INTERNATIONAL LAW, DOMESTIC LAW, AND THE EVOLUTION OF PRESIDENTIAL WAR POWERS

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[Dear readers: This is a partial draft, as we are still finishing up some sections of the piece. The draft is nonetheless substantial, and we hope it will provide sufficient material for discussion. We look forward to your comments and suggestions.]

While campaigning for his first term as President in 2007, Barack Obama expressed a narrow view of presidential war powers, 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."[1] Obama's actions as president, 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 defending the legality of this action, the Justice Department's Office of Legal Counsel emphasized, among other things, that the United Nations Security Council had authorized the use of force to protect civilians in Libya.[2]

- In 2013, Obama 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.[3]

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[1] *Barack Obama's Q&A*, BOSTON GLOBE, Dec. 20, 2007.

[2] *See* Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Eric Holder, Attorney Gen., *Authority to Use Military Force in Libya* 12 (Apr. 1, 2011) [hereinafter Libya Memorandum]..

[3] *See* Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike*

- In late 2014, by contrast, Obama initiated the use of military force against the Islamic State in Iraq and the Levant without any action from the Security Council, while invoking the consent of the Iraqi government, the international law right of self-defense, and preexisting statutory authority relating to the 9/11 attacks and the war in Iraq.[4]

- Then in 2015, Obama sought congressional authorization for this conflict, while also noting that his actions to date had involved an exercise of the United States' rights under international law to engage in individual and collective self-defense.[5]

Each of these examples implicates both international and domestic legal considerations. Indeed, this is true of every use of force abroad ordered by the President. Yet scholars almost always approach these legal questions separately. There is a rich literature on the circumstances under which the United Nations Charter permits nations to use military force, and there is a rich literature on the circumstances under which the U.S. Constitution and statutory law allows the President to use military force. But these are largely separate areas of scholarship, addressing what are generally perceived to be different legal questions. By contrast, in this Article 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 modern practice. In both regimes, moreover, the President has accrued power in the face of inaction by institutions with collective action problems (in particular, the UN Security Council and Congress). Furthermore, the development of both bodies of law has been custom-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 show that presidential decision-making on the use of force

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in Syria, N.Y. TIMES (Aug. 31, 2013).

[4] *See, e.g.,* Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES (Sept. 10, 2014); Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014).

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

is frequently sensitive to both international legal concerns and domestic legal concerns. Moreover, these considerations can operate interactively, with the strength of considerations in one domain potentially compensating for weaknesses in the other. In other words, a strong domestic legal grounding increases the likelihood that the President will decide to use of force abroad despite a weak international legal justification, and vice-versa. This interactive nature of U.S. war powers is longstanding. It became especially pronounced after the United States ratified the UN Charter in 1945, but it is by no means simply a post-Charter phenomenon.

Third, we consider the implications of these interactions for both domestic and international law. Because past practice plays an important role in the development of both bodies of law, each time the President decides to use force abroad he also creates a precedent with future relevance. Our analysis indicates that path-breaking precedents in one body of law are more likely to occur when the President is on relatively secure grounding in the other body of law. 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 those who advocate increased use of international law to restrain such decisions.

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, drawing on Robert Putnam's account of two-level games in international diplomacy, offers a model for how these two regimes interact in a way that favors the growth of presidential power over time. Part II explores the interplay 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 III addresses the implications of our argument. Part IV concludes. *[Note to readers: This draft contains Part I and two-thirds of Part II. It also lists at the end some tentative observations drawn from the case studies, in order to facilitate discussion.]*

In the course of the Article, we elaborate on the scope and limits of our claims. At the outset, however, we emphasize that what we are offering is only a partial explanation for presidential decision-making relating to the use of force. The interplay between international and domestic legal considerations that we describe here is not always present, and it varies in shape and strength over time. It also operates alongside political considerations, which are sometimes at odds with, or independent of, considerations of legality. This interplay is nonetheless an important and recurring theme in the history of U.S. war powers generally, and in the historical growth of presidential war powers more specifically.

I. WAR POWERS AS A TWO-LEVEL GAME (AND THE PRESIDENT HAS THE BEST PIECES)

In both international and U.S. domestic law, there is a dramatic gap between text and practice regarding the use of force. In both contexts, the practice is far more permissive than what seems to be suggested by the text—so much so that some are tempted to throw up their hands and conclude that law plays little if any role.[6] In this Part, we first describe these disparities, focusing first on domestic law and then on international law. We then discuss parallels in the institutional structures that have helped give rise to these disparities. On the domestic front, the key institutional actors are Congress and the President, and on the international front the key institutional actors are the UN Security Council and nations acting either individually or in conjunction with other willing nations. Although legal texts vest primary control over aggressive uses of force with Congress and the Security Council, in practice the collective action needed in order for these institutions to take action has fostered the increase of exercises of force by the President (on the domestic front) and by nations (on the international front). 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 interconnected. These connections arise because of the particular place of the United States in world affairs and occur through the medium of practice-based doctrinal developments over time.

A. Text and Practice in U.S. and International Law

Here, we briefly describe text and current practice with regard to the use of force in both U.S. domestic and international law. This discussion is necessarily at a high level of generality.

1. U.S. 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,"[7] while making the President "Commander in Chief"

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[6] *See, e.g.*, Eric Posner, *Obama Can Bomb Pretty Much Anything He Wants To*, SLATE (Sept. 23, 2014), *at* 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.

[7] *See* U.S. CONST. art. I, § 8 (also empowering Congress to "make Rules concerning Captures on Land and Water," "To raise and support Armies," "To provide and maintain a Navy," "To make Rules for the Government and Regulation of the land and naval forces,"

of the armed forces.[8] James Madison's notes from the Constitutional Convention suggest that the Framers intended that Congress should get to 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.[9] Most scholars think that as a matter of original meaning and intent, the Constitution did not authorize the President to unilaterally engage in aggressive war.[10] Moreover, although there is more divergence on this issue, most scholars further conclude that the Constitution's original meaning and intent was to require congressional authorization for most or all aggressive uses of force that might fall short of formal "war."[11] 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.[12] And, in response to attacks on U.S. shipping by France, President Adams and his advisors emphasized the need for congressional authorization for anything more than limited measures of self-defense.[13]

The President today takes a far broader view of his independent constitutional authority. The Justice Department's Office of Legal Counsel (OLC) has concluded that the President can "take military action [abroad]

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and to call forth and provide for the militia, as well as other general powers like the appropriations power).

[8] *Id.* art. II, § 2.

[9] *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).

[10] For a partial list, see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548 & n. 19 (2002) (citing scholars).

[11] *See id.*

[12] Letter from George Washington to William Moultrie, *in* 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick, ed., 1940).

[13] *See, e.g.*, John Adams, Special Message to the Senate and the House of May 16, 1797 (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"); Letter from Alexander Hamilton to James McHenry of May 17, 1798 (observing that if the President "is left on the foot of the Constitution [i.e., in the absence of statutory authority] …, I am not ready to say that he 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 must fall under the idea of reprisals & requires the sanction of that Department which is to declare or make war").

for the purpose of protecting important national interests, even without specific prior authorization from Congress."[14] OLC does not explicitly forswear a congressional role in authorizing some uses of force, but it understands Congress's power to declare war simply to be a "possible constitutionally-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 substantial period."[15] However these permissive interpretive claims developed (an issue we will return to later), 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).[16]

A similar growth in presidential power despite the apparent constraints of text and intent also has occurred in connection with the interpretation of war-related statutes. The War Powers Resolution is the most prominent example. Passed over President Nixon's veto in 1973, it sets explicit conditions and limits on the President's unilateral authority to use force abroad.[17] Yet since its passage, executive branch lawyers have been interpreting it 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 War Powers Resolution.[18] By contrast, where the executive branch is interpreting statutes that authorize presidential uses of force, it tends to read these statutes very broadly. Most recently, the Obama Administration claimed that its 2014 intervention against the Islamic State in Iraq and the Levant was authorized by (among other things) Congress's 2002 Authorization for the Use of Military Force in Iraq, 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

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[14] Libya Memorandum, *supr*a note 2, at 6.

[15] *Id.* at 8.

[16] *See, e.g.,* BARBARA SALAZAR TORREON, CONG. RES. SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2014 (Sept. 15, 2014), *available at* http://fas.org/sgp/crs/natsec/R42738.pdf (providing an extensive list of U.S. uses of force abroad).

[17] 50 U.S.C. §§ 1541-1548.

[18] *See* Libya and War Powers: Hearing Before the S. Comm. On Foreign Relations, 112th Cong. (2011) (statement of Harold H. Koh, Legal Adviser, U.S. Dep't of State) [hereinafter Koh Testimony]. This is just one of many examples of how the executive branch has narrowly interpreted the War Powers Resolution so as to favor its positions. For others, see Michael Benjamin Weiner, Note, *A Paper Tiger with Bite: A Defense of the War Powers Resolution*, 40 VAND. J. TRANSNAT'L L. 861, 872-891 (2007).

regime.[19]

There is a mediating interpretive principle that allows presidents and their legal advisers to claim fidelity to law notwithstanding the apparent disparity between text and practice. This principle is incremental, practice-based decision-making. In the context of constitutional interpretation, OLC views presidential authority as stemming not only from the constitutional text, but also from "historical gloss" on the text provided by governmental practice over time.[20] Similarly with regard to statutory interpretation, executive branch lawyers look back at prior interpretive choices in evaluating the legality of current options. Thus in making his argument that U.S. participation in the 2011 NATO bombings carried out in Libya did not constitute "hostilities," State Department Legal Adviser Harold Koh asserted that "successive Administrations have thus started from the premise that the term 'hostilities' is definable in a meaningful way only in the context of an actual set of facts" and 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."[21] As we will discuss shortly, although this emphasis on historical practice and precedent helps provide a domestic law foundation for presidential actions relating to war, it also tends to further the development of the law in favor of stronger executive power.

2. International Law

A similar disparity between text and practice has developed under international law, especially since the establishment of the UN Charter in 1945. At the time the U.S. Constitution was drafted, international law regarding the use of force was in a state of flux. It is thus hard to know exactly what the Framers perceived international law to provide, since differences existed between the rules as articulated by some leading jurists and as practiced by European states.[22] One notable development was a shift

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[19] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *see also supra* note 4.

