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PRESIDENTIAL WAR POWERS AS AN INTERACTIVE DYNAMIC: INTERNATIONAL LAW, DOMESTIC LAW, AND PRACTICE-BASED LEGAL CHANGE

There is a rich literature on the circumstances under which the United Nations Charter or specific Security Council resolutions authorize nations to use force abroad, and there is a rich literature on the circumstances under which the U.S. Constitution and statutory law allow the President to use force abroad. These are largely separate areas of scholarship, addressing what are generally perceived to be distinct legal issues. This Article, by contrast, considers these two bodies of law together as they relate to the United States. In doing so, it makes three main contributions. First, it demonstrates striking parallels between the structure of the international and domestic legal regimes governing the use of force, and it explains how this structure tends to incentivize unilateral action. Second, it theorizes that these two bodies of law are interconnected in previously overlooked ways, such that how the executive branch interprets law in one context can be and often is informed by the other legal context. Third, it documents these interactions over time for several ***690** *important components of the law on the use of force and shows that this dynamic has played a significant role in justifying the practice-based expansion of unilateral war powers. The Article concludes by arguing that both scholars and policymakers seeking to shape the law on the use of force need to take better account of this interactive dynamic.*

***691 INTRODUCTION**

Complaints about the rise of the "imperial Presidency" often emphasize in particular the growth in the President's control over the use of military force.[1] Even though the Constitution assigns to Congress the power to declare war, as well as a variety of other powers relating to war, presidents have on numerous occasions initiated the use of military force without obtaining specific congressional authorization.[2] The scope of these unilateral presidential actions has been especially significant since World War II.[3]

When he was a candidate for the presidency, Barack Obama suggested that he might reverse this trend, contending that "[t]he President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."[4] President Obama's ***692** actions after taking office, however, reflect a more complicated picture. For example:

• In 2011, he directed the use of military force against Libya without seeking congressional authorization, even though there was no actual or imminent threat to the United States. In doing so, he emphasized that the United States had "led an effort with our allies at the United Nations Security Council to pass a historic resolution that authorized a no-fly zone to stop the regime's attacks from the air, and further authorized all necessary measures to protect the Libyan people."[5]

• In 2013, he contemplated using force against Syria in response to its use of chemical weapons, but this time he lacked any authorization from the Security Council, and, at the last minute, he decided to seek congressional approval. He explained that, although he believed that he had the constitutional authority to take military action on his own, he had concluded that "it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress." [6]

• Since late 2014, by contrast, President Obama has initiated the ongoing use of military force against the Islamic State in Iraq and the Levant (ISIL, also known as ISIS) without any action from the Security Council and without any specific authorization from Congress. In doing so, he has emphasized the consent of the Iraqi government, the international law right of self-defense, and preexisting statutory authority relating to the September 11, 2001 terrorist attacks and the 2003 war in Iraq. [7]

Each of these examples, like all contemplated uses of force by the United States abroad, implicate two bodies of law: international law and domestic law. There is a rich literature on the circumstances under which the United Nations Charter or specific Security Council resolutions authorize nations to use force abroad, and there is a rich literature on the circumstances under which the U.S. Constitution and statutory law allows the President to use force abroad. Yet these are discrete areas of scholarship, addressing what are generally perceived to be different categories of legal doctrine. In this Article, by contrast, ***693** we consider these two bodies of law together and, in doing so, we explore a variety of underappreciated connections between them. We make three main contributions.

First, we demonstrate striking parallels between the structure of the international and domestic legal regimes governing the use of force. In both regimes, the law as an originalist matter looks very different from how it is understood today in the United States. In both regimes, moreover, the President has accrued power in the face of inaction by institutions with collective action limitations (in particular, the U.N. Security Council and Congress). Furthermore, the development of both bodies of law has been practice-based; indeed the same customary practices can influence the development of both international law and domestic law, although not in precisely the same ways.

Second, we theorize that these two bodies of law are interconnected in U.S. practice in previously overlooked ways. Our core insight is that how the executive branch interprets law in one context can be informed by the other legal context. We call this the *interactive dynamic*. In particular, in justifying their decisions to use military force, presidents often use a strong legal grounding in one domain to help compensate for weaknesses in the other. Because past practice plays an important role in the development of both bodies of law, each incident in turn can become a precedent with future relevance.

Third, we document this interactive dynamic over time for three important components of the law on the use of force. As we show, the interactive nature of U.S. war powers is longstanding. It became especially pronounced after the United States ratified the U.N. Charter in 1945, but it is by no means simply a post-Charter phenomenon. This phenomenon has important implications both for those who are concerned that the President has come to exercise too free a hand in decisions about the use of force and for those who advocate increased use of either international law or domestic law to restrain such decisions. [8]

The Article pursues these themes as follows. Part I describes the parallels between the international and domestic legal regimes governing the use of force and offers a theory of how these two bodies of ***694** law can interact in a way that favors the growth of presidential power over time. Parts II, III, and IV explore this interactive dynamic between international and domestic law with regard to the use of force in three important contexts: (1) the defense of U.S. citizens abroad; (2) self-defense against non-state actors; and (3) collective and treaty-based uses of force. Part V considers the implications of the interactive dynamic for both scholarship relating to war powers and for the behavior of actors engaged in making war powers decisions. It also reflects on the extent to which law, whether domestic or international, matters for executive branch decisionmaking relating to the use of force. Part VI concludes.

The focus of the Article is on how the U.S. executive branch interprets international and domestic law on the use of force, not on how these bodies of law should best be interpreted in the abstract. In addition, we focus on interactions in legal argumentation and doctrine without attempting to establish the extent to which those interactions have a causal influence on presidential decisionmaking. The extent of such a causal influence is uncertain, in part because of the difficulty of disentangling legal considerations from political considerations, a point that we revisit at the end of the Article. Moreover, different presidents have varied in their approaches to law on the use of force, including with regard to the extent to which they have been inclined to draw upon the interactive dynamic in making claims about their unilateral war authority. Thus, while our account suggests that the interactive dynamic factors into presidential decisionmaking on the use of force, we do not make strong claims of causality. Regardless of the extent of its causal influence, the interplay between international and domestic law that we document is an important and underappreciated theme in the history of U.S. war powers.

I

PARALLELS AND INTERACTIONS IN THE TWO BODIES OF LAW ON THE USE OF FORCE

In both U.S. domestic law and international law, the practices regarding the use of force are far more permissive than what seems to be suggested by the relevant legal texts as originally understood. In this Part, we begin by describing these disparities. We then discuss parallels in the institutional structures that have helped give rise to these disparities. Finally, we theorize that the gaps between text and practice that have developed in the domestic and international contexts are not just similar, but also connected through an interactive dynamic that has favored the growth of presidential war powers.

***695** *A. Disparities Between Text and Practice*

The executive branch today construes the law on the use of force in ways that differ starkly from the apparent meanings of the governing legal texts, particularly as originally understood. Here, we briefly set forth these disparities with regard to both domestic and international law. The purpose of this section is only to describe these disparities; much of the rest of the Article is devoted to exploring how the disparities developed.

1. Domestic Law

The text of the Constitution gives Congress numerous war-related powers, including the authority to “declare War” and “grant Letters of Marque and Reprisal,” [9] while making the President “Commander in Chief” of the armed forces. [10] While the President's role as Commander in Chief empowers him to direct the troops during a war, this command function does not obviously encompass the decision whether to go to war in the first place. [11] James Madison's notes from the Constitutional Convention suggest that the Framers intended that Congress would decide when the United States went to war, with the caveat that the President had the independent authority to defend the United States from attacks. [12] Most scholars think that, as a matter of original meaning and intent, the Constitution did not authorize the President to unilaterally initiate war. [13] Moreover, although there is more divergence on this issue, most scholars further conclude that the ***696** Constitution's original meaning and intent was to require congressional authorization for most or all nondefensive uses of force that might fall short of formal “war.” [14] The practice of the early presidents supports this understanding. For example, President Washington considered himself without authority to undertake “offensive expedition[s] of importance” against Indian tribes on the frontier without congressional authorization. [15]

And, in response to attacks on U.S. shipping by France, President Adams emphasized the need for congressional authorization for anything more than limited measures of self-defense. [16]

The executive branch today takes a far broader view of the President's independent constitutional authority. The Justice Department's Office of Legal Counsel (OLC) has concluded that the President can "take military action [abroad] for the purpose of protecting important national interests, even without specific prior authorization from Congress." [17] OLC does not forswear a congressional role in authorizing some uses of force, but it understands Congress's power to declare war simply to be a "possible constitution-ally-based limit" such that prior congressional authorization "may" be needed for "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a ***697** substantial period." [18] However these permissive interpretive claims developed (an issue we return to in subsequent Parts of the Article), it is clear that the President draws on them in practice. Looking at the last few decades alone, the President has frequently initiated the use of force abroad without prior congressional authorization, including significant interventions in Grenada (1983), Panama (1989), Haiti (1994), Kosovo (1999), and Libya (2011). [19]

A similar growth in presidential power despite the apparent constraints of text and intent also has occurred in connection with the interpretation of statutes related to the use of force. The War Powers Resolution is the most prominent such statute. [20] Passed over President Nixon's veto in 1973, it sets explicit conditions and limits on the President's unilateral authority to use force in hostilities abroad. Among other things, it instructs the President to withdraw U.S. troops from any hostilities within sixty days unless the President has specific statutory authorization to continue the hostilities. [21] Yet since its passage, executive branch lawyers have been interpreting the resolution in ways that whittle down its practical effect. In 2011, for example, the Obama Administration concluded that U.S. participation in the NATO bombing campaign against Libya did not amount to "hostilities" for purposes of the Resolution. [22] By contrast, where the executive branch is interpreting statutes that authorize presidential uses of force, it tends to read these statutes expansively. Most recently, the Obama Administration claimed that its ongoing intervention against ISIL, initiated in 2014, is authorized by a combination of Congress's 2001 Authorization for Use of Military Force (2001 AUMF), which was directed at the nations, organizations, and persons responsible for ***698** the September 11, 2001 terrorist attacks, [23] and Congress's 2002 Authorization for the Use of Military Force in Iraq (2002 AUMF), which empowered the President to "defend the national security of the United States against the continuing threat posed by Iraq" in the context of Saddam Hussein's regime. [24]

2. International Law

An analogous disparity exists between the text of the U.N. Charter as originally understood and the United States' current legal positions on the use of force. Prior to the adoption of the U.N. Charter in 1945 (and particularly in the nineteenth and early twentieth centuries), international law on the use of force had been broadly permissive. [25] The U.N. Charter established much more restrictive legal rules.

The core principle--set forth in Article 2(4)--is that state parties "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." [26] Despite this general prohibition, the Charter ***699** makes lawful two specific types of uses of force abroad. First, Chapter VII provides that the Security Council can authorize military actions "as may be necessary to maintain or restore international peace and security." [27] Second, Article 51 provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." [28]

Just as today the President uses force more broadly than the Constitution's text and original intent suggest is permissible without congressional authorization, so too in international affairs does the United States use force more broadly than the U.N. Charter's text, as originally understood, suggests may be done in the absence of Security Council authorization. For example, the United States interprets "self-defence if an armed attack occurs" broadly to authorize the use of force abroad to protect citizens, to encompass acts that resemble reprisals, and to justify forcible measures against non-state actors that are connected in somewhat attenuated ways to initial aggressors. Examples in the last few decades in which the United States has invoked one or more of these interpretations include an air strike carried out against Libya (1986), the intervention in Panama (1989), bombing and missile strikes against Iraq (1993) and in Afghanistan/Sudan (1998), and, more recently, uses of force undertaken as part of its war on terror since September 11. [29] The United States is, of course, not the only actor to interpret the U.N. Charter's provisions on the use of force permissively--some other countries have done the same, [30] and so occasionally has the Security Council (with the support of the United States). [31] Yet as Christine Gray notes, "many of these episodes" involving the United States "are unlike the vast mass of state practice in that they do reflect differences between states as to ***700** the applicable law" and the United States "takes a controversial position as to the content of the law in order to justify its use of force." [32]

In addition, just as the President interprets congressional statutes in ways that favor presidential decisions to use force, [33] so too in the international context has the United States interpreted Security Council resolutions broadly to favor its uses of force. For example, the United States controversially asserted that the 2003 Iraq War was authorized under international law by Security Council resolutions passed in 1990 and 1991 in the context of Iraq's invasion of Kuwait. [34]

B. Institutional Design and Practice over Time

How did these divergences from the original understanding of the text develop? Although they have been increasing over time, they are not new phenomena. Relatively early in U.S. history, executive branch actors began undertaking military operations that looked more offensive than defensive, such as the bombardment of Greytown, Nicaragua in 1854. [35] On the international side, similarly, "[t]hose who regard the present as a period when the rules of international law concerning the use of force by States are specially contested are probably new to the field, or have short memories." [36] During the Cold War, practice of the United States and other countries on the use of force departed from the text of the U.N. Charter so substantially that it led to a famous debate between Professors Thomas Franck and Louis Henkin over whether Article 2(4) was dead. [37]

There are common structural explanations for at least a substantial proportion of the divergences between text and practice in domestic law and in international law, at least as understood by the United States. Broadly speaking, in both contexts, we see that authority over offensive uses of force is entrusted to decisionmaking bodies subject to collective action limitations (Congress and the Security Council) and that power over defensive uses of force is ***701** entrusted to unitary actors (the President and individual nations), at least until the collective body acts. This creates an institutional structure that allows the unitary actors to construe their authority broadly, especially given limited judicial review in the context of the use of force. Then, over time, a practice-based approach to legal interpretation helps legitimize moves away from the original allocations of power in favor of greater allocations of power to these unitary actors. We elaborate on these points below, and we also discuss how they manifest themselves somewhat differently in domestic and international law.

1. Inaction by Collective Actors

The Constitution and the U.N. Charter appear to entrust decisions about offensive uses of force to multimember decision-makers: Congress, in the case of the Constitution, and the U.N. Security Council, in the case of the U.N. Charter. But both of these institutions face collective action and veto constraints that reduce the likelihood that they will (1) authorize uses of force ex ante and (2) punish unauthorized uses of force ex post.

In domestic law, the congressional default is inaction because legislation requires a majority vote of its members in both houses, as well as the successful surmounting of other procedural barriers. Ex ante, this means that it can be difficult for the President to get Congress to authorize uses of force that the President believes are desirable. Although sometimes Congress will take action and authorize uses of military force, as with the 2001 AUMF that followed the events of September 11, at other times--such as in connection with President Clinton's use of force in the Kosovo conflict in 1999--Congress may not muster the votes to legislate with regard to the use of force. [38] Ex post, however, the default toward inaction means that Congress as a body will have considerable difficulty in condemning presidential action once taken. As political scientists William Howell and Jon Pevehouse put it, "[a]ll of the institutional features of Congress that impede consensus building around a military venture ex ante also make it equally if not more difficult, later, to dismantle an operation ***702** that is up and running." [39] Indeed, the procedural threshold required for Congress to condemn presidential action is higher than the threshold for supporting presidential action. Such condemnation would potentially require either the two-thirds support of the members in both houses needed to override a presidential veto or the majority of the House of Representatives and the two-thirds majority in the Senate needed for impeachment. [40]

Turning to the international sphere, the U.N. Security Council also has a strong institutional default in favor of inaction. [41] To authorize the use of force under Chapter VII of the U.N. Charter, the Security Council needs the affirmative votes of nine out of the fifteen state members, and a veto can be exercised by any of the permanent five (P5) members--China, France, Russia, the United Kingdom, and the United States. [42] History bears out that this is a high bar. Between the Korean War and the end of the Cold War, the Security Council almost never authorized the use of force under Chapter VII, in part because of frequent Soviet vetoes. [43] Authorizations have proved more frequent since, but rarely in contexts involving the use of force against allies of P5 members. For example, it was clear in 2012 that any attempt to get a Security Council resolution authorizing the use of force against the Assad regime in Syria would be vetoed by Russia. [44] Yet just as the structure of the Security Council makes it difficult for it to authorize the use of force ex ante, so too does it make it difficult to condemn the use of force ex post. When it has done so, as in the wake of Iraq's invasion of Kuwait in 1990, [45] it is because no P5 member has chosen to veto the resolution.

***703** *2. Interpretive Opportunities for Unitary Actors*

Congress's collective action limitations allow presidents to push the boundaries of their legal authority under domestic law. As a unitary actor relative to Congress, the President can more readily take action. [46] Of course, where the President can get the timely support of Congress, there may be an incentive to do so in the interests of both legal form and political cover. Conversely, sometimes the President will clearly already have the authority under constitutional or statutory law to use force. But incentives to push the boundaries arise in the not infrequent situations in which the President thinks that (1) the use of force is desirable, (2) the legal authority to use force without further congressional action is not clearly established, and (3) further congressional action is not likely to be forthcoming, is not likely to be timely, or is likely to contain problematic conditions. Given the third factor, the President faces conflicting incentives from the first two factors. This tension sometimes cannot be reconciled, in which case the President must choose between the use of force and compliance with the best reading of the law. Alternatively, the President may attempt to reduce this tension either by structuring the use of force to be more in compliance with the legal framework or by advocating a more permissive interpretation of existing law. If the President advocates a more permissive interpretation, there is little risk that Congress will legislate in condemnation of the action because of Congress's collective action constraint.

A similar incentive structure applies in the international legal context, particularly with regard to the actions of the United States. A nation often will have a legal and political interest in having the Security Council authorize uses of force that it views as desirable. [47] But where an authorization is not obtainable due to the Security Council's collective action constraints and the nation does not have a clear right to act in self-defense under international law, the nation ***704** faces a tension between its desire for military action and its interest in legality. In these cases, the nation might choose to pursue one or the other of these interests or try to reconcile the two by reshaping its intended use of force or interpreting existing international law to be in its favor.

For the United States, the incentives to interpret international law liberally in its favor are especially strong. First, because it is a P5 member, the United States knows that it can always veto a proposed Security Council resolution condemning its use of force. Second, as Matt Waxman notes, "[s]tates like the United States, with the strength to defeat or deter developing threats and a willingness to pursue interventionist policies, will incline towards doctrinal formulas that permit discretion." [48]

In theory, these structural incentives could be checked by judicial review. Currently, however, there is no meaningful judicial review available either regarding the President's authority to use force under domestic law or the United States' authority to use force under international law. On the domestic side, U.S. courts have invoked justiciability doctrines or high levels of deference in cases challenging the President's authority to use force, both under the Constitution and with regard to the War Powers Resolution. [49] On the international side, the International Court of Justice (I.C.J.) has sometimes addressed the legality of uses of force--most importantly in a case brought by Nicaragua against the United States in the 1980s. [50] But the United States has resisted the institutional authority of the I.C.J. in this context, and the I.C.J. no longer has general compulsory jurisdiction over the United States. [51]

705** ***3. Use of Practice in Legal Interpretation over Time

Past practice plays an important role in legal interpretation in both domestic and international law on the use of force. When unitary actors push the boundaries of their legal authority, they therefore are simultaneously creating precedents that become part of legal discourse going forward. [52] As these precedents build up, they then have the effect of expanding the actual or perceived scope of legal authority for the unitary actors. [53] This is true despite certain doctrinal safeguards, described below, that are designed to identify what practice counts and when it does so.

