

# PRESIDENTIAL WAR POWERS, THE TAKE CARE CLAUSE, AND ARTICLE 2(4) OF THE U.N. CHARTER

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*In directing the use of military force without prior congressional authorization, Presidents invoke their authority as “Commander in Chief of the Army and Navy of the United States” under Article II, Section 2 of the Constitution. Examples of such uses of force include the missile strikes directed by President Trump against the Syrian government in 2017 and 2018.*

*Yet Article II of the Constitution is not only a source of presidential war powers. It also imposes constraints on those same powers. Article II, Section 3 requires that the President “take Care that the Laws be faithfully executed.” The “Laws” encompass treaties, including the U.N. Charter, which sharply restricts the use of force by States.*

*This Article argues that by virtue of the Take Care Clause Article 2(4) of the U.N. Charter binds the President as a matter of domestic law. In substantiating this proposition, this Article relies primarily upon the arguments of the Executive Branch itself in three superficially distinct, though interrelated domains. By synthesizing Executive Branch views on war powers, the Take Care Clause, and Article 2(4), this Article shows how presidential arguments advancing claims of authority also delineate the scope of the corresponding constitutional duties. The Take Care Clause gives and takes at once. If the President is not constrained by treaties, the President also lacks the power to execute them.*

*I rebut a 1989 Office of Legal Counsel memorandum by now-Attorney General William Barr that concluded that the President may unilaterally “override” Article 2(4) because the treaty provision is non-self-executing and because the use of force is a “political question.” I explain that, though the politi-*

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cal question and non-self-execution doctrines may be relevant to the justiciability of Article 2(4) in the courts, neither is dispositive as to the status of Article 2(4) as a “Law” that the President is obligated to faithfully execute.

The conclusion that Article 2(4) is a “Law” has significant implications for the allocation of war powers. Contrary to Barr’s 1989 memo, by virtue of the last-in-time rule, it is Congress—not the President—that possesses the authority to “override” this treaty provision.

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INTRODUCTION

On April 6, 2017, U.S. armed forces struck Shayrat airfield in Syria with cruise missiles. The missile strikes followed the Syrian government’s chemical weapons attack on the town of Khan Sheikhoun. U.S. armed forces repeated this performance a year later in concert with French and British forces by striking additional Syrian chemical weapons-related facilities following another lethal chemical weapons attack by the Syrian government. These strikes in April 2017 and April 2018 against the Syrian government were distinct from U.S. military operations in eastern Syria against ISIS, which were conducted pursuant to statutory authority under the 2001 Authorization for Use of Military Force (AUMF),<sup>1</sup> and in certain circumstances the 2002 AUMF.<sup>2</sup> Congress authorized neither the April 2017 nor the April 2018 strikes against the Syrian government.

President Donald Trump reported both uses of force against Syria to Congress,<sup>3</sup> consistent with the War Powers

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<sup>1</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>2</sup> See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>3</sup> Letter from President Donald Trump to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Apr. 15, 2017), available at <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-3/> [<https://perma.cc/788B-VR5M>]; Letter from Donald Trump, President of the United States to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Apr. 8, 2017), <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/> [<https://perma.cc/5M8Y-UE2B>] [hereinafter April 8, 2020 President Donald Trump Letter].

Resolution.<sup>4</sup> These reports explained that the President had acted pursuant to his “constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive” and “in the vital national security and foreign policy interests.”<sup>5</sup>

The Trump Administration later expanded upon its explanation of the President’s constitutional authority to order the 2018 airstrikes despite the absence of congressional authorization. In an opinion issued by the Department of Justice’s Office of Legal Counsel (OLC) on May 31, 2018 (hereinafter *Syria CW Opinion*), OLC argued that “[t]he President could lawfully direct airstrikes on facilities associated with Syria’s chemical weapons capability because he had reasonably determined that the use of force would be in the national interest . . . .”<sup>6</sup> OLC acknowledged that the Constitution’s Declare War Clause<sup>7</sup> imposes one potential limit on the President’s authority to direct such action, as that provision reserves to Congress the power to “declare war.”<sup>8</sup> However, with respect to the 2018 use of force against chemical weapons facilities, OLC concluded that “the anticipated nature, scope, and duration of these airstrikes did not rise to level of a ‘war’ for constitutional purposes.”<sup>9</sup>

Absent from the *Syria CW Opinion* is any reference to international law, including Article 2(4) of the U.N. Charter.<sup>10</sup> Article 2(4) provides in relevant part that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>11</sup> In the wake of both the 2017 and 2018 strikes against the Syrian government, a number of states<sup>12</sup> and commentators<sup>13</sup> claimed that these uses of force by the United States violated Article 2(4).

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<sup>4</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1547 (2018)).

<sup>5</sup> April 8, 2020 President Donald Trump Letter, *supra* note 3.

<sup>6</sup> April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, at 1 (2018), <https://www.justice.gov/olc/opinions> [<https://perma.cc/3A2A-VEEB>] [hereinafter 2018 Syria CW Opinion].

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>8</sup> 2018 Syria CW Opinion, *supra* note 6, at 2.

<sup>9</sup> *Id.* at 22.

<sup>10</sup> *See generally id.*

<sup>11</sup> U.N. Charter art. 2 ¶ 4.

<sup>12</sup> *See* Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai, and Elvina Pothelet, *Mapping States’ Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018), <https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/> [<https://perma.cc/H9WA-8R64>] (cataloging the publicly-expressed legal positions of states to the American-British-French strikes).

<sup>13</sup> *See, e.g.*, Jack Goldsmith & Oona Hathaway, *Bad Legal Arguments for the Syria Airstrikes*, LAWFARE (Apr. 14, 2018, 1:54 PM), <https://www.lawfareblog.com>.

Superficially, the *Syria CW Opinion*'s silence with respect to the U.N. Charter is understandable. After all, the opinion's focus is domestic, not international law. However, upon further reflection, the omission of any reference to the U.N. Charter is puzzling. The Supremacy Clause declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>14</sup> By virtue of the Supremacy Clause, one might expect that a treaty (such as the U.N. Charter) would also bear on the President's legal authority under domestic law.

Another once infamous, though now relatively forgotten, OLC opinion might explain the *Syria CW Opinion*'s silence with respect to Article 2(4) of the U.N. Charter. In a 1989 opinion, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (Override Opinion)* signed by then-Assistant Attorney General William Barr, OLC concluded that "as a matter of domestic law, the Executive has the power to authorize actions inconsistent with Article 2(4) of the U.N. Charter."<sup>15</sup> In OLC's view, because Article 2(4) is not a self-executing treaty provision, it does not impose a domestic legal constraint on the President's war pow-

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com/bad-legal-arguments-syria-airstrikes [https://perma.cc/UW5H-SVWD] (characterizing the 2018 American-British-French strikes as a violation of Article 2(4) of the U.N. Charter); Marko Milanovic, *The Syria Strikes: Still Clearly Illegal*, EJIL:TALK! (Apr. 15, 2018), https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/ [https://perma.cc/59WF-8NP7] (arguing that the 2018 American-British-French strikes violated international law).

<sup>14</sup> U.S. CONST. art VI, cl. 2.

<sup>15</sup> *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 179 (1989) [hereinafter *Override Opinion*]. The existence of the then still confidential *Override Opinion* became known publicly due to leaks to press in October 1989. See Ronald J. Ostrow, *FBI Gets OK for Overseas Arrests*, L.A. TIMES, Oct. 13, 1989, https://www.latimes.com/archives/la-xpm-1989-10-13-mn-138-story.html [https://perma.cc/4APM-MEBY]. These reports prompted a hearing the following month before the Subcommittee on Civil and Constitutional Rights in the House of Representatives at which the head of OLC, William P. Barr, and the Department of State Legal Adviser, Abraham Sofaer, testified. Despite a request by chairman of the subcommittee for the opinion, Barr refused to provide it. *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 31 (1989). The subcommittee subsequently subpoenaed the opinion and after initially resisting the subpoena, the Department of Justice relented and shared the document with the subcommittee. LOUIS FISHER, CONG. RESEARCH SERV., RL30966, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION 21, (2001); See also Michael Isikoff, *U.S. 'Power' on Abductions Detailed*, WASH. POST, Aug. 14, 1991, at A14 (describing the leaked contents of the *Override Opinion* and the efforts by Congress to obtain it from the Department of Justice).

ers. In light of this earlier conclusion, the failure of the *Syria CW Opinion* to address Article 2(4) is understandable.

The *Override Opinion*'s conclusion that under domestic law the President may unilaterally order violations of Article 2(4) is incorrect. Contrary to the *Override Opinion*, this Article contends that the President is constrained as a matter of *domestic* law by Article 2(4) because of the President's constitutional duty to "take Care that the Laws be faithfully executed."<sup>16</sup> In assessing the relevance of this duty of faithful execution, the critical question is not whether Article 2(4) is self-executing or otherwise judicially enforceable, but whether it is a "Law" within the meaning of the Take Care Clause. The U.N. Charter is indeed a "Law" that the President must faithfully execute. Violations of Article 2(4) do not constitute faithful execution. Thus, Article II is not only a source of the President's constitutional war power, but it also imposes significant limitations upon the exercise of those war powers. Properly understood, Article II contains both a sword and a shackle.

For over seventy years, scholars have recognized that the U.N. Charter, and Article 2(4) in particular, is "Law" which the President is obligated to faithfully execute. During the drafting of the Charter, Phillip Jessup, James Shotwell, and Quincy Wright argued that, once ratified, the treaty would be a "Law."<sup>17</sup> Professor Glennon later advanced this claim in reaction to the leaked contents of the *Override Opinion*.<sup>18</sup> More recently, Professor Lederman (formerly an attorney in OLC) has argued in connection with the aforementioned U.S. military actions against the Syrian government, that the President is constitutionally constrained by Article 2(4) due to the Take Care Clause.<sup>19</sup>

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<sup>16</sup> U.S. CONST. art. II, § 3.

<sup>17</sup> John W. Davis et al., Letter to the Editor, *Our Enforcement of Peace Devolves Upon the President: Congress May Authorize Extraterritorial Use of Force, but Constitution is Held to Place Responsibility for Prompt Action Directly Upon the Executive*, N.Y. TIMES, Nov. 1, 1944, at E8. The authors of the letter included John W. Davis, W.W. Grant, Phillip C. Jessup, George Rublee, James T. Shotwell, and Quincy Wright. Addressing the Dumbarton Oaks draft of the Charter, the letter argued that "the President has both the right and duty to utilize his powers as Commander in Chief to see that the laws are faithfully executed" and that the "laws' include rules of general international law and agreements binding the United States." *Id.* (citation omitted).

<sup>18</sup> Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 752 (1992).

<sup>19</sup> Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (therefore) the U.S. Constitution*, JUST SECURITY (Apr. 6, 2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/> [<https://perma.cc/88QW-LWA5>].

Notwithstanding these earlier insights, this Article is the first extended exposition of the application of the Take Care Clause to the U.N. Charter. This Article contributes to the war powers literature by both fleshing out the claim that the Charter is a “Law” and explaining the implications for the President’s constitutional authority. This Article expounds upon and weaves together three ostensibly separate doctrinal threads. The first thread is the Executive Branch’s current articulation of the President’s authority under the Constitution to direct the use of military force without prior congressional authorization. The second thread relates to the meaning of the Take Care Clause and its application to treaties—including the Charter. The final thread is the Executive Branch’s current understanding of lawful uses of force under the U.N. Charter. The Article draws these strands together to argue that by virtue of the Take Care Clause, the President’s war powers under Article II are limited by Article 2(4).

My aim in synthesizing these lines of argument is to outline the general framework of the President’s war powers that accounts for the Take Care Clause—not to opine on the lawfulness of any specific use of force by the United States.

This Article contributes not only to the practice-based scholarship on presidential war powers,<sup>20</sup> but also to the burgeoning body of work on the Take Care Clause.<sup>21</sup> Although I look to the originalist interpretations favored by recent scholarship on the Take Care Clause, I also place heavy reliance on the “historical gloss” interpretative approach in elucidating the meaning of “Laws.”<sup>22</sup> As described in Justice Felix Frankfurter’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, gloss as an interpretative approach accounts for the significance of “[d]eeply embedded traditional ways of conducting government [which] cannot supplant the Constitution

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<sup>20</sup> For works within the practice-based scholarship, see generally, for example, EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (1957); JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945); Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689 (2016); Jane E. Stromseth, Book Review, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996); Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626 (2014).

<sup>21</sup> For articles in this growing body of work, see generally, for example, Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2136 (2019).

<sup>22</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952).

or legislation, but [that] give meaning to the words of a text or supply them.”<sup>23</sup> Thus, Justice Frankfurter argued that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>24</sup>

This Article proceeds as follows. Part I provides a descriptive account of the Executive Branch’s current position regarding the President’s constitutional authority to direct the use of force in the absence of congressional authorization. Although this position is contested in some key respects, my purpose in this Part is to describe that position rather than critically examine it. Part II examines the *Override Opinion*’s analysis of the relationship between Article 2(4) and the President’s authority under Article II. Part III analyzes the Take Care Clause. Relying upon multiple forms of evidence, this Part presents the case that treaties generally, and the U.N. Charter in particular, are “Laws” within the meaning of the Take Care Clause that the President has a duty to faithfully execute. Although many of the authorities cited in this Article refer expansively to both treaties and customary international law (i.e., the law of nations) as “Laws”, the focus of this piece is Article II treaties, not customary international law (the status of the latter as “Law” would raise additional questions). Nor do I examine whether any of the various species of executive agreements are “Laws” (though the argument seems strongest for congressional-executive agreements.) Part IV engages with potential counterarguments, including the non-self-execution and political question doctrines. Part V outlines the proper framework for the exercise of war powers in light of the constraints imposed by Article 2(4). This Part again provides a descriptive account of the Executive Branch views, in this case of the use of force under Article 2(4). Crucially, it argues that the *jus ad bellum* framework under Article 2(4) provides not only the *international* rules regarding the use of force, but also binding rules under U.S. *domestic* law. Consequently, before the United States uses force in the absence of congressional authorization, it must affirmatively determine that such force is permissible under the U.N. Charter. This Part then explains that pursuant to the

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<sup>23</sup> *Id.* at 610.

<sup>24</sup> *Id.* at 610–11 (Frankfurter, J., concurring).



last-in-time rule, it is Congress, not the President, who may override Article 2(4) by authorizing the use of force.

## I

### THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO USE FORCE: THE EXECUTIVE BRANCH POSITION

In a series of opinions issued by the Department of State and OLC over more than a century, the Executive Branch has articulated its understanding of the President's constitutional authority to use force in the absence of prior congressional authorization.<sup>25</sup> Under the current view, as set forth in the *Syria CW Opinion*, the President's authority to direct U.S. military forces arises from Article II of the Constitution, which makes the President the "Commander in Chief of the Army and Navy of the United States"<sup>26</sup> and vests in the President the Executive Power.<sup>27</sup> Relying upon its own prior opinions as precedents, OLC has concluded that whether a potential use of military force is within the scope of the President's authority under Article II of the Constitution turns on two questions:<sup>28</sup>

- (1) Whether the U.S. military operations would serve sufficiently important national interests; and
- (2) Whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature,

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<sup>25</sup> See, e.g., J. REUBEN CLARK, SOLICITOR FOR THE DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1912) (right to protect citizens in foreign countries); Authority of the President to Repel the Attack in Korea, 23 Dep't St. Bull. 173 [hereinafter 1950 Korea Memo]; S. REP. NO 175(1951) [hereinafter 1951 Assignment of Ground Forces Memo]; COMMS. ON FOREIGN RELATIONS AND ON ARMED SERVICES, 82D CONG., POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES (Comm. Print 1951) [hereinafter 1951 Sending Armed Forces Memo]; The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321, 331 (1970) [hereinafter 1970 Cambodia Opinion]; Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185 (1980) [hereinafter 1980 Presidential Power Opinion]; Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992) [hereinafter 1992 Somalia Opinion]; Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 331 (1995) [hereinafter 1995 Bosnia Opinion]; Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 30, 31 (2004) [hereinafter 2004 Haiti Opinion]; Authority to Use Military Force in Libya, 35 Op. O.L.C. at 6 (2011), [https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf) [<https://perma.cc/AD8L-4EPN>] [hereinafter 2011 Libya Opinion]; Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant, Slip Op. Att'y Gen. (2014), <https://www.justice.gov/olc/file/1248476/download> [<https://perma.cc/7K77-RB59>] [hereinafter 2014 ISIL Opinion].

<sup>26</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>27</sup> *Id.* § 1, cl. 1.

<sup>28</sup> 2018 Syria CW Opinion, *supra* note 6, at 9.

scope, and duration” to constitute a “war” within the meaning of Article I, § 8, cl. 11, which gives the Congress the power “[t]o declare War.”<sup>29</sup>

My intent in elaborating this position is not to endorse the Executive Branch’s view, but to show that the Executive Branch itself recognizes constitutional limitations on the President’s war powers.