[20] *See, e.g.*, Libya Memorandum, *supra* note 2, at 6. *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

[21] Koh Testimony, *supra* note 18.

[22] *See* GEOFFREY BUTLER, THE DEVELOPMENT OF INTERNATIONAL LAW 179 (1928) (discussing how the use of letters of marque and reprisal was falling into disuse in practice

away 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.[23] Other developments had to do with offensive uses of force that might fall short of all-out war. Such uses of force included imperfect wars and reprisals, and, at least starting in the nineteenth century, actions taken in defense of the rights of citizens abroad and pacific blockades.[24] After World War I, nations restricted the legal right to wage aggressive war through several important multilateral treaties, although these instruments did not clearly address offensive uses of force short of war.[25]

After World War II, the UN Charter established the modern international law framework governing the use of force. Article 2(4) of the Charter provides 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] Chapter VII of the Charter gives the Security Council the authority to take military actions "as may be necessary to maintain or restore international peace and security."[27] Nonetheless, in Article 51, the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security

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but noting that jurist Emer de Vattel overlooked this shift); Lofgren, *supra* note 9, at 689-97 (discussing differences among jurists and in the practice as to whether there was a legal requirement to make a formal declaration of non-defensive wars and as to the relationship between imperfect wars and reprisals).

[23] *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 13-18 (1963) (concluding that the "period 1648 to 1815 is characterized by the relegation of the just war doctrine to the realms of morality or propaganda" but nonetheless noting that in the war between England and France following the French Revolution, "[b]oth states sought to justify their actions not on the moral plane but also by reference to the Law of Nations"); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 78 (5th ed. 2011) ("Subsequent to the virtual demise of the just war doctrine in the nineteenth century . . ., the predominant conviction was that every State had a right—namely, an interest protected by international law—to embark upon war whenever it pleased.").

[24] For discussion of these various measures (which sometimes overlapped), see, for example, BROWNLIE, *supra* note 23, at 28-50.

[25] *See id.* 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)); BUTLER, *supra* note 22, at 182-85 (discussing the Covenant of the League of Nations).

[26] UN Charter art. 2(4) (1945), 59 Stat. 1031. Besides being a binding treaty obligation on state parties to the UN Charter, Article 2(4) is widely understood today to reflect a principle of customary international law. *See* Nicaragua v. United States, 1986 I.C.J. 14, 99-100 (noting that both the United States and Nicaragua viewed Article 2(4) as reflecting customary international law and concluding that it is indeed not only customary international law but also possibly a *jus cogens* norm).

[27] UN Charter art. 42 (1945), 59 Stat. 1031.

Council has taken measures necessary to maintain international peace and security."[28] Taken together, these provisions suggest that, in the absence of Security Council authorization, nations may use force abroad against other nations only if they are acting in individual or collective self-defense following an armed attack.

Just as today the President uses force more broadly than the Constitution's text and original intent suggest he may do without congressional authorization, so today in international affairs do some nations use force more broadly than the UN Charter's text and original intent suggest they may do without Security Council authorization. Examples involving the United States in the last few decades include the interventions in Grenada (1983) and Panama (1989), targeted retaliations carried out against Iraq (1993) and in Afghanistan/Sudan (1998), and, more recently, the targeting of suspected terrorists in the years following September 11.[29] In addition, just as in the United States the President interprets congressional statutes in ways that favor presidential decisions to use force, so too at the international level have certain nations interpreted Security Council Resolutions to favor their uses of force. For example, the United States and several of its allies 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.[30]

As with domestic law, the disparity between text and practice could be viewed as suggesting that international law places no constraint on U.S. decision-making regarding the use of force.[31] Yet in practice, the executive branch devotes considerable effort to articulating justifications for its uses of force under international law. Indeed, as Christine Gray has observed, the United States "has often offered rather fuller articulations of its legal position than do other states using force."[32] Unsurprisingly, these legal positions are frequently controversial; they have come to include interpretations of self-defense that encompass the protection of nationals abroad, that allow for anticipatory action prior to any armed attack, and that provide wide latitude for action against non-state actors operating from the

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[28] UN Charter art. 51 (1945), 59 Stat. 1031. Articles 52 and 53 have further provisions regarding regional organizations.

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

[30] *See id.* at 354-66 (describing the U.S. and U.K. articulations of this position). An expansive interpretive move was similarly made with respect to the NATO military campaign in Kosovo in the late 1990s. *See id.* at 351-54.

[31] MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 207 (2001) (arguing that "by the [twentieth] century's end, the Charter's use-of-force regime had become all but imaginary").

[32] GRAY, *supra* note 29, at 11.

territory of another state. Over time, however, these positions have the potential to gain stronger legality through the practice-based development of international law.

B. Institutional Design and Practice over Time

Although the divergence between text and practice on the use of force has been increasing over time, it is not a new phenomenon. Early in U.S. history, the executive branch began undertaking military operations at the borders that looked more aggressive than defensive, such as General Andrew Jackson's forays into Spanish-owned Florida in 1818[33] and President Polk's decision to send the U.S. military into the disputed territory on the border between the United States and Mexico in 1846.[34] 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."[35] During the Cold War, state practice on the use of force departed from the text of the UN Charter so substantially that it led to a famous debate between Thomas Franck and Louis Henkin over whether Article 2(4) was dead.[36]

There are common structural explanations for at least a substantial proportion of the divergence between text and practice in U.S. domestic law and in international law, particularly as it concerns the United States. Broadly speaking, in both contexts, we see that authority over aggressive uses of force is entrusted textually to decision-making bodies subject to collective action limitations and that power over defensive uses of force is entrusted to unitary actors, at least until the collective body acts.[37] This creates an institutional structure that incentivizes the unitary actors to construe their authority broadly. Then, over time, a practice-based approach to legal interpretation helps legitimize moves away from the textual

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[33] *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at --- (2009).

[34] *See* AMY S. GREENBERG, A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 INVASION OF MEXICO --- (2012).

[35] James Crawford, Foreword xii, in JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES (2004).

[36] *See* Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970); Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AJIL 544 (1971).

[37] We use the phrase "unitary actor" here in a relative and formalist way. In doing so, we recognize that both the executive branch for domestic purposes and nation-states for international purposes can be disaggregated. *See, e.g.,* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 743 (2014).

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.

Collective Actors and the Use of Force. Institutionally, the textual allocation of powers developed in both the U.S. Constitution and the UN Charter entrust decisions about offensive uses of force to multi-member decision-makers: Congress, in the case of the Constitution, and the UN Security Council, in the case of the UN Charter. But both of these institutions face collective action 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 U.S. 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 various procedural veto points. 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 Authorization for the Use of Military Force 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 towards inaction means that Congress as a body will have considerable difficulty in condemning presidential action once taken. As 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 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]

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[38] A bill that would have authorized the Kosovo operation was defeated in the House of Representatives on a tie vote of 213-213. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000). A bill that would have directed the president to cease military operations was defeated on a vote of 139-250.

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

[40] U.S. CONST. art. 1, §§ 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." *See* Richard H. Pildes & Daryl J.

Turning to the international sphere, the UN Security Council has a strong institutional default in favor of inaction.[41] To authorize the use of force under Chapter VII of the UN 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 can be 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 forthcoming starting with the First Gulf War in 1990, but rarely in contexts involving the use of force against allies of the P5 members. Thus, 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 presumably 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, it also makes it difficult to condemn the use of force ex

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Levinson, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2324, 2359-60 (2006). In relation to the use of force, historically Congress has never exercised its power of impeachment and has only once passed legislation (the forward-looking War Powers Resolution) over the President's veto. We focus here and throughout this Article on formal law-making actions by Congress. For a thoughtful discussion of the role played by inter-branch dialogue in constitutional war powers, see STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 240 (2013) (arguing that "the most important constitutional issue posed by the wars fought since 1945 is not formal authorization but rather meaningful inter-branch deliberations").

[41] *See, e.g.,* Vaughn Lowe et al., *Introduction*, *in* VAUGHN LOWE ET AL., EDS., THE UNITED NATIONS SECURITY COUNCIL AND WAR 50 (2008) ("[The Security Council's] relevance in addressing international crises is called into question by the fact that there have been numerous occasions on which it has been unable to reach decisions about particular wars and threats of wars, whether because of lack of interest of major powers, resistance of those involved in a conflict, or a threat or use of the veto.").

[42] *See* UN Charter art. 27(3). The Security Council has interpreted its authority in ways that give it broader reach than a straightforward textual reading of the Charter would suggest. *See, e.g.,* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 7-9, 24-31 (2002) (describing how the Security Council has interpreted the Charter so as to treat resolutions as passed even where P5 members abstain rather than affirmatively vote for the resolutions, and how the Council has concluded that its Chapter VII powers allow it to authorize member states to use force rather than simply allowing it to authorize UN-commanded operations).

[43] *See* GRAY, *supra* note 29, at 255-59 (noting that 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) (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).

post. When it has done so, as with the condemnation of Iraq's invasion of Kuwait in 1990,[45] it is because no P5 member had an interest in vetoing the resolution.

Unitary Actors and the Use of Force. The difficulties of achieving collective action from Congress incentivize the President to push the boundaries of his 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, he may 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 (i) the use of force is desirable, (ii) his legal authority to use force without further congressional action is not clearly established, and (iii) 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 law. But sometimes the tension between the two can be reconciled—or at least reduced—either by structuring the use of force to be more in compliance with legal framework or by interpreting the existing law liberally to permit the use of force at issue. If the President chooses to interpret existing law liberally in his favor, he does so with little risk that Congress will legislate in condemnation of his action because of Congress's collective action constraint.