The classic articulation of the role of historical practice in U.S. domestic constitutional law comes from Justice Frankfurter's concurring opinion in *Youngstown Sheet & Steel Co. v. Sawyer*. [54] Frankfurter emphasized the need to look at the "gloss which life has written upon" the words of the Constitution, explaining that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned ... mak [es] as it were such exercise of power part of the structure of our government." [55] As one of us has shown in work with Trevor Morrison, reliance on historical practice in the area of **separation of powers** has a tendency to favor the growth of executive power over time, especially if congressional acquiescence is measured by mere inaction rather than affirmative acceptance. [56]

Moreover, the executive branch is more likely than the judiciary to credit historical practice, not only favoring it as a tool of construction but also often setting a low bar in finding congressional acquiescence and construing past practices aggressively in its own favor. [57]

***706** In the use of force context, the executive branch relies mainly on past practice to bridge the tensions between the principle of fidelity to law on the one hand and the existing disparities between text and practice on the other hand. OLC uses "historical precedents" as "the framework" for its constitutional analysis on the use of force. [58] Although practice does not always favor executive power (for example, the congressional authorization for the first Gulf War can be seen as a marker in favor of the need for such authorizations for major interventions), its overall direction tends to do so. [59] The executive branch also emphasizes past practice when engaging in statutory interpretation on the use of force. Thus in making his argument that U.S. participation in the 2011 NATO bombings carried out in Libya did not constitute "hostilities" for purposes of the War Powers Resolution, State Department Legal Adviser Harold Koh emphasized that "successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law's meaning over time." [60] This emphasis on historical practice both helps provide a domestic law foundation for presidential actions relating to war and, over time, tends to further the development of the law in favor of stronger executive power.

Past practice also matters for international law, both with regard to treaty interpretation and customary international law. As to treaty interpretation, the Vienna Convention on the Law of Treaties provides that one factor to take into account is the subsequent practice of parties to the treaty. [61] As to customary international law, it is measured ***707** by the presence of a "general practice accepted as law." [62] Unlike in the domestic law context, where the executive branch is the primary shaper of past practice, the United States is merely one of many nations involved in creating practice. Because of this, its overall influence on practice--and thus on international law--is much more limited.

Nonetheless, in the use of force context U.S. practice plays an outsized role. First, and most obviously, it shapes how the United States understands international law. In defining and articulating its positions on international law, the United States places far more emphasis on its own past practices than it does on those of other countries. Second, as the most important military power in the U.N. Charter era, the United States has contributed to overall state practice in ways that have helped shape international law more generally. After the September 11 attacks, for example, commentators noted a shift in understandings about when nations could use force against non-state actors located on the territory of other nations, with this shift based on the U.S. response to September 11 and the acquiescence of other nations in this response. [63] In addition, the United States, through the executive branch, is an influential member of the U.N. Security Council, and it often plays a leading role in helping to formulate that body's positions concerning the use of force. [64] Finally, regardless of whether the practice of the United States and like-minded countries has redefined international law, this practice can reduce objection to the illegality of further similar actions, as, over time, the claim that international law permits these actions becomes increasingly viewed as a competing legal position rather than as outright illegality. Taken together, these considerations help explain how the United States has moved substantially away from the original understanding of the text of the U.N. Charter, and yet still considers itself operating under the legal regime created by the Charter.

***708** *C. Interactions Between the Two Bodies of Law*

So far, we have focused on showing parallels between the domestic and the international contexts regarding the law on the use of force. In what follows, we go a step further and suggest that, for the United States, these two contexts present an interactive dynamic in which presidents draw on legal support in one sphere, international or domestic, to help compensate--at least rhetorically--for weak legal support in the other. In this section, we identify ways in which this dynamic works and explain how, given the role of practice in legal interpretation, it can influence doctrine over time.

That international and domestic *political* considerations can affect one another is already recognized. The political scientist Robert Putnam, for example, describes international negotiations as a "twolevel game" in which the President (like other heads of state) must both achieve an international agreement and persuade domestic ratifiers and implementers to accept it. [65] Crucially, the constraints faced by participants at one level, and the strategies they pursue, can affect what happens at the other level. Thus, international negotiators may factor domestic constraints into their decisions, or domestic public opinion may shift in response to the international negotiations. [66] While the specifics of Putnam's model do not directly translate to the war powers context, which centers around international confrontation rather than international agreement, the idea of interactions between the two levels may help explain political calculations in this context. For example, Jide Nzelibe draws on this insight in suggesting that a presidential decision to seek congressional authorization for the use of force sends "a costly signal to the foreign adversary about the United States' resolve to prosecute the conflict." [67]

Our approach differs from Putnam's and from Nzelibe's because our emphasis is on the development of legal *doctrine*. Although we are interested in how law in one context affects the political calculations that the President makes with regard to the other context, our core focus is on how law in one context affects the doctrinal claims made by the executive branch in the other context. Because of the role that practice plays in legal interpretation, the effects of these doctrinal claims can linger long after their initial use, as they become precedents cited by later decision-makers. In other words, each ***709** instance of the interactive dynamic can not only influence doctrinal claims at the time it occurs, but also help shape doctrine going forward. Moreover, unlike with Putnam's model, in which a President ultimately needs support at both the international and domestic levels, we hypothesize that in justifying decisions to use military force, presidents are able to trade off support in one context to help compensate for the lack of support in the other context. Finally, as the phrase "interactive dynamic" indicates, our approach, unlike Putnam's, is focused not on a single decision point but rather on the dynamic effects over time.

The interactive dynamic can manifest itself in at least three ways, which we categorize below. Although these ways are conceptually distinct, they can overlap and may be difficult to disentangle in practice.

1. International Law as a Formal Influence on Domestic Legal Doctrine

First, international law can play a formal role in the interpretation of U.S. domestic law. This mechanism, which has received some scholarly attention (especially as it concerns the domestic relevance of Security Council authorizations of force), [68] can take a variety of forms. Perhaps most importantly, presidents may view international law as giving them direct domestic legal mandates, or potentially direct domestic legal constraints. Thus, long before the adoption of the U.N. Charter, presidents relied on treaties as support for using force without congressional authorization, [69] and, relatedly, on the President's constitutional authority to "take Care that the Laws be ***710** faithfully executed" [70] as a justification for implementing treaties or carrying out certain uses of force that were authorized or encouraged under customary international law. In addition, presidents may argue that the international legal context changes the factual setting in a way that affects their domestic legal obligations. For example, the existence of a U.N. Security Council resolution could be thought to change war to a "police action" or to enhance the legally relevant interests of the United States in a particular use of force. Notably, this mechanism only operates in one direction--U.S. domestic law does not (and, analytically, should not) play a formal role in the interpretation of international law on the use of force.

2. The Transfusion of Domestic Interpretive Principles into U.S. Understandings of International Law

Second, the close parallels between international and domestic law on the use of force may encourage executive branch actors to draw on interpretive principles from one body of law in interpreting the other. In the domestic context, for example, executive branch lawyers are accustomed to emphasizing U.S. past practice, to interpreting statutes energetically, and to deeming use of force questions inappropriate for courts. It may be natural for these lawyers to apply these same principles to the international legal context, whether as a matter of ingrained habit or of conscious belief in their normative appropriateness.

Direct evidence of such interpretive moves is hard to come by, as the public positions on international law put forward by the executive branch rarely rely explicitly on U.S. domestic precedents. But the existence of these transfusions is supported by indirect evidence, including comments by former lawyers in the executive branch as to how U.S. domestic legal principles do or should inform international legal ones. [71] While the transfusion of interpretive principles could theoretically happen in either direction, in practice executive branch actors are much more likely to borrow domestic legal principles in their ***711** international legal interpretation than the other way around. [72] This could be because executive branch lawyers are more familiar with U.S. domestic law to begin with, or because the formal mechanisms of legal influence described above offer more direct ways for bringing international legal principles into domestic law.

3. Legal Strength in One Context as a Political Factor Relevant to Decisionmaking in the Other Context

Third, the strength of legal justification in one body of law could potentially affect the President's incentives to interpret the other body of law expansively. The reason stems from the connection between legality and political acceptance. The more overall international and domestic political pressure there is against a use of force, the less likely a President is to undertake it. Strong legality in one context reduces political pressure within that context: At a minimum, opponents cannot include convincing legal objections among their political ones, and at a maximum--where there is a congressional authorization or a Security Council resolution--this legality stems from supportive votes cast by key political actors. Accordingly, strong legality in one context has the potential to increase the President's willingness to take risks in the other context, including through controversial legal interpretations. [73] (A number of possible examples of this phenomenon, including President Truman's use of force against North Korea in 1950 and President Obama's use of force against Libya in 2011, are described in subsequent Parts of the Article.) Conversely, where the President is on relatively weak grounds in *both* international and domestic law--as President Obama likely would have been in 2013 if he had used force against the Assad regime in Syria in response to its use of chemical weapons [74]--he may be less willing to take action in reliance on controversial legal positions. Because executive branch ***712** actors are unlikely to be explicit about these doctrinal trade-offs, evidence of this mechanism will mostly be circumstantial. [75] Some of the executive branch's argumentation and decisionmaking concerning the use of force, however, has been at least suggestive of this phenomenon.

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The next three Parts explore the interplay between international law and domestic law in U.S. practice on the use of force. Each Part focuses on the development of a different aspect of doctrine over time. Part II focuses on the defense of citizens as a justification for uses of force; Part III focuses on self-defense against non-state actors operating from the territory of a third state; and Part IV focuses on authorizations from a treaty or from an international organization created by a treaty. These are not the only important doctrines relating to the use of force--for example, we do not discuss anticipatory selfdefense or principles of necessity and proportionality, and we cover humanitarian intervention only as it overlaps with the issues on which we focus. Overall, however, the three examples encompass most of the significant overt uses of force by the United States since the U.N. Charter, and many earlier ones as well. As we show, the interactive dynamic is important--indeed, we believe essential--to understanding the evolutionary expansion of the war powers asserted by the President.

II

PROTECTING AMERICANS ABROAD

Early in U.S. history, there appears to have been a general assumption that, as Commander in Chief, the President had some unilateral power to use force to protect Americans abroad, but there was significant uncertainty about how far the President could go. In particular, there was uncertainty about whether and to what extent the President could use force to carry out reprisals or to obtain redress after an attack on U.S. citizens or their property. Presidents who asserted broad constitutional authority in the nineteenth and early twentieth centuries used international law both as a formal influence on domestic doctrine and as political justification. Following the adoption of the U.N. Charter, the interactive dynamic came to work in the ***713** other direction, as presidents interpreted Article 51 to broadly authorize uses of force by the United States in defense of American citizens abroad.

A. The Nineteenth and Early Twentieth Centuries: International Law Is Used to Strengthen the President's Constitutional Authority

After the United States developed a navy in the early nineteenth century, it was increasingly used to protect Americans and their property abroad.[76] In justifying the power of the executive branch to undertake these actions, presidents frequently emphasized principles of international law--both as political factors justifying their actions and as formal influences on domestic doctrine. In particular, they cited the right that nations had under international law to defend their citizens, and in some situations they also drew upon the distinction in international law between nations and non-state actors.

It became increasingly common, for example, for the U.S. navy to take military action in response to attacks on U.S. merchant vessels. As an illustration, in 1831, President Andrew Jackson directed the *USS Potomac* to seek restitution in Sumatra after villagers in Quallah Battoo had attacked a U.S. merchant vessel engaged in the pepper trade and killed several members of its crew. After arriving in early 1832, the U.S. forces destroyed the village and killed between 100 and 150 Sumatrans.[77] Jackson suggested that the use of force had been proper as a “chastisement” because the villagers were “a band of lawless pirates” rather than “members of a regular government, capable of maintaining the usual relations with foreign nations.”[78] Some newspapers questioned Jackson's authority to take such action without congressional authorization.[79]

***714** A much-publicized exercise of the power to protect American citizens occurred in 1853.[80] Martin Koszta, a Hungarian by birth, had been active in efforts to detach Hungary from the Austro-Hungarian empire. After emigrating to the United States and initiating a process of naturalization to become a U.S. citizen, he made a business trip to Turkey. While there, he was apprehended by the Austrian military and placed in chains on an Austrian ship docked in Turkey. A U.S. navy captain stationed in Turkey then threatened to open fire on the Austrians if Koszta was not released. After the matter was resolved without force, the Austrians filed a protest with the U.S. government, claiming that the captain had violated international law. Specifically, the Austrians complained that the threat was “an act of war” and that only a sovereign, not a mere commander, could initiate a war under international law. [81] They cited the Declare War Clause of the Constitution in support of this argument, suggesting that the sovereign for the United States in this matter was Congress. [82]

In response, the Secretary of State defended the actions of the navy captain. He "yield[ed] a ready assent to that part of [the Austrian] note relative to the war-making power," but then relied on international law to claim that Austria rather than the United States had been the aggressor. [83] Because Koszta was in the process of becoming a U.S. citizen, the United States "had, therefore, the right, if they chose to exercise it, to extend their protection to him" and "that from international law ... Austria could derive no authority to obstruct or interfere with the United States in the exercise of this right, in effecting the liberation of Koszta." [84] The Secretary of State thus used international legal principles regarding the defense of citizens to justify the captain's actions as appropriate self-defense rather than as aggression that would require congressional authorization. [85]

***715** Shortly after the Koszta affair, there was a more controversial episode of overseas military action ostensibly aimed at protecting U.S. citizens. In 1854, a U.S. warship bombarded and burned the port city of Greytown, Nicaragua (now San Juan del Norte), following damage to some American property and an injury to a U.S. official by a bottle thrown by a mob. [86] Especially because the Greytown incident involved reprisals rather than direct measures of self-defense or rescue, it prompted constitutional concerns in Congress. [87]

In justifying his actions to Congress, President Pierce emphasized their appropriateness under international law. He likened Greytown to "a piratical resort of outlaws or a camp of savages" rather than to a nation and argued that the U.S. action was consistent with international practice. [88] International themes similarly were picked up in a later judicial decision relating to these events, *Durand v. Hollins*, which upheld the constitutionality of the bombardment in a suit brought against the navy captain by a U.S. citizen whose property had been destroyed during the operation. [89] The court noted the core "object and duty" of governments to protect their citizens "whether abroad or at home" and concluded that the President is the appropriate actor within the United States to whom "citizens abroad must look for protection of person and of property." [90] How the President exercises discretion in protecting citizens, concluded the court, is a political question not subject to review by the judiciary. [91]

The use of international law as a formal source of support for the President's constitutional powers received doctrinal support from the Supreme Court in several cases near the close of the nineteenth century. Dicta in *In re Neagle* [92] suggested that the President's constitutional responsibility to "take Care that the Laws be faithfully ***716** executed" [93] is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*," but rather includes "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." [94] An example cited by the Court in support of this broader executive authority was the Koszta affair discussed above, [95] which it described, with some exaggeration, as "[o]ne of the most remarkable episodes in the history of our foreign relations." [96] In addition, *The Paquete Habana* [97] emphasized that "[i]nternational law is part of our law," [98] a proposition that was invoked in support of the claim that the President's authority under the Take Care Clause included the authority to enforce international law, potentially through the use of military force. [99]

Around this time, presidents began asserting particularly expansive conceptions of their authority to protect U.S. citizens abroad. During the Boxer Rebellion in China in 1900, President McKinley sent over 5000 troops to China as part of a multinational force without first seeking congressional authorization, [100] explaining that the U.S. action "involved no war against the Chinese nation" and was justified in part by the need to "secur[e] wherever possible the safety of American life and property in China." [101] His Secretary of War at the time, Elihu Root, would later cite the Boxer Rebellion as a leading ***717** example in support of the proposition that "in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens." [102]

Also during this period, the executive branch, first under Theodore Roosevelt and then under William Howard Taft, began undertaking various "international police actions" ostensibly designed to restore order in Latin American countries during the early twentieth century. [103] In an essay published after he left the presidency, Taft argued that these actions were justified constitutionally because of the inability of the local governments to protect U.S. citizens under international law. As he explained, while using force to protect American citizens was potentially an "act of war [as a matter of constitutional law] if committed in a country like England or Germany or France," this was not the case in countries where "law and order are not maintained, as in some Central and South American countries." [104]

The executive branch's formal reliance on international law to justify the President's constitutional power to defend citizens is evident in a 1912 State Department legal memorandum titled *Right to Protect Citizens in Foreign Countries by Landing Forces*. [105] Much of the memorandum attempts to explain why engaging in such protection is proper under international law. But the memorandum also links the purported legality of the actions under international law to the constitutionality of unilateral presidential action. Military actions designed to protect American citizens abroad, the memorandum argues, do not constitute "war" under international law and therefore do not implicate Congress's authority to declare war. [106] The memorandum also contends that, because international law is part of U.S. law (as declared in *The Paquete Habana*), the President's authority to take care that the laws are faithfully executed includes the authority to take military action when such action is allowed by international law. [107] For the latter point, the memorandum emphasizes the Supreme Court's decision in *In re Neagle*. [108] Attached as an appendix to the memorandum is a chronological description of instances in which the ***718** United States had used military force "for the protection of American interests." [109] The memorandum proved influential and subsequent editions were prepared in 1929 and 1934. [110]

In the years after the publication of this memorandum, the executive branch relied less on international law as a formal basis for its constitutional authority. Instead, it relied on past practices without acknowledging the role that international law had played in justifying these practices. This phenomenon is evident, for example, in an oft-cited memorandum that Robert Jackson prepared in 1941 when serving as Attorney General. In the memorandum, Jackson analyzed whether the President could, prior to the United States' entry in World War II, constitutionally direct the U.S. air force to instruct British pilots in combat. [111] In concluding that he could, Jackson made a number of general observations about the President's war powers, including the observation that "the President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property *or American interests*." [112] Jackson then cited to the 1934 edition of the 1912 State Department memorandum, but made no mention of how this memorandum relied on international law for its constitutional reasoning. [113] With the President's domestic constitutional authority separated from its international legal roots, this constitutional authority would more easily survive seismic shifts in international law--such as would come with the U.N. Charter.

B. After the U.N. Charter: The United States Comes to Interpret Article 51 in Ways That Track the President's Constitutional Authority

Because the U.N. Charter limited lawful uses of force abroad to those authorized by the Security Council or in individual or collective ***719** self-defense following an armed attack, the Charter could have narrowed the President's constitutional authority if this authority was deemed tied to international law. Ultimately, however, this is not how it turned out. Instead, the executive branch continued to assert the constitutional authority to protect citizens abroad and, aided by the interactive dynamic, came to interpret Article 51 of the U.N. Charter broadly to authorize uses of force to defend citizens abroad.

As with the growth of the President's domestic war powers, the United States developed its position that the U.N. Charter authorizes the defense of citizens abroad through initial practices that later would be read broadly. The first of these was in 1958, when President Eisenhower dispatched 14,000 troops to Lebanon. For its international legal justification, the executive branch relied mainly on the fact that it had been invited by the pro-Western Lebanese government to address an internal insurrection that was being exacerbated by influence from Egypt and Syria and, indirectly, by the Soviets. [114] Although not specifically endorsed in the U.N. Charter, consent by a host government has come to be recognized as an appropriate basis under international law for intervention "if there has been outside subversion against the government." [115] Eisenhower also observed, however, that a "mission of these forces is to protect American lives--there are about 2500 Americans in Lebanon." [116] Notably, Eisenhower had statutory authorization for the action, since Congress had the previous year enacted a joint resolution stating in relation to the Middle East that "if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism." [117] In terms of the interactive dynamic, Eisenhower thus operated from a ***720** position of maximum strength under domestic law at the time that he invoked consent and hinted at the defense of citizens as justifications for intervention under international law.