### A. National Interest

Looking to historic practice, including through the rubric of gloss, OLC has recognized that a number of interests would justify the President’s reliance on his authority under Article II to direct the use of military force.<sup>30</sup> As cataloged in the *Syria CW Opinion*, these national interests include: the protection of U.S. persons and property;<sup>31</sup> assistance to allies;<sup>32</sup> support for the United Nations;<sup>33</sup> promoting regional stability;<sup>34</sup> mitigating humanitarian disasters;<sup>35</sup> and preventing the use and proliferation of chemical weapons.<sup>36</sup>

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<sup>29</sup> *Id.* at 9–10; *see also* 2011 Libya Opinion, *supra* note 25, at 10 (stating that the “President’s legal authority to direct military force . . . turns on two questions:” whether operations would serve a “sufficiently important national interest[ ]” and whether the operations would amount to war in the constitutional sense).

<sup>30</sup> *See* 2018 Syria CW Opinion, *supra* note 6, at 3–4 (describing presidents directing the use of military force without prior congressional authorization on “dozens of occasions over the course of 230 years.”). *But see* Michael J. Glennon, *The Executive’s Misplaced Reliance on War Powers “Custom,”* 109 AM. J. INT’L L. 551, 552 (2015) (criticizing the Executive Branch’s “misplaced” reliance on war powers practice).

<sup>31</sup> *See, e.g.*, 1980 Presidential Power Opinion, *supra* note 25, at 187 (“Presidents have repeatedly employed troops abroad in defense of American lives and property.”); 2004 Haiti Opinion, *supra* note 25, at 31 (“The President has the authority to deploy the armed forces abroad in order to protect American citizens and interests from foreign threats.”).

<sup>32</sup> *See, e.g.*, Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 179 (1994) [hereinafter 1994 Haiti Opinion] (finding authority for intervention “at the invitation of a fully legitimate government”).

<sup>33</sup> *See, e.g.*, 1992 Somalia Opinion, *supra* note 25, at 11 (“[M]aintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest . . .”).

<sup>34</sup> 2011 Libya Opinion, *supra* note 25, at 12 (“[W]e believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.”).

<sup>35</sup> 2014 ISIL Opinion, *supra* note 25, at 35 (“[W]e believe it . . . reasonable for the President to rely on a national interest in preventing humanitarian catastrophe, at least in combination with an interest in protecting Americans or supporting an ally or strategic partner, as a justification for conducting airstrikes against ISIL’s position[ ] . . .”).

<sup>36</sup> 2018 Syria CW Opinion, *supra* note 6, at 11.

Although OLC's national interest standard has been sharply criticized (including by Jack Goldsmith, the former head of OLC),<sup>37</sup> my purpose in this Part is simply to describe the Executive Branch's current understanding of those interests that would justify the use of force in the absence of congressional authorization.

## B. War in the Constitutional Sense

The Declare War Clause commits to Congress the authority to declare war.<sup>38</sup> The dominant Executive Branch interpretation thus acknowledges—with varying degrees of definitiveness—that the Declare War Clause limits the President's authority to direct the use of force in the absence of prior congressional authorization. As articulated in the *Syria CW Opinion*, if the President could expect an operation to rise to the level of a war in the constitutional sense, congressional authorization would be required.<sup>39</sup> Both Democratic and Republican administrations have expressed this constitutional understanding for at least the past fifty years.<sup>40</sup>

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<sup>37</sup> See Curtis Bradley & Jack Goldsmith, *OLC's Meaningless 'National Interests' Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018, 3:13 PM), <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force> [<https://perma.cc/X2YK-7XES>].

<sup>38</sup> U.S. CONST. art I, § 8, cl. 11.

<sup>39</sup> 2018 Syria CW Opinion, *supra* note 6, at 18 (“We next considered whether the President could expect the Syrian operations to rise to the level of a war requiring congressional authorization.”).

<sup>40</sup> See Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area 1 Op. O.L.C. Supp. 313, 317 (1970) [hereinafter 1970 Vietnam Opinion] (“Under our Constitution it is clear that Congress has the sole authority to declare formal, all-out war. It is equally clear that the President has the authority to respond immediately to attack both at home and abroad. Between these two lies the grey area of commitment of troops in armed conflict abroad under either American or international auspices. In this area, both the Congress and the President have acted in the past.”); 1994 Haiti Opinion, *supra* note 32, at 173 (concluding that the President has authority to deploy U.S. forces to Haiti because, inter alia, the “nature, scope, and duration of the anticipated deployment” would not amount to “war in the constitutional sense”) (internal quotation marks omitted); 1995 Bosnia Opinion, *supra* note 25, at 332 (examining whether a proposed deployment would constitute “war” in the constitutional sense); 2011 Libya Opinion, *supra* note 25, at 8 (“We have acknowledged one possible constitutionally-based limit on this presidential authority to employ military force in defense of important national interests—a planned military engagement that constitutes a ‘war’ within the meaning of the Declaration of War Clause may require prior congressional authorization.”); 2014 ISIL Opinion, *supra* note 25, at 40 (concluding that “the anticipated nature, scope, and duration of the operations were sufficiently limited so as not to require prior congressional approval”); 2018 Syria CW Opinion, *supra* note 6, at 8 (recognizing that the President is “obliged] . . . to seek congressional approval prior to contemplating military action that would bring the Nation into a war”).

In assessing whether a contemplated use of military force would amount to “war” in the constitutional sense, OLC has looked to the anticipated nature, scope, and duration of the planned military operations.<sup>41</sup> Under this view “military operations will likely rise to the level of a war only when characterized by ‘prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.’”<sup>42</sup>

Certain factors mitigate the likelihood that a military operation will constitute “war” in the constitutional sense. For example, operations that do not involve the introduction of ground forces are less likely to constitute “war.”<sup>43</sup> Further, operations that do “‘not aim at the conquest or occupation of territory’ or seek to ‘impos[e] through military means a change in the character of the political regime’” are less likely to produce armed resistance or lengthy engagements associated with “war.”<sup>44</sup>

Conversely, other factors increase the likelihood that a military engagement will amount to “war.” The risk of escalation is a particularly significant consideration in assessing whether a contemplated operation will constitute war.<sup>45</sup> OLC has “looked closely at whether an operation will require the introduction of U.S. forces directly into the hostilities, particularly with respect to the deployment of ground troops.”<sup>46</sup> The greater the difficulty in disengaging U.S. forces and the greater the risk of escalation, the more likely that a contemplated military operation will constitute “war” requiring congressional authorization.<sup>47</sup>

One OLC opinion, authored by John Yoo, rejected any constitutional limitation on the President’s inherent war powers.

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<sup>41</sup> See 2018 Syria CW Opinion, *supra* note 6, at 18; see also 2011 Libya Opinion, *supra* note 25, at 8 (“In our view, determining whether a particular planned engagement constitutes a ‘war’ for constitutional purposes instead requires a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.”).

<sup>42</sup> 2018 Syria CW Opinion, *supra* note 6, at 18.

<sup>43</sup> See 2014 ISIL Opinion, *supra* note 25, at 37.

<sup>44</sup> *Id.* (alteration in original) (quoting 1995 Bosnia Opinion).

<sup>45</sup> See 2018 Syria CW Opinion, *supra* note 6, at 21 (“[I]n evaluating the expected scope of hostilities, we also considered the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran.”).

<sup>46</sup> *Id.* at 19; see also 2011 Libya Opinion, *supra* note 25, at 8 (“In our view, determining whether a particular planned engagement constitutes a ‘war’ for constitutional purposes instead requires a fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.”).

<sup>47</sup> 2018 Syria CW Opinion, *supra* note 6, at 19, 21.

Yoo argued that “the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad” and further contends that “Congress’s power to declare war does not constrain the President’s independent and plenary constitutional authority over the use of military force.”<sup>48</sup> However, this opinion is anomalous and subsequent publicly-available opinions have not reiterated its expansive views regarding Presidential war powers.

## II

### THE OVERRIDE OPINION

Although OLC has acknowledged the Declare War Clause as a limitation on the President’s war powers, in the *Override Opinion* OLC expressly rejected Article 2(4) of the U.N. Charter as a constraint upon the President’s authority under Article II.<sup>49</sup> In order to appreciate the Executive Branch’s current view of the President’s war powers, a brief description of this opinion is necessary.

The *Override Opinion* examines a number of issues related to the legal authority, constraints, and implications of extraterritorial FBI investigations and arrests.<sup>50</sup> After concluding that the FBI had statutory authority to conduct such activities even if they violated customary international law, OLC turned to the interplay between the President’s constitutional authority to direct such activities and international law.<sup>51</sup>

First, OLC opined that even in the absence of statutory authority, the President had constitutional authority to direct law enforcement activities pursuant to the Take Care Clause.<sup>52</sup> In reaching this position, OLC relied on the Supreme Court

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<sup>48</sup> The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 188, 193 (2001).

<sup>49</sup> Press reports describing the then confidential *Override Opinion* focused on the Presidential “snatch authority” under the opinion and did not seem to mention the U.N. Charter. See Ostrow, *supra* note 15. These reports prompted a hearing before the House Subcommittee on Civil and Constitutional Rights at which the head of OLC, William P. Barr, and the Department of State Legal Adviser, Abraham Sofaer, testified. The members of the subcommittee appear to have been unaware of the opinion’s treatment of the U.N. Charter, and the witnesses did not volunteer this information during the hearing. *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 31 (1989).

<sup>50</sup> See generally *Override Opinion*, *supra* note 15.

<sup>51</sup> *Id.* at 176–79.

<sup>52</sup> *Id.* at 176.

opinion in *In re Neagle*.<sup>53</sup> In that case, the Supreme Court concluded that the President's duty to "take care that the laws be faithfully executed" extends to "acts of Congress," "treaties according to their *own terms*,"<sup>54</sup> and the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."<sup>55</sup> In view of *In re Neagle*, OLC concluded that the President possessed constitutional authority to direct law enforcement activities.<sup>56</sup>

Second, OLC concluded that the President could direct such activities even if they violated customary international law. On this issue, OLC cited, *inter alia*, to the Supreme Court's opinions in *The Schooner Exchange v. McFaddon*,<sup>57</sup> *Brown v. United States*,<sup>58</sup> and *The Paquette Habana*,<sup>59</sup> in support of the proposition that "[b]oth the Congress and the President, acting within their respective spheres, retain the authority to override any such limitations imposed by customary international law."<sup>60</sup>

Third, in four terse paragraphs, the *Override Opinion* addressed the issue of whether "Article 2(4) of the U.N. Charter would prohibit the Executive as a matter of domestic law from authorizing forcible abductions absent acquiescence by the foreign government."<sup>61</sup> The opinion assumes for the sake of the analysis that Article 2(4) would apply to extraterritorial law enforcement activities.<sup>62</sup> It then presents a black-letter formulation of the distinction between self-executing and non-self-executing treaties.

Treaties that are self-executing can provide rules of decision for a United States court, *see Cook v. United States*, 288 U.S. 102, 112 (1933), but when a treaty is non-self-executing, it "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.)<sup>63</sup>

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<sup>53</sup> 135 U.S. 1 (1890).

<sup>54</sup> *Id.* at 64.

<sup>55</sup> *Override Opinion*, *supra* note 15 at 176 (quoting *In re Neagle*, 135 U.S. 1 at 64).

<sup>56</sup> *Id.*

<sup>57</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>58</sup> 12 U.S. (8 Cranch) 110 (1814).

<sup>59</sup> 175 U.S. 677 (1900).

<sup>60</sup> *Override Opinion*, *supra* note 15, at 171.

<sup>61</sup> *Id.* at 178.

<sup>62</sup> *Id.* (alteration in original)

<sup>63</sup> *Id.*

Following this recitation of the relevance of the non-self-execution doctrine in terms of providing rules of decision for courts, the opinion makes a logical leap in the following sentence to claim that non-self-executing treaties are not binding on the *political* branches. “Accordingly, the decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties, like customary international law, are not legally binding on the political branches.”<sup>64</sup> This assertion is unaccompanied by citation to any authority. The opinion then claims that it follows that the “President, acting within the scope of his constitutional or statutory authority, thus retains full authority to determine whether to pursue action abridging the provisions of unexecuted treaties.”<sup>65</sup>

Turning from the doctrine of non-self-execution, the *Override Opinion* asserts that Article 2(4) “relates to one of the most fundamentally political questions that faces a nation—when to use force in its international relations.” The opinion concludes that it is on this basis that the “Executive has the power to authorize actions inconsistent with Article 2(4) of the U.N. Charter.”<sup>66</sup>

The *Override Opinion*’s treatment of Article 2(4) is striking in several respects. In light of the significance of its conclusion, the analysis is remarkably brief and bereft of citation to supporting authority. Further, the opinion provides no explanation to connect the doctrine of non-self-execution to the issue of whether such non-self-executing treaties bind the President. The opinion does not acknowledge, much less address, potential counterarguments.

The shortcomings of the *Override Opinion* are particularly stark because the opinion itself refers to the proper framing of the issue in its discussion of the President’s constitutional authority to direct law enforcement activities. Whether or not Article 2(4) of the U.N. Charter binds the President does not turn on whether this provision is self-executing. Instead, the critical question is whether the U.N. Charter is a “Law” that the President is obligated to “faithfully execute” under the Take Care Clause.

As reflected in the *Override Opinion*’s quotation of *In re Neagle*, the “Laws” include treaties.<sup>67</sup> This conclusion is con-

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<sup>64</sup> *Id.* at 178–79 (footnote omitted).

<sup>65</sup> *Id.* at 179.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 176.

sonant with the weight of authority, which supports the proposition that treaties generally—and the U.N. Charter in particular—are “Laws” within the meaning of the Take Care Clause. Notably, the authority also includes a series of Executive Branch legal opinions “and the still weightier precedents of history,”<sup>68</sup> of the “‘historical gloss’ placed on the Constitution by two centuries of practice.”<sup>69</sup>

### III

#### THE TAKE CARE CLAUSE

This Part examines the relevant components of the Take Care Clause. First, I consider the pertinent implications of “faithful execution.” Then, I argue that treaties generally, and the U.N. Charter in particular, are “Laws” within the meaning of the clause.

##### A. Faithful Execution

Article II, Section Three of the Constitution states that the President “shall take Care that the Laws be faithfully executed.”<sup>70</sup> The clause is formulated as an instruction or command. Eighteenth and early nineteenth century dictionaries reinforce the interpretation of the Take Care Clause as a duty.<sup>71</sup> Webster’s 1828 dictionary defines “faithfully” as “[w]ith strict adherence to allegiance and duty.”<sup>72</sup> Samuel Johnson’s dictionary in turn refers to “strict adherence to duty and allegiance” and “[w]ithout failure of performance; honestly; exactly.”<sup>73</sup> As for what it means to “execute,” Johnson offered the literary illustration: “Men may not devise laws, but are bound for ever to use and *execute* those which God hath delivered.”<sup>74</sup> Under this interpretation to “execute” is akin to “implement,” as in implementing a divine command.

Although there is some uncertainty regarding the roots and interpretation of the Take Care Clause,<sup>75</sup> the predominant view holds that the clause traces its origins to the English Bill of

<sup>68</sup> 2018 Syria CW Opinion, *supra* note 6, at 3, 11.

<sup>69</sup> 2011 Libya Opinion, *supra* note 25, at 7.

<sup>70</sup> U.S. CONST. art. II, § 3.

<sup>71</sup> See Blackman, *supra* note 21, at 221–23.

<sup>72</sup> 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining faithfully as “[i]n a faithful manner; with good faith.”).

<sup>73</sup> 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington eds., 6th ed. 1785).

<sup>74</sup> *Id.*

<sup>75</sup> Goldsmith & Manning, *supra* note 21, at 1867 (describing the clause as “delphic”).



Rights of 1689.<sup>76</sup> Prior to the Glorious Revolution, the monarch enjoyed the prerogative to suspend the application of statutes, or to dispense with their application to specific persons.<sup>77</sup> The English Bill of Rights terminated this royal prerogative by prohibiting both suspension of and dispensation from the laws.<sup>78</sup> Consequently, the English Bill of Rights transferred the authority to suspend laws from the executive to the legislature.<sup>79</sup>

The Take Care Clause reflects these anti-suspension and anti-dispensation principles.<sup>80</sup> James Wilson described the clause as providing that the President possesses “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws.”<sup>81</sup> The Department of Justice has expressed a similar understanding of the Take Care Clause. Looking to English constitutional history and the Glorious Revolution, Attorney General Civiletti acknowledged to a Senate subcommittee in 1980 that the “President has no ‘dispensing power.’”<sup>82</sup> OLC later summarized judicial and Executive Branch views on the Clause in a 1994 opinion: “The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inher-

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<sup>76</sup> English Bill of Rights, 1 W. & M., 2d Sess., c. 2 (1689), [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp) [<https://perma.cc/9DBK-UUQ6>]; See Christopher May, *Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873 (1994) (tracing the origins of the Take Care Clause to the English Bill of Rights).

<sup>77</sup> See May, *supra* note 76, at 869–72 (recounting dispensation and suspension by English monarchs prior to the Glorious Revolution).

