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# The Mutual Dependency of Force and Law in American Foreign Policy

Richard A. Epstein<sup>†</sup> & Mario Loyola<sup>††</sup>

*A successful American grand strategy requires a close integration of international and domestic institutions and practices. This Essay explores the vital interdependence of grand strategy and law, both international and domestic. First, it asks how the United States should formulate its foreign policy strategy by pointing to the three primary components that must be deployed in tandem to forge a successful American foreign policy—persuasion, inducements, and force. Second, this Essay shows that in light of the distribution of powers between the president and Congress, and within the executive branch, the execution of that strategy requires a high level of bipartisan consensus in favor of an approach that neither disclaims the use of American power nor solely relies on it. The soundness of this strategy is tested against the American experience in Iraq and elsewhere.*

## INTRODUCTION

The continuing failure of US policy in the Middle East has brought to the fore a major dysfunction at the heart of American foreign policymaking, which brings with it grave implications for the stability of the international system. This dysfunction has manifested as a series of interrelated problems in strategy, domestic politics, and international law. In a sound foreign policy, like that of the United States during the Cold War, the elements of strategy, domestic politics, and international law work in harmony. When they conflict, as they have since the end of the Cold War, the result is disintegration of both US policy and the international system as a whole, which then results in ever-heightening risks for peace and security.

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This Essay examines two key questions. First, the question of the country's external role: How should the United States interact with the rest of the world in terms of both strategy and international law, and should it act as a world leader or as just one nation among equals? Second, the question of internal governance: How should the United States distribute powers internally among its various branches of government to fulfill its proper role in the international arena?

These two questions are interrelated. As demonstrated by America's successful Cold War strategy and the Pax Americana that it nurtured in the free world, an effective grand strategy rests on persuasion, inducements to key players, and a credible threat of force.<sup>1</sup> Public persuasion—both domestic and international—is needed to create a broad base of support. But you cannot win over 100 percent of the relevant players by persuasion alone. Persuasion can be effectively deployed only if the proper inducements, whether financial or military, are supplied to key players over time. Like all self-enforcing contracts, wavering parties will cooperate only if the gains that they hope to receive from future cooperation exceed the gains that they hope to receive from defection.<sup>2</sup> Persuasion and inducements must in turn be backed by a credible threat of force against those nations and groups that threaten us or our allies. Without a concerted effort along all three fronts, American power fragments, and policy will fall into the familiar trap of making commitments that far exceed its available resources, a situation that Walter Lippmann described as a “bankrupt foreign position.”<sup>3</sup> A grand strategy based on the proper mix of persuasion, inducements, and credible threats of force can be effective only over periods of time that exceed those of any single presidential administration. They therefore must be enshrined in domestic and foreign institutions.

That is the deeper significance of alliance treaties: they are valuable because they consecrate the marriage of persuasion,

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<sup>1</sup> See Hal Brands, *What Good Is Grand Strategy? Power and Purpose in American Statecraft from Harry S. Truman to George W. Bush* 17–58 (Cornell 2014) (analyzing elements of US policy during the Truman administration, a period “often thought of as the golden age of American grand strategy”).

<sup>2</sup> See Robert E. Scott and Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 Wis L Rev 551, 558–63 (comparing enforcement difficulties faced by nation-states entering into international agreements to enforcement difficulties faced by private contracting parties); Kenneth A. Oye, *Explaining Cooperation under Anarchy: Hypotheses and Strategies*, 38 World Polit 1, 4–11 (1985) (examining payoff structures that favor international cooperation).

<sup>3</sup> Walter Lippmann, *U.S. Foreign Policy: Shield of the Republic* 43 (Little, Brown 1943).

inducements, and credible threats of force for the purposes of both international and domestic law.<sup>4</sup> In short, grand strategy depends on international law to be effective. The reverse is also true: principles of international law cannot survive unless supported by sound domestic institutions and policies, particularly of a stable constitutional order. A proper, coherent grand strategy, duly developed within a stable democracy, should define international law, and it should do so in ways that render the strategy effective.

The relation of grand strategy, domestic politics, and international law described above corresponds to the old order that relied on American exceptionalism to maintain the international system during the Cold War. The defense of this position is not without difficulties. One central premise of formal international law is the parity and equal dignity of sovereigns in their relations with each other.<sup>5</sup> But in our view, that parity leads to a huge power vacuum that can be filled only if someone—preferably the United States—takes on extra responsibilities and exercises additional leadership. This Essay is a defense of that old order and an exhortation to revive and preserve its essential elements, including, when necessary, the use of preemptive force. Of course, the old order was not without major flaws—but as we will show, those flaws generally confirm the insights developed in this Essay.

In Part I, we examine in detail the three key components to the successful American foreign policy mentioned above—persuasion, inducements, and force—and discuss why they depend on, and must define, international law. In Part II, we look at the law of the use of force under the UN system, its implicit modification by the formation of NATO, and its points of conflict with the basic elements of a successful foreign policy. In Part III, we look at the elements of the American Constitution that organize the division of control over foreign policy to show how these elements create an institutional arrangement that allows for the formation of a foreign policy that is effective, proactive, and legitimate.

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<sup>4</sup> See Andrew G. Long, Timothy Nordstrom, and Kyeonghi Baek, *Allying for Peace: Treaty Obligations and Conflict between Allies*, 69 J Polit 1103, 1105–07 (2007).

<sup>5</sup> See, for example, *Underhill v Hernandez*, 168 US 250, 252 (1897) (“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”).

## I. THE THREE PILLARS OF GRAND STRATEGY

Looking globally, the restoration of American influence abroad requires a three-part strategy: persuasion, inducement, and force.

The first part of this strategy, persuasion, is to engage in public debate and general discussion to win over a broad base of popular support in other countries. That task is never easy, and it requires a deep understanding of local norms and culture to succeed. Unless the United States can mobilize a broad base of popular support, it cannot sustain the policies that are needed to protect itself and to maintain peace and security in those regions of the world that are crucial for its vital interests. In principle, this should be the least controversial of the pillars because it involves neither the promise of explicit benefits nor the carrying out of explicit threats. In working this strategy, care must be taken not to seek a monopoly over the outlets for speech lest we create deep resentments among the very people we want to persuade.

The second prong of the grand strategy is intended to pick up where general persuasion leaves off. It requires the United States to offer direct, material support to specific political groups and, more generally, to make financial and security commitments to induce other nations to cooperate with it in international affairs. In essence, the United States cannot expect to demand any case-by-case *quid pro quo* whereby for each advantage that it confers on its allies and trading partners, it receives something of a like kind in exchange. Rather, what the United States wants from its trading partners is their durable support and cooperation, in a setting in which immediate tangible benefits are but one part of a far larger picture.

To understand how inducement fits into the overall scheme, it is useful to refer to the late Professor Gary Becker's "rotten kid' theorem," articulated in his article *A Theory of Social Interactions*.<sup>6</sup> Becker's theorem assumes, in its simplest form, a family of three, in which the head of the family, well-endowed with resources, takes into account the welfare of two children, each of whom is by assumption totally indifferent to the welfare of the other.<sup>7</sup> The theorem postulates that by withholding or granting benefits to the two children, the parent can make them act "as if

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<sup>6</sup> Gary S. Becker, *A Theory of Social Interactions*, 82 J Polit Econ 1063, 1076-83 (1974).

<sup>7</sup> *Id.* at 1076-78.

they love[ ]” one another, even if they do not.<sup>8</sup> The hard question therefore is how to identify the particular settings in which the rotten-kid theorem is likely to hold.

Within the family context, Becker’s view is unduly pessimistic because, biologically speaking, it wrongly presupposes that there are no bonds of affection between the children that make them want to cooperate even in the absence of their parents. The theorem holds strong in the international arena, however. Consider the Sunni-Shiite conflict throughout the Middle East and particularly in Iraq, where indifference is displaced by active enmity.<sup>9</sup> The only way to make both sides cooperate is by making bribes that are sufficiently large to prevent each faction from targeting members of the other group. Killing or arresting any one person does not end the conflict, as it would in Becker’s nuclear family. It only spurs a further cycle of revenge and suicide killings. The superpower pays those inducements willingly because the conflict between the two sides, including its repercussions on third parties, is more costly than the bribes.