A similar incentive structure applies to the decisions of the United States with regard to international law. The United States has a legal and political interest in having the Security Council authorize uses of force that the United States views as desirable. But where an authorization is not obtainable due to the Security Council's collective action constraints and the United States does not have a clear right to act in self-defense under international law, the United States faces a tension between its desire for substantive action and its interest in legality. In these cases, the United States might choose to pursue one or the other of these interests or, more likely, try to reconcile the two by reshaping its intended use of force or

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[45] *See* S.C. Res. 660 (1990); *see also* S.C. Res. 678 (1990) (authorizing the use of "all necessary means" by member states if Iraq failed to withdraw from Kuwait by a particular deadline).

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

interpreting existing international law to be in its favor. In making these choices, the United States knows that it can always veto a proposed Security Council Resolution condemning its use of force.[47]

In theory, these structural limitations could be addressed by the availability of judicial review. Currently, however, there is no meaningful judicial review available in either the domestic or international arenas with respect to presidential uses of force. On the domestic side, U.S. courts have invoked justiciabilty doctrines or high levels of deference in cases raising the President's authority to use force, both under the Constitution and with regard to the War Powers Resolution. On the international side, the International Court of Justice has sometimes addressed the legality of uses of force—most importantly in a case brought by Nicaragua against the United States in the 1980s. But the United States has resisted the institutional authority of the ICJ in this context, and the ICJ no longer has jurisdiction over claims against the United States based on the UN Charter.

Practice over Time. As the above discussion suggests, at particular moments unitary actors have incentives to take broad views of their legal authority. Importantly, when they do choose to do so, they create precedents that become part of the body of legal discourse going forward. Since practice plays an important role in legal interpretation in both domestic and international law, over time the precedents can have the effect of expanding the scope of legal authority for the unitary actors. This is true despite certain formal doctrinal safeguards 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*.[48] 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 sand never before questioned . . . mak[e]s as it were such exercise of power part of the

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[47] Indeed, it may be the case that the unitary actors are *disincentivized* to seek permission from the collective actor, because an affirmative failure to get permission is 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 these 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, *Iraq War: Background and Issues Overview* 3 (Cong. Res. Serv., Apr. 22, 2003), at http://www.fas.org/man/crs/RL31715.pdf.

[48] 343 U.S. 579 (1952).

structure of our government."[49] 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.[50] Moreover, the executive branch is more likely than the judiciary to credit historical practice, favoring it not only 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.[51]

In the interpretation of international law, practice also matters, at least once enough states come to follow or accept it. This is true for both treaty interpretation and customary international law. With regard to treaty interpretation, the Vienna Convention on the Law of Treaties provides that one factor to take into account is "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[52] With regard to customary international law, it is measured by the presence of a "general practice accepted as law."[53] Although the requirements of agreement (for subsequent practice) and of generality (for customary international law) make it difficult as a formal matter for individual states to shift the interpretive boundaries unilaterally, nonetheless there are ways in which states—particularly powerful ones like the United States—can do so. For one thing, lack of objection by states can

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[49] *Id.* at 611 (Frankfurter, J., concurring). There are, of course, debates about how much practice *should* matter in constitutional interpretation. In a recent book about the war powers, for example, Mariah Zeisberg argues that the best constitutional understanding of the separation of the war powers should depend on multiple factors, and that practice should be one of these factors only to the extent that it serves as a signal of good judgment. MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 251 (2013).

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

[51] *See, e.g.*, Curtis A Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014); Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 997 (2013).

[52] VCLT art. 31(3)(b); *see also* Georg Nolte, Second Report to the International Law Commission on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties (Mar. 26, 2014), UN Doc. A/CN.4/671 (analyzing the meaning of these criteria).

[53] ICJ Statute, art. 38(1)(b). For a recent discussion of how customary international law evolves, see Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AJIL 389 (2014). *See also* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., forthcoming 2015) (exploring some of the uncertainties surrounding the development, identification, and application of customary international law).

be factored into an understanding of both subsequent practice and custom.[54] Thus, in the wake of the U.S. response to the September 11 attacks, commentators noted a shift in understanding of when nations could use force against non-state actors located on the territory of other nations.[55] For another thing, even where the practice of one or more important states has failed to shift custom, this practice can nonetheless help 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.

C. The Use of Force as a Two-Level Game over Time

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 these two contexts are connected in ways that over time have shaped practice and thus doctrine. More specifically, drawing on Robert Putnam's model of two-level games in international diplomacy, we suggest a doctrinal two-level game in which the level of legality of the use of force for the President in one sphere, domestic or international, influences how willing he is to push the boundaries of legality in the other sphere. We will explore this historically in Part II and show that the dynamic dates back even before the shift in international law brought about by the UN Charter.

Although the domestic and international legal issues regarding the use of force are separate ones, nonetheless every use of force implicates both bodies of law. When the President is considering the invasion of Iraq, a bombing campaign in Libya, or a long-term operation against the Islamic State in the Levant, he is considering a use of force that will be legally evaluated under both domestic and international law. The dual nature of every use of force means that the separate doctrinal considerations play out over a single political reality. Yet this interaction is almost invariably overlooked by scholars, who focus solely on either the domestic or the international legal context.

Robert Putnam's model of a two-level game is helpful for conceptualizing this dynamic. Developed with regard to international negotiations, Putnam's model posits that the President (like other heads of state) is simultaneously involved in discussions at both the domestic and

[54] In addition, when the Security Council does overcome its collective action problems and vote, the United States, as a powerful actor, can often advance its legal interpretations through Security Council resolutions, which in turn can become important evidence of subsequent practice or customary international law.

[55] *See infra* Part II.B.

international level.[56] In order for a negotiation to prove successful, the President must have two "wins": he must reach a resolution that is satisfactory at the international level and this resolution must also be satisfactory to domestic ratifiers and implementers. Crucially, what happens at one level can influence what happens at the other level. Thus, for example, international negotiators can factor in the domestic constraints of particular actors into their decisions, and on the domestic front "messages from abroad can change minds, move the undecided, and hearten those in the domestic minority."[57]

The specifics of Putnam's model will not always apply to use of force decisions, as such decisions are often not the result of international agreement. But at a higher level of generality, the President's decisions on the use of force are made before both an international audience and a domestic audience, and it is plausible to think that there is cross-over between the politics in these two arenas. Thus, for example, Jide Nzelibe has suggested 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."[58] We will discuss some of this political cross-over shortly, but we also suggest here that the interactions between the two levels may have interesting effects on *doctrine* as well as on politics, particularly if one considers interactions over time. We describe here some of the ways in which the situation at one level might affect the decision-making at the other level—particularly the legal decision-making that is our focus.

First, and most straight-forwardly, the legal context at one level can affect how strongly the President favors the use of force for substantive reasons and therefore can influence how willing he is to push the legal boundaries at the other level. Put simply, strong legal grounding on one level can encourage the President to push the legal boundaries on the other level, as the following table illustrates. For example, President Truman's decision to commit U.S. troops to fight in the Korean War in 1950 came with strong international legal support, while pushing the then-understood boundaries of the President's domestic authority. Conversely, President Eisenhower's decision to send troops into Lebanon in 1958 came with robust domestic legal support, although it pushed the then-understood

[56] *See generally* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

[57] *Id.* at 455.

[58] Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 998 (2006) (relying on the concept of a two-level game in considering political signaling that arises from decisions about whether to seek Congressional authorization for intervention).

boundaries of the understanding of Article 51 of the UN Charter. As another example, President Obama's decision to continue operations in Libya after sixty days had passed and despite the apparent limits written into the text of the War Powers Resolution seemed heavily grounded in the political and legal context of strong international support, as evidenced by a Security Council Resolution authorizing military action. By contrast, in deciding whether to use force against the Assad regime following its use of chemical weapons, President Obama did not have the backing of the UN Security Council and ultimately decided not to act without congressional approval.

Table 1: International Law, Domestic Law, and Presidential Decision-Making

International Legal Justification

Domestic Legal Justification	Strongest <- - - - -> (International)	Weakest (International)
Strongest	use of force likely; no new interpretive developments	some uses of force; pushing the boundaries of international law
Weakest	some uses of force; pushing the boundaries of domestic law	uses of force rare

This kind of interaction can arise for several reasons. The most straightforward one has to do with the overall political capital available to the President. Because the President ultimately operates in one broader political context, he will only rarely wish to make decisions that upset both his domestic and his international audiences. Legality is important both because it serves as a signal for political support and because it is a characteristic that enhances political support. Thus a congressional

authorization both makes clear that the President has strong domestic backing and renders his actions more legitimate; a Security Council resolution plays a similar role on the international front. In addition, this interaction could arise because domestic and international audiences are sensitive to each other. For example, it may be that members of Congress pushed back only weakly against President Obama's energetic interpretation of the War Powers Resolution with regard to Libya because of his strong international footing. Conversely it is possible, though probably less likely in any given case, that international actors will be influenced by the domestic context. As an example, it may be the case that after September 11, other nations gave President Bush considerable leeway not only from their own sense of outrage at the event, but also from recognition of the strength of the commitment of the U.S. domestic audience.

Second, the international legal context can sometimes directly affect legality with respect to domestic law. (It is hard to think of how the effect could operate in the other direction.) There are many ways in which this could happen. Perhaps most notably, presidents can understand international law to give them direct domestic legal mandates, or potentially direct domestic legal constraints. Thus, long before the adoption of the UN Charter, presidents relied on treaties as support for using force without congressional authorization, and, relatedly, on the Take Care Clause of the Constitution 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 can understand the international legal context to change the factual setting in a way that affects their domestic legal obligations; thus, the existence of a UN 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.

Third, and perhaps most importantly, the interactions between the two levels are important because of their effects on practice over time. The two-level approach helps explain how many (though not all) boundary-pushing precedents are set. Once these precedents are set, however, they then become precedents in their own right within their own level. As we will show, for example, nineteenth century presidents pointed to international law in justifying their constitutional authority to use force abroad to defend U.S. citizens, and then later presidents claimed that the practice of their predecessors gave them the constitutional authority to defend U.S. citizens abroad even when, after the establishment of the UN Charter, international law was less supportive of this authority. In short, the dynamics of the two-level game has led to accrued practice—and therefore increased legal support—favoring the President vis-à-vis Congress and the United States

vis-à-vis the Security Council.

