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International Law Constraints as Executive Power

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The use of international law to understand domestic authority has a long pedigree. It is also the subject of heated debate, which focuses predominantly on the extent to which international law can or should serve as a limit on political actors, in particular the President, and the extent to which it can be invoked to expand our understanding of domestic individual rights. Yet there is another significant dynamic at work in this interplay between international and domestic law. This is the invocation of international law not as a constraining force on government actors, but as an enabling force within the domestic system. This Article explores the Executive's invocation of international law to support expansive interpretations of statutory or constitutional grants of authority; to narrow domestic prohibitions on executive action and narrow protections for individuals; and to justify the displacement of the ordinary operation of domestic legal rules, at times exchanging the domestic legal architecture for a more permissive framework based in international law.

Despite these dramatic effects, this "empowerment phenomenon" often goes unnoticed. In and of itself, the existence of international law empowerment is not inherently problematic. The dangers lie in the lack of attention and understanding paid to how it operates. In its most aggressive form, the empowerment phenomenon can result in an executive branch released from traditional statutory and constitutional constraints, free to act up to the limits of international law norms that the Executive itself asserts the authority to interpret. The hazards in this phenomenon lie in multiple factors: the insufficiency of international law itself as a sole check in the domestic legal realm; the discretion the Executive exercises over international law through its interpretive power; and the frequent lack of expertise and engagement with international law by those charged with checking executive authority. This Article examines the mechanisms through which the empowerment phenomenon operates, and navigates the tension between granting the Executive sufficient flexibility on the international plane and reining in that authority when it threatens to undermine fundamental domestic constraints.

INTRODUCTION

In the winter of 2010, two high-level lawyers working in the U.S. Department of Justice faced a forbidding task.[1] The question before them: could the President lawfully target to kill an American citizen living in

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1. The following facts are taken from a number of open sources, press reports, and declassified U.S. documents. *See, e.g.*, Memorandum from the Off. of Legal Counsel to the Att'y Gen. (Jul. 16, 2010), *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* [hereinafter July 2010 OLC Memorandum]; Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/

Yemen who, according to their colleagues in the intelligence community, posed a very real and significant threat to the United States, and who had already launched one failed attack on U.S. soil?[2] Capture, they were told, was impossible, and thus bringing him to trial was not a viable option. This was not a question of crafting a persuasive brief. There would be no judge to act as final decision maker. The legal decision—and that heavy responsibility—was the Executive's alone.

A year earlier, these lawyers had arrived to head a small but powerful legal office within the Justice Department—the Office of Legal Counsel—that was still reeling from the taint of the torture memo years. They came in to serve under an administration that had campaigned on a platform of adherence to the rule of law—both international and domestic—in the ongoing prosecution of the conflict with Al Qaeda and the wider fight against terrorism. Moreover, they were legal scholars with an established view of the Presidency as bound by law and beholden to Congress, even in war.[3] There could have been no question of drafting an opinion on targeting Americans that took a dismissive approach toward constitutional and statutory protections, or of simply finding these rights inapplicable in wartime.[4] Nor would they have been inclined to reject international law constraints on the President's wartime activities. Even the prior administration had long since given up its more extreme arguments on executive power in favor of assertions of compliance with international law and domestic statutes.[5]

This commitment to a Presidency bound by both domestic and international law compelled a painstaking assessment of each of the potential legal hurdles to the proposed course of action—and there were many. A congressional statute prohibits the killing of U.S. citizens abroad. An executive order bans assassination. Several clauses of the Constitution, the due process clause among them, safeguard life and liberty, and typically mandate long-established processes before the government may take them away. There were also potential obstacles in international law: disputes over the geo-

world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html. A more granular discussion of the legal arguments in the OLC memoranda follows in Part I.C.2.

2. *See, e.g.*, Scott Shane, Objective Troy (2015) (discussing al-Awlaki's role in the failed, but nearly successful, attempt to blow up an airliner over Detroit in 2009).

3. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008).

4. *Contra* John Yoo, *The Real Problem with the Obama Administration's Drone Memo*, Nat'l Review (Jun. 26, 2014), http://www.nationalreview.com/corner/381351/real-problem-obama-administrations-drone-memo-john-yoo (arguing that due process does not apply to targeted killing in wartime); Noah Feldman, *Obama's Drone Attack on Your Due Process*, Bloomberg View (Feb. 8, 2013), http://www.bloombergview.com/articles/2013-02-08/obama-s-drone-attack-on-your-due-process (arguing that "[t]he white paper should have said that due process doesn't apply on the battlefield").

5. *See, e.g.*, John B. Bellinger, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), http://www.state.gov/s/l/2006/98861.htm (articulating the U.S. position on how its wartime actions comport with international law); Brief for the Respondents at 19–22, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (arguing that the President's powers are not contrary to, but rather bolstered by, domestic statutes).

graphic reach of the conflict; human rights prohibitions on extrajudicial killings; and law of war regulations regarding whom a state may lawfully target within an armed conflict.

Their deliberations were secret at the time, but we now know that these lawyers concluded that the government had the authority to target and kill Anwar al-Awlaki, and that they crafted two opinions outlining their legal justification.[6] Al-Awlaki was killed in a U.S. drone strike the following year. Ultimately, under court order, the White House released redacted versions of the opinions. These memoranda assert the continued application of domestic laws to al-Awlaki and assess them in turn. They insist as well upon adherence to international law. More than that, in order for such a killing to pass muster under each of the relevant domestic law rules, the memoranda assert, it must accord with international law.

Intertwined with their insistence on adherence to both domestic and international law, the memoranda make a subtle move, one that captures the interconnectedness of these two realms. The memoranda find an implicit exception to each of the domestic rules: the statutory prohibition, the executive order, and constitutional protections. But they do not find a wartime exception per se; one presumes the authors worked hard to avoid that result. Rather the memoranda infer a more narrowly tailored exception for killing that accords with the international laws of war. Instead of checking two boxes—one for compliance with domestic law, one for compliance with international law—the memoranda in a sense rely upon one to fulfill the other. Compliance with domestic law turns on compliance with international law.[7]

Reliance on international law constraints to serve as the limiting principle to a significant assertion of executive power provides a modicum of comfort here. That comfort level might depend on the extent to which the international law constraints on the state's actions in this sphere are well-understood, legitimately constraining, and based in longstanding, publicly-scrutinized and sufficiently-debated understandings and practice. Such reliance on international law as the critical limit on presidential prerogative

6. According to press reports, while the legal decision—and the task of crafting the memoranda—rested with the Office of Legal Counsel ("OLC"), there was nevertheless much interagency discussion of the plan to target al-Awlaki, and it reportedly met no vocal dissent within the executive branch lawyers group working on these issues. *See, e.g.*, SHANE, *supra* note 2, at 224.

7. In a sense, this turn to international law is similar to the move presidents have made historically in wartime and other areas of outward-looking affairs: look to international laws to govern in lieu of the domestic. When viewed through that historical lens, one might argue that the novel move here may be not the turn to international law, but rather the insistence that domestic law continues to operate. Yet that characterization turns largely on the extent to which a given act is a traditional exercise of wartime or foreign affairs authority, and clearly regulated by traditional international law rules, or is more appropriately a domestic affair. The example at hand does not fall neatly into either category; rather, it involves the targeted killing of an American citizen abroad, for alleged operational participation in a terrorist organization. The Executive asserts both that such an act would fall squarely within an armed conflict authorized by a congressional use of force statute, and that the conflict is not regulated directly by traditional international law-of-war rules but rather by analogies to only some of these rules.

might have provided more assurance in a world in which those charged with checking executive action were as comfortable citing Vattel and debating the finer points of neutrality law as they were the President's Article II powers.[8] Today, however, the Executive's asserted compliance with international law indicates constraint, but there is insufficient engagement by many domestic actors with the content of international law in this area to ensure that this is so.

The domestic legal question at issue here thus turns not only on international law, but almost entirely on the Executive's *interpretation* of international law. And every aspect of the Executive's position—from the existence of a transnational armed conflict with a nonstate actor, to the geography of the conflict and the groups that are party to it, to who within those groups are lawful targets, and what constellation of facts suffices to make that decision—has been highly contested. The Executive's interpretations have been challenged not just by other states and scholars but even by the very legal experts working on these matters within the executive branch.[9] Furthermore, many of the Executive's legal positions in this realm are internal, secret, and evolving. While a well-informed reader might piece together certain components of these positions from bits of speeches, memos, and legal briefs, [10] much of the Executive's position is closely-held and professedly fact-driven, [11] known and moreover *understood* only by the small cadre of lawyers working and debating these issues inside the executive branch.[12]

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8. *See, e.g.*, 1 Paul Leicester Ford, The Writings of Thomas Jefferson 226–27 (1892) (providing Thomas Jefferson's notes on the cabinet meeting of April 19, 1793, on whether to issue a proclamation of neutrality, and whether to receive the French Minister).

9. *See, e.g.*, John O. Brennan, Remarks at the Program on Law and Security at Harvard Law School: Strengthening Our Security by Adhering to Our Laws and Values (Sept. 16, 2011) (discussing disagreement with allies over U.S. legal positions); Daniel Bethlehem, *Note and Comment: Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 Am. J. Int'l L. 769 (2012) (noting the lack of consensus on the meaning of "'imminence' in the context of contemporary threats" or "on who may properly be targetable within the nonstate-actor continuum of those planning, threatening, perpetrating, and providing material support essential to an armed attack"); Charlie Savage, *Obama Team Is Divided on Anti-terror Tactics*, N.Y. Times (Mar. 28, 2010), http://www.nytimes.com/2010/03/29/us/politics/29force.html. *See generally* Daniel Klaidman, Kill or Capture: The War on Terror and the Soul of the Obama Presidency (2012); Charlie Savage, Power Wars: Inside Obama's Post-9/11 Presidency (2015).

10. *See* July 2010 OLC Memorandum, *supra* note 1; *see also* Kenneth Anderson & Benjamin Wittes, Speaking the Law (2015) (cataloguing the Obama Administration's national security speeches); Memorandum from Respondents, Regarding the Government's Detention Authority Relative to the Detainees Held at Guantánamo Bay, *In re* Guantánamo Bay Detainee Litigation, 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-442) [hereinafter March 13 Brief].

11. The "functional" test that the U.S. Government employs to determine who is "part of" an enemy force naturally requires a fact-based analysis to determine what particular set of facts are sufficient to reach that conclusion. *See, e.g.*, March 13 Brief, *supra* note 10. The OLC memoranda understandably go to great lengths to restrict their analysis to the facts at hand. *See generally* July 2010 OLC Memorandum, *supra* note 1.

12. *See, e.g.*, Alexandra Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 Colum. J. Transnat'l L. 507 (2015). *See generally* Savage, Power Wars, *supra* note 9 (detailing internal debates within the Obama Administration over the President's legal and policy positions in the conflict with Al Qaeda).

The Executive's position on each of these interpretations of international law may be right or wrong, and one day these positions may become firmly established norms,[13] but today that is far from settled, even within the executive branch itself. Nevertheless, according to the Executive's position, this highly controversial, partly secret, and evolving executive interpretation of international law forms the core constraint on the Executive's asserted authority, and is thus essentially the domestic legal standard for determining when the government may lawfully target a U.S. citizen abroad using military force.

Reliance on international law to understand domestic norms, and to understand them in a way that both constrains and enhances executive power, is no anomaly. It is, however, insufficiently recognized and poorly understood. This example—including the apparent insufficiency of domestic law to regulate certain areas of executive action, and the discretion the Executive holds in interpreting the international law that binds it—captures well both the dilemma and the dangers in interpreting the contours of both domestic and international law in areas where the domestic and the international intertwine.

Today, significant debate focuses on the extent to which the law purporting to limit presidential action is "real" law. This is to say there is disagreement over the extent to which this law provides clear outer limits and whether these limits *should* or actually *do* cabin executive prerogative. This skepticism arises in part from a recognition that the executive branch operates in many areas without formal, external instruments of control or oversight. Those concerned with executive overreach have thus looked to a wide range of both existing and proposed norms and mechanisms to constrain executive authority from outside and within—from heightened judicial or congressional oversight to greater process within the executive branch itself—and views remain mixed on the efficacy of these checks in limiting executive prerogative.[14]

An interrelated debate involves the proper place of international law in the U.S. domestic system. This debate likewise focuses on questions of com-

13. In fact, very recent moves by the United Kingdom, France, and Australia (while this piece was in the final stages of the editing process) suggest that other states may be converging toward the U.S. position on using force against nonstate actors in another state's territory. *See, e.g.*, David Cameron, Statement to the House of Commons, Syria: Refugees and Counter-Terrorism (Sep. 7, 2015); Ashley Deeks, *UK Air Strike in Syria (with France and Australia Not Far Behind)*, LAWFARE (Sep. 9, 2015, 10:41 AM), https://www.lawfareblog.com/uk-air-strike-syria-france-and-australia-not-far-behind.

14. *See, e.g.*, Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (prophesying an acceleration of presidential imperialism, aided by internal executive lawyers, leading to the tragic downfall of the American republic, and proposing reforms including a "Supreme Executive Tribunal" to check executive action); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (challenging Ackerman's account of a near-lawless Executive and defending the role of OLC as a check on the President).

pliance and constraint, as well as suspicion over the effectiveness of international law as "real" law.[15] Does international law genuinely bind and constrain domestic actors? Should domestic structures monitor and enforce the state's international law obligations? The debate focuses not only on the direct application of international law as a rule of decision, but also on the extent to which international law can be invoked as an interpretive tool to understand domestic constitutional or statutory laws. Opinions differ over the extent to which international law should be invoked to interpret domestic individual rights, such as the prohibition on cruel and unusual punishment,[16] or to delimit grants of executive power, such as the commander-in-chief authority, that might otherwise seem unduly broad or amorphous.[17]

These two strands of debate come to a head over the use of international law to understand domestic executive authority. In seeking to cabin executive power where other mechanisms have failed, some scholars and practitioners have looked to international law and institutions to provide limits.[18] Others, meanwhile, have rejected international law as a check on executive

15. Scholars have noted that domestic public law shares similar characteristics with international law in that it is often unreviewable by an external, neutral arbiter with enforcement power over the executive branch. *See, e.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. Rev. 1791 (2009).

16. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) (prohibiting the use of the death penalty for juvenile defendants; noting a longstanding "refer[ence] to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"; and citing as significant authorities the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a state law that criminalized homosexual sodomy and citing jurisprudence from the European Court of Human Rights); Atkins v. Virginia, 536 U.S. 304, 317 (2002) (prohibiting the use of the death penalty for defendants with mental disabilities and citing disapproval "within the world community"); *see also* Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 4 (2006) (addressing "academic, press, and particularly congressional criticisms" of the use of international law in expanding domestic rights); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004) (critiquing the use of international law in these cases as results-driven and unprincipled).

17. *See, e.g.*, Ingrid B. Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 63–64 (2007) (arguing that the President's commander-in-chief authority should be interpreted in light of international law); David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364, 379–380 (2003) (asserting that "in exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law" but noting the "highly permissive character of the law of war," and thus recognizing "that placing international law limitations on the President's war powers, rather than narrowly constraining them, accords the President ample room for taking measures necessary to preserve the security of the nation."); Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1003–04 (2013) (arguing that the Executive has over time aggrandized power vis-à-vis Congress, and proposing a restoration of the international law limits that accompanied, and permitted, this aggrandizement); Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015) (arguing that the military tribunal exception to Article III jurisdiction should be understood as authorized and circumscribed by international law). I also fall within this category. *See* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX . INT 'L L.J. 75 (2011).

18. *See id.* at sources cited therein.

authority, branding it "amorphous" and "undemocratic."[19] Polarization in this debate risks painting a stark picture of the role of international law in the U.S. system, as though one is either for its use as a constraint or wholly against it, inhibiting a more nuanced conversation over how it both does and should operate more broadly.

In particular, this narrative obscures a more interconnected relationship between international and domestic law in the U.S. system, and one that does not always operate to constrain executive power.[20] This Article examines the invocation of international law—even of international law limits—not as a constraining force within the domestic legal system, but as an enabling one.[21] Only in understanding the interconnected ways international law operates in the domestic system can we identify the potential dangers in this phenomenon and undertake a nuanced assessment of its appropriateness in any instance. In this Article, I focus in particular on the Executive's invocation of international law for the purposes of aggrandizing its own domestic authority: to support expansive interpretations of statutory or constitutional grants of authority; to narrow statutory or constitutional prohibitions on executive action or protections for individuals; and to justify the displacement of the ordinary operation of domestic legal rules, at times with the effect of exchanging the ordinary domestic legal architecture for a more permissive framework based in international law.

As a matter of practice, this "empowerment phenomenon" is not new. Nor is the invocation of international law to understand domestic norms inherently problematic; to the contrary it is in many respects a necessary and

19. *See, e.g.*, Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); Jon Kyl et al., *The War of Law*, FOREIGN AFF. 115 (July–Aug. 2013); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73 (2006) (arguing that the President is not bound by international law, other than treaties, particularly in his exercise of war powers); Attorney General Alberto R. Gonzales, Prepared Remarks at The University of Chicago Law School (Nov. 9, 2005), http://www.justice.gov/archive/ag/speeches/2005/ag_speech_0511092.html (rejecting the use of "foreign law and international law" as "relevant in defining the terms and limits of our Constitution"); Al-Bihani v. Obama, 590 F.3d 866, 871 (2010) (rejecting international law as imposing any limit on the President's war powers, and calling the underlying international rules "vague" and "amorphous").

20. *See, e.g.*, Golove, *supra* note 17 (discussing the duality of this relationship). Jean Galbraith has demonstrated that international law historically played a role in the domestic separation of powers, one that over time resulted in an accretion of power to the President vis-à-vis Congress. *See* Galbraith, *supra* note 17. Galbraith's excellent insights provide historical context for some of the phenomena I discuss in Part I. In a forthcoming work, she and Curtis Bradley examine the interconnected relationship between international and U.S. domestic law in the use of force realm. Jean Galbraith & Curtis Bradley, *Presidential War Powers as a Two-Level Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, N.Y.U. L. REV. (forthcoming).

21. This Article focuses on the role of international law within the U.S. domestic system. States vary in their approaches to incorporating international law into their domestic systems and, with respect to the status of treaties, most fall somewhere between pure monism (under which treaties are automatically incorporated as domestic law) and dualism (under which treaties require additional legislative implementation before becoming domestic law). The status of customary international law in these domestic systems is more complex. But many of the questions addressed in this Article—the complications that arise when international law is used not to constrain but to expand authority under domestic law—should resonate across systems.

embedded feature of our legal architecture.[22] Empowerment and constraint are both logical results of this interconnection, and at times flip sides of the same coin. Nevertheless, the empowerment phenomenon can have effects that are both dramatic and dangerous, particularly when this phenomenon goes unnoticed or is poorly understood. Recognizing and distinguishing the diverse ways in which international law is invoked to enable rather than simply to constrain domestic authority is critical to understanding executive assertions of power and legal compliance. In its most aggressive form, this empowerment can result in an executive branch released from traditional domestic statutory and constitutional constraint and free to act to the limits of what international law might permit. Moreover, when the Executive reserves discretion to interpret the content of that international law, the empowerment phenomenon can result in sweeping executive power to draw the outer limits of its own domestic authority.

