadic clashes at the border and at sea,<sup>54</sup> active armed conflict has ceased on the Korean Peninsula. But it is clear from the parties' statements and behavior that they do not see the conflict as concluded, are prepared for fighting to resume at any time, and treat one another as continued adversaries. Thus, the state of war continues not just between North and South Korea, but between North Korea and the United States.

### III. RELEVANT CONSTITUTIONAL PROVISIONS AND HISTORICAL PRECEDENT

To get to this Article's question of whether the President of the United States could enter into a sole executive agreement to formally end the Korean War, it is essential to examine the relevant constitutional law regarding the power to end wars, and how it has historically been applied in practice.

The text of the Constitution does not explicitly identify a power for any branch of government to terminate war or declare a state of peace. The silence on this precise question was intentional, as evidenced by debate at the Constitutional Convention. Regarding a proposal to

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52. CHANLETT-AVERY ET. AL., *supra* note 4 at n.10 ("The 17 'sending states' are Australia, Belgium, Canada, Colombia, Ethiopia, France, Greece, Luxembourg, the Netherlands, New Zealand, The Philippines, South Africa, South Korea, Thailand, Turkey, the United Kingdom, and the United States.")

53. See, e.g., Stephen Biegun, Special Representative for N. Kor., Remarks at Stanford on DPRK (Jan. 31, 2019), <https://kr.usembassy.gov/013119-remarks-on-dprk-at-stanford-university> [<https://perma.cc/YLS4-C9WA>] ("President Trump is ready to end this war. It is over. It is done. We are not going to invade North Korea. We are not seeking to topple the North Korean regime."); Byun Duk-kun, *Declaration of Korean War's end 'obvious' part of N. Korean denuclearization process: Pompeo*, YONHAP NEWS AGENCY (Oct. 22, 2020), <https://en.yna.co.kr/view/AEN20201022000200325> [<https://perma.cc/7UPY-HJ6V>] (reporting on Secretary of State Mike Pompeo's statements saying "It is common sense that the declaration of the war's end cannot be dealt with separately (from denuclearization)."; [Moon's national security advisor Suh Hoon] said after meeting with the top U.S. diplomat here in Washington Thursday, adding the only remaining issue was when such a declaration could be made."); Olivia B. Waxman, *Trump and Kim Could Declare an End to the Korean War After Seven Decades. How Are the U.S. and North Korea Still at War?*, TIME (Feb. 25, 2019), <https://time.com/5535864/us-north-korea-war-history> [<https://perma.cc/MQQ6-4BGU>] (quoting a South Korean government official saying "The North and the United States are the only ones remaining, and if the two declare an end to the war, it will mean that all the four countries that fought war on the Korean Peninsula have declared an end to war.").

54. See HANNAH FISCHER, CONG. RSCH. SERV., RL30004, NORTH KOREAN PROVOCATIVE ACTIONS, 1950–2007 (2020), <https://fas.org/sgp/crs/row/RL30004.pdf>.

explicitly grant Congress the power to declare both war and peace,<sup>55</sup> Oliver Ellsworth stated that “(t)here is a material difference between the cases of making war and making peace. It should be easier to get out of war, than into it.” George Mason added that “(h)e was for clogging, rather than facilitating war; but for facilitating peace.”<sup>56</sup> The proposal to add “and peace” to the Declare War clause was subsequently unanimously rejected.<sup>57</sup> This was an explicit deviation from the Articles of Confederation, under which Congress possessed both the powers to declare war and peace.<sup>58</sup>

Ultimately, the Constitution explicitly gave Congress the power to declare war,<sup>59</sup> gave the President the power to make treaties with advice and consent of the Senate,<sup>60</sup> and designated the President as Commander-in-Chief.<sup>61</sup> Because of the widely accepted premise at the time that wars would inevitably end with peace treaties, the Framers appeared to believe that the power to make treaties would sufficiently facilitate the power to terminate wars.<sup>62</sup>

The idea that wars always end with an Article II treaty has eroded over time, as illustrated in evolving case law. In 1796, the Supreme Court declared that “a war between two nations can only be terminated by a treaty.”<sup>63</sup> Indeed, the three U.S. wars prior to World War I initiated with a congressional declaration of war and ended with a peace treaty ratified by the President with the advice and consent of the Senate.<sup>64</sup> World War I disrupted that trajectory, as it ended with a particularly complicated interplay between the political branches of government. President Wilson did not believe himself to have the sole authority to terminate the war<sup>65</sup> and so, upon signing armistice agreements to halt combat, he submitted the Treaty of Versailles to the Senate for its advice and consent to a formal termination of the war, but the Senate rejected the treaty. Congress then attempted to pass a joint resolution ending the war, but

55. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 549 (E.H. Scott ed., Scott, Foresman & Co. 1898) (1840).