<sup>78</sup> English Bill of Rights, *supra* note 76 (declaring the “the pretended power [to] suspend[] the laws or the execution of the law by regal authority” and the “pretended power of dispensing with laws or the execution of the laws by regal authority” to be illegal).

<sup>79</sup> *Id.*

<sup>80</sup> See *Kendall v. United States ex rel Stokes*, 37 U.S. (12 Pet.) 524, 525 (1838) (rejecting the argument that “the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution”); MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 124 (2007) (observing that the Take Care Clause “presumably arises from a discredited feature of English law, that the Crown could ‘suspend’ operation of Parliament’s acts; the President’s take-care duty assures that, whatever one thought of the ‘suspensive’ power, the President had no such authority”); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) (“General agreement exists, however, that the Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power.”).

<sup>81</sup> 2 THE WORKS OF JAMES WILSON 829, 878 (Robert Green McCloskey ed., 1967).

<sup>82</sup> *The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980) (opinion of Attorney General Civiletti).

ent constitutional authority to suspend the enforcement of the laws, particularly of statutes.”<sup>83</sup>

The duty imposed on the President by the Take Care Clause entails an obligation to abide by the “Laws” and not authorize actions inconsistent with the “Laws.” President George Washington understood his presidential responsibilities under the Clause in this manner: “It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to [that duty].”<sup>84</sup> The limited judicial interpretations of the Clause reinforce the conclusion.<sup>85</sup> As the Supreme Court stated in *Kendall*, “the obligations imposed on the President to see the laws faithfully executed” does not imply “a power to forbid their execution.”<sup>86</sup>

The interpretation of the Take Care Clause not only as a constraint on the President, but also as a constraint on the President’s powers as Commander in Chief, is buttressed by one of the rare judicial decisions of the early Republic addressing the application of the clause to the President’s war powers. In 1806, Colonel Smith was prosecuted under the 1794 Neutrality Act for “setting foot” on an expedition to liberate Venezuela from Spain.<sup>87</sup> By way of defense, Smith claimed that his actions had been authorized by Secretary of State Madison and by President Thomas Jefferson personally. To substantiate this claim, Smith sought to compel Madison’s testimony at his trial.<sup>88</sup>

The court rejected Smith’s request on the grounds that such evidence was irrelevant. It held that “the previous knowledge or approbation of the president to the illegal acts of a citizen can afford him no justification for the breach of a consti-

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<sup>83</sup> Constitutional Limitations on Fed. Gov’t Participation in Binding Arbitration, 19 Op. O.L.C. 208, 223 (1995).

<sup>84</sup> Letter from George Washington, President of the United States, to Alexander Hamilton (Sept. 7, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON 144 (John C. Fitzpatrick ed. 1939).

<sup>85</sup> See *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (referring to the President’s “responsibility” to “take Care that the Laws be faithfully executed.”); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863 (1982) (describing the Clause as imposing a “duty.”); *Morrison v. Olson*, 487 U.S. 654, 690 (1988) (referring to the “[the President’s] constitutionally appointed duty to ‘to take care that the laws be faithfully executed’ under Article II.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (majority opinion) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

<sup>86</sup> *Kendall v. United States ex rel Stokes*, 37 U.S. (12 Pet.) 524, 525 (1838).

<sup>87</sup> *United States v. Smith*, 27 F. Cas. 1233, 1233 (C.C.N.Y. 1806).

<sup>88</sup> See *id.* at 1233–35.

tutional law.—The [sic] president's duty is faithfully to execute the laws, and he has no such dispensing power."<sup>89</sup>

Supreme Court Justice William Paterson, a participant in the Constitutional Convention and sitting in the lower court by designation, made this point more forcefully at a preliminary hearing in the same trial. In describing the application of the Take Care Clause to the 1794 Neutrality Act, Justice Patterson observed:

The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. . . . Will it be pretended that the president could rightfully grant a dispensation and license to any of our citizens to carry on a war against a nation with whom the United States are at peace?<sup>90</sup>

The Executive Branch of the early Republic also acknowledged that the Take Care Clause constrained the President's war powers. During the Argentine War of Independence, Secretary of State John Quincy Adams explained to an envoy from the United Provinces of la Plata (now Argentina), that the clause barred the President from suspending U.S. neutrality laws:<sup>91</sup> "[T]he executive possessed no power to dispense with the execution of the laws; and was, on the contrary, bound by his official duty and his oath to take care that they should be faithfully executed."<sup>92</sup>

The Supreme Court has referred to the President's obligation under the Take Care Clause as "the Chief Executive's most important constitutional duty."<sup>93</sup> The significance of the duty is apparent from Congress's repeated invocation of the provision during presidential impeachments. Violation of the President's "constitutional duty to take care that the laws be faithfully executed" was cited in the Articles of Impeachment for President Bill Clinton,<sup>94</sup> as well as the Articles of Impeachment for President Richard Nixon reported out of the House

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<sup>89</sup> *Id.* at 1243.

<sup>90</sup> *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806).

<sup>91</sup> Letter from John Quincy Adams, Secretary of State, to Don Manuel H. De Aguirre (Aug. 27, 1818), in 6 WRITINGS OF JOHN QUINCY ADAMS 449 (Worthington Chauncey Ford, ed., 1916).

<sup>92</sup> *Id.* at 450.

<sup>93</sup> *Lujan v. Def. of Wildlife*, 504 U.S. 555, 577 (1992).

<sup>94</sup> H.R. Res. 611, 105th Cong. (2d Sess.1998).

Judiciary Committee.<sup>95</sup> Similarly, the Articles of Impeachment for President Andrew Johnson alleged that he was “unmindful of the high duties of his office,” including “the requirement of the Constitution that he should take care that the laws be faithfully executed.”<sup>96</sup> Most recently, the Articles of Impeachment for President Trump alleged that President Trump violated “his constitutional duty to take care that the laws be faithfully executed” in connection both with charges of abuse of power and obstruction of Congress.<sup>97</sup>

The Take Care Clause is thus, at a minimum, a source of restrictive duty. Moreover, this Article II duty constrains the President’s Article II authority as Commander in Chief.

The nature of the affirmative authority conferred upon the President by the Take Care Clause raises a number of difficult questions, including whether any such authority would support taking action pursuant to permissive—as opposed to mandatory or prohibitive—legal provisions. Although many of the historical incidents cited later in this Article involve invocations of the Take Care Clause as a source of authority, I do not attempt to address the scope of any such affirmative authority in this piece.

## B. Treaties as “Laws”

The remainder of this Part argues that treaties generally, and the U.N. Charter in particular, are “Laws.” In doing so, I build upon earlier work of Professor Swaine,<sup>98</sup> as well as Professors Jinks and Sloss.<sup>99</sup> The evidence marshalled in support of this claim includes the text of the clause, drafting history of the clause, interpretation by the founding generation, and interpretations of the courts, Executive Branch, and Senate.

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<sup>95</sup> THE IMPEACHMENT REPORT: A GUIDE TO THE CONGRESSIONAL PROCEEDINGS IN THE CASE OF RICHARD M. NIXON (United Press International & World Almanac eds.) (1974) (listing articles of impeachment).

<sup>96</sup> *History of the Impeachment of Andrew Johnson*, AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/john\\_chap\\_07.asp](http://avalon.law.yale.edu/19th_century/john_chap_07.asp) [<https://perma.cc/34MZ-Q6X6>] (last visited Oct. 7, 2020) (Articles of Impeachment of Andrew Johnson).

<sup>97</sup> H.R. Res. 755, 116th Cong., (1st Sess. 2019).

<sup>98</sup> See generally Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008).

<sup>99</sup> See generally Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

## 1. *Text*

Although strongly suggestive, the text of the Constitution does not indicate unequivocally whether treaties constitute “Laws” within the scope of the Take Care Clause. On the one hand, the Supremacy Clause states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>100</sup> Thus read in conjunction with the Supremacy Clause, it appears obvious that the Take Care Clause encompasses treaties.

This conclusion is bolstered by the pedigree of the phrase the “law of the land.” Under English law dating to the Magna Carta, the “law of the land” (*legem terrae*) was law binding on the monarch.<sup>101</sup> Based on the “law of the land” conception of the Supremacy Clause, Professor Ramsey has argued not only that treaties are binding upon the President, but also that treaties are “Laws” under the Take Care Clause.<sup>102</sup>

On the other hand, “Laws” carries different meanings throughout the Constitution.<sup>103</sup> Elsewhere in the Constitution “Laws” generally,<sup>104</sup> though not exclusively<sup>105</sup>, refers to federal statutes. Further, though the Supremacy Clause explicitly refers to treaties, the Take Care Clause does not. Thus, the text of the Constitution does not itself conclusively resolve the issue of whether treaties are “Laws.”

## 2. *Framing and Interpretation by the Founding Generation*

Statements by some founding fathers immediately preceding the Constitutional Convention indicate that, as a general matter, a duty of faithful execution could extend to treaties. In

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<sup>100</sup> U.S. CONST. art. VI, § 2.

<sup>101</sup> RAMSEY, *supra* note 80, at 163.

<sup>102</sup> See *id.* at 164 (arguing that it is clear on a textual basis that as “‘laws of the land’ in the English sense, it seems natural that [treaties] would form part of the Article II, Section 3 ‘Laws’ that the President must enforce”).

<sup>103</sup> See generally Swaine, *supra* note 98, at 342–43 (discussing the various meanings of “laws” in the Constitution).

<sup>104</sup> See, e.g., U.S. CONST. art. I, § 7 cl. 2 (describing the process of presentment in order for a bill to “become a Law”); *id.* § 8, cl. 18 (authorizing Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers”).

<sup>105</sup> See, e.g., *id.* § 10, cl. 1 (prohibiting states from enacting any “ex post facto Law”); *id.* § 8, cl. 10 (providing Congress the power to “define and punish . . . [o]ffenses against the Law of Nations”).

April 1787, both James Madison<sup>106</sup> and John Jay<sup>107</sup> emphasized the importance of faithfully executing the 1783 Treaty of Paris.

The drafting history of the Take Care Clause is at least consistent with the “laws” encompassing treaties.<sup>108</sup> Early drafts of the Take Care Clause referred to the “National Laws”<sup>109</sup> and the “federal acts.”<sup>110</sup> A later draft would have required the President to “take care that that the laws of the United States be duly and faithfully executed.”<sup>111</sup> The Committee of Style removed the limiting reference: “of the United States.”<sup>112</sup> The ratification debates shed little light on the issue.<sup>113</sup>

The United States’ early foreign relations debates clarify the founding generation’s understanding of the “Laws.” In 1793, President Washington issued a Proclamation of Neutrality with respect to the conflict between Great Britain and France, notwithstanding obligations owed to France under a Treaty of Alliance. In debating the President’s authority to issue the proclamation, Alexander Hamilton and James Madison agreed that the Take Care Clause encompassed treaties. Hamilton, writing as Pacificus, argued in favor of the President’s authority to issue the Proclamation, but did not contend that the President had the authority to violate the treaty.<sup>114</sup> To the contrary, Hamilton argued that the power to issue the Proclamation flowed in part from the constitutional obligation to execute “the Laws, of which Treaties form a part.”<sup>115</sup> Madison, as Helvidius, disagreed as to President’s authority to issue the

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<sup>106</sup> Letter from James Madison to Edmund Pendleton (Apr. 22, 1787), in 2 *THE WRITINGS OF JAMES MADISON* (Gaillard Hunt, ed., 1900) (explaining that American reparations for violations of the treaty should result in “faithful execution of the Treaty by Great Britain”).

<sup>107</sup> 32 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789* at 180 (Roscoe R. Hill ed., 1936) (“Contracts between Nations, like contracts between Individuals, should be faithfully executed.”).

<sup>108</sup> Jinks & Sloss, *supra* note 99, at 157–60 (discussing drafting history of the clause); Swaine, *supra* note 98, at 343 (same).

<sup>109</sup> 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 21 (Max Farrand ed., 1911) (Madison).

<sup>110</sup> *Id.* at 244 (The New Jersey Plan).

<sup>111</sup> See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 21 (Max Farrand ed., 1911 (Committee of Detail)).

<sup>112</sup> *Id.* 574, 600 (Committee of Style).

<sup>113</sup> Kent, Leib, & Shugerman, *supra* note 21, (reaching the same conclusion).

<sup>114</sup> See ALEXANDER HAMILTON, PACIFICUS NO. 1 (June 29, 1793), reprinted in 15 *THE PAPERS OF ALEXANDER HAMILTON* 33–34 (Harold C. Syrett ed., 1969).

<sup>115</sup> *Id.* at 38.

Proclamation, but concurred that the President's duty to execute "the Laws" included treaties.<sup>116</sup>

The position taken by John Marshall during the Jonathan Robbins affair helped to further entrench a conception of the Take Care Clause in which "Laws" encompassed treaties. President John Adams sought, in accordance with the Jay Treaty, to extradite Jonathan Robbins to Great Britain.<sup>117</sup> The President's power to order the extradition was challenged by members of Congress on the basis that there was no statutory authority for the extradition.<sup>118</sup> Marshall, then a Virginia Congressman, defended the President's authority on the grounds that the President had a duty to take care that the Jay Treaty was faithfully executed:<sup>119</sup>

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract [i.e. the treaty] by any means it possesses.<sup>120</sup>

Some early 19th century jurists and scholars also shared the understanding that the "Laws" included treaties. For example, Justice Joseph Story explained that:

Another duty of the President is, "to take care that the laws be *faithfully executed*." And by the laws we are here to understand, not merely the acts of Congress, but all the obligations of treaties, and all the requisitions of the Constitution, as the latter are, equally with the former, the "supreme law of the land."<sup>121</sup>

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<sup>116</sup> See JAMES MADISON, "Helvidius" Number 1, *reprinted in* 15 THE PAPERS OF JAMES MADISON 66, 69 (Thomas Mason et al. eds., 1985) ("A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into *execution*, like all other laws, by the *executive magistrate*.").

<sup>117</sup> See generally Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990) (providing an overview of the Robbins affair).

<sup>118</sup> 10 ANNALS OF CONG. 595-618 (1800).

<sup>119</sup> *Id.* at 613-14.

<sup>120</sup> *Id.*

<sup>121</sup> JOSEPH STORY, FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 177 (1840).

William Rawle expressed a similar view, explaining that for the purpose of the Take Care Clause, “[t]he constitution, treaties, and acts of congress, are declared to be the supreme law of the land” which the President is “bound to enforce.”<sup>122</sup>

### 3. *Judicial Interpretation*

The relatively few judicial decisions to discuss the matter (which do so primarily in dicta) reflect an understanding that the Take Care Clause encompasses treaties. The broad language of *In re Neagle* quoted above, is typical in its conclusion that treaties are “the Laws.”<sup>123</sup>

*Ex Parte Toscano* is one of the few cases to turn on the President’s duty to “faithfully execute” a treaty and involved the detention and internment by the U.S. armed forces of 208 Mexican Federalist soldiers during the Mexican civil war.<sup>124</sup> The United States based its authority to intern the Federalist troops on Article 11 of the 1907 Hague Convention (V) Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land.<sup>125</sup> The soldiers petitioned for a writ of habeas corpus, claiming violations of the Fourth, Fifth, and Sixth Amendments.<sup>126</sup>

The court denied the writ and held that the internment did not violate the petitioners’ right to due process under the Fifth Amendment. After quoting from Marshall’s statement regarding Jonathan Robbins, the court concluded that Article 11 required “no legislation to render it effective” and that under the

<sup>122</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 136 (1825).

<sup>123</sup> *In re Neagle*, 135 U.S. 1, 64 (1890) (asking rhetorically if the President’s duty under the Take Care Clause is “limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?”); see also *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (referring to the President’s “duty to execute [treaties] provisions”); *Youngstown*, 343 U.S. at 683–85 (1952) (Vinson, J., dissenting) (discussing early examples of presidents using take care power to enforce treaties); *Sanitary Dist. V. United States*, 266 U.S. 405, 425–26 (1925) (recognizing the standing of the U.S. Attorney General to bring suit in order “to carry out treaty obligations to a foreign power”); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (stating that “[t]he power to exclude or expel aliens . . . is to be regulated by treaty or by act of Congress” and that either one is “to be executed by the executive authority”).

<sup>124</sup> *Ex parte Toscano*, 208 F. 938 (S.D. Cal.1913).

<sup>125</sup> *Id.* at 940 (reiterating that Article 11 of the Convention provides, in pertinent part, that “[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them”).

<sup>126</sup> *Id.*



Take Care Clause, the “President has full authority, and it was and is his duty to execute said treaty provisions.”<sup>127</sup>

#### 4. *Executive Branch Interpretation*

Given the limited judicial review of the application of the Take Care Clause to treaties, past interpretations by the political branches take on special significance in elucidating this area of constitutional law.<sup>128</sup> The historical gloss provided by these extrajudicial precedents and accompanying practice further clarify the meaning of this constitutional provision and its application to treaties—including the U.N. Charter.<sup>129</sup>

Executive Branch precedents point in one direction. As articulated by OLC in 1986, “[i]t is indisputable that treaties are among the laws to be executed by the President.”<sup>130</sup> This view, that treaties are “Laws” within the meaning of the Take Care Clause, is consistent with a body of Executive Branch precedent spanning two centuries.