This Article proceeds as follows: Part I sets the background for the Article. It reconceptualizes familiar examples to shed light on the overlooked role of international law in enhancing the Executive's domestic authority.[23]

Part II explores some of the distinct dangers lurking in the empowerment phenomenon, two of which merit particular attention. *First*, while international law operates as an important check on state action, it is often an unsuitable or insufficient replacement for domestic constraints on executive authority, and an inappropriate allocator of *intra*state power among the branches. *Second*, the Executive often holds the reins—or is at least afforded significant flexibility—in *interpreting* the substantive content of international law, even when it is used to enhance its own authority. The resort to international law as the primary check on executive action, combined with deference to executive interpretation over the content of that international law, can result in extraordinary executive discretion to interpret the parameters of its own domestic authority, even in contexts in which strict domestic constraints would ordinarily operate.

Moreover, the empowerment phenomenon not only facilitates the Executive's aggrandizement of its own authority; at times it affirmatively induces it to do so. The phenomenon influences the institutional design of internal

22. *See, e.g.*, Cleveland, *supra* note 16; Galbraith, *supra* note 17.

23. This Article focuses on executive empowerment, but the courts and Congress also each invoke international law at times to aggrandize their own authority. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077 (2014) (involving, though not deciding, the extent to which Congress can enact legislation to implement a valid treaty *beyond* the scope of what it might otherwise have authority to enact in the absence of such treaty); Missouri v. Holland, 252 U.S. 416 (1920) (holding that Congress can enact legislation to implement a valid treaty under its necessary and proper powers). At times one branch invokes international law in order to enhance another branch's power. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (invoking international law for the purposes of broadly interpreting a congressional authorization to the President); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602 *et seq.*) [hereinafter FSIA] (codifying an international law theory of foreign sovereign immunity and empowering courts to make determinations about such states' immunity from suit).

executive branch decision making in ways that may exacerbate executive tendencies to assert expansive interpretations of its authority and obscure the Executive's true legal positions. Part II demonstrates that the empowerment phenomenon, particularly when abused or misunderstood, can have troubling consequences that are in tension with ordinary separation-of-powers principles and the rule of law.[24]

The identification of the empowerment phenomenon and a parsing of its unexplored dangers form the core focus of the Article. But I will turn briefly in Part III to considering how to grapple with the concerns I identify. One solution might be a full return by all those charged with checking executive authority to comprehensive engagement with international law and its interplay with the domestic system. This is an ideal. A second-best, yet perhaps more realistic, alternative is to place a greater burden on the Executive to demonstrate legitimate reasons for invoking international law to enhance its authority. Even when the empowerment phenomenon is appropriate, the dangers I identify in this Article prompt a rethinking of judicial deference to the executive and congressional acquiescence on the substantive content of international law and its interaction with domestic power. And finally, because the courts and Congress cannot provide total recourse, I address the importance and sufficiency of internal institutional checks in advancing international law compliance and in checking executive prerogative. There are no simple answers, and all those charged with executive oversight must navigate the tension between granting the Executive sufficient flexibility on the international plane, and reining in that authority when it threatens to undermine fundamental domestic constraints.

I. International Law Empowerment in the Domestic System

This Part identifies and frames the empowerment phenomenon. I first briefly survey the conventional debates over the role of international law in the U.S. domestic system. Next, I consider what it means to invoke international law to enhance or aggrandize executive power.

The bulk of this Part then examines the four key mechanisms through which the Executive invokes international law to enhance its domestic legal authority. These include the invocation of international law: 1) to aid an expansive interpretation of a grant of statutory or constitutional executive power; 2) to narrow or erode a prohibition on executive power; 3) to displace or disrupt ordinary domestic rules; and 4) to replace the domestic legal framework with more permissive norms based in international law.

24. *See, e.g.*, David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency 3 (2006) (warning against the existence of legal black holes, or lawless zones, as well as legal gray holes—where "there is the façade or form of the rule of law rather than any substantive protections").

In addition to these four categories, I turn at the end of this Part to a discussion of the Executive's *unsuccessful* attempts at international law empowerment.[25]

A. International Law in the Domestic System

International law plays a significant role in the domestic system, both as directly enforceable federal law and as an interpretive tool, invoked to determine the original meaning of the Constitution or statutes or to help guide our understanding of an evolving norm.[26] This role has been typically understood in terms of constraint on state actors. This may occur through the direct imposition of an international law limit as a binding rule of decision, or through the invocation of international law as an interpretive tool, either to construe statutory or constitutional grants of authority narrowly, or to construe protections for individuals expansively, and as a result broaden prohibitions on state action.[27]

Debate over the place of international law in the U.S. domestic system addresses both its use as a directly enforceable rule of decision in domestic courts and as an indirect interpretive tool. These debates are complex and fraught, but they tend to focus predominantly on the extent to which international law either can or should constrain state actors or enhance individual rights. Scholars and practitioners who seek to limit the role of international law in the domestic system run the gamut and include those who reject *any* invocation of international law as "undemocratic," those who reject its use as an interpretive tool in certain contexts, and those who would require additional domestic implementing steps before permitting domestic courts to rely upon international law—in particular non-self-executing treaties or customary international law—as a rule of decision. [28]

Advocates of international law, by contrast, often argue that courts and other actors should do more to give effect to international law through statutory interpretation or direct regulation of executive action. Some invoke international law norms to support expansive interpretations of individual

25. This might seem a surprising detour, but unsuccessful attempts at empowerment provide critical information about the Executive's internal positions on what constitutes reasonable legal arguments. Considering the vast quantity of legal decision making that happens without any oversight or public knowledge, such glimpses into the black box are rare and invaluable.

26. *See, e.g.*, U.S. CONST. art. VI (treaties are the "supreme Law of the Land"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . ."); *see also* Cleveland, *supra* note 16.

27. *See supra* notes 16–17 and accompanying text.

28. *See, e.g.*, Cleveland, *International Constitution, supra* note 16, at 4 (citing "academic, press, and particularly congressional criticisms" of the use of international law in expanding domestic rights); *see also* July 2010 OLC Memorandum, *supra* note 1; *supra* note 17 and accompanying text. The battle lines are far from strictly drawn; there are, for example, advocates of the use of international law in certain contexts who believe it should be limited in others. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM (2013).

rights in domestic litigation.[29] Many international law scholars and lawyers share a perspective that in recent years international law has come under attack in the United States; they bemoan what they view as a lack of respect for international law in the U.S. domestic system.[30]

The charged politics of this debate create a stark narrative. There is a sense that those who champion executive power are more inclined to reject international law, and that those who prioritize individual rights protections must wholly support a strong role for international law. In fact, this polarization presents a quite narrow view of the role of international law in the domestic system, and has masked the more nuanced ways in which international law is invoked that should be important to those on all sides of this debate. This includes in particular the various ways that international law and even international law limits are invoked, not simply as constraining forces within the domestic legal system, but as enabling ones as well.[31] Paradoxically, it is often this very reliance on the presumed *constraints* of international law (and its concomitant limiting effect on executive power) by those charged with checking executive action that enables executive empowerment.

B. Defining Empowerment

It is worth pausing for a moment to consider what I intend when I refer here to "expanded" or "enhanced" executive power. The answer depends to some degree on the nature of the particular invocation of international law and its role in the domestic system. In some of the examples I discuss in this Article, it may be simple to define an operation of domestic law with and without the effect of the empowerment phenomenon. Take the following two examples: a civil lawsuit proceeds against a defendant, or a person suspected of criminal acts is charged and tried. In the empowerment context, a principle of international law dramatically shifts the playing field: where the Executive can invoke a claim of foreign official immunity, it consequentially has exceptional power to move the court to dismiss the case. Where the Executive can assert an armed conflict paradigm, which it defines by reference to international law, it may claim a law-of-war-sized exception to the

29. *See, e.g.*, Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Cleveland, *supra* note 16 (discussing the historical underpinnings of a spate of recent Supreme Court decisions relying on international and foreign law for expansive interpretations of domestic rights).

30. *See, e.g.*, Thomas H. Lee, *International Law and Institutions and the American Constitution in War and Peace*, 31 BERKELEY J. INT'L L. 292, 294 (2013) ("flag[ging] the dramatic growth of American skepticism about international law and institutions").

31. Scholars have examined the President's reliance on defense of international law and institutions as an independent source of domestic legal authority. *See generally id.* Some scholars have grounded the President's authority to effect international law compliance in the Take Care clause. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 50–51 (2d ed. 1996) (noting that "[p]residents have asserted responsibility (and authority) to interpret . . . international obligations and to see that they are 'faithfully executed', even when Congress has not enacted implementing legislation").

due process clause. These moves permit the Executive to do something it might otherwise have been wholly unable to do.

In other instances, international law is invoked to understand the limits of an otherwise amorphous grant of power, and in particular to interpret that grant of power to extend to the limits of what international law would permit of the state. The discussion of *Hamdi* in the next section illustrates this move. If we understand executive power generally as a subset of the whole powers of the state, then an interpretation of a particular grant of executive power to the limits of what international law would permit of the state would necessarily entail, at least in some cases, an expansion of executive authority at the expense of other domestic actors.

Yet in many key areas it may be impossible to contemplate precisely what our understanding of executive power might look like absent the invocation of international law. How, for example, should we think about the contours of the commander-in-chief clause, or a statutory grant of war authority, in a world in which there are no laws of war? We simply cannot know how those grants of authority might have been crafted in such a world. Nevertheless, it is possible to envision a spectrum of interpretation, from narrow to expansive, and to consider the ways in which international law aids in supporting a move toward the expansive end of that spectrum.

One critical respect in which international law supports this move, perhaps counterintuitively, is by providing a limiting principle. Those charged both with defining the contours of executive power and with checking that power—including judges, Congress, civil society, and actors within the executive branch itself—typically seek some limiting principle even when proposing an expansive view of executive authority. Actors who might be inclined in a particular case toward an expansive view of executive authority are unlikely to accept that view absent a workable limiting principle.[32] Few attempt to assert wholly uncabined presidential prerogative. In seeking a limiting principle, lawyers within the executive branch and courts at times point to international law as providing that limitation;[33] they often do so on the view that it provides real and appropriate limits on government action. Yet in some areas, such as those discussed in this Article, international law—in particular the Executive's often-controversial interpretation of international law—is the most permissive limiting principle that these actors might propose with any sense of sincerity. In this way international law legitimizes an expansive view of authority by providing the limiting principle that renders such an expansive reading acceptable.

Executive empowerment can be viewed as an expansion of the domestic rule in these examples for another reason: it is difficult to identify another

32. See discussion *infra* Part I.C.1 regarding *Hamdi*, in which the Supreme Court blessed a fairly broad executive detention authority over U.S. citizens but did so only on the understanding that the wartime detention was justified under, and limited by, the laws of war.

33. *See* July 2010 OLC Memorandum, *supra* note 1.

readily available limiting principle in domestic law that would support a similarly expansive interpretation. This is not to say that it is impossible to imagine a similarly expansive interpretation derived from a limiting principle outside of international law. But arriving at such an interpretation would, in many instances, require formulating a new principle of domestic law rather than relying on existing principles. Such a new formulation would likely lack the sense of legitimacy and the pedigree that a reliance on international law provides, and would thus face a steeper hurdle to acceptance.

C. International Law Empowerment Mechanisms

This section identifies and examines four discrete mechanisms through which the executive invokes international law as a means of enhancing domestic power: 1) as an interpretive tool to enhance statutory or constitutional grants of authority; 2) to infer exceptions to domestic constraints on executive authority or to protections for individuals; 3) to justify the displacement of the ordinary operation of domestic legal rules, and 4) to exchange the domestic legal architecture for a more permissive framework based in international law. I draw on current as well as historical examples to illustrate these different categories. Some examples include elements of many or all of the mechanisms discussed.

1. *International Law Enhancement of Grants of Authority*

One critical role that international law plays in the domestic realm is as an interpretive tool to guide our understanding of domestic law texts. Regardless of the status of a particular treaty provision or rule of customary international law as directly enforceable domestic law, it may be invoked indirectly to divine the framers' or drafters' intent in order to resolve ambiguities or to determine the meaning of particular words or concepts, as well as to provide context for our understanding of evolving norms.[34] This interpretive tool operates both to aid compliance with international law, as well as to provide content and context to our understanding of domestic norms. Often, international law is invoked to interpret a grant of authority narrowly, yet this interpretive tool can also enable an expansive reading of executive authority.

One way enhancement occurs is as a simple and necessary corollary to the invocation of international law to delimit the outer contours of grants of constitutional or statutory authority. When scholars and courts look to international law as a limiting principle to understand otherwise amorphous grants of executive authority, such as the commander-in-chief or foreign affairs authority,[35] reliance on international law to shape these grants of au-

34. *See* Cleveland, *supra* note 16.
35. *See supra* note 17 and accompanying text.

thority does not require a narrow reading of that authority, and can instead have an expansive effect. The nature of the effect depends largely upon the substantive content of the international law norms invoked, as well as on the presumed baseline and the alternative potential interpretations of the domestic grant.[36]

Another way enhancement occurs is through a modified adaptation of a longstanding canon of statutory interpretation. Under the *Charming Betsy* canon, domestic statutes are interpreted so as not to violate international law whenever feasible, based on a theory of presumed congressional intent.[37] This occurs when one interpretation of an ambiguous statutory norm would result in a conflict with international law; under this canon the statute is interpreted narrowly to avoid a conflict.[38] Under a modified approach, the Executive and courts have pushed the boundaries of the *Charming Betsy* canon and invoked international law as an interpretive tool not only with the intent of promoting compliance or avoiding conflict with that law, but for the purpose of permitting executive action to the limits of what international law might permit. This results in an incorporation of additional powers permitted under international law—and permitted *of the state*—into a grant of authority *to the President* that is otherwise more limited, explicitly or otherwise. I will call this *Reverse Betsy*,[39] as it marks a significant departure from the longstanding *Charming Betsy* canon.

Under *Reverse Betsy*, courts or the Executive construe a statutory or constitutional grant of domestic executive power broadly to extend to the limits of what international law would permit of the state. A recent example of the *Reverse Betsy* is the Supreme Court's reliance on international law to support an expansive view of the President's statutory authority to use military force in the conflict with Al Qaeda (the "AUMF"),[40] essentially to the limits of

36. *See, e.g.*, Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs,* 111 YALE L.J. 231 (2001) (explaining why constitutional authority should be read in light of contemporaneous international law norms, and drawing from this broad foreign affairs authority for the executive); Galbraith, *supra* note 17, at 990 (arguing that historically Congress and the President "have relied on international law as an interpretive principle for determining the boundaries of their constitutional powers," in particular in a way that has aggrandized the President's powers).

37. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

38. *Id.*

39. Other scholars have used a similar term "reverse-Charming Betsy" to describe different phenomena. *See* Carlos M. Vázquez, *Customary International Law as U.S. Law*, 86 NOTRE DAME L. REV. 1495, 1588 (2011) (describing a hypothetical rule "under which ambiguous State laws will be construed whenever possible so as to violate international law"); CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 55 (2013) (describing a possible "canon whereby treaties will be construed, where possible, to avoid conflicts with a statute").

40. The 2001 Authorization for Use of Military Force authorized force against the planners of the September 11, 2001 attacks, including the organizations and states that supported them. Authorization for Use of Military Force, Pub. L. No. 107-40,115 Stat. 224 (2001) [hereinafter AUMF]. This is widely understood to refer to Al Qaeda and the Taliban. *See, e.g*, Hamdi v. Rumsfeld, 542 U.S. 507, 519–20 (2004).

what the international laws of war would permit of the state. To date, the courts and the Executive have interpreted this grant of authority expansively along two avenues: first, with respect to the specific actions authorized, and second, with respect to the target subjects of that force.

First, the Supreme Court has interpreted the President's statutory authority to include not just "force," per the statute's text, but also long-term detention of both citizens and non-citizen members of Al Qaeda and the Taliban.[41] The *Hamdi* Court explained its extension of the AUMF to include detention by referencing "universal agreement and practice"[42] and "long-standing law-of-war principles,"[43] invoking prior case law and treatises on the laws of war, as well as provisions addressing combatant detention in international treaties such as the Hague and Geneva Conventions.[44] In fact, these treaties do not themselves either authorize or define detention authority; rather, they establish international law obligations regarding conditions of confinement and the outer temporal limits of detention.[45] In other words, assuming that states will detain individuals in armed conflict, they establish minimum standards for how states may treat detainees, and for how long they may hold them. In the case of captured enemy fighters, for example, detention may not last beyond the end of "active hostilities."[46] The Court inferred from these international law *prohibitions* on detention beyond the end of hostilities a rule *permitting* a state to detain so long as hostilities are ongoing.[47] It then invoked that implicit state authority, and incorporated it into the congressional statutory grant of authority to the President, presumably inferring that Congress must have intended to grant the President the full authorities of the *state* under international law. The result was an extension of the President's domestic statutory authority beyond the use of force to include detention.[48]

41. *See, e.g.*, *Hamdi*, 542 U.S. at 520; Ingrid B. Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 307 (2005) (discussing the *Hamdi* plurality's reliance on international law sources to extend the force authorization to detention of enemy combatants).

42. *Hamdi*, 542 U.S. at 518 (quoting *Ex parte* Quirin 317 U.S. 1, 30 (1942)).

43. *Id.* at 521.

44. *Id.* at 518–521 (invoking, *inter alia*, *Ex parte Quirin*; looking to "the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"; and finding "[a]n important incident to the conduct of war" seizure of enemies for the purpose of punishing violations of that law); Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.") [hereinafter Third Geneva Convention].

45. *Hamdi*, 542 U.S. at 520.

46. *Id.*

47. Some scholars argue that the Geneva Conventions directly authorize detention as a matter of international law in traditional state-to-state armed conflict. *See* Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-international Armed Conflicts?*, EJIL: TALK! (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.

48. *See Hamdi*, 542 U.S. at 520.

This is not simply a grant of authority in what would otherwise be a domestic law vacuum. Quite the contrary. The Court's expansive interpretation of the AUMF crafted statutory authority for the President's administrative detention scheme—for citizens and noncitizens alike—in the place of the ordinary criminal framework and statutory rules to the contrary. It replaced the well-established procedures and constitutional and statutory norms of the criminal law framework—for instance, Miranda, presentment, criminal trial, sentencing—with a modified form of habeas corpus review to adjudicate the factual basis for detention of individuals whom the executive labeled "enemy combatants."[49] And it did so despite the express imperative of the 1971 Non-Detention Act, which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[50] The Court thus relied on the existence of an international law *constraint* to justify a domestic statutory *grant* of authority to the President, and in the process overrode the ordinary operation of explicit domestic law protections.

Notably, the *Hamdi* Court took great pains to avoid blessing uncabined executive prerogative. In invoking international law to interpret and enhance the President's authority, the Court expressly relied in large part on its belief that international law itself would act as a *constraint* on that authority.[51] The plurality warned of the hazards of an "unchecked system of detention," and "unlimited power."[52] It was willing to displace existing domestic constraints only, I argue, because it was able to import international ones, including the express rule that detention must end "after the cessation of active hostilities."[53] Without that limitation, the Court would have been hard pressed to find a limiting principle elsewhere that would have permitted the Executive the detention authority asserted in that case. Alternatively, had the plurality simply interpreted the statute broadly without invoking international law constraints, the Court would have effectively upheld the *indefinite* detention of an American citizen, despite the 1971 Non-Detention Act and the constitutional rights that normally attach to restriction of liberty, a result in sharp conflict with the Court's repeated concerns over uncabined executive power.

