Presidential War Powers as a Two-Level Dynamic: International Law, Domestic Law, and Practice-Based Legal Change

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

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PRESIDENTIAL WAR POWERS AS A TWO-LEVEL DYNAMIC: INTERNATIONAL LAW, DOMESTIC LAW, AND PRACTICE-BASED LEGAL CHANGE

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

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

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

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1 E.g., ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY ix (1973) (explaining that he would “devote special attention to the history of the war-making power”).
3 See id. (noting that “[t]he majority of the instances listed prior to World War II were brief Marine or Navy actions” and that “[a] number were actions against pirates or bandits”).
In 2013, he contemplated using force against Syria in response to its use of chemical weapons, but this time he lacked any authorization from the Security Council, and, at the last minute, he decided to seek congressional approval. He explained that, although he believed that he had the constitutional authority to take military action on his own, he had concluded that “it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress.”

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

In August 2015, it was reported that President Obama had authorized the use of airstrikes against Syrian government forces if they attacked U.S.-backed rebels in Syria. The administration justified such authorization on the ground that the airstrikes would be defensive in nature, while declining to provide a specific legal justification.

In October 2015, President Obama authorized the deployment of a small group of U.S. special operations forces to assist on the ground in the conflict against ISIL in Syria.

Each of these examples, like all contemplated uses of force by the United States abroad, implicate two bodies of law: international law and domestic law. To date, scholars have generally addressed these bodies of law separately. There is a rich literature on the circumstances under which the United Nations Charter or specific Security Council resolutions

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authorize nations to use force abroad, and there is a rich literature on the circumstances under which the U.S. Constitution and statutory law allows the President to use force abroad. These are discrete areas of scholarship, addressing what are generally perceived to be different categories of legal doctrine. In this Article, by contrast, we consider these two bodies of law together and, in doing so, we explore a variety of underappreciated connections between them. We make three main contributions.

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

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

Third, we document the two-level dynamic over time for three important components of the law on the use of force. As we show, the interactive nature of U.S. war powers is longstanding. It became especially pronounced after the United States ratified the U.N. Charter in 1945, but it is by no means simply a post-Charter phenomenon. This phenomenon has important implications both for those who are concerned that the President has come to exercise too free a hand in decisions about the use of force and for those who advocate increased use of either international law or domestic law to restrain such decisions.¹⁰

¹⁰ The focus here is on the international and domestic law governing whether military force can be used rather than on the law governing how force can be used. That is, the focus is on what is referred to in international law as jus ad bellum rather than on jus in bello. Both the structure of decisionmaking concerning jus in bello and the relationship between international law and domestic law in that area implicate distinct considerations from those implicated by jus ad bellum. In addition, we focus almost exclusively on uses of force that are overt rather than covert. Although international law on the use of force
The Article pursues these themes as follows. Part I describes the parallels between the international and domestic legal regimes governing the use of force and offers a theory of how these two levels of law can interact in a way that favors the growth of presidential power over time. Parts II, III, and IV explore this two-level dynamic between international and domestic law with regard to the use of force in three important contexts: (1) the defense of U.S. citizens abroad; (2) self-defense against non-state actors; and (3) collective and treaty-based uses of force. Part V considers the implications of the two-level dynamic for both scholarship relating to war powers and for the behavior of actors engaged in making war powers decisions. It also reflects on the extent to which law, whether domestic or international, matters for executive branch decisionmaking relating to the use of force. Part VI concludes.

We emphasize at the outset that what we are focused on are interactions in legal argumentation and doctrine. The extent to which those interactions have a causal influence on presidential decisionmaking is uncertain, in part because of the difficulty of disentangling legal considerations from political considerations, a point that we revisit at the end of the Article. Moreover, different presidents have varied in their approaches to law on the use of force, including with regard to the extent to which they have been inclined to draw upon the two-level dynamic in making claims about their unilateral war authority. Thus, while our account suggests that the two-level dynamic factors into presidential decision-making on the use of force, we do not make strong claims of causality. Regardless of the extent of its causal influence, the interplay between international and domestic law that we document is an important and underappreciated theme in the history of U.S. war powers.

I. TWO LEVELS OF LAW ON THE USE OF FORCE

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

applies to covert actions as well as overt ones, the differences in how covert actions are carried out as a matter both of public accountability and of domestic law make assessing the applicability of our arguments to covert action beyond the scope of this Article.
A. Disparities between Text and Practice

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

1. Domestic Law. — The text of the Constitution gives Congress numerous war-related powers, including the authority to “declare war” and “grant Letters of Marque and Reprisal,”11 while making the President “Commander in Chief” of the armed forces.12 While the President’s role as Commander in Chief empowers him to direct the troops during a war, this command function does not obviously encompass the decision whether to go to war in the first place.13 James Madison’s notes from the Constitutional Convention suggest that the Framers intended that Congress would decide when the United States went to war, with the caveat that the President had the independent authority to defend the United States from attacks.14 Most scholars think that, as a matter of original meaning and intent, the Constitution did not authorize the President to unilaterally initiate war.15 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 non-defensive

11 U.S. CONST. art. I, § 8, cl. 11; see also id., cls. 11-14 (empowering Congress to “make Rules concerning Captures on Land and Water,” “To raise and support Armies,” “To provide and maintain a Navy,” and “To make Rules for the Government and Regulation of the land and naval Forces”).
12 Id. art. II, § 2, cl. 1.
13 In The Federalist Papers, Alexander Hamilton—normally a defender of robust executive power—explained that the President’s Commander-in-Chief role would “amount to nothing more than the supreme command and direction of the military and naval forces.” The Federalist No. 69, at 386 (Clinton Rossiter ed., 1961).
14 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 “decla[r]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).
15 For a partial list of relevant scholarship, see Michael D. Ramsey, Textualism and War Powers, 69 U. CHI. L. REV. 1543, 1548 & n. 19 (2002). Among modern war powers scholars, the principal exception to the view that Congress must authorize offensive war is Professor John Yoo. E.g., John C. Yoo, A Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167 (1996).
uses of force that might fall short of formal “war.”\textsuperscript{16} 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.\textsuperscript{17} And, in response to attacks on U.S. shipping by France, President Adams emphasized the need for congressional authorization for anything more than limited measures of self-defense.\textsuperscript{18}

The executive branch today takes a far broader view of the President’s independent constitutional authority. The Justice Department’s Office of Legal Counsel (OLC) has concluded that the President can “take military action [abroad] for the purpose of protecting important national interests, even without specific prior authorization from Congress.”\textsuperscript{19} OLC does not forswear a congressional role in authorizing some uses of force, but it understands Congress’s power to declare war simply to be a “possible 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.”\textsuperscript{20} However these permissive interpretive claims developed (an issue we return to in subsequent Parts of the Article), it is


\textsuperscript{17} Letter from George Washington to William Moultrie (Aug. 28, 1793), in 33 \textit{The Writings of George Washington} 73 (John C. Fitzpatrick ed., 1940); see also Letter from Henry Knox, Sec’y of War, to Gov. William Blount (Nov. 26, 1792), in 4 \textit{The Territorial Papers of the United States} 220, 220-21 (Clarence Edwin Carter ed., 1936) (“[The President] does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.”).

\textsuperscript{18} John Adams, Special Session Message to the Senate and House (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”), in 1 \textit{A Compilation of the Messages and Papers of the Presidents} 223, 227 (James D. Richardson ed., 1897); see also Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 \textit{The Papers of Alexander Hamilton} 461-62 (Harold Syrett ed., 1974) (“I am not ready to say that [President Adams] has any other power than merely to employ the Ships as Convoys with authority to repel force by force (but not to capture) . . . . Any thing beyond this must fall under the idea of reprisals & requires the sanction of that Department which is to declare or make war”).

\textsuperscript{19} Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to Eric Holder, Attorney Gen., \textit{Authority to Use Military Force in Libya}, at 6 (Apr. 1, 2011) [hereinafter Krass Memorandum].

\textsuperscript{20} Id. at 8.
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).21

A similar growth in presidential power despite the apparent constraints of text and intent also has occurred in connection with the interpretation of statutes related to the use of force. The War Powers Resolution is the most prominent such statute. Passed over President Nixon’s veto in 1973, it sets explicit conditions and limits on the President’s unilateral authority to use force in hostilities abroad.22 Among other things, it instructs the President to withdraw U.S. troops from any hostilities within sixty days unless he has specific statutory authorization to continue the hostilities.23 Yet since its passage, executive branch lawyers have been interpreting the Resolution in ways that whittle down its practical effect. In 2011, for example, the Obama Administration concluded that U.S. participation in the NATO bombing campaign against Libya did not amount to “hostilities” for purposes of the Resolution.24 By contrast, where the executive branch is interpreting statutes that authorize presidential uses of force, it tends to read these statutes expansively. Most recently, the Obama Administration claimed that its ongoing intervention against ISIL, initiated in 2014, is authorized by a combination of Congress’s 2001 Authorization for Use of Military Force (“2001 AUMF”), which was directed at the nations, organizations, and persons responsible for the September 11, 2001 terrorist attacks,25 and Congress’s 2002 Authorization for the Use of Military Force in Iraq (“2002 AUMF”), which empowered the President to “defend the

21 See Torreon, supra note 2.
23 50 U.S.C. § 1544(b) (further providing for a thirty-day extension if necessary for the safe withdrawal of U.S. troops).
national security of the United States against the continuing threat posed by Iraq” in the context of Saddam Hussein’s regime.26

2. International Law. — An analogous disparity exists between the text of the U.N. Charter as originally understood and the United States’ current legal positions on the use of force. Prior to the adoption of the U.N. Charter in 1945 (and particularly in the nineteenth and early twentieth centuries), international law on the use of force had been broadly permissive.27 The U.N. Charter established much more restrictive legal rules. The core principle—set forth in Article 2(4)—is that state parties “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”28 This provision was meant to presumptively ban all uses of force by states in the territory of other states.29

Nonetheless, the Charter makes lawful two specific types of uses of force abroad. First, Chapter VII provides that the Security Council can authorize military actions “as may be necessary to maintain or restore international peace and security.”30 Second, Article 51 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 Council has taken measures necessary to

27 Around the time of the Constitution’s drafting, international law was shifting from the principle that wars could only be fought for just causes towards the position that nations had the right to go to war regardless of the reason. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 13-18 (1963); Yoram Dinstein, War, Aggression and Self-Defence 78 (5th ed. 2011). After World War I, nations attempted to restrict the legal right to wage offensive war through several important multilateral treaties. See BROWNLIE, supra, at 55-96 (discussing the Covenant of the League of Nations, the Kellogg Briand Pact, and the Saavedra Lamas Pact (the last two of which the United States ratified)).
28 U.N. Charter, art. 2(4). Besides being a binding treaty obligation, Article 2(4) is widely understood today to reflect a principle of customary international law. See Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits), 1986 I.C.J. REP. 14, 99-100 (June 27) (noting that both the United States and Nicaragua viewed Article 2(4) as reflecting customary international law and concluding that it is not only customary international law but also possibly a jus cogens norm).
29 BROWNLIE, supra note 27, at 264-68 (discussing the drafting history and explaining that the specific enumerations within this provision were intended “to give more specific guarantees to small states and . . . cannot be interpreted as having a qualifying effect”).
30 U.N. Charter, art. 42.
maintain international peace and security.”

In an internal exchange during the Charter’s drafting, U.S. negotiators recognized that this language “greatly qualified the right of self-defense by limiting it to the occasion of an armed attack” but considered this approach “intentional and sound” because “[w]e did not want exercised the right of self-defense before an armed attack had occurred.”

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 does the United States (like some other nations) use force more broadly than the U.N. Charter’s text, as originally understood, suggests may be done without Security Council authorization. For example, the United States maintains that international law authorizes the use of force abroad to protect citizens, treats its right of self-defense as extending to attacks by non-state actors, and interprets “self-defense” broadly to encompass acts that resemble reprisals. Examples in the last few decades in which the United States has invoked one or more of these interpretations include the intervention in Panama (1989), bombing and missile strikes against Iraq (1993) and in Afghanistan/Sudan (1998), and, more recently, uses of force undertaken as part of its war on terror since September 11.

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

B. Institutional Design and Practice over Time

How did these divergences between the original understanding of the text and practice develop? Although they have been increasing over time,

31 Id., art. 51. Articles 52 and 53 have additional provisions regarding action by regional organizations.
32 1 UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1945, at 818 (documenting an exchange between State Department Legal Adviser Green Haywood Hackworth and delegate Harold Stassen).
33 CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 157, 195-209 (3d ed. 2008). Our focus throughout is on U.S. practice, although some other nations have approved of these practices or advanced similar legal positions in using force abroad. See, e.g., id. at 156-59, 195-96, 234-44 (discussing some such instances).
34 Id. at 354-66.
they are not new phenomena. Early in U.S. history, the military began undertaking operations at the borders, including the border with Spanish-controlled Florida, that looked more offensive than defensive. 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.” During the Cold War, practice of the United States and other countries on the use of force departed from the text of the U.N. Charter so substantially that it led to a famous debate between Professors Thomas Franck and Louis Henkin over whether Article 2(4) was dead.

