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War Powers far from a Hot Battlefield: Checks and Balances on Presidential War-Making through Individual and Unit Self-Defense

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Abstract

While soldiers, marines, and their surrounding units have long been assumed to have a right to defend themselves, reliance on this right to individual and unit self-defense has expanded significantly since 2001. It has been applied to uses of force across a range of conflict situations, from being regularly used to counter ambiguous and asymmetric threats in Iraq and Afghanistan, to justifying drone strikes and low-footprint special forces engagements far from a "hot battlefield." In the latter situations, though, the legal remit to use force is more controversial, and use of individual and unit self-defense to justify significant strikes or engagement in hostilities have raised legal questions. This article will explore the domestic and international legal bases for these extended self-defense strikes and operations. Expansive use of individual and unit self-defense could easily be justified under the very flexible and broad theories of executive war powers and sovereign self-defense that U.S. administrations have promulgated since September 11. However, the relationship is reciprocal—a more expansive individual and unit self-defense practice could enable unilateral presidential war-making to be stretched to new situations and could further lower the gravity threshold for so-called Article 51 strikes. In both cases, this would undermine legal and process limitations on resort to force.

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I. Introduction

On March 5, 2016, U.S. drones and fighter jets struck a training camp of Al-Shabab fighters in Somalia, killing an estimated 150 alleged combatants.[1] In response to questioning from Charlie Savage at the *New York Times*, the Pentagon spokesman noted that the attacked combatants were not considered to be "affiliated forces" under the Authorization for Use of Military Force ("AUMF"), the post-September 11 congressional authority to engage in war against those responsible for the September 11 attacks and affiliated forces.[2] Instead, the March 2016 strike, along with three previous strikes in Somalia, in June, July, and November of 2015, were taken "in the tactical defense of U.S. and partner ground force units," the African Union forces fighting under the African Union Mission to Somalia (AMISOM).[3]

Later reporting suggested that the strike was part of a larger trend, in which the self-defense of special forces and their partnered forces became the rationale for a more expanded significant strikes and operations outside of declared armed conflicts, and where the domestic and international legal authority to engage in hostilities was controversial.[4] As the *New York Times* wrote in 2016, "[o]ver the past year, the military has routinely invoked a built-in exception to those rules for airstrikes taken in 'self-defense,' which can include strikes to help foreign partners even when Americans are not at direct risk."[5] Two U.S. strikes in Syria in June 2017 against an Iranian armed drone and a Syrian fighter jet were also justified as the tactical defense of partnered forces combatting the Islamic State of Iraq and the Levant (ISIL) on the ground.[6]

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[1] Helene Cooper, *U.S. Strikes in Somalia Kill 150 Shabab Fighters*, N.Y. TIMES (Mar. 7, 2016), https://www.nytimes.com/2016/03/08/world/africa/us-airstrikes-somalia.html?_r=0 [https://perma.cc/5LFZ-3AYP].

[2] *See* Charlie Savage, *Is the U.S. Now at War with the Shabab? Not Exactly*, N.Y. TIMES (Mar. 14, 2016), https://nyti.ms/2nUiKTl [https://perma.cc/K3CR-XL8W] [hereinafter Savage, *Is the U.S. Now at War with the Shabab?*]; Question to the Pentagon from Charlie Savage, New York Times reporter (Mar. 14, 2016), https://www.documentcloud.org/documents/2757459-Shabab-DOD-Statement.html [https://perma.cc/NRU6-NP2Y] (providing the original question and response from the Pentagon to the New York Times reporter for its March 14, 2016, story) [hereinafter Question to the Pentagon].

[3] Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2.

[4] Mark Mazzetti, Jeffrey Gettleman & Eric Schmitt, *In Somalia, U.S. Escalates a Shadow War*, N.Y. TIMES (Oct. 16, 2016), https://nyti.ms/2e8EO7W [https://perma.cc/S9M2-8NY8].

[5] Charlie Savage, Eric Schmitt & Mark Mazzetti, *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), https://nyti.ms/2k9Mw3a [https://perma.cc/7V8X-QWTP] [hereinafter *Obama Expands War*].

[6] Julian Borger, *U.S. Shoots Down Second Iran-made Armed Drone over Syria in 12 Days*, GUARDIAN (June 20, 2017), https://www.theguardian.com/us-news/2017/jun/20/us-iran-drone-shot-down-syria [https://perma.cc/4V9T-E59H]; Steve Holland, Phil Stewart & Andrew Osborn, *White House Says it Retains Right to Self-Defense in Syria; Moscow Warns Washington*, REUTERS (June 19, 2017), https://www.reuters.com/article/us-mideast-crisis-syria/white-house-says-it-retains-right-to-self-defense-in-syria-moscow-warns-washington-idUSKBN19A21A

These strikes were legally controversial because while the AUMF was the basis for deploying the forces to Syria, Somalia, and other global locales where such strikes or operations took place, the targets of these self-defense responses were not always clearly the Al-Qaeda members and affiliates that the AUMF was presumed to cover.[7] This article considers an alternate hypothesis: that troops authorized to be deployed in Syria or other locations under the AUMF or other domestic authorities could then engage in uses of force beyond the remit of that authorization, where they deemed it necessary in defense of themselves, their units, or partnered forces, by relying on their right to self-defense.

The right of individuals and, separately, of nations to act in self-defense is widely recognized in both domestic and international law.[8] Soldiers or marines and their surrounding units also have the right to defend themselves, which will be referred to as individual or unit self-defense. However, as Part II will discuss, the legal basis and limits have not been well established and despite widespread practice by states, there remains much ambiguity in the scope of this doctrine and its relationship to these other self-defense doctrines, and to other domestic and international legal frameworks.

[https://perma.cc/HMB6-TQ2Q] [hereinafter Holland, *White House Says*]. For further discussion and analysis of these strikes, see *infra* Part II.C.

[7] *See* WHITE HOUSE (OBAMA ADMINISTRATION), REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, FRAMEWORK REPORT (2016), at 15–16, https://www.documentcloud.org/documents/3232529-Framework-Report-Final.html#document/p1 [https://perma.cc/X5WT-PLAC] [hereinafter Obama Framework Report]; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, *available at* Matthew Kahn, *Document: White House Legal and Policy Frameworks for Use of Military Force* 3, 6, LAWFARE (Mar. 14, 2018), https://lawfareblog.com/document-white-house-legal-and-policy-frameworks-use-military-force [https://perma.cc/SV2L-955Y] [hereinafter Trump 1264 Report]. For discussion of legal questions raised by these strikes, *see, e.g.*, Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014), https://www.justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/ [https://perma.cc/286C-KFHH] [hereinafter Goodman, *Assessing the Claim*]; *Reviewing Congressional Authorizations on Use of Force*: *Hearing Before the Committee on Foreign Relations*, 115th Cong. 4 (2017) (testimony of John B. Bellinger III), https://www.foreign.senate.gov/imo/media/doc/062017_Bellinger_Testimony.pdf [https://perma.cc/M8NS-F7ZR] [hereinafter Bellinger Testimony]. The U.S. forces' engagement in hostilities with actors other than ISIL (particularly other state forces) is even more contentious. *See, e.g.*, Ryan Goodman, *Congress's 2001 AUMF as Legal Basis for US Shootdown of Syrian Jet*, JUST SECURITY (June 23, 2017), https://www.justsecurity.org/42506/congresss-2001-authorization-military-force-legal-basis-shootdown-syrian-jet/ [https://perma.cc/M6UY-USBV] [hereinafter Goodman, *Congress's 2001 AUMF*]; Rebecca Kheel, *Senate Panel Demands Trump's Legal Rationale for Shooting Syrian Jet*, HILL (June 22, 2017), https://thehill.com/policy/defense/339041-foreign-relations-requests-legal-justification-for-syrian-jet-shoot-down [https://perma.cc/8C6U-E5EF]; Kristina Daugirdas & Julian Davis Mortensen, *Contemporary Practice of the United States Relating to International Law*, 110 AM. J. INT'L L. 554, 588–90 (2016) (discussing the legal debate and controversy surrounding the strike on the Al-Shabab training camp). For further discussion, see *infra* Parts II.C. & III.A.

[8] See *infra* notes 16–22.

Notwithstanding (or perhaps because of) the legal ambiguity surrounding it, self-defense has proven useful to troops and has been applied flexibly in a variety of use of force situations. Part II.B. will discuss how reliance on individual or unit self-defense has grown in the last two decades, particularly within U.S. forces' practice, as it was stretched to cover a wide range of asymmetric and ambiguous threat situations in Afghanistan and Iraq. Part II.C. will argue that the greater prevalence of this doctrine within conflict zones in Iraq and Afghanistan trickled over to influence the practice and rationales for strikes or operations outside of declared conflict zones, in situations like those described above in Syria and Somalia.

The extension of this tactical level authority to justify uses of force outside a declared conflict zone poses a number of legal challenges, which will be the focus of parts III and IV. While U.S. troops in both Afghanistan and Syria may see a similar need to respond to ambiguous threats, the legal basis for troop deployments and for uses of forces in places like Syria is more limited than in declared conflict zones like Afghanistan, and these legal authorities have not always appeared to cover the targets or operations involved when individual or unit self-defense has been exercised. Where they do not, does self-defense provide its own authority? How is this authority connected to or how does it extend either executive or legislative authority for war-making under domestic law, or relate to states' sovereign right to self-defense under international law? Part III considers these questions as they relate to U.S. constitutional law issues, and specifically how the standing executive branch interpretation of when the president may exercise unilateral war powers might enable such extended self-defense strikes or operations. Part IV will turn to the international law issues implicit in this expanded practice, and will consider how expansive self-defense strikes might be justified by standing U.S. arguments about the scope of sovereign self-defense under international law. Both sections will also consider how an extended self-defense practice, if so justified, might then deepen the legal stretches implicit in these two legal positions, and the overall consequences for limitations on the use of force.

In making the argument that an expansive unit self-defense interpretation might easily be supported by and deepen U.S. executive branch claims about self-defense and presidential war powers, this article does not intend to defend these positions. The aim of the article is the opposite: to motivate the development of restrictions that would prevent a more expansive individual and unit self-defense from emerging. To do so, this article will consider the justifications that might easily be made to support an expansive use of self-defense based on the prevalent positions advanced by U.S. administrations in the last four decades.

Before introducing the legal framework for self-defense, a few methodological and framing points are in order. First is the question of the appropriateness of the subject matter for academic legal consideration. Self-defense provisions tend to be codified within Rules of Engagement ("ROE"), which are the guidance documents issued to forces that summarize or contain a mixture of international law, domestic law, policy, and command directives or operational

guidance designed to advance the mission.[9] Because of this, some International Humanitarian Law ("IHL") lawyers have dismissed inquiries into the scope or relevance of unit or individual self-defense as a "ROE issue," essentially a question of policy or command guidance and not law.[10] This article takes a different approach. It starts from the assumption that while ROEs are not law, many of their provisions are based on or derived from legal obligations.[11] This article seeks to interrogate those underlying legal standards and principles with regard to self-defense, and more particularly how those principles have been evolving and emerging within recent practice. This type of legal analysis and consideration is not only appropriate, but absolutely crucial. The lack of consideration given to these tactical-level self-defense issues has contributed to the ambiguous and under-developed nature of the standards surrounding self-defense, which itself has enabled its problematic expansion.[12]

Second, in terms of the source material, this paper builds upon a prior study of the use of individual and unit self-defense by the United States and other NATO countries. The findings were published in an empirical article comparing U.S. and other NATO countries interpretations of individual and unit self-defense in Afghanistan;[13] and a law review article exploring the implications of this emerging practice for *jus in bello* IHL protection and accountability.[14] These articles drew from more than 75 qualitative interviews with military commanders, lawyers, and personnel with experience applying these concepts, as well as from research into military manuals, guidance, and policies, and documentation of incidents

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[9] *See, e.g.*, GARY SOLIS, THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR 490 (2d ed. 2016); THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 115–28 (Terry D. Gill & Dieter Fleck eds., 1st ed. 2010).

[10] *See, e.g.*, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 59 n.151 (Nils Melzer ed., 2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf [https://perma.cc/R3SY-QFHR] (explaining the decision not to include considerations of self-defense in the discussion because it was a technical rules of engagement issue); *Overview of the ICRC's Expert Process* (2003–2008), INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf [https://perma.cc/5DEZ-ZSU8]; *see also* Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. OF COMP. & INT'L L. 121, 126 (2012) (noting the insufficiency of discussion of self-defense in theoretical or academic literature).

[11] GEOFFREY S. CORN ET AL. THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 127 (2012). *See also* references in *supra* note 10.

[12] A previous article by this author focused how this lack of clarity in the origin and standards of individual and unit self-defense negatively impacts IHL application and accountability in practice. *See generally* E. L. Gaston, *Reconceptualizing Individual or Unit Self-Defense*, 8 HARV. NAT'L SEC. J. 283 (2017) [hereinafter Gaston, *Reconceptualizing Self-Defense*].

[13] ERICA GASTON, WHEN LOOKS COULD KILL: EMERGING STATE PRACTICE ON SELF-DEFENSE AND HOSTILE INTENT (Global Pub. Pol'y Inst.), http://www.gppi.net/publications/peace-security/article/when-looks-could-kill-emerging-state-practice-on-self-defense-and-hostile-intent/ [https://perma.cc/Q24J-AHXJ] [hereinafter GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE].

[14] *See generally* Gaston, *Reconceptualizing Self-Defense*, *supra* note 12.

illustrating how these concepts were applied in practice.[15] This article relies on some of the same empirical evidence and qualitative interviews, but with additional interviews, background research and legal analysis related to the U.S. constitutional law and *jus ad bellum* principles at issue in this article. The heavy reliance on qualitative interviews and other non-academic sources is necessary because this is an emerging and evolving practice, not fully theorized and anchored in other positivist sources.

II. Individual and Unit Self-Defense: Ambiguous Origins, Few Limits, and Expanding Use

The right to self-defense is a fundamental principle under international law. The 1837 *Caroline* affair established that states have a right to use force to defend themselves "where necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation."[16] The defending state's response must not be "unreasonable or excessive" and must be in keeping with what is necessary in defense. This customary principle of sovereign self-defense was further enshrined in Article 51 of the U.N. Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . . ."[17] An attack in self-defense must be necessary, proportional, and triggered by an imminent or ongoing attack.[18]

A right to self-defense can also be found in most domestic criminal law jurisdictions as a defense against legal liability in the commission of a crime.[19] This is so prevalent in domestic criminal codes that it was incorporated into the Rome

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[15] The author contributed to the research of a study led by the Harvard Law School International Human Rights Clinic beginning in 2011, and relied on 29 of the interviews from that study, informing primarily the analysis of U.S. practices. *See* HARV. L. SCH. INT'L HUMAN RIGHTS CLINIC, TACKLING TOUGH CALLS: LESSONS FROM RECENT CONFLICTS ON HOSTILE INTENT AND CIVILIAN PROTECTION (2016). Separate from this Harvard study, the author conducted 46 further interviews with lawyers or troops from other NATO countries, primarily from France, Germany and the United Kingdom, but also from some other NATO countries. Most interviewees preferred to present interviews anonymously, stressing that their statements reflected their personal experience, not an official position. Almost all interviews have been anonymized to prevent the identification of any own interviewee.

[16] In the so-called *Caroline* affair in 1837, British military forces destroyed the U.S. ship Caroline, on grounds that it was imminently going to be used to attack British interests in Canada. In the subsequent dialogue over the case to settle the dispute over whether the attack was justified, it was agreed that states had a sovereign right to defend themselves against attack, or the imminent threat of attack. *See* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412, § 217 (1906) (*quoting* Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842)).

[17] U.N. CHARTER, art. 51; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 193–201 (June 27).

[18] *See* Hans Boddens Hosang, *Personal Self-Defense and Its Relationship to Rules of Engagement*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, 429, 430–31 (Terry D. Gill & Dieter Fleck eds., 1st ed. 2010) [hereinafter Hosang, *Personal Self-Defense*].

[19] *Id.* (finding that the laws of the United States, the Netherlands, Canada, Belgium, Germany and France permit self-defense as a legal justification in defense of a crime).

Statute as Article 31, which was later found to be representative of customary international law by the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[20] The principle that self-defense or defense of another's life may be necessary is also a generally recognized exception for use of force in law enforcement,[21] and in peacekeeping missions.[22]

Most countries infer that soldiers or marines, and their surrounding units, also have a right to self-defense, but the origin and scope of this right is not settled.[23] IHL contains no provisions regarding individual self-defense, and there has been minimal jurisprudence or consideration of these questions in academic literature.[24] States have adopted different, and often unclear or unvoiced, interpretations, leading to divergent practice.[25] Although there is no consensus view, Hans Hosang has theorized three possible sources for troops' right to individual and unit self-

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[20] *See Prosecutor v. Kordić and Čerkez*, International Criminal Tribunal for the Former Yugoslavia (Trial Chamber) (Feb. 26, 2001), ¶ 451; Rome Statute of the International Criminal Court, art. 31(1)(c), 2187 U.N.T.S. 90 (entered into force Jul. 1, 2002) ("[A] person shall not be criminally responsible if, at the time of that person's conduct . . . [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.").

[21] *See, e.g.*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 114, U.N. Doc. A/CONF.144/28/Rev.1 (1991) (permitting firearms to be used "when strictly unavoidable in order to protect life" in self-defense or defense of others); G.A. Res. 34/169, annex, at 186–87, Code of Conduct for Law Enforcement Officials (Dec. 17, 1979) (permitting an exception from the Article 2 "right to life" protection where absolutely necessary to defend human life from unlawful violence, make a lawful arrest, prevent an escape or, quell a riot).

[22] U.N. peacekeeping troops' right to act in self-defense was formally codified in article 21 of the U.N. Safety Convention, which was adopted by the U.N. General Assembly in 1994. *See* United Nations Convention on Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363; *see also* United Nations Dep't of Peacekeeping Operations, Dep't of Field Support, United Nations Peacekeeping Operations Principles and Guidelines 34 (2008), https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf [https://perma.cc/59KV-RMXW]; Terry D. Gill & Dieter Fleck, *Chapter 6 Peace Operations*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS § 6.11, at 173–75 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015).

[23] As Charles Trumbull notes, "[t]he right of unit self-defense is widely asserted by militaries around the world, yet its source has been examined only cursorily." Trumbull, *supra* note 10, at 126 (also generally noting the absence of discussion of self-defense in theoretical or academic literature and the lack of clarity on the source of this right).