In what follows, we shall explore particular doctrinal areas involving the use of force and consider how much of a two-level doctrinal game there appears to be. Our discussion comes with some important caveats, two of which we mention here. First, while the concept of a doctrinal two-level game may have broader implications, our focus is limited both by context and by country: we are focusing on the use of force and on the United States. In the use of force context, the United States has played a unique role in modern world affairs. Since at least sometime in the nineteenth century, it has used force abroad far more energetically than most countries of the world, both within the American hemisphere and, especially since World War II, globally as well. As a result, the United States has had a much more powerful role in shaping international law, in terms of treaties, subsequent treaty practice, and customary international law than have most countries. Second, we do not contend that our approach explains all the doctrinal developments with regard to the use of force. For one thing, our approach focuses primarily on legal interpretation rather than on the creation of new legal instruments. More fundamentally, these issues are far too complex to be captured by a single, descriptive model. What we offer here is a partial explanation, but one that is important and often overlooked.

II. Lessons From Practice

This Part explores the interplay between international law and domestic law in U.S. practice on the use of force. It focuses on three situations in which there has been a claim about a legal right to use force: the defense of citizens as a justification for uses of force; the use of force in asserted self-defense against non-state actors operating from the territory of a third state; and uses of force authorized under a treaty or by an international organization created by a treaty. Each of these claims has legal significance under both international and domestic law.

As we show, the connections between international law and domestic law for each of these claims run deep. The form and direction of these connections, though, is strongly related to the time and circumstances. In the nineteenth century and early twentieth century, presidents relied upon concepts from international law in establishing practices that increased the scope of their authority to use force without congressional authorization under domestic law. After the establishment of the UN Charter and the beginning of the Cold War, however, presidents increasingly undertook actions that pushed the boundaries of international law while relying domestically on past practice. Since the end of the Cold War, presidents have tended to push the limits of international law where they are on strong

grounds domestically and sometimes pushed the limits of domestic law where they are on strong grounds internationally.

A. Defense of Citizens

As the United States developed a broader naval presence in the nineteenth century, it increasingly used force to protect Americans living, traveling, or engaged in commerce abroad. There appears to have been a general assumption that the President had some unilateral power to authorize such uses of force, 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. nationals or their property. Presidents varied in their views about the scope of their protection authority, but they began consistently to embrace a more robust conception of it by the end of the nineteenth century. In doing so, they and their supporters frequently linked the President's unilateral authority to use force to claims that such force was allowed by international law. During the twentieth century, the linkage between claims about international law and claims about the President's protective authority became more attenuated, and presidents began relying more heavily on domestic historical practice. In doing so, claims about a presidential power to protect Americans abroad evolved into claims about a broader presidential power to protect American interests abroad. At the same time, presidents invoked domestic historical practice in an effort to influence the content of international law.

1. Protection and Reprisals

As the United States developed a navy in the early nineteenth century, it was increasingly used to protect Americans and their property abroad. For example, at the conclusion of the naval war with France at the end of the eighteenth century, Congress had mandated that at least six frigates "be kept in constant service in time of peace."[59] President Thomas Jefferson decided to send four of these vessels to the Mediterranean on his own authority to protect U.S. shipping from attacks by the Barbary pirates, after the Bey of Tripoli had threatened war if the United States failed to increase its tribute. Jefferson explained to Congress that the squadron had "orders to protect our commerce against the threatened attack," but that Jefferson had understood himself as being "[u]nauthorized by the constitution, without the sanction of Congress, to go out beyond the line of defence."[60] Jefferson continued to

[59] 2 Stat. 101 (1801).

[60] Thomas Jefferson, *First Annual Message* (Dec. 8, 1801), in 1 A COMPILATION OF

construe his military powers narrowly. For example, in response to boundary disputes with Spain relating to the Louisiana Purchase, he informed Congress that, "[c]onsidering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided."[61] As a result, he explained that he had simply instructed U.S. forces stationed in the region "to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen or his property."[62]

Throughout the nineteenth century, the U.S. navy took various actions to respond to threats to, or attacks on, American citizens. For example, in 1832, President Andrew directed the *USS Potomac* to seek restitution in Sumatra after villagers in what is now Kuala Batu had attacked a merchant vessel there and killed some of its crew. After arriving, the U.S. forces destroyed Sumatran forts and looted the village, killing hundreds of Sumatrans in the process.[63] The operation generated debate in the U.S. press, with the anti-administration newspaper *The Intelligencer* arguing that Jackson had usurped Congress's power over war, and the pro-administration newspaper *The Globe* arguing that Jackson did not need congressional authorization to deal with an "acknowledged pirate who had been preying on our commerce and murdering our citizens."[64] In his annual message to Congress, Jackson explained that he had dispatched the ship "with orders to demand satisfaction for the injury if those who committed it should be found to be members of a regular government, capable of maintaining the usual relations with foreign nations; but if, as it was supposed and as they proved to be, they were a band of lawless pirates, to inflict such a chastisement as would deter them and others from like aggressions."[65]

THE MESSAGES AND PAPERS OF THE PRESIDENTS 314, 315 (James D. Richardson ed., 1899). Jefferson's account of his authority was narrower than the directions he had given to the navy. *See* Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2d 169 (1999). Alexander Hamilton criticized Jefferson for his professed timidity, arguing that since Tripoli had declared war on the United States and one of its cruisers had attacked a U.S. naval vessel, the President had the authority to take offensive actions in response. *See* Alexander Hamilton, *The Examination No. 1* (Dec. 17, 1801), in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 455-56 (Harold C. Syrett ed., 1977).

[61] Thomas Jefferson, *Special Message to Congress on Foreign Policy* (Dec. 6, 1805).

[62] *Id.*

[63] *See* MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER 47-48 (2002).

[64] *See* David F. Long, *"Martial Justice": The First Official American Armed Intervention in Asia*, 42 PACIFIC HIST. REV. 143, 155-56 (1973).

[65] Andrew Jackson, *Fourth Annual Message* (Dec. 4, 1832).

A much-publicized exercise of a power to protect American citizens occurred in 1853. 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. The Secretary of State defended the actions of the navy captain, explaining that, 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—the only law which can be rightfully appealed to for rules of action in this case—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."[66] The captain's actions were highly popular in the United States, and Congress awarded the captain a medal.[67] Although Congress asked the President to share with it the official correspondence concerning the affair, the matter did not trigger significant constitutional controversy.

Shortly after the Koszta affair, there was a more controversial episode of foreign military action ostensibly aimed at protecting U.S. citizens. In the 1850s, a dispute broke out between a Central American transit company, in which Americans owned a substantial portion of the shares, and the authorities in the port city of Greytown, Nicaragua (now San Juan del Norte), a community that was seeking to establish itself as an independent town. After company property was damaged and the U.S. minister to Central America was injured by a bottle thrown from a mob, the United States demanded reparations and an apology, and it sent a naval warship to the area. Upon failing to receive satisfaction, the warship bombarded the town, and U.S. forces came ashore and burned the remaining buildings.[68] In a message to Congress, Pierce described Greytown as "a marauding establishment too dangerous to be disregarded and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws or a camp of savages depredating on emigrant

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[66] Letter from William L. Marcy to Chevalier Hulsemann (Sept. 26, 1853), *in* CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 8, 27 (1853).

[67] *See* 10 Stat. 594 (Aug. 4, 1854).

[68] For a general discussion of the Greytown bombardment incident, see 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 1168, at 346-54 (1906).

trains or caravans and the frontier settlements of civilized states."[69] He also argued that the U.S. action was not inconsistent with international practice: "it would not be difficult to present repeated instances in the history of states standing in the very front of modern civilization where communities far less offending and more defenseless than Greytown have been chastised with much greater severity, and where not cities only have been laid in ruins, but human life has been recklessly sacrificed and the blood of the innocent made profusely to mingle with that of the guilty."[70]

Because the Greytown incident involved reprisals rather than direct measures of self-defense or rescue, it prompted significant concerns in Congress. Both the House and Senate issued resolutions requesting that Pierce provide them with documents about the incident, [71] and he complied. Representative Cox subsequently argued that the action in Greytown was inconsistent with "notions of strict construction of the Constitution,"[72] and Representative Peckham argued that the action was "contrary to the Constitution," which he said was designed "carefully to avoid conferring upon the Executive, under any circumstances, without the consent of Congress, power to involve the country in war."[73] The *New York Times* also published an editorial arguing that if "there was a cause of war, the power is vested in Congress and not in the President, to act upon such cause."[74] Years later, however, a federal court in *Durand v. Hollins* upheld the legality of the bombardment in a suit brought against the navy captain by a U.S. citizen whose property had been destroyed during the operation.[75] The court reasoned that, "Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action."[76] It is therefore to the President, said the court, that "citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for

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[69] Franklin Pierce, *Second Annual Message* (Dec. 4, 1854), *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 273, 282 (James D. Richardson ed. 1897).

[70] *Id.* at 284; *cf.* John Bassett Moore, 60 PROC. AM. PHIL. SOC. 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 out-side 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").

[71] *See* CONG. GLOBE, 33d Cong., 1st Sess. 1854 (July 28, 1854); *see also* CONG. GLOBE 33d Cong., 1st Sess. 1988 (July 28, 1854).

[72] CONG. GLOBE, 33d Cong., 2d Sess., app. 71 (Jan. 11, 1855).

[73] CONG. GLOBE, 33d Cong., 2d Sess. 951 (Feb. 26, 1855).

[74] NEW YORK TIMES, Aug. 1, 1854.

[75] *See* Durand v. Hollins, 8 Fed. Cas. 111 (C.C.S.D.N.Y. 1860) (Case No. 4,186).