Events in Iraq between 2007 and 2011 illustrate this point. Like the head of a family, a world power has to broker deals between parties who might otherwise kill each other—a function the United States performed reasonably well between the 2007 surge and the end of the Iraq War in 2008, when General David Petraeus paid Sunni tribes to stand with the United States against al Qaeda.<sup>10</sup> Matters started to deteriorate between 2009 and the withdrawal of US forces in 2011.<sup>11</sup> The decision of the Obama administration to condition future US support on the prior willingness of local factions to cooperate betrays a deep confusion of cause and effect, for as we saw in the early years of the Obama presidency, the local factions will cooperate, for the moment, only if they can be sure of US support.<sup>12</sup> As with all

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<sup>8</sup> Id at 1080.

<sup>9</sup> See, for example, Zoe Mintz, *How the Sunni-Shiite Conflict Frames the Current Crisis in Iraq* (International Business Times, June 17, 2014), archived at <http://perma.cc/9LJS-CXWU>.

<sup>10</sup> See Reuel Marc Gerech, *Hope and Change in Iraq* (The Weekly Standard, Mar 22, 2010), archived at <http://perma.cc/8M97-D5QX> (“But in Iraqi Shiite eyes what Washington has been doing since the surge began in 2007—when General David Petraeus started paying Sunni tribes to stand against al Qaeda and with the Americans—is bribing the Sunnis to behave.”).

<sup>11</sup> See Pete Hegseth, *Iraq’s Disintegration* (National Review, June 21, 2014), archived at <http://perma.cc/H72B-ZD9D>.

<sup>12</sup> See Dexter Filkins, *What We Left Behind* (New Yorker, Apr 28, 2014), archived at <http://perma.cc/VV5F-5C8Q> (“When the last American soldiers left Iraq, at the end of

contractual arrangements, matters of sequential performance are critical, and some transactions will not take place unless someone can underwrite the risks for the parties involved.<sup>13</sup>

The third pillar of foreign policy is coercion backed by the credible threat of force against those who are not brought into line by the first two strategies. This approach will surely fail if the first two steps have not succeeded at reducing the arena in which force should be exercised. But even if they are successful, they will ultimately be made credible only if we are prepared to use force, both alone and with our allies, to defend our friends and to attack our enemies. It was a careful combination of these three elements that accounted for the success of the surge under the command of Petraeus.<sup>14</sup> It should go without saying that the ability to implement this three-part strategy overseas requires a coherent and stable foreign policy consensus at home.

The case for coercion follows from the social contract theories of Thomas Hobbes's *Leviathan* and John Locke's *Second Treatise of Government*. The great challenge of this pillar is to eliminate the physical and emotional insecurities that arise from the unbridled use of force in human affairs. Hobbes cemented his position in the pantheon of political theory by noting that in the state of nature, "the life of man, [is] solitary, poore, nasty, brutish, and short."<sup>15</sup> In the state of nature, all evident differences in strength do not matter.<sup>16</sup> The strongest has to sleep, at which point the weakest, or a confederation of the weakest, can slay him with impunity.<sup>17</sup> The rough equality among men necessarily means that no one person gains any security by going it alone.<sup>18</sup> But what happens when people band together for voluntary protection? No doubt these alliances will help, but their promise is unfulfilled so long as even one person (let alone one nation) is prepared to operate with force outside

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2011, the bloody civil war between the country's Sunni and Shiite sects had been stifled but not resolved. Now the sectarian violence had returned, with terrifying intensity.").

<sup>13</sup> For an illustration of the importance of risk underwriters for the sequential performance of contracts, see *Wisconsin Knife Works v National Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986).

<sup>14</sup> For Petraeus's account of how a "comprehensive strategy" worked, see David Petraeus, *How We Won in Iraq* (Foreign Policy, Oct. 29, 2013), archived at <http://perma.cc/N75T-ULK8>. His prophecy has surely proved correct.

<sup>15</sup> Thomas Hobbes, *Leviathan* 89 (Cambridge 1991) (Richard Tuck, ed.) (originally published 1651).

<sup>16</sup> See *id.* at 86–87.

<sup>17</sup> See *id.* at 87.

<sup>18</sup> See *id.* at 87–88.

the common framework that has been accepted by everyone else. That one person can pose a mortal threat to all others. Making a bargain with that one person may ease the short-term worry, but it will not cure the problem. That initial bribe will tempt at least one other person to adopt that hostile strategy and pick up where the original assailant left off. A succession of purchases can bankrupt the virtuous, but it cannot win the peace. Only force can combat force.

Couched in somewhat more modern terminology, there is a huge transaction cost obstacle facing any group of virtuous individuals that are trying to buy their way out of threats from the few. This somber conclusion does *not* depend on the relentless Hobbesian assumption that every person is driven by greed and self-interest.<sup>19</sup> Quite the opposite: so long as some tiny fraction of the population has that tendency, peace and social stability will quickly fall apart even if everyone else wants to cooperate to secure them.

Only counterforce against the intransigent outsider can secure social peace. If the majority can succeed in squelching the initial threat, the next person will hesitate before he takes the same aggressive posture. The initial victory allows the dominant group to consolidate its position and thus be better positioned to deal with subsequent threats. That victory ends the cycle of surrender and allows the game to come to successful closure.

Or does it? As Hobbes well understood, using force to combat force has all the dangers of playing with fire, for a dominant power can also use its power to suppress its legitimate adversaries and not only to defend its citizens.<sup>20</sup> Still, Hobbes put his faith in the single, dominant sovereign.<sup>21</sup> But as Locke pointed out, that consolidation of power creates a great risk to citizens' lives, safety, and property if their sovereign turns evil.<sup>22</sup> It is a

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<sup>19</sup> See Hobbes, *Leviathan* at 105 (cited in note 15) ("For no man giveth, but with intention of Good to himselfe; because Gift is Voluntary; and of all Voluntary Acts, the Object is to every man his own Good.").

<sup>20</sup> See *id.* at 148 (giving examples of rulers using sovereign authority to execute innocent subjects).

<sup>21</sup> *Id.* at 120:

The only way to erect such a Common Power, as may be able to defend them from . . . the injuries of one another . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will.

<sup>22</sup> For a discussion of the danger of consolidated, absolute power and an implicit critique of Hobbes's sovereign, see John Locke, *Second Treatise of Government* 50 (Hackett 1980) (C.B. Macpherson, ed) (originally published 1689).



melancholy truth that more people—think Nazi Germany,<sup>23</sup> Stalinist Russia,<sup>24</sup> Pol Pot’s Cambodia,<sup>25</sup> and so on—are killed by governments than by roving bands of bandits.

Yet these unfortunate historical events do not justify giving up the effort to form a viable state. To be sure, anarchy has its dogged defenders,<sup>26</sup> and the Hayekian principle of “spontaneous order” has gained more intellectual traction in political theory and commercial relations than it deserves.<sup>27</sup> Perhaps some small communities engage in self-organization that tends to prove stable over time. But these claims are sharply bounded by two considerations. First, community arrangements invariably take hold within a larger state: the gold miners who developed a system of property rights were backstopped by state power in most of their relations with other individuals.<sup>28</sup> Second, informal norms have to be backed by force against interlopers and outsiders who challenge those basic norms. Hence this fundamental dilemma. Develop no controlling power and private violence flourishes, which will usually impede human cooperation, even if it does not snuff it out altogether.<sup>29</sup>

Yet the alternative is worse. If good people in society choose, by hypothesis, to do nothing to quell violence, their passivity will

<sup>23</sup> See R.J. Rummel, *Democide: Nazi Genocide and Mass Murder* 11 (Transaction 1992).

<sup>24</sup> See Palash Ghosh, *How Many People Did Joseph Stalin Kill?* (International Business Times, Mar 5, 2013), archived at <http://perma.cc/GE6P-X9YT> (citing historians on this issue).