During the nineteenth century, Executive Branch officials repeatedly took the position that the “Laws” included treaties. One of the first to do so was Attorney General William Wirt, who played an important role in shaping the Office of the Attorney General.<sup>131</sup> Wirt contributed to the institutionalization of the quasi-judicial function of the Attorney General when acting as adviser—including through the recording and preservation of the opinions of the Attorney General.<sup>132</sup> He instituted these measures in order to ensure the “[c]onsistency and uniformity

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<sup>127</sup> *Id.* at 944.

<sup>128</sup> THE FEDERALIST NO. 27, at 229 (James Madison) (Clinton Rossiter Ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”). See also Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (R. Worthington ed., 1884) (explaining that ambiguities in the Constitution “might require a regular course of practice to liquidate and settle the meaning”).

<sup>129</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (describing gloss as an approach to interpreting the Constitution).

<sup>130</sup> Charles J. Cooper, *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 17 (1986).

<sup>131</sup> Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1471 (2010).

<sup>132</sup> *Id.*

in the Attorney General's interpretation of law."<sup>133</sup> Wirt also adopted the principle of *stare decisis* for opinions of the Attorney General.<sup>134</sup>

Thus, Wirt's 1822 opinion for Secretary of State John Quincy Adams should be understood as the work of one who viewed himself as interpreting the law as a judge rather than an advocate<sup>135</sup> and who sought to provide advice conforming to established law and establishing binding precedent.<sup>136</sup> In *Restoration of a Danish Slave*, Wirt addressed the issues of whether the United States had an obligation and the power to restore to his Danish owner a slave who had arrived in New York after stowing away in St. Croix (then a Danish possession) aboard an American vessel.<sup>137</sup> In Wirt's view, the carrying away of the slave from St. Croix was a "lawless infraction of the rights and sovereignty of Denmark"<sup>138</sup> and the United States had a duty under international law to restore the slave to his owner.<sup>139</sup> Turning to the President's power to order the restoration, Wirt opined that:

The President is the executive officer of the laws of the country; these laws are not merely the constitution, statutes, and treaties of the United States, but those general laws of nations which govern the intercourse between the United States and foreign nations; which impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties, and thus tend to preserve their peace and harmony. The United States, in taking the rank of a nation, must take with it the obligation to respect the rights of other nations. This obligation becomes one of the laws of the country; to the enforcement of which, the President, charged by his office with the execution of all our laws, and charged in a particular manner with the superintendence of our intercourse with foreign nations, is bound to look; and where wrong has done to a foreign government,

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<sup>133</sup> HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 79 (1937).

<sup>134</sup> See Morrison, *supra* note 131, at 1472.

<sup>135</sup> See CUMMINGS & MCFARLAND, *supra* note 133, at 90 ("I do not consider myself as the advocate for the government . . . but as a judge, called to decide a question of law with the impartiality an integrity which characterizes the judiciary.") quoting Letter from William Wirt, U.S. Att'y Gen., to John C. Calhoun, U.S. Sec'y of War (Feb. 3, 1820)).

<sup>136</sup> *Id.* at 84 (explaining that Wirt "first recorded the proposition[] . . . that so far as is possible, the judicial principles of *stare decisis* and *res judicata* ought to govern the Attorney General").

<sup>137</sup> William Wirt, *Restoration of a Danish Slave*, 1 Op. Att'y Gen. 566, 567 (1822).

<sup>138</sup> *Id.* at 568.

<sup>139</sup> *Id.*

invasive of its sovereignty, and menacing to our own peace, to rectify the injury, so far as it can be done, by a disavowal, and the restoration of things to the “*status quo*.”<sup>140</sup>

Under this view, the President’s duty to execute the “Laws” was expansive, extending to the constitution, statutes, treaties, and customary international law (“those general laws of nations”).

The Administration of President John Quincy Adams also articulated the position that the restrictive duty imposed by the Take Care Clause encompassed treaties. In 1827, the Governor of Maine protested to Secretary of State Henry Clay the demarcation by an arbitrator of the border between Maine and New Brunswick as provided for in the Treaty of Ghent.<sup>141</sup> Clay, after consulting with President Adams, responded that the Take Care Clause prevented the President from disregarding the Treaty of Ghent.<sup>142</sup>

The fulfilment of the solemn obligations imposed upon the United States by the faith of treaties, and the duty with which the President is charged by the Constitution, of taking care that the laws (of which our treaties with foreign Powers form part) be faithfully executed, did not appear to leave him at liberty to decline the stipulated reference.<sup>143</sup>

In the *Amistad Case*, Attorney General Gilpin addressed the scope of the Take Care Clause in the context of enslaved Africans seeking to free themselves. The Attorney General sought to intervene in an appeal before the Supreme Court by invoking the President’s duty to execute the Treaty of San Lorenzo.<sup>144</sup> Gilpin argued that “[t]he executive government was bound to take the proper steps for having the treaty executed . . . . A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed . . . .”<sup>145</sup> Justice Story, delivering the opinion of the Court, did not dispute the President’s duty to execute the treaty under the Take Care Clause, but instead rejected the application of the treaty based on the facts to the enslaved Africans

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<sup>140</sup> *Id.* at 570–71.

<sup>141</sup> Letter from Enoch Lincoln, Governor of Maine, to Henry Clay, Sec’y of State (Nov. 16, 1827), in 6 AMERICAN STATE PAPERS: FOREIGN RELATIONS 933 (1859).

<sup>142</sup> Letter from Henry Clay, Sec’y of State, to Enoch Lincoln, Governor of Maine (Nov. 27, 1827), in AMERICAN STATE PAPERS, *supra* note 140, at 934.

<sup>143</sup> *Id.*

<sup>144</sup> The *Amistad*, 40 U.S. (15 Pet.) 518, 570–71 (1841) (outlining the argument of the Attorney General).

<sup>145</sup> *Id.* at 571 (discussing the argument of the Attorney General).

aboard the *Amistad*.<sup>146</sup> As noted above, Justice Story also understood the “Laws” to include treaties.<sup>147</sup>

Attorney General Bates reiterated the position that the “Laws” included treaties at the outset of the Civil War. In his 1861 opinion endorsing the lawfulness of President Lincoln’s suspension of habeas corpus, Bates observed that the “broad and compendious injunction to ‘take care that the laws be faithfully executed’” embraces “all the laws—Constitution, treaties, [and] statutes.”<sup>148</sup>

The Executive Branch has maintained the position that “the Laws” encompassed treaties through the late twentieth and into the twenty-first century. OLC observed in 1987 that the President has a “dual role” with respect to treaties:

First, the President is responsible for “making” treaties, *i.e.*, entering into negotiations with foreign governments and reaching agreement on specific provisions. U.S. Const. art. II, § 2, cl. 2. Second, as part of his responsibility to “take Care that the Laws be faithfully executed,” and as the “sole organ of the federal government in the field of international relations,” the President is responsible for enforcing and executing international agreements, a responsibility that necessarily “involve[s] also the obligation and authority to interpret what the treaty requires.”<sup>149</sup>

In 2007, the Legal Adviser of the Department of State observed that the U.S. Constitution “declares that treaties are the ‘supreme law of the land’ and assigns to the President the responsibility to take care that the laws are faithfully executed. This duty includes the upholding of such treaties.”<sup>150</sup>

##### 5. *Treaties, “Laws,” and War Powers*

One might read the *Override Opinion*’s reference to “fundamental political questions” to suggest that treaty provisions, such as Article 2(4) which bear on the use of force, should not be construed as “Laws” binding upon the President. However, this proposition would be inconsistent with previous views of the Executive Branch. Some of the most prominent invoca-

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<sup>146</sup> *Id.* at 594–95.

<sup>147</sup> STORY, *supra* note 121.

<sup>148</sup> Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 82 (1968).

<sup>149</sup> Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. O.L.C. 28, 30 (1987) (alteration in original) (citations omitted).

<sup>150</sup> John Bellinger, U.S. Department of State, Remarks at the Hague: The United States and International Law (June 6, 2007), <https://2001-2009.state.gov/s/1/2007/112666.htm> [<https://perma.cc/SP88-WFSM>].

tions by the Executive Branch of treaties under the Take Care Clause have been in connection with the exercise of war powers. Although recent OLC opinions have emphasized the Commander in Chief Clause as the principal source of the President's constitutional war powers, a long-running strain of Executive Branch argumentation has also invoked the Take Care Clause as a source of war powers.

In recounting Executive Branch precedents, my purpose is not to endorse specific claims of legal *authority* under treaties or to opine on the constitutionality of historic military operations. Instead, my aim is to emphasize that underlying these claims of authority is the longstanding, predicate understanding by the Executive Branch that treaties are "Laws" that the President has an *obligation* to faithfully execute. The Take Care Clause gives and takes at once. If the President is not constrained by treaties, he also lacks the power to execute them.

One of the earliest treaty-based uses of force involved President Grover Cleveland's introduction of armed forces into Panama in the midst of a rebellion in 1885.<sup>151</sup> President Cleveland dispatched forces in order to "keep the transit open across the Isthmus of Panama."<sup>152</sup> With U.S. forces totaling more than two thousand officers and men, the intervention constituted the "largest overseas American amphibious force engaged in actual landing operations between the Mexican and Spanish American wars."<sup>153</sup>

Although President Cleveland did not explicitly invoke the Take Care Clause, the record is at least suggestive that the basis for the intervention was the execution of the 1846 Treaty of Peace, Amity, Navigation, and Commerce between the United States and New Granada (Colombia and Panama) (Treaty of 1846).<sup>154</sup> The only legal basis advanced by the President in his address to Congress was the fulfillment by the United States of "guaranties under the thirty-fifth article of the treaty of 1846."<sup>155</sup> President Cleveland explained to Congress that in employing armed forces, the United States was "[d]esirous of

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<sup>151</sup> See Daniel H. Wicks, *Dress Rehearsal: United States Intervention on the Isthmus of Panama, 1885*, 49 PAC. HIST. REV. 581, 588–89 (1980).

<sup>152</sup> Grover Cleveland, First Annual Address to Congress (Dec. 8, 1885), reprinted in JAMES D. RICHARDSON, 8 MESSAGES AND PAPERS OF THE PRESIDENTS 326 (1898).

<sup>153</sup> KENNETH J. HAGAN, AMERICAN GUNBOAT DIPLOMACY AND THE OLD NAVY 1877–1889 160 (1973).

<sup>154</sup> General Treaty of Peace, Amity, Navigation and Commerce, United States–New Granada, art. XXXV, Dec. 12 1846, 9 Stat. 881.

<sup>155</sup> See Cleveland, *supra* note 152.

exercising only the powers expressly reserved to us by the treaty, and mindful of the rights of Colombia, the forces sent to the Isthmus were instructed to confine their action to 'positively and efficaciously' preventing the transit and its accessories from being 'interrupted or embarrassed.'"<sup>156</sup> President Cleveland did not elaborate as to whether he was invoking the treaty as a source of domestic legal authority, international legal authority, or both. In his report on the operation to Congress, the Secretary of the Navy, William Whitney, provided a similar legal justification.<sup>157</sup>

Although both President Cleveland and Secretary Whitney emphasized the assiduous compliance by U.S. armed forces with the terms of the treaty of 1846, neither cited any congressional authorization for the intervention. Public reporting indicates that Cleveland considered the legal basis for the operation prior to authorizing the intervention and that his Administration's statements represent considered legal views.<sup>158</sup> The Executive Branch would subsequently cite to Cleveland's execution of the treaty of 1846 as a precedent supporting unilateral Presidential war powers.<sup>159</sup>

Later Presidents were explicit in their invocations of the Take Care Clause. The administrations of Presidents Theodore Roosevelt and William Howard Taft cited the duty to enforce treaties under the Take Care Clause to justify exercises of the President's war powers during the early years of the twentieth century. In explaining the legal authority for military intervention in Cuba (despite the absence of prior congressional authorization), President Roosevelt invoked the application of the Take Care Clause to the 1903 Treaty of Relations with Cuba.<sup>160</sup> As he explained to Taft, then his Secretary of War:

[I]f the necessity arises I intend to intervene, and I should not dream of asking the permission of Congress. That treaty is the law of the land and I shall execute it. . . . I intend to

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<sup>156</sup> *Id.*

<sup>157</sup> REPORT OF THE SECRETARY OF THE NAVY, in 1 ANNUAL REPORT OF THE SECRETARY OF THE NAVY xv (1885).

<sup>158</sup> See *Aspinwall Laid Waste: Burned to the Ground by the Insurgents*, N.Y. TIMES (Apr. 2, 1885), at 1 (describing consultations between Cleveland, the Secretaries of the Navy and State, and the Attorney General regarding the interpretation of the treaty of 1846 prior to the dispatch of marines to Panama).

<sup>159</sup> 1951 Sending Armed Forces Memo, *supra* note 25, at 12.

<sup>160</sup> Treaty of Relations, Cuba-U.S., May 22, 1903, 33 Stat. 2248.

establish a precedent for good by refusing to wait for a long wrangle in Congress.<sup>161</sup>

Taft later recounted his advice to Roosevelt regarding the relevance of the Take Care Clause to the 1903 Cuban-American Treaty of Relations:

I advised the President that this treaty, *pro tanto*, extended the jurisdiction of the United States to maintain law and order over Cuba in case of threatened insurrection, and of danger of life, property and individual liberty, and that under his duty to take care that the laws be executed this was “a law” and his power to see that it was executed was clear. . . . There were some mutterings by Senators that under the Platt Amendment, Congress only could decide to take action. However, the matter never reached the adoption of a resolution. Congress appropriated the money needed to meet the extraordinary military and naval expenditures required, and recognized the provisional government in Cuba in such a way as to make the course taken a precedent.<sup>162</sup>

The Department of State expressed a similar view regarding the application of the Take Care Clause to treaties during President Taft’s own administration. In 1912, the Solicitor of the Department of State (the forerunner to the Legal Adviser) J. Reuben Clark published a legal memorandum entitled *Right to Protect Citizens in Foreign Countries by Landing Forces*.<sup>163</sup> In this memo, Clark addressed the President’s constitutional authority to “use the forces of the United States for [the purposes of protecting U.S. citizens] without authorization by Congress.”<sup>164</sup> After arguing that such uses of force would not constitute “war” within the meaning of the Declare War Clause and that the President possessed authority as Chief Executive to conduct foreign relations, Clark turned to the Take Care Clause.<sup>165</sup> Drawing upon *The Paquete Habana*’s language that “[i]nternational law is part of our law” and *In re Neagle*’s conclusion that the “Laws” include treaties, Clark contended that the President had a “duty imposed upon him by the Constitution” to enforce international law (including treaties) even “without some ancillary legislation specially authorizing or empowering

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<sup>161</sup> Letter from Theodore Roosevelt, President of the United States, to William Howard Taft (Sept. 17, 1906), in 5 THE LETTERS OF THEODORE ROOSEVELT 414, 414 (Elting E. Morison et al. eds, 1952).

<sup>162</sup> WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 88 (1916).

<sup>163</sup> Right to Protect Citizens in Foreign Countries by Landing Forces, *supra* note 25.

<sup>164</sup> *Id.* at 38.

<sup>165</sup> *Id.* at 38–44.

him" to do so.<sup>166</sup> The Department of State would later reiterate this position in subsequent editions of this legal memorandum.<sup>167</sup>

The Department of Justice continued to cite the duty to execute treaties in support of the President's exercise of war powers late into the twentieth century. In a foundational 1980 opinion addressing the President's authority to use military force in the absence of statutory authorization, OLC specifically opined that treaties are "Laws" in the context of Presidential war powers.<sup>168</sup> The opinion observes that "[t]he President also derives authority from his duty to 'take Care that the Laws be faithfully executed,' for both treaties and customary international law are part of our law and Presidents have repeatedly asserted authority to enforce our international obligations even when Congress has not enacted implementing legislation."<sup>169</sup>

### C. The U.N. Charter as "Law"

Not only are treaties generally "Laws," but the U.N. Charter specifically is a "Law" that the President is constitutionally obligated to faithfully execute. This conclusion is supported by the views of framers of the Charter, debates over the Charter in the Senate, and subsequent interpretation by the Executive Branch.

#### 1. *Drafting of the Charter*

Those involved in the drafting and ratification of the U.N. Charter who considered the matter took the position that the Charter would be a "Law" within the meaning of the Take Care Clause. Although the views expressed were generally couched in terms of the President's *authority* to enforce the Charter as a "Law," the positions necessarily presuppose the attendant *duty* to faithfully execute the provisions of the treaty.

To avoid President Woodrow Wilson's fate with the League of Nations, the Roosevelt Administration consulted extensively with a bipartisan group of senators before and during the nego-

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<sup>166</sup> *Id.* at 44–45 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900); *In re Neagle*, 135 U.S. 1, 64 (1890)).