[76] *Id.* at 112.

their protection."[77] How the President exercises that discretion, concluded the court, is a political question not subject to review by the judiciary.[78]

Pierce's successor, President Buchanan, had a narrower view of his war powers. In particular, unlike Pierce, Buchanan did not think he had the unilateral authority to order reprisals. For example, in his second annual message to Congress, Buchanan sought a general authorization to use force to protect U.S. citizens in various locations in Latin America, explaining that the executive branch "can not legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks."[79] He reiterated his request in a subsequent special message to Congress, explaining that revolutionary forces in several Latin American countries had obtained possession of the ports and had "seized and confiscated American vessels and their cargoes in an arbitrary and lawless manner and exacted money from American citizens by forced loans and other violent proceedings to enable them to carry on hostilities."[80] Buchanan noted that the executive departments of Great Britain, France, and other countries had the authority to use force to obtain redress for their subjects, but "[n]ot so the executive government of the United States."[81]

2. Emergence of the Idea of a "Protective Power"

A more expansive conception of presidential war authority began emerging in the late nineteenth and early twentieth centuries. In particular, presidents began asserting a "protective power" that extended far beyond responding to immediate threats to U.S. citizens abroad. The Supreme Court gave doctrinal support for such a power in an 1890 decision, *In re Neagle*, which held that the executive branch had inherent authority to assign a federal marshal to protect a Supreme Court Justice. The Court in *Neagle* suggested that the President's constitutional responsibility to take care that the laws are faithfully executed 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

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[77] *Id.*

[78] *See id. See also* Perrin v. United States, 4 Ct. Cl. 543, 547 (1868) (describing claims stemming from the bombardment at Greytown as "international political questions, which no court of this country in a case of this kind is authorized or empowered to decide").

[79] *See* James Buchanan, *Second Annual Message* (Dec. 6, 1858), *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 516.

[80] James Buchanan, *Special Message to Congress* (Feb. 18, 1859), *in* 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 69, at 538, 539.

[81] *Id.*

implied by the nature of the government under the constitution."[82] An example cited by the Court in support of this broader executive authority was the Koszta affair discussed above, which it described, with some exaggeration, as "[o]ne of the most remarkable episodes in the history of our foreign relations."[83]

A particularly significant use of force to protect American citizens and their property occurred in 1900, during the Boxer Rebellion in China.[84] The rebellion involved a violent uprising by a loosely organized group of anti-foreign, anti-Christian nationalists. Some Chinese officials supported the Boxers, and foreign legations in Peking (Beijing), including the U.S. legation, were under siege by the Boxers and the Chinese imperial army. There were also Americans barricaded in the city of Tientsin (including a young Herbert Hoover, who was working for a mining consulting firm there). President McKinley responded by sending over 5,000 troops to China as part of a multinational force, without first seeking congressional authorization.[85] McKinley explained that the U.S. action "involved no war against the Chinese nation" but was limited to "securing wherever possible the safety of American life and property in China."[86]

Although the U.S. actions in the Boxer Rebellion were consistent with a presidential power of protecting American citizens abroad, the operation was much more extensive, in both size and duration, than earlier protective operations. Nevertheless, there was little objection at the time to McKinley's action. Writing a few years later, however, John Bassett Moore, a prominent international law scholar at Columbia who worked in and out of the government, described the U.S. involvement in the Boxer Rebellion as "[p]erhaps the most remarkable case in which force was used without Congressional authority."[87]

The year 1900 was also the year in which the Supreme Court decided *The Paquete Habana*. The case involved the U.S. Navy's seizure of two

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[82] 135 U.S. 1, 64 (1890). 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).

[83] 135 U.S. at 64.

[84] 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).

[85] *See* 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 476-533 (1906).

[86] *Annual Message* (Dec. 3, 1900).

[87] 7 MOORE, DIGEST, *supra* note 68, at 118. *See also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 89 (1973) (2004 ed.) ("The intervention in China marked the start of a crucial shift in the presidential employment of armed forces overseas.").

Cuban fishing vessels during the Spanish-American War, a war declared by Congress. In holding that the seizure was unlawful, the Court applied customary international law norms governing conduct during warfare. Of particular importance here, the Court observed that international law is "part of our law" and that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[88] While the Court applied international law in *The Paquete Habana* as a limitation on warfare, it implied that this limitation could be overridden by a "controlling executive act." More significantly, by declaring international law to be part of U.S. law, the Court was providing support for an argument that the President's authority to "take Care that *the Laws* be faithfully executed"[89] included the authority to enforce international law, potentially through the use of military force.

This Take Care Clause argument was invoked by the executive branch throughout the early twentieth century in support of various "police actions" ostensibly designed to restore order in Latin American countries.[90] In addition to adding to domestic precedent, the United States' actions constituted state practice and thus were relevant to the development of customary international law concerning the use of force. In 1910, Elihu Root—the President of the American Society of International Law and former Secretary of State—explained in an address to the Society that the use of force to protect citizens abroad was allowed by "international custom" when the citizens were located "in parts of the earth under the jurisdiction of governments whose control is inadequate for the preservation of order."[91] As an example, he cited to the multi-national use of force during the Boxer Rebellion.

William Howard Taft made a similar distinction when writing in the *Yale Law Journal* in 1916, during the period between his presidency and his service on the Supreme Court. The use of force to protect American citizens "might . . . be an act of war if committed in a country like England or Germany or France which would not be willing to admit that it needed the assistance of another government to maintain its laws and protect foreign relations," but it would be a different matter "[i]n countries whose peace is

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[88] *See* 175 U.S. 677, 700 (1900).

[89] U.S. CONST. art. II, § 3 (emphasis added).

[90] *See* David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 527 (2012) ("Between 1890 and 1933, there were forty-eight occasions in which a U.S. President deployed forces to Latin America. The marines came to be known as "State Department troops," and the concept of international police power served to justify presidential action in sending troops without congressional action."). *See also* BOOT, *supra* note 63, ch. 6 (describing U.S. military operations during this period).

[91] Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 PROC. AM. SOC'Y OF INT'L L. 16, 20 (1910).

often disturbed, and law and order are not maintained, as in some Central and South American countries, the landing of U.S. sailors or marines in order to prevent destruction or injury to the American consulates or to the life or property of American citizens, is not regarded as an act of war but only a police duty as it were."[92]

Meanwhile, in 1912, the State Department distributed a memorandum prepared by its Solicitor, J. Reuben Clark, that set out to justify the *Right to Protect Citizens in Foreign Countries by Landing Forces*. 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. 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. For the latter point, the memorandum emphasizes the Supreme Court's decision in *In re Neagle*. Attached as an appendix to the memorandum is a chronological description of instances in which the United States had used military force "for the protection of American interests." Subsequent editions of the memorandum were prepared in 1929 and 1934.

3. Protecting American Interests

Increasingly during the twentieth century, claims of a presidential authority to protect American lives and property were presented as part of a broader authority to protect American *interests* abroad. This phenomenon is

[92] 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). *See also* 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 350 (1922) ("When . . . in any country, the safety of foreigners in their persons and property is jeopardized by the impotence or indisposition of the territorial sovereign to afford adequate protection, the landing or entrance of a foreign public force of the State to which such nationals belong, is to be anticipated."); Report of the Delegates of the United States of America to the Sixth International Conference of American States 14 (1928), *quoted in* 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 252 (2d ed. 1945) ("[W]hen government breaks down and American citizens are in danger of their lives . . . . it is a principle of international law that in such a case a government is fully justified in taking action—I would call it interposition of a temporary character—for the purpose of protecting the lives and property of its nationals") (remarks of Charles Evan Hughes).

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.[93] In concluding that he could, Jackson made a number of general observations about the President's war powers. Among other things, he observed 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*."[94]

The slippage between protecting Americans and protecting American interests became more pronounced after World War II, just as international law became more restrictive about the conditions under which military force could be used. The United Nations Charter, ratified by the United States in 1945, imposed substantial restrictions under international law on the use of force. Article 2(4) of the Charter prohibits the use or threat of military force against the territorial integrity or political independence of another nation, and the Charter makes exceptions only for situations in which force is authorized by the UN Security Council or when, as stated in Article 51 of the Charter, a nation is exercising its "inherent right of individual or collective self-defence" in response to an "armed attack."[95] To the extent that claims of a presidential authority to use force were tied to international law, therefore, the Charter had the potential to narrow such claims. Ultimately, however, this is not how it turned out. Instead, since the adoption of the UN Charter, presidents have emphasized international law when it has been supportive of the use of force and have otherwise emphasized domestic historical practice. In addition, although with less clear success, presidents have attempted to use U.S. practice to influence international law—in particular, the scope of the right of self-defense recognized by the UN Charter.

The first major conflict that the United States engaged in after the ratification of the UN Charter was the Korean War. The War did not involve the protection of American citizens, but it illustrates the evolution of executive branch claims about war powers. There was a strong basis in international law for the use of force in Korea, since the UN Security Council had specifically recommended that UN members "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack [by North Korea] and to restore international peace and security in

[93] *See Training of British Flying Students in the United States*, 40 OP. ATTY. GEN. 58 (1941).

[94] *Id.* at 62 (emphasis added).

[95] *See* UN Charter, arts. 2(4), 51.

the area."[96] In arguing that Truman did not need congressional authorization, the State Department reasoned that the United States has an interest in international peace and security, and it contended that "[t]he United States has, throughout its history, upon orders of the Commander in Chief to the Armed Forces and without congressional authorization, acted to prevent violent and unlawful acts in other states from depriving the United States and its nationals of the benefits of such peace and security." [97] While acknowledging that in many of these instances the United States was seeking specifically to protect American lives and property, the State Department maintained that in some instances U.S. military forces had been deployed in furtherance of "the broad interests of American foreign policy, and their use could be characterized as participation in international police action."[98] The State Department included with the memorandum a list of past instances in which the United States had used military force abroad outside the context of a war.[99]

Unlike in Korea, a number of the U.S. military interventions during the Cold War were justified at least partly on the ground of protecting Americans abroad. For example, in 1958, President Eisenhower dispatched 14,000 troops to Lebanon in what was called "Operation Blue Bat." The troops were sent at the invitation of 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. Eisenhower had arguable statutory authorization for the action, since Congress had the previous year enacted a joint resolution stating that "if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism."[100] The administration's strongest argument under international law was that its use of force was carried out at the request of the Lebanese government and thus was not contrary to Article 2(4) of the UN Charter.[101] Eisenhower also claimed, however, that "[t]he mission of these forces is to protect American lives—there are about 2500 Americans

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[96] UN Security Council, *Resolution 83* (June 27, 1950).