<sup>25</sup> See Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79* 48 (Yale 2d ed 2002).

<sup>26</sup> See, for example, Peter T. Leeson, *Anarchy Unbound: Why Self-Governance Works Better Than You Think* 1–4 (Cambridge 2014); Michael Huemer, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* 334–38 (Palgrave Macmillan 2013).

<sup>27</sup> For one late expression of the ideal of “spontaneous order,” see F.A. Hayek, *Play, the School of Rules*, in W.W. Bartley III, ed, 1 *The Collected Works of Friedrich August Hayek: The Fatal Conceit; The Errors of Socialism* 154, 154 (Routledge 1988) (“A game is indeed a clear instance of a process wherein obedience to common rules by elements pursuing different and even conflicting purposes results in overall order.”). For an application of this ideal to international politics, see Edwin van de Haar, *Hayekian Spontaneous Order and the International Balance of Power*, 16 *Indep Rev* 101, 105–09 (2011).

<sup>28</sup> See John Umbeck, *Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights*, 19 *Econ Inquiry* 38, 41 (1981) (suggesting that economic theory necessarily assumes away anarchy because it assumes that each individual has the legal right to some resource).

<sup>29</sup> For exhaustive documentation of the endemic violence internally among the gold rush miners, Maine lobster fishermen, and cattle ranchers, see Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 *U Ill L Rev* 59, 69–81 (critiquing economists’ assumption that informal private ordering avoids anarchy and private violence).

clear the way for competing militias to occupy center stage, catching many innocent people in the cross fire. In the resulting confusion, one frightening possibility is that one aggressive group, perhaps held together by family or religious ties, could become strong enough to become a state by wresting away territorial control from everyone else.<sup>30</sup> That state would embody the Hobbesian nightmare, because it would owe nothing to most of the people who lived under its rule.<sup>31</sup> In practice, the no-state option is in fact a delusion. The only real question is who runs the state: relatively virtuous members of the polity, or rogues and despots. But it is precisely because most human beings are not Hobbesian monsters that all people are not *necessarily* condemned to live under tyranny and deprivation. There are more people who hate violence than those who want to practice it.<sup>32</sup> It is they who must organize. In a democracy, median voters more or less call the tune, so long as they remain in control.<sup>33</sup> But the tendency for disruption is always present. W.B. Yeats said it all too well: “The best lack all conviction, while the worst / Are full of passionate intensity.”<sup>34</sup> Think of the United States versus Iran.<sup>35</sup> Unfortunately, social contract theory does not offer any unique prescriptions on either of the two major challenges for any government—namely, what the government’s basic structure is and what basic rights (if any) this structure wishes to secure.

This combination of persuasion, inducements, and force can work well. It was the model for the 1978 Camp David Accords,<sup>36</sup>

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<sup>30</sup> See Kareem Shaheen, *Isis ‘Controls 50% of Syria’ after Seizing Historic City of Palmyra* (The Guardian, May 21, 2015), archived at <http://perma.cc/J9AY-UVES>.

<sup>31</sup> See Tim Allen, *Violence and Moral Knowledge: Observing Social Trauma in Sudan and Uganda*, 13 *Camb J Anthro* 45, 47 (special issue 1988).

<sup>32</sup> See David P. Barash, *Is There a War Instinct?* (Aeon, Sept 19, 2013), archived at <http://perma.cc/V7M8-4LTR> (“[E]ven as warfare is new to the human experience and therefore liable to be culturally induced . . . behavioural systems of restraint are old, shared by numerous animal species, and therefore likely to be deep-seated in our nature.”).

<sup>33</sup> See Michael B. Gibilisco, John N. Mordeson, and Terry D. Clark, *Fuzzy Black’s Median Voter Theorem: Examining the Structure of Fuzzy Rules and Strict Preference*, 8 *New Math & Nat Computation* 195, 195–96 (2012). See also generally Duncan Black, *On the Rationale of Group Decision-Making*, 56 *J Polit Econ* 23 (1948).

<sup>34</sup> W.B. Yeats, *The Second Coming* (1921), in W.B. Yeats, *Later Poems* 346, 346 (Macmillan 1922).

<sup>35</sup> See Evan Moore, *A Deal Based on Trust, Not Verification* (US News & World Report, July 17, 2015), archived at <http://perma.cc/64EZ-MB9N> (suggesting that the Obama administration’s “stunning concessions” in nuclear negotiations will instigate Iran’s defiance of nonproliferation standards).

<sup>36</sup> See generally *A Framework for Peace in the Middle East Agreed at Camp David*, 17 *ILM* 1466 (1978); *Framework for the Conclusion of a Peace Treaty between Egypt and Israel*, 17 *ILM* 1470 (1978).

which brought peace between Israel and Egypt and ended the era of major Arab-Israeli wars.<sup>37</sup> It is also critical to see what happens when that strategy is not followed. The 2003 invasion of Iraq triggered a global debate over the legality of preventive war.<sup>38</sup> The ensuing occupation floundered due to the administration's failure to properly execute the postinvasion plan that had actually been approved by President George W. Bush. The de-Baathification and disbanding of the Iraqi Army were symptoms of this failure.<sup>39</sup> The 2007 surge then vanquished the insurgency and brought a fragile peace to that long-suffering country through a consistent policy that involved the heavy use of force combined with two persuasive devices that were intended to win the support of the local citizenry. The first was the public promise of long-term commitment.<sup>40</sup> The second involved particular inducements, continuously supplied, to persuade Iraq's political factions to cooperate with each other.<sup>41</sup>

Yet the policy was consciously repudiated when President Barack Obama took office in 2009.<sup>42</sup> With the shift in administration, the conscious end of Pax Americana has led to endless suffering and extended conflicts that show no sign of abating.<sup>43</sup> The breakdown in Iraq is well-nigh complete: Tikrit and Mosul are in ISIS hands.<sup>44</sup> Ramadi fell, only to be recaptured after it had been reduced to ruins.<sup>45</sup> Baghdad remains within easy reach of ISIS.<sup>46</sup> While the United States remained in Iraq, Prime Minister Nouri al-Maliki, a Shiite, pursued a program of cautious

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<sup>37</sup> See Office of the Historian, *Camp David Accords and the Arab-Israeli Peace Process* (Department of State, Oct 31, 2013), archived at <http://perma.cc/X5M5-4RYB>.

<sup>38</sup> Compare, for example, William C. Bradford, "*The Duty to Defend Them*": A *Natural Law Justification for the Bush Doctrine of Preventive War*, 79 *Notre Dame L Rev* 1365, 1372 (2004), with Neta C. Crawford, *The Slippery Slope to Preventive War*, 17 *Ethics & Intl Aff* 30, 31 (2003).

<sup>39</sup> See generally James P. Pfiffner, *US Blunders in Iraq: De-Baathification and Disbanding the Army*, 25 *Intell & Natl Sec* 76 (2010).

<sup>40</sup> See Peter R. Mansoor, *Surge: My Journey with General David Petraeus and the Remaking of the Iraq War* 268 (Yale 2013).

<sup>41</sup> See *id.*

<sup>42</sup> See Danielle Pletka, *What Obama Has Wrought in Iraq* (US News & World Report, June 13, 2014), archived at <http://perma.cc/96KD-HC44>.

<sup>43</sup> For one of the many accounts of the power void, see *id.*

<sup>44</sup> See *id.*

<sup>45</sup> Zach Noble, *'Ramadi Has Fallen': Islamic State Just Captured a Critical Iraqi City, Officials Say* (The Blaze, May 17, 2015), archived at <http://perma.cc/97U6-5DMF>. See also Kareem Shaheen, *Iraq Celebrates Recapture of Ramadi but Victory Comes at a Cost* (The Guardian, Dec 29, 2015), archived at <http://perma.cc/2PBK-TQ4F>.