56. *Id.* at 548.

57. *Id.* at 549.

58. ARTICLES OF CONFEDERATION OF 1777, art. IX.

59. U.S. CONST. art. I, § 8, cl. 11.

60. U.S. CONST. art. II, § 2, cl. 2.

61. U.S. CONST. art. II, § 2, cl. 1.

62. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 98 (E.H. Bennett ed., 3d ed. 1858) (explaining that a congressional power to make peace was unanimously rejected at the Convention in favor of making peace through treaty).

63. *Ware v. Hylton*, 3 U.S. 199, 236 (1796).

64. See David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 PEPP. L. REV. 685 (2014) (reviewing U.S. conflicts and how each began and ended).

65. 58 CONG. REC. H4177 (Aug 22, 1919) (statement of Pres. Wilson “I feel constrained to say . . . not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to take such a course prior to the ratification of a formal treaty of peace.”).

the President vetoed it. Ultimately, the war officially terminated under President Harding's tenure with a joint resolution from Congress followed by presidential proclamations and treaties normalizing relations.<sup>66</sup> In the midst of this back-and-forth, the Supreme Court was tasked with determining whether the Wartime Prohibition Act to control liquor sales during the state of war still applied. This determination required a finding of whether the war was over. Building upon its earlier assertion that wars could only end with peace treaties, the Court declared that a "technical state of war (is) terminable only with the ratification of a treaty of peace or a proclamation of peace"(emphasis added).<sup>67</sup> Though fighting had ceased, the Court noted that there had been no treaty of peace, all war activities had not ceased, and the "man power of the nation" had not been "restored to a peace footing." The Court thus held that the state of war persisted for purposes of interpreting the War Prohibition Act.<sup>68</sup>

World War II further complicated the dynamic of war and peace powers, as it became the last formally declared U.S. war but then ended in an even more complex series of events than World War I. President Truman proclaimed a cessation of hostilities after Germany and Japan surrendered, but emphasized that the state of war had not actually ended.<sup>69</sup> The United States eventually concluded Article II peace treaties with Japan and other parties to World War II, but never with Germany. A state of peace was instead restored between the United States and Germany after a presidential proclamation, followed by a congressional joint resolution.<sup>70</sup> But before that, when fighting with Germany had ceased but before the presidential proclamation of peace or the congressional resolution, the Supreme Court was again tasked with determining whether a wartime statute was applicable in the case of *Ludecke v. Watkins*, 335 U.S. 160 (1948). This time, it was the Alien Enemy Act under review, which authorized the President to remove aliens from the United States during a time of declared war. A German national was challenging his removal proceedings, arguing that the statute was no longer applicable as

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66. Treaty of Peace, U.S.-Ger, ch. 40, Aug. 25, 1921, 42 Stat. 105; Treaty of Peace, U.S.-Austria, Aug. 24, 1921, 42 Stat. 1939; Treaty of Peace, U.S.-Hung., Aug. 29, 1921, 42 Stat. 1946; 42 Stat. 1951.

67. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919). This holding has been affirmed many times. See, e.g., *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70; *The Protector*, 79 U.S.(12 Wall.) 700, 702 (1870); *Hijo v. United States*, 194 U. S. 315, 323.

68. *Hamilton*, 251 U.S. at 163 ("In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the manpower of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.").

69. Proclamation No. 2714, *supra* note 43.

70. Proclamation No. 2950, 1951 PUB. PAPERS 598 (Oct.24, 1951); Act of Oct. 19, 1951, Pub. L. No. 82-181, 65 Stat.451.

hostilities between the United States and Germany had ended.<sup>71</sup> Though fighting had indeed ceased, the Court reaffirmed that cessation of hostilities does not necessarily mean the war has terminated, and held that because the political branches had not taken action to secure a final end to the war, the petitioner's removal was lawful. In so holding, the Court again expanded upon its earlier holdings by determining that wars are terminable via treaty, legislation, or presidential proclamation, emphasizing "[w]hatever the mode, its termination is a political act."<sup>72</sup>