[24] *Id.* (noting the absence of discussion of self-defense in theoretical or academic literature).

[25] *See, e.g.*, THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 9, at § 10.03(5), (9) (noting that a general right to personal, unit, and collective self-defense is generally recognized under both international law and national laws but noting substantial differences in states' interpretations of these principles). ALAN COLE ET AL., INT'L INST. OF HUMANITARIAN LAW, SAN REMO HANDBOOK ON RULES OF ENGAGEMENT 3 (2009), http://www.iihl.org/wp-content/uploads/2017/11/ROE-HANDBOOK-ENGLISH.pdf [https://perma.cc/PAA6-FC9X] (noting widespread recognition of self-defense but that national laws and definitions differ). For examples of conflicting jurisprudence and practice among four countries, *see* Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 300–04.

defense based on existing state practice and scholarship: 1) that it derives from individuals' right to self-defense under their domestic criminal law (with unit self-defense as a somewhat ill-fitting form of "collective personal self-defense");[26] 2) that it is a "corollary to the right to life;"[27] or 3) that it derives from sovereign self-defense, given that individual soldiers or marines and their units are subsidiaries or representatives of the state.[28] Other authors have postulated that unit or individual self-defense might stand alone as its own customary principle of international law; however, no state has formally adopted this position.[29]

In practice, most states appear to follow the domestic law or sovereign self-defense theories. Most European NATO partners view their forces' self-defense as stemming from their domestic laws, under which individuals have a right to self-defense as a last resort.[30] For U.S. forces, however, the common understanding of soldier and unit self-defense is that it is connected to national or sovereign self-defense.[31] Although not alone in this view, the U.S. is the most prominent example

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[26] Hans Boddens Hosang, *Force Protection, Unit Self Defense, and Extended Self-Defense*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, § 22.07, at 415, 420–22 (Terry D. Gill & Dieter Fleck eds., 1st ed. 2010) [hereinafter Hosang, *Force Protection*].

[27] *Id.*

[28] *Id*. *See also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 220 (2005) ("There is a quantitative but no qualitative difference between a single unit responding to an armed attack and the entire military structure doing so.").

[29] *See, e.g.*, Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self-Defense*, NAVAL L. REV. 126, 145 (1998) (arguing that although not clarified, the right of unit self-defense should be considered a *sui generis* customary right, but constrained by the limits of the *Caroline* principles); Trumbull, *supra* note 10. Those arguing that self-defense is its own customary right tend to suggest that the overall concept of self-defense derives from a fundamental natural law principle that those attacked have the right to defend themselves, and that this would form the basis for both sovereign self-defense in international law, domestic codes of self-defense, and might also extend to self-defense for units in combat. For a summary of literature presenting these natural law arguments, *see* Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus in Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, THE ARMY LAWYER 28 (2013) [hereinafter Montalvo, *When Did Imminent. . .?*]

[30] Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 295–300 (providing case studies and documentation of four NATO countries' positions on self-defense); GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 25–26, 33–34, 38–39, 43–44.

[31] *See* GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 25–26; Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, THE ARMY LAWYER 1, 5 (2000) ("The concept of self-defense [in U.S. Rules of Engagement] . . . stems from a state's right of self-preservation."); Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 295–97 (offering a textual analysis of the rules of engagement to support the inference that the U.S. conception of soldier self-defense stems from its sovereign right to self-defense and affirming this position with interviews with senior military lawyers). Two of the more prominent articles considering individual and unit self-defense have argued that while the accepted U.S. position and understanding is that U.S. forces' self-defense descends from the national self-defense, this position is problematic. The issues they raise will be revisited in the subsequent section, particularly in the conclusion. Colonel Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49 VANDERBILT J. OF TR. L. 1, 17 (2016) [hereinafter Corn, *Should the Best Offense Ever Be a Good Defense?*] (describing the sovereign self-defense origin theory as a sort of "orthodoxy" that is widely

of this legal position and in practice. U.S. forces have used individual and unit self-defense more expansively, in ways that test the most problematic aspects of this position.[32] In addition, it is the interpretation that unit and individual self-defense is connected to sovereign self-defense that poses the most problems for *jus ad bellum* principles. For this reason, the remainder of this article will focus on U.S. practice and legal positions related to self-defense.

A. *U.S. Standards for Individual and Unit Self-Defense: Interpretation and Practice*

To understand how a concept like individual self-defense—at least notionally defensive and limited in nature—might be the basis for seemingly offensive and significant strikes or operations in Somalia or Syria, it is important to first lay out the very broad and flexible remit that U.S. forces have to respond in self-defense. This section will do so by providing both the definitions and legal guidance surrounding individual and unit self-defense, as well as some examples of the very expansive way that these provisions have been applied in practice.[33] The 2005 U.S. Standing Rules of Engagement ("SROE") defines self-defense as follows:

> Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander . . . military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.[34]

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accepted but arguing that it is "flawed" and arguing throughout the article for a re-evaluation); Trumbull, *supra* note 10, at 122 (critiquing the common interpretation that unit and individual self-defense derive from sovereign self-defense and arguing that an understanding of these rights as a customary law principle would be better).

[32] The U.S. is not alone in adopting this view. Hosang suggests that deriving soldier self-defense from sovereign self-defense is the best approach. Hosang, *Force Protection*, *supra* note 26, at 415. *See also* DINSTEIN, *supra* note 28, at 220.

[33] There is a tension in all of the subsequent definitions between describing how self-defense is commonly applied versus what a more limited interpretation of these provisions *might* be. A senior military lawyer and scholar noted that a frequent issue with trying to capture self-defense is that what has emerged as standard U.S. practice often appears to be a major "stretching" of the original definition or intent (or may simply be wrong). "Nowhere does it say that [this is how the rule should be applied] but that's what happens in practice." Telephone Interview with former U.S. military lawyer (Dec. 20, 2018) (on file with author). The expansion of self-defense in practice, and the way this has distended or arguably distorted the definitions is taken up further in Part II.B.

[34] Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, June 13, 2005, Enclosure A, at A-2 ¶ (3)(a), *as reprinted in* David H. Lee, The Judge Advocate General's Legal Ctr. and Sch., OPERATIONAL LAW HANDBOOK 2015 97 (June 15, 2015) [hereinafter U.S. SROE]; *see also id*. at 2 ¶¶ 6(b)(1), 6(c)(1)(repeating the same basic rule of self-defense).

Individual and unit self-defense are considered to be inherent rights available to combatants at all times whether in peacetime or wartime.[35] The U.S. Operational Law Handbook notes that except for a commander's tactical orders, nothing can contravene an individual right to self-defense.[36]

The U.S. SROE states that actions taken in self-defense must be in response to an actual or imminent attack and be guided by the principles of de-escalation, necessity, and proportionality.[37] Because individual self-defense derives from sovereign self-defense in the U.S. view, the standards of imminence, necessity, and proportionality appear to flow from the U.S. understanding of the *Caroline* standards for sovereign self-defense and *not* from the similarly named standards as understood under *jus in bello* IHL doctrine.[38] However, there are slight distinctions and nuances particular to the use of these standards for individual and unit self-defense that are important to outline.

Under the U.S. self-defense paradigm, necessity is defined as simply the presence of a threat, denoted as the presence of a hostile act or hostile intent.[39] "Hostile act" and "hostile intent" are terms of art that refer to more ambiguous threats—acts that might not manifest as a direct attack (for example, someone firing a rifle) but nonetheless are perceived to harm forces or hinder the mission, or to present a threat of inflicting damage or harm. NATO guidance provides examples of what constitutes a hostile act as laying a mine, impeding NATO operations, breaching a military zone or perimeter (including an aerial zone), or failing to respond to warning signs in a speeding or aggressive vehicle might constitute hostile acts.[40] Examples of hostile intent provided by NATO and its member

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[35] All references to self-defense in U.S. doctrine and legal policy refer to self-defense as an inherent right. *See, e.g.*, *id.* ¶ 6(b)(1). *See also* COLE ET AL., SAN REMO HANDBOOK ON RULES OF ENGAGEMENT, *supra* note 25, at 3 ("Self-defense is available in all situations, including armed conflict.").

[36] *See, e.g.*, DAVID H. LEE, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCH., OPERATIONAL LAW HANDBOOK 2015 83 (2015), http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2015.pdf [https://perma.cc/UF5B-RPJF] [hereinafter LEE, OPERATIONAL LAW HANDBOOK 2015].

[37] *Id.* at A-3 ¶ 6(a). An additional rule is that while forces should attempt to de-escalate where possible, de-escalation is not required. *Id.* at A-4 ¶ 6(a)(1).

[38] *Id*. at 3–6, 84. *See also* Hosang, *Force Protection*, *supra* note 26, § 22.08, at 422–23 (noting that in keeping with this view, U.S. self-defense is guided by the *Caroline* criteria); Interview with two senior U.S. military lawyers and one senior U.S. commander [U.S.11] in Washington, D.C. (Apr. 12, 2012) (on file with author).

[39] U.S. SROE, *supra* note 34, at A-3 ¶ (4)(a)(2). *See also* LEE, OPERATIONAL LAW HANDBOOK 2015, *supra* note 36, at 83; CENTER FOR ARMY LESSONS LEARNED, AFGHANISTAN CIVILIAN CASUALTY PREVENTION HANDBOOK 5 (2012), https://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf [https://perma.cc/X63W-VG69] [hereinafter CALL HANDBOOK].

[40] NORTH ATLANTIC TREATY ORGANIZATION, NATO LEGAL DESKBOOK 255 (2d ed. 2010), https://info.publicintelligence.net/NATO-LegalDeskbook.pdf [https://perma.cc/BR2Q-694W] [hereinafter NATO LEGAL DESKBOOK]. *See also* Army Recruiting and Training Division, *Platoon Commander's Battle Course*, *Infantry Battle School* (last accessed Jan. 6, 2019), http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_mje/miv001853.pdf [https://perma.cc/VQW8-VP9W] (offering U.K. guidance on hostile act and hostile intent); État-

countries have included moving in range of weapons systems, "warlike gestures," or use of "shadowers/tattletales."[41] U.S. definitions of hostile act and hostile intent tend to be similar to those of other countries,[42] but previous studies found that in practice hostile act and hostile intent have been used to refer to a much wider range of behaviors and threat scenarios.[43] Examples of what U.S. forces interpreted as a hostile act or hostile intent in Afghanistan and Iraq included digging in the ground (interpreted as an IED threat), running away from the site of an attack or engagement (interpreted as potentially running toward a weapon or continuing the attack), or sitting on a ridge or using a cell phone (interpreted as passing on information to facilitate a threat, or preparing to remotely detonate an IED, where troop convoys were nearby).[44] Carrying objects that were perceived as weapons or as threats was frequently deemed a sign of hostile intent, even if it turned out that the objects were not weapons or even seemingly similar to weapons.[45] The import of these examples for the latter part of this article is that a very wide range of

Major des Armées, Division Emploi 1, *Directive interarmées sur l'usage de la force en opération militaire se déroulant à l'extérieur du territoire national*, 5.2 PUBLICATION INTERARMÉES 1, 26–27 (Jul. 25, 2006), https://docplayer.fr/9339510-Pia-5-2-directive-interarmees-sur-l-usage-de-la-force-en-operation-militaire-se-deroulant-a-l-exterieur-du-territoire-national.html [https://perma.cc/T8R7-6R7E] (describing French guidance on hostile act and hostile intent).

[41] For references containing these and other examples of hostile intent, see sources in *supra* note 40. Note that for other NATO countries, hostile acts or signs of hostile intent are not considered to trigger the right to self-defense, but describe ROEs that are part of offensive force. For more on this distinction see GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 18–19; Hosang, *Personal Self-Defense*, *supra* note 18, § 23.13(3), at 440; Hosang, *Force Protection*, *supra* note 26, § 22.11(2), at 425.

[42] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME 1, at 317–19 (2004), https://fas.org/irp/doddir/army/clamo-v1.pdf [https://perma.cc/GP4C-2WEC] (noting that breaching a perimeter, pointing a weapon, or speeding a vehicle toward military forces are examples of hostile act or hostile intent).

[43] GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 26–30; Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 26 n. 18 (providing multiple sources to support the proposition that the U.S. has a much more "aggressive" stance on hostile intent, viewed by some countries as "excessive").

[44] GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 22–23, 26–30 (discussing many examples of such practices). *See also* Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 10 (affirming the use of self-defense to justify attacks against potential but not immediate threats, including a helicopter attack on an individual digging in the ground).

[45] *See, e.g.*, Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 9–10 (describing another instance of ROEs suggesting carrying arms alone would constitute hostile intent and that this was not an "isolated" case); (YouTube) sunshinepress, "Collateral Murder – Wikileaks – Iraq," April 3, 2010, https://www.youtube.com/watch?v=5rXPrfnU3G0 [https://perma.cc/DE8C-8NT4] (sharing a video in which U.S. forces seemingly target a group of men on the basis that they are carrying what are believed to be arms); CALL HANDBOOK, *supra* note 39, at 22 (describing the incident of how women collecting hay with sickles were presumed to be combatants carrying weapons and killed); GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 30–34 (providing other examples of mistaken civilian casualties based on a misperception that the individual was carrying a weapon suggesting hostile intent).

behaviors or actions might be interpreted as hostile intent, thus triggering the right to individual or unit self-defense.

In addition, the range of situations that might trigger U.S. forces' self-defense is broad because of the U.S. interpretation of imminence. While European forces apply the standard dictionary definition of imminent,[46] the U.S. SROE clarify that "[i]mminent does not necessarily mean immediate or instantaneous."[47] A senior U.S. military lawyer described imminence as less about a specific window of time, and more about how likely and identifiable the threat was.[48] Another military lawyer who had advised troops in Iraq and Afghanistan said that although offensive targeting should be used where time allows, where the threat was clear and certain, the two concepts often became conflated.[49] In practice, he said, it often came down to "if you're convinced they're a threat, then it's imminent."[50] He offered the example of a commander authorizing forces to fire on what they presumed to be armed Taliban fighters crossing a known weapons transfer point in Afghanistan under a hostile intent theory.[51] The assumption was that while they did not pose a threat to troops at that moment, they would do so at some point in the near future. This example reflects a common description of imminence offered by U.S. forces and lawyers interviewed: that a threat might be described as imminent at the point when there is no other time or opportunity to repel the attack, making this the last, foreseeable moment or best opportunity to thwart the threat.[52] The threat might be one manifesting in that moment or hour, or in the next few days, but could also be even a month or more from that moment in time, depending on

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[46] This is also in keeping with most domestic criminal law interpretations of self-defense in response only to an "imminent" or immediate in time threat, and as a last resort. *See also* Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 310–14; HUMAN RIGHTS WATCH, TROOPS IN CONTACT: AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 31 (2008) (quoting a U.S. senior general in Afghanistan: "One difference is the U.S. says imminent does not have to mean instantaneous. U.S. troops have a different standard [than NATO]"); CENTER FOR LAW AND MILITARY OPERATIONS, *supra* note 42, at 102, 117–19 (describing different understandings of self-defense, hostile intent, imminence and other ROE terms between the U.S. and common coalition partners).

[47] U.S. SROE, *supra* note 34, at A-3 ¶ (3)(g).

[48] Interview with senior U.S. military lawyer, in Washington, D.C. (Apr. 13, 2012) (on file with author).

[49] Telephone Interview with former U.S. military lawyer (Apr. 2, 2012) (on file with author). *See also* Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 7–8 (arguing generally that the trends in interpretation in self-defense, including the definition of imminence have had the effect of collapsing the distinction between offensive and defensive targeting).

[50] Telephone Interview with former U.S. military lawyer (Apr. 2, 2012) (on file with author).

[51] *Id.*

[52] This understanding in imminence has become so prevalent that it has even seeped into parallel debates about pre-emptive action *jus ad bellum* within academia. *See, e.g.*, Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 775 (2012) (proposing a slight relaxation of imminence to allow defensive acts against "those actively planning, threatening, or perpetrating armed attacks" and suggesting that "the likelihood that there will be other opportunities to undertake effective action" be a factor in determining imminence).

the surrounding threat context, the nature of the threat, and other factors.[53] Another military lawyer offered the following example to illustrate this last-foreseeable-moment principle: "This definition allows us to define digging a hole as hostile act/hostile intent. It is imminent because there is no other opportunity to prevent the IED from going in the ground and no other way to prevent harm."[54]

The wider view of imminence in U.S. forces' self-defense doctrine is due in part to its anchoring within sovereign self-defense, and a more elongated U.S. interpretation of imminence in sovereign self-defense. Under the *jus ad bellum* law of self-defense, most countries interpret imminence as permitting some degree of pre-emptive or anticipatory attacks when the threat is sufficiently manifest and impending, and there are no other feasible alternatives to prevent the attack.[55] However, following the September 11 attacks, successive U.S. administrations have argued that, in the changing context of war, with more lethal and rapid weaponry available, the time horizon of imminence should be extended, particularly when facing non-state actors.[56] This principle of extended imminence and the permissibility of pre-emptive force was first enshrined in the 2002 U.S.

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[53] Interview with senior U.S. military lawyer, in Washington, D.C. (Apr. 13, 2012) (on file with author).

[54] Interview by Harvard Law School International Human Rights Clinic with U.S. military lawyer, in Cambridge, Mass. (Nov. 8, 2011) (on file with author).

[55] *See, e.g.*, Ashley S. Deeks, *Taming the Doctrine of Preemption*, *in* THE OXFORD HANDBOOK ON THE USE OF FORCE 661 (Marc Weller ed., 2015); MARY ELLEN O'CONNELL, AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE, THE MYTH OF PRE-EMPTIVE SELF-DEFENSE, 8 (2002) ("[B]ased on the practice of states . . . as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming."); CHRISTINE GRAY, INTERNATIONAL LAW AND USE OF FORCE 114 (2008); Terry D. Gill & Dieter Fleck, *Legal Basis of the Right of Self-Defense Under the U.N. Charter and Under Customary Law*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS § 8.03(6), at 220 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015) ("On balance, it would appear that a reasonable interpretation of the right to self-defense would allow for the possibility of taking action in self-defense in response to a clear and manifest threat of an impending (threat of an) attack if the indications are convincing and no alternatives are available.") [hereinafter Gill & Fleck, *Legal Basis*]; OFFICE OF GEN. COUNSEL, DEP'T OF DEFENSE, LAW OF WAR MANUAL 47 n.229 and accompanying text (2015) [hereinafter LAW OF WAR MANUAL]. While most states subscribe to this view, another school of thought relies more heavily on the literal text of the U.N. Charter, and argues that an attack must have already *occurred* to trigger a legitimate self-defense response. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 259, 278 (1963).