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49. *See Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting) (arguing that the Executive must either bring criminal proceedings against Hamdi or release him absent a congressional suspension of the writ); *see also* Amanda Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012) (arguing that according to a historical account of the Suspension Clause, citizens could not be detained even during war absent criminal charge or a suspension of the writ). *But see infra* note 108 (sources discussing the Prize Cases and other historical examples in which the Court's application of constitutional rights turned on the individual's enemy status or geographic location).

50. 18 U.S.C. § 4001(a) (Non-Detention Act); *see also Hamdi*, 542 U.S. at 543 (Souter, J., concurring in part, dissenting in part, and concurring in judgment) (arguing there is "powerful reason to think that § 4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell").

51. *Hamdi*, 542 U.S. at 530–31.

52. *Id.* at 530.

53. *See id.* at 520 (quoting Third Geneva Convention art. 118).

Second, the Executive has invoked international law in order to justify an expansive interpretation of the *subjects* of the force authorization. Presidents through two administrations have asserted that their statutory authority to wage war extends beyond those expressly contemplated by the statutory text—that is, the planners of 9/11 and those who harbored them, widely accepted as encompassing Al Qaeda and the Taliban—to those groups' unnamed "associated forces."[54] On this view, the President may capture, detain until the end of the conflict, or kill members (and possibly even certain supporters) of these "associated forces" for as long as the conflict lasts, and without publicly identifying the forces in question. Since the concept of "associated forces" is not referenced—even obliquely—in the authorization statute itself,[55] executive officials assert that such groups should be presumed to be included within the statute implicitly in accordance with "the well-established concept of co-belligerency in the law of war."[56] The Executive has never provided much content for what it means by co-belligerency.[57] But its repeated assertion of the concept's provenance in international law is based in large part on a tacit suggestion that international law provides both a longstanding pedigree and an outer limit to the President's assertion of power.[58] That assertion has found purchase with judges and members of Congress otherwise engaged in scrutinizing the Executive's assertions of authority, who have relied upon it to accept an expansive reading of the President's statutory authority.[59]

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54. The statute itself explicitly references the planners of 9/11 and those who harbored them, which are widely understood to represent Al Qaeda and the Taliban. AUMF § 2(a). Congress ultimately ratified the Executive's interpretation of its authority under the AUMF for the purposes of *detention* (though not force) in the 2012 Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011) [hereinafter 2012 NDAA].

55. The term "associated forces" was ultimately included in the 2012 NDAA, in a provision affirming the President's authority to detain under the 2001 AUMF. There is still no explicit statutory authority to use force against "associated forces," and the executive branch continues to rely on the 2001 AUMF for these purposes. *See, e.g.*, *Authorization for Use of Military Force After Iraq and Afghanistan*: *Hearing Before S. Foreign Relations Comm.*, 113th Cong. (2014) (statement of Stephen W. Preston, Gen. Counsel, Dep't of Def.) [hereinafter Preston Testimony].

56. Jeh Johnson, Gen. Counsel, Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Address Before Yale Law School (Feb. 22, 2012), http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/; *see also* Preston Testimony, *supra* note 55, at 8 ("[B]ased on the well-established concept of co-belligerency in the laws of war, the AUMF has been interpreted to authorize the use of force against associated forces of al-Qaida and the Taliban.").

57. *See infra* Part II.C.3. For a detailed critique of the Executive's co-belligerency standard, see Rebecca Ingber, *Co-Belligerency and War Powers: The Making of Executive Law*, 42 YALE J. INT'L. L. (forthcoming 2017).

58. *See id.*

59. In an exchange between then-Senator Levin and Senator King during a hearing of the Senate Armed Services Committee, King expressed skepticism about the Executive's expansive reading of the AUMF to include associated forces. To assuage King's concerns, Levin responded that, "Where [the President is] authorized to use force under domestic law, [here the] AUMF, . . . th[at] authority automatically extends under the law of armed conflict to a co-belligerent, to some entity that has aligned themselves with the specified entity against us, in the fight against us.") *See The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force, Hearing Before the Sen. Comm. on Armed Serv.*, 113th Cong. 27-29 (2013); *see also* Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009)

These invocations of international law to enhance authority under the AUMF do not fall under conventional *Charming Betsy* doctrine. Though *Charming Betsy* may at times be invoked to justify this move, the only commonality is the use of international law to interpret statutory text. *Charming Betsy*, as discussed above, involves the invocation of international law to narrow a statute where another reading would *conflict* with international law. Application of *Charming Betsy* to the AUMF would entail construing the statutory grant to the President narrowly to limit the use of force to only those actions that would not violate international law. [60] Reading the AUMF expansively to authorize detention and to extend to groups not referenced by the text has nothing to do with avoiding conflict with international law. Putting aside for the moment whether international law might *prohibit* the indefinite detention of Al Qaeda members or the extension of the conflict beyond the specific group that attacked the United States, certainly nothing in international law *requires* it. It would thus produce no conflict with international law for Congress to prohibit the President from detaining members of Al Qaeda, or for Congress to limit its authorization to use force to only core Al Qaeda and not to "associated groups," regardless of how one interprets what international law would permit of the state itself. It is hardly necessary to U.S. compliance for the courts to read such powers into domestic grants of authority to the President. Instead, this example involves interpreting a grant of authority to incorporate an extension of that authority *to the limits of what international law permits*.[61] Under this mechanism and for these discrete purposes, the Executive itself is granted, as a matter of domestic law, the entire authority of the state under international law.

2. *International Law Exceptions to Prohibitions and Protections*

In addition to its use as an interpretive tool to expand our understanding of domestic texts, the Executive also invokes international law as a tool to infer an exception from or a limitation on domestic constraints on executive authority or protections for individuals. In some uses, this interpretive mechanism can result in an implied hole in the norm or prohibition, sized to the limits of what a particular international law norm is understood to permit. In other examples it merely erodes or narrows the domestic constraint. The result is an enhancement of executive power at the expense of these individual protections.

(holding that "the government has the authority to detain members of 'associated forces' as long as those forces would be considered co-belligerents under the law of war").

60. *See, e.g.*, Wuerth, *supra* note 41, at 299 (arguing that courts should interpret congressional force authorizations as "not embrac[ing] violations of international law by the President").

61. For an additional, nonwartime example see Dames & Moore v. Regan, 453 U.S. 654, 686 (1981), discussed *infra* Part I.C.3., which also employs a *Reverse Betsy* move. In that case, the Executive and the Supreme Court relied on international law principles combined with amorphous statutory authority to enhance the Executive's domestic authority, in order to justify the unilateral extinguishing of legal claims against Iran. *See id.* at 684–85.

The example I introduced at the outset—the Executive's justification for its authority to target and kill a U.S. citizen[62] who is a member of Al Qaeda or associated forces—illustrates this invocation of international law to infer an exception to domestic constraints and protections. To date, the Executive has asserted its understanding of the legal framework governing the conflict with Al Qaeda in countless speeches and legal briefs.[63] But the most detailed public account of its constitutional and statutory analysis consists of two recently released Office of Legal Counsel ("OLC") memoranda analyzing the Executive's legal authority to target and kill Anwar al-Awlaki, a U.S. citizen accused of plotting attacks against the United States as a leader of a force associated with Al Qaeda.[64] Under the OLC memoranda, the Executive does not assert that domestic constitutional and statutory norms no longer protect such an individual during wartime, as some have advocated.[65] Instead, it presumes these domestic rules continue to apply in this wartime con-

62. The example of the targeted killing of a *U.S. citizen* is used here specifically because of the near-consensus today on the applicability of constitutional rights and statutory prohibitions to citizens, even while abroad, and to avoid clouding this discussion with confusion over the status of these rules to noncitizens abroad. Related questions may also arise with respect to noncitizens—though they have yet to receive much airing; these have arisen to some extent in the context of detention, particularly detention within the United States. In a report to Congress on a proposed transfer of detainees to the United States, the Executive stated that "any *arguably applicable* constitutional provisions should be construed consistent with the individuals' status as detainees held pursuant to the laws of war . . . ." *See* Off. of Legis. Aff., U.S. Dep't of Just., Report Pursuant to Section 1039 for the National Defense Authorization Act for Fiscal Year 2014 (May 14, 2014) (emphasis added). *But see* Barron & Lederman, *supra* note 3 (citing arguments that certain constitutional protections simply should not apply in this context). Historically, the Court's application of constitutional protections to individuals did at times turn on that individual's enemy status, or location in enemy territory. *See* William Dodge et al., International Law in the U.S. Supreme Court: Continuity and Change, 142–47, 275–78, 603 (2011) (describing a line of cases "in which the Court rejected constitutional claims by enemies during wartime" and "[e]nemy status" was defined by territorial location, citizenship, or allegiance.) That approach falls under the replacement mechanism I discuss in Part I.C.4.

63. *See, e.g.*, Harold Koh, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm; Johnson, Address Before Yale Law School, *supra* note 56; Preston Testimony, *supra* note 55. The George W. Bush Administration also employed speeches to present its legal position on the conflict. *See, e.g.*, Bellinger, Address at the London School of Economics, *supra* note 5.

64. *See* July 2010 OLC Memorandum, *supra* note 1; Memorandum from the Off. of Legal Counsel to the Att'y Gen. (Feb. 19, 2010), *Lethal Operation Against Shaykh Anwar al-Aulaqi* [hereinafter Feb. 2010 OLC Memorandum]. The memos are careful to narrow the legal justification to the particular—and almost entirely redacted—facts at issue in that case. We can derive from what is left that they premise their approval on the fact that the target is an operational leader of the enemy armed group as well as a threat. The process for determining whether the factual record from the available intelligence suffices to meet that standard is not clarified, but the memo references "high-level government officials" who have drawn these conclusions with respect to al-Awlaki. *See* July 2010 OLC Memorandum, *supra* note 1, at 21.

65. *Cf.* Yoo, The Real Problem with the Obama Administration's Drone Memo, *supra* note 4; Feldman, Obama's Drone Attack on Your Due Process, *supra* note 4.

text,[66] but it infers exceptions or carveouts to these rules for actions permitted of the state under particular international law norms.[67]

I will start with the memoranda's constitutional reasoning, which is less clear than its statutory analysis, but ultimately relies upon similar exceptions.[68] The OLC memoranda first purport to apply and satisfy the Fifth Amendment's Due Process Clause.[69] Yet "process" is not the focus of this analysis;[70] instead, the memoranda put forward a substantive standard under which the Executive may assert an exception to due process requirements. They base that exception upon a showing that 1) capture is infeasible; 2) the individual is part of enemy forces;[71] and 3) the individual poses a "continued and imminent threat to U.S. persons or interests."[72] There is no clear domestic or international law precedent given for the feasibility prong, nor is there a clear means of determining how it might be met, and it is impossible to determine the extent to which it acts as a real constraint.[73] The second and third prongs are the focus of the analysis. It can be understood from the memoranda, as well as from other legal documents, that the Executive considers the requirement that an individual be "part of enemy forces" a term of art intended to correspond to the class of individuals within a nonstate armed group that may be targeted or detained, by analogy to the international law-of-war classification of combatant in an enemy state armed force.[74] The third, "continued and imminent" test is of unclear provenance

66. *See* July 2010 OLC Memorandum, *supra* note 1, at 38 (asserting that the Fourth and Fifth Amendments "likely protect[ ]" U.S. citizens who may be targets in the conflict, "in some respects even while . . . abroad"); *see also* Feb. 2010 OLC Memorandum, *supra* note 66.

67. *See* July 2010 OLC Memorandum, *supra* note 1 (analyzing whether the targeted killing would violate several statutory prohibitions on killing abroad, as well as the Fourth and Fifth Amendments, and finding exceptions for the act at issue); Feb. 2010 OLC Memorandum, *supra* note 64; *see also* Department of Justice White Paper, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper].

68. *See* July 2010 OLC Memorandum, *supra* note 1, at 38. *See generally* Feb. 2010 OLC Memorandum, *supra* note 64.

69. *See, e.g.*, Feb. 2010 OLC Memorandum, *supra* note 64, at 6 (assuming though not deciding that, based on al-Awlaki's citizenship, the Due Process Clause "likely applies in some respects").

70. The "process" the unredacted portions of the memorandum describe is this: "the highest officers in the intelligence community have reviewed the factual basis for the lethal operation." July 2010 OLC Memorandum, *supra* note 1, at 40 (internal quotation marks omitted). Judicial review plays no role. Feb. 2010 OLC Memorandum, *supra* note 64, at 6 (proposing that even the limited judicial process contemplated in *Hamdi* for enemy combatants is necessary "only when the determination is made to *continue* to hold" them); *see also* Trevor Morrison, *The White Paper and Due Process*, LAWFARE (Feb. 7, 2013, 7:53 PM), https://www.lawfareblog.com/2013/02/the-white-paper-and-due-process/ (arguing that the DOJ reasoning "fails to acknowledge the broader doctrinal framework within which the *Mathews* test exists," in particular the "long established" norm "that the core of procedural due process is notice and an opportunity to be heard before an impartial decisionmaker").

71. *See* Feb. 2010 OLC Memorandum, *supra* note 64, at 6–7.

72. *See id.* at 6; July 2010 OLC Memorandum, *supra* note 1, at 38–40.

73. *See* July 2010 OLC Memorandum, *supra* note 1, at 40 (citing only an Israeli legal opinion regarding the practicality of capture).

74. *See id.* at 21–22 nn.28–29 (citing cases and briefs dissecting who may be detained under the laws of war and disputing assertions that under international law only individuals who are directly participating in hostilities may be targeted); March 13 Brief, *supra* note 10 (asserting authority to detain those individuals who would be analogous to members of enemy armed forces in a traditional state-to-state

but appears based at least in part on the Executive's international law theory of imminence, under which the Executive can respond to an imminent threat from another state's territory without violating the U.N. Charter's prohibition on the use of force.[75] The memoranda thus propose an exception to ordinary due process, defined by a substantive standard that turns predominantly on the Executive's international law analysis regarding the lawfulness of the target.

The Fourth Amendment analysis proceeds in a similar fashion. The OLC memoranda rely on domestic Fourth Amendment doctrine holding that the use of deadly force against an individual who poses a significant and immediate threat would not be "unreasonable." [76] Yet a years-long manhunt for a suspect in Yemen admittedly provides a very different context than the truly instantaneous exigency undergirding the domestic precedent of the Fourth Amendment "reasonableness" test.[77] Thus in seeking to apply the domestic "reasonableness" exception in this setting, the July 2010 OLC Memorandum again invokes the above factors: the existence of an armed conflict, and the requirement "that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests."[78] Like the due process clause exceptions, each of these factors forming the substance of the Fourth Amendment analysis turns in large part on internal tests derived from international law.

The Executive's position toward statutory and other domestic prohibitions on targeted killings is more explicit in carving out exceptions to these

armed conflict). While the March 13 Brief explicitly reserved its scope to detention, the OLC memoranda's reliance on it demonstrates that the "part of" standard clearly factors into targeting considerations. *Id.*

75. *See* July 2010 OLC Memorandum, *supra* note 1, at 38–40; DOJ White Paper, *supra* note 67, at 6–7; *see also* Brennan, Remarks at Harvard Law School, *supra* note 9. One commentator has suggested that the "imminence" theory in the Executive's position derives not from international law but from internal executive policy. *See* Benjamin Wittes, *Whence Imminence in that Drone Memo? A Puzzle and a Theory*, LAWFARE (June 24, 2014), http://www.lawfareblog.com/2014/06/whence-imminence-in-that-drone-memo-a-puzzle-and-a-theory/. Recent reporting further suggests the specific language "continuing and imminent" may derive from a Bush memorandum on covert lethal action. *See* SAVAGE, *supra* note 9, at 237. The reliance on an "imminence" test may in fact involve a mix of international law, domestic law, and policy considerations, and result from a compromise between those internal actors seeking to impose international law limits, and others seeking to satisfy internal rules. For a discussion of the harms in such compromises, see Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 226 n.1, 225–304 (2014).

76. *See supra* note 66 at sources cited therein; *see also* DOJ White Paper, *supra* note 67, at 9 ("[I]in circumstances where the targeted person is an operational leader of an enemy force and . . . poses an imminent threat of violent attack against the United States . . . the use of lethal force would not violate the Fourth Amendment."); July 2010 OLC Memorandum, *supra* note 1, at 41.

77. July 2010 OLC Memorandum, *supra* note 1, at 41 (citing *Tennessee v. Garner*, which—in contemplating a scenario in which an officer must make an instantaneous decision whether to use force against a fleeing suspect—suggests that such an officer may use deadly force to prevent the real-time escape of an individual the officer believes poses a threat).

78. *Id.* at 41.

laws' ordinary scope that are defined by reference to international law.[79] The memoranda analyze several relevant statutes and other authorities—including a statute criminalizing murder abroad and the executive order prohibiting assassination[80]—and conclude that each should be read to exclude from their scope operations by the state within an armed conflict conducted in accordance with the international laws of war.[81]

In essence, the Executive's position is that the existing executive order prohibiting assassination, statutory prohibitions on the killing of U.S. citizens, and fundamental constitutional protections all contain implicit exceptions for killing that is lawful under the international laws of war. The effect of this reasoning is thus: the lawfulness under *domestic* law of the targeted killing of an individual abroad turns on the Executive's interpretation of the lawfulness of the act as a matter of *international* law.[82]

As with the other mechanisms discussed, international law is invoked here ostensibly as a *limiting* principle. The authors go to great pains not to assert unfettered executive power. Instead, the argument is that the exceptions asserted by the OLC memoranda are lawful only to the extent that the actions are lawful under international law. The limiting principle of international law compliance softens, or purports to soften, what might otherwise appear to be an extraordinary assertion of authority by the Executive. Yet the result of this reasoning is an executive-inferred exception to these domestic constraints, shaped by an international law standard that the Executive defines. The strength of these international law standards and the stringency and substance of their limits on executive power thus become the entire ballgame. Parts II and III will discuss the extent to which these international law standards may provide a sufficient limiting principle and a sufficient replacement for the domestic constraints in this context.

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79. *Id.* at 17–35; DOJ White Paper, *supra* note 67, at 10–15 (discussing the prohibition on killing of U.S. nationals abroad in 18 U.S.C. § 1119(b) and the prohibition on assassination in Executive Order No. 12333).

80. *See generally* DOJ White Paper, *supra* note 67, at 10–13; Feb. 2010 OLC Memorandum *supra* note 64, at 1, 4.

81. *See, e.g.*, July 2010 OLC Memorandum, *supra* note 1, at 30 (reading into the foreign murder statute a "public authority" exception, and then asserting that "the [al-Awlaki] operation should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification," and therefore compliant with the statute).

82. A historical example suggests that the use of international law to infer a carve-out from domestic constraints has not been merely a wartime occurrence. In *In re* Ross, 140 U.S. 453 (1891), the Supreme Court upheld the peacetime use of consular courts established by treaty to try citizens overseas without the usual constitutional protections. Congress ultimately abolished the use of consular courts, and it is unlikely the *Ross* opinion would stand today. *See* 70 Stat. 773, 22 U.S.C.A. § 141 (1956)*; see also* Reid v. Covert, 354 U.S. 1, 12 (1953) (calling *Ross* "a relic from a different era," and upholding constitutional challenges brought by American citizens tried by military courts abroad during peacetime); Cleveland, *supra* note 16, at 16–17 (noting that while the intent of the *Ross* Court may have been to "protect[ ] rights, because consular courts shielded Americans from barbaric foreign legal proceedings, . . . [t]he net effect of this approach, however, was to employ international practice to deny constitutional protections").