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

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

In domestic law, the congressional default is inaction because

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legislation requires a majority vote of its members in both houses, as well as the successful surmounting of other procedural barriers. Ex ante, this means that it can be difficult for the President to get Congress to authorize uses of force that the President believes are desirable. Although sometimes Congress will take action and authorize uses of military force, as with the 2001 AUMF that followed the events of September 11, at other times—such as in connection with President Clinton’s use of force in the Kosovo conflict in 1999—Congress may not muster the votes to legislate with regard to the use of force. Ex post, however, the default toward inaction means that Congress as a body will have considerable difficulty in condemning presidential action once taken. As political scientists William Howell and Jon Pevehouse put it, “[a]ll of the institutional features of Congress that impede consensus building around a military venture ex ante also make it equally if not more difficult, later, to dismantle an operation that is up and running.” 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.

Turning to the international sphere, the U.N. Security Council also has a strong institutional default in favor of inaction. To authorize the use of force under Chapter VII of the U.N. Charter, the Security Council needs the affirmative votes of nine out of the fifteen state members, and a veto can be exercised by any of the permanent five (P5) members—China, France, Russia, the United Kingdom, and the United States. History bears out that this is a high bar. Between the Korean War and the end of the Cold War, the Security Council almost never authorized the use of force under Chapter

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38 A bill that would have directed the President to cease military operations was defeated in the House of Representatives on a vote of 139-250, and a bill that would have authorized the Kosovo operation was defeated in the House on a tie vote of 213-213. See Richard F. Grimmett, *War Powers Resolution: Presidential Compliance*, at 5 (Cong. Res. Serv., Sept. 25, 2012), at https://www.fas.org/sgp/crs/natsec/RL33532.pdf.


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.” Richard H. Pildes & Daryl J. Levinson, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2324, 2359-60 (2006).


42 See U.N. Charter, *supra* note 28, art. 27(3).
VII, in part because of frequent Soviet vetoes.\textsuperscript{43} Authorizations have proved more frequent since, but rarely in contexts involving the use of force against allies of P5 members. For example, it was clear in 2012 that any attempt to get a Security Council Resolution authorizing the use of force against the Assad regime in Syria would be vetoed by Russia.\textsuperscript{44} Yet just as the structure of the Security Council makes it difficult for it to authorize the use of force ex ante, so too does it make it difficult to condemn the use of force ex post. When it has done so, as in the wake of Iraq’s invasion of Kuwait in 1990,\textsuperscript{45} it is because no P5 member has chosen to veto the resolution.

2. Interpretive Opportunities for Unitary Actors. — Congress’s collective action limitations allow 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.\textsuperscript{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 (1) the use of force is desirable, (2) his legal authority to use force without further congressional action is not clearly established, and (3) further congressional action is not likely to be forthcoming, is not likely to be timely, or is likely to contain problematic conditions. Given the third factor, the President faces conflicting incentives from the first two factors. This tension sometimes cannot be reconciled, in which case the President must choose between the use of force and compliance with the 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 the legal framework or by adopting a more permissive interpretation of existing law. If the President adopts a more permissive interpretation, 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 in the international legal context,

\textsuperscript{43} GRAY, supra note 33, 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”).

\textsuperscript{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).


particularly with regard to the actions of the United States. A nation often will have a legal and political interest in having the Security Council authorize uses of force that it views as desirable. But where an authorization is not obtainable due to the Security Council’s collective action constraints and the nation does not have a clear right to act in self-defense under international law, the nation faces a tension between its desire for military action and its interest in legality. In these cases, the nation might choose to pursue one or the other of these interests or try to reconcile the two by reshaping its intended use of force or interpreting existing international law to be in its favor. For the United States, the incentives to interpret international law liberally in its favor are especially strong. First, because it is a P5 member, the United States knows that it can always veto a proposed Security Council Resolution condemning its use of force. Second, as Matt Waxman notes, “[s]tates like the United States, with the strength to defeat or deter developing threats and a willingness to pursue interventionist policies, will incline towards doctrinal formulas that permit discretion.”

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

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47 In some instances, unitary actors will not want to seek authorization, because they may hope to set a precedent in favor of unilateral authority, may wish to avoid setting a precedent that might suggest that they need authorization, or may be concerned that an affirmative failure to get permission will be more politically (and perhaps legally) costly than the mere absence of permission. See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 304-07 (2010) (making an argument along the latter lines with regard to the war powers in U.S. domestic law). On the international front, in 2003 the Bush Administration withdrew a proposed Security Council resolution that would have authorized the use of force against Iraq after it became apparent that one or more permanent members would likely veto any authorization. See Raymond W. Copson, *Iraq War: Background and Issues Overview* 3 (Cong. Res. Serv., Apr. 22, 2003), at http://www.fas.org/man/crs/RL31715.pdf.


1980s.\textsuperscript{50} But the United States has resisted the institutional authority of the I.C.J. in this context, and the I.C.J. no longer has general compulsory jurisdiction over the United States.\textsuperscript{51}

3. \textit{Use of Practice in Legal Interpretation over Time}. — Past practice plays an important role in legal interpretation in both domestic and international law on the use of force. When unitary actors push the boundaries of their legal authority, they therefore are simultaneously creating precedents that become part of legal discourse going forward. As these precedents build up, they then have the effect of expanding the actual or perceived scope of legal authority for the unitary actors. This is true despite certain 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 \textit{Youngstown Sheet & Steel Co. v. Sawyer}.\textsuperscript{52} Frankfurter emphasized the need to look at the “gloss which life has written upon” the words of the Constitution, explaining that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . mak[e]s as it were such exercise of power part of the structure of our government.”\textsuperscript{53} 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.\textsuperscript{54} Moreover, the executive branch is more likely than the judiciary to credit historical practice, not only favoring it as a tool of construction but also often setting a low bar in finding congressional acquiescence and construing past practices aggressively in its own favor.\textsuperscript{55}

\textsuperscript{50} See Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), 1986 I.C.J. REP. 14 (June 27).
\textsuperscript{52} 343 U.S. 579 (1952).
\textsuperscript{53} \textit{Id.} at 611 (Frankfurter, J., concurring). For recent endorsements by the Supreme Court of the relevance of historical practice to discerning the separation of powers, see NLRB v. Noel Canning, 134 S. Ct. 2550, 2559 (2014), and Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015).
\textsuperscript{55} See, e.g., Curtis A Bradley, \textit{Treaty Termination and Historical Gloss}, 92 TEX. L. REV. 773, 829 (2014); Jean Galbraith, \textit{International Law and the Domestic Separation of
In the use of force context, the executive branch relies mainly on past practice to bridge the tensions between the principle of fidelity to law on the one hand and the existing disparities between text and practice on the other hand. OLC uses “historical precedents” as “the framework” for its constitutional analysis on the use of force.\(^{56}\) Although practice does not always favor executive power (for example, the congressional authorization for the first Gulf War can be seen as a marker in favor of the need for such authorizations for major interventions), its overall direction tends to do so. The executive branch also emphasizes past practice when engaging in statutory interpretation on the use of force. Thus in making his argument that U.S. participation in the 2011 NATO bombings carried out in Libya did not constitute “hostilities” for purposes of the War Powers Resolution, State Department Legal Adviser Harold Koh emphasized that “successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law’s meaning over time.”\(^{57}\) This emphasis on historical practice both helps provide a domestic law foundation for presidential actions relating to war and, over time, tends to further the development of the law in favor of stronger executive power.

Past practice also matters for international law, both with regard to treaty interpretation and customary international law. As to treaty interpretation, the Vienna Convention on the Law of Treaties provides that one factor to take into account is the subsequent practice of parties to the treaty.\(^{58}\) As to customary international law, it is measured by the presence of a “general practice accepted as law.”\(^{59}\) Unlike in the domestic law context, where the executive branch is the primary shaper of past practice,
the United States is merely one of many nations involved in creating practice. Because of this, its overall influence on practice—and thus on international law—is much more limited.

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

C. Interactions between the Two Levels of Law

So far, we have focused on showing parallels between the domestic and the international contexts regarding the law on the use of force. In what follows, we go a step further and suggest that, for the United States, these two contexts are deeply connected. More specifically, we suggest a two-level dynamic in which presidents draw on legal support in one sphere, international or domestic, to help compensate—at least rhetorically—for weak legal support in the other. In this section, we identify ways in which

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this dynamic works and explain how, given the role of practice in legal interpretation, it can influence doctrine over time.

Our concept of a two-level dynamic is somewhat analogous to the “two-level game” posited by Robert Putnam in the context of international negotiations.\(^6^2\) Under Putnam’s model, for the President (like other heads of state), negotiations are a two-level game in which he must both achieve an international agreement and persuade domestic ratifiers and implementers to accept it.\(^6^3\) Crucially, the constraints faced by participants at one level, and the strategies they pursue, can affect what happens at the other level. Thus, international negotiators may factor domestic constraints into their decisions, or domestic public opinion may shift in response to the international negotiations.\(^6^4\) While the specifics of Putnam’s model do not directly translate to the war powers context, which will not necessarily involve efforts to achieve international agreements, the idea of interactions between the two levels helps explain political calculations in this context. For example, Jide Nzelibe draws on this insight in suggesting that a presidential decision to seek congressional authorization for the use of force sends “a costly signal to the foreign adversary about the United States’ resolve to prosecute the conflict.”\(^6^5\)

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

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\(^6^3\) Id. at 437-38.

\(^6^4\) Id. at 455.

levels.

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

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

2. The Transfusion of Domestic Interpretive Principles into U.S. Understandings of International Law. — Second, the close parallels between international and domestic law on the use of force may encourage executive branch actors to draw on interpretive principles from one level in interpreting the other level. In the domestic context, for example, executive branch lawyers are accustomed to emphasizing U.S. past practice, to interpreting statutes energetically, and to deeming use of force questions inappropriate for courts. It may be natural for these lawyers to apply these same principles to the international legal context, whether as a matter of

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67 U.S. CONST. art. II, § 3.
ingrained habit or of conscious belief in their normative appropriateness.

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

3. Legal Strength at One Level as a Political Factor Relevant to Decision-making at the Other Level. — Third, the strength of legal justification at one level could potentially affect the President’s incentives to interpret law at the other level expansively. The reason stems from the connection between legality and political acceptance. The more overall international and domestic political pressure there is against a use of force, the less likely a President is to undertake it. Strong legality at one level reduces political pressure at that level: at a minimum, opponents cannot include convincing legal objections among their political ones, and at a maximum—where there is a congressional authorization or a Security Council Resolution—this legality also embodies political support. Accordingly, strong legality at one level has the potential to increase the President’s willingness to take risks at the other level, including through controversial legal interpretations. Conversely, where the President is on relatively weak grounds in both international and domestic law—as

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68 See, e.g., Abram Chayes, A Common Lawyer Looks at International Law, 78 HARV. L. REV. 1396, 1403-04, 1410-1411 (1965) (suggesting that the separation of powers on the use of force in the domestic context is a helpful model for thinking about the international legal context); Michael P. Scharf & Paul R. Williams, Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser 82-85 (2010) (quoting former State Department Legal Adviser Abraham Sofaer as influenced by the Chayes article and as paying particular attention to U.S. past practice).

69 See James Crawford, The Course of International Law para. 185 (2013) (observing that international lawyers “are commonly municipal lawyers first, and bring to the international sphere a collection of presumptions and perceptions as part of our training”).

70 In addition, international legality may increase political support domestically, in line with Putnam’s observation that “messages from abroad can change minds [and] move the undecided.” Putnam, supra note 62, at 455.
President Obama likely would have been in 2013 if he had used force against the Assad regime in Syria in response to its use of chemical weapons\textsuperscript{71}—he may be less willing to take action in reliance on controversial legal positions. Because executive branch actors are unlikely to be explicit about these doctrinal trade-offs, evidence of this mechanism will mostly be circumstantial. Some of the executive branch’s argumentation and decisionmaking concerning the use of force, however, has been at least suggestive of this phenomenon.

* * *

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

II. PROTECTING AMERICANS ABROAD

Early in U.S. history, there appears to have been a general assumption that, as Commander in Chief, the President had some unilateral power to use force to protect Americans abroad, but there was significant uncertainty about how far the President could go. In particular, there was uncertainty about whether and to what extent the President could use force to carry out reprisals or to obtain redress after an attack on U.S. citizens or their property. Presidents who asserted broad constitutional authority in the

nineteenth and early twentieth centuries used international law both as a formal influence on domestic doctrine and as political justification. Following the adoption of the U.N. Charter, the two-level dynamic came to work in the other direction, as presidents interpreted Article 51 to broadly authorize uses of force by the United States in defense of American citizens abroad.