[56] For discussion of how the U.S. response to the September 11 attacks attempted to extend or change pre-existing understanding and interpretations of imminence in self-defense, and opposition to those changes, *see* GRAY, *supra* note 55, at 198–228; DINSTEIN, *supra* note 28, at 207-08; Leanne Piggott, *The "Bush Doctrine" and the Use of Force in International Law*, *in* THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING? 241, 243–47 (Matthew J. Morgan ed., 2009). For a statement describing the current position of the U.S. government on how imminence should be interpreted with regard to threats by non-state actors, *see* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws* (Sept. 16, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an [https://perma.cc/QBF3-FV4V] [hereinafter Brennan Speech, Harvard Law School].

National Security Strategy and was a key part of what came to be known as the Bush Doctrine.[57] The extension of imminence in sovereign self-defense post-2001 trickled down to individual and unit self-defense: according to a review of past versions of the SROE since 1981 by U.S. military lawyer Eric Montalvo, the language that *"[i]mminent does not necessarily mean immediate or instantaneous*" was only inserted with the 2005 version of the SROE, the first revision of the SROE after 2001.[58] Montalvo argues that this change was precipitated by the Bush Doctrine and the 2002 U.S. National Security Strategy's redefinition of self-defense to incorporate responses to non-immediate or non-instantaneous threats.[59]

As a result of this more flexible interpretation of imminence, individual and unit self-defense can be applied not only to immediate threats, as might be presumed in the classic definition, but also to target behavior suggesting threats that might manifest days or even weeks later. Similar to the way that the incorporation of hostile act and hostile intent widens the range of behaviors that self-defense might be applied to, the broader interpretation of imminence widens the time parameters of the identified threat, further increasing the number of situations in which self-defense might be applied.

The final key definitional ingredient is the U.S. interpretation of what would be a "proportionate" response in individual and unit self-defense. Again, assuming that the starting point is the *jus ad bellum* definition of proportionate, the most common interpretations of proportionality *jus ad bellum* are: a tit for tat approach, with the amount of force being used in defense matching that of the attack; that the defensive force used must be proportionate to the level of injury being inflicted; or that the defensive force need only be guided by what is required to extinguish the threat (at present or in the future).[60] The U.S. understanding of proportionality in a

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[57] NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002). A number of authors have described the 2002 National Security Strategy as positing a different interpretation of imminence and representing the proposition that pre-emptive forces was justified in self-defense. *See, e.g.*, Deeks, *supra* note 55 at 667; MICHAEL DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 25 (2008); DINSTEIN, *supra* note 28, at 183.

[58] Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 26. *See also* John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 80 (2010).

[59] Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 25; *see also* NATIONAL SECURITY COUNCIL, *supra* note 57, at 15.

[60] For a discussion of these different positions and arguments within *opinio juris* and state practice, *see, e.g.*, JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 10–14 (2004); Gill & Fleck, *Legal Basis*, *supra* note 55, § 8.04, at 196; David Kretzmer, *The Inherent Right to Self-Defense and Proportionality in Jus Ad Bellum*, 24 EUROPEAN J. INT'L L. 235, 235 (2013). Discussions of proportionality in *jus ad bellum* differ from proportionality principles under either a *jus in bello* or law enforcement paradigm. For a discussion of some of these differences, see Jasmine Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 90 INT'L REV. OF THE RED CROSS 963, 979–80 (2008); Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese war*, 88 INT'L REV. OF THE RED CROSS 779, 779 (2006); INT'L COMMITTEE OF THE RED CROSS, EXPERT MEETING: THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND

self-defense paradigm tends towards the last interpretation and appears to interpret what is necessary as a floor, rather than a ceiling.[61] The U.S. Law of War Manual notes that measures taken in self-defense should take into consideration what level of force is necessary to "discourage future armed attacks or threats thereof."[62] Applying this to unit or individual self-defense, the U.S. Operational Law Handbook notes that force need not be directly proportional to the level of force in the attack: "[f]orce use[d] may exceed . . . [that] of the hostile act or hostile intent, but the nature, duration, and scope of force should not exceed what is required."[63]

Examination of U.S. forces' use of self-defense in practice suggests that the "respond decisively" criterion has been interpreted liberally in practice, with forces responding with whatever means were available, and with deference generally being given to their interpretations of what was necessary.[64] Examples given in interviews with U.S. forces and others observing their conduct included troops on patrol receiving a small amount of fire and responding with the discharge of all available weaponry possessed by that unit, or troops on a base observing a lower-level threat outside the base and responding by firing artillery or calling in an airstrike.[65] One former military lawyer and scholar said that in practice "you frequently have instances of [U.S. forces] calling in airstrikes or artillery on insurgents [armed only] with small arms" on a self-defense justification—an example, in his view, of a broader and problematic trend toward over-stretching self-defense.[66]

The example above, of striking a man with an AK-47 with the artillery firepower of a base not only illustrates the permissiveness of the proportionality standard, but also illustrates a final important concept—the scope of *unit* self-defense and how it is applied. Under unit self-defense, an attack or threat on one soldier can trigger not only the right of that soldier to defend himself but his entire

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LAW ENFORCEMENT PARADIGMS 8–9, https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf [https://perma.cc/YP76-3L5S].

[61] Although the United States appears to apply the *ad bellum* standards in a way that is less restrictive, on his reading of the difference between the *jus ad bellum* and *jus in bello* restrictions, Geoffrey Corn argues that the former should be more restrictive. Geoffrey S. Corn, *Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, 88 INT'L L. STUD. 57, 66 (2012) [hereinafter Corn, *Self-defense Targeting*]. The fact that the definition of proportionality in the SROE tends toward one of the *jus ad bellum* interpretations, rather than borrowing the language associated with proportionality concepts in *jus in bello* further reinforces the earlier point that the U.S. interpretation of the standards governing soldier self-defense borrows from the sovereign self-defense standards (rather than other *in bello* conceptions of these rights, or from analogous domestic law conceptions).

[62] LAW OF WAR MANUAL, *supra* note 55, at 41.

[63] U.S. SROE, *supra* note 34, at A-3 ¶ (4)(a)(3).

[64] GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 13, at 32–33; Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 315, 324–25.

[65] *See* GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 14, at 32–33. The previous study also noted frequent incidents and observations of U.S. forces' self-defense responses that would raise questions of indiscriminate or disproportionate force under a traditional IHL analysis, but a full discussion of this issue is beyond the scope of this article.

[66] Telephone Interview with former U.S. military lawyer (Dec. 20, 2018) (on file with author).

unit's ability to defend that individual and the unit as a whole. Where unit self-defense is triggered, the response can be all of the firepower possessed by that unit. To offer an illustration, in the case of an AK-47 threat on an individual in the base, this would be all the firepower available to the base, including all artillery assets. Aerial assets can also act in unit self-defense on behalf of any forces within their (aerial) area of operations, a wide geographic remit. In the scenario of troops who called for back-up support from air assets stationed nearby, in what is known generally as a "troops in contact" situation, the unit self-defense response might be all the firepower available to those air assets.[67] Importantly for later sections of this paper, this unit self-defense also typically extends to other partners, when designated as such. This might include, for example, extension to other NATO forces fighting alongside U.S. forces, to Afghan national security forces in Afghanistan, or to African Union forces being trained by U.S. special forces in Somalia.[68]

Taken together, the flexible proportionality standard and the way that unit self-defense allows other units, including aerial units, to act on partner forces' behalf means a soldier threatened with an AK-47 might well trigger a response with an F-22 fighter jet. Combined with the flexible temporal definition of imminence this sort of self-defense action need not even be in response to an immediate threat, but merely against a threat that was reasonably foreseeable. A fair argument could be made that self-defense was never intended to provide this wide a remit. One senior military lawyer and scholar interviewed argued that in the last two decades, "we've twisted imminence and self-defense beyond any normal meaning."[69] However, he noted that this had gone on for so long that it had become standard practice. "The exception has swallowed the rule for so long that . . . it's just the status quo. Over time we've so distended self-defense that [I'm] not sure it can come back to normal."[70]

B. *Bottom-up Emergence of Expansive Individual and Unit Self-Defense*

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[67] *See, e.g.*, CALL HANDBOOK, *supra* note 39, at 22 (describing an air attack called in to deal with what was presumed to be fighters on a neighboring hillside opposite a command outpost, though it later turned out to be women culling grass). *See also* HUMAN RIGHTS WATCH, *supra* note 46, at 32. A senior military lawyer and scholar noted that expansive uses of unit self-defense—he gave the example of responding to insurgents armed with small arms with artillery or bombs—were particularly common where a "troops in contact" designation was given, noting, "You call a 'troops in contact' and suddenly you stop speaking about proportionality in the classic sense." Telephone Interview with former U.S. military lawyer (Dec. 20, 2018) (on file with author).

[68] The extension to other partnered forces must be designated in the rules of engagement, and typically is. For an example, *see* Army Recruiting and Training Division, *supra* note 40, at MIV001861a (providing an excerpt of British rules of engagement in Iraq); RAY MURPHY, U.N. PEACEKEEPING IN LEBANON, SOMALIA AND KOSOVO: OPERATIONAL AND LEGAL ISSUES IN PRACTICE 168 (2007) (providing an excerpt of a 2004 Soldier Card for KFOR forces in Kosovo).

[69] Telephone Interview with former U.S. military lawyer (Dec. 20, 2018) (on file with author).

[70] *Id.*

The permissive legal standards discussed in section A above made a more expansive interpretation possible, but it was the conflict context in Iraq and Afghanistan that created a demand for flexible tools for responding to ambiguous threats. This section will consider how the nature of the threats in Afghanistan and Iraq drove the expansion of self-defense, and how the widespread reliance on individual and unit self-defense in those conflicts led to the mainstreaming of this type of threat response across all U.S. forces.

The concepts of self-defense and hostile intent have been a core part of U.S. ROEs at least since the early 1980s, but have only come to prominence in more recent engagements.[71] In particular, the nature of the conflicts in Iraq and Afghanistan, and the predominance of asymmetric tactics, created more situations in which U.S. forces might need flexibility in defending themselves. For context, there were more than 34,000 attacks on U.S., Iraqi, and international forces in 2005, and by 2007 the rate of attacks had nearly doubled, with an average of just under 1,000 attacks per week.[72] The deadliest threat to international forces (and, notably, to Iraqi civilians) came from IEDs, roadside bombs, and suicide attacks. By 2005, there were 10,000 roadside IEDs or ambushes.[73] These had more than nearly doubled by 2007.[74] Similar threat dynamics evolved in Afghanistan, particularly as the Taliban insurgency increased from 2007 on.[75] Reporting on Pentagon data

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[71] ROEs as a tool to help regulate use of force began to emerge in codified form in the 1980s, initially driven by a need to coordinate and guide naval operations, but gained greater prominence for other services and force operations after the first Gulf War. *See* SOLIS, *supra* note 9, at 490–94 (describing the factors leading to ROE development, from Vietnam through the Gulf War); Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 28 (providing a brief history of U.S. SROE development, and noting the first "SROE-like document" in 1981); Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 13–19 (describing the roots of the SROE in naval operations in the 1980s and arguing that these naval roots contributed to a misplaced conflation of unit self-defense with national self-defense).

[72] Michael E. O'Hanlon & Jason H. Campbell, *Iraq Index: Tracking Variables of Reconstruction & Security in Post-Saddam Iraq*, BROOKINGS INSTITUTION (Dec. 18, 2008), https://www.brookings.edu/wp-content/uploads/2016/07/index20081218.pdf [https://perma.cc/85FK-HPGP].

[73] *Id.* at 29.

[74] *Id.*

[75] Most analysts date the beginnings of significant Taliban resurgence to between 2006 and 2007, and show increasing levels of IEDs and suicide attacks from that point on, with some attributing the increase to a tactics or skill transfer from Iraqi to Afghan insurgents in this period. For more, *see* ANTONIO GIUSTOZZI, KORAN, KALASHNIKOV AND LAPTOP 72 (2009) (dating the Taliban resurgence to late 2006 to early 2007); CLAY WILSON, CONG. RESEARCH SERV., RS22330, IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES 1–2 (2008) (noting the significant death toll attributed to growing IEDs and suicide attacks in Afghanistan, in part due to some transfer in tactics from Iraq); Anthony H. Cordesman & Jason Lemieux, *IED Metrics for Afghanistan, January 2004-May 2010*, CTR. FOR STRATEGIC & INT'L STUDIES (July 21, 2010), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/100722_ied_iraq_afghan.pdf [https://perma.cc/J4CB-QKDE] (showing continued rise in IEDs through mid-2010); Associated Press, *Roadside Bombs Surge in Afghanistan*, June 4, 2009, (April 7, 2011); Alia Brahimi, *The Taliban's Evolving Ideology*, LSE GLOBAL GOVERNANCE 11–12 (2010), http://www.lse.ac.uk/globalGovernance/publications/workingPapers/WP022010.pdf

provided in 2013 suggested that "between more than half to two-thirds of Americans killed or wounded in combat in the Iraq and Afghanistan wars have been victims of IEDs planted in the ground, in vehicles or buildings, or worn as suicide vests, or loaded into suicide vehicles."[76]

What the prevalence of such tactics meant was that increasingly, where a marine or soldier fired his/her weapon or authorized the use of force, they were firing reactively after their convoy had been ambushed, or an IED had detonated, or pre-emptively, to prevent a suspected, forthcoming suicide attack or IED threat. In addition, as other military lawyers and scholars have noted, the asymmetric tactics prevalent in Iraq and Afghanistan, with insurgents frequently hiding among the population, made the sort of positive identification that would be necessary for status-based targeting difficult.[77] This created stronger pressures to respond in a conduct-based targeting mode. Self-defense, with its very flexible conceptions of hostile act and hostile intent and indefinite temporal threat horizons, offered that framework.[78]

As a result of these pressures, self-defense became one of the most common rationales for use of force in Afghanistan, according to soldiers, military lawyers, and commanders interviewed. For many forces, it was the dominant use of force paradigm. For example, one U.S. military lawyer deployed first to Iraq and then to Afghanistan said that for a lower-level soldier stationed at a Forward Operating Base (FOB), 100 percent of the time when they fired their weapon it was in self-defense.[79] Another military lawyer who provided operational guidance to troops in Afghanistan and Iraq quipped that relying on self-defense and hostile intent was such a common justification with the troops he advised that "[i]t rolls off the tongue."[80] U.N. observers and IHL investigators interviewed also noted the prevalence of these self-defense justifications in Afghanistan, noting that in cases they raised with U.S. forces—for example, after civilian casualties resulted from

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[https://perma.cc/9NJ3-WRV3] (Working Paper No. WP 02/2010) (noting the growth of the Taliban movement and increased use of suicide bombs and IEDs from 2006 and 2007).

[76] Gregg Zoroya, *How the IED changed the U.S. military*, U.S.A. TODAY (Dec. 19, 2013), https://eu.usatoday.com/story/news/nation/2013/12/18/ied-10-years-blast-wounds-amputations/3803017/ [https://perma.cc/S7NX-286Y].

[77] Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 30–31; Albert S. Janin, *Engaging Civilian Belligerents Leads to Self-Defense/Protocol I Marriage*, Jul. 2007 ARMY LAW 82, 91–93 (2007); JOINT AND COALITION OPERATIONAL ANALYSIS (JCOA), REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS 1 (2013), https://publicintelligence.net/jcoa-reducing-civcas [https://perma.cc/P8ZA-D7BL].

[78] *See* discussion of scope of hostile act and hostile intent determinations and of imminence in *supra* notes 39–54 and accompanying text; Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 30–31 (explaining how the counterinsurgency environment created a greater demand for conduct-based targeting in Iraq and Afghanistan and describing self-defense as "the framework" for conduct-based responses).

[79] Telephone Interview with former U.S. military lawyer (Apr. 2, 2012) (on file with author) (noting also that a soldier who had a relatively secure position on a major headquarters might not fire their weapon at all in the course of their assignment).

[80] Telephone Interview with former U.S. military lawyer (Apr. 12, 2012) (on file with author).

an incident—a very common response was that the individual had demonstrated hostile intent.[81]

Other military lawyers and scholars have similarly noted the expanded use of self-defense in response to the environments in Iraq and Afghanistan, and many have raised concerns that this expansion was inappropriate.[82] Scholar and former military lawyer Geoffrey Corn described self-defense as accounting for "much of the force applied in current military operations."[83] Another military scholar and former lawyer, Colonel Gary P. Corn summarized, observing the same trends, "The terms hostile act and hostile intent (HA/HI), traditionally meant to provide definitional guidance for servicemembers to determine the necessity of using force in self-defense, have become buzzwords for justifying attacks against potential, not immediate, threats."[84] Reflecting on trends like this, Corn argued that self-defense had become the "default authority for engaging civilians participating directly in hostilities," and worried that this blurred the lines between offensive and defensive operations.[85] Another military judge advocate, Eric Montalvo, noted that the overbroad use of self-defense in Iraq and Afghanistan had resulted in a "targeting model that has shifted away from the conduct-based targeting required in COIN operations and looks more like status-based targeting based on a civilian's physical characteristics," and argued that this increased the risk of civilian casualties.[86]

An equally important trend to note (particularly for the later analysis) is that as hostile act and hostile intent determinations became more regular, they not only became a part of the standard lexicon for regular ground forces coming under attack

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[81] Telephone Interview with IHL Investigator (Feb. 27, 2012) (on file with author); Telephone Interview with U.N. Staff (Feb. 17, 2012) (on file with author). The position that the soldier, marine, or unit's response was justified in self-defense appeared to foreclose a discussion about whether the use of force had met traditional IHL principles of distinction or proportionality, thus appearing to displace IHL rules and accountability in practice. For more, *see* Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 325–27.