3. *International Law Displacement of Domestic Rules*

A third empowerment mechanism is the invocation of international law to disrupt or displace domestic legal rules. This mechanism empowers the Executive by disrupting the ordinary operation of domestic law in a way that permits the Executive greater latitude to act than it might otherwise have.

The areas of foreign sovereign immunity and the executive settlement of claims provide examples. These are subtler than the prior wartime examples, and enhance executive power in a less direct way. But under longstanding doctrine in the areas of immunity and claims settlement, the Executive has wielded considerable authority to extinguish legal claims and other property rights by reference to international law and comity. The success of these mechanisms is connected in part to theories of historical gloss and congressional acquiescence, but international law has played a consistent role in both the doctrines' origins and their continued vitality.[83]

In cases involving sovereign or foreign official immunity, an entire lawsuit—and any claim of petitioner to redress—may be thrown out of court altogether based on a conception of immunity drawn from longstanding principles of international law and comity.[84] The Executive's role in immunity decisions and the substantive content of the immunity doctrine have evolved considerably. At various points in history the Executive, courts, and Congress have all played significant roles in deciding when to extend immunity and thus extinguish the claim. In early cases involving claims of foreign government immunity, the courts relied upon customary international law principles and comity to grant essentially absolute immunity to foreign states, and afforded some weight to executive views.[85] As views on the substantive doctrine shifted,[86] so too did the Court's level of deference, and as a

83. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM L. REV. 1, 53–56 (1993) (acknowledging "the existence of some independent but limited presidential law-making authority" in the areas of claims settlement by executive agreement and foreign sovereign immunities cases). *Cf.* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 452 (2012) (advocating a "circumspect" approach to finding congressional acquiescence in executive action); Ingrid B. Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 931 (2011) (grounding the Court's immunity doctrine in constitutional and functional foreign relations concerns, as well as in history and congressional authorization).

84. *See, e.g.*, William S. Dodge, *International Comity in American Law*, 115 COLUM L. REV. (forthcoming) (describing U.S. immunities doctrine as including "an international law 'core' and a comity 'penumbra'").

85. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. SYSTEM 228–29 (2d ed. 2015) (discussing cases in which the Court issued decisions inconsistent with the position of the State Department). *See generally* Wuerth, *supra* note 83, at 917.

86. The Executive's substantive position evolved from a theory of absolute immunity to a restrictive approach, which permitted an exception to immunity for commercial activity by the state. The State Department announced this approach in a 1952 memo from the then Acting Legal Adviser Jack Tate, which described the evolution of international law on the matter and the Department's position of re-

result the Court gradually moved toward a position of total deference to executive views.[87]

Ultimately, this practice became burdensome for the Executive.[88] In an effort to relieve the State Department and to codify a particular theory of immunity, Congress passed the Foreign Sovereign Immunities Act of 1976 ("FSIA").[89] Under the FSIA, the courts now make determinations of foreign state immunity, relying on the FSIA and on its international law underpinnings.[90] However, the executive branch continues to play a large role in putting forth suggestions of immunity to the courts in cases involving head-of-state and foreign official immunity,[91] which the Supreme Court has held do not fall under the FSIA.[92] Thus, while U.S. practice has evolved significantly, at various points in history in cases involving foreign nations or government officials—and continuing today for cases involving head-of-state and foreign official immunity—the Executive has wielded quite significant,

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strictive immunity. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULLETIN 984–85 (1952). For a description of the historical evolution of U.S. practice regarding sovereign immunity, see, e.g., Samantar v. Yousuf, 560 U.S. 305, 311 (2010). For an example of "absolute" or "classical" immunity, see *Schooner Exch.*, 11 U.S. at 116.

87. *See Ex parte* Republic of Peru, 318 U.S. 578, 588–89 (1943) (asserting that courts are bound to accept the Executive's position on immunity so as not "to embarrass the executive arm of the government in conducting foreign relations"); Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35 (1945) ("In the absence of [an executive assertion of immunity], the courts may decide for themselves whether all the requisites of immunity exist . . . in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.").

88. The State Department was heavily involved in issuing immunity suggestions to the courts upon requests of foreign states, a process that became a burden to the Department and stoked controversy over its decisions. *See* Wuerth, *supra* note 83, at 927–28.

89. FSIA, *supra* note 23; Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007) (citing the "two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV. ch. 5, at 392–95 (1987). The FSIA codified the "restrictive" theory of immunity, along with specific exceptions to immunity recognized under international law, such as cases involving "rights in immovable property." *See, e.g.*, *Permanent Mission of India to the United Nations*, 551 U.S. at 199–200 (noting that "the FSIA was also meant 'to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice'") (internal citations omitted).

90. Permanent Mission of India to the United Nations, 551 U.S. at 200.

91. Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014) (granting "absolute deference to the State Department's position on status-based immunity doctrines such as head-of-state immunity" and "substantial weight" to "[t]he State Department's determination regarding conduct-based immunity").

92. *See Samantar*, 560 U.S. 305; *see also* Curtis Bradley & Laurence Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 232 (2011) (noting that the *Samantar* Court made little analysis of the international law underpinnings of the FSIA in failing to extend it to individuals, and contrasting this approach with a 2006 British House of Lords decision that "relied heavily on international law in construing the word 'State' in Britain's State Immunity Act to encompass foreign officials acting in an official capacity").

and at times absolute, authority to quash petitioners' legal claims by reference to principles of international law and comity.[93]

Courts have also upheld as longstanding practice executive authority to settle international claims disputes, affirming both the Executive's power to make executive agreements with other nations and the Executive's discretion in implementing these agreements to override state laws and extinguish legal claims.[94] In the cases of *United States v. Belmont* and *United States v. Pink*, for example, the Supreme Court upheld the Executive's authority to preempt state law and assume claims against U.S. nationals that the Soviet Union had assigned to it via an executive agreement based on diplomatic correspondence between the two states.[95] In *Dames & Moore*, the Court relied in part on the Executive's international law arguments to permit its unilateral suspension of domestic legal claims against Iran, which the Executive had effected through an executive order implementing an executive agreement with Iran to resolve the hostage crisis.[96] Though the *Dames & Moore* Court was not clear as to the specific constellation of authorities necessary for its decision, the statutory texts alone did not suffice to suspend the claims.[97] Instead, the Court explicitly relied upon the Executive's assertion that "international agreements settling claims by nationals of one state against the government of another 'are established international practice reflecting traditional international theory.'"[98] Thus, while the Court did not identify the precise location of the Executive's authority and also relied on longstanding congressional acquiescence to practice, the Executive's international law practice of settling claims through international law agreements was a necessary factor in the Court's decision (and was the very practice in which Congress had acquiesced). Recently, the *Medellín* Court reaffirmed that practice, suggesting that the Court's comfort in permitting this executive discretion lay in part in the limitations imposed by the international agreements themselves.[99]

93. *But see* HENKIN, *supra* note 31, at 56 n.68 (arguing that the discretion left to the Executive was intended to "giv[e] effect not to Executive views of international law but to 'national policy' on immunity even if it was contrary to, or not based on or related to, international law").

94. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); *see also* Medellín v. Texas, 552 U.S. 491, 531-32 (2008) (acknowledging "[t]he Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement"); Monaghan, *The Protective Power of the Presidency, supra* note 83.

95. *Belmont*, 301 U.S. 324; *Pink*, 315 U.S. 203.

96. *Dames & Moore*, 453 U.S. at 686.

97. *Id.* at 675.

98. *Id.* at 679 (quoting HENKIN, *supra* note 31, at 262).

99. *Medellín*, 552 U.S. at 531 (stating as a basis for the distinction that "the limitations on this source of executive power are clearly set forth"). The *Medellín* Court did not explain why neither the Vienna Convention on Consular Affairs nor the International Court of Justice opinion interpreting it were themselves at least as clearly limiting if not more so than the executive agreements at issue in the prior cases.

4. *International Law Replacement of Domestic Rules*

Finally, the fourth mechanism I identify is the replacement of an ordinary domestic legal framework with a different legal framework drawn from international law. Replacement is similar to the displacement and exception mechanisms, but differs in a few key respects. Unlike displacement, discussed above, under which international law is invoked only at an initial stage to alter the ordinary course of events, replacement involves *both* disrupting the ordinary course of domestic law and then *replacing* the domestic rules with international law. Replacement is also distinct from the exception mechanism, in which specific domestic norms purportedly continue to operate but with individualized exceptions that are sized to what international law permits. Replacement, by contrast, effects an entire framework shift, under which an entire set of rules is replaced wholesale with another. Such a replacement does not necessitate that the new legal framework drawn from international law will be either more or less constraining than the domestic framework. But when the international law framework is more permissive than the domestic legal framework it replaces, this exchange of one set of limitations for another can lead to an expansion of executive authority and a weakening of individual protections, albeit one that is intended, again, to expand only to the limits of what international law permits of the state.[100]

An example is the longstanding substitution of an international law-based regime of administrative detention and military commissions in the place of ordinary criminal process for individuals whom the Executive seeks to capture and detain in its prosecution of an armed conflict. Under this mechanism, international law serves first as a justification for the shift of legal framework. In this case, that justification rests on the twin executive determinations of the existence of an armed conflict and the labeling of a particular individual as an enemy combatant[101] in that conflict. With respect to both of these determinations, the Executive (and courts when in-

100. The courts have engaged repeatedly in recent years when the Executive was seen to overstep the international law limits on the use of military commissions, to mixed effect. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (invalidating the President's *unilateral* use of military commissions); *Medellín*, 552 U.S. 491 (Stevens, J., concurring) (questioning the extent to which the crime at issue was a valid law of war offense); al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (raising questions regarding the extent to which the Executive can rely upon a congressional statute to prosecute an individual in a military commission on a charge that is not an established war crime under international law).

101. Note that the Obama Administration ceased using the term "enemy combatant" at least in certain contexts, such as the Guantánamo habeas litigation, but it has nevertheless continued to rely on the concept of enemy combatant status for the purposes of detention and targeting in the current conflict. *See, e.g.*, March 13 Brief, *supra* note 10 (dropping the "enemy combatant" label but nevertheless continuing to assert broad authority to militarily detain members and supporters of Al Qaeda and Taliban forces); Preston Testimony, *supra* note 55 ("[I]n our ongoing armed conflict against al-Qaeda, the Taliban and associated forces, the United States military relies on the authority of the AUMF to hold enemy belligerents in military detention in Afghanistan and at the detention facility at Guantánamo Bay, Cuba."); Koh, *supra* note 63 ("[I]ndividuals who are part of . . . an armed group are belligerents and, therefore, lawful targets under international law.").

volved[102]) typically invokes international law as the substantive body of law that provides the standard under which these concepts should be understood.[103]

International law next provides the replacement legal framework that stands in lieu of the usual domestic legal architecture. Particularly relevant here is its replacement of the ordinary operation of domestic criminal process, including Miranda warnings, charge, presentment, trial, sentence, and accompanying fundamental constitutional rights, such as the right to a jury trial and counsel, for those who would otherwise merit them.[104] In the place of this domestic legal framework stand two entirely different detention regimes both justified and governed largely by international law: the first is an administrative detention regime under which the Executive may detain an individual with minimal process not for crimes committed, but instead based on status as an "enemy combatant" until the "end of hostilities," both of which it defines by reference to international law; the second is a military commission regime, under which individuals may be charged and tried by military courts, outside of regular criminal process, for violations of the international laws of war.[105]

102. The executive branch has generally demanded—and often received—deference on these questions. *See, e.g.*, Brief for Respondents at 25, Hamdi v. Rumsfeld, 542 U.S. 507 (No. 03-6696) (arguing that the "determination that an individual is an enemy combatant" is a "quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority"); Brief for Appellees at 17, al Bihani v. Obama, 509 F.3d 866 (D.C. Cir. 2010) (No. 09-5051) ("[T]he determination of whether a conflict has ended is a matter 'of political judgment for which judges have neither technical competence nor official responsibility.'") (citing Ludecke v. Watkins, 335 U.S. 160, 170 (1948)). In other cases judicial review may be absent entirely. *See, e.g.*, DOJ White Paper, *supra* note 67, at 10 (stating that "there exists no appropriate judicial forum to evaluate the[ ] constitutional considerations" involved in the targeted killing of a U.S. citizen abroad in the conflict with Al Qaeda, and that judicial intervention might require a court "inappropriately" to interfere in executive branch warmaking).

103. *See, e.g.*, March 13 Brief, *supra* note 10 (arguing that "principles derived from law-of-war rules governing international armed conflicts," which have "been codified in treaties such as the Geneva Conventions or become customary international law . . . must inform the interpretation of the [Executive's] detention authority . . . ."); Petition for Writ of Certiorari at 27–30, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (arguing that the President's ability to seize and detain "enemy combatants" is well-settled under laws of war and thus comes within his Article II powers); *Hamdan*, 548 U.S. at 631 (holding that conflict with Al Qaeda was a "conflict not of an international character" covered by Common Article 3 of the Geneva Conventions). With respect to the determination that the United States is currently engaged in an armed conflict with Al Qaeda, the Executive has not articulated a clear legal standard under which it makes this determination, but it has suggested that its understanding is guided by international law principles. *See, e.g.*, Brief for Appellees at 18, Al-Bihani, 509 F.3d 866 (N. 09-5051) (noting that "the laws of war focus on the cessation of 'hostilities,' which continue in Afghanistan"); July OLC Memorandum, *supra* note 1, at 25–26 (citing Prosecutor v. Tadic, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber Oct. 2, 1995)) (looking to international law sources including jurisprudence from the International Criminal Tribunal for the Former Yugoslavia for guidance on the existence and geographic scope of an armed conflict).

104. Due process and habeas rights are likewise significantly narrowed, as will be discussed *infra* Part I.C.1. For federal crimes this also includes supervision by an Article III judge. *See, e.g.*, Vladeck, *supra* note 17.

105. *See, e.g.*, Military Commissions Act of 2009 § 948(c) (2009) (identifying as subject to military commissions "[a]ny alien unprivileged enemy belligerent"); *id.* § 948(b) (specifying the purpose "of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and

All of these mechanisms can work in tandem with others discussed in this Article. For example, in the current conflict with Al Qaeda, the Executive's power to effect the replacement mechanism relies in part upon an expansive statutory interpretation of the AUMF, as discussed in Section 1. Similarly, its compliance with constitutional and statutory protections for individuals relies on the exceptions it infers to these constraints discussed in Section 2.[106]

As a matter of practice, these mechanisms are not new. During the Civil War, for example, Lincoln's Administration looked to the international laws of war to justify a naval blockade on the South through unilateral executive action, seizure of property without compensation, and detention of Confederate soldiers without ordinary criminal process; in the place of the ordinary operation of domestic law it imposed a legal framework based instead in international law and looked to that law to determine the outer bounds of its authority.[107] In World War II, the Executive relied upon the international laws of war to try by military commission on U.S. soil, convict, and execute several individuals (including at least one U.S. citizen) as "unlawful combatants," without the benefit of certain constitutional protections like the Fifth and Sixth Amendments.[108]

D. Unsuccessful Attempts at Empowerment

The cases discussed up to this point have involved successful invocations of international law to effect an enhancement of executive power. But not all invocations of international law for these purposes have met with such success. The Executive has made many *unsuccessful* attempts to enhance its authority through reliance on international law to alter or displace domestic rules and constraints. The Executive's failed attempts at the empowerment phenomenon are significant simply because executive legal arguments that

other offenses triable by military commission"); *see also* DEP'T OF JUSTICE & DEP'T OF DEFENSE, DETERMINATION OF GUANTÁNAMO CASES REFERRED FOR PROSECUTION, http://www.justice.gov/opa/documents/taba-prel-rpt-dptf-072009.pdf (explaining the framework under which the Department of Defense and the Department of Justice would assess whether individuals would be prosecuted in a military commission or Article III court); *Hamdan*, 548 U.S. 557; Vladeck, *supra* note 17 (arguing that the Article III exception for military commissions should be grounded in international law).

106. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014).

107. *See, e.g.*, The Prize Cases, 67 U.S. 635 (1862); Thomas Lee & Michael Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES (Curtis Bradley & Chris Schroeder eds., 2009); Golove, *supra* note 17, at 385 ("[I]t was on the theory that the President, as commander in chief, may exercise the lawful belligerent rights of the United States under international law that Lincoln justified the imposition of a naval blockade on Southern ports, the seizure and destruction of vast quantities of property located in the South as enemy property, and even the Emancipation Proclamation."); Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1886 (2010) (arguing that "the Constitution itself called into play a new legal regime during wartime, the laws of war, which fleshed out the broad and vague constitutional provisions granting war powers and provided the applicable rules guiding the government's military measures").

108. *See Ex parte* Quirin, 317 U.S. 1, 37–39 (1942).

see the light of day or are subject to judicial review represent only the tip of the iceberg. Considering the vast quantity of legal decision making that happens inside the black box of the executive branch, any glimpse into executive lawyering is edifying and provides insight into the kind of legal arguments executive officials find reasonable or salient, and thus may be relying upon internally.[109] As evidence of the significance, one need only consider the fact that the Executive's legal analysis of its authority to target and kill U.S. citizens, which employs several of the mechanisms discussed in this Article, was never intended for public consumption, much less judicial review.[110] The Executive's attempt to use these arguments, even as unsuccessful litigation positions, is often the only information the public receives regarding the Executive's analysis of its own authority. It thus provides the public with a tiny wedge into understanding the complex web of lawyering and policymaking that happens away from public view or judicial oversight.

Executive invocation of the empowerment phenomenon for the purpose of compliance with that law might provide less potential for abuse than empowerment for other purposes. Yet the Executive has, in many instances, met resistance to its invocation of international law for the purposes of compliance, from Washington's failed attempts to prosecute violators of neutrality[111] to recent cases involving free speech and religious rights.[112]

A well-known example of the Executive's unsuccessful attempt to invoke international law to expand domestic authority is the case of *Medellín v. Texas*.[113] *Medellín* addressed a failure by the state of Texas to provide consular visits in accordance with the Vienna Convention of Consular Affairs to an alien criminally convicted and sentenced to death.[114] The International Court of Justice ("ICJ") had previously found the United States in breach of this obligation, and ordered a remedy through the state's criminal process.[115]

109. *See, e.g.*, Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013) (describing the vast array of legal decision making that takes place inside the executive outside of litigation or public view).

110. *See supra* Part I.C.2.

111. In the Neutrality Crisis of 1793, Washington imposed a position of strict neutrality via executive fiat and asserted that, despite the lack of a statute criminalizing the conduct, he would prosecute all violators. Proclamation of Neutrality 1793, http://avalon.law.yale.edu/18th_century/neutra93.asp (last visited Oct. 2, 2015) [hereinafter Neutrality Proclamation of 1793]. The ensuing prosecutions received the imprimatur of several justices, including the Chief Justice, yet ultimately resulted in jury nullification. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (jury charge delivered by Chief Justice John Jay). *Cf.* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 608-14 (6th ed. 2009) (discussing the ultimate rejection of federal common law crimes in United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812)).

112. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (dismissing the Executive's attempted reliance on the Vienna Convention on Diplomatic Rights as a compelling interest sufficient to repel a First Amendment challenge to a statute prohibiting certain acts of protest outside embassies in the District of Columbia); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (dismissing the Executive's attempted reliance on a treaty obligation as a "compelling interest" sufficient to justify a burden on religious exercise under the Religious Freedom Restoration Act of 1993).