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

After the United States developed a navy in the early nineteenth century, it was increasingly used to protect Americans and their property abroad.\(^{72}\) In justifying the power of the executive branch to undertake these actions, presidents frequently emphasized principles of international law—both as political factors justifying their actions and as formal influences on domestic doctrine. In particular, they cited the right that nations had under international law to defend their citizens, and in some situations they also drew upon the distinction in international law between nations and non-state actors.

It became increasingly common, for example, for the U.S. navy to take military action in response to attacks on U.S. merchant vessels. As an illustration, in 1831, President Andrew Jackson directed the USS Potomac to seek restitution in Sumatra after villagers in Quallah Battoo had attacked a U.S. merchant vessel engaged in the pepper trade and killed several members of its crew. After arriving in early 1832, the U.S. forces destroyed the village and killed 150 Sumatrans.\(^{73}\) Jackson suggested that the use of force had been proper as a “chastisement” because the villagers were “a band of pirates” rather than “members of a regular government, capable of maintaining the usual relations with foreign nations.”\(^{74}\) Although some newspapers questioned Jackson’s authority to take such action without congressional authorization, Congress itself did not raise constitutional

\(^{72}\) In an early instance, Thomas Jefferson sent several ships to the Mediterranean to defend U.S. commercial ships from attacks by the Barbary Pirates. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 208-16 (1976); Montgomery N. Kosma, Our First Real War, 2 GREEN BAG 2d 169 (1999). For incidents in the first half of the nineteenth century involving attacks by non-state actors, see infra Part III.A.


objections.\textsuperscript{75}

A much-publicized exercise of a power to protect American citizens occurred in 1853.\textsuperscript{76} Martin Koszta, a Hungarian by birth, had been active in efforts to detach Hungary from the Austro-Hungarian empire. After emigrating to the United States and initiating a process of naturalization to become a U.S. citizen, he made a business trip to Turkey. While there, he was apprehended by the Austrian military and placed in chains on an Austrian ship docked in Turkey. A U.S. navy captain stationed in Turkey then threatened to open fire on the Austrians if Koszta was not released. After the matter was resolved without force, the Austrians filed a protest with the U.S. government, claiming that the captain had violated international law. Specifically, the Austrians complained that the threat was “an act of war” and that only a sovereign, not a mere commander, could initiate a war under international law. They cited the Declare War Clause of the Constitution in support of this argument, suggesting that the sovereign for the United States in this matter was Congress.\textsuperscript{77}

In response, the Secretary of State defended the actions of the navy captain. He “yield[ed] a ready assent to that part of [the Austrian] note relative to the war-making power,” but then relied on international law to claim that Austria rather than the United States had been the aggressor.\textsuperscript{78} Because Koszta was in the process of becoming a U.S. citizen, the United States “had, therefore, the right, if they chose to exercise it, to extend their protection to him” and “that from international law . . . Austria could derive no authority to obstruct or interfere with the United States in the exercise of this right, in effecting the liberation of Koszta.”\textsuperscript{79} The Secretary of State thus used international legal principles regarding the defense of citizens to justify the captain’s actions as appropriate self-defense rather than as aggression that would require congressional authorization.\textsuperscript{80}

Shortly after the Koszta affair, there was a more controversial episode of overseas military action ostensibly aimed at protecting U.S. citizens. In 1854, a U.S. warship bombarded and burned the port city of Greytown,

\begin{footnotes}
\footnote{\textsuperscript{75} See SCHLESINGER, \textit{supra} note 1, at 53.}
\footnote{\textsuperscript{76} The facts discussed here are detailed in the \textsc{Correspondence between the Secretary of State and the Charge D’Affaires of Austria Relative to the Case of Martin Koszta} (1853).
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\footnote{\textsuperscript{77} Letter from Chevalier Hulsemann to William L. Marcy (Aug. 29, 1853), \textit{in id.} at 6-7.
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\footnote{\textsuperscript{78} Letter from William L. Marcy to Chevalier Hulsemann (Sept. 26, 1853), \textit{in id.} at 24-25.
}
\footnote{\textsuperscript{79} \textit{Id.} at 8, 27.
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\footnote{\textsuperscript{80} The captain’s actions were highly popular in the United States, and Congress awarded him a medal. \textit{See} 10 Stat. 594 (Aug. 4, 1854).
}
\end{footnotes}
Nicaragua (now San Juan del Norte), following damage to some American property and an injury to a U.S. official by a bottle thrown by a mob.\footnote{For a general discussion of the Greytown bombardment incident, see 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 1168, at 346-54 (1906).} Especially because the Greytown incident involved reprisals rather than direct measures of self-defense or rescue, it prompted constitutional concerns in Congress.\footnote{See, e.g., CONG. GLOBE, 33d Cong., 2d Sess., app. 71 (Jan. 11, 1855) (Rep. Cox) (arguing that the action in Greytown was inconsistent with “notions of strict construction of the Constitution”); CONG. GLOBE, 33d Cong., 2d Sess. 951 (Feb. 26, 1855) (Rep. Peckham) (arguing that the action was “contrary to the Constitution,” which was designed “carefully to avoid conferring upon the Executive, under any circumstances, without the consent of Congress, power to involve the country in war”).}

In justifying his actions to Congress, President Pierce emphasized their appropriateness under international law. He likened Greytown to “a piratical resort of outlaws or a camp of savages” rather than to a nation and argued that the U.S. action was consistent with international practice.\footnote{Franklin Pierce, Second Annual Message (Dec. 4, 1854), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 273, 282, 280 (James D. Richardson ed. 1897). Pierce’s successor, President Buchanan, had a narrower view of his war powers, stating that the President “can not legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks.” James Buchanan, Second Annual Message (Dec. 6, 1858), in 5 A COMPILATION, supra, at 516.} International themes similarly were picked up in a later judicial decision relating to these events, \textit{Durand v. Hollins}, which upheld the constitutionality of the bombardment in a suit brought against the navy captain by a U.S. citizen whose property had been destroyed during the operation.\footnote{8 Fed. Cas. 111 (C.C.S.D.N.Y. 1860) (Case No. 4,186).} The court noted the core “object and duty” of governments to protect their citizens “whether at home or abroad” and concluded that the President is the appropriate actor within the United States to whom “citizens abroad must look for protection of person and property.”\footnote{Id. at 112.} How the President exercises his discretion in protecting citizens, concluded the court, is a political question not subject to review by the judiciary.\footnote{See id.}

The use of international law as a formal source of support for the President’s constitutional powers received doctrinal support from the Supreme Court in several cases near the close of the nineteenth century. Dicta in \textit{In re Neagle} suggested that the President’s constitutional responsibility to “take Care that the Laws be faithfully executed”\footnote{U.S. CONST. art. II, § 3.} is not “limited to the enforcement of acts of congress or of treaties of the United States according to their express terms,” but rather includes “the rights,
duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution.” 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.” In addition, The Paquete Habana emphasized that international law is “part of our law,” a proposition that was invoked in support of the claim that the President’s authority under the Take Care Clause included the authority to enforce international law, potentially through the use of military force.

Around this time, presidents began asserting particularly expansive conceptions of their authority to protect U.S. citizens abroad. During the Boxer Rebellion in China in 1900, President McKinley sent over 5,000 troops to China as part of a multinational force without first seeking congressional authorization, explaining that the U.S. action “involved no war against the Chinese nation” and was limited to “securing wherever possible the safety of American life and property in China.” His Secretary of War at the time, Elihu Root, would later cite the Boxer Rebellion as a leading example in support of the proposition that “in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens.”

Also during this period, the executive branch, first under Roosevelt and then under William Howard Taft, began undertaking various “international police actions” ostensibly designed to restore order in Latin American

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88 135 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).

89 135 U.S. at 64.

90 175 U.S. 677, 700 (1900).


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

countries during the early twentieth century. In an essay published after he left the presidency, Taft argued that these actions were justified constitutionally because of the inability of the local governments to protect U.S. citizens under international law. As he explained, while using force to protect American citizens was potentially an “act of war [as a matter of constitutional law] if committed in a country like England or Germany or France,” this was not the case in countries where “law and order are not maintained, as in some Central and South American countries.”

The executive branch’s formal reliance on international law to justify the President’s constitutional power to defend citizens is evident in a 1912 State Department legal memorandum titled 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.” The memorandum proved influential and subsequent editions were prepared in 1929 and 1934.

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96 See J. Reuben Clark, Solicitor for the Department of State, Right to Protect Citizens in Foreign Countries by Landing Forces 38-40 (1912).
97 Id. at 38-40.
98 Id. at 44-48.
99 Id. at 45-47.
100 Id. at 51. See also Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1776 (1968) (“Since international law as well as statutes and treaties had long been considered part of the ‘laws’ to which the ‘faithfully executed’ clause refers, any interests evidenced by those laws became a potential subject for presidential protection by force.”).
In the years after the publication of this memorandum, the executive branch relied less on international law as a formal basis for its constitutional authority. Instead, it relied on past practices without acknowledging the role that international law had played in justifying these practices. This phenomenon is evident, for example, in an oft-cited memorandum that Robert Jackson prepared in 1941 when serving as Attorney General. In the memorandum, Jackson analyzed whether the President could, prior to the United States’ entry in World War II, constitutionally direct the U.S. air force to instruct British pilots in combat.\footnote{Training of British Flying Students in the United States, 40 Op. Atty. Gen. 58 (1941).} In concluding that he could, Jackson made a number of general observations about the President’s war powers, including the observation that “the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.”\footnote{Id. at 62 (emphasis added).} Jackson then cited to the 1934 edition of the 1912 State Department memorandum, but made no mention of how this memorandum relied on international law for its constitutional reasoning.\footnote{See Training of British Flying Students, supra note 101, at 62.} With the President’s domestic constitutional authority separated from its international legal roots, this constitutional authority would more easily survive seismic shifts in international law—such as would come with the U.N. Charter.

B. After the U.N. Charter: The United States Comes To Interpret Article 51 in Ways that Track the President’s Constitutional Authority

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

As with the growth of the President’s domestic war powers, the United States developed its position that the U.N. Charter authorizes the defense of citizens abroad through initial practices that later would be read broadly. The first of these was “Operation Blue Bat” in 1958, when President
Eisenhower dispatched 14,000 troops to Lebanon. For its international legal justification, the executive branch relied mainly on the fact that it had been invited by the pro-Western Lebanese government to address an internal insurrection that was being exacerbated by influence from Egypt and Syria, and, indirectly, by the Soviets. 104 Although not specifically endorsed in the U.N. Charter, consent has come to be recognized as an appropriate basis under international law for intervention “if there has been outside subversion against a government.” 105 Eisenhower also observed, however, that a “mission of these forces is to protect American lives—there are about 2500 Americans in Lebanon.” 106 Notably, Eisenhower had statutory authorization for the action, since Congress had the previous year enacted a joint resolution stating in relation to the Middle East that “if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism.” 107 In terms of the two-level dynamic, Eisenhower thus operated from a position of maximum strength under domestic law at the time that he invoked consent and hinted at the defense of citizens as justifications for intervention under international law.

In the mid-1960s, President Johnson dispatched troops to the Dominican Republic after substantial fighting broke out between the military-led government and rebel forces. Johnson explained to the public that he had acted “to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country.” 108 The United States also sent a letter to the U.N. Security Council explaining that

104 See, e.g., LILICH ON THE FORCIBLE PROTECTION OF NATIONALS ABROAD 47 (Thomas C. Wingfield & James E. Meyen eds., 2002).
105 GRAY, supra note 33, at 81; see also Quincy Wright, United States Intervention in the Lebanon, 53 AM. J. INT’L L. 112, 119-125 (1959) (concluding that intervention based on invitation is lawful to assist a government facing insurrection that is “primarily due to ‘subversive intervention’ from outside” although doubting this standard was met with regard to Lebanon).
106 Dwight D. Eisenhower, Statement by the President (July 15, 1958), available at http://www.presidency.ucsb.edu/ws/?pid=11133. For skepticism, in light of this operation, about whether the use of force to protect nationals abroad is consistent with Article 51 of the U.N. Charter, see Wright, supra note 105, at 117 (noting that, although “[i]t is difficult to bring these extensions within the meaning of Article 51 of the Charter”).
the operation was designed “to protect American citizens still there and escort them to safety from the country.”109 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.110 Moreover, the United States did not invoke Article 51; rather, to the extent that it offered any justification under international law, it emphasized regional security issues.111 Because of the accretion of practice, presidential action to protect U.S. citizens abroad was viewed as having a strong legal footing, and the executive branch appears as a result to have been more willing to push the boundaries of international law.