<sup>167</sup> J. Reuben Clark, *Solicitor of the Dep't of State, Right to Protect Citizens in Foreign Countries by Landing Forces* (2d rev. ed. 1929); J. Reuben Clark, *Solicitor of the Dep't of State, Right to Protect Citizens in Foreign Countries by Landing Forces*, (3rd rev. ed. 1934).

<sup>168</sup> 1980 Presidential Power Opinion, *supra* note 25, at 186.

<sup>169</sup> *Id.* (footnotes omitted).



tiations over the Charter.<sup>170</sup> In the course of these consultations, the Roosevelt Administration indicated that the ratified treaty would be a “Law.” To allay concerns over the impact of the treaty on Congress’s power to declare war, the Department of State provided the senators with a memorandum prepared by the Legal Adviser, Green Hackworth, addressing the constitutional division of war powers.<sup>171</sup> The memorandum cataloged the provisions bearing on the war powers of both Congress and the President as relevant to the arrangements contemplated in the Dumbarton Oaks draft.<sup>172</sup> With respect to the President’s authority, the memorandum cites both the Take Care Clause and the Supremacy Clause.<sup>173</sup> With reference to the Take Care Clause, the memo quotes Willoughby’s treatise, which argues that the President’s authority “by reason of his obligation to take care that the laws be faithfully executed” would extend to the use of force “in pursuance of express provisions of a treaty, or for the execution of treaty provisions.”<sup>174</sup> Anticipating the Truman Administration’s later characterization of the conflict in Korea, Hackworth explained that “the use of armed force to prevent or suppress a breach of the peace under an international agreement” would not constitute war in the constitutional sense but would instead be a “police measure.”<sup>175</sup>

James Shotwell, the author of the earliest draft of the treaty, also took the position that the ratified Charter would be a “Law.”<sup>176</sup> In a 1944 letter to the *New York Times*, Shotwell and a group of legal scholars and former officials addressed the issue of whether the President had constitutional authority to enforce the Dumbarton Oaks proposal.<sup>177</sup> They described the well-established distinction between limited uses of force directed by the President pursuant to the President’s constitu-

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<sup>170</sup> CORDELL HULL, 2 THE MEMOIRS OF CORDELL HULL 1695–98 (1948) (describing consultations).

<sup>171</sup> *Id.* at 1696–97 (describing sharing Hackworth’s memo with senators).

<sup>172</sup> Memorandum from Green Hackworth, Legal Adviser, Dep’t of State, to Cordell Hull, Use of Armed Force in the Maintenance of Peace and Security 1–2 (Aug. 31, 1944) (Papers of Cordell Hull, Library of Congress, Reel 25), [https://findingaids.loc.gov/db/search/xq/searchMferDsc04.xq?\\_id=loc.mss.eadmss.ms009275&\\_start=126&\\_lines=125](https://findingaids.loc.gov/db/search/xq/searchMferDsc04.xq?_id=loc.mss.eadmss.ms009275&_start=126&_lines=125) [<https://perma.cc/8H8F-78AR>].

<sup>173</sup> *Id.* at 2.

<sup>174</sup> *Id.* at 4 (quoting WESTEL WILLOUGHBY, 3 THE CONSTITUTIONAL LAW OF THE UNITED STATES 1567 (2d ed. 1929)).

<sup>175</sup> *Id.* at 5.

<sup>176</sup> See OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS 195–96 (2017) (identifying Shotwell as author of the “first draft of what would become the United Nations Charter”).

<sup>177</sup> Davis, *supra* note 17.

tional war powers and “war” in the constitutional sense that required Congressional authorization.<sup>178</sup> They further explained that peace enforcement actions contemplated in the Dumbarton Oaks proposal would be sufficiently limited as not to implicate “war” requiring congressional authorization.<sup>179</sup> The letter argued that the President would have the “constitutional right to utilize contingents of the armed forces” for peace enforcement purposes.<sup>180</sup> Citing the Take Care Clause, *In re Neagle*, and *The Paquette Habana*, the letter concluded that “the President has both the right and duty to utilize his powers as Commander in Chief to see that the laws are faithfully executed,” and that the “‘laws’ include rules of general international law and agreements binding the United States.”<sup>181</sup> Consequently, the President’s duty of faithful execution would extend to the U.N. Charter.

## 2. *Senate Advice and Consent*

It does not appear that the Truman Administration publicly addressed the Charter’s status as a “Law” either when it presented the treaty to the Senate for advice and consent or during testimony by Administration officials. Nonetheless, the floor debate over the Charter indicates that the issue of whether the treaty was a “Law” was squarely before the Senate. Further, those who spoke on the matter were uniformly of the view that the Charter was indeed a “Law.” Viewed through the rubric of “gloss,” the Senate debate demonstrates more than an instance of mere acquiescence to the Executive Branch’s position regarding the Charter as “Law,” but is instead an affirmative endorsement of that understanding.<sup>182</sup>

The discussion of the Take Care Clause arose in the context of the debate over what effect the treaty would have upon the allocation of war powers between the President and Congress. Consistent with the views expressed in the Hackworth memorandum and the Shotwell letter, several Senators cited the historical practice of Presidents in directing the use of military force in the absence of prior congressional authoriza-

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<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citations omitted).

<sup>182</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring) (accepting that the “long-continued acquiescence of Congress” can “giv[e] decisive weight to a construction by the Executive of its powers”).

tion.<sup>183</sup> A number of Senators went further and spoke in support of the proposition that the President, pursuant to his duty to “take care,” could execute the Charter by directing the use of military force.<sup>184</sup>

Senator Scott Lucas argued that in providing its advice and consent to ratification of the Charter, the Senate would be “giving to the President additional powers which he does not now have.”<sup>185</sup> Lucas noted that the President already had “the power to call out the troops for the purpose of faithfully enforcing the laws of the land, including treaties in situations which may involve the property rights, or personal rights, of an American citizen.”<sup>186</sup> By virtue of the Charter, the President’s authority under the Take Care Clause would extend to allow him to respond to breaches of the peace.<sup>187</sup>

Senator Tom Connally, the Chairman of the Senate Foreign Relations Committee and a member of the U.S. delegation at the United Nations San Francisco conference, spoke to counter concerns that the Charter would fundamentally alter the constitutional distribution of war powers. Referring to previous uses of force, he observed that “we sent troops without any congressional authorization, because it is the duty of the President of the United States to enforce the laws, and a treaty legally ratified by the Senate is a law of the United States. That has been done repeatedly. That doctrine still lives.”<sup>188</sup> Then-Senator (and future Vice President to Truman) Alben Barkley took the floor to concur with Connally’s position.<sup>189</sup>

The views expressed by Senator Warren Austin, Republican Senator from Vermont and future Ambassador to the United Nations, are particularly notable. Senator Austin (along with Senator Connally) belonged to the bipartisan group of senators who met regularly with the Secretary of State and experts

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<sup>183</sup> 91 CONG. REC. 7988 (1945) (statement of Sen. Barkley); *id.* at 7990–91 (statement of Sen. Connally); *id.* at 7992 (statement of Sen. Wheeler); *id.* at 8065 (statement of Sen. Austin).

<sup>184</sup> *See, e.g., id.* at 8031 (statement of Sen. Lucas); *id.* at 8065 (statement of Sen. Austin); *id.* at 7991 (statement of Sen. Connally); *id.* at 8031–32 (statement of Sen. Fulbright) (reading into the record a selection from Willoughby’s treatise regarding President’s constitutional authority to send U.S. forces abroad in the absence of a declaration of war “in pursuance of express provisions of a treaty, or for the execution of treaty provisions . . . could not reasonably be subject to constitutional objection”); *id.* at 8075 (statement of Sen. Pepper).

<sup>185</sup> *Id.* at 8031 (statement of Sen. Lucas).

<sup>186</sup> *Id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.* at 7991 (statement of Sen. Connally).

<sup>189</sup> *Id.* at 7991 (“I wish to say that I agree with the Senator from Texas.”).

during the Second World War to discuss the contours of what would become the United Nations.<sup>190</sup>

Austin most clearly articulated the position that the U.N. Charter would constitute a “Law” that the President would have a duty to enforce. Austin identified himself as:

one of those lawyers in the United States who believe that the general powers of the President—not merely the war powers of the President but the general authority of the President—are commensurate with the obligation which is imposed upon him as President, that he take care that the laws are faithfully executed.<sup>191</sup>

Once ratified, the Charter would render a “threat to international security and peace” a violation of “the law of the United States, because we shall have adopted it in a treaty.”<sup>192</sup> Thus, as a “Law,” the President would have an obligation to faithfully execute the Charter: “There is nothing imposed upon [the President] by the Constitution that is more mandatory than that he shall take care—take care that the laws are faithfully executed.”<sup>193</sup>

In response to questioning from Senator Walter George as to whether the authority to “execute” the Charter would deprive Congress of the power to declare war, Senator Austin recognized that the authority to declare war would continue to reside with Congress. Austin concurred with George that “the President will be bound faithfully to execute this charter and to preserve the peace by the methods and in the manner set out in the charter.”<sup>194</sup> In order to further clarify his position regarding the impact of the Charter on the allocation of war powers, Austin placed Shotwell’s letter into the Congressional Record.<sup>195</sup>

Senator Claude Pepper also invoked Shotwell’s letter during the course of the debate.<sup>196</sup> Pepper observed that:

[T]he President is responsible for seeing that the laws are executed. Under the Constitution a treaty is made the supreme law of the land. As Senators have pointed out, the President acts in the execution of a treaty just as he acts in the execution of a law. Therefore, the President himself has

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<sup>190</sup> See *id.*; Hull, *supra* note 170.

<sup>191</sup> 91 CONG. REC. 8064–65 (1945) (statement of Sen. Austin).

<sup>192</sup> *Id.* at 8065.

<sup>193</sup> *Id.* at 8064.

<sup>194</sup> *Id.* at 8065 (statement of Sen. George).

<sup>195</sup> *Id.* at 8065–67 (statement of Sen. Austin).

<sup>196</sup> *Id.* at 8075 (statement of Sen. Pepper).

the power to use our forces to execute our laws and our treaties.<sup>197</sup>

The issue of whether the U.N. Charter was a “Law” was squarely before the Senate during the floor debate on the treaty. Although some Senators questioned the implications of “faithful execution” of the Charter, none challenged its status as a “Law.”

### 3. Korean “Police Action” and the “Great Debate”

President Harry Truman’s use of force in Korea represents the high-water mark of the exercise of presidential war powers to commit armed forces to hostilities without prior congressional authorization. President Truman’s actions in Korea may have exceeded (under the current Executive Branch view) the limits imposed by the Declare War Clause due to its “nature, scope, and duration.”<sup>198</sup> Nonetheless, the Truman Administration’s legal justifications for both the Korean “police action,” as well as the subsequent deployment of four additional army divisions to Europe, provide the clearest articulations of the Executive Branch understanding that the U.N. Charter fell within the scope of the Take Care Clause.

The Truman Administration’s constitutional justification for repelling the North Korean forces placed considerable reliance on the U.N. Charter as a “Law.” In an opinion issued by the Department of State in 1950, the Administration excerpted Senator Austin’s statements during the debate over the Charter. The opinion quotes Senator Austin’s view that the President would have an obligation to faithfully execute the U.N. Charter<sup>199</sup> and includes his observation that the U.N. Charter “will be the law of the United States, because we shall have adopted it in a treaty.”<sup>200</sup>

The Truman Administration developed this argument further in a series of legal memoranda submitted to the Senate in 1951 during the course of the “Great Debate” following the deployment of additional U.S. armed forces to Europe to deter Soviet aggression. A memo entered into the Congressional Record by Secretary of State Acheson explained that “[i]t is the President’s duty under the Constitution to take care that the laws are faithfully executed. That this applies to treaties (which are part of the supreme law of the land) as well as to

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197 *Id.*

198 *See supra* note 40.

199 1950 Korea Memo, *supra* note 25, at 176.

200 *Id.*

statutes is unquestioned.”<sup>201</sup> This memo quoted at length both Senators Alexander Wiley’s and Austin’s remarks during the debate over the Charter supporting the proposition that “the President is entitled to use the Armed Forces in implementation of the Charter of the United Nations, which is a treaty.”<sup>202</sup>

At the request of the Chairman of the Senate Foreign Relations Committee, the “executive departments” prepared a further memo expounding upon the powers of the President to send armed forces outside the United States. This memo identified three such constitutional bases for the President to deploy armed forces: 1) his authority as Commander in Chief; 2) his special responsibility in the field of foreign affairs; and 3) his duty to take care that the laws be faithfully executed.<sup>203</sup>

In elaborating upon this last basis, the opinion asserted, “the President has the authority and the duty to carry out treaties of the United States. Treaties, duly approved, are the law of the land and it becomes the President’s duty to ‘take care that they be faithfully executed’ as laws.”<sup>204</sup> Citing President Taft, the opinion explained that, in executing a treaty, the President “does not depend on implementing legislation when the purpose of the treaty can be served by something he has the power to do.”<sup>205</sup> Citing Justice Marshall, the opinion explained that “[i]t has been established from the beginning that the President must carry out a treaty as the law of the land.”<sup>206</sup> The opinion situates President Truman’s “taking care” of the U.N. Charter in Korea in a historical context of Presidents relying upon the execution of treaties to use military force.<sup>207</sup> The opinion concludes this argument by explaining that the President “is under a duty as Chief Executive to see that the great objectives of the Charter are carried on so far as it lies within his power to do so.”<sup>208</sup>

Congressional criticism of the Truman Administration’s legal justification for resorting to force in Korea increased over time. Yet, even treaty-based critiques did not take issue with the claim that the U.N. Charter was a “Law.” Instead, critics

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<sup>201</sup> See *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the S. Comms. on Foreign Relations and Armed Services*, 82nd Cong. 90–91 (1951).

<sup>202</sup> *Id.* at 91.

<sup>203</sup> 1951 Sending Armed Forces Memo, *supra* note 25, at iii, 1.

<sup>204</sup> *Id.* at 2.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 11.

<sup>207</sup> *Id.* at 2.

<sup>208</sup> *Id.* at 25.

such as Senator Karl Mundt argued that neither the Charter, nor U.N. Security Council Resolutions 83 and 84, *obligated* the United States to deploy troops into combat.<sup>209</sup> Under this view, faithful execution of a recommendation by the Security Council did not entail committing troops to combat.<sup>210</sup>

#### D. The War Powers Resolution

Although a broader examination of the War Powers Resolution is beyond the scope of this Article, three aspects of the resolution and the inter-branch dialogue surrounding it merit discussion here.

First, during the course of congressional hearings on the legislation, the Nixon Administration continued to point to the Take Care Clause and the execution of treaties as a potential source of war power. Testifying before the House Committee on Foreign Affairs in 1970, John Stevenson, the Legal Adviser of the Department of State, explained that the constitutional sources of the President's war powers included the Take Care Clause.<sup>211</sup> Stevenson asserted in this connection that "[t]he Supreme Court has consistently held since *Ware v. Hylton* (3 Dall 199) in 1796 that the word 'laws' included treaties."<sup>212</sup> Testifying at the same hearing, William Rehnquist, then the head of OLC, also cited the Take Care Clause as a source of the President's war powers and invoked Truman's reliance on the U.N. Charter as a basis for the Korean "police action."<sup>213</sup>

Second, the Nixon Administration conceded that the United States had no extant treaty obligations that would require the United States "to supply armed force to another country immediately and without regard to constitutional processes

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<sup>209</sup> 97 CONG. REC. 5088 (1951) (statement of Sen. Mundt) (arguing U.S. forces were "engaging in a war in which [the President] put them without consultation with Congress or without a declaration of war, and without treaty commitments which might have put us in by other constitutional processes").

<sup>210</sup> See also Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 621–31 (1993) (arguing that Truman's actions in Korea departed from the understanding reached between Congress and the Executive prior to the ratification of the Charter, particularly in light of the United Nations Participation Act of 1945).

<sup>211</sup> See *Congress, the President, and the War Powers, Hearings Before the Subcomm. on Nat'l Sec. Pol'y and Sci. Devs. of the H. Comm. on Foreign Affairs*, 91st Cong. 206 (1970) (statement of John Stevenson, Legal Adviser Department of State).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 211, 215 (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice).

in the United States.”<sup>214</sup> Whereas certain earlier treaties that were no longer in force contained such provisions, “recent defense treaties such as NATO, SEATO, ANZUS and other recent defense treaties” take into account domestic constitutional processes.<sup>215</sup> The significance of this admission is that it undercuts any reliance upon these treaties as sources of authority under the Take Care Clause. If these treaties do not impose categorical obligations upon the United States to resort to the use of force, the President does not therefore have a constitutional duty to direct the use of force in order to ensure the faithful execution of these “Laws.” Thus, even if in principle the execution of a treaty pursuant to the Take Care Clause might serve as a source of war powers, in practice no authority could be derived from the specific terms of extant treaties.