[97] *See* U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T STATE BULL. 173, 174 (July 1, 1950).

[98] *Id.*

[99] *Id.* at 177-78 (reprinted from H. Rept. 2495, 81st Cong., 2d Sess. 67 (1950)). For a critical assessment of these and other arguments, see Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AJIL 21 (1995).

[100] Joint Resolution to Promote Peace and Stability in the Middle East, Pub. L. 85-7, § 2 (Mar. 9, 1957).

[101] *See, e.g.*, LILLICH ON THE FORCIBLE PROTECTION OF NATIONALS ABROAD 47 (Thomas C. Wingfield & James E. Meyen eds., 2002).

in Lebanon."[102]

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."[103] The United States also sent a letter to the UN Security Council explaining that the operation was designed "to protect American citizens still there and escort them to safety from the country" and that "[t]he President acted after he had been informed by the military authorities in the Dominican Republic that American lives were in danger, that their safety could no longer be guaranteed, and that the assistance of United States military personnel was required."[104] 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.[105] A Soviet-sponsored effort to have the Security Council condemn the operation failed to pass after several veto members (including the United States) voted against it.

The most significant military conflict during Johnson's administration was of course the Vietnam War, which was ostensibly authorized by Congress in the 1964 Gulf of Tonkin Resolution. The War was highly controversial, and in its wake Congress enacted the War Powers Resolution. Of potential relevance here, the Resolution begins by setting out Congress's view of the President's war authority. Section 2(c) of the Resolution assert that the President has the 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

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[102] Dwight D. Eisenhower, *Statement by the President*, July 15, 1958; *see also* Dwight D. Eisenhower, *Special Message to Congress* (July 15, 1958). For skepticism, in light of this operation, about whether the use of force to protect nationals abroad is consistent with Article 51 of the UN Charter, see Quincy Wright, *United States Intervention in the Lebanon*, 53 AJIL 112, 117 (1959) (noting that, although "[t]here have been many cases in which states have landed forces in foreign territory to protect embassies or other government agencies, as in the Boxer affair of 1900, 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").

[103] Lyndon B. Johnson, *Statement on Sending Troops to the Dominican Republic* (April 28, 1965). *See also Statement on Cease-Fire*, 53 STATE DEPT. BULL. 19, 20 (July 5, 1965) (contending that "we went into the Dominican Republic to preserve the lives of American citizens and citizens of a good many other nations").

[104] UN Doc. S/6310 (April 29, 1965).

[105] *See, e.g.*, 111 Cong. Rec. 23857 (Sept. 15, 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. INT'L L.J. 439 (1966).

States, its territories or possessions, or its armed forces."[106] This section makes no mention of a presidential power to use force to protect Americans abroad, but some of the key congressional supporters of the Resolution later conceded that such an authority should have been included.[107]

Issues quickly arose after the enactment of the Resolution concerning presidential authority to use force to protect or rescue American citizens. 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 UN Security Council, the United States invoked its right of self-defense under Article 51 of the UN Charter.[108] The operation was popular domestically and generated only muted criticism abroad. Professor Raoul Berger published an Op-Ed in *The New York Times* about the incident, however, complaining that "[o]nce more Congress has abdicated its constitutional responsibility."[109] In rejecting any inherent presidential authority to use force to protect Americans abroad, Berger emphasized the narrow view of presidential war authority articulated before the Civil War by President Buchanan.[110]

In November 1979, after U.S. embassy personnel had been taken hostage in Iran, the Justice Department's Office of Legal Counsel (OLC) prepared a memorandum discussing possible economic, diplomatic, and military responses that the President could take in response to the situation.[111] With respect to military measures, OLC reasoned that "[i]t is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of

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[106] 50 U.S.C. § 1541(c). The executive branch has not acquiesced in this description of its authority. *See Overview of the War Powers Resolution*, 8 OP. O.L.C. 271, 274 (1984) ("The 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.").

[107] *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 117 (2003); *see also* Thomas M. Franck, *After the Fall. The New Procedural Framework for Congressional Control Over the War Power*, 71 AJIL 605, 613 (1977) ("The enumeration, moreover, could not be taken to be binding because it is plainly not exhaustive. Gone is reference to presidential power to rescue citizens endangered abroad.").

[108] *See* UN Doc. S/11689 (May 15, 1975).

[109] Raoul Berger, *The Mayaguez Incident and the Constitution*, N.Y. TIMES, May 23, 1975.

[110] A House subcommittee held hearings concerning this and other incidents in light of the War Powers Resolution. *See* War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, 1975: Hearings Before Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Int'l Relations, 94th Cong., 1st Sess. (1975)

[111] *See* Memorandum Opinion for the Attorney General, *Presidential Powers Relating to the Situation in Iran*, 4a OP. OFF. LEGAL COUNSEL 115 (Nov. 7, 1979).

Americans abroad."[112] As support, OLC cited *Durand v. Hollins* and referred generally to "recurring historic practice which goes back to the time of Jefferson."[113] This power to protect American lives and property, OLC further noted, "has been used conspicuously in recent years in a variety of situations."[114] President Carter subsequently authorized a military rescue effort in Iran, 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 help them."[115] The United States also sent a letter to the UN Security Council explaining that the operation was initiated pursuant to the United States' right of self-defense under Article 51 of the UN Charter "with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy."[116] International reactions to this argument were mixed.

The Reagan administration engaged in a number of military actions ostensibly related to the protection of American citizens. In 1983, it directed an invasion of the island nation of Grenada after the execution of the country's leader and resulting unrest, claiming (among other things) that the action was needed to protect U.S. medical students on the island. The operation was popular domestically but received substantial criticism internationally. Although the United States claimed that the operation was consistent with its inherent right of self-defense recognized by Article 51 of the UN Charter,[117] the UN General Assembly voted by a wide margin to declare it "a flagrant violation of international law," and a similar resolution had substantial support in the Security Council but was vetoed by the United States.[118] In 1986, Reagan directed air strikes against Libya in

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[112] *Id.* at 121.

[113] *Id.*

[114] *Id.*

[115] Letter from the President to the Speaker of the House and the President Pro Tempore of the Senate, 80 DEPT. STATE BULL. 42, 43 (June 1980).

[116] UN Doc. S/13908 (April 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* 325, 334, *in* AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS (Warren Christopher ed., 1985).

[117] *See* Statement of Jean Kirkpatrick (Oct. 27, 1983), UN Doc. S/PV 2491.

[118] For skepticism about the international legality of the Grenada operation, see, for example, Francis A. Boyle et al., *International Lawlessness in Grenada*, 78 AJIL 172 (1984); Louise Doswald-Beck, *The Legality of the United States Intervention in Grenada*, 31 NETH. INT'L L. REV. 355 (1984); and Christopher C. Joyner, *The United States Action in Grenada: Reactions on the Lawfulness of Invasion*, 78 AJIL 131 (1984). Eleven members of Congress brought suit seeking to enjoin the Grenada operation, but the suit was

retaliation for terrorist activities, including most notably the bombing of a discotheque in Berlin by Libyan agents that had resulted in the death of a U.S. servicemember and injuries to many others. In defending its action before the Security Council, the United States emphasized, among other things, a right to protect American citizens abroad.[119] Again the action was popular at home, and again the UN General Assembly condemned it, although the vote was not as lopsided as with the action in Grenada.

In late 1989, President George H.W. Bush directed an invasion of Panama after a military coup there and the killing of a U.S. servicemember, claiming that the action was needed to protect the lives of the approximately 35,000 Americans living in Panama. As with Reagan's actions, this invasion was highly popular domestically but received widespread criticism internationally, and it was condemned by the UN General Assembly. As the Reagan administration had done with the Libya bombing, the Bush administration sent a letter to the Security Council invoking the United States' right of self-defense under Article 51 of the UN Charter.[120] 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."[121] An effort in the Security Council to pass a resolution condemning the invasion was defeated after several permanent members with veto authority voted against it.

In the early 1990s, President George H.W. Bush decided to send troops to Somalia to help protect UN and other humanitarian relief operations in which U.S. government personnel and private citizens were participating. OLC concluded that the military operation was constitutional, treating the authority to protect American citizens as a subset of a broader authority to protect American interests. It reasoned that "the President's role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further

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dismissed on the ground that the plaintiffs should be required to pursue institutional rather then judicial remedies. *See* Conyers v. Reagan, 578 F. Supp. 324, 327 (D.D.C. 1984), *dismissed as moot*, Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

[119] *See* UN Doc. S/17990 (Apr. 14, 1986) (explaining that "[o]ver a considerable period of time Libya has openly targeted American citizens and U.S. installations").

[120] S/21035 (Dec. 20, 1989) (explaining that "this United States action is designed to protect American lives and our obligations to defend the integrity of the Panama Canal treaties").

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

national interests such as protecting the lives of Americans overseas."[122] OLC also concluded that "long-standing precedent supports the use of the Armed Forces to protect Somalis and other foreign nationals in Somalia."[123] For the latter proposition, it cited to Johnson's intervention in the Dominican Republic and McKinley's involvement in the Boxer Rebellion. It also said that the United States has a "vital national interest" in supporting UN Security Council resolutions and the credibility and effectiveness of the UN more generally, citing to the Korean War as precedent. "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."[124]

The slippage between protecting Americans abroad and protecting American interests abroad also was evident in 2004, when President George W. Bush deployed troops unilaterally to Haiti after President Aristide was overthrown by an armed rebellion. In concluding that this deployment was constitutional, OLC claimed that "[t]he President has the authority to deploy the armed forces abroad in order to protect American citizens *and interests* from foreign threats."[125] In support of this claim, OLC quoted Robert Jackson's similar statement in his *British Flying Students* opinion, and it invoked *Durand v. Hollins*. OLC also cited its prior opinions concerning the Iranian hostage crisis and the intervention in Somalia. In light of these materials, OLC concluded that "the President has authority to order the deployment of the armed forces to Haiti in order to protect American citizens there," and it noted that "[t]housands of Americans live in Haiti."[126] The President could also reasonably decide, argued OLC, that the deployment was "necessary to protect American property, such as the United States Embassy in Haiti."[127] OLC further reasoned that an operation designed to protect American citizens and property need not be limited to that function and can also be used to protect foreign citizens, citing as precedent the Somalia intervention, Johnson's action in the Dominican Republic, and the U.S. actions during the Boxer Rebellion.[128] Even more

[122] Memorandum from Timothy E. Flanigan, Assistant Attorney General, to the Attorney General, *Authority to Use United States Military Forces in Somalia* (Dec. 4, 1992), 16 OP. OFF. LEGAL COUNSEL 8, 8 (1992).