Post-World War II, both formal declarations of war and treaties of peace have become rarities.<sup>73</sup> Indeed, wars have ended primarily through unilateral presidential action, and increasingly without formal peace agreements.<sup>74</sup> As discussed, the Korean War launched without congressional authorization and never formally concluded. The Vietnam War ended after increasing pressure from Congress via repeal of the Gulf of Tonkin resolution which had been cited as authorization for the war, refusal to appropriate money for further combat, and passage of a resolution calling upon the President to seek a negotiated settlement, culminating with the Nixon administration concluding a peace agreement without Senate ratification.<sup>75</sup> Both the 1991 and 2003 Iraq Wars initiated with congressional authorizations of force but ended solely through presidential action.<sup>76</sup> And while the Afghanistan War has not yet been fully

71. *Ludecke v. Watkins*, 335 U.S. 160, 163 (1948).

72. *Id.* at 168–69.

73. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 34 (3d ed. 2001) (“In the international armed conflicts of the post-World War II era, States commonly try to avoid not only the term ‘war’ but also its corollary ‘treaty of peace.’”).

74. Tanisha M. Fazal, *The Fall and Rise of Peace Treaties*, 108 *AJIL UNBOUND* 46, 49 (2015).

75. Department of State Appropriations Authorization Act, Pub. L. No. 93-126, § 13, 87 Stat. 451 (1973); Continuing Appropriations, 1974, Pub. L. No. 93-124, § 1, 87 Stat. 449 (1973); Continuing Appropriations Resolution of 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973); Fulbright Amendment to Second Supplemental Appropriations Act of 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99; Foreign Military Sales Act, Amendments, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971) (“The joint resolution entitled ‘Joint resolution to promote the maintenance of international peace and security in Southeast Asia’, approved August 10, 1964 (78 Stat. 384; Public Law 88-408), is terminated effective upon the day that the second session of the Ninety-first Congress is last adjourned.”); Agreement on Ending the War and Restoring Peace in Vietnam, U.S.-Viet., art. 1, Jan. 27, 1973, 24 U.S.T. 1.

76. Andrew J. Bacevich, *The United States in Iraq: Terminating an Interminable War, in Between War and Peace: How America Ends Its Wars* 302, 304–06 (Matthew Moten ed., 2011); Authorization for Use of Military Force Against Iraq Resolution of 1991, Pub. L. No. 102-1, 105 Stat. 3 (1991); Letter Dated 11 Apr. 1991 from the President of the Secretary Council to the Permanent Representative of Iraq to the United Nations, UN Doc. S/22485 (Apr. 11, 1991); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 17, 2011, 8:40 PM), <https://www.reuters.com/article/us-iraq-withdrawal/last-u-s-troops-leave-iraq-ending-war-idUSTRE7BH03320111218> [<https://perma.cc/3S8N-YGPV>].



terminated, the process has begun with an agreement between the Trump administration and the Taliban, without involvement by Congress.<sup>77</sup>

It is not just peace treaties that have increasingly fallen out of use, but Article II treaties more broadly. A “treaty” as contemplated by the United States Constitution is narrower than the term is understood in international law. While a treaty for international law purposes refers to any and all binding written international agreements, under Article II of the U.S. Constitution, the term only applies to such agreements ratified by the President with the advice and consent of the Senate.<sup>78</sup> The president may enter unilaterally into other international agreements that are legally binding under international law (via “sole executive agreements”) or with approval from Congress (“congressional-executive agreements”).<sup>79</sup> Though presidents have utilized sole executive agreements across a range of issues since the beginning of American history,<sup>80</sup> they were relatively rare in the first 100 years.<sup>81</sup> In modern practice, though, most international agreements that presidents enter into are not Article II treaties, but executive agreements. While the vast majority are congressional-executive agreements, some nonetheless are sole executive agreements.<sup>82</sup>

The president’s authority to conclude congressional-executive international agreements can be delegated by Congress through a statute or an Article II treaty.<sup>83</sup> When using a sole executive agreement, the president’s authority must flow directly from his independent powers under the Constitution.<sup>84</sup> Justice Jackson’s concurring opinion in the *Steel Seizures* case made clear that when the President “acts in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers.”<sup>85</sup> Thus, the President may only enter into sole executive agreements when the subject matter of the agreement is within the scope of the President’s independent powers as delegated by the

77. See Beatrice Walton, *The U.S.-Taliban Agreement: Not a Ceasefire, or a Peace Agreement, and Other International Law Issues*, JUST SECURITY (Mar. 19, 2020), <https://www.justsecurity.org/69154/the-u-s-taliban-agreement-not-a-ceasefire-or-a-peace-agreement-and-other-international-law-issues> [<https://perma.cc/Y2FX-G2EX>].

78. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, 6–8 (2018).

79. *Id.*

80. HENKIN, *supra* note 12 at 496, n.163 (“Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U.S. foreign relations”).

81. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 168–69 (2009).

82. Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1287 (2008).

83. Mulligan, *supra* note 78 at 7.

84. *Id.*

85. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Constitution, and if that power is shared with Congress then Congress must not have acted to explicitly oppose the agreement.<sup>86</sup>

Two Supreme Court cases particularly illustrate this standard. *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937), both dealt with the Litvinov Assignment, a sole executive agreement post-Russian Revolution in which the President agreed that the United States would recognize and establish diplomatic relations with the Soviet government, and in return accept certain asset claims that were previously the property of Russia.<sup>87</sup> In both cases, the Court upheld the agreement as constitutionally sound, but only because the sole executive agreement in question clearly flowed from the President's power as the sole organ of international affairs to recognize foreign governments.<sup>88</sup> Justice Sutherland explained in *U.S. v. Pink*, “[n]o such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised.”<sup>89</sup>

#### IV. ANALYSIS: COULD THE PRESIDENT END THE KOREAN WAR WITHOUT CONGRESS?

In order to determine whether a peace agreement to end the Korean War may be concluded as a sole executive agreement, it is necessary to determine whether peace agreements fall within the scope of the President's independent constitutional powers. The Supreme Court has established that the separation of powers is a weaker constraint on the President in issues of foreign affairs.<sup>90</sup> Further, the Court has held that the President is the “sole organ of the nation in its external relations”<sup>91</sup>

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86. This summation of the President's authority to conduct sole executive agreements is similar to the test proposed by Oona Hathaway. See Hathaway, *supra* note 81 at 212 (“Another way to put the limitation is as follows: the President may not commit the United States to an international agreement on his own if he would be unable to carry out the obligations created by the agreement on his own in the absence of an agreement. Hence, the President cannot enter an agreement that requires the appropriation of funds or declares war without congressional approval of the agreement, because the President cannot take these actions in the absence of an agreement. The President may not use a sole executive agreement with another nation, in other words, to expand his powers beyond those granted to him in the Constitution.”).

87. *United States v. Pink*, 315 U.S. 203, 211 (1942); *United States v. Belmont*, 301 U.S. 324, 326 (1937).

88. *Belmont*, 301 U.S. at 330 (“The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted.”).

89. *Pink*, 315 U.S. at 230.

90. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

91. *Id.* at 319; See also *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 109 (1948) (“The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the

which includes the power to recognize foreign governments and establish relations with them.<sup>92</sup> The President is the Commander-in-Chief of the armed forces,<sup>93</sup> and, as discussed earlier in this Article, shares the power to end war with Congress.

Hence, an agreement in which the United States, South Korea, and North Korea mutually recognize the end of the war and commit to normalized relations rests fully within the President's independent constitutional powers as Commander-in-Chief and sole organ of foreign affairs.<sup>94</sup> The Supreme Court has consistently asserted that the President holds the power to terminate war by proclamation,<sup>95</sup> and so it stands to reason that he may enter into an agreement with the other parties to a conflict to proclaim an end of the war. The Court has further affirmed the power of the President to normalize and establish diplomatic relations with other countries.<sup>96</sup> An agreement recognizing the end of the Korean War and establishing normalized relations would be an even clearer case of a constitutionally sound sole executive agreement than the Litvinov Assignment at issue in *Pink* and *Belmont* above. In those cases, the agreement to normalize relations with the Soviet government included a commitment to accept assignment of international insurance claims, something that is not obviously within the President's independent powers. In fact, that commitment required overriding domestic state law.<sup>97</sup> A peace agreement recognizing the end of the Korean War and normalizing relations between the parties without such conditions, by contrast, fits squarely within established presidential powers. Thus, so long as Congress has not acted in opposition, the Constitution does not prevent the President from entering into a sole executive agreement with North Korea and South Korea that formally ends the Korean War and establishes peaceful relations.