In the mid-1960s, President Johnson dispatched troops to the Dominican Republic after substantial fighting broke out between the military-led government and rebel forces. Johnson explained to the public that he had acted "to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country." [118] The United States also sent a letter to the U.N. Security Council explaining that the operation was designed "to protect American citizens still there and escort them to safety from the country." [119] Critics charged, however, that the operation far exceeded what was needed to protect American lives and that its purpose ultimately was to prevent the establishment of a Communist government in the Dominican Republic. [120] Moreover, the United States did not invoke Article 51; rather, to the extent that it offered any justification under international law, it emphasized regional security issues. [121] Because of the accretion of practice, presidential action to protect U.S. citizens abroad was viewed as having a strong domestic legal footing, and the executive branch appears as a result to have been more willing to push the boundaries of international law.

The most significant military conflict during Johnson's administration-- the Vietnam War (discussed below in Section IV.A)--did not involve the protection of American citizens. In the wake of that war, Congress enacted the War Powers Resolution, [122] which contains not only a provision requiring the president to withdraw U.S. troops from hostilities within sixty days in the absence of congressional ***721** authorization, [123] but also a provision that could be thought to limit the President's authority under domestic law to initiate the use of force in protection of citizens abroad. Section

2(c) of the Resolution states as a matter of "purpose and policy" that the President has the constitutional authority to introduce U.S. armed forces into hostilities "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." [124] Ironically, the omission of a presidential power to use force to protect American citizens had the effect of undermining Section 2(c) rather than of weakening the legality of this presidential power. As Thomas Franck put it, "[t]he enumeration [in Section 2(c)] could not be taken to be binding because it is plainly not exhaustive. Gone is reference to presidential power to rescue citizens endangered abroad." [125] In other words, the President's rescue authority had become sufficiently settled in domestic practice that Congress's failure to mention it was viewed as confirmation that Section 2(c) could not be treated as a reliable statement of constitutional law.

At the same time that the President's domestic power to use force in defense of nationals abroad was recognized as too strong to be dislodged, the United States began expressly asserting the existence of a similar right under the U.N. Charter. For example, in 1975, President Ford directed military operations to recover the U.S. container ship *Mayaguez* after it had been seized by Cambodian forces. In a letter to the U.N. Security Council, the United States invoked its right of selfdefense under Article 51 of the U.N. Charter. [126] The operation was popular domestically and generated only muted criticism abroad. [127] Even more prominently, after U.S. embassy personnel were taken ***722** hostage in Iran, President Carter authorized a military rescue effort, which, because of mechanical difficulties, had to be aborted while in progress. Carter explained to Congress that, "[i]n carrying out this operation, the United States was acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them." [128] The United States also sent a letter to the U.N. Security Council explaining that the operation was initiated pursuant to the United States' right of self-defense under Article 51 of the U.N. Charter "with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy." [129]

The administrations of President Reagan and President George H.W. Bush engaged in a number of military actions ostensibly related to the protection of American citizens. These included the 1983 invasion of Grenada, air strikes against Libya in 1986, and the 1989 invasion of Panama. The State Department's Legal Adviser, Abraham Sofaer, subsequently explained that, although "[s]ome international lawyers argue that self-defense may be exercised only in response to an attack upon the territory of the State taking such action," "[t]he United States rejects this notion" and "believes it has the right to defend its nationals from attacks, no matter where such attacks are launched, especially if they are launched with the specific intent to harass its nationals." [130] These actions all attracted significant legal and political controversy internationally, especially because the air strikes in Libya constituted what were in essence reprisals rather than rescues and the interventions in Grenada and Panama went far beyond the defense of citizens to encompass regime change. [131] Because of its institutional design, however, the Security Council did not condemn ***723** these actions--for example, a resolution declaring the Grenada intervention a violation of international law failed after receiving eleven favorable votes, three abstentions, and one veto (by the United States). [132] Although there were condemnations of the actions in the U.N. General Assembly, [133] the Assembly, unlike the Council, lacks the authority to issue binding pronouncements.

In essence, although executive branch lawyers did not put it in these terms, the United States was coming to understand the U.N. Charter regime governing the use of force in ways that closely resembled the protective power asserted under domestic law by presidents in the late nineteenth and early twentieth centuries. Substantively, the United States was expanding the scope of its claims to situations that looked like reprisals (as presidents had earlier done in incidents like Greytown) and encompassed regime change (as with some police actions in Latin America in the early twentieth century). As in U.S. domestic law, executive branch lawyers emphasized past U.S. practice in justifying their choices and read these practices broadly. [134] Taken together, these factors suggest that executive branch lawyers were transfusing domestic legal principles into the international legal context.

* * *

Overall, the President's power to use military force to protect Americans abroad reveals the interactive dynamic described in Part I. Presidents have long invoked international law to help justify their domestic authority. After domestic historical practice had accumulated, it was then cited as its own source of authority, even after international law became less supportive with the creation of the U.N. Charter. In turn, presidents eventually came to read Article 51 of the Charter to authorize broad uses of force for the defense of citizens abroad, with executive branch lawyers approaching this issue in ways that paralleled the domestic legal framework. This is not to say that ***724** U.S. practice has succeeded in changing international law. The claim of a right to use force to protect nationals abroad has not generated consensus, especially outside the context of targeted rescue efforts, and in a number of instances uses of force by the United States under this rationale have been heavily criticized as being either disproportionate or pretextual. [135] Nevertheless, U.S. practice (along with the practice of certain other nations) has helped to make it plausible that international law permits some use of force to protect nationals abroad. [136]

III

SELF-DEFENSE AGAINST NON-STATE ACTORS

The legality of uses of force against non-state actors on the territory of other states has come into sharp relief in the years since September 11, 2001. But this issue is not a new one, either in the U.S. **separation of powers** or in international law. Similar to other aspects of the use of force, the story is mostly one of expanding legal authority for unitary actors at the expense of collective actors, and the connections between the domestic and the international legal frameworks are strong.

A. The Nineteenth and Early Twentieth Centuries: Presidents Draw on International Law in Asserting Constitutional Authority

As with the defense of U.S. citizens, nineteenth-century presidents pointed to international legal principles in claiming that they had constitutional authority to use force abroad against non-state actors even without congressional authorization. Indeed, at that time the defense of citizens and uses of force against non-state actors were ***725** closely intertwined, and many of the early precedents discussed in Part II also involved actions taken against non-state actors. In justifying the constitutional authority to use force, presidents drew on the formal distinction in international law between state and non-state actors.

President Monroe's actions with regard to Spanish-owned Florida provide early examples. In 1817, he ordered the U.S. military to Amelia Island to dislodge a band of “freebooters and smugglers of various nations” who were using it as a base for smuggling slaves into the United States in violation of its prohibition on the slave trade. [137] The following year, he authorized U.S. forces (led by Andrew Jackson) to enter Florida in pursuit of raiding Seminoles. [138] In both instances, Monroe emphasized that these actions were justified under international law because Spain was “utterly unable” to control the offending actors on its territory. [139] Monroe also treated it as constitutionally significant that, under international law, the offenders were private actors rather than states. When Jackson went beyond his instructions and captured Spanish forts, Monroe chastised him on the ground that, while pursuit of the Seminoles was the United

States' "right by the law of nations," an attack on the Spanish posts "would authorize war, to which, by the principles of our Constitution, the Executive is incompetent." [140]

As the nineteenth century progressed, presidents increasingly felt themselves entitled to pursue non-state actors without congressional authorization, particularly where these actors were pirates or could be ***726** analogized to pirates. Indeed, members of Congress also seemed to believe that the special status of pirates under international law supported presidential power in this regard. When President Monroe encouraged congressional legislation authorizing hot pursuit of pirates onto the territory of foreign sovereigns in the Caribbean, [141] the House Committee on Foreign Relations rejected such legislation as unnecessary. It concluded that because pirates are "the common enemies of mankind" under international law, they could not "avail [themselves] of the protection of the territory of the third power .... Under this rule, the pursuit and capture of pirates anywhere, and everywhere, may be justified. The Executive has acted upon it." [142] Given these signs of acquiescence, later presidents would accordingly find it helpful to justify uses of force abroad by making analogies to piracy, including uses of forces for the asserted defense of citizens. For example, as discussed in Part II, President Jackson drew such an analogy to justify the use of force in Sumatra, and President Pierce did so to justify the bombardment of Greytown. [143]

Uses of force by the United States in the early twentieth century also often involved the defense of citizens against non-state actors, including in the Boxer Rebellion and some operations in Latin America. [144] One particularly famous incident occurred when President Wilson ordered U.S. forces into Mexico in 1916 to kill or capture revolutionary Pancho Villa following his U.S. raids. Because Wilson initially obtained the consent of Mexico (although this was ***727** later revoked), he was on strong grounds under international law when the raid began, and he did not pursue congressional approval for his actions. [145] With these precedents and the prior ones, presidents came to conclude that they had constitutional authority to use force for self-defense (broadly defined) against non-state actors operating on the territory of other states, at least where these other states either permitted the intervention or were not capable of curbing the offenders.

B. After the U.N. Charter: The United States Interprets International Law Broadly at Times of Strong Domestic Legal Authority

The restrictions on the use of force in the U.N. Charter potentially limited the legality of uses of force against non-state actors operating on the territory of other states as a matter of international law. Although the issue was not entirely settled, substantial formal legal authority prior to 2001 suggested that non-state actors acting independently from states could not commit an "armed attack" for purposes of Article 51--and thus that states who were harmed by these nonstate actors could not invoke Article 51 as a basis for responding with military force. [146] Under this view, a state could only use force in selfdefense against a non-state actor on the territory of another state if ***728** this other state was colluding in some way with the non-state actor. As we discuss in this section, however, the United States came to embrace a broader meaning of "armed attack" in ways that arguably triggered a shift in international custom. Consistent with the interactive dynamic that we recounted in Part I, the executive branch developed this broader international legal interpretation in uses of force that were supported by strong domestic legal authority.

Starting in the 1980s, the United States began to claim a right to act in self-defense against terrorists on foreign soil at least "when no other means is available." [147] This claim was acted upon in the strikes ordered by President Clinton in 1998 against Al Qaeda in Sudan and Afghanistan following the bombings of the U.S. embassies in Kenya and Tanzania. In its letter to the Security Council invoking Article 51 in support of the strikes, the United States noted that it was acting "only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization." [148] The reaction to the U.S. actions by other states was "mixed and muted." [149] In both instances, there was little if any doubt about the President's constitutional authority to undertake these missions in light of the assaults on the U.S. embassies.

The question of self-defense against non-state actors on foreign soil sprang to the forefront after the terrorist attack of September 11. On September 12, 2001, the U.N. Security Council passed Resolution 1368 condemning the attack, "[r]ecognizing the inherent right of individual or collective self-defense in accordance with the Charter," [150] and signaling the Council's "readiness to take all necessary steps." [151] Two days later, the House and the Senate approved the 2001 AUMF, which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or ***729** persons." [152] With the 2001 AUMF, President Bush was on very strong ground as a matter of U.S. domestic law in acting against Al Qaeda and the Taliban regime in Afghanistan.

With regard to international law, the Bush Administration faced a choice of either seeking a Security Council resolution explicitly authorizing the use of force against Al Qaeda and the Taliban regime or instead simply invoking Article 51. In the end, the Administration chose to invoke Article 51. [153] It is difficult to tell how much the decision to act without a Security Council resolution was related to the interactive dynamic, but it is at least plausible that the decision stemmed in part from the fact that the Administration had extraordinarily secure footing in domestic law. Whatever the reason, the Administration initiated military operations in Afghanistan against Al Qaeda and the Taliban solely under Article 51. In doing so, it did not specify the precise connection between the Taliban and Al Qaeda, but it did make clear that the Taliban was unwilling to crack down on Al Qaeda and also described Al Qaeda as "supported by the Taliban regime in Afghanistan." [154]

States were generally supportive of the U.S. action. [155] Accordingly, numerous commentators think that this action moved the goalposts of custom on the use of Article 51 against non-state actors operating on the territory of a third state. [156] The degree of this shift is of course debated. The United States has come to frame its perceived ***730** legal right as one to invoke self-defense against non-state actors on the territory of the other state where that state is "unable or unwilling" to suppress these non-state actors. [157] (This standard is similar to one set forth in the House Report on piracy from 1825 mentioned earlier and to U.S. justifications for uses of force to defend U.S. citizens in Latin America in the early twentieth century. [158])

Having gained broader acceptance for its position after September 11, at a time when its authority under domestic law was at a maximum, the executive branch is now using the "unwilling or unable" standard in situations that have considerably less secure domestic legal footing. A currently ongoing example is the U.S. campaign in Syria against ISIL, which started in 2014. In justifying these hostilities, the executive branch has been on fairly weak authority under domestic law. It has relied on some indeterminate combination of the President's constitutional authority and expansive readings of the 2001 AUMF and of the 2002 AUMF which authorized the original intervention against Saddam Hussein's regime--sources of authority that are each in some way problematic. [159] Under international law, the United States relied on the "unwilling or unable" standard in conjunction with the collective self-defense of Iraq, as well as asserted individual self-defense. [160] This claim is stronger under international ***731** law than it would have been prior to September 11, because of the increased acceptance of this approach in the community of nations. [161] In other words, once the United States had acquired increased state acquiescence for this standard after September 11 where it had strong domestic legal grounding, it began to use this standard in a situation in which the President's domestic legal grounding was much weaker. This is yet another example of how presidential decisionmaking on the use of force may have interactive effects. Indeed, the Obama Administration believed it important to put in the preamble of its proposed congressional authorization for the use of military force against ISIL a statement that "the United States has taken military action against ISIL in accordance with its inherent right of individual and collective self-defense." [162] In addition to the campaign against ISIL, the Obama Administration is also signaling its intent to use the "unwilling or unable" standard in cyber-conflicts in the future. [163]

As the executive branch is further embracing its "unwilling or unable" standard for international law, it is simultaneously using this understanding to inform its constitutional and statutory interpretation with regard to the targeted killing of U.S. citizens. For example, a Department of Justice White Paper that became public in 2013 evaluated the circumstances under which the executive branch could lawfully target a U.S. citizen who was a high-level operational leader of ***732** Al Qaeda or associated forces. [164] In describing how such targeting would be consistent with the Due Process Clause of the Constitution, certain statutory provisions, and an executive order prohibiting assassinations, the White Paper emphasized that this targeting would be consistent with international law. As part of this analysis, the White Paper twice invoked the "unwilling or unable" standard in claiming that targeting "would be consistent with international legal principles of sovereignty and neutrality." [165] Once again, international and domestic legal argumentation are intertwined.

* * *

In sum, there is considerable interplay between international and domestic law regarding uses of force against non-state actors. Starting in the nineteenth century, presidents drew upon international legal concepts in asserting a domestic constitutional right to use force against non-state actors under certain conditions despite the absence of congressional authorization. Although international law changed with the U.N. Charter, presidents did not revisit the scope of their domestic constitutional authority. After September 11, and with clear congressional authorization, President Bush chose to interpret Article 51 of the U.N. Charter expansively to justify the U.S. intervention in Afghanistan rather than seeking Security Council authorization. This action led international practice to become more favorable to such expansive readings of Article 51. Presidents have then in turn invoked these expansive readings in situations in which Congress has not clearly authorized the use of force, such as the current campaign against ISIL. The interplay between international and domestic law has thus helped presidents to expand their legal authority through practice in relation to both Congress and the Security Council.

IV

COLLECTIVE AND TREATY-BASED SECURITY

Separate from or in addition to individual self-defense, U.S. uses of force abroad often occur under the auspices of Security Council resolutions, as part of multinational coalitions, or in collective self- ***733** defense of another state. Both before and after the enactment of the War Powers Resolution, the presence and form of collectivity has proved relevant for presidents in deciding whether to seek congressional authorization for uses of force. The connections between the international and the domestic contexts have in turn had important implications for U.S. constitutional practice and to some extent for international legal practice as well.

A. Before the War Powers Resolution: Presidents Invoke Treaties in Claiming Expansive Constitutional Authority

Long before the establishment of the U.N. Charter, presidents weighed whether their constitutional authority to use force abroad was enhanced when they were acting to enforce a treaty right. This question had some nineteenth-century salience, but became even more important in the early twentieth century, when the United States entered into treaties with several Latin American countries that granted the United States the right to use military force either to defend those countries from external threat or to preserve their domestic tranquility. In 1906, President Theodore Roosevelt relied on his Take Care Clause authority with regard to one such treaty--a 1903 treaty with Cuba [166] --as a justification for authorizing military intervention without congressional approval. With striking candor, Roosevelt explained his position to William Howard Taft:

> [I]f the necessity arises I intend to intervene, and I should not dream of asking the permission of Congress. That treaty is the law of the land and I shall execute it .... I intend to establish a precedent for good by refusing to wait for a long wrangle in Congress. [167]

As this letter suggests, Roosevelt not only formally relied on the treaty as a source of constitutional empowerment, but also understood that this would help expand presidential power vis-à-vis Congress in the long run. [168]

The end of both World War I and World War II saw debates about U.S. participation in international security regimes. When the ***734** Senate was considering the Treaty of Versailles, a majority of senators made clear that they did not want any international obligation or authorization stemming from the League of Nations to substitute for specific congressional authorizations for the use of force. [169] At the end of World War II, however, the Senate debates over the U.N. Charter signaled a greater willingness to accept some role for an international organization in authorizing the use of force as a matter of domestic law. The presumption at that time was that the United States would reach an agreement with the United Nations by which it would place certain troops at the disposal of the Security Council. [170] Once this agreement was reached and approved by Congress, it was accepted that the President would not need case-specific congressional authorization for uses of force by these troops. A report by the Senate Foreign Relations Committee justified this anticipated delegation on the grounds that "[p]reventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace .... Consequently, the provisions of the Charter do not affect the exclusive power of Congress to declare war." [171]

In part because of Cold War tensions, the contemplated agreement with the United Nations was never concluded. [172] The relationship between congressional war powers and the Security Council nevertheless soon became an issue after North Korean forces crossed the Thirty-Eighth Parallel in late June 1950. In response to this development, the Security Council (with the Soviet Union boycotting and thus unavailable to cast a veto [173]) issued a resolution that recommended that UN members "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." [174] President Truman ***735** directed that U.S. forces be sent to Korea, an action that would eventually lead to the presence of over 300,000 U.S. troops in Korea and tens of thousands of American casualties. [175] Although Truman briefed congressional leaders and initially had strong support in Congress, [176] he did not seek congressional authorization. [177] There is some indication that, as with Theodore Roosevelt, Truman's choice reflected a desire to set a precedent favorable to presidential war powers. [178]

Consistent with the interactive dynamic, the Security Council resolution was important to the executive branch's defense of President Truman's constitutional authority--both as a formal matter of doctrine and because it was politically salient to Truman's domestic audience. [179] The State Department provided a legal opinion on President Truman's authority that defended his actions on several grounds, thereby leaving more paths of legal reasoning for successors to use in the future. [180] First, the memorandum emphasized the President's past uses of force in defense of American citizens (and, it claimed, sometimes more generally in defense of "the broad interests of American foreign policy"), but it did not discuss the connections between these past practices and international law or consider the comparatively much greater scale of the Korea venture. [181] Second, the memorandum argued that it was appropriate to use force to support the Security Council's resolutions because the "continued existence of the United Nations as an effective international organization is a paramount United States interest." [182] It also suggested that the U.N. Charter triggered the President's obligations and authority under the Take Care ***736** Clause. [183] By stripping historical practice of its context and emphasizing the Security Council's resolution, the memorandum provided a justification for a significant expansion of the President's constitutional authority to use force without congressional authorization.