113. Medellín v. Texas, 552 U.S. 491 (2008).

114. *Id.*

115. *Id.*; *see* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

The executive branch took the position that the underlying treaty was not self-executing (and thus did not itself create judicially enforceable domestic law), but that the President could unilaterally choose to give it such effect by issuing a memorandum to the Attorney General directing that the states comply with the ICJ opinion.[116] The Executive's (ultimately unsuccessful) position to the Court was that the President himself could, through such action, choose to make that obligation enforceable and thus override contrary state law.[117] The Executive's argument would have placed complete authority in the hands of the President over the decision whether and when to override domestic law in order to comply with an international obligation.[118] It located this power in the President's "authority to implement the Optional Protocol and the U.N. Charter."[119] The Court did not agree, and held that contrary to the government's assertion of authority, the President could not unilaterally choose to give effect to an international obligation that was not otherwise domestically enforceable in order to "establish binding rules of decision that preempt contrary state law."[120]

Often congressional action has provided the remedy for such failed attempts. Historically, Congress has acted many times when unilateral executive action has failed: from the Neutrality Act of 1794, enacted to bolster Washington's proclamation of Neutrality, to the Military Commissions Act of 2006, enacted in the wake of the Supreme Court's decision in *Hamdan* striking down the President's unilateral establishment of military commissions. As Part III discusses further, congressional action—either to implement international law or to aid executive action in reliance upon it—is a useful means of balancing executive discretion with individual rights and separation of powers concerns in areas in which the international and domestic realms collide. Of course, it is not always effective. In *Medellín*, for example, the Court directly suggested congressional action as the appropriate means of implementing the international law obligation at issue in that case, but as of yet Congress has failed to act and the United States continues to struggle to remedy the breach that the ICJ found in *Avena*.

116. Medellín v. Dretke, 544 U.S. 660 (2005); Brief for the United States as Amicus Curiae Supporting Petitioner, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984); *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 338–40 (2006).

117. Brief for the United States as Amicus Curiae Supporting Petitioner at 5, Medellín v. Texas, 552 U.S. 491 (No. 06-984).

118. *Id.* ("[T]he President is authorized to determine whether and how to comply with the ICJ's decision.").

119. *Id.* at 4, 27–29.

120. *Medellín*, 552 U.S. at 530 (internal quotation marks omitted) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, Medellín v. Texas, 552 U.S. 491 (No. 06-984)).

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Although perhaps counterintuitive, a consistent theme emerging from these examples is that the expectation of international law's force as a constraint and its use as a limiting principle often underlie its invocation to enhance authority. The assurance of international law constraint acts as security that the Executive's asserted authority will not be entirely unbounded. The following Parts II and III address the extent to which international law truly fulfills that role and serves as a sufficient limiting principle in these domestic contexts, and the extent to which it may act as an appropriate determiner of the outer bounds of domestic executive power.

II. Dangers in the Empowerment Phenomenon

While the enhancement described in Part I can be a dramatic phenomenon, it is neither new nor always problematic. And while we should not try to extinguish it without regard for context, there are aspects of this phenomenon that can lead to abuse, with dangerous effects for the separation of powers, the rule of law, and individual rights. This Part explores some of the dangers lurking in this phenomenon, the circumstances under which we need to be particularly vigilant, and the overlooked hazards of dismissing international law as irrelevant in the domestic sphere. One demonstrable conclusion we can draw from the enhancement phenomenon is that all actors concerned with domestic law—and in particular those concerned with executive power and individual rights—must engage with international law and undertake a nuanced understanding of both the substantive content itself and how it interacts with the domestic system.

This section describes three primary areas of concern in the use of international law to enhance and enable domestic authority. First, "international law" is itself a broad term covering a vast expanse of rules and norms in an array of forms, many of which are not conducive to acting as sole constraints on intrastate actors. Second, the use of international law in the domestic system can aggrandize executive power through the Executive's interpretive discretion, effectively leaving the Executive responsible in some cases for interpreting the parameters of its own domestic authority. Third, the empowerment phenomenon can obscure the legal reasoning behind executive positions and distract or mollify the very actors who would otherwise critique and check executive power.

A. International Law as Insufficient Check on Executive Power

Reliance on international law as a check on executive discretion or as a limiting principle in lieu of other domestic constraints hinges in part on the expectation that international law and other external forces will operate as

true constraints. This perception is based in part in the genuine role that international law plays in checking state action on the global stage.[121] Executive overreach is thus ascribed to a simple failure to impose or to observe international law limits.[122] This may sometimes be true, but it is not the full picture. The role that international law plays in checking state action is often entirely distinct from—and addresses questions that are different from—matters of the Executive's internal domestic powers vis-à-vis individuals or the other branches. "International law" is a broad field covering a vast expanse of rules and norms. Many of these norms are not conducive to acting as sole constraints on government actors, nor are they tailored for that purpose. Others are far more permissive than the corresponding domestic norm. Though there may be cases in which it is the only option, international law is often at best an imperfect replacement for domestic legal constraints or determiner of the proper outer bounds of domestic executive power, for the following reasons:

First, international law is not, as a rule, intended to address questions regarding the internal balance of power within the state. States have distinct internal structures, and international law generally does not speak to these domestic power dynamics. It makes logical sense that rules governing what the state may permissibly do should constrain domestic actors to act within those bounds, but these rules should not necessarily define the extent of a given domestic actor's power or the balance of that power vis-à-vis others.

Second, much of international law, outside of specific substantive areas, developed historically to govern and facilitate relations between states, not the relationship between states and individuals within those states. While in the modern era states have developed international human rights norms to regulate state conduct toward those subject to state authority, historically most international law did not develop with the intent of regulating that relationship. Even international law norms that do address the states' actions toward individuals, such as the laws governing armed conflict, may carve out from their scope of application individuals who are presumed protected by the state's domestic laws or diplomatic relations.[123]

Third, even in areas where both international law and domestic law regulate the relationship between the state and individuals subject to its control, international law may be much more permissive than U.S. domestic law. This is logical, since international treaties such as human rights instruments

121. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

122. *See supra* note 17 at sources cited therein.

123. *See, e.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (describing the scope of this convention as providing protections for individuals who "find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals" and likewise exempting from protection the nationals of states who retain "normal diplomatic representation" with the detaining state) [hereinafter Fourth Geneva Convention].

are the result of multilateral negotiation and compromise by the drafting parties, and can thus only represent the minimum of what the drafters were willing to accept. Human rights instruments are ultimately intended to operate as an additional overlay of constraint atop domestic rules, which may and often do provide significantly greater and more detailed regulation than international law norms. (Of course, these instruments are particularly important in states or contexts otherwise lacking such domestic protections.) Compare for example the general prohibition on the use in legal proceedings of evidence derived from torture under the Convention Against Torture ("CAT") with the exclusionary rule under U.S. constitutional law; the latter goes much further than the international law rule by prohibiting not just evidence derived from torture but in fact *any* involuntary statements and even the fruits of such statements.[124] A displacement, rather than an overlay, of this particular human rights provision would have entailed a lessening instead of a heightening of protection.[125]

Fourth, international law has historically been understood to operate in many spheres not as a granter of authority for states but rather as a prohibitive force on state action. That is, unlike in the U.S. domestic structure where federal actors must be specifically granted power under the Constitution,[126] in the international sphere states were historically presumed free to act unless their actions were proscribed by a principle of international law.[127]

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124. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; Message from the President of the United States Transmitting the Convention Against Torture and Inhuman Treatment or Punishment, S. Treaty Doc. No. 100-20, at 14–15 (1988) ("The U.S. rules against admissibility of illegally obtained evidence and involuntary confessions are stricter than is provided for under the Convention."). Of course, international law may also go further than domestic law constraints. For example, the United States in its same Senate transmittal package suggested an "understanding" to article 16 of the Convention because it contained a requirement that was "arguably broader than existing U.S. law." *Id.* at 15–16.

125. The rule is nevertheless an important protection, not only for foreign states which do not have any domestic law on point, but for the United States itself in areas such as Guantánamo where it may understand its CAT obligation, but not its constitutional exclusionary rule, to operate. *See* U.S. Dep't of State, United States Written Response to Questions Asked by the Committee Against Torture (Apr. 28, 2006), www.state.gov/j/drl/rls/68554.htm (recognizing the application of the CAT exclusionary rule to proceedings at Guantánamo).

126. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (The U.S. federal government is "one of enumerated powers. . . . [I]t can exercise only the powers granted to it . . . .").

127. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 18 ("The rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . . . Restrictions upon the independence of States cannot therefore be presumed."). This general rule is debated. Many scholars have historically argued in favor of a theory of completeness of international law. *See, e.g.*, Hersch Lauterpacht, *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, Simbolk Verzijl 196–221 (1958). Nevertheless, international law jurisprudence and practice includes the possibility, even advisability, of "non liquet," under which "an international tribunal should decline to decide a case where rules are not available for its determination because of gaps or lacunae in international law." Parry & Grant, Encyclopedic Dictionary of International Law (1986). *See*, *e.g.*, International Court of Justice, *Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 4, 926 (July 1996) (declining to issue a final ruling on the legality of the use of nuclear weapons).

This principle (and the related question as to whether international law should be considered "complete" or to contain gaps) is a matter of significant debate, but it is nevertheless one that states rely upon and seek to preserve.[128] And critical sources have in recent years recognized the existence of gaps in international law in specific contexts.[129] Simply importing what international law permits wholesale into a domestic law grant of authority—in other words providing the Executive with authority to act to the limits of international law—could in some contexts entail an importation of the gaps along with the constraints. This could result in a blank check of domestic authority to the Executive. So, for example, went the argument by Bush administration officials in the early years of the conflict with Al Qaeda: the President claimed both Article II and statutory authority to use force against Al Qaeda, including at a minimum all the authority assumed under the international laws of war. But since those laws of war did not protect these nonstate actors, administration officials argued, there were no legal constraints at all on the President's treatment of such individuals.[130]

Fifth, the compliance and enforcement checking mechanisms of international law are distinct from those of domestic law. While it is true that both public international law and public domestic law engage matters that are judicially enforceable and those that are not,[131] the enforcement mechanisms that operate outside of courts are different in each sphere. For international law, the checks on the state will include the oversight of international organizations and the actions of other states in the international community—their diplomatic activities, their expectations of reciprocity, their approval or opprobrium, economic and other sanctions, even the threat of war.[132] Yet these checking functions engage primarily when other states have a real interest in the matter at hand.[133] Other states and players on the international

128. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Written Statement of the Government of the United States, at 8 (June 20, 1995), http://www.icj-cij.org/docket/files/95/8700.pdf (asserting the "fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations").

129. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 926 (July 8) (failing to "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake").

130. *See* Memorandum from George Bush on the Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), http://www.pegc.us/archive/White_Bouse/bush_memo_20020207_ed.pdf.

131. *See* Goldsmith & Levinson, *supra* note 15.

132. *See, e.g.*, Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011); *cf.* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004) (analogizing the potential checking functions of international institutions to those of domestic federalism).

133. Even in areas subject to judicial review, states—not individuals—are often the critical actors. For example, only states may be parties to cases before the International Court of Justice. Statute of the International Court of Justice, art. 34(1).

plane—outside of the human rights monitoring context[134]—are far less likely to engage the United States aggressively over a matter of its own *domestic* activities or legal interpretations. Thus the President's use of international law interpretation to justify the detention of an American citizen is far less likely to garner international outcry or pushback abroad on the specific international law interpretation at issue than would the President's invocation of similar arguments to detain foreign nationals or to use force in another state's territory without consent.

Sixth, the international law invoked may not speak directly to specific domestic law matters for which it is employed nor provide the clear limiting principles suggested. Take, for example, the Department of Justice's due process analysis in the targeted killing memoranda: in lieu of existing domestic constraints on executive action and strict protections for individual rights and process, the Executive reserves sole discretion to define, impose, and adjudicate a substantive standard that relies on internal, secret interpretation of international law rules.[135] The international law theories discussed in the memoranda are substantive standards for *who* might be lawfully targeted and under what conditions. These are not procedural standards for making that determination and ensuring its accuracy. This is something of a tautology: certain individuals the Executive deems legitimate targets may lawfully receive less process to determine whether they truly are legitimate targets.[136]

Similarly the memoranda rely to some degree upon the Executive's evolving and sharply contested international law theory of imminence—developed to justify the use of force in another state's sovereign territory under the U.N. Charter[137]—in order to satisfy the domestic law requirements of the Fourth Amendment, under which deadly force may in limited circumstances be used against individuals who pose an immediate threat. One is an

134. In the context of human rights treaty body reporting, for example, states must report their domestic compliance with treaty obligations to the treaty monitoring committees.

135. *See supra* Part I.C.2.

136. *See* July 2010 OLC Memorandum, *supra* note 1; Feb. 2010 OLC Memorandum, *supra* note 64. It is clear only that, whatever the Executive has in mind by the process due to individuals that is contemplated by these standards, it is certainly not *judicial* process. *See supra* note 70 at sources cited therein; *see also* Eric Holder, Speech at the Northwestern University School of Law (Mar. 5, 2012) ("'Due process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.").

137. The United States currently takes the view that the U.N. Charter exception to the prohibition on the use of force for responses in self-defense to an "armed attack" can be met by an imminent threat of attack and asserts a broader understanding of "imminence" than that of its allies. *See, e.g.*, Brennan, Remarks at Harvard Law School, *supra* note 9; U.N. Charter art. 2, ¶ 4, 51; Ben Emmerson (Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Third Annual Rep.*, ¶¶ 57–58, U.N. Doc. A/68/389 (Sept. 18, 2013) [hereinafter Emerson Report] (noting the lack of "clear international consensus [on] the scope of the right to anticipatory self-defence" and stating that "while the United States appears to accept that resort to anticipatory self-defence is constrained by the principle of imminence, it interprets this standard as a flexible one"). *See generally* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513 (2003).

evolving standard involving state sovereignty; the other is a constitutional protection for individuals. These are apples and oranges, and yet one is used to help define the parameters of the other.

Finally, the international legal principles governing a number of the areas explored in this Article—from the doctrines of sovereign and foreign official immunity[138] to the laws governing conflicts with nonstate actors—are or have been historically in a state of great flux and controversy, another reason international law is not always well-suited to act as the *sole* constraint on executive authority. International law is not some exogenous, pure entity that imposes constraints on states in a perfectly clear, binary way, where compliance and violation are the only two options. Instead, and in particular in the area of customary international law, it can be an interactive and dynamic dance among states, where aggressive interpretation and even violation of law all play a part in its evolution. In fact, this aspect of international law is one reason the U.S. domestic system generally cedes to the Executive significant discretion over its interpretation. Yet for those very reasons, relying on international law as a sole constraint in the domestic sphere entails placing significant domestic authority in the hands of the President. This facet of the phenomenon will be explored further in the next section.

B. International Law Interpretation as Empowerment

The Constitution generally entrusts the President with executing—not making—the law. Of course, there is significant debate over where the one ends and the other begins, and the devil is often in the details. Certainly, Congress delegates to agencies within the executive branch a vast amount of authority, and interpreting the scope of that authority is, to a large extent, understood to be an executive prerogative.[139] Interpretation of law itself is necessary to its execution and the power to interpret entails some core power to effect legal change in both large and small ways.[140] The amalgamation of phenomena described in this Article—in which international law, interpreted largely by the executive branch, is invoked to understand domestic authority—leaves the executive branch with significant authority to determine the outer parameters of its own domestic power. Perhaps not surprisingly, the executive at times relies upon international law interpretations that are sharply contested and that provide the President with significant flexibility and authority, at times well beyond what many might construe *either* international law *or* domestic law to permit.

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138. *See, e.g.*, Bradley & Helfer, *supra* note 92, at 248 (describing law of foreign official immunity as "unsettled and rapidly evolving"); Wuerth, *supra* note 83.

139. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

140. *See* Mistretta v. United States, 488 U.S. 361, 413–27 (1989) (Scalia, J., dissenting).

1. *International Law Triggers the Deference Reflex*

The dangers in the international law empowerment phenomenon discussed in this section are compounded to an immeasurable degree by the role that international law plays in triggering the reflex—by courts and Congress—to defer to executive interpretation and discretion.

There is a longstanding debate in scholarship and practice over the extent to which the executive branch should receive deference to its activities in the realm of foreign affairs and national security, and to a lesser degree over whether it should receive such deference on matters of international law interpretation.[141] In practice, and despite their mandate "to say what the law is,"[142] courts often defer considerably to executive positions on international law interpretation.[143] This may rest in part on the "sole organ" doctrine: the desire that "the United States speak with one voice" in this realm.[144] It may also lie in part in the means through which international custom evolves, whereby the Executive's actions and statements of law can have the effect of "creating or modifying international law."[145] Whatever the underlying purpose, in many areas where judicial oversight of executive action ostensibly exists, while the Executive's interpretation does not always wholly determine the judicial outcome, courts have nevertheless historically given the executive interpretation "great weight," and that interpretation is often dispositive of the matter at hand.[146]

Moreover there are some areas in which the Executive simply acts alone with little or no oversight of its legal positions. In addition to those areas where courts may engage but defer to executive interpretations, executive

141. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (arguing that the President should receive "*Chevron* deference" on matters of foreign affairs); Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (arguing that the "*Chevron*" model of deference from administrative law provides insights into understanding the Court's deference to the executive in the foreign affairs realm); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112 cmt. c (1987). *But see* Deborah Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011) (critiquing the suggestion of a "*Chevron*" framework for deference in the foreign affairs realm).

142. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

143. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112 cmt. c (1987). In recent years scholars have suggested the Court may be rethinking the level of deference to afford the Executive in foreign affairs. *See, e.g.*, Pearlstein, *supra* note 141 (arguing that in many critical cases the Supreme Court has not shown significant deference to executive interpretations of treaties or of statutes implicating foreign affairs); Harlan Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court,* 83 GEO. WASH. L. REV. 380 (2015); Ganesh Sitaraman & Ingrid B. Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015). The Court's recent decision in *Zivotofsky* is fodder for a counternarrative to these arguments. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2096 (2015) (finding exclusive executive power over recognition of foreign states).

144. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (quoting a speech by Marshall to Congress, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112 cmt. c (1987).

145. Restatement (Third) of Foreign Relations Law, § 112 cmt. c (1987).

146. *See, e.g.*, Bradley, *supra* note 141, at 701 n.224, 707 n.249 (citing cases); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 326(2) (1987).

interpretation also takes place in contexts where the courts may never see the matter at hand at all, or may abdicate to the political branches on other grounds, with the frequent effect of leaving such decisions in the hands of the Executive.[147] Congress for its part has shown little appetite for engaging or dissecting the Executive's international law interpretation in many of the critical areas discussed in this Article.[148]

The Executive thus often has significant discretion in interpreting what international law requires—and permits—of the United States. Though the rationale for this flexibility may lie largely in a desire to grant the Executive flexibility on the international plane, the phenomena discussed here demonstrate that this authority has ripple effects in domestic law. And to the extent that international law is used as a means of defining the parameters of domestic executive authority, deference or abdication to the Executive on the content of that international law means ceding to the Executive significant discretion to define the parameters of its domestic power.

2. *International Law in Flux and the Power of Interpretation*

The Executive's flexibility in interpreting international law—based largely in judicial deference and congressional acquiescence to executive positions—is often further compounded by the evolving state of that international law.