The most significant military conflict during Johnson’s administration—the Vietnam War (discussed below in Part IV.A)—did not involve the protection of American citizens. In the wake of that war, Congress enacted the War Powers Resolution, which contains not only a provision requiring the president to withdraw U.S. troops from hostilities within sixty days in the absence of congressional authorization, but also a provision that could be thought to limit the President’s authority under domestic law to initiate the use of force in protection of citizens abroad. Section 2(c) of the Resolution states as a matter of “purpose and policy” that the President has the constitutional authority to introduce U.S. armed forces into hostilities “only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”112 Ironically, the omission of a presidential power to use force to protect American citizens had the effect of undermining Section 2(c) rather than of weakening the legality of this presidential power. As Thomas Franck put it, “[t]he enumeration [in Section 2(c)] could not be taken to be binding because it is

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111 See Leonard C. Meeker, Legal Adviser, The Dominican Situation in the Perspective of International Law, 53 DEP’T STATE. BULL. 60, 64-65 (1965) (urging that “international law [grows] out of the life of nations” and not squarely defending the legality of the intervention under existing international law). Consulted confidentially about whether the operation was legal under international law, Abe Fortas expressed doubts that it was legal and urged that moral rather than legal arguments be made. Memorandum from Abe Fortas to McGeorge Bundy 1 (May 6, 1965) (Johnson Library Dominican Republic Folder Vol. 3, Memos and Misc. 4/28/65-5/7/65) (on file with the authors).
112 50 U.S.C. § 1541(c). Unsurprisingly, “[t]he Executive Branch has taken the position from the very beginning that § 2(c) of the [War Powers Resolution] does not constitute a legally binding definition of Presidential authority to deploy our armed forces.” Overview of the War Powers Resolution, 8 OP. OFF. LEG, COUNSEL 271, 274 (1984).
plainly not exhaustive. Gone is reference to presidential power to rescue citizens endangered abroad."113 In other words, the President’s rescue authority had become sufficiently settled in domestic practice that Congress’s failure to mention it was viewed as confirmation that Section 2(c) could not be treated as a reliable statement of constitutional law.

At the same time that the president’s domestic power to use force in defense of nationals abroad was recognized as too strong to be dislodged, the United States began expressly asserting the existence of a similar right under the U.N. Charter. For example, in 1975, President Ford directed military operations to recover the U.S. container ship Mayaguez after it had been seized by Cambodian forces. In a letter to the U.N. Security Council, the United States invoked its right of self-defense under Article 51 of the U.N. Charter.114 The operation was popular domestically and generated only muted criticism abroad.115 Even more prominently, after U.S. embassy personnel were taken hostage in Iran, President Carter authorized a military rescue effort, which, because of mechanical difficulties, had to be aborted while in progress. Carter explained to Congress that, “[i]n carrying out this operation, the United States was acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to help them.”116 The United States also sent a letter to the U.N. Security Council explaining that the operation was initiated pursuant to the United States’ right of self-defense under Article 51 of the U.N. Charter “with the aim of extricating American nationals who

113 Thomas M. Franck, After the Fall. The New Procedural Framework for Congressional Control Over the War Power, 71 AM. J. INT’L L. 605, 613 (1977); see also, e.g., ELY, supra note 16, at 117.
115 Philip Shabecoff, Ford Is Backed; Senate Unit Endorses His Right to Order Military Action, N.Y. TIMES, at A1 (May 15, 1975) (describing how the Senate Foreign Relations Committee unanimously “support[ed] the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men”); see also War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, 1975: Hearings Before Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Int'l Relations, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Hearings] (including testimony by the Legal Adviser of the State Department regarding the President’s constitutional authority to use force to protect U.S. citizens abroad).
116 Message to Congress of April 26, 1980, in 80 DEPT. STATE BULL. 8 (June 1980). OLC had earlier provided a legal opinion concluding that the President had domestic legal authority to use force to rescue the hostages. Memorandum Opinion for the Attorney General, Presidential Powers Relating to the Situation in Iran, 4a OP. OFF. LEGAL COUNSEL 115, 121 (Nov. 7, 1979).
have been and remain the victims of the Iranian armed attack on our Embassy.”

International reactions to this argument were mixed.

The administrations of President Reagan and President George H.W. Bush engaged in a number of military actions ostensibly related to the protection of American citizens. These included the 1983 invasion of Grenada, air strikes against Libya in 1986, and the 1989 invasion of Panama. The State Department’s Legal Adviser, Abraham Sofaer, subsequently explained that, although “[s]ome international lawyers argue that self-defense may be exercised only in response to an attack upon the territory of the State taking such action,” “[t]he United States rejects this notion” and “believes it has the right to defend its nationals from attacks, no matter where such attacks are launched, especially if they are launched with the specific intent to harass its nationals.”

These actions all attracted significant legal and political controversy internationally, especially because the air strikes in Libya constituted what were in essence reprisals rather than rescues and the interventions in Grenada and Panama went far beyond the defense of citizens to encompass regime change. Because of its institutional design, however, the Security Council did not condemn these actions—for example, a resolution declaring the Grenada intervention a violation of international law failed after receiving eleven favorable votes, three abstentions, and one veto (by the United States). Although there were condemnations of the actions in the U.N. General Assembly, the Assembly, unlike the Council, lacks the authority to issue binding pronouncements.

In essence, although executive branch lawyers did not put it in these terms, the United States was coming to understand the U.N. Charter regime governing on the use of force in ways that closely resembled the protective power asserted under domestic law by presidents in the late nineteenth and early twentieth century. Substantively, the United States was expanding the scope of its claims to situations that looked like reprisals (as presidents had

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119 Gray, supra note 33, at 157-58, 196.
120 1983 U.N.Y.B. 211. Eleven members of Congress brought suit seeking to enjoin the Grenada operation, but the suit was dismissed on the ground that the plaintiffs should be required to pursue institutional rather than judicial remedies. See Conyers v. Reagan, 578 F. Supp. 324, 327 (D.D.C. 1984), dismissed as moot, Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).
earlier done in incidents like Greytown) and encompassed regime change (as with some police actions in Latin America in the early twentieth century). As in U.S. domestic law, executive branch lawyers emphasized past U.S. practice in justifying their choices and read these practices broadly.\textsuperscript{122} Taken together, these factors suggest that executive branch lawyers were transfusing domestic legal principles into the international legal context.

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Overall, 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 then cited as its own source of authority, even after international law became less supportive with the creation of the U.N. Charter. In turn, presidents eventually came to read Article 51 of the Charter to authorize broad uses of force for the defense of citizens abroad, with executive branch lawyers approaching this issue in ways that paralleled the domestic legal framework. This is not to say that 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.\textsuperscript{123} Nevertheless, U.S. practice (along with the practice of certain other nations) has helped to make it plausible that international law permits some use of force to protect nationals abroad.\textsuperscript{124}

\textsuperscript{122} \textit{E.g.}, Abraham D. Sofaer, \textit{International Law and the Use of Force}, 82 PROC. AM. SOC’Y INT’L L. 420, 423 (1988) (suggesting that past U.S. practices in Lebanon, the Dominican Republic, and the seizure of the Mayaguez supported a “practical but principled approach” which the Reagan Administration was similarly applying regarding Grenada and Libya).

\textsuperscript{123} \textit{See generally} DINSTEIN, supra note 27, at 217-19, 255-59 (2011); \textit{GRAY, supra} note 33, at 126-29; \textit{Tom Ruys, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER} 213-49 (2010).

\textsuperscript{124} \textit{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”); \textit{Franck, supra} note 121, at 77 (suggesting that the international response to the practice of the United States and some other nations “manifest[s] a situational ethic rather than a doctrinaire consistency either prohibiting or permitting all such actions”); \textit{Kristin E. Eichensehr, Note, Defending Nationals Abroad: Assessing the Lawfulness of Forceful Hostage Rescues}, 48 VA. J. INT’L L. 451, 460 (2008) (noting that “powerful states,
III. SELF-DEFENSE AGAINST NON-STATE ACTORS

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

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

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

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

including the United States, the United Kingdom, Israel, France, and Belgium have consistently asserted that the defense of nationals remains an acceptable justification for the use of force, and they have sometimes acted on this belief”.

126 Message of President Monroe to Congress of Jan. 13, 1818, in 2 A Compilation, supra note 74, at 24; see also Message of President Monroe to Congress, March 25, 1818, in 2 A Compilation, supra, at 31 (noting Spain’s “utter inability”).
offenders were private actors rather than states. When Jackson went beyond his instructions and captured Spanish forts, Monroe chastised him on the ground that, while pursuit of the Seminoles was the United States’ “right by the law of nations,” an attack on the Spanish posts “would authorize war, to which, by the principles of our Constitution, the Executive is incompetent.”127

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. Indeed, members of Congress also seemed to believe that the special status of pirates under international law supported presidential power in this regard. When President Monroe encouraged congressional legislation authorizing hot pursuit of pirates onto the territory of foreign sovereigns in the Caribbean,128 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.”129 Given these signs of acquiescence, later presidents would accordingly find it helpful to justify uses of force abroad by making analogies to piracy, including uses of forces for the asserted defense of citizens. For example, as discussed in Part II, President Jackson drew such an analogy to justify the use of force in Sumatra, and President Pierce did so.

127 Letter from James Monroe to Andrew Jackson (July 19, 1818), in VI THE WRITINGS OF JAMES MONROE 55-56 (Stanislaus Murray Hamilton, ed. 1902); see also Second Annual Message of President Monroe, in 2 A COMPILATION, supra note 74, at 43 (stating with regard to U.S. relations with Spain that “the power of the Executive is deemed incompetent [to change them]; it is vested in Congress only”). For an account of the constitutional debate in Congress triggered by Jackson’s actions, see David P. Currie, Rumors of War: Presidential and Congressional War Powers, 1809-1829, 67 U. CHI. L. REV. 1, at 13-16 (2000). Later in the nineteenth century, the contours of the right to pursue a non-state actor onto the territory of a more able state would be taken up by Daniel Webster and Lord Ashburton in their famous exchange of notes over the Caroline incident, in which British forces crossed into the United States in hot pursuit of Americans who had been running arms to Canadian rebels. See R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT’L L. 82, 92 (1939).

128 Eighth Annual Message of President Monroe, Dec. 7, 1824, in 2 A COMPILATION, supra note 74, at 258.

129 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), in 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 188 (Asbury Dickins & John W. Forney, eds., 1860) (noting, however, that unless Spain “wanted either the power or the will to do her duty,” it would be inappropriate to conduct searches outside the context of pursuit).
to justify the bombardment of Greytown.\textsuperscript{130}

Uses of force by the United States in the early twentieth century also often involved the defense of citizens against non-state actors, including in the Boxer Rebellion and some operations in Latin America.\textsuperscript{131} One particularly famous incident occurred when President Wilson ordered U.S. forces into Mexico in 1916 to kill or capture revolutionary Pancho Villa following his U.S. raids. Because Wilson initially obtained the consent of Mexico (although this was later revoked), he was on strong grounds under international law when the raid began, and he did not pursue congressional approval for his actions.\textsuperscript{132} With these precedents and the prior ones, presidents came to conclude that they had constitutional authority to use force for self-defense (broadly defined) against non-state actors operating on the territory of other states, at least where these other states either permitted the intervention or were not capable of curbing the offenders.

\textit{B. After the U.N. Charter:}

\textit{The United States Interprets International Law Broadly at Times of Strong Domestic Legal Authority}

The restrictions on the use of force in the U.N. Charter potentially limited the legality of uses of force against non-state actors operating on the territory of other states as a matter of international law. 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 as a basis for responding with military force.\textsuperscript{133} Under this view, a state could only use force in self-

\textsuperscript{130} See supra text accompanying notes 74, 83; see also John Bassett Moore, 60 \textit{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”). 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, \textit{supra} note 15, at 1632.

\textsuperscript{131} See \textit{supra} notes 91-95 and accompanying text.

\textsuperscript{132} See \textit{U.S. Dep’t of State, Papers Relating to the Foreign Relations of the United States} 486-88 (1916). Wilson’s actions had strong support in Congress; the Senate unanimously passed a resolution approving of the pursuit of Pancho Villa and emphasizing “that such military expedition shall not be permitted to encroach in any degree upon the sovereignty of Mexico.” 53 Cong. Rec. 4274 (Mar. 17, 1916).

\textsuperscript{133} For detailed treatment, see \textit{Ruys, supra} note 123, at 368-433. As Ruys notes, \textit{id.} at 370, in recommending that the Senate give its advice and consent to the NATO treaty, the
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. As we discuss in this section, however, the United States came to embrace a broader meaning of “armed attack” in ways that arguably triggered a shift in international custom. Consistent with the two-level dynamic that we recounted in Part I, the executive branch developed this broader international legal interpretation in uses of force that were supported by strong domestic legal authority.

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

Senate Committee on Foreign Relations had observed that the words “armed attack” in the Charter and the NATO treaty “clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another.” The International Court of Justice signaled its support for this understanding in Nicaragua v. United States. See Case Concerning Paramilitary and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits), 1986 I.C.J. REP. 14, 103-105, para. 195 (June 27). In recent years, the I.C.J. has also appeared to embrace this position. See 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 that these decisions should be more narrowly construed).

134 George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, 86 DEP’T STATE BULL. 15, 17 (Mar. 1986). In articulating this position, Secretary of State Shultz emphasized that “The U.N. Charter is not a suicide pact,” presumably a deliberate borrowing of the famous parallel phrase with respect to the Constitution. See id.