For the rest of the Cold War, the Security Council never again authorized a use of force within a state, [184] leaving the only lawful uses of force on the territory of a non-consenting state to be those taken in "individual or collective self-defense" pursuant to Article 51. The Senate encouraged the President to enter into collective defense regimes [185] and then gave its advice and consent to a number of such treaties, including the treaties establishing NATO and SEATO. As a matter of international law, these treaties were clearly tied to Article 51. [186] As a matter of constitutional law, however, neither the North Atlantic Treaty creating NATO nor the Southeast Asia Collective Defense Treaty creating SEATO were intended to substitute for a congressional authorization to use force. The treaties provided that their members were to use force in accordance with their "constitutional processes." [187] While different U.S. actors had different views of the existing state of U.S. constitutional law on the use of force, they agreed that the treaties were not to change the baseline, whatever it was. The unanimous understanding set forth in the Senate Foreign Relations Committee's report recommending advice and consent to the North Atlantic Treaty, for example, was that "[n]othing in the treaty ... increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them." [188]

With the Vietnam War, however, the executive branch came to blur the line between treaty commitments and constitutional powers. ***737** The SEATO treaty was invoked not just in asserting that the United States was acting in the collective self-defense of Vietnam for purposes of international law, [189] but also in justifying the constitutionality of presidential actions. The State Department reasoned that "the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States," and therefore triggered the President's powers of constitutional self-defense. [190] With this move, the executive branch transformed a commitment intended for an international legal purpose into a source of constitutional power.

B. After the War Powers Resolution: The Interplay Between International and Domestic Law Manifests Itself in Multiple Ways

Following the Vietnam War, Congress tried to restrict the executive branch's ability to use treaties as sources of constitutional empowerment. In addition to the sixty-day clock and other provisions already mentioned, the War Powers Resolution provided that the President should not use "any treaty heretofore or hereafter ratified" as grounds for inferring a constitutional authority to use force. [191] As we discuss below, however, the interactive dynamic between domestic law and treaties has survived the War Powers Resolution, although it is sometimes manifested in counterintuitive ways. This dynamic appears both with regard to the initiation of hostilities and to their continuation.

1. Initial Uses of Force

After Congress passed the War Powers Resolution, the executive branch briefly backed away from the broad claim that the President had constitutional authority to use force to defend American interests ***738** abroad.[192] Yet it still continued to emphasize treaty commitments. In 1975, for example, the Legal Adviser informed a congressional committee that the President could introduce troops into hostilities not only in "the three situations listed in subsection 2(c) of the War Powers Resolution," but also "to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, ... and to carry out the terms of security commitments contained in treaties."[193]

In the years since, the executive branch has returned to the broader formulation of protecting American interests. This move is evident in the Presidency of George H.W. Bush. In the first Gulf War, President Bush obtained both a Security Council resolution *and* congressional authorization--the first (and, as of now, the only) time when *both* collective actors have clearly authorized a use of force.[194] Not long after, however, President Bush decided to send troops to Somalia without clear congressional approval, following a Security Council resolution authorizing nations to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations" there.[195] In its memorandum defending the constitutionality of this action, OLC noted both the interest in protecting American citizens and in supporting U.N. Security Council resolutions, ***739** citing throughout to past practices.[196] "Against the background of this repeated past practice under many Presidents," reasoned OLC, "this Department and this Office have concluded that the President has the power to commit United States troops abroad for the purpose of protecting important national interests."[197]

From the perspective of the interactive dynamic, this broad claim of constitutional authority occurred at a time when the President had a Security Council resolution and was therefore at the apex of international legality. In subsequent years, the executive branch has similarly appeared most comfortable with broad invocations of American interests as a matter of constitutional law where the enforcement of Security Council resolutions are at issue--or at the very least where the United States is acting as a part of NATO. This is the case for the following U.S. interventions: Haiti in 1994, which was authorized by the Security Council;[198] Bosnia in 1995, which was authorized by the Security Council and carried out through NATO;[199] Kosovo in 1999, which was carried out through NATO;[200] Haiti in 2004, which was authorized by the Security Council;[201] and most recently Libya in ***740** 2011, which was authorized by the Security Council and eventually carried out through NATO (after initial actions by the United States and certain allies).[202] By the time of the Libya intervention, OLC had a long line of precedents since the War Powers Resolution that it could cite for the proposition that the President could constitutionally initiate the use of force, at least up to a fairly high threshold, where the President "could reasonably determine that such use of force was in the national interest."[203]

Logically, this broad language suggests that executive branch lawyers would conclude that the President could constitutionally order uses of force abroad purely for the humanitarian protection of citizens of other countries, provided that the President views this as within the national interest. Yet President Obama, at least, has proven reluctant to do so where such a use of force would violate international law. The striking example is Obama's response after the Syrian regime crossed what he called a "red line" by apparently using chemical weapons against its own population in 2013.[204] As the Obama Administration recognized, a responsive strike against Syria would have difficulty "fit[ting] under a traditionally recognized legal basis under international law,"[205] since Russia would doubtless veto a Security Council authorization and the strike would not be in self-defense. Instead, as an international legal justification, the United

States would probably have had to rely on something akin to pure humanitarian intervention.[206] This is a position the United States had never before cited as its sole basis for a use of force under international law and which, while it has its advocates, is difficult to reconcile with the text of the ***741** U.N. Charter.[207] As *New York Times* reporter Charlie Savage noted, Obama's attempt "to deal with the novelty of the crisis in international law [became] entangled in the separate domestic law question of whether the president could order strikes on Syria without Congressional permission."[208] The White House Counsel explained to him that, "[b]ecause it would be 'more controversial for the president to act alone in these circumstances' as a matter of international law, it would be better to get Congress on board as a matter of domestic law 'to enhance the legitimacy' of the action."[209] Ultimately, Obama decided to seek congressional authorization,[210] a decision that quickly became moot after a diplomatic solution was found to resolve the crisis.[211]

2. The Continuation of Hostilities

Prior to the War Powers Resolution, neither international law nor domestic law set any fixed time limits on the use of force. Although the provision in the War Powers Resolution requiring withdrawal from hostilities within sixty days in the absence of congressional authorization is a matter purely of domestic law, in practice its existence may also affect executive branch decisionmaking and doctrinal reasoning with respect to treaties and collective security.[212]

***742** As a doctrinal matter, the sixty-day clock has appeared to incentivize executive branch lawyers to construe congressional authorizations broadly in ways that interconnect with how the executive branch interprets international legal obligations.[213] The aftermath of the first Gulf War illustrates this point. The Security Council had authorized the intervention in Resolution 678 and the congressional statute then simply authorized the President to "use United States Armed Forces pursuant to United Nations Security Council Resolution 678."[214] In carrying out these authorizations, President Bush initially hued closely to their mandate and did not go further in seeking to overthrow Saddam Hussein. Yet following the initial conclusion of the first Gulf War and the ceasefire established in a later Security Council resolution, the Bush and later the Clinton Administrations sought to create "no-fly zones" over areas of northern and southern Iraq. In essence, the executive branch claimed that Iraq was in violation of the ceasefire and therefore that (1) the authority to use force could be inferred from Security Council resolutions for international law purposes,[215] and (2) the congressional statute continued to apply for domestic law purposes, thus serving as an authorization that satisfied the sixty-day clock.[216] These seemingly parallel arguments, however, were not perfectly parallel, as Congress but not the Security Council came to signal its approval for the executive branch's approach.[217] In ***743** effect, the executive branch transfused its willingness to engage in energetic statutory construction into the international legal context.[218]

Executive branch lawyers for President George W. Bush took these broad readings of the Iraq-related Security Council resolutions and widened them. In 2002, OLC concluded that President Bush had the authority to invade Iraq under international law, based on an exceptionally capacious reading of Resolution 678 and related resolutions.[219] Although Bush was on weak international legal grounds in invading Iraq, he had clear domestic legal authority as a result of the 2002 AUMF--yet another example of how legal strength in one body of law can potentially increase the likelihood that a president will act despite legal weakness in the other body of law.

Between the two Gulf Wars, President Clinton had to confront a question about the continuation of hostilities in Kosovo during NATO's bombing campaign. From the perspective of the interactive dynamic, Kosovo is an unusual case, as its legality under *both* international and domestic law was problematic. Unlike the Libya operation, the Kosovo operation lacked clear Security Council authorization and indeed the Legal Adviser declined to provide an opinion saying that it was legal under international law. [220] Nevertheless, because of the humanitarian nature of the operation and the multinational commitment of NATO, international criticism was limited, and the operation is often cited for the possibility that sometimes the use of force might ***744** be "illegal but legitimate" under international law. [221] As a matter of domestic law, even accepting that President Clinton had the constitutional authority to initiate the campaign, this campaign was problematic under the War Powers Resolution since it lasted more than sixty days and yet was not expressly authorized by Congress. Nonetheless, OLC claimed that there was no violation of the Resolution because Congress had in effect authorized it through the enactment of supplemental appropriations measures needed to fund the operation. [222]

Although the Kosovo intervention was a NATO-based operation, this factor did not particularly affect the executive branch's formal analysis in relation to the War Powers Resolution. By contrast, the structure of NATO involvement proved important to the controversy over the sixty-day clock in the 2011 Libya intervention. According to news accounts, OLC advised the President that he did not have the authority to continue the U.S. operations in Libya when the sixty-day clock expired. [223] But other executive branch lawyers--most notably, the State Department's Legal Adviser, Harold Koh--argued that a continuation of the operation would not violate the Resolution, and Obama accepted that conclusion. Specifically, Koh's argument was that, all things considered, the U.S. role in the bombing campaign did not constitute "hostilities" within the meaning of the Resolution. [224] In reaching this conclusion, Koh remarked that before the sixty-day clock had run, the United States had turned command of the mission over to NATO and was now playing a "constrained and supporting role." [225] Besides emphasizing the structural role played by NATO, Koh also referred to strong international legal and political support for the mission, noting that it was a "NATO-led, Security-Council authorized operation." [226] Once again, we see international law arguments pressed into service for a domestic legal justification.

*745 V

IMPLICATIONS OF THE INTERACTIVE DYNAMIC

In this Part, we consider some implications of the interactive dynamic. First, we discuss the relevance of the dynamic for current scholarly debates over the law on the use of force, both domestically and internationally. Next, we consider its implications for the decisionmaking of war powers actors, in particular Congress, the President, and the Security Council. We conclude by discussing how the dynamic both confirms and complicates the role that law plays in presidential decisions to use military force.

A. Implications for War Powers Scholarship

The interactive dynamic has implications both for foreign relations law scholarship concerning the President's constitutional authority to use military force, and for international legal scholarship concerning the authority of nations to use military force. While our analysis does not resolve normative questions about appropriate methods of legal interpretation or what the law on the use of force should be, it does shed light on how the executive branch approaches these issues in practice. Our central insight is that scholars seeking to understand how U.S. uses of force relate to law need to consider both bodies of law in order to fully appreciate what is going on with respect to each body. We consider more specific implications below.

1. U.S. War Powers Scholarship

Much of modern scholarship concerning the President's constitutional authority to use military force is originalist in its methodology. That is, it considers how the Constitution's distribution of war authority would have been understood at the time of the Founding. Most of this scholarship has concluded that the Constitution was understood as requiring congressional authorization for non-defensive uses of military force. [227]

As this Article makes clear, however, these originalist accounts do not map well onto either the actual practice of presidential uses of ***746** force or the legal reasoning offered to justify this practice. Presidential war powers have evolved, and there is no reason to believe that U.S. practice will return to the narrower conception of presidential power evident in the early years of the nation. Among other things, the nature of the security threats to the United States are substantially different from what they were at the Founding; U.S. foreign policy interests have become much more complex and global in scope; presidents have at their disposal a large standing military, something that was not true at the Founding; and Congress, for partisan and other reasons, often acquiesces in presidential unilateralism.

Some non-originalist scholarship, by contrast, has given weight to historical practice in discerning the scope of the President's war powers authority. These accounts typically make an effort, like OLC in the Obama Administration, to distinguish between smaller-scale uses of force and larger conflicts. Peter Spiro contends, for example, that, although presidents have the authority to carry out limited military operations on their own authority, congressional authorization is needed to wage "real war"--that is, "the massive use of force against an enemy itself capable of marshalling substantial force." [228] Jane Stromseth concludes more narrowly that, although historical practice supports a presidential power to use "limited force to rescue American citizens abroad whose lives are in imminent danger," such practice does not clearly support a broader presidential authority to engage in "little wars." [229]

While these practice-based analyses offer more realistic accounts than originalism of the modern constitutional law of presidential war powers, this Article suggests that they are incomplete. In particular, these analyses have not given sufficient attention either to the interconnections between U.S. war powers practice and international law or to the dynamic relationship between domestic and international law in this area. [230] For example, because Professor Spiro does not consider how Security Council authorizations have helped the President ***747** in claiming greater constitutional authority, [231] he is perhaps too optimistic in asserting that historical practice can maintain a firm distinction between "real war" and smaller engagements. The example of the Korean War (and of the executive branch's continued invocation of this war as a precedent at least up until recently) shows how international authorizations can serve to tilt constitutional practice. Professor Stromseth does consider the doctrinal question of whether Security Council resolutions can substitute for congressional authorization, [232] but she does not consider how these substitutions can shape historical practice in ways that favor presidential power irrespective of the international legal context. Overall, the interactive dynamic described in this Article, by positing that customary practice is multi-dimensional, suggests that the lines drawn by practice can shift more rapidly and more substantially than might otherwise be anticipated.

2. International Legal Scholarship

Most international legal scholarship on the use of force includes extensive discussion of U.S. practice but pays little attention to U.S. internal law on the use of force. [233] This makes sense as a purely doctrinal matter, as international law formally develops without consideration of the internal laws and procedures of particular nations. Yet for international legal scholars who are interested in understanding more than just the formal doctrine, our account has considerable relevance. As we have shown, understanding U.S. domestic law on the use of force is crucial for understanding how the United States conceptualizes ***748** and engages with international law on the use of force. Because the United States plays such a major role in relation to international law on the use of force--even though U.S. positions on this law are often in tension with prevailing interpretations--U.S. domestic law on the use of force has an important, though indirect, effect on the shape and development of international law.

In particular, our findings suggest that international legal scholars trying to understand U.S. practice should pay close attention to the relationship between the President and Congress. Currently, scholars examining U.S. behavior focus almost exclusively on presidents as decision-makers. For example, some recent scholarly works focus extensively on how Presidents George W. Bush and Barack Obama do or do not differ in their approach to international law on the use of force without ever considering how the U.S. **separation of powers** might affect this issue. [234] As we have shown, however, the presence or absence of congressional authorization is relevant to how willing a President may be to interpret international law permissively on the use of force. The 2001 AUMF, for example, helps explain the continuity between the Bush Administration and the Obama Administration with respect to the war on terror, as it can be interpreted to give the President domestic authorization to engage in actions that may be questionable as a matter of international law. [235]

Finally, at a higher level of generality, our findings contribute to the developing body of scholarship on "comparative international law." [236] As Anthea Roberts puts it, "[h]ow international law is received and understood within a domestic system is likely to depend on underlying cognitive grids, which are shaped by domestic legal training." [237] We have shown how domestic legal approaches with ***749** regard to the use of force get transfused by executive branch lawyers into the international arena. In both contexts, the executive branch emphasizes practice rather than foundational texts, characterizes past practices in ways that favor its positions, interprets statutes and resolutions in a fairly free-form way, and resists resolution of use-of-force questions by courts.

B. Implications for War Powers Actors

This Article has shown how institutional design, the open-textured possibilities of practice-based legal interpretation, and interactions between the domestic and international spheres all combine over time to help justify vastly increased presidential war powers. In what follows, we consider what our account suggests for those who favor stronger legal restraints on the President's unilateral authority to use force or, at the very least, want to slow the erosion of these restraints. [238] These suggestions involve both a general attentiveness to the interactive dynamic and some specific ideas about the drafting of authorizations, the use of soft law mechanisms, and the treatment of practice in legal interpretation.

1. Awareness of the Interactive Effect of Authorizations to Use Force

Immediately after Congress's approval of the 2002 AUMF for Iraq, Hillary Clinton described her vote in favor as "probably the hardest decision I've ever had to make." [239] She added that she thought that "bipartisan support would make the president's success at the United Nations 'more likely and, therefore, war less likely.'" [240] Although potentially self-serving, this remark suggests that members of Congress can indeed think in terms of the effects of their votes on international actors. But it also suggests that they can get it wrong. Instead of helping President Bush obtain the support of the Security ***750** Council, the 2002 AUMF provided domestic support for him to invade Iraq on a tenuous international legal justification and with relatively little international support.

Awareness of the interactive dynamic would help to predict this consequence. The interactive dynamic suggests that an authorization from Congress or the Security Council may reduce the likelihood that the President will await an authorization by the other body. [241] Members of Congress should therefore be aware that when they authorize uses of force, the President may be more likely to bypass the Security Council and instead to push the boundaries of international law, as with Iraq in 2002 and as has occurred to some degree with the war on terror following the 2001 AUMF. Even if members of Congress are unconcerned about international law per se, they should be aware that, because of the interactive dynamic, changes in international law can have consequences for domestic law over time. Members of the Security Council should similarly be aware that when they authorize uses of force, the President may use it to help justify bypassing Congress, as with the Korean War and, on much more modest scales, interventions in recent decades in Haiti, Bosnia, and Libya.

These implications should matter to members of Congress and of the Security Council because, as we have shown, they have good reason to care about the long-term structure of both bodies of law. The more precedents the President has for using force under tenuous international legal theories, the more comfortable the President may feel in the future doing so even without Congressional authorizations. Similarly, the more precedents the President has for acting without Congress as a matter of domestic law, the more likely the President is to use force abroad without a Security Council authorization or other strong international legal grounding. To say that collective actors should be aware of these possibilities is not to suggest that they should decline to provide authorization when they think it is substantively and institutionally warranted. Such awareness is relevant, however, to the potential content of their authorizations and their responses to unilateral action, as explained in the next two subsections.

751** ***2. Decisions on What to Put in Authorizations for Uses of Force

The interactive dynamic also has implications for the content of authorizations for the use of force. Indeed, in practice these implications are likely to be more important than the implications for whether to authorize uses of force, which will mostly be driven by perceived substantive and political imperatives. Once again, the overall implication is that actors should try to limit the risks that their authorization will loosen legal restraints with respect to the other body of law at issue. They could achieve this by putting certain conditions into their own authorizations--conditions that would further protect against overly expansive interpretation of these authorizations by the executive branch.

For Security Council authorizations, we suggest consideration of limits related to domestic legal authority, time, and scope. As to domestic legal authority, these authorizations could borrow the language found in the NATO treaty and state that members are permitted to use force in accordance with their "constitutional processes." [242] This would not necessarily lead the President to seek congressional authorization, but it could strengthen the hand of domestic actors arguing that the President should do so, and it would at least make it more difficult to argue that obtaining Security Council authorization was a substitute for obtaining otherwise-required congressional authorization.

As to time, past practice like the revival of the first Gulf War resolutions to justify the second Gulf War offers plenty of reasons why, regardless of the interactive dynamic, Security Council members should consider time limits on authorizations. [243] Yet the interactive dynamic suggests that Security Council members should be particularly aware of the sixty-day clock of the War Powers Resolution and how it affects the domestic legal and political climate in which the President operates. The Security Council's authorization in Libya indirectly helped to set a domestic precedent for finding the sixty-day clock inapplicable, and this precedent might be used in the future in contexts in which there is no Security Council resolution. To avoid playing a role in further watering down the power of the sixty-day clock, Security

Council members could consider authorizing uses of ***752** force for only short periods of time or at least establishing review processes that would be engaged after some initial period. [244]

Finally, as to scope, limits placed by the Security Council could reduce the risk of large-scale uses of force by the President without congressional authorization. The Security Council authorization in Libya, for example, explicitly "exclud[ed] a foreign occupation force of any form on any part of Libyan territory." [245] Although no doubt put in to assuage international concerns, this provision also may have helped to reduce the risk as a matter of domestic law that hostilities unauthorized by Congress would escalate into a commitment of U.S. ground troops.