As with many areas of law, international law compliance does not operate in a perfectly binary fashion—compliance or violation. Instead there is a spectrum, along which sits legal interpretation. While some interpretations may be uncontroversial or, by contrast, entirely beyond the pale, much legal interpretation rests in some grey zone between the two.[149] Areas of significant judicial oversight might see more or less finality in interpretation on at least some matters, but in many matters of international law multiple interpretations may persist for a significant period. Even where consensus may start to congeal on the international plane, the United States may nevertheless continue to assert a unique view. In many of these areas, and without necessary regard for whether the position is taken in good faith or is a plausible view of the law, the position taken by the U.S. Executive will be ac-

147. Al Awlaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing the case on standing and political question grounds).

148. *See, e.g.*, NDAA 2012, *supra* note 54 (simply codifying the government's litigation position on the Executive's detention authority standard, which had been accepted by the D.C. Circuit); *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before S. Foreign Relations Comm.*, 113th Cong. (2014) (questioning the Executive's position on what groups are covered under the AUMF, but never questioning the Executive's international law interpretation of its authority); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); *cf.* FSIA, *supra* note 23 (codifying the Executive's international law approach to foreign state immunity in U.S. courts).

149. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1114–17 (2013) (noting the difficulty in distinguishing executive non-compliance from mere disagreement over interpretation).

cepted by some and sharply contested by others. The evolving state of international law in many of the areas discussed in this Article exacerbates the Executive's flexibility in this realm, granting it greater discretion to argue that its interpretation is simply one among many and well within an accepted margin of appreciation, rather than a true outlier.[150]

This phenomenon, and the resulting potential for aggrandizement of executive power, is no anomaly. Throughout history the Executive has asserted controversial international law positions and concomitant enhanced domestic authority. An early example is President Washington's proclamation of neutrality in the face of war between England and France in 1793. In order to avoid being drawn into the war, Washington imposed on the nation a disposition of strict neutrality through executive fiat, in the Neutrality Proclamation of 1793.[151] He relied in part for this unilateral action on the assertion that strict neutrality was a "duty" required by the law of nations, one under which he additionally derived authority to prosecute violators.[152] Yet the international law from which Washington derived the nation's neutrality obligations was far from clear. In fact, Washington's position required parsing a number of controversial legal questions, including the status of treaty obligations that the United States owed the belligerents as well as the aggressiveness of the neutrality required by international law.[153] As it happened, the Washington Administration chose a position that accorded with its policy interests in staying out of the war; moreover, couching this policy as a legal obligation included the additional political advantage of attributing its policy to an external source when defending its actions to the warring parties. Scholars have thus long argued over the extent to which Washington was simply attempting to enforce the state's obligations under international law, or instead strategically employing international law to impose a policy he deemed important.[154] He may very well have been doing both. Certainly he deemed reliance on international law essential to his asserted authority, as did Chief Justice John Jay and

150. *Cf.* Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 10–13 (1995) (asserting that treaty parties may even "take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action").

151. Neutrality Proclamation of 1793, *supra* note 111.

152. *Id.*; *see* Robert Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373 (2012).

153. In fact many viewed the law and state practice as favoring benevolent and not strict neutrality. Reinstein, *Washington Administration*, *supra* note 152, at 391–400.

154. *See, e.g.*, *id.* at 377 (noting and rejecting a longstanding scholarly view that "[i]nasmuch as no uniform practice among European countries was present that would have required the strict neutrality decisions made by the Washington [A]dministration, . . . those decisions were discretionary executive choices"); Prakash & Ramsey, *Executive Power, supra* note 36, at 328–32 (terming the proclamation a "policy" decision and stating that law did not require it). Another interpretation of events is depicted in the musical *Hamilton*, in which the title character opposes intervention in the conflict. He argues, "We signed a treaty with a King whose head is now in a basket. Would you like to take it out and ask it? 'Should we honor our treaty, King Louis' head?' 'Uh . . . do whatever you want, I'm super dead.'" Lin-Manuel Miranda, Hamilton (Broadway musical lyrics 2015).

Justice James Wilson, who provided the jury charges in the ensuing (and unsuccessful) prosecutions.[155] Ultimately, Congress ratified Washington's actions in the Neutrality Act of 1794.[156] In the intervening space the Washington Administration relied on its own, contested, view of international law to enhance its authority domestically—to impose a position of neutrality on the nation and to prosecute violations of it without congressional legislation.

The evolving landscape of foreign immunity doctrine provides a more current example of international law in flux and of controversial executive interpretation, in an area where that interpretation is invoked to disrupt the ordinary course of domestic law. As discussed above, immunity doctrine within the U.S. domestic system has evolved considerably over the last century. Today the Executive retains considerable power in the areas of head-of-state and foreign official immunity to either suppress or permit to go forward the claims of petitioners for redress against foreign officials through its substantive decisions regarding the immunity doctrine. The Executive premises these decisions in part on its understanding of customary international law, but its interpretation of that law has evolved over time,[157] and its contemporary position is hardly uncontroversial. In particular, there is ongoing debate among states, scholars, and courts regarding the extent to which the immunity of foreign officials for their *acts* (as opposed to for their status) attaches to conduct that violates *jus cogens* norms.[158] U.S. statements of interest in these cases have to date weighed in against permitting an exception to immunity, but have not affirmatively argued that *jus cogens* violations will necessarily be considered official acts.[159] Some U.S. courts have engaged this international law debate and refused to recognize *jus cogens* violations as official acts meriting immunity;[160] others have relied entirely on the Executive's interpretation of the state of the law and assertions of immunity.[161] The actor charged with interpreting the international law norm—the courts in cases governed by the FSIA and those others mentioned above, and the Executive in head-of-state immunity cases and foreign official immunity cases in which it continues to command deference—thereby wields significant power to dictate the outcome of these domestic cases.

Wartime provides numerous aggressive examples of the empowerment phenomenon. As demonstrated in Part I, the executive branch often asserts wartime authority to act, at a minimum, to the limits of international law.

155. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

156. *See* Act of June 5, 1794, ch. 50, 1 Stat. 381, 381–84.

157. *Id.*

158. *See, e.g.*, Bradley & Helfer, *supra* note 92.

159. *See, e.g.*, U.S. Statement of Interest, Yousef v. Samantar, 699 F.3d 763 (4th Cir. 2012) (asserting that "a *jus cogens* exception to official-act immunity . . . would . . . be out of step with customary international law").

160. *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012).

161. *See, e.g.*, Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009).

And due to a mix of judicial deference, abdication, and congressional acquiescence, the content of the particular international law theory espoused by the Executive is often effectively the only legal constraint on executive authority. In areas where the laws applicable in war are evolving or controversial, such as in nontraditional conflicts like that with Al Qaeda, the Executive claims significant flexibility in asserting compliance with an expansive understanding of its own authority.

The Executive relies for its wartime empowerment on its international law-based assertions of, *inter alia*, an armed conflict with Al Qaeda; expansion of that conflict both to other "associated forces"[162] and, geographically, to locations beyond the "hot" battlefield;[163] status-based detention and targeting of individuals based on their membership in these groups rather than for particular acts;[164] and the use of force in another state's territory against a nonstate actor who poses a broadly-understood "imminent" threat.[165] The substantive international law theories for each of these issues—and in fact every component of the Executive's asserted legal architecture for the conflict with Al Qaeda—have been the subject of significant international debate. And in each the Executive puts forward an expansive view of the United States'—and in effect the Executive's own[166]—authority to act.[167] Moreover, in many areas—such as the geographic scope of the conflict or the constellation of activities that define "membership" in a

162. *See supra* Part I.A.; *infra* Part II.C. (discussing the Executive's co-belligerency rhetoric).

163. *See* Brennan, *supra* note 9 (noting the view by "some of our closest allies and partners" that—contrary to the view of the U.S. Government—the "geographic scope of the conflict [is] limit[ed] . . . to the 'hot' battlefields"); Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165 (2013) (addressing the "intractable" debate over the legal scope of the conflict with Al Qaeda).

164. For an extensive discussion of the Government's proffered international law basis for detention in the conflict with Al Qaeda and the relationship between this theory and its targeting standards see Ingber, *supra* note 17. As an example of a clear outlier, the Executive's position that it can detain "substantial supporters" of Al Qaeda cannot be found in any treaty, nor in any modern source on customary international law, nor is it a position shared by any ally. *See, e.g.*, CANADIAN OFF. OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS §§ 303, 318 (2001) [hereinafter 2001 CANADIAN MANUAL] (defining "combatant"—lawful and unlawful—to "include[ ] any member of the armed forces, except medical and religious personnel," as well as "[c]ivilians who take a direct part in hostilities"); JOINT DOCTRINE & CONCEPTS CTR., U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶¶ 4(2), 4(2)(1) (2004) [hereinafter U.K. MANUAL] (employing a similar definition). *See generally* Nils Melzer, Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

165. *See* Emmerson Report, *supra* note 137, ¶¶ 51–76 (discussing the lack of international consensus—and the outlier view of the United States—on matters ranging from the imminence standard for anticipatory self defense to the geographic scope of the conflict, and noting the lack of clarity over the U.S. legal standard for status-based targeting in the conflict).

166. The Executive has in recent years asserted reliance on its statutory authority under the AUMF and not rested on unilateral Article II powers alone. But in interpreting its AUMF authority to extend essentially to the limits of what international law would permit of the state, the Executive has assumed the entirety of the state's power as its own. *See supra* Part I.B.

167. *See* Emmerson Report, *supra* note 137 (discussing international consensus and the outlier view of the United States on various matters and the lack of clarity for the U.S. legal standard for status-based targeting in the conflict).

party to the conflict sufficient to render an individual detainable or targetable—while the Executive justifies its actions through reliance on international law, it has never proffered a specific interpretation of the outer parameters of the limits of that law.[168] In fact, the Executive itself has repeatedly acknowledged, and even stressed, the ambiguities and evolving nature of the international law governing this area.[169] Yet in significant areas it holds out these ambiguous, evolving international law theories as providing the sole constraints on its own domestic authority.

In effect, the operation of normal domestic laws and process, including constitutional protections regarding deprivation of liberty for citizens and noncitizens alike, all give way to the Executive's unilateral and at times undisclosed theories of international law, theories that need not necessarily be shared by any foreign state, let alone guided by international consensus.

This is not to say that the Executive's international law positions are necessarily unreasonable. In fact, the actions of other states in recent months suggest that there may be increasing convergence on U.S. legal theories regarding armed conflict with nonstate actors in other states' territory.[170] However, the capacity of the Executive to take and act upon aggressive positions that have been hotly contested suggests that international law—and in particular the Executive's interpretation of international law—does not always provide clear, strict, or even well-established outer limits on executive authority. Consideration of the extent to which international law may be invoked to enhance executive authority must account for this reality. In addition, even in areas where there are good and valid reasons to cede significant interpretive discretion to the Executive on matters of international law, the extent to which the Executive should retain that discretion when the international law in question is invoked to determine the outer bounds of *domestic* power must be scrutinized separately.

3. *Internal Executive Dynamics Influence Empowerment*

That the Executive will take an expansive view of its own authorities when it can may seem obvious to cynics or proponents of a self-interested,

168. *See, e.g.*, July 2010 OLC Memorandum, *supra* note 1, at 25 (noting the difficulty of determining the legal parameters of the "geographic scope" of the current conflict and finding support—though no limiting principle—by analogy to traditional conflicts; and also asserting al-Awlaki's membership in a party to the conflict, as well as his specific operations, without defining which, provides the basis for the Executive's targeting authority or the outer bounds of that authority); March 13 Brief, *supra* note 10 (asserting detention authority over individuals analogous to those detainable in international armed conflict under the AUMF "as informed by the laws of war," but failing to establish outer bounds for the authority other than disclaiming authority to detain "unwitting supporters").

169. *See, e.g.*, Brennan, Remarks at Harvard Law School, *supra* note 9 (noting debates and evolving positions in the international community over the international law governing the conflict with Al Qaeda); Bellinger, Address at the London School of Economics, *supra* note 7 (stressing debates among critics of U.S. policies regarding the appropriate legal framework for the conflict with Al Qaeda).

170. *See supra* note 13 at sources cited therein.

rational actor view of executive authority.[171] Yet scholars have demonstrated that there exist significant internal constraints that cabin executive authority, even in areas where the Executive's own interpretations of its legal authority rarely see judicial review.[172] This is a view I share, with some reservations about the particulars of how these constraints operate and the consistency of their effectiveness.

Among these reservations, there are factors unique to this area in which international and domestic law intertwine, which affect the extent to which internal checks currently exercise sufficient constraint on executive prerogative. Exploration of this argument will be the subject of future work, but it is worth pausing here briefly to examine why distinct facets of this interplay may prompt greater reason for concern regarding unrestrained executive authority.[173] The concerns I share here do not rest on a rational actor theory of the Presidency, which might ascribe the empowerment phenomenon to an instrumentally-minded unitary Executive grabbing power wherever possible.[174] Rather I see the Executive as an enormous multilithic, living organism, a conglomeration of diverse views and biases, expertise, and power.[175] The empowerment phenomenon can be dangerous in large part because of the distinct ways that international law, and, specifically, the use of international law in the domestic sphere, affects the internal dynamics of executive decision making within the belly of this beast.

One critical aspect of these internal dynamics is differentiated decision making. This is commonplace in the executive branch, and particularly exacerbated in the context of national security decision making, where many groups and layers of actors operate throughout the executive branch.[176] Different components of the executive rely upon others to provide content or expertise; this operates both as a vertical matter (e.g., between higher-level political actors and lower-level "action officers") as well as a horizontal one (e.g., between different agencies, offices within those agencies, and actors with distinct portfolios within those offices). Thus it is not only possible but commonplace for one set of executive actors, lacking a certain expertise or mandate, to rely upon, without necessarily dissecting, the sign-off of another

171. *See generally* Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010); Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

172. *See supra* note 14 and accompanying text (citing a range of views on the efficacy of internal checks in limiting executive prerogative); Jack Goldsmith, Power and Constraint: The Accountable Presidency After 9/11 (2012).

173. A full exploration of the applicability of "internal separation of powers" to the Executive's international law interpretation is outside the scope of this Article and will be examined in a separate project.

174. *See supra* note 171 at sources cited therein. A power-hungry and domineering President could only exacerbate the effects I discuss here. *See, e.g.*, Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. Times (June 21, 2011), http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html?_r=0) (worrying that Presidents might pick and choose among their advisers' legal opinions).

175. *See* Ingber, *supra* note 109.

176. *See id.*

set of actors on a matter that falls within their particular expertise or mandate.

Proponents of a theory of internal executive constraints, sometimes identified as "internal separation of powers,"[177] point to these various components and actors as serving a checking function on executive authority. In particular, scholars have hailed[178] (and others have debated[179]) the efficacy of OLC within the Department of Justice in reining in executive power. On matters of international law, the State Department's Office of the Legal Adviser ("L")—an office comprised almost entirely of civil servants who devote their careers to international law[180]—serves as a forceful advocate for international law compliance within the executive branch, and as an intermediary between domestic actors and the international sphere. Yet different types of legal decisions trigger different processes for decision making and elevate different deciders within the executive branch; in turn they may reach very different legal conclusions.[181] The task at hand may thus determine which office takes the lead in determining the legal position, and the expertise and traditions of particular executive offices may not always serve the checking function expected of them.

For example, while the lawyers charged with international law compliance are housed in L, OLC is charged primarily with interpreting matters of domestic statutory and constitutional law and protecting the President's domestic authority.[182] The two offices work together on many matters, but their mandates, focuses, and expertise may at times bring them to different conclusions, even when both offices are acting entirely in good faith. These are just two of the many legal offices operating throughout the Executive. When a matter implicates both domestic and international law concerns, the mandates of these offices may overlap, but which office has the lead on a matter of legal interpretation may have a significant influence on the Executive's ultimate position.[183]

One problem with this dynamic that is relevant for our purposes here is that when international law is used in the place of domestic legal authority, the relevant expertise and the legal compliance norms for these different bodies of law may be divided among different offices. The expertise or culture of legal compliance with respect to a particular norm may not align perfectly with the office that holds the mandate in making a particular legal interpretation. In more specific terms, an office generally steeped in domes-

177. *See supra* note 14 at sources cited therein.

178. *See, e.g.*, Morrison, *supra* note 14.

179. *See, e.g.*, ACKERMAN, *supra* note 14.

180. *See Office of the Legal Adviser*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/ (last visited Dec. 1, 2015). The head of the office is normally a political appointee.

181. *See* Ingber, *supra* note 109.

182. *See* Morrison, *supra* note 14; *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/olc/ (last visited Dec. 1, 2015).

183. *See, e.g.*, Ingber, *supra* note 109.

tic legal interpretation and norms—whether it be OLC or a litigating division of the Justice Department—may end up holding the pen on a matter of international law interpretation, yet may not have the same expertise, negotiating background, or ingrained cultural norms of respect for the particulars of the international law norm at issue.[184] Particularly when that office also sees its mandate as protecting executive authority whenever possible, one can easily imagine it taking greater liberties with a flexible international law interpretation than it might take with a similarly amorphous domestic law norm.[185] The same holds for the converse; in the event where an office focused primarily on international law compliance holds sway on a matter of domestic interpretation, it may be more willing to assert aggressive domestic legal arguments in the service of international law compliance than would an office focused solely on domestic matters.[186]

Internal checking mechanisms do exist and can be powerful constraints on executive action. But there is no one-size-fits-all approach to the internal separation of powers. It is necessary to examine the distinct processes, expertise, and legal culture operating with respect to particular kinds of legal decision making in order to assess the extent to which sufficient checks exist to rein in particular exercises of executive authority.

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I do not argue that the Executive is entirely unconstrained in its interpretation of international law and its use of that law to determine the outer bounds of its domestic authority. To the contrary—and for many reasons including those discussed in the literature regarding the internal separation of powers—the Executive is almost always likely to put forward at least a straight-faced argument for compliance. This requirement itself, as well as the process for formulating such an argument, serves significant constraining functions.[187] Nor is the U.S. executive branch alone in seeking to push the legal envelope to accord with its own interests; all states and representatives of those states take positions on international law interpretation

184. *Id.*

185. *See, e.g.*, Charlie Savage, *Obama Team Is Divided on Anti-terror Tactics*, N.Y. Times (June 28, 2011), http://www.nytimes.com/2010/03/29/us/politics/29force.html.

186. *See, e.g.*, Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. Times, June 17, 2011, at A1 (discussing disagreement between the State Department Legal Adviser and OLC over the applicability of the War Powers Resolution to the U.S. engagement in the conflict in Libya). According to press reports, the State Department proposed a more flexible view than that of OLC on the President's *domestic* authorities to use force in Libya, in relation to the War Powers Act. *Id.*

187. *See, e.g.*, Bradley & Morrison, *supra* note 149 (arguing that "the negative consequences to a President of appearing to exceed the boundaries of what is plausible would be more severe than the negative consequences of asserting a plausible but not ultimately persuasive view of the law" and that even "[t]he relative perceived strength of a legal argument . . . might have a constraining effect"); Richard Pildes, *Law and the President*, 125 Harv. L. Rev. 1381 (2012) (reviewing Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2010) (connecting the President's perceived compliance with law to his credibility to the public)).

that may diverge from the positions taken by others, and depending on their particular domestic structures this may give the actors charged with formulating those positions additional discretion within their domestic systems.[188]

I also do not argue here that the international law positions the Executive has taken—including when those positions are extremely expansive—are necessarily unreasonable interpretations of the United States' obligations. Rather, I argue that the potential for significant executive discretion in matters of international law interpretation should prompt scrutiny when that interpretation interacts with a domestic constraint. Those charged with checking executive authority—the courts, Congress, civil society, even internal executive officials—can either cabin or exacerbate that discretion depending on how well those parties understand and are willing to scrutinize the Executive's international law positions and the interplay of these positions with domestic law.