[123] *Id.*

[124] *Id.* at 9.

[125] *See* Jack L. Goldsmith III, Assistant Attorney General, *Deployment of United States Armed Forces to Haiti* (Mar. 17, 2004), 28 OP. OFF. LEGAL COUNSEL 31 (2004) (emphasis added).

[126] *Id.* at 32.

[127] *Id.*

[128] *See id.*

broadly, OLC argued that such an operation can be used to promote American foreign policy interests, including interests in preserving regional stability and in supporting efforts by the United Nations.[129] OLC made clear, however, that "a Security Council resolution is 'not required as a precondition for Presidential action.'"[130]

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In sum, the President's power to use military force to protect Americans abroad reveals the two-level 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 often invoked as its own source of authority, even in situations in which international law was less supportive. At the same time, in situations in which the international law grounds for using force were strong, it continued to be invoked to help compensate for the lack of domestic precedent. International law is not static, however, and presidents have also invoked U.S. uses of force in an effort to influence the content of international law—in particular with respect to the scope of the right of self-defense recognized under Article 51 of the UN Charter. This is not to say that 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.[131] Nevertheless, U.S. practice—both before and after the adoption of the UN Charter—has helped to make it at least arguable that international law permits some use of force to protect nationals abroad.[132] The plausible international legality of these actions is in turn used to bolster arguments about their domestic legal validity.

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[129] *Id.* at 32-33.

[130] *Id.* at 33 (quoting Somalia Memorandum, *supra* note 122, at 7).

[131] *See generally* DINSTEIN, *supra* note 23, at 217-19, 255-59 (2011); GRAY, *supra* note 29, at 126-29; TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER 213-49 (2010).

[132] *See, e.g.*, ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 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"); *see also* D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 97 (1958) (observing that "[t]he practice of the U.S. affords the greatest source of instances of action in protection of the lives and property of citizens").

B. 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 domestic U.S. law of separation of powers or in international law. Similar to other aspects of the use of force, the story is 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.

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, many of the early precedents establishing a right of defense of citizens discussed in the prior section also involved actions taken against non-state actors. In justifying uses of force despite the absence of clear congressional authorization, presidents emphasized the distinctions in international law between state and non-state actors.[133]

An early example related to Amelia Island in Spanish-owned Florida in 1817. A band of "freebooters and smugglers of various nations" had seized Amelia Island and were using it as a base for their activities, including smuggling slaves into the United States in violation of its prohibition on the slave trade.[134] In response, President Monroe ordered the military to Amelia Island, and the smugglers surrendered without bloodshed. In explaining his actions to Congress, Monroe provided an early example of how Presidents can blend together policy, international law, and domestic law in justifying their uses of force. After describing the "annoyance and injury" that the Amelia Island adventurers could have caused to the United States, Monroe claimed that a failure to break up the establishment would have had problematic consequences for the United States in light of international law.[135] Specifically, he claimed that inaction would have suggested that the United States was treating this establishment as an independent nation, and therefore was bound by the principle of neutrality in relation to it.[136]

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[133] *See* SCHLESINGER, *supra* note 87, at 50 ("Military action against Indians—stateless and lawless by American definition—pirates, slave traders, smugglers, cattle ranchers, frontier ruffians or foreign brigands was plainly something different from warfare against organized governments. It differed both in the juridical status of the combatants and in the practical fact that such fugitive hostilities would not lead to full-scale war.").

[134] Report of the House Committee on Foreign Relations of Jan. 10, 1818, in Appendix to the History of the Fifteenth Congress (1st Session) at 1786-1787.

[135] Message of President Monroe to Congress of Jan. 13, 1818.

[136] *Id.* The United States was observing neutrality with respect to the war between Spain and its Latin American colonies seeking independence. *See id.*

Monroe viewed these considerations as "sufficiently strong in themselves to dictate the course which has been pursued."[137] Nevertheless, he went on to argue that he did have congressional authorization, pointing to an earlier congressional statute that was arguably but not obviously on point.[138] Monroe further claimed that the intervention was fully justified as an international matter, since Spain was "utterly unable" to exercise control over the Amelia Island smugglers.[139]

The following year, President Monroe sent U.S. forces (led by Andrew Jackson) to the Florida border with orders to defend against raids by the Seminoles. Monroe authorized Jackson to enter into Florida in pursuit of the enemies, reasoning that since Spain was unable to prevent the raids, "the United States have a right to pursue their enemy, on a principle of self-defense."[140] Although Monroe instructed Jackson to "respect the Spanish authority" in Florida,[141] Jackson went beyond his instructions and, among other things, captured Spanish forts and executed two British tradesmen suspected of inciting the Indians. Jackson's actions against Spain provoked international protest and were widely viewed as an unconstitutional violation of Congress's power to declare war. In chastising Jackson, Monroe explained to him that pursuit of the Seminoles was the United

[137] *Id.*

[138] *See id*. (referring to the "law of 1811," which had been passed in a secret session of Congress and only recently been made public). This law authorized the President to intervene in Spanish Florida "in the event of an attempt to occupy said territory, or any part thereof, by any foreign government." Act of Jan. 15, 1811, at 3 Stat. 471; *see* David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers*, 1809-1829, 67 U. CHI. L. REV. 1, 8 n.22 (2000) (noting that this act was passed following concerns that Florida might fall into French or British hands). Given that the Monroe Administration did not want to treat the Amelia Island adventurers as a foreign government or as representatives of a foreign government, the statute's applicability is debatable. Indeed, later supporters of presidential war powers would cite the Amelia Island incident without mentioning this Congressional authorization. *See, e.g.,* 90 Cong. Rec. 7525 (1944) (Statement of Sen. Connally); 97 Cong. Rec. 2851, 2857 (1951).

[139] Message of President Monroe to Congress of Jan. 13, 1818; *see also, e.g.*, 33 Annals of Cong. 886 (1819) (statement of Rep. Hopkinson). In a later speech, Monroe tied the intervention more explicitly to self-defense. *See* President Monroe, Second Annual Message to Congress (Nov. 16, 1818) (discussing the Amelia Island incident and observing that the "sacred" right of self-defense applied "whether the attack be made by Spain herself or by those who abuse her power").

[140] Message of President Monroe to Congress, March 25, 1818. 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. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82, 92 (1939) (describing the *Caroline* incident as "the first important case of intervention in self-defense where the intervention was suffered by a strong state").

[141] Message of President Monroe, *supra* note 140.

States' "right by the law of nations," but an attack on the Spanish posts "would authorize war, to which, by the principles of our constitution, the executive is incompetent."[142]

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 analogized to pirates. (The Barbary "pirates" were different because they were state-sponsored.) Indeed, members of Congress seemed to feel 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,[143] 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 a third power. … Under this rule, the pursuit and capture of pirates any where, and every where, may be justified. The Executive has acted upon it."[144] 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 the prior section, President Jackson drew such an analogy with regard to the expedition in Sumatra and President Pierce did the same for the bombardment of Greytown.[145]

Uses of force by the United States in the early twentieth century also often involved the defense of citizens against non-state actors. As discussed in the prior section, the executive branch and its supporters went to considerable efforts to interpret and shape international law so that it would authorize many uses of force by the United States, especially in relation to Latin America, and further viewed this international law as a constitutional justification for the president to use force without congressional

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[142] Letter from James Monroe to Andrew Jackson (July 19, 1818).

[143] Eighth Annual Message of President Monroe, Dec. 7, 1824 ("Whether those robbers should be pursued on the land, the local authorities be made responsible for these atrocities, or any other measure be resorted to to suppress them, is submitted to the consideration of Congress").

[144] Report of the Committee of Foreign Relations of the House of Representatives on Piracy and Outrages on American Commerce by Spanish Privateers, Jan. 31, 1825, at 49. Because of the status of pirates under international law, the Committee deemed that the President had the authority to engage in hot pursuit of pirates regardless of whether this pursuit was onto habited or uninhabited lands. *Id.* at 50.

[145] *See supra* note 69 and accompanying text. For an argument that an independent Presidential power to attack non-state 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 10, at 1632.

authorization.[146] One particularly famous incident occurred when President Wilson ordered the Punitive Expedition 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 later revoked), he was on solid grounds under international law when the raid began, and he did not pursue congressional approval for his actions.[147]

By the time of the UN Charter, U.S. domestic practice thus gave the President considerable domestic legal cover in using force without congressional authorization for self-defense (broadly defined) against non-state actors operating on the territory of other states. As a matter of international law, however, the legality of such actions became subject to the Charter's provisions on the use of force. Between 1945 and 2001, substantial formal legal authority 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 non-state actors could not invoke Article 51 in defense.[148] Under this view, a state

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[146] *See supra* Part II.A.2.

[147] *See* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED States 486-88 (1916); *cf.* James Scott Brown, *Editorial Comment*, 8 AJIL 337, 338 (1916) (suggesting that in the absence of consent, it would only be appropriate for the United States to enter Mexico if there were "unwillingness or inability" of the Mexican government to provide redress). Wilson's actions had strong support in Congress; the Senate unanimously passed a resolution approving of the pursuit of Pancho Villa "for the sole purpose of apprehending and punishing" him and emphasizing "that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico." 53 Cong. Rec. 4274 (Mar. 17, 1916). By contrast, Wilson sought Congressional approval (albeit slightly after the fact) for a military intervention in Vera Cruz against what was arguably the government of Mexico. *See* 8 AJIL 619-20 (1914).