Members of Congress should consider similar kinds of limits in congressional authorizations for uses of force. Its authorizations could be tied to particular international legal justifications, as Eisenhower's authorization in the Middle East was tied to intervention by invitation [246] and the authorization for the first Gulf War was tied to Resolution 678 of the Security Council. [247] To protect against overly expansive interpretations of these international legal justifications, Congress could further include other limitations like sunset provisions, definitions of the relevant enemy, and geographic specifications. At least in some instances, presidents may be receptive to such limitations. By way of example, the draft AUMF that President Obama submitted to Congress in February 2015 to address the conflict against ISIL would have expressly declined to authorize "the use of the United States Armed Forces in enduring offensive ground combat operations," would have terminated in three years unless reauthorized by Congress, and would have repealed the 2002 AUMF relating to Iraq. [248]

Carefully tailored authorizations would go a considerable distance to limiting the ways in which the interactive dynamic can contribute to the long-term growth of presidential war powers. Nonetheless, presidents might use their bargaining power in Congress ***753** and the Security Council to resist the adoption of such limits. Moreover, while major uses of force by the United States typically involve an authorization by either Congress or the Security Council, there are nonetheless many situations in which the President uses force without any formal authorization--typically in some form of asserted selfdefense. Because of this, it is important to consider how the interactive dynamic can affect other aspects of the legal processes involved in decisions on the use of force.

3. Soft Law Mechanisms

Where the President is considering a use of force without authorization from Congress or from the Security Council, the institutional design of these actors makes it highly unlikely that they will formally oppose the President's actions through their lawmaking processes. Yet their members and other actors have various "soft law" mechanisms that they can use to try to pressure the President into a decision not to use force or, if hostilities are ongoing, to tamper down or terminate these hostilities. [249] For members of Congress, these methods include hearings, committee reports, non-binding resolutions, resistance to funding the hostilities or to other aspects of the President's agenda, behind-the-scenes conversations with the White House, and communications with the public. For other nations, these methods include public and private protests, non-cooperation with (or even opposition to) the United States on this use of force or on other issues, and gestures of disagreement expressed in other international fora. Such resistance not only serves to signal political objections, but also can influence practice-based legal developments. As one of us has argued in the domestic context, these signals can be considered in measuring Congress's nonacquiescence to an executive branch practice. [250] In the international context, acquiescence or nonacquiescence by nations to the subsequent practice of the United States is important to the impact of these practices on doctrine. The vote in the General Assembly against the U.S. invasion of Grenada, for example, undercuts ***754** the argument that this invasion was a legitimate exercise of the right of self-defense. [251]

The interactive dynamic has implications for the most effective deployments of soft law. Perhaps most importantly, actors seeking to resist presidential action through soft law should consider the context with respect to the other body of law in determining when to time their acts of resistance. If the President is most likely to be responsive to concerns about the use of force when getting pressure in *both* the international and domestic context, then actors in each context should consider timing their opposition accordingly. While the initiation of hostilities is usually the most crucial time at international law, in the domestic context both the initiation of hostilities and the end of the sixty-day clock of the War Powers Resolution have particular salience. Thus other nations might wish to time gestures of opposition not only at times leading up to the initiation of hostilities, but also sixty days in, so as to add pressure on presidents at a moment when they are on weaker grounds domestically. As for members of Congress, if the President is on weak international legal ground, then they would want to put particular pressure to bear before or at the time of the initial use of force. On the other hand, if the President is on strong international legal ground they might instead focus their efforts on emphasizing the sixty-day clock of the War Powers Resolution.

Soft law mechanisms can also be used to signal approval of presidential action. Where the President is on strong ground under international law, members of Congress might wish to emphasize the significance of this fact to their acquiescence in a presidential use of force. Doing so would help limit the scope of their acquiescence. By way of example, the more the Obama Administration's interpretation of "hostilities" for purposes of the sixty-day clock in the Libya intervention is explicitly linked to the Security Council resolution (or to NATO involvement), the harder it will be for future administrations to use this interpretation in the absence of these factors. Nonetheless, the effectiveness of limits built into congressional acquiescence depends in large part on the willingness of future executive branch actors to recognize these limits. As we have shown, however, the executive branch instead tends to read past practices broadly in favor of presidential power. Because of this, it is important to also consider ways in which the use of practice in legal interpretation can be disciplined.

***755** *4. Treatment of Practice in Legal Interpretation*

In the past, the interactive dynamic has aided executive branch lawyers in expansive interpretations of past practice. Over time, this Article has shown, these interpretations have led to increasingly broad claims of legal authority in both domestic and international law. Institutionally, these trends are helped by the fact that executive branch lawyers may consider it in the interest of their client to be public about the breadth of presidential war powers and silent or private about the limits. As Trevor Morrison has put it in relation to OLC, "written precedents could become weighted more toward client-friendly conclusions than the totality of all its legal advice, oral and written combined." [252]

The soft law mechanisms discussed above might help encourage executive branch lawyers to be less expansive in their interpretation of past practice. In addition, our account of the interactive dynamic provides insights for executive lawyers interested in preserving the restraining effect of law. While this possibility might seem fanciful, interests in restraint could come from intrinsic fidelity to law or from substantive concerns about the absence of legal restraints. Executive branch actors might favor restraints because of distrust of future presidents or, on the international law side, out of concerns that the erosion of international legal standards will increase the risk of undesirable actions by other nations. [253] Articulating meaningful restraints can also be a way of enhancing the President's credibility when using force. [254]

Most powerfully, executive branch lawyers can refuse to give opinions that certain uses of force are legal. With regard to Kosovo, for example, the Legal Adviser of the State Department declined to provide an opinion that this intervention was lawful under international law. [255] Although the intervention went forward nonetheless, the absence of such an opinion has left its footprint on U.S. practice. Had ***756** such an opinion existed and concluded that humanitarian intervention is authorized by international law, it might have increased presidential willingness down the road to advance this international legal justification. As noted earlier, the United States considered advancing this justification in relation to responding to the Assad regime's use of chemical weapons, but ultimately President Obama decided not to use force without congressional backing. [256]

Even within legal opinions finding uses of force to be lawful, there are ways that executive branch lawyers can narrow the precedential scope of these opinions. One way is for executive branch actors to clearly identify limits to executive branch authority, ideally using language stronger than "possible." [257] A second way is for executive branch lawyers to try to rest their arguments on the narrow or single justifications rather than on broad or multi-factor ones. The OLC memorandum in support of the Libya intervention, for example, identified both regional stability and preserving the credibility of the Security Council as important national interests that the President could deem advanced by this intervention. [258] A focus solely on the Security Council would have been a narrower ground--one that would reduce the likelihood of Libya being used as a precedent in situations where the international legal justification was much weaker. Yet a third way would be for the executive branch to be more rigorous in evaluating past practice. In assessing legality under international law, for example, executive branch lawyers could focus less on U.S. practice and more on international practice generally.

* * *

The prospects for restraint suggested above are modest ones. Formal action from Congress and the Security Council is difficult to obtain, and the executive branch has considerable incentives to favor the long-term expansion of presidential war powers. In addition, the President is often on a sound basis in one body of law even without a specific authorization. On the domestic law side, the President's constitutional power to use force for the rescue of citizens abroad is now well-established from the perspective of practice and, increasingly, the ***757** President's authority to use force abroad for other interests--at least up to a certain threshold and before the triggering of the sixty-day clock--is becoming or has become the same. On the international law side, the Charter-sanctioned principle of self-defense and accompanying practice, along with the rise of consent-based interventions, place the United States on sound, or at least plausible, footing under international law for many uses of force.

More robust constraints would likely require the intervention of courts. As discussed earlier, courts currently play very little role in policing the executive branch's legal interpretations on the use of force, [259] and their absence encourages the practice-based expansions we have documented in this piece. On the domestic law side, if the federal courts showed even slightly more receptivity to adjudicating use-of-force cases, through relaxation of traditional limitations such as the political question doctrine, they could potentially trigger more restraints on presidential action. [260] On the international law side, it is unlikely that in the future the United States will formally accept the authority of an international court to adjudicate the legality of uses of force. [261] But such court decisions (regardless of whether they involve the United States as a party) might nonetheless increase the cost of broad legal interpretations by the United States.

C. Law and Presidential Decisionmaking

In recounting the interactive dynamic relating to war powers, this Article has assumed that law matters at least to some extent in this context. If law does not have direct or indirect effects on presidential decisions to use military force, then the dynamic described here would be immaterial to policy: presidents would make the same decisions about whether to use force regardless of whether they were able to ***758** shift between international law and domestic law justifications, and regardless of whether they were able to broaden legal doctrine over time. If so, the interactive dynamic would be an important part of rhetoric and argumentation, but not something that policymakers should be attentive to in thinking about the evolution of presidential war powers. This question of legal effect is therefore significant, but it is also very difficult to assess empirically. [262]

Some scholars doubt that law concerning the use of force matters much at all. [263] The stakes are high for decisions on the use of force, which puts more strain on the fidelity to legal norms. There is also little judicial review available to check presidential compliance with the law in either the international or domestic context. And, as this Article has documented, the practice of presidential use of force has departed substantially from the textual assignments of war powers and what most observers consider the original understanding of those assignments. On a few occasions, policymakers are even candid in their internal deliberations that they are acting regardless of legality. After President Johnson ordered an intervention in the Dominican Republic, for example, the legal justification drafted by the State Department was post hoc and so unimpressive that future Supreme Court justice Abe Fortas deemed "its soundness as a matter of legal ***759** analysis ... subject to effective challenge." [264] From this and other examples, it is clear that law does not always carry the day.

Yet there are reasons to think that law relating to the use of force plays a meaningful and sometimes dispositive role in presidential decisionmaking. To begin with, presidents and their supporters spend significant time and energy seeking to justify uses of force in legal terms. They issue executive branch legal memoranda, testify before Congress, make statements to the public, and send letters to the United Nations all explaining why particular uses of force are legal under domestic and international law. In doing so, they expose themselves to potential criticism of their legal analysis--criticism that has the potential to undermine their credibility. [265] And even when the content of the law is debatable, legal argumentation is subject to plausibility constraints. [266]

There are particular indications that, despite its significant limitations, the War Powers Resolution has had a material impact on executive branch decisionmaking. Few unilateral uses of force by presidents since enactment of the Resolution in 1973 have exceeded the Resolution's sixty-day limit, and there are indications that presidents have sometimes made an effort to conclude operations (such as in Grenada and Panama) before the expiration of that period. [267] Moreover, in those instances in which it has appeared that the period was expiring, such as with Kosovo in 1999 and Libya in 2011, presidents and their advisors made strenuous efforts to explain why the Resolution was not being violated. The Resolution also seems to have contributed to the Obama Administration's decision in 2014 to rely on preexisting statutes for the use of force against ISIL rather than on the President's constitutional authority. [268] In other instances in which the Resolution's sixty-day clock has been implicated, such as in Lebanon in 1983 ***760** and Somalia in 1993-1994, Congress has itself acted to limit presidential uses of force. One reason why the Resolution may matter, as suggested by two political scientists, is that it allows members of Congress who oppose presidential uses of force to "cloak their actions in U.S. law rather than appearing unpatriotic." [269]

The various executive branch efforts at public legal justification suggest that, at a minimum, presidents believe that there are important audiences that care about legality. Potential audiences include members of the President's party in Congress, Congress as a whole, the U.S. public (as informed by the media, scholarly experts, and others), U.S. allies, and the international community more generally. Even if one assumes that presidents care only about politics, legality matters to presidential decisionmaking if, as seems likely, it can affect the level of political support (domestic or international) for contemplated action. It is also plausible that there is some internalization of legal norms relating to the use of force within the executive branch. Presidents may themselves have internalized such norms or desire to have a legacy that includes a reputation for legal fidelity. Reports about President Obama's decision to seek congressional authorization in 2013 for using force against Syria are suggestive of such a preference. As the *Wall Street Journal* reported, "Mr. Obama made no secret to aides he felt uncomfortable acting without U.N. Security Council backing." [270] Additionally, executive branch lawyers who advise the President are likely to have internalized norms of both fidelity to law and legal professionalism, which may limit the extent to which they are willing to strain legal interpretation in support of presidential policy. [271]

The analysis in this Article offers further insight into how law may influence executive branch decisionmaking on the use of force. Our account suggests that law matters in ways that will be overlooked by those who focus only on domestic or international law. As we have shown, there are remarkably few instances in which presidents have used military force in the U.N. Charter era when they appeared to lack plausible support in *both* domestic and international law. Instead, instances in which they have strained international law have tended to involve situations in which they had strong domestic legal support, ***761** such as in Iraq in 2003. And instances in which they have strained domestic law--such as in Korea in 1950 and Libya in 2011--have tended to involve situations in which they had strong international legal support. In situations in which contemplated uses of force appeared to have weak support in both domestic law and international law, as with Iraq in 2003 prior to the congressional authorization and Syria in 2013, presidents have not acted unilaterally. This pattern suggests that even if the constraining effects of domestic and international law are each relatively thin, they are stronger when they are operating in the same direction. Law thus matters more when considered along two dimensions--but it does so in a way that is in tension with traditional conceptions of how bodies of law are supposed to operate.

CONCLUSION

In order to understand the evolution of presidential war powers in the United States, it is necessary to consider how domestic law and international law governing the use of force have interacted over time. Although international law does not purport to regulate domestic **separation of powers**, U.S. argumentation and decisionmaking concerning the use of force has often been linked to international law. In particular, presidents have drawn from international law to enhance their domestic authority to use force, both in select instances and through the accretion and extension of precedent. Moreover, while U.S. **separation of powers** plays no direct doctrinal role in the development of international law, it is relevant to international legal practice on the use of force, because it influences U.S. practice and the United States plays an outsized role internationally with regard to the use of force. Both scholarship on war powers, and efforts to reform domestic and international decisionmaking on the use of force, need to take better account of this interactive dynamic.

Footnotes

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1 *E.g.*, ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY, at ix (1973) (explaining that he would "devote[] special attention to the history of the war-making power").

2 *See* BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2015 (2015), http://fas.org/sgp/crs/natsec/R42738.pdf.

3 *See Summary* to TORREON, *supra* note 2 (noting that "[t]he majority of the instances listed prior to World War II were brief Marine Corps or Navy actions" and that "[a] number were engagements against pirates or bandits").

4 *Barack Obama's Q&A*, BOSTON GLOBE, Dec. 20, 2007, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/.

5 President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), https://www.whitehouse.gov/the-press-office/2011/03/28/remarkspresidentaddress-nation-libya.

6 President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), https://www.whitehouse.gov/the-press-office/2013/09/10/remarkspresidentaddress-nation-syria.

7 *See* President Barack Obama, Statement by the President on ISIL (Sept. 10, 2014), https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1; President Barack Obama, Statement by the President (Aug. 7, 2014), https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president.

8 The focus here is on the international and domestic law governing *whether* military force can be used rather than on the law governing *how* force can be used. That is, the focus is on what is referred to in international law as *jus ad bellum* rather than on *jus in bello*. Both the structure of decisionmaking concerning *jus in bello* and the relationship between international law and domestic law in that area implicate distinct considerations from those implicated by *jus ad bellum*. In addition, we focus almost exclusively on uses of force that are overt rather than covert. Although international law on the use of force applies to covert actions as well as overt ones, the differences in how covert actions are carried out as a matter both of public accountability and of domestic law make assessing the applicability of our arguments to covert action beyond the scope of this Article.

9 U.S. CONST. art. I, § 8, cl. 11; *see also id.*, cls. 11-14 (empowering Congress to "make Rules concerning Captures on Land and Water," to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces").

10 *Id.* art. II, § 2, cl. 1.

11 In *The Federalist Papers*, Alexander Hamilton--normally a defender of robust executive power--explained that the President's Commander-in-Chief role "would amount to nothing more than the supreme command and direction of the military and naval forces." THE FEDERALIST NO. 69, at 386 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911) (recording an exchange in which the delegates voted to change Congress's power from "mak[ing] war" to "declar[ing] war," thus "leaving to the Executive the power to repel sudden attacks"). For discussion of other sources reflecting a similar understanding during the time of the ratification debates, see Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 683-88 (1972).

13 *See, e.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548 & n.19 (2002) (collecting sources). Among modern war powers scholars, the principal exception to the view that Congress must authorize offensive war is Professor John Yoo. *E.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

14 *E.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 66-67 (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER 7 (3d rev. ed. 2013)LOUIS FISHER, PRESIDENTIAL WAR POWER 7 (3d rev. ed. 2013); Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 69 (1995); Lofgren, *supra* note 12, at 697-99.

15 Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), *in* 10 THE WRITINGS OF GEORGE WASHINGTON 366, 367 (Jared Sparks ed., New York, Harper & Bros. 1847); *see also* Letter from Henry Knox, Sec'y of War, to Governor William Blount (Nov. 26, 1792), *in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 220-21 (Clarence Edwin Carter ed., 1936) ("[The President] does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.").

16 President John Adams, Special Session Message to the Senate and House of Representatives (May 16, 1797), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 233, 237 (James D. Richardson ed., 1896) [hereinafter PRESIDENTIAL COMPILATION] (urging Congress to develop regulations "as will enable our seafaring citizens to defend themselves against violations of the law of nations, and at the same time restrain them from committing acts of hostility against the powers at war"); *see also* Letter from Alexander Hamilton to James McHenry (May 17, 1798), *in* 21 THE PAPERS OF ALEXANDER HAMILTON 461, 461-62 (Harold C. Syrett ed., 1974) ("I am not ready to say that [President Adams] has any other power than merely to employ the Ships as Convoys with authority to *repel* force by *force*, (but not to capture) .... Any thing beyond this ... requires the sanction of that Department which is to declare or make war.").

17 Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *6 (O.L.C. Apr. 1, 2011) (Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney General, to the Attorney General).

18 *Id.* at *8.

19 *See* TORREON, *supra* note 2.

20 50 U.S.C. §§ 1541-1548 (2012).

21 50 U.S.C. § 1544(b) (providing for a thirty-day extension if necessary for the safe withdrawal of U.S. troops).

22 *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7-11 (2011) [hereinafter *Koh Testimony*] (statement of Harold H. Koh, Legal Adviser, United States Department of State); UNITED STATES ACTIVITIES IN LIBYA 25 (2011), *reprinted in* Letter from Joseph E. Macmanus, Acting Assistant Sec'y, Dep't of State Bureau of Legislative Affairs, and Elizabeth L. King, Assistant Sec'y of Def. for Legislative Affairs, Dep't of Def., to John A. Boehner, Speaker, House of Representatives (June 15, 2011), https://assets.documentcloud.org/documents/204673/united-statesactivitiesin-libya-6-15-11.pdf. Although executive branch lawyers have sometimes questioned the constitutionality of the 60-day provision, State Department Legal Adviser Harold Koh insisted that "[w]e are not saying the War Powers Resolution is unconstitutional or should be scrapped or that we can refuse to consult Congress." Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), http://www.nytimes.com/2011/06/16/us/politics/16powers.html?_r=0.