135 See supra note 116 and accompanying text.


137 Ruys, supra note 123, at 427.
The question of self-defense against non-state actors on foreign soil sprang to the forefront after the terrorist attack of September 11. On September 12, 2001, the U.N. Security Council passed Resolution 1368 condemning the attack, “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.” Two days later, the House and the Senate approved the 2001 AUMF, which authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations and persons.” With the 2001 AUMF, President Bush was on very strong ground as a matter of U.S. domestic law in acting against Al Qaeda and the Taliban regime in Afghanistan.

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

States were generally supportive of the U.S. action. Accordingly,

140 See 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 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”).
141 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 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).
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.\textsuperscript{142} The degree of this shift is of course debated. The 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.\textsuperscript{143} (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.\textsuperscript{144})

Having gained broader acceptance for its position after September 11, at a time when its authority under domestic law was at a maximum, the executive branch is now using the “unwilling or unable” standard in situations that have considerably less secure domestic legal footing. A currently ongoing example is the U.S. campaign in Syria against ISIL, which started in 2014. In justifying these hostilities, the executive branch has been on fairly weak authority under domestic law. It has relied on some indeterminate combination of the President’s constitutional authority and expansive readings of the 2001 AUMF and of the 2002 AUMF which authorized the original intervention against Saddam Hussein’s regime—sources of authority that are each in some way problematic.\textsuperscript{145}

\begin{footnotes}
\item[142] For a discussion of the various positions, see RUYS, \textit{supra} note 123, at 439-443; see also Monika Hakimi, \textit{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 did so, for example, against Hezbollah in Lebanon in 2006. See \textit{id.} at 9; see also \textit{id.} at 11-14 (discussing other possible examples). Nonetheless, as the sources cited here indicate, the response to September 11 is taken as the most important indication of a possible shift in custom.

\item[143] Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012), \textit{available at} http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law. Shortly before the military operation in Pakistan in 2011 that resulted in the killing of Osama bin Laden, lawyers within the executive branch apparently invoked the “unwilling or unable” concept in concluding that such an operation would be lawful. See Charlie Savage, \textit{How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden}, N.Y. TIMES (Oct. 28, 2015).

\item[144] See \textit{supra} note 129 and accompanying text; see also \textit{supra} Part II.A. For an analysis rooting the “unwilling or unable” standard in the law of neutrality, see Ashley Deeks, “\textit{Unwilling or Unable”: Towards a Normative Framework for Extraterritorial Self-Defense}, 52 VA. J. INT’L L. 483, 499-503 (2012).

\item[145] See Letter from President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 23, 2014), \textit{available at} http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq. If President Obama was acting solely under his constitutional
international law, the United States relied on the “unwilling or unable” standard in conjunction with the collective self-defense of Iraq, as well as asserted individual self-defense.\textsuperscript{146} 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.\textsuperscript{147} In other words, once the United States had acquired increased state acquiescence for this standard after September 11 where it had strong domestic legal grounding, it began to use this standard in a situation in which the President’s domestic legal grounding was much weaker. This is yet another example of how presidential decision-making on the use of force operates at two levels and may have interactive effects. Indeed, the Obama Administration believed it important to put in the preamble of its proposed congressional authorization for the use of military force against ISIL a statement that “the United States has taken military action against ISIL in accordance with its inherent rights of individual and collective self-defense.”\textsuperscript{148} In addition to the campaign against ISIL, the Obama Administration is also signaling its intent to use the “unwilling or unable” authority as Commander in Chief, then his actions would not be consistent with the War Powers Resolution’s requirement that the President withdraw from hostilities within sixty days if there is no specific statutory authorization. For the difficulties inherent in applying the two AUMFs, see supra notes 25-26 and accompanying text. In addition, news reports state that the Obama Administration has now authorized (although not conducted) limited uses of force against the Assad regime in Syria. See supra note 8 and accompanying text. If such uses of force were to occur, they would raise additional issues of legality under domestic and international law.


\textsuperscript{147} See Hakimi, supra note 142, at 19-20. For a concern that the “unwilling or unable” standard for the use of force invoked by the United States may be abused by other states, see Ryan Goodman, \textit{State Practice and the Use of Force: Iran Invokes the “Unwilling or Unable” Test Against its Neighbors}, \textit{JUST SECURITY} (Feb. 26, 2014), at https://www.justsecurity.org/7588/state-practice-force-iran-invokes-unwilling-unable-test-neighbors/.

standard in cyber-conflicts in the future.\textsuperscript{149}

As the executive branch is further embracing its “unwilling or unable” standard for international law, it is simultaneously using this understanding to inform its constitutional and statutory interpretation with regard to the targeted killing of U.S. citizens. For example, a Department of Justice White Paper that became public in 2013 evaluated the circumstances under which the executive branch could lawfully target a U.S. citizen who was a high-level operational leader of Al Qaeda or associated forces.\textsuperscript{150} In describing how such targeting would be consistent with the due process clause of the constitution, certain statutory provisions, and an executive order prohibiting assassinations, the White Paper emphasized that this targeting would be consistent with international law. As part of this analysis, the White Paper twice invoked the “unwilling or unable” standard in claiming that targeting “would be consistent with international legal principles of sovereignty and neutrality.”\textsuperscript{151} Once again, international and domestic legal argumentation are intertwined.

* * *

In sum, there is considerable interplay between international and domestic law regarding uses of force against non-state actors. Starting in the nineteenth century, presidents drew upon international legal concepts in asserting a domestic constitutional right to use force against non-state actors under certain conditions despite the absence of congressional authorization. Although international law changed with the U.N. Charter, presidents did not revisit the scope of their domestic constitutional authority. After September 11, and with clear congressional authorization, President Bush chose to interpret Article 51 of the U.N. Charter expansively to justify the U.S. intervention in Afghanistan rather than seeking Security Council authorization. This action led international practice to become more

\textsuperscript{149} United States Submission to the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security 4 (2014–15) (on file with authors) (arguing that “[a] State may act without consent . . . if the territorial State is unwilling or unable to stop or prevent the actual or imminent armed attack launched in or through cyberspace”).


\textsuperscript{151} White Paper, supra note 150, at 1-2, 5. 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).
favorable to such expansive readings of Article 51. Presidents have then in turn invoked these expansive readings in situations in which Congress has not clearly authorized the use of force, such as the current campaign against ISIL. The interplay between international and domestic law has thus helped the President to expand his legal authority through practice in relation to both Congress and the Security Council.

IV. COLLECTIVE AND TREATY-BASED SECURITY

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

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

Long before the establishment of the U.N. Charter, presidents weighed whether their constitutional authority to use force abroad was enhanced when they were acting to enforce a treaty right. This question had some nineteenth century salience, but became even more important in the early twentieth century, when the United States entered into treaties with several Latin American countries that granted the United States the right to use military force either to defend those countries from external threat or to preserve their domestic tranquility. In 1906, President Theodore Roosevelt relied on his Take Care Clause authority with regard to one such treaty—a 1903 treaty with Cuba—as a justification for authorizing military intervention without congressional approval. With striking candor, Roosevelt explained his position to William Howard Taft: “If the necessity arises I intend to intervene, and I should not dream of asking the permission of Congress. That treaty is the law of the land and I shall execute it. . . . I intend to establish a precedent for good by refusing to wait for a long wrangle in Congress.”152 As this letter suggests, Roosevelt not only

152 Letter from Theodore Roosevelt to William Howard Taft (Sept. 17, 1906), in 5 THE LETTERS OF THEODORE ROOSEVELT 414-15 (Elting E. Morison et al. eds., 1952). For discussion of various U.S. interventions in Latin America and the Caribbean during this
formally relied on the treaty as a source of constitutional empowerment, but also understood that this would help expand presidential power vis-à-vis Congress in the long run.  

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

In part because of Cold War tensions, the contemplated agreement with the United Nations was never concluded. The relationship between congressional war powers and the Security Council nevertheless soon became an issue after North Korean forces crossed the thirty-eighth parallel

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153 See also Gartner, supra note 94, at 501 (noting that “Roosevelt self-consciously sought to create precedents for expanded presidential power and both the expanded use of executive agreements and the deployment of armed forces without congressional approval continued after his time in office”).

154 Although the Treaty of Versailles never received the advice and consent of the Senate, during the debates a majority of the Senate voted in favor of a reservation to the treaty that disclaimed any obligation to use U.S. armed forces “unless, in any particular case, the Congress which under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States shall in the exercise of full liberty of action act or joint resolution so provide.” 59 CONG. REC. 4333 (Mar. 15, 1920) (recording a vote of 56-26).

155 See, e.g., Golove, supra note 66, at 1499-1501 (discussing how this assumption, which stems from Article 43 of the U.N. Charter, was manifested during the advice and consent process); see also United Nations Participation Act § 6, 22 U.S.C. § 287a (embedding this assumption in the implementing legislation).

156 SEN. EXEC. REP. NO. 79-8, at 9 (1945).
in late June 1950. In response to this development, the Security Council (with the Soviet Union boycotting and thus unavailable to cast a veto) recommended that UN members “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.” President Truman directed that U.S. forces be sent to Korea, an action that would eventually lead to the deployment of over 250,000 troops and tens of thousands of U.S. casualties. Although Truman briefed congressional leaders and initially had strong support in Congress, he did not seek congressional authorization. There is some indication that, as with Theodore Roosevelt, Truman’s choice reflected a desire to set a precedent favorable to presidential war powers.

Consistent with the two-level dynamic, the Security Council resolution was important to the executive branch’s defense of President Truman’s constitutional authority—both as a formal matter of doctrine and because it was politically salient to Truman’s domestic audience. The State Department provided a legal opinion on President Truman’s authority that defended his actions on several grounds, thereby leaving more paths of legal reasoning for successors to use in the future. First, the memorandum emphasized the President’s past uses of force in defense of American citizens (and, it claimed, sometimes more generally in defense of “the broad interests of American foreign policy”), but it did not discuss the connections between these past practices and international law or consider the comparatively much greater scale of the Korea venture. Second, the memorandum argued that it was appropriate to use force to support the Security Council’s resolutions because the “continued existence of the United Nations as an effective international organization is a paramount U.S. interest.” It also suggested that the U.N. Charter triggered the

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157 S.C. Res. 83 (June 27, 1950).
158 See LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 101 n. 37 (1996) (noting further that Congress did pass statutes that supported the war effort by making appropriations and expanding the draft).
159 See DEAN ACHEISON, PRESENT AT THE CREATION: MY YEARS AT THE STATE DEPARTMENT 415 (1969) (recalling that Truman did not want to “establish a precedent in derogation of presidential power to send our forces into battle”).
160 See Galbraith, supra note 55, at 1025-26 (describing the importance of the Security Council resolution to members of Congress).
161 U.S. Dep’t of State, AUTHORITY OF THE PRESIDENT TO REPEL THE ATTACK IN KOREA, 23 DEP’T STATE BULL. 173 (July 1, 1950).
162 Id. at 173-78. Notably, the memorandum omits discussion of how the protection of American citizens abroad by the President had been justified constitutionally by way of reference to international law, see supra Part II, and therefore does not consider whether the fundamental change in international law brought about by the U.N. Charter would change the constitutional landscape on this issue.
163 Id. at 177.
President’s obligations and authority under the Take Care Clause. By stripping historical practice of its context and emphasizing the Security Council’s resolution, the memorandum provided a justification for a significant expansion of the President’s constitutional authority to use force without congressional authorization.

For the rest of the Cold War, the Security Council never again authorized a use of force within a state, leaving the only lawful uses of force on the territory of a non-consenting state to be those taken in “individual or collective self-defense” pursuant to Article 51. The Senate encouraged the President to enter into collective defense regimes and then gave its advice and consent to a number of such treaties, including the treaties establishing NATO and SEATO. As a matter of international law, these treaties were clearly tied to Article 51. As a matter of constitutional law, however, neither the North Atlantic Treaty creating NATO nor the Southeast Asia Collective Defense Treaty creating SEATO were intended to substitute for a congressional authorization to use force. The treaties provided that their members were to use force in accordance with their “constitutional processes.”

While different U.S. actors had different views of the existing state of U.S. constitutional law on the use of force, they agreed that the treaties were not to change the baseline, whatever it was. The unanimous understanding set forth in the Senate Foreign Relations Committee’s report recommending advice and consent to the North Atlantic Treaty, for example, was that “Nothing in the treaty . . . increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them.”