[82] *See, e.g.*, Janin, *supra* note 77, at 93 (noting that "[t]he practical and legal constraints of PID make status-based engagements very rare. . . [placing] U.S. armed forces in a reactive posture"); JCOA, *supra* note 77, at 1 (noting that the increased reliance on self-defense and hostile act and hostile intent resulted from the situational environment in Afghanistan); Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 1 (arguing that the COIN environment in Afghanistan and Iraq contributed to an "expansion of the understanding of the operational authorities of self-defense"); Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 34 (attributing a significantly "expanded [sic] application of anticipatory self-defense, imminence, and hostile intent" to "more than ten years of COIN operations in Iraq and Afghanistan").

[83] GEOFFREY S. CORN ET AL. THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 193 (2012).

[84] Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 10. Corn offered the example of the ROE used in Falluja in Iraq, which guided U.S. Marines that openly carrying a weapon was to be interpreted a sign of hostile intent, and noted that such broad targeting under the hostile intent framework was "not an isolated case, but represents a growing and concerning trend." *Id.* at 9–10.

[85] *Id.* at 11; *see also id.* at 7–8 (noting the effects on the demarcation between offensive and defensive operations).

[86] Montalvo, *When Did Imminent. . .?*, *supra* note 29, at 34.

but also were widely relied upon in offensive operations and by air assets. Casualties resulting from U.S. special forces' offensive nighttime raids were frequently justified not as the result of deliberate targeting, but on the grounds that an individual present demonstrated hostile intent in the course of the operation—for example, by running away from the scene, holding what forces interpreted as a weapon, or making other gestures perceived to be threatening.[87] Unit self-defense—on behalf of forces on the ground—was also a frequent justification for air and drone strikes in Afghanistan. There is a term of art known as "troops in contact" that troops use to call for back-up support from other forces or assets in the vicinity when they are under attack or believe there is an immediate threat, essentially a self-defense situation. "Troops in contact" was one of the most common justifications for airstrikes in Afghanistan—so much so that one French military lawyer likened the phrase to "the magic word" for having an airstrike authorized.[88] Separate from these "troops in contact" situations, U.N. investigators in Afghanistan noted that in inquiries about casualties that resulted from air strikes, U.S. military officials frequently told them the strike or the casualties were justified because the individual had demonstrated hostile intent—a frequency that led them to believe that self-defense was a fairly widespread justification for air strikes.[89] Although material surrounding the legal basis for strikes by Unmanned Aerial Vehicles, or drones, tends to be classified, the material that has been released (for example, through Freedom of Information Act[90] requests) suggests that drones may be used in a unit self-defense capacity, the same as other aerial assets, to respond to a perceived imminent threat to U.S. or partner forces on the ground. For example, on February 21, 2010, a drone circling a remote area of Uruzgan province,

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[87] Telephone Interview with U.N. Staff (Feb. 17, 2012) (on file with author) (noting that IHL investigators frequently received the explanation that individuals targeted in night raid were killed not because they were targeted per se but because they demonstrated hostile intent through their behavior in the course of the raid). For other accounts and sources describing hostile intent being used within the context of night raids, *see* JEREMY SCAHILL, DIRTY WARS: THE WORLD IS A BATTLEFIELD 340–41, 343 (2013); GASTON, EMERGING STATE PRACTICE ON SELF-DEFENSE, *supra* note 14, at Chapter 2.1.1, 15–16, "Expansion to Aerial Assets"; OPEN SOCIETY FOUNDATIONS, THE COST OF KILL/CAPTURE: IMPACT OF THE NIGHT RAID SURGE ON AFGHAN CIVILIANS 18–19 (2011).

[88] Interview with three French military lawyers, in Paris, Fr. (June 18, 2015) (on file with author) (describing a troops in contact determination as "le mot magie") (author translation). *See also* Telephone Interview with former U.S. military lawyer (Dec. 20, 2018) (on file with author) (noting that air assets were frequently called in to defend troops on a unit self-defense basis, particularly under "troops in contact" designations, which he referred to as a sort of "talismanic word" for receiving authorization for back-up force); HUMAN RIGHTS WATCH, *supra* note 46;
Eric C. Husby, *A Balancing Act: In Pursuit of Proportionality in Self–Defense for On-Scene Commanders*,
THE ARMY LAWYER 6 (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/05-2012.pdf [https://perma.cc/A93W-6KEE]; Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 10 n.31 (providing the example of self-defense used in a targeting mode by a helicopter).

[89] Telephone Interview with IHL Investigator (Feb. 27, 2012) (on file with author); Telephone Interview with U.N. Staff (Feb. 17, 2012) (on file with author).

[90] 5 U.S.C. § 552 (2016).

Afghanistan, spotted a convoy of vehicles and initiated a strike on the basis that the vehicles in the convoy demonstrated "hostile intent":[91]

> Roger, thinking about the situation, I'm pretty sure we are covered [Classified excerpt] demonstration of hostile intent tactical movement in conjunction with the ICOM chatter it would appear that they are maneuvering on our location and setting themselves up for an attack.

The vehicles were later determined to contain only civilians.[92]

Given the broad latitude afforded to self-defense, self-defense designations are possible even when the threat to troops is physically and temporally remote. As a result, aerial assets have relied on the designation when there was no clear evidence of troops in danger in the immediate vicinity, in situations that might otherwise resemble regular, offensive targeting. A senior German commander deployed with U.S. forces in northern Afghanistan offered the example of a known IED bomb maker identified in aerial surveillance footage in a physically remote area of Afghanistan, several days' drive from any international forces. Although the situation might seem more suited to a traditional (offensive) targeting paradigm, he said that the U.S. forces that he was stationed with argued that this was a clear case of hostile intent and that air assets could address the threat on behalf of other troops in the province even before it became an immediate threat.[93] Drawing on similar observations, Corn argued that the "troops in contact" designation was regularly cited (wrongly in his view) to justify "hasty, tactical targeting" and even "to draw insurgents out and thereby trigger self-defense authorities, so-called baited self-defense"—essentially using the self-defense authorities in offensive ways.[94]

What this section has attempted to portray is the broad nature of the emerging practice of self-defense. Self-defense could be applied to respond to a range of behaviors, and to indefinite threat horizons. In addition, the flexibility to respond in self-defense could be transferred to others—unit self-defense could encompass defensive responses by individuals or units who were not directly threatened on behalf of those who were (again, not immediately, but at some foreseeable point in the future). As a result of this wide latitude, self-defense came to be relied on to an increasing degree in Iraq and Afghanistan, mainstreamed both among regular forces and special forces, available to ground soldiers and those operating air assets. The broad application of self-defense to a range of circumstances was possible in part because of the ambiguity in the underlying standards, which placed few clear limits on the use of self-defense, and in part due to substantial deference to forces on their own perception that they were in threat. This interacted with conflict environments laden with ambiguous threats to produce a broad conduct-based targeting framework that was available in any threat scenario

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[91] *See Transcripts of U.S. Drone Attack*, LATIMES.COM, 00:33 min., http://documents.latimes.com/transcript-of-drone-attack [https://perma.cc/7MKH-PKB5].
[92] *Id.*
[93] Interview with German commander, in Berlin, Ger. (Jul. 6, 2015).
[94] Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 11.

in which troops found themselves. This includes—as the next section will discuss—hostile situations in undeclared conflict zones where the legal authority to use force under a wartime paradigm have not always been clear.

C. *Unit and Individual Self-Defense Far from a Hot Battlefield: Legal Bases & Legal Stretches*

Revisiting the strikes discussed in the introduction to this paper, the strikes in defense of forces on the ground in Syria and Somalia, as well as the self-defense authorities exercised by troops in other global locations appear to have the same characteristics as the uses of force in self-defense that were documented in Iraq and Afghanistan. As noted in the introduction, the March 2016 strike on the Al-Shabab training camp was framed not as an expansion of targeting authority justified under the AUMF, but as a "tactical defense" of forces on the ground, not that dissimilar to regular "troops in contact" situations in Afghanistan.[95] In follow-up reporting by the *New York Times*, Robert S. Taylor, the acting Pentagon general counsel, said that the strike was justified because the intelligence suggested an imminent threat and—reflecting the terms of art that have come to be associated with the imminence standard in self-defense[96]—that this presented the "last, best opportunity" to stop it.[97] Similarly, the two June 2017 strikes, on an Iranian drone and a Syrian fighter jet, were justified neither as part of a forward targeting decision nor as part of a new engagement in hostilities with Syria or Iran, but as actions in defense of U.S. trainers or associated anti-ISIL forces on the ground, using the language of "hostile intent." According to *The Guardian*'s reporting, Capt. Jeff Davis, the Pentagon spokesman, justified firing on the Iranian drone by saying:

> We have said before that demonstrated hostile intent and actions of pro-regime forces towards coalition partner forces in Syria that are conducting legitimate counter-Isis operations in Syria, will not be tolerated . . . . We do not seek conflict with any party in Syria other than Isis but we will not hesitate to defend ourselves or our partners if necessary.[98]

The *Guardian* report also noted the determination was made because the armed drone was approaching a U.S. outpost "where U.S. advisors were training an anti-Isis local militia."[99] The situation mirrors many of the other "troops in contact" and self-defense-justified aerial strikes in Afghanistan, in that troops on the ground

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[95] A Department of Defense spokesman, Joe Sowers said that although the AUMF was deemed to bestow "authority for direct action against a limited number of targets in Somalia" who are deemed to be part of Al-Qaeda, this did not include those killed in the March 5 strike, nor those killed in previous strikes in June, July, and November 2015. Instead, they were killed as part of a "tactical defense" of U.S. and AMISOM forces in Somalia based on evidence that the individuals posed a threat. Question to the Pentagon, *supra* note 2.
[96] *See supra* notes 46–54 and accompanying text.
[97] Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2.
[98] Borger, *supra* note 6.
[99] *Id.*

were under a perceived threat and aerial assets in the same area of operations were able to respond on their behalf in unit self-defense. The reporting on the strike against a Syrian aircraft on June 18, 2017 did not specifically cite "hostile intent," but did note that the strike was taken in defense of U.S.-allied forces on the ground and cited "collective self-defense," which is one of the categories along the spectrum of self-defense in the U.S. SROE.[100] These Somalia and Syria strikes do not stand alone. *New York Times* reporting on U.S. counter-terrorism strikes and special forces operations found a "built-in exception" for airstrikes taken in "self-defense," or defense of partners "even when Americans are not at direct risk" that appears to describe self-defense in hostile intent-like situations.[101]

The language and logic of self-defense and hostile intent have also been apparent in incidents involving special forces (and their partners) deployed outside of declared conflict zones. In February 2018, U.S. strikes killed hundreds of pro-regime forces in Syria, including a significant number of Russian private security contractors, in response to an attack against U.S.-partnered Syrian Democratic Forces ("SDF") fighters and their embedded special forces mentors in SDF-held territory in northern Syria.[102] The incident, which was described as the bloodiest engagement the United States faced in Syria and the first standoff between Russian and American fighters in 50 years, was framed as a "self-defense" response by the Pentagon.[103] On October 4, 2017, four U.S. and four Nigerien soldiers were ambushed and killed in Niger. The high casualty count in a country where the United States was not clearly engaged in hostilities (at least not as far as many congressional officials and the U.S. public were aware) sparked public controversy and investigations into the legal basis.[104] The Trump Administration's justification, following legal lines drawn under the Obama Administration, was that the forces were there only to "train, advise, and assist" Nigerien forces and that, where they had used force, in the October 2017 incident and in another less publicized incident in December 2017, they had done so "in self-defense."[105]

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[100] Holland, *White House Says*, *supra* note 6. For the current U.S. Standing Rules of Engagement, which includes the specific provision on collective self-defense as it relates to unit or individual self-defense, *see* LEE, OPERATIONAL LAW HANDBOOK 2015, *supra* note 36, at 83.

[101] *See Obama Expands War*, *supra* note 5.

[102] *See* Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html [https://perma.cc/ZY5R-BGTT].

[103] *Id. See* Joshua Yaffa, *Putin's Shadow Army Suffers a Setback in Syria*, NEW YORKER (Feb. 16, 2018), https://www.newyorker.com/news/news-desk/putins-shadow-army-suffers-a-setback-in-syria [https://perma.cc/2KD6-TC49].

[104] Rukmini Callimachi, Helene Cooper, Eric Schmitt, Alan Blinder & Thomas Gibbons-Neff, "*An Endless War": Why 4 U.S. Soldiers Died in a Remote African Desert*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/interactive/2018/02/17/world/africa/niger-ambush-american-soldiers.html [https://perma.cc/ETB8-53QW] [hereinafter *An Endless War*].

[105] The position was disclosed as part of a report to Congress required under Section 1264 of the National Defense Authorization Act for fiscal year 2018. 50 U.S.C. § 1549 (2018); Trump 1264 Report, *supra* note 7.

The similarity in the nature of the situations, the reliance on the legal terms of art and buzzwords associated with hostile intent and self-defense situations, and the post-hoc explanations of these strikes as tactical defenses suggest that these instances represent examples of the use of self-defense authority by troops or units on the ground outside of a declared conflict environment. It is not altogether surprising that these self-defense justifications transferred from one theater of operations to another. The same special forces and drone operators that relied on these self-defense determinations in Iraq and Afghanistan are deployed globally—to some 149 countries in 2017 and 133 countries as of mid-2018.[106] It would seem logical that a commander engaged in a hostile environment far from a "hot battlefield" would respond to what he perceived as an imminent attack on his troops in the same manner as he had dozens of times in Afghanistan or Iraq.[107]

While this is a potent sociological explanation, it does not satisfy the question of the underlying legal authorities for these engagements where they occur outside of declared conflict zones. There is significant room for debate about how and where individual and unit self-defense should be relied upon—as opposed to other, offensive force paradigms—to justify force within a conflict such as that in Afghanistan. However, the ability of troops to use force in an armed conflict framework was not in doubt in Afghanistan, and their remit to use force to dispose of threats within that conflict environment has generally been greater as a result. That remit is somewhat less clear and more contested in places like Syria, Somalia, or Niger. The general under-theorization of unit and individual self-defense makes it difficult to identify how unit and individual self-defense either leverages or interacts with the more limited domestic and international authorities that forces rely on in these undeclared conflict zones. This is particularly important where the targets appear to be beyond the limited basis justifying troops' presence and activities there. Was there a plausible legal basis for using self-defense as the authority for taking down an Iranian drone or a Syrian jet, or for attacking dozens of Russian citizens, or a training camp of 100 fighters in Somalia? Does the domestic authority for deploying troops in those positions extend also to these strikes or attacks or does self-defense provide its own basis for these strikes? How

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[106] In congressional testimony in May 2017, the chief of U.S. Special Operations Command General Raymond Thomas, reported that "[o]n a daily basis, we sustain a deployed or forward stationed force of approximately 8,000 across 80-plus countries." *Statement of General Raymond A. Thomas, III, U.S. Army Commander United States Special Operations Command Before the H. Armed Serv. Comm. Subcomm. On Emerging Threats and Capabilities*, 115th Congress, 3 (May 2, 2017) https://docs.house.gov/meetings/AS/AS26/20170502/105926/HHRG-115-AS26-Wstate-ThomasR-20170502.PDF [https://perma.cc/DJF3-ZSNG]. Nick Terse, *Special Operations Forces Continue to Expand Across the World—Without Congressional Oversight*, NATION (July 17, 2018), https://www.thenation.com/article/special-operations-forces-continue-expand-across-world-without-congressional-oversight/ [https://perma.cc/5LLH-ZBF8].

[107] As an example of such a transfer of self-defense from one theater of operations to another, Corn provides the example of U.S. forces that had served in Afghanistan then applying an aggressive form of self-defense while on deployment in Haiti, on a humanitarian mission. Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 11 n.42. While not special forces, this illustrates how easily the ingrained self-defense paradigms from Afghanistan might transfer with forces, even when operating in very different mission contexts.

do these unit and individual self-defense strikes fit into international legal restrictions on the resort to force, *jus ad bellum*, in particular the concept of when the exercise of sovereign self-defense is justified?

Parts III and IV will explore these questions and how several prevailing legal theories articulated by the United States might explain the legal basis for such strikes under domestic and international law, respectively. Each Part will also discuss how justifying and applying unit and individual self-defense authorities in this way undermines existing restrictions on resort to force.

III. Domestic Legal Basis: Legislative or Executive "Stretchiness" & Constitutional Limits on Presidential War-Making

While the SROE and other policy guidance make clear that individual and unit self-defense are subsets of sovereign self-defense under the U.S. interpretation of international law, they do not clearly articulate the domestic legal basis for individual and unit self-defense. The unclear constitutional basis has been brought to the fore by the recent instances of U.S. forces exercising self-defense in situations where congressional authorization to engage in hostilities has been more limited and more controversial. This Part will consider the possible domestic legal bases in these situations, and argue that the most likely reading of individual and unit self-defense is that it rests on Article II authority, a sort of tactical or unit level expression of the commander-in-chief's ability to exercise force to defend the nation. However, this interpretation would raise a number of separation of power issues. While the standing executive branch interpretation of the President's commander-in-chief authority would likely cover most extended self-defense strikes or operations, it does so because of increasingly expansive—arguably over-expansive—interpretations of presidential war powers in the last two decades. In addition, because self-defense is an expression of the president's commander-in-chief authority, where it is used to engage in significant conflict activities in areas that are not clearly authorized by Congress, it would further push the boundaries of executive war powers.