23 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). For a consideration of this "creative and unexpected reading of the 2001 AUMF," see Marty Lederman, *Tentative First Reactions to the 2001 AUMF Theory*, JUST SECURITY (Sept. 11, 2014, 10:42 AM), http://justsecurity.org/14804/first-reactions-2001-aumf-theory/.

24 Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *see also* Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basisforairstrikes-official-says.html.

25 Around the time of the Constitution's drafting, international law was shifting from the principle that wars could only be fought for just causes towards the position that nations had the right to go to war regardless of the reason. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 13-18 (1963); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCEE 78 (5th ed. 2011). After World War I, nations attempted to restrict the legal right to wage offensive war through several important multilateral treaties. *See* BROWNLIE, *supra*, at 55-96 (discussing the Covenant of the League of Nations, the Kellogg-Briand Pact, and the Saavedra Lamas Pact (the last two of which the United States ratified)).

26 U.N. Charter art. 2, ¶ 4; *see, e.g.*, BROWNLIE, *supra* note 25, at 264-68 (discussing the drafting history and explaining that the specific enumerations within this provision were intended "to give more specific guarantees to small states and ... cannot be interpreted as having a qualifying effect"). Besides being a binding treaty obligation, Article 2(4) is widely understood today to reflect a principle of customary international law. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 187 (June 27) (noting that both the United States and Nicaragua viewed Article 2(4) as reflecting customary international law and concluding that it is not only customary international law but also possibly a *jus cogens* norm). *See generally* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2 (1963) (arguing that the U.N. Security Council and other organs are "vitally concerned with the development of customary international law").

27 U.N. Charter art. 42.

28 *Id.* art. 51. Articles 52 and 53 have additional provisions regarding action by regional organizations.

29 *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 157, 195-209 (3d ed. 2008).

30 *See, e.g.*, *id.* at 156-59, 195-96, 234-44 (discussing some such instances).

31 For example, the Security Council has sometimes interpreted its authority to extend to matters that are largely internal to a single state, as when it authorized the use of "all necessary means" in relation to Haiti in 1994. *See* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 194 (2005). In addition, Security Council resolutions can lend support to broad interpretations of Article 51. For an example, see S.C. Res. 1368 (Sept. 12, 2001), which is discussed *infra* note 151 and accompanying text.

32 GRAY, *supra* note 29, at 11-12.

33 *See supra* notes 20-24 and accompanying text.

34 *See* William H. Taft & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003); *see also* GRAY, *supra* note 29, at 354-66.

35 *See infra* notes 86-88 and accompanying text.

36 James Crawford, *Foreword* to JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES, at xii, xii (2004).

37 Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971). Despite disagreeing with Franck about the state of Article 2(4), Henkin said that "[i]t is difficult to quarrel with Dr. Franck's diagnosis of the ills of the Charter" including "the disposition of nations to take law into their own hands and distort and mangle it to their own purpose." Henkin, *supra*, at 544.

38 A bill that would have directed the President to cease military operations was defeated in the House of Representatives on a vote of 139 to 290, and a bill that would have authorized the Kosovo operation was defeated in the House on a tie vote

of 213 to 213. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 5 (2012), https://www.fas.org/sgp/crs/natsec/RL33532.pdf.

39 WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS 8 (2007).

40 U.S. CONST. art. I, §§ 2, 3, 7. This structural requirement is made even stronger in practice by the party system, since "the political interests of elected officials generally correlate more strongly with party than with branch." Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2324, 2359-60 (2006).

41 *See, e.g.*, Vaughan Lowe et al., *Introduction* to THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 1, 50 (Vaughan Lowe et al. eds., 2008).

42 *See* U.N. Charter art. 27, ¶ 3.

43 GRAY, *supra* note 29, at 255-59 ("The action against Korea in 1950 was the only use of force authorized by the Security Council during the Cold War in response to a breach of the peace by a state.").

44 *See, e.g.*, Colum Lynch, *Russia, China Veto U.N. Sanctions Resolution on Syria*, WASH. POST (July 19, 2012), https://www.washingtonpost.com/world/national-security/newshellingpessimism-in-syria-a-day-after-bomb-kills-top-government-aides/2012/07/19/gJQAJzszvW_story.html (describing Russia's and China's veto of a proposed resolution under Chapter VII imposing sanctions and noting their asserted concerns that this resolution might somehow implicitly justify military intervention).

45 S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 678 (Nov. 29, 1990).

46 *See generally* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

47 In some instances, however, unitary actors will not want to seek authorization, because they may hope to set a precedent in favor of unilateral authority, wish to avoid setting a precedent that might suggest that they need authorization, or be concerned that an affirmative failure to get permission will be more politically (and perhaps legally) costly than the mere absence of permission. *See* Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 304-07 (2010) (making an argument along the latter lines with regard to the war powers in U.S. domestic law). On the international front, in 2003 the Bush Administration withdrew a proposed Security Council resolution that would have authorized the use of force against Iraq after it became apparent that one or more permanent members would likely veto any authorization. *See* RAYMOND W. COPSON, CONG. RESEARCH SERV., RL31715, IRAQ WAR: BACKGROUND AND ISSUES OVERVIEW 3 (2003), http://www.fas.org/man/crs/RL31715.pdf.

48 Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 168 (2013).

49 *E.g.*, Doe v. Bush, 323 F.3d 133, 135 (1st Cir. 2003) (Iraq); Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (Kosovo); Kucinich v. Obama, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (Libya); *cf., e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1197 (2006) ("In matters implicating foreign affairs and national security, for example, judicial review of executive branch statutory interpretation is extremely infrequent." (citing Dames & Moore v. Regan, 453 U.S. 654, 660-61 (1981))).

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

51 In 1985, in response to the International Court of Justice (I.C.J.) decision to exercise jurisdiction over the case brought by Nicaragua, the United States withdrew its consent to the I.C.J.'s general compulsory jurisdiction. *See* United States:

Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 I.L.M. 1742 (1985).

52 *Cf.* ALVAREZ, *supra* note 31, at 194 ("While some would contend that the Council's enforcement measures do not constitute 'precedents' in the sense established by common law courts, those familiar with the path dependencies evident in most organizations know that prior practices are often a reliable guide to future actions.").

53 *Cf. id.* (arguing that the U.N. Security Council is able to cross lines more easily by relying on prior enforcement actions).

54 343 U.S. 579 (1952).

55 *Id.* at 610-11 (Frankfurter, J., concurring). For recent endorsements by the Supreme Court of the relevance of historical practice to discerning the **separation of powers**, see *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014), and *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015).

56 Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the **Separation of Powers***, 126 HARV. L. REV. 411, 440-44 (2012).

57 *See, e.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 828-29 (2014) (noting that Executive Branch lawyers have a tendency to over-claim about past practice); Jean Galbraith, *International Law and the Domestic **Separation of Powers***, 99 VA. L. REV. 987, 1043-45 (2013) ("[T]he strength and applicability of past practices are often overstated by supporters of increased presidential power.").

58 Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *6 (O.L.C. Apr. 1, 2011); *see also id.*, at *7 (emphasizing the "historical gloss"); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 872 (1996) [hereinafter Stromseth, *Why Methodology Matters*] (reviewing LOUIS FISHER, PRESIDENTIAL WAR POWER (1995)) (noting that "Presidents and their advisers regularly invoke historical practice as a means of validating presidential power to commit U.S. forces to hostilities").

59 *See* Bradley & Morrison, *supra* note 56, at 442-46 (explaining factors that make expansion of executive power more probable than contraction).

60 *Koh Testimony*, *supra* note 22, at 13.

61 Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (providing that "[t]here shall be taken into account ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"); *see also* Int'l Law Comm'n, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties: Text of Draft Conclusions 1-5 Provisionally Adopted by the Drafting Committee at the Sixty-Fifth Session, U.N. Doc. A/CN.4/L.813, at 2 (2013) (noting, in Draft Conclusion 4(3), that "conduct by one or more parties in the application of the treaty, after its conclusion" can constitute a supplementary means of interpretation under article 32 of the Vienna Convention on the Law of Treaties).

62 Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055.

63 *See, e.g.*, TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 439-43 (2010) (discussing the different ways commentators have interpreted the precedential ramifications of the U.S. response to the September 11 attacks); *see also* Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 7-9 (2015) (analyzing the U.S. response to the September 11 attacks in the context of the loosening prohibition against using defensive force against non-state actors).

64 *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 398 (2005) (noting that the "permanent members--and in particular the US-- can of course control [the Security Council] much more easily than the typical processes of international law-making and enforcement").

65 *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 436-38 (1988) (describing this phenomenon).

66 *See id.* at 455 (describing ways in which international pressures can "reverberate" among the domestic politics of negotiating states).

67 Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 998 (2006).

68 *See, e.g.*, Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991) (examining the ways in which U.S. membership in the United Nations has affected discussions about war powers); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991) (arguing that under U.S. law, the President is not authorized to use military force by either the U.N. Charter or the United Nations Participation Act); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers,* 70 COLO. L. REV. 1491, 1492 (1999) (explaining the constitutional foundations for the view that the President "ha[s] constitutional authority to use armed force once the Security Council has authorized an enforcement action"); Thomas H. Lee, *International Law and Institutions and the American Constitution in War and Peace*, 31 BERKELEY J. INT'L L. 291 (2013) (arguing that presidents have drawn on Security Council resolutions and other forms of international law in asserting constitutional authority to use force); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993) [hereinafter Stromseth, *Rethinking War Powers*] (analyzing congressional and presidential roles in authorizing the use of military force in response to Security Council requests for collective action); *see also* Galbraith, *supra* note 57, at 1019-26 (arguing that international law has shaped the constitutional **separation of powers** regarding the use of military force).

69 *See infra* Section IV.A.

70 U.S. CONST. art. II, § 3.

71 *See, e.g.*, Abram Chayes, Comment, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1403-04, 1409-11 (1965) (suggesting that the **separation of powers** on the use of force in the domestic context is a helpful model for thinking about the international legal context); *see also* MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 82-85 (2010) (reproducing account of former State Department Legal Adviser Abraham Sofaer, in which he referenced the Chayes comment, and paid particular attention to U.S. past practice).

72 *See* JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW ¶ 185, at 152 (2014) (observing that international lawyers "are commonly municipal lawyers first, and bring to the international sphere a collection of presumptions and perceptions as part of our training").

73 In addition, international legality may increase political support domestically, in line with Putnam's observation that "messages from abroad can change minds [and] move the undecided." Putnam, *supra* note 65, at 455.

74 *See, e.g.*, Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, AM. SOC'Y OF INT'L L. INSIGHTS (Aug. 30, 2013), http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemicalweaponattacks (noting that intervention by the United States would be difficult to justify as self-defense based on Article 51); Oona Hathaway & Scott Shapiro, *Attacking Syria Without the U.N.'s Go-Ahead Would Be a Mistake*, WASH. POST (Aug. 28, 2013), https://www.washingtonpost.com/opinions/attacking-syria-without-the-uns-go-ahead-would-be-amistake/2013/08/28/c73e784a-0f61-11e3-bdf6-e4fc677d94a1_story.html (arguing that the United States should refrain from using military force in Syria because doing so would violate international law).

75 Syria is an unusual example in which there is some direct evidence of this mechanism. *See infra* note 209 and accompanying text.

76 In an early instance, Thomas Jefferson sent several ships to the Mediterranean to defend U.S. commercial ships from attacks by the Barbary Pirates. *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 208-16 (1976)*See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 208-16 (1976); Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2d 169 (1999). For incidents in the first half of the nineteenth century involving attacks by non-state actors, see *infra* Section III.A.

77 *See* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER 47-48 (2002)*See* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER 47-48 (2002) (recounting the attack in Sumatra as well as the resulting political and legal controversy); HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829-1901, at 52-54 (1984)HENRY BARTHOLOMEW COX, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829-1901, at 52-54 (1984) (same).

78 President Andrew Jackson, Fourth Annual Message (Dec. 4, 1832), *in* 2 PRESIDENTIAL COMPILATION, *supra* note 16, at 591, 596.

79 *See* SCHLESINGER, *supra* note 1, at 53 (recounting newspapers' criticism of the Jackson Administration's actions).

80 The facts discussed here are detailed in the CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA (Washington, Robert Armstrong 1853) [hereinafter KOSZTA CORRESPONDENCE].

81 Letter from Chevalier Hulsemann, Charge D'Affaires of Austria, to William L. Marcy, Sec'y of State (Aug. 29, 1853), *in* KOSZTA CORRESPONDENCE, *supra* note 80, at 3, 6-7.

82 *Id.*

83 Letter from William L. Marcy, Sec'y of State, to Chevalier Hulsemann, Charge D'Affaires of Austria (Sept. 26, 1853), *in* KOSZTA CORRESPONDENCE, *supra* note 80, at 8, 24-25.

84 *Id.* at 27.

85 The captain's actions were highly popular in the United States, and Congress awarded him a medal. *See* A Joint Resolution Directing the Presentation of a Medal to Commander Duncan N. Ingraham, No. 24, 10 Stat. 594 (Aug. 4, 1854).

86 For a general discussion of the incident, see Bombardment of Greytown, 7 MOORE DIGEST, ch. XXIV, § 1168, at 346-54.

87 *See, e.g.*, CONG. GLOBE, 33d Cong., 2d Sess. 951 (1855) (statement of Rep. Peckham) (arguing that the action in Greytown was "contrary to the Constitution," which was designed "carefully to avoid conferring upon the Executive, under any circumstances, without the consent of Congress, power to involve the country in war"); CONG. GLOBE, 33d Cong., 2d Sess. app. 71 (1855) (statement of Rep. Cox) (arguing that the action was inconsistent with "notions of strict construction of the Constitution").

88 President Franklin Pierce, Second Annual Message (Dec. 4, 1854), *in* 5 PRESIDENTIAL COMPILATION, *supra* note 16, at 273, 282, 284. Pierce's successor, President Buchanan, had a narrower view of his war powers, stating that the President "can not legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks." President James Buchanan, Second Annual Message (Dec. 6, 1858), *in* 5 PRESIDENTIAL COMPILATION, *supra* note 16, at 497, 516.

89 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

90 *Id.* at 112.

91 *Id.*

92 135 U.S. 1 (1890).

93 U.S. CONST. art. II, § 3.

94 135 U.S. at 64. Consistent with the Court's reasoning in that case, Henry Monaghan has argued that the President's authority to enforce the laws "includes a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm." Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993).

95 *See supra* notes 80-84 and accompanying text.

96 135 U.S. at 64.

97 175 U.S. 677 (1900).

98 *Id.* at 700.

99 *E.g.*, J. REUBEN CLARK, SOLICITOR FOR THE DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 40 (rev. ed. 1912) (quoting *The Paquete Habana*, 175 U.S. at 700).

100 *See* Boxer Movement, 5 MOORE DIGEST, ch. IX, §§ 808-10, at 476-533 (describing the circumstances surrounding President McKinley's dispatch of troops in response to the Boxer Rebellion). For accounts of the Boxer Rebellion, see DIANA PRESTON, THE BOXER REBELLION: THE DRAMATIC STORY OF CHINA'S WAR ON FOREIGNERS THAT SHOOK THE WORLD IN THE SUMMER OF 1900 (1999), and DAVID J. SIBLEY, THE BOXER REBELLION AND THE GREAT GAME IN CHINA (2012).

101 President William McKinley, Message to Congress (Dec. 3, 1900), *in* 34 CONG. REC. 2, 4 (1901). President McKinley may have been more willing to push the boundaries of his authority to defend citizens abroad not only because the opponents were non-state actors, but also because the United States was part of a multinational coalition. *See id.* at 3-4 (noting the multinational nature of the intervention).

102 Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 520 (1910).

103 David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 503, 527 (2012); *see* BOOT, *supra* note 77, at 129-56 (describing American military interventions in Latin America between 1898 and 1914).

104 William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610-11 (1916).

105 CLARK, *supra* note 99.

106 *Id.* at 34-36.

107 *Id.* at 40-43.

108 *Id.* at 41-43.

109 *Id.* at 45. *See also* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1776 (1968) ("Since international law as well as statutes and treaties had long been considered part of the 'laws' to which the

'faithfully executed' clause refers, any interests evidenced by those laws became a potential subject for presidential protection by force." (internal citation omitted)).

110 *See* J. REUBEN CLARK, SOLICITOR FOR THE DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (2d rev. ed. 1929); J. REUBEN CLARK, SOLICITOR FOR THE DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1934) (containing supplemental appendix up to 1933).

111 Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58 (1941)40 Op. Att'y Gen. 58 (1941).

112 *Id.* at 62 (emphasis added).

113 *Id.*

114 *See, e.g.*, RICHARD B. LILLICH, LILLICH ON THE FORCIBLE PROTECTION OF NATIONALS ABROAD 43-44, 46-47 (Thomas C. Wingfield & James E. Meyen eds., 2002).

115 GRAY, *supra* note 29, at 81; *see also* Quincy Wright, Editorial Comment, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 125 (1959) (concluding that intervention based on invitation is lawful to assist a government facing insurrection that is "primarily due to 'subversive intervention' from outside," although doubting this standard was met with regard to Lebanon).

116 President Dwight D. Eisenhower, Statement by the President Following the Landing of United States Marines at Beirut (July 15, 1958), http://www.presidency.ucsb.edu/ws/?pid=11133. For skepticism, in light of this operation, about whether the use of force to protect nationals abroad is consistent with Article 51 of the U.N. Charter, see Wright, *supra* note 115. Wright notes that, although "[t]here have been many cases in which states have landed forces in foreign territory to protect embassies or other government agencies, ... or to protect the lives of their citizens[,] [i]t is difficult to bring these extensions within the meaning of Article 51 of the Charter." *Id.* at 117.

117 Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, § 2, 71 Stat. 5, 5 (1957).

118 President Lyndon B. Johnson, Statement on Sending Troops to the Dominican Republic (Apr. 28, 1965), http://millercenter.org/president/speeches/speech-4032.

119 Permanent Rep. of the United States to the U.N., Letter dated April 29, 1965 from the Permanent Rep. of the United States of America addressed to the President of the Security Council, U.N. Doc. S/6310 (Apr. 29, 1965).

120 *See, e.g.*, 111 CONG. REC. 23,857 (1965) (statement of Sen. Fulbright); Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order--Part I*, 43 DENV. L.J. 439 (1966).

121 *See* Leonard C. Meeker, *The Dominican Situation in the Perspective of International Law*, DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), July 5, 1965, at 60, 64-65 (urging that "international law [grows] out of the life of nations" and not squarely defending the legality of the intervention under existing international law). Consulted confidentially about whether the operation was legal under international law, Abe Fortas expressed doubts that it was legal and urged that moral rather than legal arguments be made. Memorandum from Abe Fortas to McGeorge Bundy (May 6, 1965) [hereinafter Fortas Memorandum] (copy on file with authors; original available in the Lyndon B. Johnson Library and Museum).

122 50 U.S.C. §§ 1541-1548 (2012).

123 *Id.* § 1544(b).

124 *Id.* § 1541(c). Unsurprisingly, "[t]he Executive Branch has taken the position from the very beginning that § 2(c) of the [War Powers Resolution] does not constitute a legally binding definition of Presidential authority to deploy our armed forces." Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984).

125 Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 613 (1977).

126 Permanent Rep. of the United States to the U.N., Letter dated May 14, 1975 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/11689 (May 15, 1975).

127 *E.g.*, Philip Shabecoff, *Ford is Backed: Senate Unit Endorses His Right to Order Military Action*, N.Y. TIMES, May 15, 1975, at A1 (describing how the Senate Foreign Relations Committee unanimously "support[ed] the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men"); *see also War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int'l Sec. & Sci. Affairs of the H. Comm. on Int'l Relations*, 94th Cong. 2-8 (1975) [hereinafter *1975 Hearings*] (including testimony by the Legal Adviser of the State Department regarding the President's constitutional authority to use force to protect U.S. citizens abroad).