Third, Congress seized upon the Nixon Administration’s concession regarding obligations in existing mutual defense treaties. The War Powers Resolution seeks to foreclose arguments that the President could rely upon current or future treaties as a source of domestic legal *authority*. Section 8(a) of the War Powers Resolution provides in pertinent part that:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

• • •

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.<sup>216</sup>

It is clear that the Nixon Administration continued to conceive of treaties as “Laws” within the meaning the Take Care Clause but conceded that extant treaties did not mandate the use of force. In response, Congress sought to bar reliance upon treaties as a source of Presidential authority with respect to war powers.

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<sup>214</sup> *War Powers Legislation: Hearings Before the H. Comm. on Foreign Relations*, 92 Cong. 330 (letter from David M. Abshire, Assistant Sec’y of State for Congr. Relations, to Senator Robert Taft (Mar. 23, 1971)).

<sup>215</sup> *Id.*

<sup>216</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 558 (1973) (codified at 50 U.S.C. § 1547 (2018)).



### E. Summary

The weight of authority indicates that treaties generally—and the U.N. Charter in particular—are “Laws” within the meaning of the Take Care Clause. Democratic and Republican Administrations have cited the President’s duty to faithfully execute treaties as an independent legal basis to use military force in the absence of congressional authorization. The Executive Branch has never disavowed the position that treaties are “Laws,” including in the context of war powers.

Notwithstanding this conclusion, Executive Branch invocations of the Take Care Clause demonstrate a subtle, though important shift in emphasis following the enactment of the War Powers Resolution and especially since 1980. Post-1980 (public) OLC opinions have been silent regarding the application of the Take Care Clause to treaties in connection with war powers.<sup>217</sup> To the extent that these opinions have invoked international law, they have referred to maintenance of the “credibility of United Nations Security Council decisions” as a national interest that the President may advance at his discretion.<sup>218</sup> Further, post-1980 opinions continue to rely upon earlier precedents in which the President had directed the use of force premised at least in part upon the application of the Take Care Clause to treaties (particularly the Korean police action), while omitting the role that the execution of treaties played in justifying the earlier uses of force.<sup>219</sup>

Although the Executive Branch continues to maintain that treaties are “Laws,”<sup>220</sup> the post-1980 shift by OLC away from

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<sup>217</sup> See 1992 Somalia Opinion, *supra* note 25; 1995 Bosnia Opinion, *supra* note 25; 2004 Haiti Opinion, *supra* note 25.

<sup>218</sup> See 1992 Somalia Opinion, *supra* note 25, at 11 (“[M]aintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest . . . .”); 2011 Libya Opinion, *supra* note 25 (“[T]he President could legitimately find that military action by the United States to assist the international coalition in giving effect to UNSC Resolution 1973 was needed to secure ‘a substantial national foreign policy objective.’”).

<sup>219</sup> See, e.g., 1995 Bosnia Opinion, *supra* note 25, (citing approvingly the 1950 Memorandum regarding Korea as support for the President’s authority to direct the use of force in the absence of congressional authorization); 2018 Syria CW Opinion, *supra* note 6, at 12, 18 (citing President Truman’s defense of South Korea in the absence of congressional authorization).

<sup>220</sup> See Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals, 10 Op. O.L.C. 12, 17 (1986) (“It is indisputable that the treaties are among the laws to be executed by the President . . . .”); Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. O.L.C. 28, 30 (1987) (explaining that the President’s responsibility under the Take Care Clause extends to international agreements); John

the Take Care Clause in the context of the use of force has the effect of deemphasizing treaties (including the U.N. Charter) as potential constraints on the President's war powers. At the same time, by continuing to invoke earlier treaty-based uses of force and citing the enforcement of U.N. Security Council decisions as a "national interest," OLC relies upon international law to support the exercise of presidential authority.<sup>221</sup> Taken together, these features of recent OLC war powers opinions treat international law merely as bolstering the President's authority, not as a limitation under domestic law.

The recent trend by OLC to downplay the President's obligations under the Take Care Clause with respect to treaties and war powers (while never publicly overruling or distinguishing earlier Executive Branch positions) is anomalous. It is inconsistent with the overall body of Executive Branch precedent relating to treaties and war powers up to 1980, as well as with the continuing treatment by the Executive Branch of treaties as "Laws." As explained in Part V, the better view, more consistent with a rule of Executive Branch *stare decisis*,<sup>222</sup> is that the Take Care Clause represents a constraint upon the President's war powers.

#### IV

#### COUNTERARGUMENTS

This Part rebuts two counterarguments advanced in the *Override Opinion* as well as a further potential challenge. As explained below, in relation to the non-self-execution and political question doctrines, the *Override Opinion* erroneously conflates the issue of judicial enforcement of a law with the issue of whether a law is binding on the President. In addition, I address a distinct though related issue: the claim that the President has plenary authority to suspend treaties at will.

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Bellinger, *supra* note 150 (observing that the U.S. Constitution "declares that treaties are the 'supreme law of the land' and assigns to the President the responsibility to take care that the laws are faithfully executed. This duty include the upholding of such treaties."); *see also* Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration, *supra* note 83 (indicating the President's duty under the Take Care Clause is not limited to statutes).

<sup>221</sup> *See* Bradley & Galbraith, *supra* note 20 (describing how the stripping of context from practice results in an expansion of the justification of the President's war powers).

<sup>222</sup> *See generally* Morrison, *supra* note 131, at 1475–80 (examining the role of *stare decisis* in the practice of OLC).

A. The Doctrine of Non-Self-Executing Treaties: Law Beyond the Courts I

The *Override Opinion*'s conclusion that the President may authorize violations of Article 2(4) flows from its characterization of the provision as non-self-executing. The opinion's treatment of the doctrine of non-self-executing treaties (as well as the political question doctrine discussed below) erroneously conflates the judicial enforcement of a law with whether the law binds the President. Whether Article 2(4) is non-self-executing for the purposes of judicial enforcement is not dispositive as to whether such a treaty provision constitutes a "Law" for the purposes of the Take Care Clause. Although a private litigant may not rely upon a provision in court, it does not follow that the provision is not "domestic law" for other purposes distinct from judicial enforcement, including as law binding the Executive Branch.<sup>223</sup>

The doctrine of non-self-executing treaties originates in *Foster v. Neilson*, where Justice Marshall explained that:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.<sup>224</sup>

Courts and scholars use the label "non-self-executing" inconsistently and often imprecisely.<sup>225</sup> Courts sometimes use broad dicta suggesting that non-self-executing treaties are not "domestic law."<sup>226</sup> Yet, in the judicial context, such language is

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<sup>223</sup> See Swaine, *supra* note 98, at 355–57.

<sup>224</sup> *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

<sup>225</sup> See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (describing "doctrinal disarray" and "judicial confusion").

<sup>226</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 505 (2008) ("In sum, while treaties 'may comprise international commitments they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself con-

best understood as meaning that such treaties are not “domestic law” for the purposes of the *court*.<sup>227</sup> Treaties may be non-self-executing in the judicial context because they fail by themselves to provide a rule of decision for courts.<sup>228</sup> Further action by the political branches, such as implementing legislation, is necessary before such treaties would have the force of law in the courts. Other treaties may be termed non-self-executing because they do not by themselves create a private right of action for a plaintiff seeking to enforce the treaty in court.<sup>229</sup>

Separate from the question of judicial enforcement, some treaties may contemplate the exercise of Congress’s Article I powers—for example, the appropriation of funds—and thus require additional legislation in order to be fully implemented.<sup>230</sup> A significant species of treaty provisions that can be termed non-self-executing because they require Congress’s further exercise of Article I powers are those granting authority to the President in the realm of war powers. Section 8(a)(2) of the War Powers Resolution refers to treaties that are non-self-executing in this sense. In the view of Congress, such mutual defense treaties require implementation by “legislation specifically authorizing the introduction of United States Armed Forces into hostilities,” and thus the President cannot rely upon the treaties themselves as a source of authority.<sup>231</sup>

Courts have characterized Article 2(4) as non-self-executing in two different senses. First, courts have held that Article 2(4) does not create a private right of action.<sup>232</sup> Second, courts

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veys an intention that it be ‘self-executing’ and is ratified on these terms.” (quoting *Igaruta-De La Rosa*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (asserting in the context of judicial proceedings that when treaty provisions “are not self-executing, they can only be enforced pursuant to legislation to carry them into effect”).

<sup>227</sup> *Vazquez*, *supra* note 225 (“At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative ‘implementation.’”).

<sup>228</sup> See *Foster*, 27 U.S. at 314 (describing a non-self-executing treaty as one that the “legislature must execute . . . before it can become a rule for the Court”).

<sup>229</sup> *Vazquez*, *supra* note 225, 719–22 (describing the “private right of action” doctrine).

<sup>230</sup> See, e.g., *The Over the Top*, 5 F.2d 838, 845 (D. Conn. 1925) (“It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.”).

<sup>231</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 558 (1973) (codified at 50 U.S.C. §§ 1541–1548).

<sup>232</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d. 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that Articles 1 and 2 of the U.N. Charter are not self-executing and thus “were not intended to give individuals the right to enforce them in municipal courts”); *United States v. Khatallah*, 160 F. Supp. 3d 144, 153

have held that Article 2(4) does not of its own force provide a rule of decision enforceable in U.S. courts.<sup>233</sup>

Courts have not addressed the implications of the non-self-executing status of Article 2(4) under the Take Care Clause. As a general matter, courts have not distinguished between self-executing and non-self-executing treaties when referring to treaties as “Laws.”<sup>234</sup> One of the few exceptions concerns a treaty bearing on the President’s war powers. The courts have held that the Hague Convention (V) is a “Law”<sup>235</sup> and separately that the treaty is non-self-executing.<sup>236</sup> This supports the view that self-execution is not dispositive as to whether a treaty is a “Law.”

In line with this understanding, in the centuries following the emergence of the non-self-execution doctrine, the Executive Branch generally has not distinguished between self-executing and non-self-executing treaties when discussing the scope of the “Laws.” The Truman Administration expressed this position most clearly in its argument that, through the Take Care Clause, the U.N. Charter provided authority for the President to use military force in Korea.<sup>237</sup>

The Senate Foreign Relations Committee (SFRC) has also endorsed the view that even non-self-executing treaties are “Laws.”

[A]ll treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed. In general, the committee does not recommend that the Senate give advice and consent to treaties unless it is satisfied that the United States will be able to implement them, either through implementing legislation, the exercise of relevant constitutional authorities, or through the direct application of the treaty itself in U.S. law.”<sup>238</sup>

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(D.D.C. 2016) (holding that Article 2(4) does not create a private right of action); *United States v. Al Liby*, 23 F. Supp. 3d 194, 202 (S.D.N.Y. 2014) (same); *United States v. Noriega*, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990)).

<sup>233</sup> *Al Liby*, 23 F. Supp. 3d at 202 (concluding that Article 2(4) cannot “reasonably have been intended to be enforceable in U.S. courts”); *Khatallah*, 160 F. Supp. 3d at 152 (describing the language of Article 2(4) as “so broad that it is difficult to imagine how a court could enforce them absent some additional implementing legislation”).

<sup>234</sup> See *supra* notes 123–124.

<sup>235</sup> *Ex parte Toscano*, 208 F. 938, 944 (1913)

<sup>236</sup> *Khatallah*, 160 F. Supp. 3d at 152–53.

<sup>237</sup> 1951 Sending Armed Forces Memo, *supra* note 25, at 2.

<sup>238</sup> S. EXEC. REP. NO. 110–12, at 10 (2008).

Further, in contrast to the mutual defense treaties at issue in the War Powers Resolution, no additional legislation is necessary for the President to refrain from taking certain actions that are constitutionally committed to the President as Commander in Chief—namely, abstain from directing the use of force. Citing to President Taft, the Truman Administration explained that the President “does not depend on implementing legislation when the purpose of the treaty can be served by something he has the power to do.”<sup>239</sup>

As discussed below, the issue of judicial enforcement is distinct from the question of whether or not a law is binding. OLC’s *Best Practices* recognizes that legal issues that may never be addressed by a court are nonetheless legal issues.<sup>240</sup> Non-self-executing treaties are not the only species of law not subject to judicial enforcement. For example, the Guarantee Clause of the Constitution has also been held to be beyond judicial enforcement.<sup>241</sup>

### 1. *Medellin*

The strongest argument that non-self-executing treaties in general, and the U.N. Charter in particular, are not “Laws” comes from language in *Medellin v. Texas*.<sup>242</sup> Briefly, in *Medellin*, the petitioner sought a writ of habeas corpus relying upon a judgment by the International Court of Justice (ICJ) under the Vienna Convention on Consular Relations<sup>243</sup> and a Memorandum by President George W. Bush directing the state courts to give effect to the ICJ decision.<sup>244</sup> The Supreme Court addressed two questions in the case:

*First*, is the ICJ’s judgment . . . directly enforceable as domestic law in a state court in the United States?

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<sup>239</sup> 1951 Sending Armed Forces Memo, *supra* note 25, at 2.

<sup>240</sup> Memorandum from David J. Barron, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, on Best Practices for OLC Legal Advice and Written Opinions to Attorneys of the Office of Legal Counsel 1 (July 16, 2010) (emphasizing the importance of providing “an accurate and honest appraisal of applicable law . . . because [OLC] is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts”).

<sup>241</sup> See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (stating that Congress is to decide if the Guarantee Clause is being followed, and that decision is binding on all government departments including the judiciary).

<sup>242</sup> 552 U.S. 491 (2008).

<sup>243</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>244</sup> *Medellin*, 552 U.S. at 498.

*Second*, does the President's Memorandum independently require the States to provide review and reconsideration of the claims [of the individuals named in the ICJ judgment]?<sup>245</sup>

The Supreme Court answered both questions in the negative.

In seeking to enforce the ICJ judgment, the United States *did not* invoke the President's responsibility to "take Care that the Laws be faithfully executed." The Court stated that this was "a wise concession."<sup>246</sup> Because an ICJ judgment arising under non-self-executing treaties (including the U.N. Charter) is "not domestic law," the President "cannot rely on his Take Care powers here."<sup>247</sup> Neither Justice John Paul Stevens's concurrence, nor Justice Stephen Breyer's dissent address the Take Care Clause.

Taken in isolation, *Medellin's* Take Care language could be interpreted to exclude non-self-executing treaties (including the U.N. Charter) from the scope of the Clause. Some scholars have indeed read *Medellin* to stand for this proposition.<sup>248</sup> This interpretation would support the *Override Opinion's* conclusion that non-self-executing treaties are not binding on the President.

However, such a reading of *Medellin's* Take Care language is unwarranted. For the Court to reach such a sweeping conclusion in such a casual fashion without citation to supporting authority would be remarkable. For the Court to reach such a conclusion without acknowledging, much less distinguishing or overruling, the historical interpretations of the Take Care Clause by the courts or political branches would be all the more remarkable.

When read in the context of the entire opinion, *Medellin* itself clarifies that a broad reading of the Take Care language is unnecessary. In addressing the relevance of non-self-execution to the President's authority, the Court framed the matter in terms of judicial enforcement:

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 532.

<sup>247</sup> *Id.*

<sup>248</sup> See Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SEC. J.F. (Apr. 14, 2011), <http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion-2/> [<https://perma.cc/592P-K4ZX>] ("The Court concluded that the Executive cannot rely upon the President's responsibility to 'take care that the laws be faithfully executed' as grounds for enforcing a non-self-executing treaty."); see also Jean Galbraith, *International Law and Domestic Separation of Powers*, 99 VA. L. REV. 987, 1000 n.29 (2013) (claiming that the Court "effectively conclude[ed] that the Take Care Clause does not apply to non-self-executing treaties" (citing *Medellin*, 552 U.S. at 532)).

That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to establish binding rules that preempt contrary state law.<sup>249</sup>

Thus, for the purpose of the Court's inquiry, the question of whether a treaty is non-self-executing bears on the President's *authority* to enforce the treaty in the *courts*. The Court did not reach the issue of whether a non-self-executing treaty provision may bind the President even if it is not judicially enforceable. As the Court explained, the only questions it decided were:

[W]hether [the President] may unilaterally create federal law by giving effect to the judgment of [the ICJ] pursuant to this non-self-executing treaty, and, if not, whether he may rely on other authority under the Constitution to support the action taken in this particular case. Those are the only questions we decide.<sup>250</sup>

In *Medellin*, the Court used the term non-self-executing to refer to a treaty provision which contemplated *further legislative action* before the provision would constitute binding federal law in a *court*.<sup>251</sup> The Court did not address the question of whether the President is bound to comply with a non-self-executing treaty provision. Therefore, *Medellin* should not be read as excluding a non-self-executing treaty provision (such as Article 2(4)) from the scope of the Take Care Clause.

This narrower reading of *Medellin* is supported by the SFRC, which in the wake of the ruling reiterated its view that all treaties are "Laws:"

Following the Supreme Court's decision in [*Medellin*], the committee has taken special care to reflect in its record of consideration of treaties its understanding of how each treaty will be implemented, including whether the treaty is self-executing. As noted in Executive Report 110-25, the committee believes it is of great importance that the United States complies with the treaty obligations it undertakes. In accordance with the Constitution, all treaties—whether self-exe-

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<sup>249</sup> *Medellin*, 552 U.S. at 530 (internal quotation marks omitted).