C. *International Law as Legitimizer of Executive Action*

International law has long been used as a legitimizing force to bolster support for a state or particular actor's policy choices on the *international* plane. As I demonstrate here, compliance with international law—or the suggestion of compliance—is also used in the *domestic* sphere to bolster support for an actor's domestic legal position.[189]

The force of international law as a legitimizer lies largely in its signaling of factors that provide reassurance to critics of executive power. These include the suggestion of external acquiescence in the President's actions; the checking function of international law and institutions, which may be particularly valuable in areas where there is little domestic oversight; and the presumption that international law itself provides a layer of constraint on the Executive's authority.[190] At times, however, these signals may be overstated. Moreover, international law can be misappropriated—both intentionally and unintentionally—to justify the empowerment mechanism through reliance upon these legitimizing effects even when the correspond-

188. Anthea Roberts's work on comparative international law suggests that states may take very different and in fact somewhat parochial views on what international law entails. *See* Anthea Roberts, Is International Law *International?* (forthcoming 2015); *see also* Ashley Deeks, *Domestic Humanitarian Law: Developing the Law of War in Domestic Courts*, in Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects (D. Jinks et al. eds., 2014); Chayes & Chayes, *supra* note 150 (asserting that treaty parties may even "take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action").

189. *Cf.* Galbraith, *International law, supra* note 17, at 998–1000 (arguing that international law can provide "extra-constitutional legitimacy" but that international law's role as a legitimizing force has declined in recent years).

190. *See, e.g.*, Katerina Linos, The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries 2 (2013) (arguing that politicians rely on international norms to "signal that their decisions are competent and mainstream"); *see also supra* Part I.F. (discussing the use of international law embodied in United Nations Security Council Resolutions to signal international acquiescence in the President's course of action in Libya).

ing presumed checks do not operate or are not sufficient. This may occur through overstating the acquiescence of others in a particular course of action; through exaggerating a constraint to provide a sense of security to critics in permitting looser domestic requirements; or through the invocation of international law rhetoric as a smokescreen to obscure the true underlying legal argument or its effect.[191] The dual nature of international law's use as a legitimizer of action makes it all the more important that executive power-watchers remain engaged in international law substance and attuned to the nuances of international law argumentation in the domestic realm.

1. *International Law Compliance as Assumed Constraint*

International law is sometimes used effectively to provide critical domestic checks, particularly in areas where the domestic law constraints are difficult to determine, or where the Executive operates without significant domestic oversight or claims significant domestic legal discretion. In such areas, imposing international law constraints may be the only means of providing at least some outer bounds to the Executive's authority. An example is the *Hamdi* Court's broad reading of the President's statutory authority to permit the wartime detention of a U.S. citizen on U.S. soil.[192] The Court did not interpret that authority as limitless. Instead it relied upon the constraints in international law to soften and delimit an otherwise broad holding. It held that Hamdi could be detained only because it was lawful to detain him under the laws of war, and that he could be detained only for such time as the laws of war would permit. Were it not for the assumption of international law constraints on the Executive's actions in that case, it is unlikely the Court would have upheld such expansive domestic authority.[193]

Yet for reasons discussed above in Section A, international law does not always provide the limiting principle expected of it. In permitting detention of "enemy combatants," the *Hamdi* Court appeared to contemplate a fairly narrow definition of that term, envisioning fighters who had actually participated in the conflict in Afghanistan against the United States.[194] In litigating the many detainee cases that followed *Hamdi*, however, the Executive proposed a much broader and more fluid conception of the class of individu-

191. For a discussion of particularly egregious examples of the reliance on rhetoric regarding the legality of actions under international law see GOLDSMITH & POSNER, *supra* note 171, at 167–69 (discussing, *inter alia*, Hitler's reliance on international law justifications for occupation and invasions of other states).

192. *See supra* Part I.C.1.

193. *See supra* Part I.B. The Court was explicit about this approach in *Medellín*; in distinguishing the claims settlement line of cases, the Court stated that its security in granting the executive significant discretion in those cases lay in part on the limitations imposed by the international agreements themselves. Medellín v. Texas, 552 U.S. 491, 530–31 (2008).

194. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (noting debate over the scope of the term, and narrowing its ruling to persons falling under the government's description of Hamdi himself: "an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there").

als subject to its detention authority. In making its case, particularly in the wake of *Boumediene*, the government successfully relied upon a standard for detention it proposed as derived from, and presumably cabined by, international law.[195] Yet with few exceptions, the courts have shown almost no interest in dissecting the international law theory behind the Executive's legal definition of whom it may detain. Despite years of litigation scrutinizing the government's detention regime, the courts have generally left the interpretation of the parameters of this authority almost entirely to the executive.[196]

I suggest that since the days of *Hamdi* and *Boumediene*, courts have shown a willingness to defer to the Executive's position in large part because the executive has, in recent years, gone to great lengths to insist on compliance with international law, in contrast to early positions by the prior Administration.[197] Yet despite its explicit insistence on compliance with international law in these cases in recent years, the Executive has nevertheless promoted a quite flexible, expansive, and in fact hotly contested view of the international law defining its authority to detain in armed conflict.[198]

In particular, there are two core components of the Executive's detention authority theory that suggest it diverges sharply from consensus views of international law: 1) the extension of that authority beyond "military wing" members of Al Qaeda or Taliban armed forces to nonfighter "members" or even mere "supporters" of those groups, and 2) the constellation of facts sufficient to support these legal classifications.[199] Despite its assurance that this is a cabined detention authority, "informed by" international law,[200] the Executive's position that its authority to detain as "enemy combat-

195. I say "presumably" because the Executive's position here gives the impression that it is intended to be cabined by international law, but it is not in fact explicit on this point. U.S. briefs simply state that the government's definition is "informed by principles of the laws of war." March 13 Brief, *supra* note 10, at 1. In fact, when pressed in oral argument, lawyers for the government avoided pinning down the government's position on the extent to which the President's AUMF authority is limited by international law. *See, e.g.*, Transcript of Oral Argument, al Warafi v. Obama 716 F.3d 627 (D.C. Cir. 2013) (No. 11-5276).

196. While the district courts made early attempts to assess the government's detention standard against the AUMF and international law, appellate decisions later diluted the courts' review in favor of an extraordinarily deferential standard. *Compare, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009) (accepting much of the government's proposed detention standard but holding that the AUMF authorized the President to detain persons who substantially supported Taliban or Al Qaeda forces only to the extent such support amounted to membership in those forces) *with* Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2012) (Tatel, J., dissenting) (arguing that "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be "meaningful").

197. *Compare, e.g.*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re* Guantánamo Bay Detainee Litigation, (D.D.C. Mar. 13, 2009) (Misc. No. 08-442) (TFH), *with* Memorandum from the President, *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (asserting that "none of the provisions of Geneva apply to [the] conflict with al Qaeda").

198. *See supra* Part II.B.2.

199. *See* Ingber, *supra* note 17.

200. *See* March 13 Brief, *supra* note 10; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004).

ants"[201] nonfighting "members" of particular organizations as well as "substantial supporters" of these groups—by which it has included financiers,[202] propagandists,[203] those providing logistical and administrative support,[204] those who took up military training but ultimately only served as medics,[205] and even those simply found in the vicinity of other fighters[206]—is in fact extremely controversial as a matter of international law. More than controversial, this position cannot be found in any treaty, nor in any modern source on customary international law; nor is it a position shared—at least not openly—by any ally.[207] Yet this position has received significant deference and ultimately endorsement by the courts; to date the Executive's legal theory has afforded the Executive considerable flexibility and broad authority to detain virtually the entire population of individuals who have come before U.S. domestic courts with habeas petitions to challenge their law-of-war detention.[208] Whatever one's view of the merits of this substantive standard, there is little in the *Hamdi* decision to suggest that the Supreme Court thought it was endorsing this broad a detention standard at that time. To the contrary, the Court declared that its "understanding" of the AUMF to include detention authority "may unravel" should the circumstances cease to look like traditional "conflicts that informed the development of the law

201. I refer here to detention authority for individuals held specifically as "enemy combatants" and not under other theories, such as criminal detention or law of war detention for civilian threats to security. While the government dropped the use of the term "enemy combatant" in March 2009 in the context of the Guantánamo habeas litigation, this change was largely symbolic; the government's international law theory remains one based on combatant detention. *See, e.g.*, Rebecca Ingber & Nathalie Weizmann, *Whatever Happened to Umm Sayyaf?* LAWFARE (June 11, 2015, 8:10 AM), http://www.lawfareblog.com/whatever-happened-umm-sayyaf (explaining the government's theory for detention by analogy to state combatants); *see also Hamdi*, 542 U.S. 507 (extending detention authority under the AUMF under a theory that international law permits detention in armed conflict of enemy combatants).

202. Sliti v. Bush, 592 F. Supp. 2d 46. (D.D.C. 2008).

203. United States v. al Bahlul, 820 F. Supp. 2d 1141, 1159 (USCMCR 2011) *vacated in part*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *reh'g en banc granted*, *order vacated* (Apr. 23, 2013) *on reh'g en banc*, 767 F.3d 1 (D.C. Cir. 2014) *and aff'd in part*, *vacated in part, remanded,* 767 F.3d 1 (D.C. Cir. 2014) *and vacated in part*, 792 F.3d 1 (D.C. Cir. 2015) (reviewing a conviction under a military commission—whose jurisdiction was limited to trying "unlawful enemy combatants"—for material support and conspiracy on the basis of defendant's role in "al Qaeda's media office and later as [Bin Laden's] personal assistant/secretary for public relations").

204. Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010).

205. Al Warafi v. Obama, 704 F. Supp. 2d 32 (D.D.C. Mar. 24, 2010).

206. Ali v. Obama, 736 F.3d 542 (D.C. Cir. 2013); Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011).

207. *See, e.g.*, 2001 CANADIAN MANUAL, *supra* note 164 (defining "combatant"—lawful and unlawful—to "include[ ] any member of the armed forces, except medical and religious personnel" as well as "[c]ivilians who take a direct part in hostilities"); U.K. MANUAL, *supra* 164 (employing a similar definition); Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (July 1, 2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

208. *See, e.g.*, Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011) (upholding the government's detention authority—and overturning a district court grant of habeas—on the basis of very thin and circumstantial evidence).

of war."[209] The government's stated reliance on international law standards in these cases—and the Court's reliance on its international law limits in ratifying the President's expansive authority under the AUMF—surely suggest to potential critics a more constraining set of limitations than the Executive has ultimately adopted.

Reliance on international law as the constraining force in certain areas can decrease pressure on existing or potential domestic law constraints that might otherwise do more work. The *Hamdi* Court, in relying on international law constraints, did not seek a different limiting principle for the President's detention authority. Furthermore, cases following *Hamdi* have relied upon international law to form the standard for detention authority rather than apply pressure on Congress to craft its own standard.[210] Arguably it is partly for this reason that there has been virtually no grappling with the substantive standard for detention outside of the executive branch, nor has there been a real exploration of the domestic rights that should apply to such detainees, whether citizens or not.[211]

Concerns about this standard go beyond Guantánamo detention. Despite the government's insistence in early briefing that its Guantánamo theory was restricted to detention alone, the jurisprudence that has developed in those cases forms the core precedent for determining the legal category of enemy combatant for the government's targeting authority.[212] Perhaps the most significant legal constraint the OLC memoranda place on the government's ability to target and kill American citizens is the requirement that the target be a member of enemy armed forces engaged in an armed conflict against the United States.[213] The Guantánamo litigation precedent tells us that the bar for meeting that standard may be very low indeed.

2. *International Law Compliance Arguments Mollify the Usual Critics of Executive Authority*

There is another powerful but counterintuitive reason that international law can have a significant legitimizing force in contemporary debates: the substantial overlap between the community of actors who often critique strong claims of executive authority—within the courts, Congress, and civil society at large—and those actors engaged in efforts to preserve a strong role for international law constraints in the domestic system. When these man-

209. *Hamdi*, 542 U.S. at 521.

210. Congress ultimately simply affirmed the detention standard the courts had been employing in the Guantánamo litigation, without providing clarification. *See* NDAA 2012, *supra* note 54.

211. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (extending habeas to military detainees at Guantánamo without clarifying the substantive norms that would apply).

212. *See, e.g.*, July 2010 OLC Memorandum, *supra* note 1, at 21–22 nn.28–29 and accompanying text (citing U.S. briefs and judicial opinions in the Guantánamo habeas litigation for the purposes of determining the "individuals against whom Congress has authorized the use of necessary and appropriate force").

213. *See supra* Part I.C.2.

dates overlap, the usual critics of executive authority may be inclined to find executive claims of authority that rest on assertions of international law compliance more persuasive. The frequent coincidence of these two objectives—executive oversight and international law compliance—may obscure for these critics the potential for executive aggrandizement by reference to international law.[214]

This paradox is exacerbated today by ongoing debate surrounding the role of international law in the U.S. domestic system, and the perspective shared by many that international law has in recent years come under attack in the United States.[215] It is also due in part to the perception in recent years of the Executive—in particular the Bush Administration—as willfully dismissing international law as a constraint on the President's authority, and of its grisly reasons for doing so, such as the mistreatment of military detainees under its control.[216] This narrative and history promote a somewhat skewed perspective on the substance of international law writ large, one that is viewed predominantly through the lens of individual rights advocacy. The prominence of these activities promotes certain assumptions about international law—that it is particularly rights-protective and at times more so than even U.S. domestic law—which imbue international law with a sense of legitimacy and protectiveness where individual rights or power imbalances are at stake. As discussed above, these assumptions do not always bear out.

The frequent overlay between the outspoken critics of executive power and those communities working to promote the role of international human rights norms in domestic courts helps foster this perception. These constituencies may be particularly inclined to view more leniently executive positions that purport to comply with international law. Take, for example, the litigation position of the American Civil Liberties Union ("ACLU") in *Hamdi*.[217] The civil rights organization did not argue, as Justice Scalia ultimately asserted in his dissent, that as a U.S. citizen Hamdi must be charged with a crime or released. Instead it accepted the view that such individuals could be held as "enemy combatants"—a term it did not define—as long as their detention satisfied the treatment criteria of the Geneva Conventions.[218] That entailed neglecting critical matters of process, as well as criteria for determining *who* could be detained, both core dimensions of domestic law protections.

214. *Cf.* Galbraith, *supra* note 17 (proposing a restoration of the international law limits that accompanied the Executive's aggrandizement vis-à-vis Congress).

215. *See supra* Part I.A.

216. *See, e.g.*, Office of Legal Counsel, Memorandum for Alberto Gonzales Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees, Jan. 22, 2002.

217. ACLU Amicus Brief, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 02-7338), 2002 WL 33962810 (accepting the long-term detention of citizens as "enemy combatants" if held as Prisoners of War).

218. *Id.* at 27–29.

The ACLU position may have been the result of a simple political calculation regarding what was possible. Critics of executive overreach rightly look to all sources of legal constraint to check otherwise unbridled authority; at times, particularly when domestic sources are unclear or domestic oversight is inoperative, they may view the imposition of international law constraints alone as a better result than a completely law-free zone. Yet the existence of such constraints may sometimes neutralize the fight for the imposition of and compliance with other domestic legal constraints.

3. *International Law Arguments as Smokescreen*

Another danger in using international law to determine the outer bounds of domestic executive authority is that a lack of engagement with or understanding of international law by potential critics or oversight bodies can have the effect—either intentional or not—of obscuring the Executive's legal argument.

Arguments sounding in international law are sometimes employed in ways that conceal the Executive's true legal position. The Executive invokes norms drawn from international law that may resonate with or sound similar to domestic law doctrines, but in fact have entirely different sources, standards, and purposes.[219] The Department of Justice's conflation of its *jus ad bellum* imminence theory with the kind of imminent danger contemplated in Fourth Amendment jurisprudence, discussed above, is one example. Another form of obfuscation is the conflation—by the Executive[220] and by courts[221]—of what actions the *President* may lawfully undertake in wartime as a matter of *domestic* law with what actions the *United States* may lawfully undertake as a matter of *international* law. If the Court and others concerned with executive authority do not remain attuned to the substance of the international law that replaces the domestic constraints, reliance on international law as a sole constraint in areas where the Executive asserts aggressive and flexible interpretations can provide a mere veneer of protection with little real constraint.

Obfuscation can occur with *or without* the full intent of the party employing the technique, and it is exacerbated by the frequently divided nature of international and domestic law expertise. This does not require bad faith. The potential for such occurrence is clearer when one contemplates the dis-

219. This is similar to what Shirin Sinnar calls a "rule of law trope—a legal term of art borrowed from constitutional law to persuade law-conscious audiences that the executive was sufficiently constrained." Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. (forthcoming 2016).

220. *See, e.g.*, DOJ White Paper, *supra* note 67, at 1–3 (explaining the President's authority as relying upon, *inter alia*, "the inherent right of the *United States* to national self-defense under international law") (emphasis added).

221. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004) (drawing on international law's acceptance of detention in war to incorporate detention authorization into Congress's grant of authority to the President to use force).

aggregated nature of executive decision making.[222] In particular, when addressing a thorny, mixed matter of international and domestic law, it may be complicated to determine which office has the appropriate mandate or expertise. Acquiescence in a particular approach by a key set of actors may be erroneously presumed.[223] Similarly, the courts and Congress often assume that executive positions are the result of particular expertise and the work of a given set of actors. Yet in reality those particular experts may not always be the actual drivers of a policy or legal position. [224]

This combination of disaggregated decision making, on the one hand, and congressional and judicial assumptions of executive expertise and competence, on the other, at times obscures some of the Executive's current wartime legal positions. Consider for example the Executive's position on the scope of the "associated forces" it asserts fall within its authority to use force under the AUMF.[225] The Executive invokes what it calls "the well-established concept of co-belligerency in the [*international*] law of war" for the purpose of defending its interpretation of its *domestic* statutory authority.[226] I theorize that the Executive relies upon "co-belligerency" for two related functions: 1) as a means of legitimizing its claim to expansive domestic authority by asserting it has a basis in some exogenous, pedigreed legal concept; and 2) as a pledge that the interpretation has reasonable limits—by promising that the claimed authority is not "open-ended" but rather steeped in this "well-established" international norm.[227]

In order for "co-belligerency" to provide these legitimizing and checking functions, however, the term must in fact invoke a clearly defined and well-accepted standard for determining how an entity—in this context a nonstate armed group—*becomes* a "co-belligerent," or what threshold it must meet before it should properly fall within the AUMF. Yet as a matter of international law, the term "co-belligerency" itself does not provide this content.[228] And as I explore in another work, the standard that scholars have proposed for determining when such a group becomes a co-belligerent of Al Qaeda—and which two presidential administrations have to some degree seemed to accept[229]—is the wrong *international* law test for the *domestic* law purpose

222. *See supra* notes 175–181 and accompanying text.

223. *See id.*

224. *See id.*

225. *See supra* notes 54–59 at sources cited therein.