128 President Jimmy Carter, Message to Congress (Apr. 26, 1980), *in* DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), June 1980, at 42, 43. OLC had earlier provided a legal opinion concluding that the President had domestic legal authority to use force to rescue the hostages. Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 121 (1979).

129 Permanent Rep. of the United States to the U.N., Letter dated Apr. 25, 1980 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/13908 (Apr. 25, 1980). For a defense of the international legality of the rescue effort, see Oscar Schachter, *International Law in the Hostage Crisis: Implications for Future Cases*, *in* AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS 325, 334 (Warren Christopher et al. eds., 1985).

130 Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 286 (1991).

131 *See* GRAY, *supra* note 29, at 157-58, 196 (discussing the General Assembly's condemnation of U.S. action).

132 1983 U.N.Y.B. 211, U.N. Sales No. E.86.I.1. Eleven members of Congress brought suit seeking to enjoin the Grenada operation, but the suit was dismissed on the ground that the plaintiffs should be required to pursue institutional rather than judicial remedies. *See* Conyers v. Reagan, 578 F. Supp. 324, 327 (D.D.C. 1984), *dismissed as moot*, 765 F.2d 1124, 1125 (D.C. Cir. 1985).

133 *See* THOMAS M. FRANCK, RECOURSE TO FORCE 88, 91, 93 (2002) (describing General Assembly votes condemning interventions in Grenada, Libya, and Panama).

134 *See, e.g.*, Abraham D. Sofaer, *International Law and the Use of Force*, NAT'L INT., Fall 1988, at 53, 55 (suggesting that past U.S. practices in Lebanon, the Dominican Republic, and the seizure of the *Mayaguez* supported a "principled but practical approach," which the Reagan Administration was similarly applying regarding Grenada and Libya).

135 *See generally* DINSTEIN, *supra* note 25, at 216-19, 255-59 (arguing for proportionality in assessing uses of force); GRAY, *supra* note 29, at 126-29 (discussing the relationship between a state's right to self-defense and the powers of the Security Council); RUYS, *supra* note 63, at 213-49 (assessing international law arguments related to protection of nationals).

136 *E.g.*, ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 110 (1993) (noting that modern practice by those states most directly affected by the issue, including practice by the United States, "would seem to call into question the existence of a rule prohibiting state intervention to protect nationals"); FRANCK, *supra* note 133, at 77 (suggesting that the international response to the practice of the United States and some other nations "manifest[s] a situational ethic rather than doctrinaire consistency

either prohibiting or permitting all such actions"); Kristen E. Eichensehr, Note, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 451, 460 (2008) (noting that "powerful states, including the United States, the United Kingdom, Israel, France, and Belgium have consistently asserted that the defense of nationals remains an acceptable justification for the use of force, and they have sometimes acted on this belief").

137 15 ANNALS OF CONG. 1786 (1818).

138 *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815-1848, at 98-104 (2007) (detailing Jackson's campaign in Florida).

139 President James Monroe, Special Message to Congress (Jan. 13, 1818), *in* 2 PRESIDENTIAL COMPILATION, *supra* note 16, at 23, 24; *see also* President James Monroe, Special Message to Congress (Mar. 25, 1818), *in* 2 PRESIDENTIAL COMPILATION, *supra* note 16, at 31, 31 (noting Spain's "utter inability" to control the situation on the ground).

140 Letter from President James Monroe to General Andrew Jackson (July 19, 1818), *in* 6 THE WRITINGS OF JAMES MONROE 54, 55-56 (Stanislaus Murray Hamilton ed., 1902); *see also* President James Monroe, Second Annual Message, *in* 2 PRESIDENTIAL COMPILATION, *supra* note 16, at 39, 43 (stating with regard to U.S. relations with Spain that the "power of the Executive is deemed incompetent [to change them]; it is vested in Congress only"). For an account of the constitutional debate in Congress triggered by Jackson's actions, see David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1, 13-16 (2000). Later in the nineteenth century, the contours of the right to pursue a non-state actor onto the territory of a more able state would be taken up by Daniel Webster and Lord Ashburton in their famous exchange of notes over the *Caroline* incident, in which British forces crossed into the United States in hot pursuit of Americans who had been running arms to Canadian rebels. *See* R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82, 92 (1938) (discussing the *Caroline* case).

141 *See* President James Monroe, Eighth Annual Message (Dec. 7, 1824), *in* 2 PRESIDENTIAL COMPILATION, *supra* note 16, at 248, 258 (submitting to Congress for consideration whether pirates should be pursued in foreign territories).

142 H.R. COMM. OF FOREIGN RELATIONS, 19TH CONG., REPORT ON PIRACY AND OUTRAGES ON AMERICAN COMMERCE BY SPANISH PRIVATEERS (Jan. 31, 1825), *reprinted in* 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 187, 187-88 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) (noting, however, that unless Spain "wanted either the power or the will to do her duty," it would be inappropriate to conduct searches outside the context of pursuit). As the report discussed, prior legislation already authorized the executive branch to defend U.S. merchant ships against pirates at sea, although the House Committee expressed its view that this authorization implicated "a power, however, which the President possesses [even] without an act of Congress." *Id.* at 187.

143 *See supra* text accompanying notes 78, 88; *see also* John Bassett Moore, Remarks at the Meeting of the American Philosophical Society (Apr. 23, 1921), *in* 60 PROC. AM. PHIL. SOC., at xviii (1921) (arguing that the Greytown incident should not serve as precedent for an expansion of presidential war power, because "Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground"). For an argument that an independent presidential power to attack nonstate actors on the territory of other states existed as an originalist manner, at least where the other state was not opposed to the attack, see Ramsey, *supra* note 13, at 1632.

144 *See supra* notes 100-04 and accompanying text.

145 *See* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 486-88UNITED STATES 486-88 (1925). Wilson's actions had strong support in Congress; the Senate unanimously passed a resolution approving of the pursuit of Pancho Villa and emphasizing "that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico." 53 CONG. REC. 4274 (1916).

146 For detailed treatment, see RUYS, *supra* note 63, at 368-433. *See also* GRAY, *supra* note 29, at 199 (observing that "[f]or many states and commentators the concept of selfdefense against non-state actors was unacceptable before 9/11"). As Ruys

notes, *supra* note 63, at 370, in recommending that the Senate give its advice and consent to the NATO treaty, the Senate Committee on Foreign Relations had observed that the words "armed attack" in the Charter and the NATO treaty "clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another." 95 CONG. REC. 9820 (1949). The I.C.J. signaled its support for this understanding in *Nicaragua v. United States*. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 103-05, ¶ 195 (June 27). In recent years, the I.C.J. has also appeared to embrace this position. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 194, ¶ 139 (July 9) (noting that "Israel does not claim that the attacks against it are imputable to a foreign state" and concluding that "Article 51 of the Charter has no relevance in this case"); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 222-23, ¶ 146 (Dec. 19) (rejecting Uganda's claim of self-defense because the attacks against it were not attributable to the Democratic Republic of the Congo). *But see* Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 679, 685-89 (Marc Weller ed., 2015) (arguing that these decisions should be more narrowly construed).

147 George P. Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), Mar. 1986, at 15, 17. In articulating this position, Secretary of State Shultz emphasized that "[t]he UN Charter is not a suicide pact," presumably a deliberate borrowing of the famous parallel phrase with respect to the Constitution. *See id.*

148 Permanent Rep. of the United States to the U.N., Letter dated Aug. 20, 1998 from the Permanent Rep. of the United States of America addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998).

149 RUYS, *supra* note 63, at 427.

150 S.C. Res. 1368, *supra* note 31, at 1.

151 *Id.* ¶ 5.

152 Authorization for Use of Military Force, Pub. L. No. 107-40, §2, 115 Stat. 224, 224 (2001) (signed by President Bush on Sept. 18).

153 *See* Permanent Rep. of the United States to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the United States of America addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) [hereinafter Oct. 7 Letter]; *see also* Elaine Sciolino & Steven Lee Myers, *Bush Says 'Time is Running Out'; U.S. Plans to Act Largely Alone*, N.Y. TIMES, Oct. 7, 2001, at A1 (noting that the Bush Administration had rejected the U.N. Secretary-General's call for Security Council authorization and that at first the Pentagon had even been "unwilling to have NATO invoke the alliance's mutual defense clause").

154 Oct. 7 Letter, *supra* note 153; *see also* KIMBERLEY N. TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 47, 51-61 (2011) (analyzing the extent to which the Taliban could be considered responsible under the law of state responsibility for the September 11 attacks).

155 *See, e.g.*, GRAY, *supra* note 29, at 198 (noting the "almost universal support of states for a US right of self-defense in response to 9/11").

156 For a discussion of the various positions, see RUYS, *supra* note 63, at 439-43. *See also* Hakimi, *supra* note 63, at 7-8, 19-20. The United States is not the only country in recent times to use force against non-state actors operating on the territory of third states where these third states are not shown to be responsible under the law of state responsibility. Israel did so, for example, against Hezbollah in Lebanon in 2006. *See id.* at 9; *see also id.* at 11-14 (discussing other possible examples). Nonetheless, as the sources cited here indicate, the response to September 11 is taken as the most important indication of a possible shift in custom.

157 Eric Holder, U.S. Att'y Gen., Address at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaksnorthwesternuniversity-school-law. Shortly before the military operation in Pakistan in 2011 that resulted in the killing of Osama bin Laden, lawyers within the executive branch apparently invoked

the "unable or unwilling" concept in concluding that such an operation would be lawful. *See* Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES, Oct. 29, 2015, at A1.

158 *See supra* note 142 and accompanying text; *see also supra* Section II.A. For an analysis rooting the "unwilling or unable" standard in the law of neutrality, see Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499-503 (2012). For a concern that the "unwilling or unable" standard for the use of force invoked by the United States may be abused by other states, see Ryan Goodman, *State Practice and the Use of Force: Iran Invokes the "Unwilling or Unable" Test Against Its Neighbors*, JUST SECURITY (Feb. 26, 2014, 1:03 PM), https://www.justsecurity.org/7588/state-practice-force-iran-invokes-unwilling-unable-testneighbors/.

159 *See* Press Release, The White House, Letter from President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 23, 2014), http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powersresolutionregarding-iraq (asserting both constitutional and statutory authority for military action). If President Obama was acting solely under his constitutional authority as Commander in Chief, then his actions would not be consistent with the War Powers Resolution's requirement that the President withdraw from hostilities within sixty days if there is no specific statutory authorization. For the difficulties inherent in applying the two AUMFs, see *supra* notes 23-24 and accompanying text.

160 *See* Permanent Rep. of the United States to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014); *see also* Stephen W. Preston, Gen. Counsel, Dep't of Def., The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015) (transcript available at http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-fortheunited-states-use-of-military-force-since-911) (offering a somewhat expanded analysis). The need to rely on the 2001 AUMF as a matter of domestic law because of the sixty-day clock of the War Powers Resolution may help explain why the United States is invoking individual self-defense against ISIL under international law, instead of only invoking the (stronger) ground of the collective self-defense of Iraq.

161 *See* Hakimi, *supra* note 63, at 19-20. In addition, in November 2015, following ISIL's terrorist attacks in Paris and elsewhere, the Security Council signaled acquiescence to the legality of at least certain uses of force against ISIL. Resolution 2249 "[*c*]*alls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter ... on the territory under control of ISIL ..., to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL." S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

162 Draft Joint Resolution to Authorize the Limited Use of the United States Armed Forces Against the Islamic State of Iraq and the Levant [hereinafter Draft Joint Resolution], http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf (reproducing draft as proposed by the President on Feb. 11, 2015).

163 Applicability of International Law to Conflicts in Cyberspace, 2014 Digest of United States Practice in International Law, ch. 18, § A(3)(b) at 735 (quoting the United States Submission to the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security) (arguing that "[a] State may act without consent ... if the territorial State is unwilling or unable to stop or prevent the actual or imminent armed attack launched in or through cyberspace").

164 U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (n.d.) [hereinafter WHITE PAPER], http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

165 WHITE PAPER, *supra* note 164, at 1-2, 5; *cf.* Rebecca Ingber, *International Law Constraints as Domestic Power*, 57 HARV. INT'L L.J. 49, 68-69 (2016) (discussing other ways in which this White Paper and a related OLC memorandum rely on international law in reaching their conclusions with regard to domestic law).

166 Treaty Embodying the Provisions Defining the Future Relations of the United States with Cuba Contained in the Act of Congress, Approved March 2, 1901, Making Appropriations, U.S.-Cuba, May 22, 1903, 33 Stat. 2248.

167 Letter from President Theodore Roosevelt to William Howard Taft (Sept. 17, 1906), *in* 5 THE LETTERS OF THEODORE ROOSEVELT 414, 414-15 (Elting E. Morison et al. eds., 1952). For discussion of various U.S. interventions in Latin America and the Caribbean during this period, see BOOT, *supra* note 77, at 129-81.

168 *See also* Gartner, *supra* note 103, at 501 (noting that "Roosevelt self-consciously sought to create precedents for expanded presidential power and both the expanded use of executive agreements and the deployment of armed forces without congressional approval continued after his time in office").

169 Although the Treaty of Versailles never received the advice and consent of the Senate, during the debates a majority of the Senate voted in favor of a reservation to the treaty that disclaimed any obligation to use U.S. armed forces "unless in any particular case the Congress which under the Constitution has the sole power to declare war or authorize the employment of the military or naval forces of the United States shall in the exercise of full liberty of action by act or joint resolution so provide." 59 CONG. REC. 4333 (1920) (recording a vote of 56 to 26).

170 *See, e.g.*, Golove, *supra* note 68, at 1499-501 (discussing how this assumption, which stemmed from Article 43 of the U.N. Charter, would affect the allocation of war powers between the President and Congress); *see also* United Nations Participation Act of 1945 § 6, 22 U.S.C. § 287d (2012) (embedding this assumption in the implementing legislation).

171 S. EXEC. REP. NO. 79-8, at 9 (1945).

172 *See* Golove, *supra* note 68, at 1520 (noting that negotiations for Article 43 agreements failed "due to the outbreak of the Cold War").

173 *See* DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 404-05 (1969).

174 S.C. Res. 83, U.N. Doc. S/INF/4/Rev.1, at 5 (June 27, 1950).

175 TORREON, *supra* note 2, at 10.

176 *See* ACHESON, *supra* note 173, at 408 (noting that the President directed a consultation with congressional leaders); Louis Henkin, *Congress, the President and the United Nations*, 3 PACE Y.B. INT'L L. 1, 6 (1991) ("In modest debate, Congress supported the President's action, but apparently saw no need to provide a declaration of war or other formal authorization.").

177 *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 382 n.37 (2d ed. 1996) (noting, however, that Congress did pass statutes that supported the war effort by making appropriations and expanding the draft).

178 *See* ACHESON, *supra* note 173, at 415 (recalling that Truman did not want to "establish a precedent in derogation of presidential power to send our forces into battle").

179 *See* Galbraith, *supra* note 57, at 1025-26 (describing the importance of the Security Council resolution to members of Congress).

180 *Authority of the President to Repel the Attack in Korea*, DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), July 31, 1950, at 173 [hereinafter *Authority to Repel*].

181 *Id.* at 173-78. Notably, the memorandum omits discussion of how the protection of American citizens abroad by the President had been justified constitutionally by way of reference to international law, *see supra* Part II, and therefore does not consider whether the fundamental change in international law brought about by the U.N. Charter would alter the constitutional landscape on this issue.

182 *Authority to Repel*, *supra* note 180, at 177.

183 *Id.* at 176 (quoting Senator Austin).

184 GRAY, *supra* note 29, at 258.

185 In the 1948 Vandenberg Resolution, the Senate encouraged the President to "particularly pursue" various objectives "within the United Nations Charter," including the "[p]rogressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the Charter." S. Res. 239, 80th Cong. (1948).

186 *See* Southeast Asia Collective Defense Treaty art. IV(1), Sept. 8, 1954, 6 U.S.T. 81, 209 U.N.T.S. 23 (identifying actions that would be taken in response to an "armed attack in the treaty area against any of the Parties"); North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (explicitly referencing Article 51).

187 Southeast Asia Collective Defense Treaty, *supra* note 186, arts. 4(1) & 9(2) (noting that, in case of an armed attack on a party to the treaty, each party will "act to meet the common danger in accordance with its constitutional processes"); North Atlantic Treaty, *supra* note 186, art. 11.

188 S. EXEC. REP. NO. 81-8, at 14 (1949); *see also id.* at 19 (emphatically repeating this point); *cf.* S. EXEC. REP. NO. 84-1, at 12 (1955) (recalling this point with regard to the SEATO treaty).

189 Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-nam*, DEP'T ST. BULL. (U.S. Dep't of State, Washington, D.C.), Mar. 28, 1966, at 474, 474-82 (1966).

190 *Id.* at 485. In addition, the executive branch emphasized the Gulf of Tonkin Resolution and the President's commander-in-chief power. *See id.* at 484-88. For the latter, the legal opinion relied heavily on Truman's initiation of the Korean War, while downplaying the political and legal importance of the Security Council Resolution to Truman's decision to act without congressional authorization. *See id.* at 484-85, 488; *see also* Memorandum from Nicholas Katzenbach, U.S. Attorney Gen., to President Lyndon B. Johnson (June 10, 1965), *in* 2 FOREIGN RELATIONS OF THE UNITED STATES, 1964-1968, at 751, 752 (Glenn W. LaFantasie et al. eds., 1996) (rejecting an argument that the commander-in-chief power only extends to "minor police measures" on the ground that "the action taken by President Truman in Korea, which is not widely regarded as having been illegal, shows how extensive the powers of the President may be").

191 50 U.S.C. § 1547(a)(2) (2012) (excepting treaties where Congress passes implementing legislation that serves as a specific congressional authorization).

192 *See supra* notes 112, 181, 190 and accompanying text for discussion of how this claim had developed earlier.

193 *1975 Hearings*, *supra* note 127, at 90-91 (including two other specific contexts and qualifying this enumeration with the claim that no "single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised"); *see also* Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274-75 (1984) (reiterating this list).

194 Although the collective self-defense of Kuwait would probably have sufficed as an international legal justification, President George H.W. Bush "lobbied hard for the endorsement of the U.N. Security Council," which he received in Resolution 678. ELY, *supra* note 14, at 50. By contrast, as John Hart Ely wryly observed, Bush "treat[ed the endorsement] of Congress as optional." *Id.*; *see also* President George H.W. Bush, Remarks at the Texas State Republican Convention in Dallas, Texas (June 20, 1992), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH 1992-93, at 993, 995 (1993) (declaring "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait"). Yet Bush did eventually seek and obtain congressional authorization. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3 (1991) (codified as amended at 50 U.S.C. § 1541 (2012)); *see also* David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 109, 152 (2d ed. 1991) ("History will view Bush's grudging request for congressional authorization as more significant than his attempt ... to disclaim any constitutional responsibility to bow to the will of Congress.").

195 *See* S.C. Res. 794, ¶ 10 (Dec. 3, 1992).

196 Auth. to U.S. Military Forces in Somalia, 16 Op. Att'y Gen. 6, 9-12 (1992)16 Op. Att'y Gen. 6, 9-12 (1992) (referring to *Durand v. Hollins*, the Boxer Rebellion, Robert Jackson's *British Flying Students* opinion, and President Johnson's actions in the Dominican Republic, and especially emphasizing the Korean War as a precedent for a constitutional authority to implement Security Council resolutions concerning Somalia).