<sup>250</sup> *Id.* at 523 n.13.

<sup>251</sup> *Id.* at 522–23 ("In sum, while the ICJ's judgement in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions.").



cutting or not—are the supreme law of the land, and the President shall take care that they be faithfully executed.<sup>252</sup>

Depending upon the reason that it is non-self-executing, the status of a treaty provision as non-self-executing may bear on the *authority* of the President to implement the provision, including in court. However, even such non-self-executing provisions may still constitute “the Laws,” under the Take Care Clause and thus act as a constraint upon the President. Thus, the doctrine of non-self-executing treaties is a red herring when it comes to the question of the President’s constitutional obligation to execute a treaty’s provisions.

#### B. The Political Question Doctrine: Law Beyond the Courts II

The *Override Opinion* cryptically states that “Article 2(4) relates to one of the most fundamentally political questions that faces a nation — when to use force in its international relations” before concluding that the President may direct actions in violation of Article 2(4).<sup>253</sup> As previously discussed, if this passage is interpreted to mean that treaties implicating presidential war powers are beyond the scope of the Take Care Clause, such a proposition fails.

This language could also be interpreted as a reference to the political question doctrine, *sensu strictu*. Under this reading, as the use of force is generally non-justiciable due to the political question doctrine, Article 2(4) cannot constrain the President as a matter of law. However, this proposition is also untenable as it misconstrues the nature of the political question doctrine.

The political question doctrine relates to justiciability, not whether a law binds the President. Under the doctrine, courts will not address certain issues because their resolution is tasked to the political branches.<sup>254</sup> In *Baker v. Carr*, the Supreme Court enumerated six factors that may render a case nonjusticiable under the political question doctrine.<sup>255</sup> Courts

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<sup>252</sup> S. EXEC. REP. NO.111-8, at 10 (2010).

<sup>253</sup> *Override Opinion*, *supra* note 15.

<sup>254</sup> *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”); *see also Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 215 (1974) (“[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the ‘case or controversy’ requirement of Art. III, embodies both the standing and political question doctrines.”).

<sup>255</sup> *Baker*, 369 U.S. at 217 (stating that the factors are: (1) “textually demonstrable constitutional commitment of the issue to a coordinate political depart-

have certainly invoked the political question doctrine and relied upon the *Baker* factors in order to avoid addressing challenges related to the exercise to the President's war powers.<sup>256</sup> And it seems unlikely that any court evaluating a challenge to the President's decision to use force predicated upon Article 2(4) would reach the merits for reasons of standing, the doctrine of non-self-execution,<sup>257</sup> and justiciability (including the political question doctrine).

However, though certain forms of government action may not be subject to judicial review, it does not follow that those actions are unconstrained by law.<sup>258</sup> The Supreme Court has distinguished between the issues of whether government action violates the Constitution from whether it is for *courts* to determine if a violation has occurred.<sup>259</sup> Moreover, broadly,

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ment;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing a lack of respect due to coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment of multifarious pronouncements by various departments on one question").

<sup>256</sup> See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (dismissing a claim brought by members of Congress arguing that President Reagan's aid to Contras violated the Constitution's war powers clause on political question grounds); *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (affirming district court's dismissal of suit brought by members of Congress challenging the presence of military advisors in El-Salvador as a violation of the War Powers Resolution and the Declare War Clause on political question grounds); *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) (challenging President George H.W. Bush's deployment order to the Persian Gulf as violating the War Powers Resolution and the Declare War Clause posed a political question).

<sup>257</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that Articles 1 and 2 of the U.N. Charter are not self-executing and thus "were not intended to give individuals the right to enforce them in municipal courts"); *United States v. Noriega*, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990) (holding that Article 2(4) does not create a private right of action).

<sup>258</sup> See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Under-enforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm" rather than the boundaries of the underlying constitutional norms); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1299 (2006) (citing Sager for the proposition that "[e]ven in the absence of judicial enforcement, constitutional norms continue to bind Congress, the President, and other governmental officials").

<sup>259</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) ("The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424,

the Supreme Court has differentiated between the subset of legal questions that are justiciable because they satisfy the “case or controversy” standard for Article III standing from the broader issues of the President’s duty under the Take Care Clause and the compliance of executive officers with the law.<sup>260</sup> Thus, the status of “Law” under the Take Care Clause does not turn on whether it is justiciable. The fact that courts have viewed it as not within their competence to address certain aspects of the President’s war powers does not mean that the Constitution does not impose limitations on those powers. The political question doctrine is equally a red herring.

### C. Treaty Suspension/Termination

There is another potential challenge to the proposition that treaties bind the President under domestic law. This claim flows from the President’s ability to suspend or even terminate or withdraw from treaties. If the President has such authority, the argument might run, then the President also possesses the power to suspend a treaty at will, providing an alternative pathway for the President to evade the legal restrictions of a treaty.

In confronting this argument, it is necessary to address at least two issues. First, whether the President *ever* possesses the unilateral authority to terminate or suspend a treaty. Second, if the President does possess such authority, under what circumstances may the President lawfully exercise such power?

With respect to the first issue, the text of the Constitution does not specifically address the question of which branch or branches of government have the authority to suspend or terminate treaties. Further, the courts have generally abstained from addressing separation of powers issues raised by treaty termination.<sup>261</sup> In the absence of either clear textual indicators or judicial precedent, historical practice provides the best guidance on this separation of powers question. Practice in this area is mixed. The United States has terminated treaties pursuant to actions by the President working with either the full

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(2018) (Kennedy J., concurring) (“There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects.”).

<sup>260</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 557 (1992).

<sup>261</sup> *See, e.g., Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (concluding that a challenge by a group of Senators to President Jimmy Carter’s unilateral termination of the mutual defense treaty presented a non-justiciable political question).

Congress or Senate.<sup>262</sup> The President has also unilaterally terminated dozens of treaties, and in recent decades such unilateral termination has become the norm.<sup>263</sup> The prevailing (though not universal) view is that the President may unilaterally suspend or terminate treaties in at least some circumstances.<sup>264</sup>

If the President has some constitutional authority to unilaterally suspend or terminate treaties, under what circumstances may the President exercise it? Pursuant to the Take Care Clause, faithful execution of a treaty by the President entails that the President may only suspend or terminate a treaty in accordance with its terms or in a manner otherwise consistent with international law.<sup>265</sup> The modern default rules of international law governing the suspension, withdrawal, or termination of a treaty are reflected in the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>266</sup> In the absence of express provisions in the treaty itself, legitimate reasons for suspending, terminating, or withdrawing from a treaty under customary international law include: joint termination by consent of all parties<sup>267</sup> or the conclusion by all parties of a later

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<sup>262</sup> See generally Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014) (cataloging U.S. practice with respect to treaty termination).

<sup>263</sup> *Id.*; see also Memorandum from Herbert J. Hansell, Legal Adviser, U.S. Dep't of State on President Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty to Cyrus Vance, U.S. Sec'y of State (Dec. 15, 1978), reprinted in 1978 DIGEST UNITED STATES PRACTICE INTERNATIONAL LAW 741-45 (Maria Llyod Nash ed., 1978) (listing treaty terminations prior to 1978); 2002 DIGEST UNITED STATES PRACTICE INTERNATIONAL LAW 202-06 (Sally J. Cummins & David P. Steward eds., 2002) (cataloging treaties terminated by presidential action between 1980 and 2002).

<sup>264</sup> Bradley, *supra* note 262, at 823 (“[T]he best description of the current U.S. constitutional law governing treaty termination is probably . . . [that] the President has unilateral authority to terminate treaties when such termination is permitted under international law and is not disallowed either by the Senate in its advice and consent to the treaty or by Congress in a statute.”). *But see generally* Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J.F. 432 (2018) (arguing against a general unilateral Presidential power to terminate international agreements, and contending instead that whether unilateral authority to terminate exists is agreement specific).

<sup>265</sup> Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1231-1232 (2005) (arguing that terminating or suspending a treaty in violation of its terms is not faithful execution); see also Jinks & Sloss, *supra* note 99, at 103-04 (“[A] presidential decision to breach a treaty, in contravention of international law, may violate the President’s duty under the Take Care Clause.”).

<sup>266</sup> Vienna Convention on the Law of Treaties arts. 54-64, May 23, 1969, 1155 U.N.T.S. 331 (listing the lawful bases upon which a country may suspend or terminate a treaty).

<sup>267</sup> *Id.* art. 54(b).

treaty;<sup>268</sup> unilateral suspension in response to a material breach by another party;<sup>269</sup> and suspension, termination, or withdrawal due to “[a] fundamental change of circumstances.”<sup>270</sup> Although the United States is not a party to the Convention, the United States regards the Convention to largely reflect binding customary international law.<sup>271</sup> Thus, when the terms of a treaty do not provide for suspension, termination, or withdrawal, the default rules reflected in the Vienna Convention govern.

A 2001 OLC opinion, authored by John Yoo and Robert Delahunty, advanced a more aggressive view of the President’s authority to suspend treaties. Yoo and Delahunty argued that:

The President’s power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so. . . . [H]is constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law.<sup>272</sup>

However, at the end of the second term of the Bush Administration, OLC disavowed this position. In rejecting the Yoo-Delahunty view, OLC observed that, “Presidents have traditionally suspended treaties where authorized by Congress or where suspension was authorized by the terms of the treaty or under recognized principles of international law, such as where another party has materially breached the treaty or where there has been a fundamental change in circumstances.”<sup>273</sup>

To summarize, under the prevailing view, the President possesses authority to unilaterally suspend, terminate, or withdraw from a treaty consistent with the terms of the treaty

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<sup>268</sup> *Id.* art. 59.

<sup>269</sup> *Id.* art. 60(1).

<sup>270</sup> *Id.* art. 62.

<sup>271</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at 144 intro. note (1987) (describing statements by the Executive Branch regarding the Vienna Convention on the Law of Treaties).

<sup>272</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice on the Authority of the President to Suspend Certain Provisions of the ABM Treaty to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat’l Sec. Council 12 (Nov. 15, 2001), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memoabmtreaty11152001.pdf> [<https://perma.cc/2XR7-EYS6>].

<sup>273</sup> Memorandum of Steven G. Bradbury, Principal Deputy Assistant Attorney Gen. on the Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 9 (Jan. 15, 2009) (warning that the Yoo-Delahunty position does “not reflect the current views of this Office and should not be treated as authoritative”).

or in a manner otherwise consistent with international law. Such actions are consistent with faithful execution. Just as the President might exercise authority under a statute to waive specific provisions of the statute, so too may the President suspend a treaty provision consistent with the terms of the treaty. However, suspension, termination, or withdrawal from a treaty in a manner inconsistent with its terms or the default rules reflected in the Vienna Convention would not amount to faithful execution. Further, it is clear that the “greater power” of the President to suspend, terminate, or withdraw from a treaty consistent with its terms or in a manner otherwise consistent with international law *does not* include the “lesser power” to suspend a treaty at will. As long as a treaty remains in effect, the President is bound to faithfully execute the instrument.

## V

### IMPLICATIONS

#### A. Constitutional Authority and Constraint

Because it is a “Law,” the President must “faithfully execute” the U.N. Charter (including Article 2(4)). At a minimum, faithful execution bars the President from directing conduct inconsistent with Article 2(4). Therefore, Article 2(4) imposes limitations on the President’s war powers as a matter of domestic law.

The Executive Branch framework outlined in Part I must therefore be modified to incorporate this additional constitutional constraint. The President’s authority to direct the use of force in the absence of congressional authorization thus turns on three issues:

- (1) ARTICLE II AUTHORITY: Whether the use of force would serve sufficiently important national interests;
- (2) ARTICLE II CONSTRAINT: Whether the use of force would violate the President’s obligation to Take Care that the Laws, (including Article 2(4) of the U.N. Charter) are faithfully executed.
- (3) ARTICLE I CONSTRAINT: Whether the use of force would constitute a “war” within the meaning of the Declare War Clause;

This Part describes the implications of the constraint imposed by the Take Care Clause on the President’s war powers by outlining the framework for the use of force under Article 2(4). In doing so, this Part describes the United States’ own views on the use of force under Article 2(4), recognizing that these views may be contested. Although aspects of this scheme

may be contested, this Part is descriptive insofar as it seeks to sketch the broad contours of the use the United States interpretation of Article 2(4).

This Part is prescriptive in that it argues the framework governing the use of force under Article 2(4) is also binding on the President as a matter of *domestic law*. My aim is to spell out the implications of Article 2(4) as a “Law” that the President must faithfully execute by drawing upon the United States current understanding of Article 2(4).

## B. The Use of Force under the U.N. Charter

### 1. *Scope of the Prohibition on the Use of Force*

Article 2(4) of the U.N. Charter provides in relevant part that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>274</sup> Article 51 of the U.N. Charter, however, specifies that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.”<sup>275</sup>

Although a comprehensive account of the United States’ views on the use of force under the U.N. Charter are beyond the scope of this Article, a few aspects of the U.S. interpretation of the prohibition on the use of force are worth highlighting.

First, the United States has long taken the position that any illegal “use of force” under Article 2(4) constitutes an “armed attack” under Article 51.<sup>276</sup> Thus, in the view of the United States “use of force” and “armed attack” are equivalent.

Second, the United States has treated uses of force against certain external manifestations of a State as prohibited by Article 2(4). These include the forcible seizure or bombing of em-

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<sup>274</sup> U.N. Charter art. 2, ¶ 4.

<sup>275</sup> U.N. Charter art. 51.

<sup>276</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks to US CyberCOM Legal Conference on International Law in Cyberspace (Sept. 12, 2012) (“[T]he United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an “armed attack” that may warrant a forcible response.”).

bassies,<sup>277</sup> attacks on U.S. warships,<sup>278</sup> the forcible interdiction and seizure of a U.S.-flagged merchant vessel,<sup>279</sup> as well as attacks or attempted attacks against U.S. service members<sup>280</sup> and Presidents overseas.<sup>281</sup>

Third, Article 2(4)'s prohibition applies to the "use of force" generally and is not limited to the use of "military" force. For the purposes of Article 2(4), the specific instrumentality a State employs to use force is irrelevant. Article 2(4) would prohibit a use of force conducted by an intelligence or law enforcement agency (of the sort contemplated in the *Override Opinion*) as well as a use of force by a State's armed forces. For example, the United States has treated operations by the Iraqi intelligence services against former President George H.W. Bush<sup>282</sup> as constituting armed attacks or uses of force prohibited by Article 2(4).

Finally, the United States has indicated that even "indirect" uses of force by a State may implicate Article 2(4)'s prohibition. In the *Nicaragua Case*, the United States characterized the provision of "arms, munitions, finance, logistics, training, safe havens, planning and command and control support" by Nica-

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<sup>277</sup> See Letter from Donald F. McHenry, Permanent Representative of the United States to the United Nations to the President of the Security Council, U.N. Doc S/13908 (April 25, 1980) (characterizing the operation to rescue hostages held by Iran as a measure in self-defense in response to the "armed attack" on the U.S. Embassy on Tehran); Letter from Bill Richardson, Permanent Representative of the United States of America to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998) (characterizing the truck bomb attacks on the U.S. embassies in Nairobi and Dar es Salaam as armed attacks).

<sup>278</sup> See Letter from Herbert S. Okun, Acting Permanent Representative of the United States of America to the United Nations to the President of the Security Council, UN Doc. S/19791 (Apr. 18, 1988) (characterizing the mining of the U.S. warship, the USS Samuel B. Roberts as an armed attack).

<sup>279</sup> See Letter from John Scali, Permanent Representative of the United States to the United Nations to the President of the Security Council, U.N. Doc S/11689 (May 15, 1975) (reporting that the United States took "appropriate measures under Article 51" in response to the "armed attack" on the S.S. Mayaguez by Cambodia).

<sup>280</sup> See Letter from Herbert S. Okun, Acting Permanent Representative of the United States to the United Nations to the President of the Security Council, U.N. Doc 2/17990 (Apr. 14, 1986) (informing the Security Council of measures taken by the United States in self-defense in response to attacks by Libya).

<sup>281</sup> See William J. Clinton, Address to the Nation on the Strike on Iraqi Intelligence Headquarters (June 26, 1993) (justifying U.S. missile strikes on the headquarters of Iraqi intelligence in response to an "attack" form of a plot by Iraqi intelligence to assassinate former President George H.W. Bush in Kuwait); U.N. SCOR, 48th Sess., 3245th mtg. at 6, U.N. Doc. S/PV.3245 (June 7, 1993) (characterizing the plot as an "attack" and justifying the U.S. missile strikes on the headquarters of the Iraqi Intelligence Service as an "exercise of self-defense" under Article 51).

<sup>282</sup> See *supra* note 281.



ragua to guerillas in El Salvador as an “armed attack.”<sup>283</sup> Therefore, support by an external State to insurgents would constitute a use of force implicating Article 2(4) in at least some circumstances.

## 2. *Exceptions to Article 2(4)’s Prohibition on the Use of Force*

The United States has recognized three circumstances under which the U.N. Charter does not prohibit the use of force:<sup>284</sup>

- (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII;
- (2) use of force in self-defense; and
- (3) use of force with the consent of the territorial State.