A. *The Challenge: Legislative or Executive "Stretches" to Justify Individual and Unit Self-Defense*

The strikes and other self-defense responses in Syria, Somalia, and Niger have provoked controversy domestically, either because the nature of the groups or combatants targeted or the locations where these operations took place were not clearly covered by the domestic authorities for deploying troops to these locations.[108] In terms of the legal basis for troops or military assets to be deployed

[108] *See, e.g.*, Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2 (citing legal scholars' questioning of whether the AUMF could be stretched to cover the Somalia strike); *see also* Kheel, *supra* note 7 (citing legal questions raised over the domestic basis for shooting down a Syrian jet); Daugirdas & Mortensen, *supra* note 7, at 588–90 (discussing the legal debate and controversy surrounding the Al-Shabab strike).

in these areas of operations, both the Obama and Trump Administrations have posited that Congress's grant of authority to pursue Al-Qaeda and its affiliates under the 2001 AUMF justifies limited troop deployments and counter-terrorism operations in Syria, Iraq, Somalia, and Yemen.[109] The Obama and Trump Administrations have argued that the operations against ISIL in Syria and Iraq are additionally supported by the 2002 Authorization for Use of Military Force in Iraq.[110] In general, the Obama and Trump Administrations' legal framework reports rely on these congressional grants of authority to justify global troop deployments, rather than on their Article II commander-in-chief authorities; however, in its 2018 legal framework report, the Trump Administration referenced its commander-in-chief authority to justify the deployment of U.S. special forces in Niger, and the pre-emptive strike against chemical weapons facilities in Syria in February 2018.[111]

The Obama and Trump Administrations' claims that they may use the AUMF to authorize operations against some of these groups have themselves been the subject of significant legal debate. In particular, not all agree that the AUMF should be used to justify troop deployments aimed at countering ISIL, given that ISIL did not exist in 2001 and Al-Qaeda has rejected it, suggesting a weak claim for the sort of affiliation or co-belligerency nexus required under the AUMF.[112] Nonetheless, the claims of legislative authority for these operations through either the 2001 and/or 2002 AUMF provide at least a presumptive basis for troop deployments and operations in these locations. However, while the 2001 and 2002 AUMF may be the basis for U.S. troop deployments, these authorities have not always appeared to cover the targets attacked by those forces in the name of self-defense (of themselves or partners).[113] The Obama Administration's positions seemed to recognize that the AUMF granted authority to engage in hostilities that were not limited geographically, but were limited to those arguably connected to or affiliated with Al-Qaeda. For example, in the Obama Administration's 2016 report to Congress on the legal basis for such troop deployments and operations, it noted that the "2001 AUMF does not authorize the President to use force against every group," and then specified particular groups within Afghanistan, Somalia, Libya, and Syria that were deemed to be Al-Qaeda affiliates and thus targetable under the 2001 AUMF.[114] In the case of Somalia, at the time of the March 2016 strike the Obama Administration had determined that while some individuals affiliated with Al-Shabab were considered to be Al-Qaeda members, the Al-Shabab group as a

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[109] Obama Framework Report, *supra* note 7, at 15–18; Trump 1264 Report, *supra* note 7, at 5–7.
[110] Obama Framework Report, *supra* note 7, at 15–16; Trump 1264 Report, *supra* note 7, at 3.
[111] Trump 1264 Report, *supra* note 7, at 3–4, 7. In justifying the deployment of troops in Niger, the Trump Administration framework report also referenced statutory authorities to train and assist Nigerien partner forces, albeit without identifying those statutory authorities. *Id.* at 7.
[112] *See, e.g.*, Goodman, *Assessing the Claim*, *supra* note 7; Bellinger Testimony, *supra* note 7. The claims surrounding the legal basis for the preemptive attack on the Syrian chemical weapons facilities were even more hotly debated, but this discussion is beyond the scope of this article.
[113] *See, e.g.*, Goodman, *Congress's 2001 AUMF*, *supra* note 7; Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2; Kheel, *supra* note 7; Daugirdas & Mortensen, *supra* note 7, at 588–90.
[114] *See, e.g.*, Obama Framework Report, *supra* note 7, at 5 (designating specific combatant groups in the countries where troops were deployed under 2001 AUMF authority).

whole was not deemed to be an "associated force."[115] This distinction was one of the reasons that the March 2016 strike on the Al-Shabab training camp raised questions, because it seemingly targeted those who were not at that time designated to be Al-Qaeda affiliates, and so appeared to be a strike unsupported by AUMF authority.[116] The seeming gap in legal authority for these strikes was never fully resolved by the Obama Administration, or at least, the rationale was not publicly articulated.[117] The debate continued under the Trump Administration, with questions raised over the legal basis for subsequent strikes on persons or assets associated with the Assad regime, with Iran, or Russia, in Syria. In testimony before the Senate Foreign Relations Committee, former State Department Legal Advisor John Bellinger said of the June 2016 strike against a Syrian jet:

> I was puzzled about the statements coming out of the Pentagon that the shootdown was authorized by the 2001 AUMF . . . it's hard for me to see that Congress, by authorizing the use of force against organizations and nations and groups that committed the 9/11 attacks, authorized the use of force against Syria. [118]

Although a slightly different issue, the death of U.S. forces in Niger also provoked public controversy because congressional officials said they were not even aware of troop deployments there, raising questions of whether there could be congressional intent for the AUMF to extend to that area of operations without any knowledge of the deployment, much less the nexus to Al-Qaeda.[119]

Two legal theories for the domestic legal basis for these strikes and operations have emerged—both arguably a "stretch" (in the words of some

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[115] Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2; Daugirdas & Mortensen, *supra* note 7, at 589 ("[T]he administration has generally limited the use of force against al-Shabaab to the targeting of specific named individuals who are known to be personally 'associated' with Al Qaeda (sometimes referred to as 'dual-hatted' fighters)."). This position was later revised and all members of Al-Shabab were deemed to be Al-Qaeda affiliates. *Obama Expands War*, *supra* note 5; Kristina Daugirdas & Julian Davis Mortensen, *Contemporary Practice of the United States Relating to International Law*, 111 AM. J. INT'L L. 533, 533-535 (2017); Obama Framework Report, *supra* note 7, at 5 (describing the process underlying the determination that Al-Shabab as a group was an Al-Qaeda "associated force").

[116] Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 2; Daugirdas & Mortensen, *supra* note 7, at 588–90.

[117] Obama Administration statements, both public and confidentially to news media, appeared contradictory or unclear on this point. *See, e.g.*, Question to the Pentagon, *supra* note 2.

[118] John Bellinger, Senate Foreign Relations Committee—Bipartisan Support for a New AUMF?, LAWFARE (June 20, 2017), https://www.lawfareblog.com/senate-foreign-relations-committee-bipartisan-support-new-aumf [https://perma.cc/EWM6-F9P2]. Illustrating the level of controversy on this issue, the Senate Foreign Relations Committee then formally requested that the Trump Administration provide an explanation for the shooting down of the Syrian jet in June 2017, and other attacks against the Assad regime. Kheel, *supra* note 7.

[119] *An Endless War*, *supra* note 104.

scholars) but of different constitutional bases.[120] In his testimony discussing the Syria strikes, Bellinger suggested that although these strikes appeared to surpass the limits of the 2001 AUMF, they might well still be supported under the President's Article II authority, a theory also supported by other scholars.[121] In other words, though the strikes would not be covered by the AUMF or other legislative authorities, the President's Article II authority would be stretched to cover them. Others have argued that while not clearly part of the AUMF authority to counter Al-Qaeda and its affiliates, such strikes are an acceptable extension of it, a sort of incidental authority to defend forces implicit in the congressional authorization. As Ryan Goodman has argued, "If we assume the counter-ISIS fight is authorized by the AUMF . . . then force protection of our counter-ISIL operations would be too."[122] Goodman's rationale for siding with the legislative stretch interpretation appears to be partly motivated by a desire to cabin already expansive presidential war powers: "[W]hich stretchiness would you prefer? One that stretches the statutory interpretation under the 2001 AUMF or one that stretches the interpretation of the President's stand-alone constitutional authority to act without congressional approval?"[123]

The Trump Administration's 2018 legal framework report appears to adopt this latter theory of treating self-defense as implicit to the legislative authorization for deploying forces. Addressing the legal basis for the strikes in Syria in May and June 2017, the 2018 legal framework report posits that: "As a matter of domestic law, the 2001 AUMF provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations."[124] The 2018 legal framework report also suggested that the self-defense response of U.S. special forces in Niger was "conducted pursuant to the 2001 AUMF."[125] Beyond these two lines, there is little explication of how the AUMF would stretch to these strikes and it is unclear how settled this interpretation is.[126]

This point is worth revisiting because there are a number of problems with the theory that the legislative mandate can be stretched to cover any subsequent

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[120] *See* Monica Hakimi, *The U.S. Strike against Pro-Assad Forces and the 2001 AUMF*, JUST SECURITY (May 19, 2017), https://www.justsecurity.org/41181/u-s-strike-pro-assad-forces-2001-aumf/ [https://perma.cc/L23X-WVFH]; Goodman, *Congress's 2001 AUMF*, *supra* note 7.

[121] Hakimi, *supra* note 120; Goodman, *Congress's 2001 AUMF*, *supra* note 7. *See also* Robert Chesney, *War Powers and the Su-22 Episode: Third-Party Defense of Coalition Partners*, LAWFARE (June 20, 2017), https://www.lawfareblog.com/war-powers-and-su-22-episode-third-party-defense-coalition-partners [https://perma.cc/R4HM-WN2H].

[122] Goodman, *Congress's 2001 AUMF*, *supra* note 7. *See also* Hakimi, *supra* note 120 (arguing that extending the AUMF authorities to "operations that are designed to protect ISIS-fighting forces does not seem like such a stretch").

[123] Goodman, *Congress's 2001 AUMF*, *supra* note 7.

[124] Trump 1264 Report, *supra* note 7, at 6.

[125] *Id*. at 7.

[126] The Obama Administration's defense of the March 2016 Somalia strike also hints at some form of implicit authority for self-defense within the AUMF but are not entirely clear. *See* Question to the Pentagon, *supra* note 2.

actions in unit and individual self-defense. While Congress no doubt envisioned that troops would have some right to defend themselves in the course of hostilities *that they authorized*, self-defense has frequently been used to target adversaries whom Congress has expressly declined to authorize war against (Syria, Iran) or in situations where Congress did not seem to realize that they had granted authority for operations (judging by their *ex post* reaction to troop deaths in Niger).[127] To the extent that there is some incidental grant of authority supporting actions in self-defense, the outer limits of that "statutory stretchiness"—to borrow Goodman's framing—would seem to be where the self-defense response results in engagement in hostilities that Congress has expressly decided against, and in some cases has tried to limit, engagement in hostilities (as in Syria).

Another issue with this "statutory stretch" theory is that it appears at odds with the framing of self-defense as an "inherent" right in all other practice and guidance on self-defense.[128] Suggesting that unit and individual self-defense are only available incidental to other lawful domestic authorities to engage in armed conflict, would suggest that individual and unit rights to self-defense are not "inherent" at all but are contingent on statutory authorization from Congress. Instead, the "inherent" language would seem to cohere more strongly with a view that soldiers' or units' self-defense derives from the president's inherent commander-in-chief authority. However, that authority is not unconstrained. The President's ability to engage in war-making is subject to constitutional checks and balances, the scope of which have been the subject of much debate. To fully explore this proposition and determine what the remit for Article II supported self-defense strikes might be, the subsequent section will discuss the scope of inherent presidential authority to engage in war-making and the constraints on that authority. This will be followed by a discussion of how an expansive interpretation and use of individual and unit self-defense in undeclared conflict situations could further extend presidential war powers.

B. *The Constitutional Debate over Presidential War-Making*

The Constitution divided war-making authorities between Congress and the President. A full discussion of congressional versus presidential war powers cannot be covered in this article—entire libraries may not do the subject justice.[129] What

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[127] *An Endless War*, *supra* note 104.

[128] *See* Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31 at 7. Corn's note that the same self-defense rules under the SROE were applicable for forces deployed on a humanitarian, peacetime mission in Haiti is an illustration of the principle that self-defense is available in all contexts and not dependent on a wartime authorization. *Id.* at 11 n.42. *See also* Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 304–06.

[129] The number of sources on war powers and interpretations thereof is too numerous to count. Articles discussing these competing arguments and debates that the author found useful (and which contain more exhaustive discussions of other sources) include: Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L. J. 845 (1996); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990); William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997); Charles A. Lofgren, *War-Making*

must suffice here is to introduce the scope of debate surrounding the President's inherent, unilateral power to engage in hostilities absent congressional authorization. The U.S. Constitution vests the President with the authority to direct and oversee the waging of war as commander-in-chief of the U.S. Armed Forces,[130] but it grants Congress the authority to "declare War."[131] Most scholars' analysis of the Framers' intentions and deliberations suggest they had a very limited view of presidential war-making authority, with the President as commander-in-chief merely executing the orders of Congress when it decides on recourse to war.[132] However, even those scholars who adopt a very narrow view of executive war powers tend to agree that the Framers intended for the President to still be able to "repel sudden attacks" on his own authority.[133]

This inherent, but ill-defined authority to repel sudden acts is important for considering Article II authority for unit and individual self-defense strikes for two reasons. First, it is notable that the President's ability to repel sudden acts—what might be characterized as a defensive authority—is considered to be core to the President's commander-in-chief authority. While the scope of this defensive authority is hotly debated (to be discussed immediately below), the fact that this

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under the Constitution: The Original Understanding, 84 YALE L. J. 672 (1972); LOUIS FISHER, PRESIDENTIAL WAR POWER (3d ed. 1995).

[130] "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States." U.S. CONST. art. II, § 2.

[131] The powers granted to Congress pertaining to the armed forces and "militias" of the States in Article 1 are: "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8.

[132] *See, e.g.*, Lofgren, supra note 129, at 675–88; Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by Declare War*, 93 CORNELL L. REV. 45, 48 (2007); 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, 695–96 (2016); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548–53 (2002). Some of the most prominent early texts cited by these and other scholars examining the Framer's intent include: Speech by Alexander Hamilton, "Madison Debates, June 18," *available at* The Yale Law School Library (June 18, 1787) (arguing for Congress to have the "sole power of declaring war," and the President "to have the direction of war when authorized or begun"); The Federalist No. 69, at 416 (Alexander Hamilton) (Kesler & Rossiter ed. 2003) (arguing that the President's commander-in-chief authority should be more limited than the British King's: "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") (emphasis in original).

[133] *See generally* Lofgren, *supra* note 129, at 675–88 (summarizing the original debates in the Constitutional Convention surrounding congressional authority to "make" versus "declare" war and leaving to the President the authority to "repel sudden attacks") (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (Max Farrand ed., rev. ed. 1937)).

defensive authority is considered to be central, even "inherent," to the President's commander-in-chief power lends strength to the argument that the "inherent" right of units and forces to defend themselves descends from the President's inherent, defensive authority to repel attacks.

More broadly, the "repel sudden attacks" language has been interpreted as signaling that there is some degree of inherent presidential authority to engage in war-making unilaterally, which would form the base for any Article II-derivative self-defense strikes. Competing views of how to weigh historical practice and differing methodological approaches to inferring original intent have left the exact scope of the President's unilateral power to engage in hostilities open to interpretation, and to extensive historical and legal debate.[134] While some scholars have focused on finding the original Framers' intent, others have emphasized historical practice, which particularly since the Korean War, has appeared to present a seemingly broader view of executive war-making and substantial congressional deference.[135] Curtis Bradley and Jean Galbraith have summarized the debate: while most scholars tend to agree that the Framers intended to require congressional authority to initiate offensive uses of force, even those falling short of war, more recent presidential practice and the current executive branch position "takes a far broader view of the President's independent constitutional authority."[136]

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[134] *See generally* Stromseth, *supra* note 129 (discussing how different authors' methodology of constitutional interpretation has influenced their interpretation of war powers); William M. Treanor, *The War Powers Outside the Courts*, 81 IND. L. J. 1333 (2006); Ramsey, *Textualism and War Powers*, supra note 132 at 1543; Lofgren, *supra* note 129; Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); *cf.* Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002). *See also* Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1370–88 (1993); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057–66 (2005).

[135] John Hart Ely's WAR AND RESPONSIBILITY is most frequently cited as illustrating that Congress has acquiesced to the President when it comes to Presidential War Powers. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (2d ed. 1993). *See also* Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970) (arguing that historical practice settles the opaque question of division of powers between presidents and Congress, in the President's favor); FISHER, *supra* note 129 (offering a survey of historical practice of U.S. engagement in hostilities from 1789 to 1995 and considering the balance of legislative-congressional authorities in those hostilities); Stromseth, *supra* note 129 (*reviewing* Fisher's historical survey and other war powers scholarship and noting the increased tendency toward larger presidential war powers claims since the Korean war). *But cf.* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding* [pt. 1], 121 HARV. L. REV. 689, 693 (2008) (discussing Ely's work and the traditional premise of congressional acquiescence but rejecting the "the traditional assumption that Congress has ceded the field to the President when it comes to war").

[136] Bradley & Galbraith, *supra* note 132, at 696; *see also* Ramsey, *Textualism and War Powers*, *supra* note 132, at 1548; Barron & Lederman, *supra* note 135, at 941; *see generally* Prakash, *supra* note 132.

One chapter of the continuing debate over war powers authorities came with the passage of the War Powers Resolution ("WPR") of 1973.[137] Trying to introduce a cap on presidential engagement in war-making without congressional consent, the WPR requires that the President:

> [S]hall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.[138]

When the President finds it necessary to introduce forces into a situation of imminent or actual hostilities absent a congressional declaration of war, the President must report back to Congress within 48 hours on the circumstances, the legal basis, and the estimated scope and duration of the conflict.[139] Unless Congress decides to approve the action, the forces must be withdrawn within 60 days (or in some circumstances 90 days).[140]

Presidents have long argued that the WPR is unconstitutional, starting with President Nixon's initial veto of the WPR, which was overridden.[141] Presidents have routinely under-complied with the reporting requirements of the WPR, submitting reports later than 48 hours, not at all, or bending the reporting requirements, justifications, or descriptions of the situations in ways that would gut the restraints of the WPR—such as by describing the engagement in a way that might not clearly trigger Congress's ability to withdraw forces after 60 days.[142]

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[137] War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548, § 1543(a) (2014)).
[138] 50 U.S.C. § 1541–1548 (2014).
[139] 50 U.S.C. § 1544(a) (2014).
[140] 50 U.S.C. § 1544(b) (2014).
[141] *See* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984), https://www.justice.gov/olc/file/626836/download [https://perma.cc/RVK2-TCRN] ("The Executive Branch has taken the position from the very beginning that § 2(c) of the [War Powers Resolution] does not constitute a legally binding definition of Presidential authority to deploy our armed forces."); Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579, 585–87 (1984) (providing examples under the Ford, Carter, and Reagan Administrations either objecting to the constitutionality of the War Power Resolutions or openly defying its provisions based on their own interpretation of executive power).
[142] Eileen Burgin, *War over Words: Reinterpreting Hostilities and the War Powers Resolution*, 29 BYU J.
PUB. L. 99, 125–39 (2014) (finding that successive administrations have "stretched the reporting envelope," frequently denying the existence or manifestation of hostilities in order to limit reporting requirements or potential for withdrawal) [hereinafter Burgin, *War over Words*]; RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, *THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS*, 77–88 (2012) (identifying 18 cases in which Presidents deployed forces to hostile situations without submitting a WPR report); Zablocki, *supra* note 141, at 581–86 (providing examples of Presidents' defining engagement in hostilities in ways that would not trigger the WPR requirements in the cases of the 1975 Danang sealift, the 1975 evacuation of Americans and Cambodians from

Reviewing the 131 presidential reports submitted under the WPR from its enactment to the Obama Administration's June 2011 report on Libya, Eileen Burgin writes that "adherence to section 4(a)(1)'s letter and spirit has been virtually non-existent."[143] Burgin notes that Congress has repeatedly failed to respond to presidential non-compliance with the WPR, for example, by enacting legislation that invoked the law or mandatory withdrawal in cases of violations or by creating new processes or procedures that might have prevented future transgressions.[144] While there have been counter-examples of Congress objecting to presidents' skirting of the WPR requirements and intent,[145] the perception of congressional acquiescence has at least created the argument that Congress assents to this broader conception of the President's authority.[146]

Although the WPR has not appeared to significantly constrain presidential action, executive branch efforts to interpret around its limitations have led to a substantial body of legal theorization and justification for when the president can engage in unilateral war-making. Efforts to justify significant hostilities in Somalia in 1992, in Haiti in 1994, in Bosnia in 1995, and in Libya in 2011 without congressional authorization have generated a series of Office of the Legal Counsel ("OLC") memos about the scope of presidential war-making (hereinafter these four memos are referred to collectively as the "OLC memos").[147] Marty Lederman describes the claim being made in these OLC memos as the Obama/Clinton "Third Way," a Goldilocks approach between those who argue that the Constitution limits the president from ever initiating hostilities unilaterally and the expansive, Bush-

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Phnom Penh, the 1975 rescue of those captured on the freighter Mayaguez, and the 1980 failed rescue of US Embassy personnel held hostage in Iran).