<sup>46</sup> See Kevin Carroll, *How to Prevent the Fall of Baghdad* (Wall St J, May 26, 2015), archived at <http://perma.cc/E5L8-BDJK>.

accommodation with the Sunnis and worked within limits to maintain the operation of shared power within a broadly democratic framework.<sup>47</sup> The task of reconciliation is far from complete. There is little doubt that the United States did badly in the immediate aftermath of the invasion under the leadership of Paul Bremer, but after the 2007 surge it gained ground with forceful coordinated actions.<sup>48</sup> Matters were moving in a positive direction when Obama took office in 2009 and it became clear that the long-term commitment to Iraq was beginning to erode.<sup>49</sup> The situation came to a head when Obama withdrew all American forces at the end of 2011, ignoring the advice of commanders and the private pleas of senior Iraqi leaders.<sup>50</sup>

Consider this chain of events. On December 14, 2011, Obama announced the departure of US troops from Iraq, with the promise that he would leave behind “a sovereign, stable and self reliant Iraq with a representative government that was elected by its people.”<sup>51</sup> On December 18, 2011, the United States withdrew its last ground forces from Iraq.<sup>52</sup> On December 19, 2011, al-Maliki, who had ruled uneasily for ten years, had an arrest warrant issued for Iraq’s Sunni Vice President Tariq al-Hashimi on charges of supporting terrorism.<sup>53</sup> Why that result? With the middleman gone, al-Maliki’s calculations were easy. If there was a barely tenuous coexistence when the United States was present in force, there could be no deal once the United States left. So he struck first, because he could be toppled.

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<sup>47</sup> See Reidar Visser, *Iraq’s New Government and the Question of Sunni Inclusion* (Combating Terrorism Center, Sept 29, 2014), archived at <http://perma.cc/62N3-CT86>.

<sup>48</sup> See Pfiffner, 25 *Intell & Natl Sec* at 76–79 (cited in note 39); Mansoor, *Surge* at 268 (cited in note 40).

<sup>49</sup> See Sheryl Gay Stolberg and Helene Cooper, *Obama Adds Troops, but Maps Exit Plan* (NY Times, Dec 1, 2009), archived at <http://perma.cc/JZX8-W7Y6>. But see Zeke J. Miller, *Obama Says U.S. Will Bomb ISIS in Syria, Train Rebels* (Time, Sept 10, 2014), archived at <http://perma.cc/HFW4-7BKP>.

<sup>50</sup> See Mario Loyola, *My Iraqi Friend and the Obama Betrayal* (Wall St J, May 29, 2015), archived at <http://perma.cc/8TZY-Q2LZ>; Filkins, *What We Left Behind* (cited in note 12).

<sup>51</sup> Chris McGreal, *Barack Obama Declares Iraq War a Success* (The Guardian, Dec 14, 2011), archived at <http://perma.cc/9XX6-673G>.

<sup>52</sup> Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War* (Reuters, Dec 18, 2011), archived at <http://perma.cc/H85B-B3CF>.

<sup>53</sup> Jack Healy, *Arrest Order for Sunni Leader in Iraq Opens New Rift* (NY Times, Dec 19, 2011), archived at <http://perma.cc/B7E4-TWU6>.

## II. THE IMPORTANCE OF INTERNATIONAL LAW AND THE LIMITATIONS OF THE UNITED NATIONS

Prior to the adoption of the UN Charter, the principal means of enforcing a sovereign state's rights (including the right of self-defense) was self-help.<sup>54</sup> The Charter eliminated that option through the virtually blanket prohibition of Article 2(4), without creating any credible enforcement mechanism to take its place—thus leaving individual states free to use force only in self-defense (and even then only “if an armed attack occurs”).<sup>55</sup> As typically construed, the Charter also allows for the use of force if an attack is imminent, an instructive example of notable agreement that a treaty cannot possibly mean what it actually says.<sup>56</sup> But many mortal threats require preventive self-defense long before an attack is imminent. It is all too easy to remember cases in which democracies have failed to react quickly enough to looming danger; indeed, that was the principal lesson of the events that led to World War II.<sup>57</sup> As Prime Minister Winston Churchill put it in his “Iron Curtain” speech of 1946, “There never was a war in all history easier to prevent by timely action than the one which has just desolated such great areas of the globe.”<sup>58</sup> By contrast, America fared far better at the start of the Cold War by defining a strategic defensive perimeter in Europe and along the Pacific Rim and by developing a strategy of containing the Soviet Union outside that perimeter.<sup>59</sup>

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<sup>54</sup> See W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale J Intl L 279, 279 (1985).

<sup>55</sup> UN Charter Art 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

<sup>56</sup> See Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 Wash Q 89, 91–93 (Spring 2003) (contrasting “restrictionist” commentators who interpret Article 51 as authorizing self-defense only in instances in which an armed attack has actually occurred with “counter-restrictionists” who interpret Article 51 as permitting anticipatory self-defense).

<sup>57</sup> See Michael Jabara Carley, *1939: The Alliance That Never Was and the Coming of World War II* 4 (Dec 1999).

<sup>58</sup> Winston S. Churchill, *The Sineus of Peace*, in Randolph S. Churchill, ed, *The Sineus of Peace: Post-war Speeches* 93, 104 (Houghton Mifflin 1949).

<sup>59</sup> See Brands, *What Good Is Grand Strategy?* at 17–58 (cited in note 1).

The Truman Doctrine,<sup>60</sup> the treaties of alliance with NATO and key Pacific Rim countries,<sup>61</sup> and the strategy of containment<sup>62</sup> were the pillars of US strategy in the Cold War. The Soviet veto at the UN Security Council meant that the UN could not serve as a credible vehicle for containing Soviet ambitions, which enhanced the importance of NATO and the Pacific Rim alliances.<sup>63</sup> These developments were virtually universally accepted throughout the free world and quickly became deeply institutionalized both within America's domestic constitutional order and internationally.<sup>64</sup> But at key points, the grand strategy was in potential conflict with the law of the UN Charter.<sup>65</sup> As a result, the United States and its major allies have paid lip service to the rules of the Charter, but their actual foreign policy has deviated widely from the Charter's rules.

In this context, consider the US actions in the Cuban quarantine<sup>66</sup> and Israel's attacks on nuclear reactors in Iraq in 1981<sup>67</sup> and Syria in 2007.<sup>68</sup> All of these actions were technically illegal under the Charter, but the international community widely accepted

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<sup>60</sup> See id at 21–24 (discussing the gradual development of Truman-era grand strategy during the early years of the Cold War).

<sup>61</sup> See, for example, Victor D. Cha, *Powerplay: Origins of the U.S. Alliance System in Asia*, 34 *Intl Sec* 158, 158–59 (2010).

<sup>62</sup> See Hugh Ross, ed, *The Cold War: Containment and Its Critics* 2–19 (Rand McNally 1963).

<sup>63</sup> See North Atlantic Treaty, TIAS No 1964, 34 UNTS 243 (1949). The key guarantee in Article 5 of the Treaty begins: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” Id at 246. Article 5 then calls for collective action permissible under Article 51 of the UN Charter and agrees to report these matters to the Security Council, with this caveat: “Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.” Id. Note that if the Security Council does nothing, NATO continues to act.

<sup>64</sup> See generally Lawrence S. Kaplan, *A Community of Interests: NATO and the Military Assistance Program, 1948–1951* (Department of Defense 1980).

<sup>65</sup> See, for example, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *Eur J Intl L* 1, 3–4 (1999) (noting that Article 51 of the UN Charter was subject to “gross” misinterpretations during the Cold War).

<sup>66</sup> For background information on the Cuban quarantine, see Office of the Historian, *The Cuban Missile Crisis, October 1962* (Department of State, Oct 31, 2013), archived at <http://perma.cc/WG37-M3SY>.

<sup>67</sup> For further discussion of Israel's 1981 attack on an Iraqi nuclear reactor, see *1981: Israel Bombs Baghdad Nuclear Reactor* (BBC), archived at <http://perma.cc/XWC2-G674>.