[148] For detailed treatment, see RUYS, *supra* note 131, at 368-433. As Ruys notes, *id.* at 370, in its report on the NATO treaty, the Senate Committee on Foreign Relations had observed in 1949 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 International Court of Justice signaled its support for this approach in *Nicaragua v. United States*. *See* Case Concerning Paramilitary and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. REP. 14, 103-105, para. 195 (June 27). In recent years, the ICJ has also appeared to embrace this position. Advisory Opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. REP. 136, 194, para. 139 (Jul. 9); *see also* Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. REP. 168, 222-23, para. 146 (Dec. 19); *but see* Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?* at 8-12, *in* THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., 2015) (arguing based on principles of "judicial economy" that the "fact that the ICJ required armed attacks launched by non-state actors to be attributable to the state from whose territory they were supported or operated could be understood as a direct consequence of the fact that, in each contentious case to come before the ICJ, the host state was the target of defensive force").

could only use force in self-defense against a non-state actor on the territory of another state if this other state was colluding in some way with the non-state actor. This approach was not universally shared, and 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.'"[149] Only once before September 11, however, did the United States clearly invoke this claim in practice. This was in 1998, when President Clinton carried out strikes 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, 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."[150] The reaction to the U.S. actions by other states was "mixed and muted."[151]

The question of self-defense against non-state actors on foreign soil sprang to the forefront after the events of September 11. On September 12, 2001, the UN Security Council passed Resolution 1368 condemning the attack, "recognizing the inherent right of individual or collective self-defense in accordance with the Charter," and signaling the Council's "readiness to take all necessary steps" to respond to the attack.[152] Two days later, the House and the Senate approved the 2001 Authorization for Use of Military Force, which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations and persons."[153] With the 2001 AUMF, President Bush was at the apex of his authority under U.S. domestic law in acting against Al Qaeda and the Taliban regime in Afghanistan.

With regard to international law, the Bush Administration faced an interesting choice in the days following September 11. It had to decide whether to seek a Security Council Resolution explicitly authorizing the use of force against Al Qaeda and the Taliban regime or instead simply to invoke Article 51. As Secretary of State Colin Powell put it in a press conference on September 26, "We will be going back to the UN for additional expressions of support through UN resolutions but, at the

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[149] RUYS, *supra* note 131, at 422-23 (quoting Secretary of State George Shultz)

[150] Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/1998/780.

[151] RUYS, *supra* note 131, at 427.

[152] U.N. Sec. Res. 1368 (2001).

[153] Authorization for Use of Military Force, 115 Stat. 224 (2001) (signed by President Bush on Sept. 18).

moment, should the President decide that there are more actions he has to take, he will make a judgment as to whether he needs UN authority or whether he can just act on the authority inherent in the right of self defense and consistent with our own laws and regulations and constitutional powers."[154] In the end, the Bush Administration chose to invoke Article 51 and not to seek a Security Council Resolution authorizing the use of force.[155] It is difficult to tell how much the Bush Administration's decision to act without a Security Council Resolution was motivated by the fact that it had extraordinarily secure footing in domestic law. Whatever the reason, the Administration launched its attack on Al Qaeda in Afghanistan and on the Taliban regime with Article 51 as its sole international legal basis. 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."[156]

States were generally supportive of the U.S. action. 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.[157] The degree of this shift is of course debated. The

[154] Colin L. Powell, Remarks with His Excellency Brian Cowen, Minister of Foreign Affairs of Ireland (Sept. 26, 2001), *at* http://2001-2009.state.gov/secretary/former/powell/remarks/2001/5061.htm

[155] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/2001/946; *see also* Carola Hoyos & Patti Waldmeir, *UN Charter and Resolutions Offer US Action Legal Backing*, FIN. TIMES 4 (Oct. 8, 2001) (noting "President George W. Bush's decision not to seek further international legal authorisation before the US and UK take action"); Elaine Sciolino & Steven Lee Myers, *Bush Says 'Time is Running Out'; U.S. Plans to Act Largely Alone*, N.Y. TIMES A1 (Oct. 7, 2001) (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").

[156] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/2001/946; *see also* Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L. Q. 401, 408-09 (2002) (reading this language as constructed to support a claim that the Taliban bore enough responsibility for September 11 that it could be considered an "armed attack" under the traditional view requiring state action); 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).

[157] For a discussion of the various positions, see RUYS, *supra* note 131, at 439-443; *see also, e.g.*, Jutta Brunnee, *The Meaning of Armed Conflicts and the Jus ad Bellum*, in Mary Ellen O'Connell ed., WHAT IS A WAR? AN INVESTIGATION IN THE WAKE OF 9/11, at 33 (2012); Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, *in*

United States has come to frame its perceived legal right as one to invoke self-defense against non-state actors on the territory of the other state where that state is "unwilling or unable" to suppress these non-state actors.[158] (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.[159])

Having gained broader acceptance for its position after September 11, at a time when its authority under domestic law was at a maximum, the U.S. executive branch is now using the "unwilling or unable" standard in situations that have considerably less secure domestic legal footing. For a recent example, consider the U.S. bombing campaign carried out in Syria against ISIL in 2014 and early 2015. In justifying these hostilities, the executive branch was on fairly weak authority under domestic law—it was relying on very expansive readings of the 2001 AUMF and of the 2002 AUMF authorizing intervention in Iraq.[160] Under international law, the

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Fred Borch & Paul Wilson, eds., INTERNATIONAL LAW AND THE WAR ON TERRORISM 7, 33 (2003); GRAY, *supra* note 29, at 194; Anders Henriksen, *Jus ad Bellum and American Targeted Use of Force to Fight Terrorism around the World*, 2014 J. CONFLICT & SECURITY L. 1, 23; NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 34-36 (2010); Monika Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 7-8, 19-20 (2015). 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's actions against Hezbollah in Lebanon in 2006 are one example. *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 subsequent practice and custom.

[158] Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law. For a recent critique of this doctrine, see Dawood I. Ahmed, *Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense*, 9 J. INT'L L. & INT'L REL. 1 (2013).

[159] *See supra* n. 144 and accompanying text; *see also supra* Part II.A.2. For an analysis rooting the "unwilling or unable" standard in the law of neutrality, see Ashley Deeks, *"Unwilling or Unable": Towards a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499-503 (2012).

[160] President Obama identified his commander-in-chief power and the two AUMFs as sources of authority. *See* Letter from President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 23, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq. Each of these grounds is questionable. If President Obama was acting solely under his commander-in-chief power, 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. The two AUMFs each contain such a statutory authorization, but their applicability is far from obvious. For the 2001 AUMF to be applicable, there would have to be a sufficient connection between Al Qaeda and ISIL. The Obama Administration did not defend such a connection, and indeed

United States relied on the "unwilling or unable" standard in conjunction with the collective self-defense of Iraq.[161] This claim is stronger under international law than it would have been prior to September 11, because of the increased acceptance of this approach in the community of nations.[162] 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 situations where the President's domestic legal grounding is much weaker.

As the executive branch is further embracing its "unwilling or unable" standard in international law, it is simultaneously using this understanding of international law 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 Al Qaeda or associated forces.[163] In describing how such targeting would be consistent with the due process clause of the constitution, certain statutory provisions, and the 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."[164]

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in its justification to the Security Council it did not even attempt to claim such a connection (although it linked a different group within Syria, the Khorasan Group, to Al Qaeda). *See* Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General, S/2014/695. Passed in the context of Saddam Hussein's regime, the 2002 AUMF authorizes the President to use force "in order to [] defend the national security of the United States against the continuing threat posed by Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002). It takes some energetic statutory construction to conclude that this authorizes the President to use force in order to defend the current Iraqi regime against a new threat.

[161] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary General, S/2014/695. This is the first time the United States has stated the "unwilling or unable" standard in an Article 51 letter.

[162] *See* Hakimi, *supra* note 157, at 19-20.

[163] Department of Justice White Paper, 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, *available at* http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf [hereinafter White Paper]; *cf.* Rebecca Ingber, International Law Constraints as Domestic Power 18-22 (manuscript on file with authors) (discussing other ways in which this White Paper relies on international law in reaching its conclusions with regard to domestic law).

[164] White Paper, *supra* note 163, at 1-2, 5.

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As this section has shown, 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 UN 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 UN Charter expansively to justify the U.S. intervention in Afghanistan rather than seeking Security Council authorization, and this action in turn has led international practice to become more favorable to such expansive readings of Article 51. Presidents have then in turn invoked such an expansive reading in situations in which Congress has not specifically authorized the use of force. The interplay between international and domestic law has thus helped the President to expand his legal authority through practice in relation to both Congress and the Security Council.

C. Collective and Treaty-Based Security

(forthcoming)

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[Tentative observations drawn from the case studies:

1. Because of the significant role played by custom in both the U.S. constitutional law of war powers and the international law governing the use of force, there is a danger that unitary actors can erode limitations on their authority over time. In practice, presidents have exploited this possibility in both the domestic and international arenas.

2. Although international law does not purport to regulate domestic separation of powers, the U.S. domestic separation of powers concerning the use of force is affected by international law. In particular, presidents have been able to draw from international law to enhance their domestic authority to use force, both in select instances and through the accretion and extension of precedent.

3. While U.S. separation of powers plays no direct doctrinal role in the

development of international law, it is nonetheless 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. Clear domestic legal authority, and especially congressional authorizations, increase the likelihood that Presidents will use force in ways that are justified only by expansive interpretations of international law.

4. A "road not taken" in U.S. constitutional law, at least in our current doctrinal landscape, is one whereby the President's domestic authority to use force would be limited by international law. Although international law may have had a constraining effect in discrete periods of history, the overall picture is one in which presidents have primarily used international law to enhance their authority. That said, presidents are unlikely to use force unilaterally when the legal support for such force is weak both domestically and internationally.

5. Political considerations relating to the use of force are separate from, but potentially can be affected by, legal considerations, and vice-versa. For example, presidents are more likely to seek to extend domestic or international precedent concerning the use of force when they have substantial political support in the other arena.]

III. IMPLICATIONS AND POSSIBILITIES FOR CHANGE

(forthcoming)

A. *Implications for Contemporary War Powers Debates*

B. *Implications for Collective Actors*

C. *Does Law Matter?*

IV. CONCLUSION

(forthcoming)