To be sure, a sole executive agreement is not the only, or even the most preferable, mechanism for formally ending the Korean War—indeed, Congressional approval of such an agreement is desirable. As

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Nation's organ in foreign affairs"); *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring in judgment and opinion of Court that the President can “act in external affairs without congressional authority”); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (the President has “unique responsibility” for the conduct of “foreign and military affairs”).

92. *Pink*, 315 U.S. at 223; *Belmont*, 301 U.S. at 328.

93. U.S. CONST. art. II, § 2, cl. 2.

94. Simon, *supra* note 64 at 729 (“As the Commander in Chief and the Chief Executive of the U.S., the President has the constitutional authority to withdraw U.S. forces from a theater of combat, to recognize countries and international boundaries, and to resolve international claims and other elements that typically are included in war termination agreements. If the President is constitutionally responsible for the individual elements of a standard peace treaty, in Hathaway's view, he may conclude the entire peace agreement unilaterally.”).

95. *Id.*

96. *Pink*, 315 U.S. at 223; *Belmont*, 301 U.S. at 330.

97. *Belmont*, 301 U.S. at 327.

a matter of internal policy, the State Department has identified criteria known as the “Circular 175 Procedure” to determine whether legally binding international agreements should take the form of an Article II treaty with the advice and consent of the Senate, or whether they may be concluded as executive agreements (either congressional-executive or sole executive). The full eight criteria to be considered are: (1) the extent to which the agreement involves commitments or risks affecting the nation as a whole; (2) whether the agreement is intended to affect state laws; (3) whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; (4) past U.S. practice as to similar agreements; (5) the preference of the Congress as to a particular type of agreement; (6) the degree of formality desired for an agreement; (7) the proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and (8) the general international practice as to similar agreements.<sup>98</sup> Applying these criteria, it is important to recognize that a final resolution of the Korean War after so many decades would be a significant shift in longstanding U.S. posture toward North Korea and no small undertaking. Further, in order to signal to the other warring parties that the United States unambiguously sees the peace agreement as binding and final with buy-in from both the President and Congress, the Article II treaty process is the best procedure available. Nonetheless, while these factors may demonstrate that it is preferable to formulate such an agreement as an Article II treaty from a policy perspective, that does not mean that the President is legally prohibited from concluding it as a sole executive agreement. If the President determines that it is more strategic, expedient, or otherwise preferable to secure a peace agreement to end the Korean War without congressional approval, there is nothing in the text, case law, or past practice under the Constitution prohibiting him from doing so.

Of course, though the President’s power to end war is independent, it is not exclusive. As previously discussed, the Supreme Court’s precedent has made clear that Congress shares the power to end war with the President. This means that Congress does not have to act and may elect to passively allow the President to exercise his powers to end war. But Congress has war-ending powers, too, and thus may act if it wishes to check the President’s power to enter into a peace agreement. The Supreme Court has noted, “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”<sup>99</sup> A joint resolution from Congress disapproving of such an agreement or insisting that the President seek Congressional approval would shift the analysis, placing the President’s authority to unilaterally conduct the agreement, at a minimum, in question. And, of course, Congress’

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98. *Treaty Procedures*, U.S. DEPARTMENT OF STATE (NOV. 26, 2018), <https://www.state.gov/treaty-procedures> [<https://perma.cc/UCR7-EDBU>].

99. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015).

most potent power remains the power of the purse. A Congress that wishes to hamstring the President's ability to pursue a peace agreement with North Korea could block any appropriations necessary for the conclusion or implementation of the agreement.

It should be noted here that, although numerous advocates and lawmakers have urged the United States and North Korea to address nuclear weapons, human rights, sanctions and other issues in any peace agreement between them, the scope of this Article's analysis is limited to the prospects for an agreement that simply includes a mutual recognition that the war has ended and a commitment to normalize relations. If the U.S. President, along with the leaders of South Korea, North Korea, and any other parties to the agreement indeed seek to include provisions beyond simply agreeing to end the war, the constitutional law analysis would become significantly more complicated. A full analysis is outside the scope of this Article, but two consequences are almost certain. First, the more complex the agreement and the more commitments involved for the United States, the more vulnerable it would be to potential disapproval or defunding from Congress. Furthermore, if the commitments in the agreement exceed the boundaries of the President's independent powers, the agreement would also be at risk of charges that it falls outside the proper scope of a sole executive agreement under the Constitution. Barring such complexities, it is clear that in the absence of congressional action, the President is free to enter into a peace agreement to end the Korean War.