With the Vietnam War, however, the executive branch came to blur the line between treaty commitments and constitutional powers. The SEATO treaty was invoked not just in asserting that the United States was acting in

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164 Id. at 176 (quoting Senator Austin).
165 GRAY, supra note 33, at 258.
166 In the 1948 Vandenberg Resolution, the Senate encouraged the President to “particularly pursue” various objectives “within the United Nations Charter,” including the “[p]rogressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the Charter.” S. Res. 239, 90th Cong., 2d Sess., June 11, 1948.
168 North Atlantic Treaty, supra note 167, art. 11; Southeast Asia Collective Defense Treaty, supra note 167, arts. 4(1) & 9(2).
169 S. EXEC. REP. NO. 81-8, at 14 (1949); see also id. at 19 (emphatically repeating this point); S. EXEC. REP. NO. 84-1, at 12 (1955) (recalling this language).
the collective self-defense of Vietnam for purposes of international law, but also in justifying the constitutionality of presidential actions. The State Department reasoned that “the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States,” and therefore triggered the President’s powers of constitutional self-defense. With this two-level move, the executive branch transformed a commitment intended for an international legal purpose into a source of constitutional power.

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

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

1. Initial Uses of Force. — After Congress passed the War Powers Resolution, the executive branch briefly backed away from the broad claim that the President had constitutional authority to use force to defend American interests abroad. Yet it still continued to emphasize treaty commitments. In 1975, for example, the Legal Adviser informed a

\[ \text{\footnotesize\textsuperscript{170}} \text{U.S. Dep’t of State, The Legality of United States Participation in the Defense of Viet-Nam, 54 DEP’T STATE BULL. 474, 474-80 (1966).} \]

\[ \text{\footnotesize\textsuperscript{171}} \text{Id. at 485. In addition, the executive branch emphasized the Gulf of Tonkin Resolution and the President’s commander-in-chief power. See id. at 484-88. For the latter, the legal opinions relied heavily on Truman’s initiation of the Korean War, while downplaying the political and legal importance of the Security Council Resolution to Truman’s decision to act without congressional authorization. See id.; see also Memorandum from Nicholas Katzenbach, U.S. Att’y Gen., U.S. Dep’t of Justice, to President Lyndon Baines Johnson (June 10, 1965), available at https://history.state.gov/historicaldocuments/frus1964-68v02/d345 (rejecting an argument that the commander in chief power only extends to “minor police actions” on the ground that “the action taken by President Truman in Korea, which is not widely regarded as having been illegal, shows how extensive the powers of the President may be”).} \]

\[ \text{\footnotesize\textsuperscript{172}} 50 U.S.C. § 1547(a)(2). \]

\[ \text{\footnotesize\textsuperscript{173}} \text{See supra notes 102, 162, 171 and accompanying text for discussion of how this claim had developed earlier.} \]
congressional committee that the President could introduce troops into hostilities not only in “the three situations listed in subsection 2(c) of the War Powers Resolution,” but also “to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad . . . and to carry out the terms of security commitments contained in treaties.”  

In the years since, the executive branch has returned to the broader formulation of protecting American interests. This move is evident in the Presidency of George H.W. Bush. In the first Gulf War, President Bush obtained both a Security Council Resolution and congressional authorization—the first (and, as of now, the only) time when both collective actors have clearly authorized a use of force.  

Not long after, however, President Bush decided to send troops to Somalia without clear congressional approval, following a Security Council resolution authorizing nations to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations” there.  

In its memorandum defending the constitutionality of this action, OLC noted both the interest in protecting American citizens and in supporting U.N. Security Council resolutions, citing throughout to past practices.  

174 1975 Hearings, supra note 115, at 90-91 (including two other specific contexts and qualifying this enumeration with the claim that no “single definitional statement can clearly encompass every conceivable situation in which the President’s Commander in Chief authority could be exercised”); see also Overview of the War Powers Resolution 8 Op. O.L.C. 271, 274-75 (1984) (reiterating this list).  

175 Although the collective self-defense of Kuwait would probably have sufficed as an international legal justification, President George H.W. Bush “lobbied hard for the endorsement of the U.N. Security Council,” which he received in Resolution 678. Ely, supra note 16, at 50. By contrast, as John Hart Ely wryly observed, Bush “treated [the endorsement] of Congress as optional.” Id.; see also George H.W. Bush, Remarks at the Texas State Republican Convention (June 20, 1992), at http://www.presidency.ucsb.edu/ws/?pid=21125 (remarking “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait”). Yet Bush did eventually seek and obtain congressional authorization. Pub. L. 102-1, at § 2(a), 105 Stat. 3 (Jan. 14, 1991). See also David Scheffer, Use of Force After the Cold War: Panama, Iraq, and the New World Order, in RIGHT V. MIGHT 109, 152 (2d ed. 1991) (“History will view Bush’s grudging request for congressional authorization as more significant than his attempt . . . to disclaim any constitutional responsibility to bow to the will of Congress.”).  


177 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, 9-12 (1992) (emphasis added) (referring to Durand v. Hollins, the Boxer Rebellion, Robert Jackson’s British Flying Students opinion, and President Johnson’s actions in the Dominican Republic, and especially emphasizing the Korean War as a precedent for a constitutional authority to implement Security Council Resolutions).
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.”

From the perspective of the two-level dynamic, this broad claim of constitutional authority occurred at a time when the President had a Security Council Resolution and was therefore at the apex of international legality. In subsequent years, the executive branch has similarly appeared most comfortable with broad invocations of American interests as a matter of constitutional law where the enforcement of Security Council Resolutions are at issue—or at the very least where the United States is acting as a part of NATO. This is the case for the following U.S. interventions: Haiti in 1994, which was authorized by the Security Council; 179 Bosnia in 1995, which was authorized by the Security Council and carried out through NATO; 180 Kosovo in 1999, which was carried out through NATO; 181 Haiti in 2004, which was authorized by the Security Council; 182 and most recently Libya in 2011, which was authorized by the Security Council and eventually carried out through NATO (after initial actions by the United States and certain allies). 183 By the time of the Libya intervention, OLC had a long line of precedents since the War Powers Resolution that it could cite for the proposition that the President could constitutionally initiate the use of force, at least up to a fairly high threshold, where he “could reasonably determine that such use of force was in the national interest.” 184

Logically, this broad language suggests that executive branch lawyers would conclude that the President could constitutionally order uses of force abroad purely for the humanitarian protection of citizens of other countries,

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178 Id. at 9.
181 Interestingly, there is no publicly available written OLC opinion regarding the initiation of the use of force in Kosovo. For discussion of the OLC opinion addressing Kosovo and the War Powers Resolution’s sixty-day clock, see infra note 199 and accompanying text. At various times, administration officials suggested that the NATO campaign was implicitly authorized by Security Council resolutions, but the State Department Legal Adviser did not provide an opinion to this effect. See infra note 197 and accompanying text.
183 See Krass Memorandum, supra note 19, at 7-12.
184 Id. at 1, 8 (suggesting a possible constitutional limit on “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period”).
provided that he views this as within the national interest. Yet President Obama, at least, has proven reluctant to do so where such a use of force would violate international law. The striking example is Obama’s response after the Syrian regime crossed what he called a “red line” by apparently using chemical weapons against its own population in 2013.\footnote{Albert R. Hunt, Obama’s Red Line Comes Back to Haunt Him, INT’L HER. TRIB. (Sept. 2, 2013).} As the Obama Administration recognized, a responsive strike against Syria would have difficulty “fit[ting] under a traditionally recognized legal basis under international law,”\footnote{Charlie Savage, Obama Tests Limits of Power in Syria Conflict, N.Y. TIMES (Sept. 8, 2013).} since Russia would doubtless veto a Security Council authorization and the strike would not be in self-defense. Instead, as an international legal justification, the United States would probably have had to rely on something akin to pure humanitarian intervention.\footnote{See id. (further quoting the White House Counsel as saying that a strike would nonetheless be “justified and legitimate under international law,” presumably a reference to the doctrine of humanitarian intervention). In addition, the United States would have acted without its traditional ally, as Britain’s Parliament voted against the use of force. Mark Landler, David E. Sanger & Thom Shanker, Obama Set for Limited Strike on Syria as British Vote No, N.Y. TIMES (Aug. 29, 2013).} This is a position the United States had never before cited as its sole basis for a use of force under international law and which, while it has its advocates, is difficult to reconcile with the text of the U.N. Charter.\footnote{GRAY, supra note 33, at 51 (observing that “the doctrine is far from firmly established in international law”); cf. Saira Mohamed, Taking Stock of the Responsibility to Protect, 48 STAN. J. INT’L L. 63, 65-74 (2012) (describing the rise of the related norm that the international community has a responsibility to protect victims of massive human rights violations where the state where these violations occur fails to do so).} As a reporter noted, Obama’s attempt “to deal with the novelty of the crisis in international law [became] entangled in the separate domestic law question of whether the president could order strikes on Syria without Congressional permission.”\footnote{Savage, supra note 186.} Ultimately, Obama decided to seek congressional authorization,\footnote{Id. The White House Counsel claimed that Obama had the constitutional authority to act unilaterally, but that he sought congressional authorization to “‘have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapon use.’” Id.} a decision that quickly became moot after a diplomatic solution was found to resolve the crisis.

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

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

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191 Indeed, the status of the sixty-day clock under domestic law has been questioned, as executive branch lawyers have sometimes suggested that it is unconstitutional. See Stephen M. Griffin, Long Wars and the Constitution 167-71, 179-81, 203-04 (2013). Nonetheless, as we discuss, this clock has cast a significant shadow on the legal reasoning made within the executive branch regarding the continuation of hostilities.

192 In the domestic law context, Harold Koh has described this kind of aggressive statutory interpretation as the game of “‘Find the Statute,’ or less colloquially, ‘The Hunt for Allegedly Delegated Prior Executive Authority.’” Harold Hongju Koh, War and Responsibility in the Dole/Gingrich Congress, 50 U. Miami L. Rev. 1, 14 (1995).

193 Pub. L. 102-1, at § 2(a), 105 Stat. 3 (Jan. 14, 1991). The resolution stated that it “constitute[d] specific statutory authorization” for purposes of the War Powers Resolution, thus removing the sixty day clock. Id. at § 2(c).

194 A provision in an appropriations bill gave the “sense of the Congress” that Iraq was in noncompliance with Resolution 687, which had set forth the terms for the ceasefire at the end of the first Gulf War, and that “the Congress supports the use of all necessary means to achieve the goals of Security Council Resolution 687 as being consistent with the Authorization for Use of Military Force Against Iraq Resolution.” Pub. L. 102-190 at § 1095, 105 Stat. 1488 (1991). Another provision in this appropriations bill signaled support for reading Congress’s earlier authorization broadly enough to apply to Security Council Resolution 688, which demanded that Iraq improve its treatment of the Kurds. See Pub. L. 102-190 at § 1096, 105 Stat. 1489 (1991).
willingness to engage in energetic statutory construction into the international legal context.\footnote{Furthermore, because the United States needed the energetic construction of the Security Council Resolutions in order to deal with the sixty-day clock domestically, it had little incentive to explore other international legal justifications, such as trying to argue for an emerging norm of humanitarian intervention. (By contrast, the British came to defend their participation in the Iraq no-fly-zones based on the principle of humanitarian intervention. See Gray, supra note 33, at 36-37.) For another example of how the sixty-day clock may help shape the international legal arguments put forward by the United States, see supra note 146.}

Executive branch lawyers for President George W. Bush took these broad readings of the Iraq-related Security Council Resolutions and widened them. In 2002, OLC concluded that President Bush had the authority to invade Iraq under international law, based on an exceptionally capacious reading of Resolution 678 and related resolutions.\footnote{Jay S. Bybee, Authority of the President under Domestic and International Law to Use Military Force Against Iraq, 26 Op. Off. Leg. Counsel 143, 162-173 (Oct. 23, 2002) (relying heavily on U.S. practice in interpreting international law); see also William H. Taft IV & Todd F. Buchwald, Preemption, Iraq, and International Law, 97 Am. J. Int’l L. 557, 559-63 (2003).} Although Bush was on weak international legal grounds in invading Iraq, he had clear domestic legal authority as a result of the 2002 AUMF—yet another example of how legal strength at one level of law can potentially increase the likelihood that a president will act despite legal weakness at the other level.