<sup>68</sup> For additional information on Israel's 2007 attack on a Syrian nuclear site, see David E. Sanger and Mark Mazzetti, *Israel Struck Syrian Nuclear Project, Analysts Say* (NY Times, Oct 14, 2007), archived at <http://perma.cc/Q5N8-GAM6>.

them either at the time or afterward.<sup>69</sup> Some will say that customary international law, which is based on state practices and international acceptance, has enshrined the right of remote prevention—that is, the prevention of attacks that are not imminent.<sup>70</sup> But that position is hardly universally accepted. Indeed, it is certainly rejected by a majority of scholars and diplomats.<sup>71</sup>

Former Secretary of State Dean Acheson put the matter in the proper light during congressional hearings in the aftermath of the Cuban Missile Crisis:

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. *One would be surprised if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance a principle condemnatory of an action so essential to the continuation of pre-eminent power as that taken by the United States last October.* Such a principle would be as harmful to the development of restraining procedures as it would be futile. No law can destroy the state creating the law.<sup>72</sup>

This inescapably correct insight was contradicted as recently as July 23, 2015, when Secretary of State John Kerry told the US Senate Foreign Relations Committee that US strikes against Iran's nuclear program have no basis under international law so long as other parties continue to observe the Iran nuclear deal.<sup>73</sup> Under this agreement (known as the Joint Comprehensive Plan

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<sup>69</sup> For international acceptance of the Cuban quarantine, see Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 Vand J Transnatl L 643, 653–59 (2007). For a contrasting account showing international acceptance of Israel's actions in 1981 and 2007, see Leonard S. Spector and Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Non-proliferation Regime*, 38 Arms Control Today 15, 16–18 (July/Aug 2008).

<sup>70</sup> See Arend, 26 Wash Q at 90 (cited in note 56).

<sup>71</sup> See, for example, Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 San Diego Intl L J 7, 10–11, 14–15 (2003).

<sup>72</sup> *Remarks by the Honorable Dean Acheson*, 57 Proceedings Am Socy Intl L 13, 14 (1963) (emphasis added).

<sup>73</sup> See *Kaine Questions Secretaries Kerry, Moniz & Lew at Foreign Relations Committee Hearing on Iran Nuclear Deal* (Tim Kaine, July 23, 2015), archived at <http://perma.cc/K78U-3F73>.

of Action), all international economic sanctions against Iran are to be lifted early in exchange for minimal steps on Iran's part, after which the sanctions will be virtually impossible to reinstate if—or, more likely, when—the Iranians are in breach.<sup>74</sup> The nuclear agreement has many flaws, but its most fatal one is the fact that it does not deal with the threat posed by Iran, which inheres not solely in the nuclear program but also in the ideology and the very nature of the regime.

It is not possible to run a nuclear-nonproliferation regime, or a stable world order, on the basis of a principle of “sovereign equality” that deems democratic institutions no better than those of dictatorships or state sponsors of terrorism.<sup>75</sup> This approach necessarily cedes to all nations the ability to obtain nuclear weapons for their own use (whether purely defensive or as an added deterrent to reinforce the projection of hegemonic power). We can see that trend right now, for if Iran is to have the nuclear bomb, then so too will Saudi Arabia, and so on down the line.<sup>76</sup> Any ability to stop nuclear proliferation depends on the strong American guarantee. Indeed, matters go sharply in reverse when the UN becomes the forum for international affairs. Its key disability is that it starts with the fantastically antidemocratic notion of parity among nations, with no standards for membership, in the vain hope of establishing a “Parliament of Man.” That sweeping ambition undermines the UN's more modest, proper role as an aid to diplomacy, as the UN's second secretary general, the great Dag Hammarskjöld, wisely understood.<sup>77</sup>

It remains necessary to devise a doctrine for the establishment and evolution of international law, so that US policy can conform to rules of the road that both discipline the exercise of American power and enshrine the basic elements of an effective

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<sup>74</sup> See Barak Ravid, *Nuclear Restrictions and Inspections in Exchange for Lifting of Sanctions: The Details of the Iran Deal* (Haaretz, July 14, 2015), archived at <http://perma.cc/75SZ-PNMS>. For more-recent developments indicating potential breach, see Jennifer Griffin and Lucas Tomlinson, *Iran Tests Another Mid-range Ballistic Missile in Breach of UN Resolutions* (Fox News, Dec 7, 2015), archived at <http://perma.cc/B4GQ-YQAH>.

<sup>75</sup> Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 Yale L J 207, 207–08 (1944).

<sup>76</sup> See Yaroslav Trofimov, *Saudi Arabia Considers Nuclear Weapons to Offset Iran* (Wall St J, May 7, 2015), archived at <http://perma.cc/R7HL-3UUL>.

<sup>77</sup> See Dag Hammarskjöld, *“The Element of Privacy in Peacemaking”*: Address at Ohio University \*25–26 (UN, Feb 5, 1958), archived at <http://perma.cc/3ULM-3C2A> (“There is an essential difference between the nation and the society of nations, each of which remains individually sovereign. The United Nations General Assembly is patterned on a parliament but with power only to recommend not to legislate.”).



grand strategy, and so that America can have a foreign policy that is both effective and accepted as legitimate. The key lies in the domestic institutions that must devise and maintain our foreign policy.

### III. FOREIGN POLICY DEPENDS ON A CONSTITUTIONAL ORDER

The complex internal-governance structure of the United States is a double-edged sword. On the one hand, the level of internal deliberation that leads to a coherent solution sends a strong signal to the rest of the world that American policy is well formulated. Hence, Senate consent to the North Atlantic Treaty and to the Pacific Rim alliances has left little doubt about America's commitment to those allies.<sup>78</sup> Yet by the same token, strong divisions of opinion within the United States can sap its ability to function well in international arenas, which has surely been the case in recent years, with deep internal divisions over the wisdom of American foreign policy and military initiatives.<sup>79</sup> The challenge of democratic foreign policymaking was foreseen by the Framers, who sought to protect the nation's foreign policy from the vagaries of public opinion while still ensuring the full participation of democratic decisionmaking.<sup>80</sup> No single branch of government alone can devise a sustainable grand strategy. The solution is institutional cooperation and institutionalization of the policy itself.

Achieving global peace is difficult because it is necessary to maneuver both domestic and foreign markets simultaneously. The cardinal point is that, in the field of foreign policy, the practical need for broad bipartisan support for a lasting policy overwhelms any constitutional questions about the distribution of congressional and presidential authority.<sup>81</sup> Simply put, if a nation's foreign policy has an acute separation of powers problem,

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<sup>78</sup> See, for example, George Bunn, *Missile Limitation: By Treaty or Otherwise?*, 70 Colum L Rev 1, 42–47 (1970) (attributing US commitment to the development of NATO in part to strong support and active participation from Congress).

<sup>79</sup> See Douglas Kriner, *Accountability without Deliberation? Separation of Powers in Times of War*, 95 BU L Rev 1275, 1291–95 (2015).

<sup>80</sup> For a discussion on what the Framers had in mind regarding separation of powers between the legislative and executive branches over foreign affairs, see generally H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 Wm & Mary L Rev 1471 (1999).

<sup>81</sup> See James M. McCormick and Eugene R. Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional-Executive Foreign Policy Relations, 1947–1988*, 52 J Polit 1077, 1077–79 (1990).

the policy risks failure. An effective foreign policy must secure lasting domestic and international support to create and sustain long-term national commitments, especially under stress. Foreign policy must be institutionalized and shielded from changes in administration, which in turn requires extensive congressional involvement. Any effective international position requires that the United States be able to make durable commitments to its allies, which includes mounting credible threats against aggressive nations that want to prey on those allies. Such a strategy requires a strong bipartisan commitment that can withstand changes in political control.