[143] Burgin, *War over Words*, *supra* note 142, at 125.

[144] *Id*. at 140.

[145] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 465–67 (2012)(discussing evidence of congressional objections to unilateral executive engagement in hostilities that undercuts the argument that congress has acquiesced); Barron & Lederman, *supra* note 135, at 719 (generally rejecting the widespread assumption of congressional acquiescence and providing examples of congressional engagement in trying to limit or regulate executive actions); Burgin, *War over Words*, *supra* note 142, at 123–34 (documenting prominent and public objections by congressional representatives in response to the Obama engagement in Libya).

[146] *See*, *e.g.*, Burgin, *War over Words*, *supra* note 142, at 145 (providing the example that "Precedents of executives circumventing and misconstruing the WPR's reporting requirements . . . with relatively little congressional retribution . . . may have reinforced President Obama's perception that he had license to dodge the law," in the case of the Libya intervention); Monaghan, *supra* note 135, at 31 (arguing that historical practice of unilateral presidential deployment of forces without congressional approval had so "settled the legitimacy of 'inherent' presidential power" as to be "decisive of the constitutional issue").

[147] Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992) [hereinafter OLC Somalia Memo]. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994), *available at* https://www.justice.gov/file/20306/download [https://perma.cc/68ZN-KTK9] [hereinafter OLC Haiti Memo]; Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330-31 (1995) [hereinafter OLC Bosnia Memo]; Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011), *available at* https://www.justice.gov/olc/opiniondocs/authority-military-use-in-libya.pdf [https://perma.cc/K54A-T2RJ] [hereinafter OLC Libya Memo].

era claim that the Constitution granted the president broad, unenumerated authority to engage in military hostilities without congressional consent.[148]

This theory of significant but still constrained executive war-making power is not undisputed, and may particularly be rejected by those who adhere to either of the other two poles referenced in Lederman's characterization, the very limited or very broad views of presidential power.[149] Notwithstanding this continuing debate, as Lederman notes, this Third Way position has "rightly or wrongly . . . governed, or at least described, U.S. practice for the past several decades."[150] Given that the Third Way paradigm best describes the standing interpretations of inherent presidential war-making authority, the conditions within this Third Way paradigm would in effect describe the outer bounds of an Article II-derived self-defense authority and will be used to consider the potential outer bounds of self-defense strikes in the remaining discussion.

C. *Limits of Executive War-Making: The Third Way Conditions*

Under the Third Way paradigm of presidential authority, the President can initiate military action unilaterally and without congressional consent, but only under certain circumstances: the hostilities in question must fall short of war in a

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[148] 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/E5SC-EZSZ] [hereinafter Lederman, *Why the Strikes*]; Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I–The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection/ [https://perma.cc/VD59-TCSK] [hereinafter Lederman, *Syria Insta-Symposium*]. For examples of positions that typify the other two extremes that the "Third Way" approach threads between, *see, e.g.*, ELY, WAR AND RESPONSIBILITY, *supra* note 135, at 3–11 (representing the more classical, limited position that the President must in nearly all cases obtain congressional authorization to use force abroad); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Daniel J. Bryant, Assistant Attorney Gen., Authorization for Use of Military Force Against Iraq Resolution of 2002, at 2–6 (Oct. 21, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-military-force-iraq.pdf [https://perma.cc/54H4-NRC2] (arguing that the Constitution provided an unenumerated "broad war power to the President" that Presidents had routinely acted upon without requiring a declaration of war from Congress); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, Authority of the President Under Domestic and International Law To Use Military Force Against Iraq, at 7–9 (Oct. 23, 2002), https://fas.org/irp/agency/doj/olc/force.pdf [https://perma.cc/F3XV-EYQX] (also arguing that the constitutional authority granted to the President to "engage in military hostilities to protect the national interest" does not require congressional consent).

[149] *See* Lederman, *Why the Strikes*, *supra* note 148 (setting up the dichotomy that scholars would tend to agree with one of the three positions, and thus implicitly that those supporting the "traditional restrictive view," or "the Bybee/Yoo permissive view" would not agree with his proposed "Clinton/Obama 'third way'"). For further examples of these positions see all references noted in *supra* note 149.

[150] *See* Lederman, *Why the Strikes*, *supra* note 148.

constitutional sense and must support sufficiently important national interests.[151] In exercising this unilateral authority, the President must also respect any statutory restrictions, such as those under the WPR. This section will elaborate on each of these conditions, and how they have been applied to recent conflicts to establish what type of operational activities or deployments they might rule out.

As Lederman writes, one condition established in the series of OLC memos is that the hostilities in question must fall short of "war in the constitutional sense."[152] This argument first emerged in Assistant Attorney General Walter Dellinger's OLC memo justifying deployment of troops to Haiti in 1994. He argued that the President's deployment of troops did not transgress Congress's reserved authority to initiate war, because the nature of engagement in Haiti was "not a 'war' in the constitutional sense"—it was at the invitation of the Haitian government and the "nature, scope, and duration of the deployment [were] such that the use of force involved [did] not rise to the level of 'war.'"[153] Dellinger contended that the "overriding interest" of the WPR was to prevent engagement "in major, prolonged conflicts such as the wars in Vietnam and Korea" without congressional consent, not the type of lower-level deployments for other diplomatic purposes that presidents had frequently engaged in historically.[154]

It is notable that this "not war" justification was applied not only to the more limited and consensual (at the government's invitation) intervention in Haiti, but also to the more significant troop deployments and non-consensual uses of force in Bosnia and in Libya. In the initial Haiti OLC memo, Dellinger supported his argument that the Haiti engagement fell short of a war in part by arguing that the deployment "did not involve the risk of major or prolonged hostilities or serious casualties."[155] Dellinger's Bosnia memo recognized that, unlike the Haiti

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[151] *Id.*; *see also* Lederman, *Syria Insta-Symposium*, *supra* note 148; Bobby Chesney, *A Point-by-Point Summary of OLC's Libya Memo*, LAWFARE (Apr. 7, 2011), https://www.lawfareblog.com/point-point-summary-olcs-libya-memo [https://perma.cc/X44H-ESZ7] [hereinafter Chesney, *A Point-by-Point Summary*] (briefly summarizing the Third Way conditions).

[152] Lederman, *Why the Strikes*, *supra* note 148; *see also* Lederman, *Syria Insta-Symposium*, *supra* note 148.

[153] *See* OLC Haiti Memo, *supra* note 147, at 177–79; *see also* OLC Bosnia Memo, *supra* note 147, at 331 ("Historical practice supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not "wars" in either the common meaning or the constitutional sense.").

[154] OLC Haiti Memo, *supra* note 147, at 176, 177–79 (relying on the finding in Johnson v. Eisentrager, 339 U.S. 763, 789 (1950)), that the President may deploy forces "abroad to any particular region" in the "conduct of diplomatic and foreign affairs," and past precedents of Presidents deploying armed forces at the request of foreign governments). *See also* OLC Bosnia Memo, *supra* note 147, at 7 (citing a memo, *Training of British Flying Students in the United States*, 40 OP. ATT'Y GEN. 58, 62 (1941), by then Attorney General Robert Jackson stating that the Commander in Chief, the President has "the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country").

[155] *See* OLC Haiti Memo, *supra* note 147, at 173.

intervention, it was harder to suggest there was no risk of sustained military conflict in Bosnia, given that the 20,000 troops deployed might incur casualties and it would be tougher to disengage with such a large number of deployed troops than it would have been with air assets alone.[156] The greater pitch of hostilities in Bosnia than in Haiti is also important—Bobby Chesney has pointed out that in the two years leading up to the troop deployments in 1995, "the U.S. participated in air operations to enforce a no-fly zone and to protect civilians—including an intense two week period involving attacks on 'hundreds of targets' by NATO air assets (with U.S. participation)."[157] In the Bosnia OLC memo, Dellinger surmounts these potential objections, albeit not entirely convincingly, by emphasizing the consensual nature of the engagement and that, as part of a "peace agreement that will be guaranteed by NATO and the United Nations Security Council," the United States would not bear the sole burden of sustained engagement.[158] In addition, beginning with the Bosnia OLC memo, the OLC memos defray too close an inquiry into the nature of the hostilities by pointing to historical practice of presidents deploying forces overseas under their general foreign relations authority. In the Bosnia OLC memo, Dellinger argued there had been a consistent and extensive historical practice of presidents deploying forces in situations short of what he framed as the statutory definition of war. Among other examples, he cited the Supreme Court case *United States v. Verdugo-Urquidez*[159] which noted that U.S. forces had been deployed more than 200 times to protect American citizens or in the national security of the United States.[160]

Caroline Krass's Libya OLC memo continued this trend, in part sidestepping the question of how a non-consensual, intensive bombing campaign in Libya would not constitute war by noting that the "gloss" of historical practice suggests a wide remit for executive power in carrying out foreign relations, including substantial presidential uses of force abroad without congressional approval.[161] The Libya OLC memo also downplayed the importance of the level of force as a criteria for whether an engagement was war or not, and instead emphasized the duration of hostilities: Krass argued that the standard for what would constitute war "will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period"—the type of engagements typified by U.S.

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[156] *See* OLC Bosnia Memo, *supra* note 147, at 333.
[157] Chesney, *A Point-by-Point Summary*, *supra* note 151; *see also* OLC Libya Memo, *supra* note 147, at 9.
[158] *See* OLC Bosnia Memo, *supra* note 147, at 333–34.
[159] 494 U.S. 259 (1990).
[160] *Id.* at 331 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990)).
[161] *See* OLC Libya Memo, *supra* note 147, at 6–7. *See also* Jack Goldsmith, *Office of Legal Counsel Opinion on Libya Intervention*, LAWFARE (Apr. 7, 2011), https://www.lawfareblog.com/office-legal-counsel-opinion-libya-intervention [https://perma.cc/KAE6-9LC8] [hereinafter Goldsmith, *Libya Intervention*] (arguing that the Libya OLC memo is notable for the significant weight given to the "historical gloss" argument).

engagement in Korea or Vietnam.[162] In making this argument, the Libya OLC memo further expanded the interpretation of the *levels* of force might be deployed without it being a war in a constitutional sense.[163]

These precedents suggest that very significant levels of airstrikes and troop deployments can be folded into this "not-war" category and deployed at the President's discretion. This is particularly true where forces act at the invitation of the sovereign government, although, per the Libya fact pattern, consent is not a necessary condition. The different patterns and duration in the Bosnia and Libya situations offer conflicting precedents, but the overall tone and analysis suggests that relying solely or predominantly on aerial assets may be less likely to trigger concerns, as would a more time-limited engagement (but with there being substantial flexibility on what constitutes "prolonged").

The second condition of this Third Way theory of executive war-making authority is that the intervention must be justified by "sufficiently important national interests."[164] The four OLC memos offer a range of rationales, including that the action protected American lives and property in country (Haiti, Somalia), preserved regional stability or helped allies (e.g., NATO) to prevent the spread of regional conflict (Haiti, Bosnia, Libya), or supported U.N. Security Council mandates or credibility (Haiti, Somalia, Libya).[165] The precedents and historical evidence corralled in the OLC memos are used to argue that there is a constitutional mandate for presidents to deploy troops where necessary to protect American persons, property, or interests, as part of regular diplomatic and foreign relations, and in service of other policies or strategies identified as within the national interest (e.g., in support of NATO operations and allies).[166] In short, there are any number

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[162] *See* OLC Libya Memo, *supra* note 147, at 8; *see also id*. at 8–9 (arguing that the WPR was intended to limit unilateral presidential authority to engage in prolonged conflicts like Vietnam and Korea, relying on the OLC Haiti Memo).

[163] Goldsmith, *Libya Intervention*, *supra* note 161 (arguing that justifying the Libya intervention's "two weeks of nonconsensual aerial bombardments" as something other than a war significantly expands past interpretations of what does not constitute a war under the "Declare War" clause); *see also* Jack Goldsmith, *The Legal Reason Why the Obama Administration Won't Call the Libya Action "War*", LAWFARE (Mar. 24, 2011), https://www.lawfareblog.com/legal-reason-why-obama-administration-wont-call-libya-action-war [https://perma.cc/F6QF-9UVG] [hereinafter Goldsmith, *The Legal Reason Why*].

[164] *See* OLC Libya Memo, *supra* note 147, at 10.

[165] *See Id*.; OLC Bosnia Memo, *supra* note 147, at 332–33; OLC Somalia Memo, *supra* note 147, at 10–12; OLC Haiti Memo, *supra* note 147, at 177.

[166] *See, e.g.*, OLC Libya Memo, *supra* note 147, at 7 (arguing that the "historical gloss" of more than 200 years of practice suggested a broad constitutional power for the president to use military forces abroad without congressional consent respond to a range of national security threats and "military and diplomatic circumstances"); OLC Haiti Memo, *supra* note 147, at 176 n.3, 177–78 (noting past practice and precedent establishing presidential authority to dispatch troops to rescue Americans, project force around the globe, and in the regular "conduct of diplomatic and foreign affairs") (citing Johnson v. Eisentrager, 339 U.S. 763, 789 (1950)); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (arguing the President has authority to dispatch forces for missions of "goodwill or rescue" or defend U.S. lives, property or interests, an argument and precedent relied on in the Somalia, Bosnia, and Libya memos).

of possible missions that might meet this very broad threshold of "sufficiently important national interests."

In addition to meeting these two conditions ("not a war" and justified by important national interests), there is a slight caveat to this unilateral executive authority. It must respect any statutory limitations, including the time limits and notice requirements of the WPR.[167] One way of understanding this caveat is through the "zone of twilight" analogy in Justice Robert Jackson's famous *Youngstown Sheet & Tube Co. v Sawyer*[168] concurrence, which has typically been used to analyze separation of powers issues.[169] Jackson offered three categories of presidential authority, with the President having the clearest and most authority for actions that have the "express or implied authorization of Congress," the least for acts that go against the "expressed or implied will of Congress," and a third "zone of twilight," characterized as:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, *congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility*.[170]

The limitation that any exercise of unilateral war powers must be in keeping with statutory restraints appears designed to keep these executive war-making actions within this zone of twilight rather than falling into the third category of going against the express or implied will of Congress, where the President's power has "ebbed" in Jackson's framework.[171] The first OLC memo in these Third Way arguments, the Dellinger OLC memo on Haiti, explicitly references this *Youngstown* twilight framework. It frames the operations in Haiti as an example of the situation Jackson foresaw (italicized text above) in which congressional inertia, indifference or quiescence "invite[d] 'measures on independent presidential responsibility.'"[172] The OLC memos also frequently point to past appropriations or

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[167] Lederman, *Why the Strikes*, *supra* note 148 ("[T]he President has considered himself free to act unilaterally, in support of important interests that have historically justified such unilateral action—subject, however, to any statutory *limitations*, including the time limits imposed by the War Powers Resolution.); Chesney, *A Point-by-Point Summary*, *supra* note 151 (summarizing the Libya OLC memo arguments as standing for the position that President has unilateral authority to deploy forces without congressional authorization, but must respect the 60–90 day timeframe under the WPR).

[168] 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[169] *See, e.g.*, Curtis A. Bradley & Trevor Morrison, *Historical Gloss and the Separation of War Powers*, 126 HARV. L. REV. 411, 419 (2012) (describing the Jackson twilight analogy as "the canonical three-tiered framework for assessing presidential power").

[170] Youngstown, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

[171] *Id.* at 637 ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

[172] OLC Haiti Memo, *supra* note 147, at 173 (quoting Jackson's *Youngstown* concurrence and applying it to the operations in Haiti).

other congressional legislation to the countries in question to suggest that Congress might have envisioned, or at least not ruled out, some level of military engagement in that country.[173] This lends the OLC memos an argument of implied consent (albeit not always convincingly) and helps rebut an inference that action in these countries goes against the will of Congress, which would place the President at the ebb of his power in the Jackson analogy. The "not-war" argument and the re-framing of the WPR as seeking to constrain only conflicts like Korea or Vietnam also contribute to this line of argument by shrinking the putative statutory constraints of the WPR, and thus minimizing the appearance of a clash with congressional intent.[174]

While the memos take pains to argue that Congress does not foreclose such action, they do not suggest that initiating this type of military activity is solely under the preserve of Congress. These memos advance a theory of overlapping or concurrent authority that rests on a view that the President has inherent Article II authority to initiate military engagement in certain situations. This is important because it is this inherent executive power that individual and unit self-defense engagements would rest upon.