Between the two Gulf Wars, President Clinton had to confront a question about the continuation of hostilities in Kosovo during NATO’s bombing campaign. From the perspective of the two-level dynamic, Kosovo is an unusual case, as its legality under both international and domestic law was problematic. Unlike the Libya operation, the Kosovo operation lacked clear Security Council authorization and indeed the Legal Adviser declined to provide an opinion saying that it was legal under international law.\footnote{Scharf & Williams, supra note 68, at 124-25; see also Sean D. Murphy, Kosovo: Air Strikes Against Serbia (Contemporary Practice of the United States Relating to International Law), 93 Am. J. Int’l L. 628, 631-32 (1999); Bill Clinton, Statement on Kosovo (Mar. 24, 1999), at http://millercenter.org/president/speeches/speech-3932.} Nevertheless, because of the humanitarian nature of the operation and the multinational commitment of NATO, international criticism was limited, and the operation is often cited for the possibility that sometimes the use of force might be “illegal but legitimate” under international law.\footnote{See, e.g., INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000) (“The Commission concludes that the NATO military intervention was illegal but legitimate.”). But cf. Anthea Roberts, Legality vs. Legitimacy: Can Uses of}
President Clinton had the constitutional authority to initiate the campaign, this campaign was problematic under the War Powers Resolution since it lasted more than sixty days and yet was not expressly authorized by Congress. Nonetheless, OLC claimed that there was no violation of the Resolution because Congress had in effect authorized it through the enactment of supplemental appropriations measures needed to fund the operation.199

Although the Kosovo intervention was a NATO-based operation, this factor did not particularly affect the executive branch’s formal analysis in relation to the War Powers Resolution. By contrast, the structure of NATO involvement proved important to the controversy over the sixty-day clock in the 2011 Libya intervention. According to news accounts, OLC advised the President that he did not have the authority to continue the U.S. operations in Libya when the sixty-day clock expired.200 But other executive branch lawyers—most notably, the State Department’s Legal Adviser, Harold Koh—argued that a continuation of the operation would not violate the Resolution, and Obama accepted that conclusion. Specifically, Koh’s argument was that, all things considered, the U.S. role in the bombing campaign did not constitute “hostilities” within the meaning of the Resolution.201 In reaching this conclusion, Koh remarked that before the sixty-day clock had run, the United States had turned command of the mission over to NATO and was now playing a “constrained and supporting role.”202 Besides emphasizing the structural role played by NATO, Koh also referred to strong international legal and political support for the mission, noting that it was a “NATO-led, Security-Council authorized operation.”203 Once again, we see international law arguments pressed into service for domestic legal justification.

V. IMPLICATIONS OF THE TWO-LEVEL DYNAMIC

In this Part, we consider some implications of the two-level dynamic.

200 Charlie Savage, 2 Top Lawyers Lost to Obama in Libya War Policy Debate, N.Y. TIMES (June 17, 2011).
201 Koh Testimony, supra note 24.
202 Id. at 3, 7.
203 Id. at 12.
First, we discuss the relevance of the dynamic for current scholarly debates over the law on the use of force, both domestically and internationally. Next, we consider its implications for the decisionmaking of war powers actors, in particular Congress, the President, and the Security Council. We conclude by discussing how the two-level dynamic both confirms and complicates the role that law plays in presidential decisions to use military force.

A. Implications for War Powers Scholarship

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

1. U.S. War Powers Scholarship. — Much of modern scholarship concerning the President’s constitutional authority to use military force is originalist in its methodology. That is, it considers how the Constitution’s distribution of war authority would have been understood at the time of the Founding. Most of this scholarship has concluded that the Constitution was understood as requiring congressional authorization for non-defensive uses of military force.204

As this Article makes clear, however, these originalist accounts do not map well onto either the actual practice of presidential uses of force or the legal reasoning offered to justify this practice. Presidential war powers have evolved, and there no reason to believe that U.S. practice will return to the narrower conception of presidential power evident in the early years of the nation. Among other things, the nature of the security threats to the United States are substantially different from what they were at the Founding; U.S. foreign policy interests have become much more complex

and global in scope; presidents have at their disposal a large standing military, something that was not true at the Founding; and Congress, for partisan and other reasons, often acquiesces in presidential unilateralism.

Some non-originalist scholarship, by contrast, has given weight to historical practice in discerning the scope of the President’s war powers authority. These accounts typically make an effort, like OLC in the Obama Administration, to distinguish between smaller-scale uses of force and larger conflicts. Peter Spiro contends, for example, that although the President has the authority to carry out limited military operations on his own authority, he needs congressional authorization to wage “real war”—that is, “the massive use of force against an enemy itself capable of marshalling substantial force.” Some on—originalist scholarship, by contrast, has given weight to historical practice in discerning the scope of the President’s war powers authority. These accounts typically make an effort, like OLC in the Obama Administration, to distinguish between smaller-scale uses of force and larger conflicts. Peter Spiro contends, for example, that although the President has the authority to carry out limited military operations on his own authority, he needs congressional authorization to wage “real war”—that is, “the massive use of force against an enemy itself capable of marshalling substantial force.”

Jane Stromseth concludes more narrowly that, although historical practice supports a presidential power to use “limited force to rescue American citizens abroad whose lives are in imminent danger,” such practice does not clearly support a broader presidential authority to engage in “little wars.”

While these practice-based analyses offer more realistic accounts than originalism of the modern constitutional law of presidential war powers, this Article suggests that they are incomplete. In particular, these analyses have not given sufficient attention either to the interconnections between U.S. war powers practice and international law or to the dynamic relationship between domestic and international law in this area. For example, because Professor Spiro does not consider how Security Council authorizations have helped the President in claiming greater constitutional authority, he is perhaps too optimistic in asserting that historical practice

205 Peter J. Spiro, War Powers and the Sirens of Formalism, 68 N.Y.U. L. REV. 1338, 1348 (1993) (reviewing John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993)). Some scholars have interpreted the historical practice more expansively. E.g., Henry P. Monaghan, Presidential War-Making, 50 B.U. L. REV. 19, 27 (1970) (special issue) (contending, during the Vietnam War, that “the teaching of our history” is that “presidents have employed that amount of force that they deemed necessary to accomplish their foreign policy objectives” and that “the only limitation upon presidential power has been that imposed by political considerations”).

206 See Stromseth, supra note 56, at 882-86.


208 See Spiro, supra note 205, at 1348-1360 (discussing various past practices but not referencing the Security Council or international law on the use of force). In prior writing, one of us similarly focused only on the domestic elements of historical practice in assessing
can maintain a firm distinction between “real war” and smaller engagements. The example of the Korean War (and of the executive branch’s continued invocation of this war as a precedent at least up until recently) shows how international authorizations can serve to tilt constitutional practice. Professor Stromseth does consider the doctrinal question of whether Security Council resolutions can substitute for congressional authorization, but she does not consider how these substitutions can shape historical practice in ways that favor presidential power irrespective of the international legal context. Overall, the two-level dynamic, by positing that customary practice is multi-dimensional, suggests that the lines drawn by practice can shift more rapidly and more substantially than might otherwise be anticipated.

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

In particular, our findings suggest that international legal scholars trying to understand U.S. practice should pay close attention to the relationship between the President and Congress. Currently, scholars examining U.S. the relevance of that practice to presidential war powers. See Bradley & Morrison, supra note 54, at 461-68.

209 Stromseth, supra note 56, at 893-906 (concluding that congressional authorization was not needed for Bosnia for the Security-Council authorized peacekeeping mission but that Security Council resolutions should not substitute for congressional authorizations in more war-like contexts); see also Stromseth, supra note 66, at 621-54 (considering the import of the Security Council resolutions for the constitutional issue in Korea and the first Gulf War). Cf. Ganesh Sitarman & David Zions, Behavioral War Powers, 90 N.Y.U. L. REV. 516, 562 (2015) (contending that “[t]he lessons of behavioral psychology suggest that situations in which the U.N. authorizes the use of force may be less troubling than situations in which the U.N. does not authorize force”).

210 E.g., FRANCK, supra note 121, at 86-96, 152-55; GRAY, supra note 33, at 193-234; RUYS, supra note 123, at 305-318, 433-447; DINSTEIN, supra note 27, at 294-300.
behavior focus almost exclusively on presidents as decision-makers. For example, some recent scholarly works focus extensively on how Presidents George W. Bush and Obama do or do not differ in their approach to international law on the use of force without ever considering how the U.S. separation of powers might affect this issue. As we have shown, however, the presence or absence of congressional authorization is relevant to how willing a President may be to interpret international law permissively on the use of force. The 2001 AUMF, for example, helps explain the continuity between the Bush Administration and the Obama Administration with respect to the war on terror, as it can be interpreted to give the President domestic authorization to engage in actions that may be questionable as a matter of international law.

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

B. Implications for War Powers Actors


212 See supra text accompanying notes 138-141.


214 Roberts, supra note 213, at 82 (internal quotation marks omitted).
This Article has shown how institutional design, the open-textured possibilities of practice-based legal interpretation, and interactions between the domestic and international spheres all combine over time to help justify vastly increased presidential war powers. In what follows, we consider what our account suggests for those who favor stronger legal restraints on the president’s unilateral authority to use force or, at the very least, want to slow the erosion of these restraints. These suggestions involve both a general attentiveness to the two-level dynamic and some specific ideas about the drafting of authorizations, the use of soft law mechanisms, and the treatment of practice in legal interpretation.

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

Awareness of the two-level dynamic would help to predict this consequence. Because of the role that law at one level can play in providing support for the President’s decisions with regard to the other level, an authorization from Congress or the Security Council may reduce the likelihood that the President will await an authorization by the other body. Members of Congress should therefore be aware that when they

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


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

218 Our claim is that it reduces the likelihood, not that it eliminates it. Presidents may still seek authorization at the other level if doing so is politically advantageous and is relatively assured. As noted, for example, President George H.W. Bush ultimately decided...
authorize uses of force, the President may be more likely to bypass the Security Council and instead to push the boundaries of international law, as with Iraq in 2002 and as has occurred to some degree with the war on terror following the 2001 AUMF. Even if members of Congress are unconcerned about international law per se, they should be aware that, because of the two-level dynamic, changes in international law can have consequences for domestic law over time.

Members of the Security Council should similarly be aware that when they authorize uses of force, the President may use it to help justify bypassing Congress, as with the Korean War and, on much more modest scales, interventions in the last twenty years in Haiti, Bosnia, and Libya. These implications should matter to members of Congress and of the Security Council because, as we have shown, they have good reason to care about the long-term structure of law at the other level. The more precedents the President has for using force under tenuous international legal theories, the more comfortable he may feel in the future doing so even without Congressional authorizations. Similarly, the more precedents the President has for acting without Congress as a matter of domestic law, the more likely the President is to use force abroad without a Security Council authorization or other strong international legal grounding. To say that collective actors should be aware of these possibilities is not to suggest that they should decline to provide authorization when they think it is substantively and institutionally warranted. Such awareness is relevant, however, to the potential content of their authorizations and their responses to unilateral action, as explained in the next two subsections.

2. Decisions on What To Put in Authorizations for Uses of Force. — The two-level dynamic also has implications for the content of authorizations for the use of force. Indeed, in practice these implications are likely to be more important than the implications for whether to authorize uses of force, which will mostly be driven by perceived substantive and political imperatives. Once again, the overall implication is that actors at each level should try to limit the risks that their authorization will loosen legal restraints at the other level. They could achieve this by putting certain conditions into their own authorizations—conditions that would further protect against overly expansive interpretation of these authorizations by the executive branch.

For Security Council authorizations, we suggest consideration of limits related to domestic legal authority, time, and scope. As to domestic legal

to obtain congressional authorization for the 1991 Gulf War even after obtaining Security Council authorization. See supra note 175. Moreover, the two-level dynamic will not always promote unilateralism, since a strong basis for the use of force under international law will sometimes make it easier for the President to obtain congressional authorization.
authority, these authorizations could borrow the language found in the NATO treaty and state that members are permitted to use force in accordance with their “constitutional processes.” This would not necessarily lead the President to seek congressional authorization, but it could strengthen the hand of domestic actors arguing that he should do so, and it would at least make it more difficult to argue that obtaining Security Council authorization was a substitute for obtaining otherwise-required congressional authorization.

As to time, past practice like the revival of the first Gulf War resolutions to justify the second Gulf War offers plenty of reasons why, regardless of the two-level dynamic, Security Council members should consider time limits on authorizations. Yet the two-level dynamic suggests that Security Council members should be particularly aware of the sixty-day clock of the War Powers Resolution and how it affects the domestic legal and political climate in which the President operates. The Security Council’s authorization in Libya indirectly helped to set a domestic precedent for finding the sixty-day clock inapplicable, and this precedent might be used in the future in contexts in which there is no Security Council resolution. To avoid playing a role in further watering down the power of the sixty-day clock, Security Council members could consider authorizing uses of force for only short periods of time or at least establishing review processes that would be engaged after some initial period.