These three bases for using force on the territory of another State are not mutually exclusive. By virtue of the Take Care Clause, any lawful use of force directed pursuant to the President’s authority under Article II must be undertaken consistent with one or more of these bases.

### a. *U.N. Security Council Authorization*

Under Chapter VII of the U.N. Charter, the U.N. Security Council may authorize the use of force as may be necessary to maintain or restore international peace and security.<sup>285</sup> The United States has used force pursuant to a U.N. Security Council resolution under Chapter VII, including to protect civilian populated areas under threat of attack in Libya,<sup>286</sup> and to support the International Security Assistance Force in Afghanistan.<sup>287</sup>

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<sup>283</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Pleadings, Oral Arguments, Documents, 1986 I.C.J. 14, ¶ 189–90 (Aug. 17, 1984) (characterizing the provision of “arms, munitions, finance, logistics, training, safe havens, planning and command and control support” by Nicaragua to guerillas in El Salvador as an “armed attack”); *see also* Abraham D. Sofaer, *International Law and the Use of Force*, 13 NAT’L INT. 53, 58 (1988) (stating that the United States “assumed that Nicaragua’s support of guerillas for the purpose of destroying the government of El Salvador was a form of aggression against El Salvador, and that necessary and proportional responses, including force, could be taken collectively against such actions.”).

<sup>284</sup> WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 8 (2016) [hereinafter USE OF FORCE REPORT].

<sup>285</sup> U.N. Charter art. 42.

<sup>286</sup> *See* S.C. Res. 1973 (Mar. 17, 2011).

<sup>287</sup> *See* S.C. Res. 1386 (Dec. 20, 2001); S.C. Res. 1510 (Oct. 13, 2003).

b. *Self-Defense*

The U.N. Charter recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack subject to the requirements imposed by customary international law that any use of force in self-defense must be limited to what is necessary and proportionate to address the threat.<sup>288</sup>

i. *Self-Defense against Non-State Actors*

The right of self-defense is not restricted to threats posed by States.<sup>289</sup> For centuries, the United States and other States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors.<sup>290</sup> This right remains widely accepted, including in the context of operations against ISIS in Syria.<sup>291</sup>

A State may use force on the territory of another State in self-defense only if it is necessary to do so in order to address the threat giving rise to the right to use force in the first instance. States therefore must assess whether the territorial State is able and willing to mitigate the threat emanating from its territory and, if not, whether it would be possible to secure the territorial State's consent before using force on its territory against a non-State actor.<sup>292</sup>

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<sup>288</sup> U.N. Charter art. 51.

<sup>289</sup> Brian Egan, Legal Adviser to the Department of State, Keynote Speech at the Annual Meeting of the American Society of International Law (Apr. 4, 2016), <https://2009-2017.state.gov/s/l/releases/remarks/255493.htm> [<https://perma.cc/9BKE-XEPL>].

<sup>290</sup> See Brian Finucane, *Fictitious States, Effective Control, and the Use of Force against Non-State Actors*, 30 BERKELEY J. INT'L L. 35, 61–69 (2012) (describing historical examples of the use of force against non-state actors).

<sup>291</sup> See, e.g., Letter from Samantha J. Power, Representative of the United States of America to the President of the U.N. Security Council (Sept. 23, 2014) (notifying the U.N. Security Council of military action against ISIL and al-Qa'ida in Syria and explaining that "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."); see also Letter from Heiko Thoms, the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations to the President of the Security Council (Dec. 10, 2015) ("Germany will now support the military measures of those states that have been subject to attacks by ISIL" on the grounds that "ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the [Syrian] Government.").

<sup>292</sup> USE OF FORCE REPORT, *supra* note 284, at 10.

In some cases, a State is not required to obtain the consent of the State on whose territory force will be used against a non-State armed group. States may defend themselves when they face actual or imminent armed attacks by a non-State armed group and the use of force is necessary because the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by the non-State actor for such attacks.<sup>293</sup>

The United States has explained that it regards the “unable or unwilling” standard to flow from the principle of necessity. The standard is

an important application of the requirement that a State, when relying on self-defense for its use of force in another State’s territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.<sup>294</sup>

With respect to the “unable” prong, inability is most obvious when a State has lost effective control over the portion of its territory where the armed group is operating. With respect to the “unwilling” prong, unwillingness may be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory.<sup>295</sup>

ii. *Self-Defense in Response to Imminent Armed Attacks*

The United States has recognized that a State may use force in self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur. In assessing whether an armed attack is imminent, the United States has identified a number of relevant factors. These factors include:

[T]he nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake ef-

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293 *Id.*

294 Egan, *supra* note 289.

295 USE OF FORCE REPORT, *supra* note 284, at 10.

fective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.<sup>296</sup>

The United States does not regard

the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.<sup>297</sup>

Further, in the view of the United States, the traditional conception of what constitutes an imminent attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.<sup>298</sup>

In contrast, to defend against the threat of an imminent armed attack, the resort to force against more inchoate threats under the rubric "preventative self-defense" is more controversial. The United States and other States have rejected such uses of force as unlawful in the past. Specifically, in 1981 the United States joined a unanimous Security Council in condemning Israel's attack against the Osirak nuclear reactor in Iraq. Israel justified the attack as necessary to defend itself against future, unrealized nuclear weapons that Iraq might use the reactor to produce. The United States and other members of the Security Council rejected this argument, invoked the language of Article 2(4), and "strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations."<sup>299</sup> In the view of the United States, Israel's actions violated Article 2(4) due to the

absence of any evidence that Iraq had launched or was planning to launch an attack that could justify Israel's use of force. . . . [T]he presence in a State of the military capacity to injure or even to destroy another State cannot itself be considered a sufficient basis for the defensive use of force.<sup>300</sup>

### c. *Consent to Use Force*

The United States also recognizes that a State may lawfully use force on the territory of another State with that territorial

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<sup>296</sup> *Id.* at 9 (quoting Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by a Nonstate Actor*, 106 AM. J. INT'L L. 769 (2012)).

<sup>297</sup> *Id.* (quoting Bethlehem, *supra* note 296).

<sup>298</sup> *Id.*

<sup>299</sup> S.C. Res. 487 (June 19, 1981).

<sup>300</sup> Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 109 (1989) (writing as Department of State Legal Adviser).

State's consent.<sup>301</sup> The United States has relied on State consent in various military operations, including in Iraq, Libya, Yemen and Somalia.<sup>302</sup>

d. *Humanitarian Intervention?*

The United States has not adopted the doctrine of humanitarian intervention as an independent exception to the prohibition of the use of force imposed by Article 2(4).<sup>303</sup> In fact, only three states (the United Kingdom, Denmark, and Belgium) have clearly taken the position that the doctrine of humanitarian intervention provides such a legal basis.

Of these states, the United Kingdom has been the most forthcoming in explicating its legal theory. In advance of the 1999 NATO intervention in the Kosovo conflict, the UK circulated a note to NATO Allies asserting a theory of lawful humanitarian intervention.<sup>304</sup> The note argued that “force can also be justified on the grounds of overwhelming humanitarian necessity without a [U.N. Security Council authorization]” under the following conditions:

- “[T]here is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;”
- “[I]t is objectively clear that there is no practical alternative to the use of force if lives are to be saved;” and
- “The proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim—i.e. it is the minimum necessary to achieve that end.”<sup>305</sup>

The United States did not adopt the United Kingdom's humanitarian intervention justification for the Kosovo intervention. Instead, the justification of the United States for its

<sup>301</sup> USE OF FORCE REPORT, *supra* note 284, at 11.

<sup>302</sup> See *id.* at 15, 17, 18 (describing U.S. military operations in Iraq, Libya, Yemen, and Somalia undertaken on the basis of consent).

<sup>303</sup> See Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 Hous. L. Rev. 971, 1004 (2016) (former Legal Adviser to the Department of State complaining that “the United States has yet to articulate either a full domestic or international law rationale that would justify the use of humanitarian force in the absence of an authorizing U.N. Security Council resolution”); see also USE OF FORCE REPORT, *supra* note 284, at 11 (not identifying humanitarian intervention as a basis to use force).

<sup>304</sup> Foreign and Commonwealth Office, Note of 7 October 1998, FRY/Kosovo: The Way Ahead; UK View on the Legal Base for the Use of Force, *reprinted* in Adam Roberts, NATO's “Humanitarian War” Over Kosovo, 41 SURVIVAL 102, 106 (1999).

<sup>305</sup> *Id.*

actions relied upon a number of non-legal “factors.”<sup>306</sup> Michael Matheson, then Acting Legal Adviser at the Department of State, later acknowledged that the U.S. Government had considered and rejected adopting the doctrine of humanitarian intervention as the basis for the use of force in Kosovo.<sup>307</sup> Matheson conceded the United States “mumbled something about [the Kosovo intervention] being justifiable and legitimate,” but this mumbled explanation “*was* something less than a definitive legal rationale.”<sup>308</sup> Significantly, the United States did not claim that the Kosovo intervention was consistent with Article 2(4).<sup>309</sup>

It is important to distinguish humanitarian intervention under international law (which the United States has not endorsed) from the national interest of “averting humanitarian catastrophe” in OLC’s recent war powers opinions. As discussed in Part I, OLC has identified “averting humanitarian catastrophe” as a national interest that the President may, as Commander in Chief, further through the use of military force without prior congressional approval.<sup>310</sup> However, OLC has distinguished this national interest from the doctrine of humanitarian intervention.<sup>311</sup> Even if the President were to direct the use of military force to further this national interest, due to his duty under the Take Care Clause, the President would still need a basis to use force in a manner consistent with Article 2(4) (i.e., U.N. Security Council authorization, consent, or self-defense). The 2014 intervention in Iraq to prevent further

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<sup>306</sup> See Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC’Y INT’L L. PROC. 301 (2000) (stating that the United States identified the following “factors” as justifying the intervention: (1) the existence of relevant UN Security Council resolutions; (2) the threat to regional stability; (3) NATO’s “special responsibilities” in the relevant country; (4) the multilateral character of NATO decision-making; (5) threat of humanitarian catastrophe; (6) violations of international humanitarian law; (7) violations of human rights; (8) threats to the safety of international observers; (9) friendly force conformity with the law of armed conflict; and (10) adversary violations of multilateral agreements).

<sup>307</sup> MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS* 124–25 (2010).

<sup>308</sup> *Id.* at 125.

<sup>309</sup> Koh, *supra* note 303, at 980 (decrying the failure of the United States “to articulate a clear international legal rationale for its Kosovo intervention”).

<sup>310</sup> 2014 ISIL Opinion, *supra* note 25, at 35 (“[W]e believe it was reasonable for the President to rely on a national interest in preventing humanitarian catastrophe, at least in combination with an interest in protecting American or supporting an ally or strategic partner, as a justification for conducting airstrikes against ISIL’s position . . .”).

<sup>311</sup> *Id.* at 36 n.15 (“Our conclusion addresses only the President’s domestic legal authority to engage in such military intervention without prior congressional approval. We do not address the validity of humanitarian intervention as a justification for the use of force under international law.”).

atrocities by ISIS is one example of a use of force motivated in part by the national interest in averting a humanitarian catastrophe,<sup>312</sup> but rendered lawful by a recognized exception to Article 2(4)—here, the request of the Government of Iraq.<sup>313</sup>

In view of the foregoing, and in the absence of one of the three traditional bases to use force consistent with Article 2(4), the President could not as a matter of domestic law direct the use of force premised upon the doctrine of humanitarian intervention.

### C. Faithful Execution and Interpretation of Article 2(4)

The conclusion that Article 2(4) is a “Law” that binds the President could have a hydraulic effect on Executive Branch lawyering. Unable to advise the President that the President may simply override Article 2(4), Executive Branch lawyers may seek to interpret the Charter’s rules regarding the use of force in a manner that maximizes the President’s freedom of action. Such interpretation could take the form of stretching the three existing bases to use force to fit inapposite facts or devising new exceptions to Article 2(4)’s prohibition on the use of force (such as humanitarian intervention).

The Take Care Clause itself imposes limits on such creative lawyering. Former senior Executive Branch lawyers have identified a few implications of the Clause that are worth emphasizing in this context. Faithful execution of the laws not only forecloses dispensation from the laws, but it also bars reliance upon merely reasonable interpretations of the law as opposed to the “best view” of the law.<sup>314</sup> Faithful execution “cannot be reconciled with executive action based on preferred, merely plausible legal interpretations that support desired policies.”<sup>315</sup> In order for lawyers to assist the President in upholding the

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<sup>312</sup> *Id.* at 36.

<sup>313</sup> See Statement by Barack Obama, President of the United States on Iraq (Aug. 7, 2014), <https://obamawhitehouse.archives.gov/photos-and-video/video/2014/08/07/president-obama-makes-statement-iraq#transcript> [<https://perma.cc/9A3H-5EJJ>] (“When we face a situation like we do on that mountain—with innocent people facing the prospect of violence on a horrific scale, when we have a mandate to help—in this case, a request from the Iraqi government—and when we have the unique capabilities to help avert a massacre, then I believe the United States of America cannot turn a blind eye.”).

<sup>314</sup> Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1313–14 (2000). Moss, then head of OLC, provided the first lengthy articulation of the “best view” principle of interpretation and rooted it in the Take Care Clause.

<sup>315</sup> Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1580 (2007). Professor Johnsen previously served as the Acting Assistant General heading OLC.

President's responsibility under the Take Care Clause, they must seek to provide the President with the best, most faithful interpretation of the law.<sup>316</sup>

Given Article 2(4)'s status as a "Law," Executive Branch lawyers must seek to faithfully interpret this provision when advising the President.

#### D. The Last-in-time Rule: Congress's Power to Override Article 2(4)

The fact that the U.N. Charter is "Law" binding upon the President has significant implications for the constitutional separation of war powers. Article 2(4) constrains the President's war powers, but at least as a matter of domestic law, it does not constrain Congress's power, including under the Declare War Clause. In contrast to the *Override Opinion's* position, it is Congress, not the President, that has the power to override Article 2(4).

Under the Constitution, treaties and federal statutes have equivalent status.<sup>317</sup> If a treaty and a federal statute relate to the same subject, the courts should seek to construe them in such a way as to give effect to both.<sup>318</sup> However, if it is not possible to reconcile a treaty and federal statute, the last-in-time instrument is controlling.<sup>319</sup>

Thus, as a matter of domestic law, the United States retains the authority to breach treaties, including the U.N. Charter. As a consequence of the last-in-time rule, if Congress passes legislation authorizing the use of force in a manner inconsistent with Article 2(4) and the President signs such legislation into law (or it is enacted over veto), the last-in-time congressional authorization will be the controlling law. Thus, under the Take Care Clause, the President would no longer have an obligation to "faithfully execute" the United States' obligations under Article 2(4) with respect to the congressionally-authorized use of force.

However, there is a significant caveat to the application of the last-in-time rule to Article 2(4). Even if the use of force

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<sup>316</sup> Mary DeRosa, *National Security Lawyering: The Best View of the Law as Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277, 297–98 (2018). Professor DeRosa previously served as the National Security Council Legal Adviser.

<sup>317</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* (articulating the last-in-time rule).



pursuant to such a last-in-time congressional authorization would be lawful as a matter of domestic law, it would constitute a violation of international law.<sup>320</sup> The application of the last-in-time rule would not alter that nature of the United States' international legal obligations under Article 2(4).

#### CONCLUSION

The framework set forth in this Article corrects a misinterpretation of the domestic legal status of the U.N. Charter and its effect upon the war powers of the President. Article 2(4) of the U.N. Charter is a "Law" within the meaning of the Take Care Clause. This conclusion is supported by the weight of authority, particularly longstanding (though now neglected) arguments of the Executive Branch invoking treaties as "Laws" in connection with the exercise of war powers. Indeed, reliance upon the Charter as a "Law" was one of the principal arguments undergirding the most expansive exercise of unilateral presidential war powers—President Truman's police action in Korea.

Arising from the English constitutional tradition and representing a response to monarchical abuses, the Take Care Clause imposes a duty of faithful execution upon the President. Properly understood, Article II is not only the source of the President's war powers, but by virtue of the Take Care Clause, Article II also constrains those powers. Applied to Article 2(4), the Clause bars the President from directing certain uses of force without prior congressional authorization. Contrary to suggestions in OLC's *Override Opinion*, a "Law" such as Article 2(4) binds the President even if it is not judicially enforceable. Although courts may decline to adjudicate claims premised upon Article 2(4) under the non-self-execution or political question doctrines, the President is nonetheless obligated to faithfully execute this provision.

The conclusion that Article 2(4) is a "Law" alters the allocation of war powers between the President and Congress. In the absence of prior congressional authorization, the President may not direct actions in contravention of Article 2(4). Nonetheless, by virtue of the last-in-time rule, Congress (not the President) possesses the power under domestic law to authorize the use of force in violation of Article 2(4).

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<sup>320</sup> *Id.* (acknowledging that the application of the last-in-time rule constitutes a violation of the treaty).