D. *Self Defense and the Third Way*

Returning to the question of the legal basis for extended unit and individual self-defense: could exercises of unit and individual self-defense that appeared to exceed the legislative mandate for deployment be alternately covered by the President's Article II authority, or would such uses of force be considered beyond the President's inherent war powers? Assuming that this Third Way framework and the interpretation established in the OLC memos describe the limits of presidential war powers, then even extreme examples of unit and individual self-defense

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[173] *See, e.g.*, OLC Haiti Memo, *supra* note 147, at 174–75 (arguing that the deployment to Haiti "accorded with the sense of Congress" as expressed in prior defense appropriations); OLC Somalia Memo, *supra* note 147, at 13 (arguing that prior appropriations under the Horn of Africa Recovery and Food Security Act demonstrated congressional recognition that might make use of military personnel to "carry out or protect humanitarian missions in Somalia"); OLC Bosnia Memo, *supra* note 147, at 329 n.1 (noting that "Congress has from time to time enacted legislation (or expressed its sense) on the United States' policy and role in the Bosnian conflict" and citing several defense and foreign relations appropriations bills from 1994 and 1995).

[174] Examples of using the not-war arguments or Vietnam and Korean war standards to seemingly shrink the statutory restriction in the WPR include: OLC Libya Memo, *supra* note 147, at 8–9 ("By allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for 'major, prolonged conflicts such as the wars in Vietnam and Korea,' not more limited engagements."); OLC Haiti Memo, *supra* note 147, at 175–76 (arguing that the "structure of the War Powers Resolution ("WPR") recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces" into hostilities provided that the timeframe of the WPR are respected); OLC Bosnia Memo, *supra* note 147, at 334. Although this is the argument made by the OLC memos, other scholarship suggests that the WPR did not intend for hostilities to be interpreted so narrowly. *See* Burgin, *supra* note 142 (citing H.R. REP. NO. 93-287, at 7) (arguing that the choice of the word "hostilities" as opposed to "war" demonstrated congressional intention to include a broader set of activities and conflict situations).

authority could be justified under Article II authority. First, such engagements would likely not exceed the "not-war" criteria. If the standard of "war" in a constitutional sense is only operations of a duration and threshold of Korea or Vietnam, then almost any special forces deployment or other form of low intensity warfare would fall below that threshold. For example, although the March 2016 strike in Somalia killed an estimated 100 people (presumed to be fighters), was itself a significant use of firepower, and was preceded and followed by other significant strikes and operations in partnership with AMISOM forces, it would still fall far below the threshold of hostilities set in Libya (with months of bombing) or the hundreds of strikes in Bosnia, both of which were determined to not be war in the constitutional sense.

Turning to the second criteria—these strikes or self-defense responses would likely also meet the broadly defined national interest criteria, which ranges from supporting regional stability, to supporting U.N. mandates or the interests of other allies, to protecting U.S. persons and interests abroad. Supporting U.N. Security Council resolutions, coalition partners, and U.S. allies have all been invoked to justify the Somalia, Syria, and Niger engagements, and would likely be present in most global counter-terrorism deployments.[175] More importantly, an exercise of self-defense on behalf of U.S. forces or their partnered forces while deployed abroad would by definition be an example of defending U.S. persons or interests overseas, which was among the most prominent justifications cited in the OLC memos.[176] As argued in the Somalia OLC memo: "the President has the power to commit United States troops abroad for the purpose of protecting important national interests . . . . At the core of this power is the President's authority to take military action to protect American citizens, property, and interests from foreign threats."[177] The link between the national interest and the defense of U.S. soldiers

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[175] *See, e.g.*, Obama Framework Report, *supra* note 7, at 8, 12–14 (noting instances where use of force has been in support of U.N. Security Council resolutions and framing many of the use of force engagements overseas as part of broader U.S. efforts to support to partners, allies, and multi-national coalitions); Trump 1264 Report, *supra* note 7, at 4, 7 (suggesting the broad interest of working with allied state and multinational partnerships for national interests by noting the 70 state coalition involved in anti-ISIS operations and noting the invitation of the Government of Niger to assist).

[176] *See, e.g.*, OLC Haiti Memo, *supra* note 147, at 176 n.3, 177–78 (citing Johnson 339 U.S. at 789); OLC Bosnia Memo, *supra* note 147, at 331 (citing Verdugo-Urquidez, 494 U.S. at 273); OLC Libya Memo, *supra* note 147, at 7. The Bosnia, Somalia and Libya OLC memos reference the case *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941), which found that the President has authority to dispatch forces for missions of "goodwill or rescue" or defend U.S. lives, property or interests. While there is general support for the principle that states may act to rescue or in defense of nationals overseas under international law, scholars differ on whether that right is grounded within the national right to self-defense. For a discussion of this principle and further sources, *see* Terry D. Gill & Dieter Fleck, *Chapter 12: Rescue of Nationals*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 240–43 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015). *See also* Lederman, *Why the Strikes*, *supra* note 148 (noting that "self-defense and protection of U.S. nationals have been the most commonly invoked" rationales for unilateral executive action under the Third Way premise).

[177] *See* OLC Haiti Memo, *supra* note 147, at 9 (citing as support *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941); Verduqo-Urquidez, 494 U.S. at 273;

is further emphasized in other guidance and practice. For example, within the U.S. operational law handbook, national self-defense is defined as defending U.S. forces from a hostile act or hostile intent.[178]

Lastly, for extended self-defense strikes or operations to be based on unilateral executive authority, they must not transgress congressional intent, including by not violating any statutory conditions or requirements such as those envisioned in the WPR. As a first step towards considering this, it is important to be clear that this is not a claim that unit and individual self-defense would likely be used to justify the deployment of forces into these positions of threat. Instead, as with the special forces deployments described thus far above, forces might be deployed on some other valid domestic legal authority, such as the 2001 or 2002 AUMF. Then once in a position of threat, these forces would be free to deploy any necessary force as part of their individual and unit self-defense rights, even if it exceeded the mandate of their deployment. In the past, presidents have shown a tendency to justify such deployments with some sort of legislative hook, which more clearly satisfies the requirement of considering congressional intent, but this need not be the case. As was frequently highlighted in the OLC memos, presidents have regularly and uncontroversially deployed armed forces abroad for a number of purposes, sometimes as part of congressionally approved operations, but also on rescue or aid missions, or simply in the course of other regular foreign and diplomatic affairs.[179] As observed by the OLC in 1980 (and repeated in many of the OLC memos discussed under the Third Way): "Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval."[180] The Libya OLC memo in particular argued that past historical practice established a broad presidential authority to deploy troops as part of the President's "constitutional authority to conduct U.S. foreign relations."[181] As

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Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 121 (1979); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980)).

[178] *See* LEE, OPERATIONAL LAW HANDBOOK 2015, *supra* note 36, at 79. *See also* U.S. SROE, *supra* note 34, at 2; LAW OF WAR MANUAL, *supra* note 55, at 47–48.

[179] *See supra* note 6; *see also* OLC Somalia Memo, *supra* note 147, at 9 (citing past precedents establishing presidential authority to deploy troops abroad on missions of good will or rescue, or to undertake military action overseas in defense of American lives or property); OLC Haiti Memo, *supra* note 147, at 178 (arguing for the existence of a 'broad constitutional power' to deploy forces abroad as part of the conduct of diplomatic and foreign affairs); OLC Libya Memo, *supra* note 147, at 6 (summarizing past memo to find that the President's commander in chief and chief executive responsibilities provide the President with constitutional authority to commit troops abroad and take military actions in protection of national interests).

[180] Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980). This quote is also cited in the OLC Libya Memo, *supra* note 147, at 7; Haiti OLC Memo, *supra* note 147, at 176. *See also* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41677, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2010* (2011) (notably cited in the OLC Libya Memo, *supra* note 147, at 7, as support for its historical practice argument).

[181] *See* OLC Libya Memo, *supra* note 147, at 5. *See also id.* at 6 (arguing generally that the President bears the "'vast share of responsibility for the conduct of our foreign relations,'" and accordingly holds "independent authority 'in the areas of foreign policy and national security'") (citing Am. Ins.

such, there are many reasons, including but not limited to congressionally approved war-making, that troops might find themselves in hostile situations overseas in what would be deemed a valid exercise of executive authority.[182] Arguably, once there, the full levels of force available under individual and unit self-defense would always travel with them.

In sum, most light footprint deployments and any expansive uses of self-defense that followed would likely easily satisfy the requirements of the Third Way framework, and be justified as a legitimate exercise of Article II authority. Nonetheless, one could envision some types of self-defense strikes, operations, or situations that would appear to go against Congress's express or implied consent, and thus raise an issue under the *Youngstown* framework discussed above. This would most likely occur in situations in which troops' deployment was based on a limited grant of legislative authority and the self-defense strikes or operations in question exceeded that remit, or constituted engagement in hostilities that Congress had expressly declined to authorize. Examples would include situations like the previously discussed strikes or incidents involving those not deemed to be Al-Qaeda affiliates under the AUMF or persons or military assets of other nations whom Congress has expressly declined to authorize war against (as with the strikes against Syrian, Iranian, or Russian persons or assets in Syria). In some ways, the arguments against extending executive authority to cover these strikes or engagements would be similar to those against a legislative stretch, which were discussed in the introduction to this section. While there might be a presumed implicit authority for troops to defend themselves, in this case drawing on executive power, the limits of that implicit authority would seemingly be where the President finds himself at the "ebb" of his power in the Jackson twilight analogy, where doing so goes against the express or implied will of Congress.

There are two potential arguments that might be used to overcome such *Youngstown* objections and justify extending executive power even to actions seemingly barred or not clearly authorized by Congress. The first is that the OLC Third Way precedents established a certain generosity in finding implied congressional intent, using the "not war in a constitutional sense" argument to avoid an inference of statutory prohibition under the WPR, and interpreting other congressional appropriations liberally to imply a level of congressional awareness or tacit consent of the operations in question.[183] Both of these strategies could be applied relatively easily for the type of low intensity operations in question. As noted, most of the extended self-defense strikes and operations would fall into this Third Way "not-war" category. In addition, given that the deployment of troops to the area of operations in question would likely be supported by a legislative

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Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown, 343 U.S. at 610–11 (Frankfurter, J., concurring)); Haig v. Agee, 453 U.S. 280, 291 (1981)).

[182] Corn provided the example of U.S. forces that had served in Afghanistan then deployed on a humanitarian mission in Haiti. Although not deployed in the context of an armed conflict, they then possessed and deployed the aggressive and expanded form of unit and individual self-defense that had been inculcated in Afghanistan. Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 11 n.42.

[183] *See supra* notes 176.

mandate (such as the AUMF), and that global special forces deployments of this kind have been routinely supported through appropriations for over a decade, there would be ample other congressional legislation that could be used to support an argument of congressional intent or awareness. The fact that Congress had not specifically foreseen potential casualties or direct hostilities, nor closely monitored the scope of special forces deployments that it appropriated funds for (such as those to Niger) might be interpreted as the sort of "congressional inertia, indifference or quiescence" that serves to "enable, if not invite" presidential initiative, to borrow from the *Youngstown* dicta.[184]

A second argument would be that self-defense actions are more squarely within the President's independent powers than other types of war-making might be. As noted earlier, debates over constitutional separation of powers have generally agreed that the Constitution designated that notwithstanding Congress's authority to declare war, the President has the inherent authority as commander-in-chief to "repel sudden attacks."[185] This inherent defensive power would seem to lend more easily to a situation of troops repelling immediate attacks than other types of war-making, such as deploying troops or otherwise initiating hostilities. As Jack Goldsmith has argued, "[s]elf-defense is more at the core of presidential power, and easier to justify under Article II."[186] While Goldsmith's analysis focused on national or sovereign self-defense, past U.S. precedents have made clear that a certain gravity of attack is not required for national or sovereign self-defense to be triggered under the U.S. interpretation (to be discussed fully in Part IV),[187] and the way that unit and individual self-defense are situated within U.S. doctrine establishes a fluid connection between these tactical levels of self-defense and collective or national self-defense.[188] Lastly, another common argument within war powers debates is that the President, as the commander-in-chief, has relatively

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[184] Youngstown, 343 U.S. at 637 (Jackson, J., concurring).

[185] *See supra* notes 133–135 and accompanying text.

[186] Jack Goldsmith, *The Ease of Writing an OLC Opinion in Support of Military Action Against North Korea on N. Korea*, LAWFARE (Sept. 14, 2017), https://lawfareblog.com/ease-writing-olc-opinion-support-military-action-against-north-korea [https://perma.cc/5RZG-US23]. In support of his argument, Goldsmith writes that Bush-era OLC memos not rescinded by the Obama Administration suggested a wider berth for actions justified under self-defense, particularly in situations where the targets present a threat of terrorism. *Id.* (citing Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," Sept. 25, 2001); Bybee, *supra* note 148. *See also* Ramsey, *Textualism and War Powers*, *supra* note 132, at 1546 (arguing that notwithstanding congressional authority to "declare war" the President retains primary authority to respond in cases of self-defense: "Because self-defense in the face of hostile attack was considered an absolute right that a nation would always exercise, one did not need to look for a public manifestation of an intent to do so . . . [i]f this is correct, Congress's declare-war power does not limit the President's power to respond to an attack, which remains part of the 'executive Power' of Article II, Section 1.").

[187] See *infra* notes 201–212 and accompanying text.

[188] *See* U.S. SROE, *supra* note 34, at A-3 ¶¶ 3–4 (listing four types of self-defense as unit, individual, national, or collective self-defense, providing the same sourcing for all three, and suggesting the requirements of de-escalation, necessity, and proportionality for all three).

greater authority over the execution or conduct of war once initiated than Congress does, such that Congress cannot "dictate strategic or tactical decision on the battlefield."[189] Whether the President enjoys preclusive power over tactical decision-making is an ongoing debate, and a full discussion or determination of this issue is beyond the scope of this article.[190] Nonetheless, without fixing the outer bounds of the President's battlefield authorities, at a minimum there is a presumption that the President holds substantial sway over tactical decision-making for troops in situations of hostilities, and this would likely lend credibility to the use of Article II authority to support self-defense responses, even where clear congressional authorization was lacking.

As the forgoing argument demonstrates, deployment of forces in these situations would easily fall within the very broad and flexible conditions established in the Third Way framing of executive power. This is not to suggest that this position is unproblematic. Convincing arguments have been made that Congress did not in fact intend to limit the type of military engagement that required congressional consultation and consent to only situations like Korea or Vietnam.[191] Even if one takes as a given that the President has unilateral authority to initiate some lower level of engagement—such as in Haiti or Somalia—the OLC memos have increasingly ratcheted up the type of engagement and levels of force that can be folded into this "not-war" framework and created a situation where the U.S. constitutional definition of war now appears as far from the common and dictionary understandings of the term as the U.S. legal understanding of "imminent." As such, the expansion of executive power to these situations is extremely problematic, but the problem is not one of unit self-defense's making. As Jack Goldsmith and Matthew Waxman argued in 2016 while reflecting on the Obama Administration's legacy for executive war powers:

> Going forward, a President who is able to meet the relatively low constitutional threshold for the initiation of light-footprint warfare will now also have a powerful precedent for circumventing the

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[189] Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of R. Gonzales, Counsel to the President (Aug. 1, 2002). *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 590–91 (2006) (arguing that Congress cannot "impinge on the proper authority of the President" by "direct[ing] the conduct of campaigns") (internal quotations and citations omitted). There is also some evidence within the debates among the original framers that would suggest that the commander-in-chief retained greater authority over the execution of war. *See, e.g.*, "Madison Debates, June 18," *supra* note 132 (arguing for Congress to have the "sole power of declaring war," and the President "to have the direction of war when authorized or begun"); Stromseth, *supra* note 129, at 851 (arguing that the Framers intended that "once military action was begun . . . the President as Commander in Chief should direct the military operations").

[190] *See generally* Barron & Lederman, *supra* note 135 (exploring in exhaustive detail the presumption among some scholars that the President's commander-in-chief authorities provide preclusive authority over tactical and operational matters).

[191] *See, e.g.*, Burgin, *War over Words*, *supra* note 142, at 105–07, 116–23 (offering legislative history to disprove the contentions made by the Obama Administration that the word 'hostilities' in the WPR was intended to refer only to armed conflicts involving extended troop deployments and sustained fighting by ground troops, such as were present in Korea and Vietnam).

> WPR's 60-day limit on that warfare. In short, the legal precedents are now in place for extended light-footprint warfare without congressional authorization, so long as the President can point to regional instability and the violation of an international norm to justify the intervention in the first place.[192]

The precedents that would enable this free use of presidential war powers for the type of global and significant-but-sporadic engagement in hostilities—the type of force most implicated in use of self-defense far from a hot battlefield—are already there. However, an expansive individual and unit self-defense paradigm nonetheless provides useful tools for enacting that unconstrained presidential war-making, as the next subsection will discuss.

E. *Consequences of an Expansive Self-defense*

Although plausibly justifiable, using unit and individual self-defense in this more expansive way is problematic because it could further enlarge the expression and interpretation of unilateral presidential war powers, and may also erode some of the quieter, institutional restraints on use of force.

The most aggressive way to use unit and individual self-defense would be to deploy troops to an area on a more limited mandate, with the expectation that they could then exploit the self-defense loophole to justify more significant engagement in hostilities. The aforementioned OLC memos, as well as numerous other legal precedents, establish many valid reasons and ways that the President may deploy U.S. forces overseas in the course of regular diplomatic and foreign relations and to protect national interests and citizens.[193] Given the regular pattern of presidents trying to evade the restrictions of the WPR, and use creative legal arguments to engage in war-making,[194] it might not be such a stretch to imagine presidents knowingly deploying forces to foreseeably hostile situations on the presumption that they can then engage in substantial war-like uses of force through their troops' individual and unit self-defense responses. A reasonable objection might be that while the past precedents clearly establish the President's authority to freely deploy forces as part of "regular diplomatic and foreign affairs," these precedents relate to presumptively peacetime affairs or at least to deployments that are not intentionally for the purpose of engaging in war.[195] A further separation of

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[192] Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 THE WASH. QUARTERLY 7, 14 (2016).

[193] *See supra* notes 166, 177 and accompanying text.

[194] *See supra* notes 141–42; Goldsmith, *The Legal Reason Why*, *supra* note 163. The author would also characterize many of the arguments in the Third Way memos as creative legal arguments to get around restraints on presidential war-making, including the entire arc of the "not-war" theory and the larger "gloss" of historical practice arguments in the Libya OLC memo and others. See references to these arguments in *supra* notes 150–61.