197 *Id.* at 9.

198 *See* Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173, 177-78, 178 n.7 (1994) (noting both that the President has broad authority to use the armed forces without congressional authorization and that the use of such forces in Haiti was unquestionably legal under international law given the Security Council resolution).

199 *See* Proposed Deployment of U.S. Armed Forces into Bosnia, 19 Op. O.L.C. 327, 332-33 (1995) (stating that the President has the authority to deploy armed forces into Bosnia without congressional authorization given the U.S. interests in promoting stability in the former Yugoslavia and protecting the credibility and effectiveness of "a NATO operation that carries out a peace agreement supported by the United Nations").

200 Interestingly, there is no publicly available written OLC opinion regarding the initiation of the use of force in Kosovo. For discussion of the OLC opinion addressing Kosovo and the War Powers Resolution's sixty-day clock, see *infra* note 222 and accompanying text. At various times, administration officials suggested that the NATO campaign was implicitly authorized by Security Council resolutions, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 628, 631-32 (1999), but the State Department Legal Adviser did not provide an opinion to this effect. *See infra* note 220 and accompanying text; *see also* Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000) ("[N]o single factor or doctrine seemed to be entirely satisfactory to all NATO members as a justification under traditional legal standards.").

201 *See* Deployment of U.S. Armed Forces into Haiti, 28 Op. O.L.C. 30, 33 (2004) (declaring that the President could consider the Security Council resolution regarding Haiti when "evaluating the foreign policy and national security interests of the United States that are at stake in Haiti" and deciding how to use "his authority as Commander in Chief").

202 *See* Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *10-12 (O.L.C. Apr. 1, 2011).

203 *Id.* at *1, *8 (suggesting a possible constitutional limit on "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period").

204 Albert R. Hunt, *Obama's Red Line Comes Back to Haunt Him*, INT'L N.Y. TIMES (Sept. 1, 2013), http://www.nytimes.com/2013/09/02/us/politics/obamas-red-line-comesbackto-haunt-him.html.

205 Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-ofpowerin-syrian-conflict.html (quoting White House counsel Kathryn Ruemmler).

206 *See id.* (further quoting the White House Counsel as saying that a strike would nonetheless be "justified and legitimate under international law," presumably a reference to the doctrine of humanitarian intervention). In addition, the United States would have acted without its traditional ally, as Britain's Parliament voted against the use of force. Mark Landler, David E. Sanger & Thom Shanker, *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES (Aug. 29, 2013), http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html.

207 *See* GRAY, *supra* note 29, at 51 (observing that "the doctrine is far from firmly established in international law"); *cf.* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319, 321-23 (2012) (describing the rise of the related norm that the international community has a responsibility to protect victims of massive human rights violations when the state in which these violations occur fails to do so).

208 Savage, *supra* note 205.

209 CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 652 (2015) (quoting White House Counsel Kathryn Ruemmler).

210 Savage, *supra* note 205. The White House Counsel stated that Obama believed he had the constitutional authority to act unilaterally, but that he sought congressional authorization to "have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use." *Id.*

211 *See* Michael R. Gordon, *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, N.Y. TIMES (Sept. 14, 2013), http://www.nytimes.com/2013/09/15/world/middleeast/syria-talks.html?_r=0.

212 Indeed, the status of the sixty-day clock under domestic law has been questioned, as executive branch lawyers have sometimes suggested that it is unconstitutional. *See* STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 167-71, 179-80, 203-04 (2013) (discussing the executive branch's resistance to ceding authority over the use of force to Congress and noting that lawyers in the administrations of Nixon, George H.W. Bush, and George W. Bush argued that the War Powers Resolution was unconstitutional or did not actually limit the President's inherent authority to use the military). Nonetheless, this clock has cast a significant shadow on the legal reasoning made within the executive branch regarding the continuation of hostilities. *See* FISHER, *supra* note 14, at 150 (observing that "[m]ilitary operations in Grenada and Panama were conducted as though the 60-day limit was enforceable--if not legally, then politically").

213 In the domestic law context, Harold Koh has described this kind of aggressive statutory interpretation as the game of "'Find the Statute,' or less colloquially, 'The Hunt for Allegedly Delegated Prior Executive Authority.'" Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1, 14 (1995).

214 Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3 (1991) (codified as amended at 50 U.S.C. § 1541 (2012)). The resolution stated that it "constitute[d] specific statutory authorization" for purposes of the War Powers Resolution, thus removing the sixty-day clock. *Id.* § 2(c)(1), 105 Stat. at 4.

215 *See* GRAY, *supra* note 29, at 349-51 (discussing this issue).

216 *See* GRIMMETT, *supra* note 38, at 6-8 (describing exchanges between the political branches on this issue).

217 A provision in an appropriations bill gave the "sense of the Congress" that Iraq was in noncompliance with Resolution 687, which had set forth the terms for the ceasefire at the end of the first Gulf War, and that "the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution." Pub. L. No. 102-190, § 1095, 105 Stat. 1488, 1488 (1991). Another provision in this appropriations bill signaled support for reading Congress's earlier authorization broadly enough to apply to Security Council Resolution 688, which demanded that Iraq improve its treatment of the Kurds. *See id.*, § 1096, 105 Stat. at 1489 (noting that "the Congress supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688 consistent with ... the Authorization for Use of Military Force Against Iraq Resolution").

218 Furthermore, because the United States needed the energetic construction of the Security Council resolutions in order to deal with the sixty-day clock domestically, it had little incentive to explore other international legal justifications, such as trying to argue for an emerging norm of humanitarian intervention. (By contrast, the British came to defend their participation in creating the no-fly zones based on the principle of humanitarian intervention. GRAY, *supra* note 29, at 36-37.) For another example of how the sixty-day clock may help shape the international legal arguments put forward by the United States in justification of operations against ISIL, see *supra* note 160.

219 Auth. of the President Under Domestic and Int'l Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 162-73 (2002) (relying heavily on U.S. practice in interpreting international law); *see also* William H. Taft IV & Todd F. Buchwald,

Preemption, Iraq, and International Law, 97 AM. J. INT'L L. 557, 559-63 (2003) (arguing that the U.S. use of force against Iraq was legal under international law because it was in accord with Security Council Resolution 1441, passed in 2002).

220 *See* SCHARF & WILLIAMS, *supra* note 71, at 124-25 (discussing the rationale behind the Legal Adviser's failure to write an opinion concerning the legal justification for the intervention in Kosovo); *see also* President William J. Clinton, Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro) (Mar. 24, 1999), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 1999, at 451, 451-53 (2000) (justifying the operation to the nation on the grounds of humanitarianism and the need to protect national interests); Murphy, *supra* note 200, at 631-32 (discussing international legal justifications for the operation provided by executive branch spokesmen).

221 *See, e.g.*, INDEP. INT'L COMM'N ON KOS., THE KOSOVO REPORT 4 (2000) ("The Commission concludes that the NATO military intervention was illegal but legitimate."). *But cf.* Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 184-88 (Philip Alston & Euan MacDonald eds., 2008) (critiquing the "illegal but justified" concept).

222 Auth. for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 327 (2000). OLC made this argument notwithstanding the fact that the Resolution specifically provides that authorization to use force is not to be inferred from "any provision contained in any appropriation Act." 50 U.S.C. § 1547(a)(1) (2012).

223 Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), http://www.nytimes.com/2011/06/18/world/africa/18powers.html?_r=0.

224 *Koh Testimony*, *supra* note 22, at 8-9.

225 *Id.* at 3, 8.

226 *Id.* at 10.

227 *See, e.g.*, ELY, *supra* note 14, at 3; FISHER, *supra* note 14, at 6-12; FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAINTHE DOG OF WAR 18 (2d ed. 1989); Lofgren, *supra* note 12, at 697, 699; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007); William Michael Treanor, *Fame, the Founding, and the Power to Declare War,* 82 CORNELL L. REV. 695, 698-99 (1997); *see also* Ramsey, *supra* note 13, at 1546-47 (arguing that the President is not authorized to order military attacks without congressional approval, but that the President may take certain unilateral executive actions, including military force, that do not create a state of war).

228 Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1348 (1993) (reviewing ELY, *supra* note 14). Some scholars have interpreted the historical practice more expansively. *E.g.*, Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. (SPECIAL ISSUE) 19, 27 (1970) (contending, during the Vietnam War, that "the teaching of our history" is that "presidents have employed that amount of force that they deemed necessary to accomplish their foreign policy objectives" and that "the only limitation upon presidential power has been that imposed by political considerations").

229 *See* Stromseth, *Why Methodology Matters*, *supra* note 58, at 882-86.

230 For scholarship attentive to interconnections between domestic and international law as it relates to the President's conduct of a war once begun, see David Golove*, Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 378-94 (2003); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 154-79 (2004); and Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 74-80 (2007).

231 *See* Spiro, *supra* note 228, at 1348-60 (discussing various past practices but not referencing the Security Council or international law on the use of force). In prior writing, one of us similarly focused only on the domestic elements of historical practice in assessing the relevance of that practice to presidential war powers. *See* Bradley & Morrison, *supra* note 56, at 461-68.

232 Stromseth, *Rethinking War Powers*, *supra* note 68, at 893, 902-06 (concluding that congressional authorization was not needed for the Security Council-authorized peacekeeping mission in Bosnia but that Security Council resolutions should not substitute for congressional authorizations in more war-like contexts); *see also* Stromseth, *Why Methodology Matters*, *supra* note 58, at 621-54 (considering the import of the Security Council resolutions for the constitutional issue in Korea and the first Gulf War); *cf.* Ganesh Sitaraman & David Zionts, *Behaviorial War Powers*, 90 N.Y.U. L. REV. 516, 562 (2015) (contending that "[t]he lessons of behavioral psychology suggest that situations in which the U.N. authorizes the use of force may be less troubling than situations in which the U.N. does not authorize force").

233 *E.g.*, DINSTEIN, *supra* note 25, at 294-300 (discussing use of force in the Gulf War); FRANCK, *supra* note 133, at 86-96, 152-55 (describing uses of force by the U.S. for defense of citizens abroad and humanitarian intervention); GRAY, *supra* note 29, at 193-234 (discussing use of force in Kosovo); RUYS, *supra* note 63, at 305-18, 433-47 (discussing use of force after 9/11).

234 *See generally, e.g.*, CHRISTIAN HENDERSON, THE PERSISTENT ADVOCATE AND THE USE OF FORCE: THE IMPACT OF THE UNITED STATES UPON THE JUS AD BELLUM IN THE POST-COLD WAR ERA (2010) (studying the relationship between U.S. uses of force and international law but with no mention of the U.S. constitutional **separation of powers** and only brief references to the AUMFs); AIDEN WARREN & INGVILD BODE, GOVERNING THE USE-OF-FORCE IN INTERNATIONAL RELATIONS: THE POST 9/11 US CHALLENGE ON INTERNATIONAL LAW (2014) (focusing extensively on the acts of the Bush and Obama Administrations under international law without discussing the U.S. **separation of powers**); Christine Gray, *President Obama's 2010 United States National Security Strategy and International Law on the Use of Force*, 10 CHINESE J. INT'L L. 35 (2011) (analyzing the extent to which the Obama Administration is continuing the approaches of the Bush Administration without discussing U.S. **separation of powers**).

235 *See supra* text accompanying notes 151-54.

236 Early contributions include Martti Koskenniemi, *The Case for Comparative International Law*, 20 FINNISH Y.B. INT'L L. 1 (2009), and Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

237 Roberts, *supra* note 236, at 75.

238 Although we do not take a position in this Article on the normatively appropriate scope of presidential war powers, we focus on the implications for those interested in restraint because, as we have shown, the current system already naturally works to the advantage of those who favor the growth of presidential authority over time. We consider only suggestions that we deem politically feasible. We thus do not suggest amendments to the Constitution or the U.N. Charter. We similarly do not suggest changes to the War Powers Resolution. To date, calls for such changes have been unavailing, although members of Congress continue to put forth bills to that effect. *See, e.g.*, S. 1939, 113th Cong. (2014).

239 Alison Mitchell & Carl Hulse, *Congress Authorizes Bush to Use Force Against Iraq*, N.Y. TIMES (Oct. 11, 2002), http://www.nytimes.com/2002/10/11/national/11IRAQ.html?pagewanted=all.

240 *Id.* Clinton would later come to conclude that she got her vote "wrong. Plain and simple." HILLARY RODHAM CLINTON, HARD CHOICES 127 (2014).

241 Our claim is that it reduces the likelihood, not that it eliminates it. Presidents may still seek authorization from the other collective actor if doing so is politically advantageous and is relatively assured. As noted, for example, President George H.W. Bush ultimately decided to obtain congressional authorization for the 1991 Gulf War even after obtaining Security Council authorization. *See supra* note 194 and accompanying text. Moreover, the interactive dynamic will not always promote unilateralism, especially if international authorization occurs first, since a strong basis for the use of force under international law might make it easier for the President to obtain congressional authorization.

242 North Atlantic Treaty, *supra* note 186, art. 11.

243 Some Security Council resolutions related to peacekeeping already have used time limits. *E.g.*, S.C. Res. 743, ¶ 3 (Feb. 21, 1992) (establishing an initial one-year mission in Bosnia).

244 For a recent example in which the Security Council took express account of a time period reflected in U.S. domestic law, see S.C. Resolution 2231, at ¶ 34(ii) (2015), which set the operative date for relaxing sanctions against Iran, pursuant to an agreement to limit Iran's nuclear program, as ninety days after endorsement of the agreement by the Council, a move designed to accommodate a domestic review process mandated by Congress. *See* Somini Sengupta, *U.N. Moves to Lift Iran Sanctions After Nuclear Deal, Setting up a Clash in Congress*, N.Y. TIMES (July 20, 2015), http://www.nytimes.com/2015/07/21/world/middleeast/security-council-following-iran-nuclear-pact-votes-to-lift-sanctions.html (describing the agreement).

245 S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

246 *See supra* notes 114-15 and accompanying text.

247 *See supra* notes 212-14 and accompanying text.

248 Draft Joint Resolution, *supra* note 162, §§ 2(c), 3, 6.

249 *Cf.* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 586-99 (2008) (describing ways that soft law can influence behavior in the context of statutory interpretation); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 727-43 (2010) (characterizing the relationships between hard and soft law in the international sphere).

250 Bradley & Morrison, *supra* note 56, at 450; *see also* Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550, 2563 (2014) (treating resistance by congressional committees to presidential practice as relevant in assessing historical practice).

251 *See supra* note 133 and accompanying text.

252 Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1469 (2010).

253 *Cf.* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 401-02 (2014) (arguing that one reason that nations comply with rules of customary international law is a concern about setting precedents that could weaken the legal effect of the rules for other nations). A concern about precedent may be one reason why presidents have not advocated any general right to engage in humanitarian intervention. *See* SCHARF & WILLIAMS, *supra* note 71, at 124-26.

254 *Cf.* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 868 (2007) (considering "mechanisms of *executive self-binding* that send a signal of credibility by committing presidents to actions or policies that only a well-motivated president would adopt").

255 *See supra* note 220 and accompanying text.

256 *See supra* notes 208-10 and accompanying text.

257 *Cf.* Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *8 (O.L.C. Apr. 1, 2011) (suggesting that "prolonged and substantial military engagements" "may" be subject to a "possible constitutionally-based limit" on Presidential action without prior congressional authorization).

258 *Id.* at *10-12. The OLC memorandum focuses on the "combination" of these interests, but elsewhere suggests that interests standing "alone" can also justify action. *See, e.g.*, *id.* at *10-13.

259 *See supra* text accompanying notes 49-51.

260 *See, e.g.*, Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 122-23 (1991) (describing how a federal district court decision prior to the first Gulf War helped nudge the first Bush Administration into seeking congressional authorization).

261 *See supra* note 51 (discussing the U.S. reaction to the *Nicaragua* decision). While in the future the International Criminal Court (ICC) may have authority to impose individual criminal liability for violations of the law on the use of force, this would not apply to U.S. citizens unless the United States were to join the ICC. *See* Dapo Akande, *What Exactly Was Agreed in Kampala on the Crime of Aggression?*, EQ, Nov. 2010, at 23, 24-25 ("[T]he Court may not exercise jurisdiction over the crime of aggression when committed by a national of a non-State Party or on its territory."). Even though other decisions of the ICJ (such as its advisory opinion on the use of nuclear weapons) and any future decisions of the ICC on the use of force thus have no formal binding effect on the United States or its leaders, these decisions nonetheless can matter for the United States because of their import for international law more generally.

262 The difficulty of making an empirical assessment stems from a number of factors. For decisionmaking in this area, such as whether to seek congressional or Security Council authorization, there is likely to be a heavy overlap of legal and political considerations. *Cf.* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L REV. 1097, 1149 (2013) (noting the interactive nature of law and politics with respect to issues of presidential power). In addition, there is an asymmetry of available information. While we know of instances in which presidents have decided to use force even when the law appeared to be unsupportive, we do not have comparable knowledge of the instances in which presidents have decided *not* to use force, although such instances undoubtedly happen. *See* SCHARF & WILLIAMS, *supra* note 71, at 165 (quoting a former Legal Adviser who stated that "I'm sure each one of us at one point or another has advised our clients not to use force in a situation and our advice was taken. Certainly it happened for me at least twice, and once at the very highest level imaginable"); Stromseth, *Why Methodology Matters*, *supra* note 58, at 877 ("The lists [of presidential uses of force] do not include cases in which presidents refrained from using force because they knew Congress would oppose it or because they were unsuccessful in obtaining congressional authorization.").

263 *See, e.g.*, MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 207 (2001) (arguing that "by [the twentieth] century's end, the [UN] Charter's use-of-force regime had become all but imaginary"); Eric Posner, *Obama Can Bomb Pretty Much Anything He Wants to*, SLATE (Sept. 23, 2014, 11:39 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/09/war_against_isis_in_syria_obama_s_legal_and_political_justifications.html (arguing that "[t]he real constraint on a president's war-making powers is political, not legal").

264 Fortas Memorandum, *supra* note 121, at 1.

265 In addition, they expose themselves to what Jon Elster has referred to as a "consistency constraint" that limits their ability to change their position without seeming opportunistic and hypocritical. *See* Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998).

266 *See* Bradley & Morrison, *supra* note 262, at 1117 ("Even if the President is advised that there is a minimally plausible argument in favor of the action in question, the law might still constrain him not to act if the argument is perceived as being too weak.").

267 *See* David P. Auerswald & Peter F. Cowhey, *Ballotbox Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505 (1997) (examining the length of unilateral uses of force since the War Powers Resolution).

268 *See, e.g.*, Spencer Ackerman, *White House Says Expired War Powers Timetable Irrelevant to ISIS Campaign*, THE GUARDIAN (Oct. 16, 2014, 8:36 AM), http://www.theguardian.com/us-news/2014/oct/15/white-house-war-powers-resolution-iraq (noting that the Obama Administration was claiming that, because its authority derived from AUMFs enacted in 2001 and 2002, the sixty-day limit in the War Powers Resolution did not apply).

269 Auerswald & Cowhey, *supra* note 267, at 514.

270 Adam Entous & Carol E. Lee, *At the Last Minute, Obama Alone Made Call to Seek Congressional Approval*, WALL ST. J. (Sept. 1, 2013, 12:56 PM), http://www.wsj.com/articles/SB10001424127887324009304579047542466837.

271 *See* Morrison, *supra* note 252, at 1502, 1518-19 (describing professional norms at OLC); *see also* Bradley & Morrison, *supra* note 262, at 1138 (noting that reputational considerations may be an additional constraint).

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