Knowing that these commitments have to be durable to be effective means that the United States must think long and hard before deciding to intervene in any arena with either the use or threat of force. But once that force has been committed, it is dangerous business to precipitously withdraw in ways that necessarily create a power vacuum. A different administration may well have chosen to make the initial decision differently. But once the die is cast, any successor administration should keep within the broad contours of the policies of its predecessors. It is of course always necessary to execute midstream corrections, and it may be possible to modify the level or direction of the commitment. But there are limits, for these are the same kinds of gradual changes that have to be made within any single administration. What an administration cannot do, at least successfully, is decide to pull out and leave a void in power, which other players will rush to fill. There is, in a word, no easy or quick exit option once previous commitments have been made—a lesson that the Obama administration did not grasp until the world saw the disastrous consequences of that hasty withdrawal now unfolding across the Middle East and spreading throughout Europe. Indeed, those errors have been compounded by the recent Russian military intervention in Syria, where US foreign policy struggles to make incremental inroads against ISIS dominance and President Bashar al-Assad's intransigence.<sup>82</sup>

The more theoretical question asks how to distribute power under our Constitution to achieve that long-term end. In one sense, the document was not drafted with this problem in mind, because in 1787 it was inconceivable that the United States

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<sup>82</sup> For one possible response, see Max Boot and Michael Pregent, *How Obama Could Salvage His Hapless ISIS Strategy* (Wall St J, Sept 30, 2015), archived at <http://perma.cc/PG3R-EN3F>.

would play a dominant role on the world stage.<sup>83</sup> Nonetheless, we think that the basic distribution of rights under our Constitution has hit on a permanent structure that today should work as well as any other. The basic plan of the Constitution is akin to a corporate model. Congress, as a two-member board of directors, sets general policies regarding funding and regulating the disposition of the armed forces.<sup>84</sup> It has the power to declare war, and to define and punish offenses against the law of nations.<sup>85</sup> Although the point is easy to overlook, of the nineteen enumerated powers in the Constitution, some seven clauses grant specific powers to Congress over military and foreign affairs, and one (the Necessary and Proper Clause) intersects profoundly with the operation of the others.<sup>86</sup> At the same time, much of Article I, §§ 9 and 10 limits the power of the states to engage in foreign affairs—so that, in sharp contrast to the European Union,<sup>87</sup> foreign activities lie exclusively in the purview of the national government.<sup>88</sup>

The second piece of the puzzle is the executive power, which gives the president both the right and the duty to see that the laws are faithfully executed.<sup>89</sup> And therein lies the rub. There is no way that anyone can draft a constitution that works well with a weak executive in power. There is a simple reason why corporations spend so much time and effort on the question of succession of the CEO.<sup>90</sup> From bitter experience, corporate boards have learned that no set of institutional or charter restraints on the CEO can offset his personal weaknesses in the

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<sup>83</sup> See Matthew Spalding, *America's Founders and the Principles of Foreign Policy: Sovereign Independence, National Interests, and the Cause of Liberty in the World* (Heritage Foundation), archived at <http://perma.cc/E6CZ-A75D> ("At the time of its founding, the United States was a weak and fledgling nation . . . extremely vulnerable to the great powers that dominated the world.").

<sup>84</sup> See US Const Art I, § 8. See also Aaron Blake, *Congressman: Members of Congress Are Underpaid* (Wash Post, Apr 4, 2014), archived at <http://perma.cc/6X4R-APPS> (quoting Representative Jim Moran as calling Congress "the board of directors for the largest economic entity in the world").

<sup>85</sup> See US Const Art I, § 8, cls 10–11.

<sup>86</sup> US Const Art I, § 8.

<sup>87</sup> See Kristin Archick, *The European Union: Questions and Answers* \*7 (Congressional Research Service, Sept 4, 2015), archived at <http://perma.cc/6BJM-DC22>.

<sup>88</sup> See US Const Art I, §§ 9–10.

<sup>89</sup> See US Const Art II, § 3.

<sup>90</sup> For the importance of CEO succession, see generally Wei Shen and Albert A. Cannella Jr, *Revisiting the Performance Consequences of CEO Succession: The Impacts of Successor Type, Postsuccession Senior Executive Turnover, and Departing CEO Tenure*, 45 *Academy Mgmt J* 717 (2002).

office or the weaknesses of the people whom he chooses to fill subordinate positions. It is worth noting that the decision to remove former Baathists from virtually all government positions in Iraq was apparently made not at the highest levels by either Congress or the president, or even by Bremer in his capacity as the administrator of the Iraqi Provisional Authority. We have heard inconsistent accounts on whether Meghan O'Sullivan, a deputy national-security adviser for Iraq, was for or against the decision.<sup>91</sup> But that is precisely the point. Once decisions go below the highest level, they are opaque, and allocations of power between the president and Congress are of little operational importance. Whether one approves of de-Baathification is beside the point. The key insight is that vital decisions are frequently made by second-tier officials, often without direct oversight from above.

The need for effective, quick, decisive action on the ground in distant places is not a reason to oppose a constitutional system of divided authority at home. In fact, the separation of powers is critical in the foreign policy arena. It is clear that the Constitution makes a major effort to secure civilian control over the military when it makes the president the commander in chief of the Army and Navy (and even the Air Force), as well as the militia “when called into the actual Service of the United States.”<sup>92</sup> Quite consciously, in calling up the militia the president cannot act unilaterally but must depend on the prior action of Congress—which is yet another check on the president’s power.<sup>93</sup> Note that textually, the president does not have any “commander in chief power”<sup>94</sup> that goes side by side with his pardon power.<sup>95</sup> Instead, this power is subject to the rules and regulations that Congress makes under its Article I powers.<sup>96</sup> As Alexander Hamilton wrote in Federalist 69, the president in his role as commander in chief is “much inferior” to the English king<sup>97</sup> and

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<sup>91</sup> See, for example, L. Paul Bremer III, *My Year in Iraq: The Struggle to Build a Future of Hope* 40–49 (Simon & Schuster 2006); Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* 415–19, 464 (HarperCollins 2008).

<sup>92</sup> US Const Art II, § 2.

<sup>93</sup> See US Const Art I, § 8, cl 15.

<sup>94</sup> Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 Hofstra L Rev 317, 325 (2005).

<sup>95</sup> See *id.* at 327–28.

<sup>96</sup> See *id.* at 320–21.

<sup>97</sup> Federalist 69 (Hamilton), in *The Federalist* 462, 465 (Wesleyan 1961) (Jacob E. Cooke, ed):

most notably does not possess the power to declare war or to act outside the frame of reference set by Congress.<sup>98</sup>

Not only is Congress empowered to give its advice and consent to treaties and to provide for the regulation of the armed forces but also—crucially—Congress is given the power to define “Offences against the Law of Nations.”<sup>99</sup> There is no reason to think that the Framers intended this power to be limited to domestic law; they quite properly saw Congress as a vital source of the country’s definition of international law itself.<sup>100</sup>

The administration of President Bush made a major mistake when it elected to define rules for the treatment of al Qaeda detainees captured in the battlefield and for counterterrorism operations without input from Congress. The Detainee Treatment Act of 2005<sup>101</sup>—made necessary by damaging public controversy and adverse court rulings—did put to rest the separation of powers issue, but it left the procedural rights of the detainees too vague for comfort.<sup>102</sup> The Bush administration should have sought to enshrine its policy in an act of Congress from the very beginning to shield the policy from damaging controversy and to give the policy lasting impact.

One of the most vexatious elements of our constitutional scheme is the operation of the treaty power. The constitutional text is simple enough. Under Article II, § 2, the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>103</sup> That provision removes the House of Representatives from the process and makes it appear that the president does

In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.

It is worth noting that Hamilton also said that “the President is to be Commander in Chief,” which is textually accurate and constitutionally instructive. *Id.*

<sup>98</sup> See Epstein, 34 Hofstra L Rev at 324–25 (cited in note 94).

<sup>99</sup> US Const Art I, § 8, cl 10.

<sup>100</sup> See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses against the Law of Nations”*, 42 Wm & Mary L Rev 447, 465–74 (2000).

<sup>101</sup> Pub L No 109-148, 119 Stat 2739, codified as amended at 42 USC § 2000dd et seq.

<sup>102</sup> See Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 Harv Hum Rts J 257, 260–65 (2006).