226. Jeh Johnson, *supra* note 56 ("[T]he concept of an 'associated force' [is not] an open-ended one, as some suggest. . . . [Rather,] it is based on the well-established concept of co-belligerency in the law of war.").

227. *See* Ingber, *supra* note 57.

228. *See, e.g.*, *id.*; Morris Greenspan, The Modern Law of Land Warfare 531 (1959) (defining the term "co-belligerent" as simply a "belligerent fighting in association with one or more belligerent powers").

229. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047 (2005) (looking to neutrality law for guidance in crafting a co-belligerency standard for determining the groups appropriately covered under the AUMF.) U.S. briefs relying on the co-belligerency concept cite this article. *See, e.g.*, Brief for Respondents-Appellees at *42 n.10, Khan v.

asserted here.[230] However, it is a test that permits the Executive significant flexibility in interpreting the AUMF broadly to authorize force against groups providing a certain degree of support to Al Qaeda, even if such groups have not themselves directly attacked the United States.

A cynical view of executive authority might hold that the use of an inapt international law test to suggest real constraints in an effort to expand authority is an intentional obfuscation by executive officials. Yet there is often more going on beneath the surface, as I explore in that piece.[231] One likely villain in such cases is the simple messiness of bureaucratic decision making, the differentiation of expertise, interests, and biases throughout the Executive, and the stickiness of legal positions once taken. [232] Moreover the cynical view does not explain the concept's acceptance by courts and Congress with virtually no scrutiny of its underpinnings, despite their keen interest in the substantive issues regarding the scope of the President's AUMF authority.[233] This example alone underscores the need for those charged with executive oversight in the domestic realm to remain attentive to international law content and its invocation for the purpose of understanding domestic law.

III. Implications of the Empowerment Phenomenon

The primary contributions of this Article lie first, in reconceptualizing the interplay between international law and the U.S. domestic system to examine the invocation of international law not just in constraining but in enabling domestic power; and second, in parsing the particular dangers in this phenomenon that have gone virtually unexplored. This Article now turns briefly to potential remedies.

There are a number of ways to grapple with the concerns identified in this Article. The deepest solution to these concerns lies primarily in a renewed substantive engagement—by all those charged with checking executive authority—with both the substance of international law and its interplay with the domestic system. This would permit recognition of the empowerment

Obama, (D.C. Cir. 2011) (No. 10-5306). We cannot know for certain that the Obama Administration relies upon this substantive standard internally, as its briefs may continue to cite the article or reference neutrality law simply because prior courts have accepted the argument. But the Executive's statements and practice suggest that it is relying on a substantive standard for its "associated forces" theory that accepts some level of support falling short of direct hostilities as bringing third parties into the conflict.

230. *See* Ingber, *supra* note 57 (arguing that the neutrality-derived test is the wrong standard for interpreting the groups governed by the AUMF because it is not a test for determining the existing parties to the conflict; rather it is derived from somewhat archaic international law rules governing when a state—as a whole—may lawfully choose to respond with force to another state's actions). This paper explores how such a concept takes root within the executive branch and ultimately becomes entrenched law. *Id.*

231. *Id.*

232. *See Ingber*, *supra* note 109.

233. *See, e.g.*, *supra* note 59.

phenomenon when it occurs, and a deep understanding of the ways international law is invoked to enhance as well as to constrain executive authority. Ideally such recognition could lead to a nuanced exchange between the Executive and critics of executive power over the appropriate scope of executive authority in accordance with both domestic and international law.

Comprehensive substantive engagement by all parties is an idealistic solution. I thus propose a more granular means of effecting greater substantive engagement and holding the Executive to account for its legal positions. This is a three-part solution and entails first placing a burden on the Executive to demonstrate legitimate reasons for invoking international law to enhance its authority. I then suggest a rethinking of the considerations relevant to judicial deference and congressional acquiescence, which must account for the dangers identified in this Article. And finally, because there will always be areas where the Executive acts out of view of courts and Congress, internal institutional checks are critical to reining in executive power. In these areas, the empowerment phenomenon prompts consideration of the efficacy of the "internal separation of powers" in advancing international law compliance and checking executive authority.[234]

A. An Executive Burden in Invoking International Law Empowerment

There is a tension inherent in the concerns identified in this Article. There are substantial and legitimate reasons that our domestic structure turns to international law in certain areas as the substantive rule of decision, particularly where the matter primarily involves the regulation of our relationship to other states. At times international law provides the *only* effective legal limits on state action. At times compliance with international law on the international plane may require some disruption to the ordinary domestic order. Certainly international law constraints operate effectively alongside and in addition to domestic ones. But occasionally international law is invoked instead as shorthand in lieu of grappling with the appropriate outer bounds of domestic executive power. As demonstrated, this phenomenon can have grave results for the domestic separation of powers, individual rights, and the rule of law more broadly. An executive burden to explain in detail the authority it claims, in particular its understanding of its authorities *and limitations* under both domestic and international law, would go a long way toward neutralizing these dangers.

Whether international law empowerment is ultimately appropriate in any given case will depend on a weighing of several critical factors, which the Executive's consideration of its legal position should address. The first factor is the extent to which the matter at hand is primarily outward-looking or inward-focused. International law provides the only common (or potentially

234. This section touches on matters that will be the subject of future work on the influence of the "internal separation of powers" on the Executive's international law interpretation.

common[235]) rule of decision for state-to-state interaction. Moreover, the checking and enforcement mechanisms of international law, and the motivation of reciprocity, operate most effectively on actions that directly affect other states and international institutions, thus providing some limits on the asserted power. Examples include obligations to provide consular rights to foreign nationals under the Vienna Convention on Consular Relations, or immunity from suit for foreign states and officials. The checking functions of international law are *least* effective in areas primarily implicating the state's internal affairs, such as the allocation of power between the branches or—with the possible exception of human rights law—the relationship between the state and its subjects.

Another factor is the extent to which the international law in question is actually intended to act as a constraint and is sufficiently developed to provide a clear set of rules that lend themselves to easily verifiable compliance. Scholars often rely upon international law as a useful limiting principle, for example where the Executive's domestic authority is not clear or otherwise fails to provide sufficient limits.[236] But because the objective in such cases is a clear constraint on executive action, the invocation of international law as limiting principle will be most useful—and most consistent with the fundamental constitutional principle that the Presidency is an office of limited powers—in areas where it provides clearly ascertainable rules that constrain state action, such as the strict provisions of the Geneva Conventions governing battlefield detention of Prisoners of War.

In other areas, however, where international law is ambiguous or in a state of flux—such as capture of nonstate actors far from the battlefield and detention under a law-of-war framework—it provides a less clear or verifiable limiting principle. The Executive typically does not flagrantly violate the law but rather at least *professes* compliance based on an interpretation that may be controversial. The extent to which that interpretation is within a margin of appreciation or, instead, truly beyond the pale is an exceedingly difficult determination, particularly in areas where the law is evolving and the United States itself may seek to advance a particular view. The use of international law as a sole limiting principle should thus take account of the extent to which that international law rule provides a genuine constraint.

A third factor is the extent to which the international law principle is invoked for a traditional use—both as a matter of the domestic empowerment and the substantive international law norm itself. Longstanding domestic reliance on established international law principles as the rule of decision in the domestic realm may suggest that these principles have over time become a part of our domestic structure, and also suggests acquiescence by the other branches in the Executive's reliance on these principles. The

235. *Cf.* Roberts, *supra* note 188.

236. *See supra* note 17 and accompanying text.

historical use of sovereign immunity doctrine to displace legal claims is a good example of this.[237] By contrast, the more novel the decision to turn to international law in a particular area, and the more creative the substantive international law theory, the more such an approach merits close scrutiny.

In light of the foregoing, consider two examples drawn from Part I: military detention and targeted killing. Whether the Executive's burden is met in any given example depends on its particular use in that case. Consider first the case of Yaser Esam Hamdi, a U.S. citizen detained without criminal charge or trial and held as an enemy combatant. As discussed above, the *Hamdi* Court invoked international law to justify a broad reading of a use of force statute, not for the purpose of compliance with international law but for the purpose of enhancing executive power. In doing so, however, the *Hamdi* Court looked to a longstanding tradition of permitting military detention of fighters found within the active battlefield in a state-to-state armed conflict and likewise pointed to clear limits in international law governing the outer bounds of such detention. Compared to traditional battlefield detention, Hamdi's circumstances—his U.S. citizenship, the fact that he was held on U.S. soil far from the conflict, and the government's determination to hold him outside of a clear Geneva framework (and with no clear end of the conflict in sight)—are more novel, inward-facing and less clearly defined by international law rules. The Executive could likely meet its burden in such a case, but it is a close call.[238] And if the *Hamdi* case is on the line, any significant extension of the *Hamdi* reasoning—either to contexts beyond its traditional use or to international law theories whose outer limits are not clearly defined—should raise red flags.[239]

The Executive's position on the legality of targeted killing of al-Awlaki—illuminated primarily through the redacted Department of Justice OLC memoranda—does not currently meet this burden. In justifying the use of force against al-Awlaki, the Executive has stretched the traditional understanding both of the substantive international law and of its invocation to enhance domestic power. The Executive's international law position on whom it may lawfully target in the conflict with Al Qaeda is both controversial in its breadth, and completely unclear on its limits. Throughout much of the decade and a half of this conflict we have not known *where* the Executive believes it has authority to use force, *against which groups*, nor against *whom within those groups*. While the Executive may point to judicial precedent for the use of international law to narrow ordinary due process principles in the areas of detention and even trial and execution,[240] in cases

237. In fact, as evidence of this, Congress ultimately did codify the Executive's international law position in the FSIA. FSIA, *supra* note 23.

238. Justices Souter and Ginsburg would have insisted that the Government's detention authority turn on the extent to which its detention policies complied with the laws of war. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 549–51 (2004).

239. The *Hamdi* plurality itself suggested this. *See supra* note 206 and accompanying text.

240. *See, e.g.*, *Hamdi*, 542 U.S. 507; *Ex parte* Quirin, 317 U.S. 1 (1942).

in which there has previously been at least *some* judicial scrutiny, it can point to no precedent for using the empowerment phenomenon to permit the long-term tracking and premeditated targeted killing without trial of an American citizen, at home or abroad. It may be that the Executive could meet its burden to demonstrate that international law empowerment is appropriate in this case. But it has much work to do in explaining first, why a resort to international law is appropriate here to defining the contours of each of these domestic law authorities and prohibitions; and second, exactly how, as a granular matter, it views international law as limiting the Executive's authority in the critical areas—such as the classification of enemy combatant—where its international law theory is the core constraint.

B. Rethinking Deference to Executive Interpretations of International Law

The empowerment phenomenon described in this Article should prompt a rethinking of not only *when* international law might be properly invoked to empower domestic authority, but also *who* is best suited to interpret the substantive content of that law. The courts' and Congress's level of deference and acquiescence to the Executive on the interpretation of international law must take into consideration the extent to which that international law is invoked to determine the outer contours of domestic legal authority.

As with the factors discussed above regarding the use of the empowerment phenomenon itself, there are good reasons to permit the Executive discretion in determining the U.S. position on international law and matters affecting foreign policy. These reasons include the desire that the state speak clearly "with one voice" to the international community on its international law positions and that the state through executive action be able to move international custom.[241] The Executive may also have specialized expertise as the drafter and implementer of the particular international treaty or norm at issue.[242] And questions of international interpretation are often intermingled with questions of foreign policy on which the judiciary rightly defers to the political branches,[243] such as recognition of foreign governments[244] or whether to treat acts of violence against the state as an act of war. Erring too heavily against executive discretion could leave the Executive with insufficient room to maneuver on the international plane. Yet the tensions between permitting executive discretion on the international plane and reining in executive authority in the domestic sphere collide where international law is used to determine the outer limits of domestic authority.

241. Restatement (Third) of Foreign Relations Law § 112 cmt. c (1987).

242. *See, e.g.*, Bradley, *supra* note 141.

243. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); Sosa v. Alvarez-Machain 542 U.S. 692, 727 (2004) (courts should be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.").

244. In *Zivotofsky v. Kerry*, the Court recently held that the President has exclusive power over recognition of foreign governments. Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076 (2015).

Similar factors thus guide this inquiry. First, the inward-outward distinction is also significant for matters of deference. Fundamental separation-of-powers principles suggest that deference to executive interpretation is often appropriate on matters that primarily implicate foreign policy. Yet these same principles do not and should not entrust the Executive with interpretive control over matters implicating primarily domestic legal concerns such as separation of powers and individual rights.[245] In fact, one of the very justifications for retaining executive discretion over international law interpretation on the international plane—the argument that the President should be able to move international custom by, in effect, *violating* international law—should raise alarm when that discretion is employed on the domestic plane to override domestic law. The deference trigger should therefore be weakest when international law provides the rule of decision with respect to a domestic constraint or norm addressing core domestic matters of individual rights or separation of powers.

A second factor is the extent to which executive discretion entails control over the parameters of its own domestic authority. For the reasons explained, it is appropriate that courts defer to the Executive on matters of foreign policy. But when the legal question at stake is the scope of the executive branch's own legal authority, courts should hesitate before deferring to the Executive's interpretation.[246] Deference should be weakest when the Executive relies on international law for the purpose of expanding authority or evading a statutory or constitutional prohibition, as these areas provide the greatest incentive to aggrandize authority.[247] By contrast, there should be less concern where the underlying goal is compliance with international law as there is less reason to fear the Executive will employ international law interpretation for the purpose of aggrandizing his own authority.

Third is the extent to which the matter at hand is primarily a question of policy or of law. Deference to the political branches on matters of foreign policy need not extend entirely to matters of international law interpretation, though often these are difficult to differentiate. Deference to the Executive on whether a foreign state merits immunity, for example, may include both a political act of recognition as well as a legal determination regarding the extent to which the act in question merits immunity.[248] The Executive merits deference on the policy question of recognition, but courts have the institutional competence necessary to address the legal components of the

245. This is without prejudice to areas where the President may receive deference to his interpretations over delegated statutory authority. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

246. MONTESQUIEU, SPIRIT OF THE LAWS 151–52, (Thomas Nugent trans., 1949) (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.").

247. *See*, *e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007).

248. *See, e.g.*, *supra* Part I.C.3. (discussing foreign official immunity).

question, such as the extent to which an act qualifies as a commercial activity sufficient to engage that immunity exception.

C. Inter-branch Engagement over Empowerment

Judicial deference is not the only relevant factor. Courts and Congress should both be increasingly inclined to step in the more the empowerment phenomenon leaves the Executive responsible for interpreting inward-facing as opposed to outward-looking authority, the more the matter at hand addresses individual rights versus foreign policy—in short the more it involves a matter of the parameters of the President's domestic power. All of this requires vigilance by courts and Congress over the way international law is being employed and over the content of that law.

Proposing increased congressional engagement is not simple rhetoric or fantasy. History—even recent history—provides many useful examples where Congress has stepped in to craft a domestic legal framework when the prior regime of executive discretion under the empowerment phenomenon was considered ineffective, insufficient, or inappropriate. At times Congress has acted entirely of its own accord to engage the Executive's attempt at empowerment, and at other times it has acted after judicial intervention has already invalidated executive action. Relevant examples discussed in this Article include: the Neutrality Act of 1794, enacted to bolster Washington's unilateral attempt to impose a position of strict neutrality on the country; the Foreign Sovereign Immunities Act, enacted in part to codify the Executive's international law theory of immunity; and the Military Commissions Act of 2006, enacted to permit the President to try violations of the international laws of war after the Supreme Court in *Hamdan* struck down the President's unilateral establishment of military commissions.[249]

These are, of course, examples of congressional action primarily intended to *enable* rather than to *constrain* executive action. Yet the very act of legislating entails a grappling with and choosing the appropriate domestic rules; it also codifies clear limits and it clarifies for public consumption—and potential critique—the breadth and limits of the authority granted to the Executive.[250]

D. Institutional Design as a Check on Empowerment

While it is important that the courts and Congress engage with international law in these areas as they would with domestic law, they do not realistically provide a complete solution to the problems explored in this Article.

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249. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); FSIA, *supra* note 23; Neutrality Proclamation, *supra* note 111.

250. *See, e.g.*, the Military Commissions Act, *supra* note 249, which authorized the President to try enemy combatants in military commissions after *Hamdan* had struck down his attempt to do so unilaterally, but also created clear rules for how such commissions must be undertaken.

The internal process and institutional design of internal executive decision making over matters of international law interpretation must provide genuine internal supplements to these external checks.

In fact, internal checks can at times be *more* constraining than external oversight mechanisms. Consigning control over international law interpretation to the courts and Congress does not necessarily mean more constraining or less controversial international law interpretations. To the extent these institutions have taken up knotty matters of international law in recent years, many of the outcomes have been roundly criticized by international law practitioners and scholars.[251] Additionally, judicial involvement without real teeth can have a significant if inadvertent effect on intra-executive process without providing meaningful review.[252] If courts intervene in a matter but leave some residual kernel to the Executive—for example, the standard for determining that an individual is an enemy combatant—that kernel has the potential to swallow the whole enterprise.[253] Moreover, the simple existence of judicial review alone can have unintended, negative consequences on executive decision making, like abdication of responsibility by executive officials or the reshuffling of decision-making authority within the executive, for example by taking decisions out of the hands of experts or policymakers and placing them instead in the hands of litigators.[254] Finally, there are a number of critical areas where the Executive acts unilaterally, even secretly, and due to some mix of judicial and congressional abdication or ignorance there is little to no room for intervention.

In these areas where external checks have broken down or do not exist, internal checks—the "internal separation of powers"—can act as an effective, second-best alternative. But again *who* makes the decision can be pivotal. Internal checks are only as strong as the expertise and cultural norms of the personnel or institutions making decisions. And when the international and the domestic realms intersect, these norms and expertise can be dispersed among decision makers and may not align perfectly with the task at hand. Therefore, for reasons I touch on briefly here and will explore in future work, internal separation-of-powers theories must take account of the unique role of international law and international law experts in internal decision making. Internal checks may not operate as effectively when international law arguments are at stake, particularly when international law operates in the domestic sphere to enhance executive power.[255] As with the

251. *See, e.g.*, Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (critiquing the Supreme Court's approach to treaties in *Medellín*); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 177 (2008) (critiquing the law-of-war basis for certain crimes contained within the Military Commissions Act of 2006).

252. *See* Ingber, *supra* note 109, at 383.

253. *See supra* notes 202–07 and accompanying text.

254. *Id.*

255. *See supra* Part II.B.2.

external actors discussed in prior sections, the efficacy of internal checks in this realm relies upon an understanding of and engagement with international law. International law engagement is critical for all those charged with understanding, interpreting, and checking executive power.

Conclusion

The role of international law in our domestic system is significant, and it is wide-ranging. We should let neither attempts to reject it as irrelevant, nor fear of its dismissal, stand in the way of nuanced discussion about its multifaceted nature. This includes recognizing the potential dangers in invoking international law to enhance authority or to narrow or override more restrictive domestic constraints.

This Article proposes potential remedies, in particular a greater burden on the Executive to demonstrate legitimate reasons for invoking international law to enhance its authority as well as clear limitations on that authority. However, real resolution requires renewed engagement with substantive international law and vigilance by those charged with checking executive action—the courts, Congress, civil society at large, and even actors internal to the Executive—to the ways the Executive employs legal interpretation as a tool both to protect and to aggrandize its own authority, at times at the expense of the separation of powers, individual liberties, and the rule of law.