### CONCLUSION

The Constitution gives Congress the lead role in decisions to go to war and the President leadership in tactically executing the war. But the Constitution does not prescribe a precise process for how wars should end. Instead, the President and Congress share the power to end wars. There are a range of political acts consistent with the Constitution's separation of powers scheme that can be utilized to terminate a state of war, dependent upon the facts of the situation and the steps required to inaugurate a state of peace. This system of shared power and flexibility, in theory, are meant to realize the Framers' vision of a reality in which wars are easier to end than to begin.

But, in practice, the United States has deviated far from this reality. The Korean War was a key inflection point in this erosion from constitutional norms, as the United States entered the war in 1950 without congressional authorization, ceased active combat in 1953, yet so far has failed to establish a final settlement to the conflict nearly seventy years later. But it is for this precise reason that the Korean War is particularly well-suited to be terminated by sole executive agreement.

Largescale hostilities have been suspended for decades under the armistice, so there are no active operations to halt in order to usher in a

state of peace.<sup>100</sup> Instead, what remains of the war is a tense posture in which the United States, North Korea, and South Korea continue to prepare themselves for resumed hostilities at any time. This is evident from the continued operation of the U.S.-led United Nations Command, the joint U.S.-ROK military exercises and Combined Command Force preparing to “Fight Tonight,” as well as North Korea’s nuclear buildup and threats of invasion. Thus, what is needed to end the war is a solemn, final, and binding agreement between at least these three nations—if not also China and the “sending states”—that they all unambiguously acknowledge the end of the Korean War and commit not to resume hostilities.<sup>101</sup>

These acts are fully within the discretion of the U.S. President. It does not require legislation to authorize or implement and does not infringe on exclusive congressional powers. As such, it may be concluded as a sole executive agreement. Of course, it could also be concluded as a nonbinding political commitment rather than a legally binding executive agreement.<sup>102</sup> But such an agreement would be of little utility in conclusively establishing an end to the state of war, and could easily be dismantled by a subsequent administration or sabotaged by an oppositional Congress. As a policy matter, the more political support that can be demonstrated for such an agreement, the more likely it is to succeed. Indeed, an Article II treaty ratified by the President with the advice and consent of two-thirds of the Senate, or at least a congressional-executive agreement in which Congress acts in support of the President’s agreement, would shore up the agreement’s durability. But that does not mean an Article II treaty is the only legally available option, and in fact as demonstrated, it most certainly is not.

Peace agreements eliminate all ambiguity about whether parties are in a state of war. They also work to facilitate normalization and lead to more durable peace than when conflicts end without such agreements.<sup>103</sup> The Korean War ushered in an era of American warmaking in which peace agreements are rarities.<sup>104</sup> Yet ironically, it could be this

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100. Mutual Defense Treaty, U.S.-S. Kor., art. 6, Oct. 1, 1953 (noting that the matter of U.S. troops in South Korea is a matter for negotiation between the countries and is not dependent upon a state of war with North Korea and providing that the alliance “shall remain in force indefinitely” until either side decides to revoke it with a year’s notice, stating no conditions for revocation.).

101. The parties have proposed a peace agreement as a first step toward a “peace regime” that could eventually involve additional commitments on other issues to create a durable state of peace, build confidence, and work toward other shared goals. See PANMUNJOM DECLARATION, *supra* note 3.

102. Executive agreements that are politically and not legally binding do not generally require so much as notification to Congress. Mulligan, *supra* note 78 at 12–13.

103. See Fazal *supra* note 74.

104. *Id.* at 36 (“[T]he use of peace treaties to conclude interstate war has seen a dramatic decline since 1950. Approximately three-quarters of nineteenth century interstate wars were accompanied by peace treaties. This number drops to approximately forty percent for the twentieth century as a whole, and to a mere fifteen

“Forgotten War” which reverses that trend—if and when it at last ends with a binding peace agreement among the once-warring parties. Legally, many pathways are open, including a sole executive agreement. But as the Supreme Court has stated, “[w]hatever the mode, its termination is a political act.”<sup>105</sup> Indeed, as with all conflicts, peace will only come with political will. In short, if the President has the will, the Constitution has a way.

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percent for interstate wars after 1950. Like declarations of war that used to accompany the start of conflict, peace treaties may be falling into desuetude.”).

105. *Watkins*, 335 U.S. at 168–69.