<sup>103</sup> US Const Art II, § 2.

not have unilateral power to enter into any treaty. By modern sensibilities about political theory, the exclusion of only the House, and not the Senate, seems archaic.<sup>104</sup> In 1787, the indirect election of the Senate by the state legislatures may have created the image that its sober judgment as the upper house was most needed for international affairs. But now, with the direct election of the Senate,<sup>105</sup> the sociological pedigree of the two houses is much closer.

The Iran nuclear deal raises serious concerns about the president's ability to improperly skirt the Senate's ratification role in the treaty process.<sup>106</sup> In the Iran negotiation, the president claimed that the resulting pact was an executive agreement, which did not constitute a treaty and hence could be entered into unilaterally by the president.<sup>107</sup> Opponents argue that no transaction this momentous should be done unilaterally by the president, and they note by way of example that, unlike the Iran nuclear deal, the Iraq War had the support of both Congress and the American people when it was launched.<sup>108</sup> The dispute has generated furious disagreement, but where does it leave us?

Against the common historical use of executive agreements,<sup>109</sup> there is no reason as a matter of constitutional practice why the Iran nuclear deal needed to be presented to the Senate as a treaty because, as far the public documents reveal, it does not require any changes in domestic law.<sup>110</sup> The president had all the waiver authority he needed under current sanctions to conclude the deal as an executive agreement, and with respect to the UN sanctions, there is no way for Congress to constrain the

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<sup>104</sup> See Myres S. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 Yale L J 181, 186–89 (1945).

<sup>105</sup> US Const Amend XVII.

<sup>106</sup> See *Joint Comprehensive Plan of Action on Iran's Nuclear Program* (Council on Foreign Relations, July 14, 2015), archived at <http://perma.cc/JP2X-FH2E>.

<sup>107</sup> See Stephen Collinson, *Iran Deal: A Treaty or Not a Treaty, That Is the Question* (CNN, Mar 12, 2015), archived at <http://perma.cc/H99G-AVMJ>.

<sup>108</sup> See Dan Collins, *Congress Says Yes to Iraq Resolution* (CBS News, Oct 3, 2002), archived at <http://perma.cc/HBU5-DR6F>.

<sup>109</sup> See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal L Rev 671, 722–61 (1998).

<sup>110</sup> See John Yoo, *Why Obama's Executive Action on Iran Does Not Violate the Law* (National Review, July 26, 2015), archived at <http://perma.cc/B6SM-LP5F> (“Obama-administration officials argue that the agreement need not take the treaty form because it is not legally binding under international law. . . . Under this approach, though, the president who occupies the Oval Office in January 2017 can undo the deal with little delay.”).

president's vote in the Security Council. On the other hand, by not presenting the agreement as a treaty, the president has ensured that it will not be enshrined as a lasting policy. The fact that the Iran nuclear deal is not binding for purposes of domestic law is therefore a double-edged sword. Therein lies the failure of not negotiating with Iran an agreement that could be ratified by a two-thirds vote of the Senate. In the most charitable view, it is a huge missed opportunity, because foreign policy is most successful when it is instituted on a bipartisan basis.<sup>111</sup> The reverse of that coin is that imposing any agreement of this importance on an unwilling people without the support of Congress is both doomed to fail and destined to prove damaging to vital US interests.

Compare the ratification of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water<sup>112</sup> ("Limited Nuclear Test Ban Treaty") with the negotiations for the Iran nuclear deal. The former, a treaty with the Soviet Union and Great Britain, was signed on August 5, 1963, and thereafter ratified in the Senate on September 23, 1963, by a vote of 80–19 before President John F. Kennedy signed the treaty, as ratified on October 7, 1963.<sup>113</sup> The Limited Nuclear Test Ban Treaty has now lasted over fifty years.<sup>114</sup> The Iran negotiations have not followed that straightforward path. The Iran nuclear deal, with its multiple exit options, trap doors, and time triggers for all parties, is unlikely to prove as enduring, especially given the lack of buy-in from Congress. Unfortunately, the fact that it is not legally binding does not detract from its character as a *fait accompli*. It is far from clear how a future president's decision to abrogate or modify the current agreement would affect either actions that have already been taken under it or our relations with other nations. The Iran nuclear deal appears to have been negotiated in such a way as to maximize the

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<sup>111</sup> For a general discussion of the effect of the Iran nuclear deal, see Bryan R. Gibson, *For All Parties Involved, the Iran Nuclear Deal Is a Big Win* (London School of Economics, July 14, 2015), archived at <http://perma.cc/P7T2-M5R8>; Marguerite Ward, *Iran Deal Could Spark Arms Race—or Boost Trade* (CNBC, July 10, 2015), archived at <http://perma.cc/Y7CK-TPA9>.

<sup>112</sup> TIAS No 5433, 480 UNTS 43 (1963).

<sup>113</sup> See *Nuclear Test Ban Treaty* (John F. Kennedy Presidential Library and Museum), archived at <http://perma.cc/58BT-MUM3>.

<sup>114</sup> *Id.*

benefit to Iran and the harm to the United States that would flow from a congressional disapproval.<sup>115</sup>

With respect to the president's inherent power to use force as commander in chief, the War Powers Resolution,<sup>116</sup> adopted over the veto of President Richard Nixon, demonstrates the difficulty of setting out a unified program. The War Powers Resolution sets out a series of timetables: The president must notify Congress within forty-eight hours after initiating the commitment of US military forces to battle.<sup>117</sup> There is an ostensible sixty-day period in which force may be maintained, followed by a thirty-day withdrawal period.<sup>118</sup> Presidents have generally complied with the Resolution's provisions, even while affirming its unconstitutionality.<sup>119</sup> It is likely that President Bill Clinton skirted these provisions in initiating his bombing campaign in Kosovo in 1999.<sup>120</sup> President Obama, reversing earlier practice, insisted on the constitutionality of the War Powers Resolution<sup>121</sup> and then explicitly ignored its requirements when he committed American airpower in Libya—a disastrous intervention that once again shows the dangers of half measures that are undertaken abroad without a strong domestic consensus behind the strategy.<sup>122</sup> The unfortunate impasse over the War Powers Resolution is that its uncertain constitutional and political statuses exacerbate rather than salve the separation of powers problems of American foreign policy.

The dangers from the Nixon era have carried over recently, as the United States continues to dither in response to the threat that ISIS poses in the Middle East. The weakness of the American response shows as a simple matter of international relations the massive risk of a policy that allows for the use of air

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<sup>115</sup> For a discussion of the concessions made by the United States during the negotiation stage, see James Phillips, *No Deal Still Better Than a Bad Deal on Iran Nukes* (The Daily Signal, June 29, 2015), archived at <http://perma.cc/6ZDK-AWN8>.

<sup>116</sup> Pub L No 93-148, 87 Stat 555 (1973), codified as amended at 50 USC § 1541 et seq.

<sup>117</sup> 50 USC § 1543(a).

<sup>118</sup> 50 USC § 1544(b).

<sup>119</sup> See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 Va L Rev 101, 104 (1984).

<sup>120</sup> See Andrew D. LeMar, *War Powers: What Are They Good For?: Congressional Disapproval of the President's Military Actions and the Merits of a Congressional Suit against the President*, 78 Ind L J 1045, 1052–53 (2003).

<sup>121</sup> See Conor Friedersdorf, *3 Ways Obama Expanded War Powers Well beyond George W. Bush* (Defense One, Nov 7, 2014), archived at <http://perma.cc/P4HX-E7WC>.