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

Members of Congress should consider similar kinds of limits in congressional authorizations for uses of force. Its authorizations could be

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219 North Atlantic Treaty, supra note 167, art. 11.
220 Some Security Council Resolutions related to peacekeeping already have used time limits. E.g., S.C. Res. 743 (1992) (establishing an initial one-year mission in Bosnia).
221 For a recent example in which the Security Council took express account of a time period reflected in U.S. domestic law, see S.C. Resolution 2231 (2015), which set the operative date for relaxing sanctions against Iran, pursuant to an agreement to limit Iran’s nuclear program, as ninety days after endorsement of the agreement by the Council, a move designed to accommodate a domestic review process mandated by Congress. See Someni Sangupta, U.N. Moves to Lift Iran Sanctions After Nuclear Deal, Setting Up a Clash in Congress, N.Y. TIMES (July 20, 2015).
tied to particular international legal justifications, as Eisenhower’s authorization in the Middle East was tied to intervention by invitation\textsuperscript{223} and the authorization for the first Gulf War was tied to Resolution 678 of the Security Council.\textsuperscript{224} To protect against overly expansive interpretations of these international legal justifications, Congress could further include other limitations like sunset provisions, definitions of the relevant enemy, and geographic specifications. At least in some instances, presidents may be receptive to such limitations. By way of example, the draft AUMF that President Obama submitted to Congress in February 2015 to address the conflict against ISIL would have expressly declined to authorize “the use of the United States Armed Forces in enduring offensive ground combat operations,” would have terminated in three years unless reauthorized by Congress, and would have repealed the 2002 AUMF relating to Iraq.\textsuperscript{225}

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

3. Soft Law Mechanisms. — Where the President is considering a use of force without authorization from Congress or from the Security Council, the institutional design of these actors makes it highly unlikely that they will formally oppose his actions through their lawmaking processes. Yet their members and other actors have various “soft law” mechanisms that they can use to try to pressure the President into a decision not to use force or, if hostilities are ongoing, to tamper down or terminate these hostilities.\textsuperscript{226} For members of Congress, these methods include hearings, committee reports, non-binding resolutions, resistance to funding the hostilities or to other aspects of the President’s agenda, behind-the-scenes conversations with the

\textsuperscript{223} See supra note 107 and accompanying text.
\textsuperscript{224} See supra note 193 and accompanying text.
\textsuperscript{225} Draft Joint Resolution, supra note 148.
White House, and communications with the public. For other nations, these methods include public and private protests, non-cooperation with (or even opposition to) the United States on this use of force or on other issues, and gestures of disagreement expressed in other international fora. Such resistance not only serves to signal political objections, but also can influence practice-based legal developments. As one of us has argued in the domestic context, these signals can be considered in measuring Congress’s nonacquiescence to an executive branch practice. In the international context, acquiescence or nonacquiescence by nations to the subsequent practice of the United States is important to the impact of these practices on doctrine. The vote in the General Assembly against the U.S. invasion of Grenada, for example, undercuts the argument that this invasion was a legitimate exercise of the right of self-defense.

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

Soft law mechanisms can also be used to signal approval of presidential action. Where the President is on strong grounds under international law, members of Congress might wish to emphasize the significance of this fact to their acquiescence in a presidential use of force. Doing so would help limit the scope of their acquiescence. By way of example, the more the Obama Administration’s interpretation of “hostilities” for purposes of the

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227 Bradley & Morrison, supra note 54, at 450; see also NLRB v. Noel Canning, 134 S. Ct. 2550, 2563 (2014) (treating resistance by congressional committees to presidential practice as relevant in assessing historical practice).

228 See supra note 121 and accompanying text.
sixty-day clock in the Libya intervention is explicitly linked to the Security Council resolution (or to NATO involvement), the harder it will be for future administrations to use this interpretation in the absence of these factors. Nonetheless, the effectiveness of limits built into congressional acquiescence depends in large part on the willingness of future executive branch actors to recognize these limits. As we have shown, however, the executive branch instead tends to read past practices broadly in favor of presidential power. Because of this, it is important to also consider ways in which the use of practice in legal interpretation can be disciplined.

4. Treatment of Practice in Legal Interpretation. — In the past, the two-level dynamic has aided executive branch lawyers in expansive interpretations of past practice. As we have shown, over time these interpretations have led to increasingly broad claims of legal authority in both domestic and international law. Institutionally, these trends are helped by the fact that executive branch lawyers may consider it in the interest of their client to be public about the breadth of presidential war powers and silent or private about the limits. As Trevor Morrison has put it in relation to OLC, “written precedents could become weighted more towards client-friendly conclusions than the totality of all its legal advice, oral and written combined.”

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

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Most powerfully, executive branch lawyers can refuse to give opinions that certain uses of force are legal. With regard to Kosovo, for example, the Legal Adviser of the State Department declined to provide an opinion that this intervention was lawful under international law.\(^{232}\) Although the intervention went forward nonetheless, in an unusual case in which the basis in both domestic and international law was tenuous, the absence of such an opinion has left its footprint on U.S. practice. Had such an opinion existed and concluded that humanitarian intervention is authorized by international law, it might have increased presidential willingness down the road to advance this international legal justification. As noted earlier, the United States considered advancing this justification in relation to responding to the Assad regime’s use of chemical weapons, but ultimately President Obama decided not to use force without the backing of a congressional authorization.\(^{233}\)

Even within legal opinions finding uses of force to be lawful, there are ways that executive branch lawyers can narrow the precedential scope of these opinions. One way is for executive branch actors to clearly identify limits to executive branch authority, ideally using language stronger than “possible.”\(^{234}\) A second way is for executive branch lawyers to try to rest their arguments on the narrow or single justifications rather than on broad or multi-factor ones. The Krass Memorandum in support of the Libya intervention, for example, identified both regional stability and preserving the credibility of the Security Council as important national interests that the President could deem advanced by this intervention.\(^{235}\) A focus solely on the Security Council would have been a narrower ground—one that would reduce the likelihood of Libya being used as a precedent in situations where the international legal justification was much weaker. Yet a third way would be for the executive branch to be more rigorous in evaluating past practice. In assessing legality under international law, for example, executive branch lawyers could focus less on U.S. practice and more on international practice generally.

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\(^{232}\) See supra note 197 and accompanying text.

\(^{233}\) See supra notes 187-188 and accompanying text.

\(^{234}\) Compare Krass Memorandum, supra note 19, at 8 (suggesting that “prolonged and substantial military engagements” “may” be subject to a “possible constitutionally-based limit” on Presidential action without prior congressional authorization).

\(^{235}\) Id. at 10-12. The Memorandum focuses on the “combination” of these interests, but elsewhere suggests that interests standing “alone” can also justify action, see id.
The prospects for restraint suggested above are modest ones. Formal action from Congress and the Security Council is difficult to obtain, and the executive branch has considerable incentives to favor the long-term expansion of presidential war powers. In addition, the President is often on a sound basis in one body of law even without a specific authorization. On the domestic law side, the President’s constitutional power to use force for the rescue of citizens abroad is now well-established and, increasingly, his authority to use force abroad for other interests—at least up to a certain threshold and before the triggering of the sixty-day clock—is becoming or has become the same. On the international law side, the Charter-sanctioned principle of collective self-defense and the rise of consent-based interventions place the United States on sound, or at least plausible, footing under international law for many uses of force.

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

C. Law and Presidential Decisionmaking

In recounting the two-level dynamic relating to war powers, this Article has assumed that law matters at least to some extent in this context. If law does not have direct or indirect effects on presidential decisions to use military force, then the dynamic described here would be immaterial to policy: presidents would make the same decisions about whether to use force regardless of whether they were able to shift between international

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236 See supra text accompanying notes 49-50.
237 See supra note 51 (discussing the U.S. reaction to the Nicaragua decision). While in the future the International Criminal Court (ICC) may have authority to impose individual criminal liability for violations of the law on the use of force, this would not apply to U.S. citizens unless the United States were to join the ICC. See Dapo Akande, What Exactly Was Agreed in Kampala on the Crime of Aggression?, 2 EQUAL. OF ARMS REV. 23, 23-25 (2010).
law and domestic law justifications, and regardless of whether they were able to broaden legal doctrine over time. If so, the two-level dynamic would be an important part of rhetoric and argumentation, but not something that policymakers should be attentive to in thinking about the evolution of presidential war powers. This question of legal effect is therefore significant, but it is also very difficult to assess empirically.\textsuperscript{238}

Some scholars doubt that law concerning the use of force matters much at all.\textsuperscript{239} The stakes are high for decisions on the use of force, which puts more strain on the fidelity to legal norms. There is also little judicial review available to check presidential compliance with the law, at either the international or domestic levels. And, as this Article has documented, the practice of presidential use of force has departed substantially from the textual assignments of war powers and what most observers consider the original understanding of those assignments. On a few occasions, policymakers are even candid in their internal deliberations that they are acting regardless of legality. After President Johnson ordered an intervention in the Dominican Republic, for example, the legal justification drafted by the State Department was post hoc and so unimpressive that future Supreme Court justice Abe Fortas deemed “its soundness as a matter of legal analysis . . . subject to effective challenge.”\textsuperscript{240} From this and other examples, it is clear that law does not always carry the day.

Yet there are reasons to think that law relating to the use of force plays a

\textsuperscript{238} The difficulty of making an empirical assessment stems from a number of factors. For decisionmaking in this area, such as whether to seek congressional or Security Council authorization, there is likely to be a heavy overlap of legal and political considerations. Cf. Curtis A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 COLUM. L REV. 1097, 1149 (2013) (noting the interactive nature of law and politics with respect to issues of presidential power). In addition, there is an asymmetry of available information. While we know of instances in which presidents have decided to use force even when the law appeared to be unsupportive, we do not have comparable knowledge of the instances in which presidents have decided not to use force, although such instances undoubtedly happen. See SCHARF & WILLIAMS, supra note 68, at 165 (quoting a former Legal Adviser that “I’m sure each one of us at one point or another has advised our clients not to use force in a situation and our advice was taken. Certainly it happened for me at least twice, and once at the very highest level imaginable.”); Stromseth, supra note 56, at 877 (“The lists of [presidential uses of force] do not include cases in which presidents refrained from using force because they knew Congress would oppose it or because they were unsuccessful in obtaining congressional authorization.”).


\textsuperscript{240} Fortas Memorandum, supra note 111, at 1.
meaningful and sometimes dispositive role in presidential decisionmaking. To begin with, presidents and their supporters spend significant time and energy seeking to justify uses of force in legal terms. They issue executive branch legal memoranda, testify before Congress, make statements to the public, and send letters to the United Nations all explaining why particular uses of force are legal under domestic and international law. In doing so, they expose themselves to potential criticism of their legal analysis—criticism that has the potential to undermine their credibility. And even when the content of the law is debatable, legal argumentation is subject to plausibility constraints.

There are particular indications that, despite its significant limitations, the War Powers Resolution has had a material impact on executive branch decisionmaking. Few unilateral uses of force by presidents since enactment of the Resolution in 1973 have exceeded the Resolution’s sixty-day limit, and there are indications that presidents have sometimes made an effort to conclude operations (such as in Grenada and Panama) before the expiration of that period. Moreover, in those instances in which it has appeared that the period was expiring, such as with Kosovo in 1999 and Libya in 2011, presidents and their advisors made strenuous efforts to explain why the Resolution was not being violated. The Resolution also seems to have contributed to the Obama administration’s decision in 2014 to rely on preexisting statutes for the use of force against ISIL rather than on the President’s constitutional authority. In other instances in which the Resolution’s sixty-day clock has been implicated, such as in Lebanon in 1983 and Somalia in 1993-94, Congress has itself acted to limit presidential uses of force. One reason why the Resolution may matter, as suggested by two political scientists, is that it allows members of Congress who oppose presidential uses of force to “cloak their actions in U.S. law rather than appearing unpatriotic.”

The various executive branch efforts at public legal justification suggest that, at a minimum, presidents believe that there are important audiences

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241 Additionally, they expose themselves to what Jon Elster has referred to as a “consistency constraint” that limits their ability to change their position without seeming opportunistic and hypocritical. See Jon Elster, Deliberation and Constitution Making, in Deliberative Democracy 97, 104 (Jon Elster ed., 1998).
242 See Bradley & Morrison, supra note 238, at 1117.
244 See, e.g., Spencer Ackerman, White House Says Expired War Powers Timetable Irrelevant to ISIS Campaign, THE GUARDIAN (Oct. 16, 2014) (noting that the Obama administration was claiming that, because its authority derived from AUMFs enacted in 2001 and 2002, the sixty-day limit in the War Powers Resolution did not apply).
245 Auerswald & Cowhey, supra note 243, at 514.
that care about legality. Potential audiences include members of the President’s party in Congress, Congress as a whole, the U.S. public (as informed by the media, scholarly experts, and others), U.S. allies, and the international community more generally. Even if one assumes that presidents care only about politics, legality matters to presidential decisionmaking if, as seems likely, it can affect the level of political support (domestic or international) for contemplated action. It is also plausible that there is some internalization of legal norms relating to the use of force within the executive branch. Presidents may themselves have internalized such norms or desire to have a legacy that includes a reputation for legal fidelity. Reports about President Obama’s decision to seek congressional authorization in 2013 for using force against Syria are suggestive of such a preference. As the Wall Street Journal reported, “Mr. Obama made no secret to aids he felt uncomfortable acting without U.N. Security Council backing.” Additionally, executive branch lawyers who advise the President are likely to have internalized norms of both fidelity to law and legal professionalism, which may limit the extent to which they are willing to strain legal interpretation in support of presidential policy.

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

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246 Adam Entous & Carol E. Lee, At the Last Minute, Obama Alone Made Call to Seek Congressional Approval, WALL STREET JOURNAL (Sept. 1, 2013).
247 See Morrison, supra note 229, at 1502, 1518-19 (describing professional norms at OLC); see also Bradley & Morrison, supra note 238, at 1138 (noting that reputational considerations may be an additional constraint).
bodies of law are supposed to operate.

VI. CONCLUSION

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