<sup>122</sup> See Charlie Savage and Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation* (NY Times, June 15, 2011), archived at <http://perma.cc/2V5G-ZTRZ>.



forces, but not ground forces, in combat. The airpower is significant enough to have political implications, but it is not able to decisively reshape the strategic reality on the ground. Airpower alone can be effective in a coercive diplomacy mode, as Clinton demonstrated when the 1999 Kosovo action ended in the Dayton Peace Accords.<sup>123</sup> But the Obama administration is obviously not trying to bring ISIS to the negotiating table and, in any case, the administration does not appear to believe in coercive diplomacy to start with, as demonstrated by its supine acceptance of virtually all of Iran's opening negotiation positions in the Iran nuclear deal.<sup>124</sup>

Obama's half measures show the failure to apprehend the dangers of weak military leadership and confused grand strategy. Of course, he has plenty of support. For example, Professor Harold Koh, Obama's former State Department legal adviser, has written in support of a resolution that would both (1) "authorize the president to use such force against ISIL . . . as is necessary and appropriate to achieve agreed-upon, defined strategic objectives" for at most two years, geographically limited to Iraq and Syria and operationally limited to no US ground forces; and (2) narrow or repeal the 2001 al Qaeda and 2002 Iraq Authorizations for Use of Military Force<sup>125</sup> before leaving office if the al Qaeda conflict recedes.<sup>126</sup> Koh supported this view by virtue of the fact that it will place the US military intervention on firmer legal ground while simultaneously allowing the United States to take the nation off its war footing.<sup>127</sup> And indeed, the president did not seek explicit authorization to root out ISIS from the Middle East.<sup>128</sup> Unfortunately, this approach to the use of force is dead wrong. Most likely, the practical effect and intended purpose of the Resolution were not to authorize force but to deauthorize it and bequeath the deauthorization to the next president. That proposal is designed not to put possible military

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<sup>123</sup> For the successes and problems of the coercive use of air force in the Kosovo action, see generally Scott A. Cooper, *Air Power and the Coercive Use of Force*, 24 Wash Q 81 (Autumn 2001).

<sup>124</sup> See Phillips, *No Deal Still Better Than a Bad Deal* (cited in note 115).

<sup>125</sup> See generally Authorization for Use of Military Force, Pub L No 107-140, 115 Stat 224 (2001); Authorization for Use of Military Force against Iraq Resolution of 2002, Pub L No 107-243, 116 Stat 1498 (2002).

<sup>126</sup> Harold Hongju Koh, *The Lawful Way to Fight the Islamic State* (Politico Magazine, Aug 29, 2014), archived at <http://perma.cc/3LHG-RQJK>.

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

<sup>128</sup> See Russell Berman, *The War against ISIS Will Go Undeclared* (The Atlantic, Apr 15, 2015), archived at <http://perma.cc/W8XX-8NAM>.

action against ISIS on firmer footing but rather to complicate the legal issue for future presidents.

There is no reason to precommit a future president to a version of future events that may never occur. No one can say for sure whether the war in Iraq or Syria will spread to Libya, Yemen, or Pakistan, or even to other places as yet unknown. There was no reason to think when the resolution was first proposed that this conflict could be wrapped up within eighteen months. Instead, a resolution to that effect signals weaknesses to our enemies and reduces one serious element of uncertainty in the way in which they wish to formulate their plans. Nor did it make sense, then or now, to bar the use of ground forces. At a minimum, these forces can improve the accuracy of the air war. More than that, they can stiffen through good leadership the Iraqi elements that are involved in the struggle by putting back on the table a set of inducements that might be able to foster cooperation among the Kurds, Shiites, and Sunnis. When the president takes to the air, he tells the American people “what the United States will do with our friends and allies to degrade and ultimately destroy the terrorist group known as ISIL.”<sup>129</sup>

“Ultimately” can take a long time, assuming that the nation does not tire of a half venture that has produced few visible results. Nor is “ultimately” ever likely to occur, so long as the administration does not grasp the essentials of the rotten-kid theorem and instead insists that additional US action depends on Iraqi formation of an inclusive government, which remains a perilous operation.<sup>130</sup> The Iraqi government is, of course, in disarray.<sup>131</sup> For each day that the United States occupies a marginal role, it becomes harder to correct for past errors. It is commonplace to attack American policy in Iraq as a trillion-dollar blunder, and in an odd sense it has turned out that way.<sup>132</sup> But the explanation lies not in that we intervened too much but rather in that, after the military successes of 2003, we did too little to execute the tripartite strategy of persuasion, inducements, and force, which was belatedly put into place only during the

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<sup>129</sup> *Statement by the President on ISIL* (The White House, Sept 10, 2014), archived at <http://perma.cc/F9GV-XMA8>.

<sup>130</sup> See Josh Rogin, *U.S. Helped Push Iraq's Politics to a Breaking Point, and Now Is Pushing Maliki Out* (The Daily Beast, Aug 11, 2014), archived at <http://perma.cc/R5EQ-QTEY>.

<sup>131</sup> See *id.*

<sup>132</sup> See Sarwar Kashmeri, *Iraq—a Trillion Dollars Worth of Nothing* (Huffington Post, Dec 22, 2011), archived at <http://perma.cc/2HV4-TWM2>.

surge. The losses that followed were more attributable to a weak intervention than to a strong one.

#### CONCLUSION

So as the issue now stands, what can be done? Whether the issue deals with either Iraq or Iran, we do not think that there is any institutional fix that can handle the question so long as the president—and, to some extent, Congress—is committed to a policy that downplays the critical leadership role of American foreign policies, even in the face of the increasing instability in the Middle East and elsewhere. But in the large scheme of things, we think that two points do become clear.

First, the difficulties that we face as a nation are not in large measure attributable to our constitutional structure, which sets an appropriate framework for dealing with matters of war and peace. The system of separation of powers can produce better deliberations and focused action that can then legitimate American leadership in the rest of the world. Note that, in making this claim, we use the word “appropriate” and not some stronger term like “effective” or “definitive”—owing to the complexity of the situation, this stronger objective is simply unattainable when set out in general terms. James Madison famously said in Federalist 10 that “[e]nlightened statesmen will not always be at the helm,” so the Constitution must be drafted in a way to cope with the dangers that factionalism poses to the nation.<sup>133</sup> But it is critical to note the problems to which that remark was addressed: debtor relief, restrictions on foreign manufacturers, and the apportionment of taxes—all of which are matters on which some structural constraints are workable.<sup>134</sup> Think of Article I, § 8, which limits the power to tax to matters that concern the debt, the common defense, or the general welfare of the United States,<sup>135</sup> and understand that the last clause is *not* an open invitation to tax for whatever purpose Congress may desire.<sup>136</sup> Think also of Article I, § 10, which states that no state shall make any law “impairing the Obligation of Contracts.”<sup>137</sup>

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<sup>133</sup> Federalist 10 (Madison), in *The Federalist* 56, 60 (cited in note 97).

<sup>134</sup> *Id.* at 59–60.

<sup>135</sup> US Const Art I, § 8, cl 1.

<sup>136</sup> See Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 194–98 (Harvard 2014).

<sup>137</sup> US Const Art I, § 10.

Second, interpretive fixes of this sort are regrettably unavailable for foreign policy matters when the sound exercise of both congressional and presidential power is critical above and beyond the constitutional text. We see no way in which the United States' foreign policy endeavors can be successful—even if we have an ideal constitutional structure—unless we also have leaders in both branches of government, as well as many members of the public at large, who understand the basic commitments necessary to allow the United States to succeed. Our power in large measure is the response to the soundness of our permanent government structures. In a hostile and ugly world, moral relativism that dwells on America's past sins will not set the right tone for public debate. It will not do for President Obama to invoke the sins of Christian crusaders when asked about the ISIS atrocities.<sup>138</sup> Unless we still believe in American exceptionalism and Pax Americana, we cannot make the kinds of durable commitments that will allow decent people to put their trust in us and others to fear the consequences of our wrath.

To be sure, statements of this sort bespeak (especially in light of the dismal performance of recent years) a certain level of arrogance. But what is the alternative? The wholesale slaughter of innocent people caught in the cross fire between roving bands of, or subject to the thumbs of, ugly tyrants. No, we cannot be the universal policemen for the world, but neither can we abdicate our responsibilities because, frankly, there is no one else out there who can take our place.

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<sup>138</sup> See Evan Simon, *Historians Weigh In on Obama's Comparison of ISIS Militants to Medieval Christian Crusaders* (ABC News, Feb 6, 2015), archived at <http://perma.cc/HN5B-L4P8> (quoting Obama as stating: "Lest we get on our high horse and think this is unique to some other place, remember that during the Crusades and the Inquisition, people committed terrible deeds in the name of Christ").