[195] An objection might be made that the OLC opinion on Bosnia included an explicit discussion that within this historical practice troops were frequently deployed in situations of danger, including in

powers argument would be that leveraging the self-defense authority in this way would not merely take advantage of the "silence" of Congress, but would, in spirit, go against congressional intent. This would take the action out of the "twilight zone" of concurrent, but acceptable authority into the last rung of Jackson's analogy, where presidential authority is at its lowest.

Though it therefore might seem difficult for the President to deliberately exploit individual and unit self-defense as a loophole for engaging in force, regular and problematic over-stretching and exploitation of expansive self-defense authorities is in practice already happening in the way that special forces rely on these authorities in their deployments far from a hot battlefield. Special forces are regularly sent abroad on what are nominally "train and equip" missions, but in these countries engagement in broader hostilities is not merely foreseeable but arguably very much anticipated. These deployments are intended as part of a broader campaign against terrorist and insurgent groups. The October 2017 incident involving special forces operations in Niger appears to be a case in point: although the over-arching rationale for the deployment was a "train and equip" mission with the Nigerien military, the special forces who were killed were engaged in a "kill-or-capture raid" against a presumed terrorist at the time, the follow-up investigation revealed.[196] In situations such as those in Niger, special forces might lean on the authority provided under the AUMF, but they also rely in significant part on the fact that they can exercise whatever force is necessary—including significant strikes—to deal with any threat that manifests. This is not purely a question of being ready should threats arise; their presence and engagement in these missions is designed to pursue and neutralize terrorist groups or other threats. Even if the mode of use of force in a particular tactical moment is reactive or defensive, the purpose of the deployment or operation is part of taking forward the war against terrorist affiliates. What is *de facto* happening is a reliance on special forces' inherent self-

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situations of 'genuine risk of war' and in situations that have resulted in actual hostilities, *see* OLC Bosnia Memo, *supra* note 147, at 330–31. Nonetheless, inserting troops into situations that involve risk is distinguishable from one in which they were deployed with an intent to get into hostilities, although in practice, this distinction may be difficult to establish and defend. The defense of troops in these situations could also arguably be justified based on past precedents establishing presidential authority to initiate rescue missions or the defense of American lives overseas, although this would also arguably be a misappropriation of these past rescue mission precedents. It is one thing to recognize an ability to rescue citizens in distress and another to place those citizens (the U.S. forces) into a hostile or threatening situation that would then necessitate or provoke a rescuing or defensive response.

[196] *See* Joe Gould, *Did Military Hide the Real Mission of the Niger Ambush from Congress?*, DEFENSENEWS.COM (May 8, 2018), https://www.defensenews.com/congress/2018/05/08/did-military-hid-niger-mission-from-congress-key-senator-asks/ [https://perma.cc/X2DS-7857] (noting congressional allegations that the Defense Department was not disclosing the full motivations or mission for U.S. forces' deployment to Niger, following a classified briefing revealing that the four forces killed had been on a mission to "'capture-or-kill' a target and not simply a training activity with local forces"); Thomas Gibbons-Neff, Helene Cooper & Eric Schmitt, *Mattis Erupts Over Niger Inquiry and Army Revisits Who Is to Blame*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/us/politics/niger-mattis.html [https://perma.cc/5U4G-T996] (noting that the report into the death of four U.S. forces in Niger found that they were at the time engaged in a "capture-or-kill raid on a local militant").

defense rights to engage in war-making, with unclear congressional buy-in, at least for the full extent of engagement.

In addition, the nature of self-defense as an inherent and tactically devolved tool, and the nature of the deployments in which it is likely to be used, reduce some of the internal process checks that might otherwise act as an additional restraint on uses of force. The type of situations involved in individual and unit self-defense would likely generate less attention and consideration than the prior situations that gave rise to these legal precedents. The types of force that are justified by individual and unit self-defense today frequently occur in deployments that do not in themselves trigger public or congressional notice. This might be because they are part of covert operations, solely or primarily rely on air assets rather than ground forces, or because they occur as part of sporadic, low-level engagements. They are decidedly not a Bosnia nor a Libya situation, nor even a Haiti or a (1992) Somalia situation (although they might be analogized as closest to the last). As a result, they would be unlikely to trigger the type of attention that might initiate a WPR report, or even the level of internal executive branch process about how to get around the WPR reporting and conditions—the type of process represented by the OLC memos. As scholars like Trevor Morrison have previously argued, the internal process of seeking legal advice and support from the OLC does establish internal checks on presidential action by forcing the articulation of the administration's reasoning.[197] Even if an OLC opinion found a justification for unilateral authority to initiate war (but in keeping with the WPR and its reporting obligations), once begun, presidents might then have to keep in line with the limitations and arguments established in the OLC memos. Without the pressure even to generate an OLC memo to consider a particular special forces engagement—because of their isolated or sporadic nature—this type of process limitation on presidential war-making would be much less likely.

The recent history of the emergence of self-defense, as discussed in Part II, suggests that the use of self-defense in this way is not a top-down decision, but emerged organically out of troops' responses over a number of years, across multiple conflict zones. However, even if the loophole created by expansive self-defense authorities is not by design, it fits within larger trends in national and international security law. Many scholars have noted, and questioned, the trend toward claiming more expansive executive branch authority where national security issues are concerned following September 11, particularly but not exclusively where it concerns the ability to pursue counter-terrorism operations

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[197] Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62, 72 (2011), https://harvardlawreview.org/wp-content/uploads/pdfs/vol124_forum_morrison.pdf [https://perma.cc/PG5L-K5P4]; Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)). *See also* Burgin, *War over Words*, *supra* note 142, at 116–22 (discussing how the legal reasoning within the initial legal opinion on whether the intervention in Libya could be justified under executive authority established parameters that the Obama Administration then tried to keep to, or had to justify around).

globally.[198] Bobby Chesney has argued that since the September 11 attacks, the U.S. has adopted a "continuous threat" model: "a claim about the President's authority to direct the use of military force as an exercise of national self-defense even in the absence of explicit congressional authorization."[199] Although Chesney was not writing about individual and unit self-defense specifically, it is a natural handmaiden for such a model. They provide a ready way for the President's Article II authority to cover significant strikes wherever U.S. forces are present, independent of congressional authorization. Individual and unit self-defense is particularly apt for this type of exercise of authority because the forces' authority to defend themselves arguably flows from the President's commander-in-chief authority (as argued in Part III.A.1). The legal precedents and positions that enable self-defense to be used as an evasion on checks and balances were already there. In effect, self-defense leverages a slippery slope that was already erected. Individual and unit self-defense offers a ready and flexible tool for enacting a model of broad executive authority to respond to global threats.

Research into the intent of the divided war-making authority suggests that the reason that the Framers created these checks and divided war-making authority was due to a fear that vesting the authority to engage in war-making in one individual or branch, in the person of the executive, would increase the risk of the nation being entangled in a greater number of wars. As such, the growing use of force in self-defense far from a hot battlefield is not just the latest twist in a continuing contest between Congress and the executive, but a more fundamental disintegration of structural restraints on the resort to war.

IV. International Law Consequences: Blurring War Paradigms and Lowering the Barriers to Resort to Force

Although this article has so far focused on the domestic constitutional law implications of a broader self-defense practice, analyzing the legality of this extended self-defense doctrine necessitates consideration of both the domestic and international legal bases. A parallel stretching of legal authorities and understanding has been happening on the international law side. Since September 11, the United States has argued for a broad interpretation of when states may exercise their right to collective and national self-defense, particularly against non-state actors.[200] The United States has argued that the sovereign right to self-defense does not require a particular gravity of attack to be triggered, and so could equally be relied upon in the sort of low-level engagements typical of extended unit and individual self-defense responses. Moreover, similar to the domestic legal

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[198] *See, e.g.*, Barron & Lederman, *supra* note 135, at 704–11 (cataloguing broad commander-in-chief claims under the Bush Administration; *see generally* CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY (2015) (describing how the Obama Administration ingrained many of the expansive claims to presidential power, while requiring more extensive process requirements and procedural checks to the exercise of that authority).

[199] Robert M. Chesney, *Postwar*, 5 HARV. NAT'L SEC. J. 305, 328 (2014).

[200] GRAY, *supra* note 55, at 248–56; DINSTEIN, *supra* note 28, at 195; Piggott, *supra* note 56, at 243–47.

discussion, this can go both ways and frequent use of extended unit and individual self-defense can further widen the U.S. practice of so-called low-threshold self-defense strikes. This would further water down traditional interpretations of legitimate justifications for resorting to war *jus ad bellum*, eroding barriers on the use of force.

A. *Expansive Self-Defense Framework within the U.S. Legal Position*

Since 2001, the United States has consistently argued that it is in a global or transnational non-international armed conflict ("NIAC") with Al-Qaeda and its affiliates, framing them as a global non-state actor with no fixed geographic base.[201] On this theory, rather than the existence of the armed conflict being confined to specific territorial or juridical physical boundaries, the NIAC follows the Al-Qaeda fighter wherever s/he is present; travelling in the fighter's backpack, as some scholars have framed it.[202] Parallel to this transnational NIAC claim, the United States has argued that it additionally has authority to pursue terrorists globally as part of its sovereign right to self-defense, even where those attacks do not rise to the level of an armed conflict.[203]

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[201] Brennan Speech, Harvard Law School, *supra* note 56 (arguing that the geographic scope of the armed conflict with Al-Qaeda is not limited only to "hot" battlefields); Hamdan, 548 U.S. at 633 (effectively ratifying the determination of a transnational NIAC by deeming that Common Article 3 was applicable to enemy combatants). The transnational NIAC concept has been controversial on multiple fronts. Many international lawyers have argued that the elapsing of geographic boundaries and the elevation of disparate terrorist and criminal groups into a conflict party have resulted in a 'war everywhere' state that folds what are in reality law enforcement actions into a war paradigm. International lawyers have further criticized that this has only been possible by misconstruing or ignoring existing IHL doctrine about the required thresholds for the duration and intensity of an armed conflict, and by agglomerating a range of criminal and terrorist threats to meet the threshold of an armed conflict. For a sample of critiques, *see, e.g.*, Naz Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225 (2014) (summarizing the debates surrounding IHL, international human rights law (IHRL), and applicability of the armed conflict to the U.S. global war on terrorists); INTERNATIONAL LAW ASSOCIATION: USE OF FORCE COMMITTEE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 29–32 (2010); International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law*, ICRC OPINION PAPER 3–5 (Mar. 2008), http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf [https://perma.cc/23JF-9ZY8]; Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. J. L & POL'Y 343 (2010); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"*, 27 FLETCHER F. WORLD AFF. 55, 69 (2003).

[202] Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War', in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz, ed., forthcoming), http://ssrn.com/abstract=1824783 [https://perma.cc/9UZA-2F95] (characterizing the U.S. view that the "the armed conflict goes where the participants go, as it did in World War II and does today"); *see also* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT J. TRANSN. L. 295, 333 (2007).

[203] *See* Obama Framework Report, *supra* note 7, at 16–18; Trump 1264 Report, *supra* note 7, at 6–7; Harold Hongju Koh, Legal Advisor in the U.S. State Dep't, Speech at the Am. Soc'y of Int'l Law

The argument that the United States may resort to its sovereign right to self-defense even for sporadic, isolated, and lower level attacks is based on legal positions taken by the United States that predate the September 11 attacks, but that have been relied on much more frequently and in a wider range of contexts since then. In a 1989 speech, Abraham Sofaer, then-State Department Legal Advisor, argued that states' inherent right to self-defense enshrined in Article 51 is not limited only to an "armed attack" on the defending states' territory, but that the customary understanding and the past practice established the right of states to protect themselves and their citizens from "every illegal use of force," including on others' territories. [204] Sofaer specifically forewarned that this form of self-defense response below the threshold of an armed conflict, might be applicable in response to terrorist attacks that have occurred or were "about to occur."[205] In 2004, State Department Legal Advisor William Taft issued a formal comment objecting to the International Court of Justice's treatment of the "armed attack" question in the *Case Concerning Oil Platforms*.[206] Taft argued that the U.S. position was that international law and practice did not limit the Article 51 right to self-defense only to "grave attacks."[207] Taft established the position that "if the United States is attacked with deadly force by the military personnel of another State, it reserves its

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Annual Meeting: The Obama Administration and International Law (Mar. 25, 2010), https://www.state.gov/documents/organization/179305.pdf [https://perma.cc/GQZ3-JFZF] [hereinafter Koh Speech]; Stephen W. Preston, CIA General Counsel, Speech at Harvard Law School (Apr. 10, 2012), https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html [https://perma.cc/YA6D-TMTH]; U.S. DEP'T OF JUSTICE, PRESIDENTIAL POLICY GUIDANCE ON PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES 2 (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download [https://perma.cc/8LCN-WBU9] [hereinafter Presidential Policy Guidance]; U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OF AN ASSOCIATED FORCE 1, 4–5 (Nov. 28, 2011), https://fas.org/irp/eprint/doj-lethal.pdf [https://perma.cc/LJK2-2Z9G] [hereinafter U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION]; U.S. DEP'T OF DEF., REPORT ON PROCESS FOR DETERMINING TARGETS OF LETHAL OR CAPTURE OPERATIONS 2 (Mar. 6, 2014), https://www.aclu.org/sites/default/files/field_document/report_on_process_of_determining_targets_of_lethal_or_capture_operations.pdf [https://perma.cc/S977-438X]. For further discussion of these statements and documents as establishing the U.S. position, and perceived criticisms against them, *see* COLUMBIA L. SCH. HUMAN RIGHTS CLINIC AND SANA'A CTR. FOR STRATEGIC STUDIES, OUT OF THE SHADOWS: RECOMMENDATIONS TO ADVANCE TRANSPARENCY IN THE USE OF LETHAL FORCE 39–45 (June 2017), https://static1.squarespace.com/static/5931d79d9de4bb4c9cf61a25/t/5a0b6ea224a6941e715f3da4/1510698666740/5764_HRI+Out+of+the+Shadows-WEB.PDF [https://perma.cc/5UT4-LADP] [hereinafter OUT OF THE SHADOWS].

[204] 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, 93–96 (1989).

[205] *Id.*

[206] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

[207] William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 299–302 (2004) (arguing that the U.S. military actions against Iranian oil platforms were justified under its self-defense rights, even if the attacks emanating from those oil platforms had not reached a level of gravity sufficient to constitute an armed attack).

inherent right preserved by the U.N. Charter to defend itself and its citizens."[208] In addition to the immediate examples cited by Sofaer and Taft, examples of the U.S. exercising force under this self-defense interpretation, outside of the context of a regular armed conflict, include the Clinton Administration's cruise missile strikes targeting (unsuccessfully) Osama bin Laden, and the Reagan-era strikes on presumed terrorist hubs in Libya in 1986.[209]

Similar to the Third Way consensus, the Sofaer and Taft legal arguments arguably represent the standing U.S. legal position on the limits of sovereign self-defense (or lack thereof). Since 2001, the United States has repeatedly cited the Sofaer and Taft arguments as precedents when asserting its expansive view of when it may exercise the right to self-defense.[210] Summarizing the U.S. position on when Article 51 rights might be triggered, State Department Legal Advisor Harold Koh stated in 2012: "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."[211]

Although the core arguments may have predated the global war on terror, this lower-threshold self-defense argument has gained new momentum in the quest for legal justifications for striking terrorists outside of a clear, armed conflict context. Authors such as Kenneth Anderson have argued that the United States need not depend on the recognition of a transnational NIAC to justify strikes against terrorists far from a hot battlefield because such strikes could be justified fully under a low-threshold sovereign self-defense interpretation, which he termed "naked self-defense."[212] Similarly, Jordan Paust has defended U.S. drones strikes in Pakistan on this basis:

> No one argues that self-defense under Article 51 of the Charter can only be engaged in during war. For these reasons, Article 51 self-defense actions provide a paradigm that is potentially different than either a mere law enforcement or war paradigm, and it is understood

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[208] *Id*. at 302.

[209] *See* Chesney, *Postwar*, *supra* note 199, at 325–26 (discussing how the 1986 strike in Libya and the Clinton Administration targeting of Osama bin Laden would contribute to the evolution of the U.S. self-defense doctrine); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 247–48 (2010) [hereinafter Paust, *Self-Defense*] (characterizing the cruise missile strikes against Osama bin Laden under the Clinton Administration as precedential examples of low-threshold Article 51 strikes).

[210] *See, e.g.*, LEE, OPERATIONAL LAW HANDBOOK 2015, *supra* note 36, at 47 n.230 (citing both the Sofaer speech and the Taft memo to establish the point that self-defense applies against any illegal use of force, and that there is no gravity threshold); U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION, *supra* note 203, at 9 (citing the 1989 Sofaer speech).

[211] Harold Hongju Koh, *Remarks as Prepared for Delivery by Harold Hongju Koh to the U.S. CYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012*, 54 HARV. INT'L L. J. at 7 (2012), http://www.harvardilj.org/wp-content/uploads/2012/12/Koh-Speech-to-Publish1.pdf [https://perma.cc/UC52-H6MB] (citing the Taft decision on Oil Platforms and the 1989 Sofaer speech).

[212] *See generally* Anderson, *supra* note 202.

> that military force can be used in self-defense when measures are reasonably necessary and proportionate.[213]

Geoffrey Corn has argued that the naked self-defense argument is problematic because if an armed conflict is not triggered, then *jus in bello* protections would not clearly govern or regulate the military action that followed, and some version of *jus ad bellum* principles might be applied in their stead.[214] He argues this would degrade the scope of lawful authority to use force and would also create confusion in an operational sense, given that the *jus ad bellum* concepts were historically never used or conceived to be operational principles governing the execution of force in conflict.[215]

This low-threshold self-defense argument has been used much more frequently in the post-2001 context to justify targeted killings by drone strikes outside of a recognized armed conflict, albeit in conjunction with, rather than in place of, the transnational NIAC argument.[216] The continued insistence on the transnational NIAC justification for these strikes, as well as statements affirming that the United States is applying *jus in bello* standards to the execution of these strikes,[217] suggests that the United States has not fully adopted a naked self-defense position, at least not to the degree that Corn feared. Nonetheless, as Kenneth Anderson has argued, although plausibly authorized by other domestic and international legal theories, many of the drone strikes and targeted killings have closely resembled a "naked self-defense" rationale.[218] He argues that as time has

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[213] Paust, *Self-Defense*, *supra* note 209, at 260. *See also* Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists under the International Law of Self-Defense*, 8 ALBANY GOV'T L. REV. 166, 171–78 (2015).

[214] Corn, *Self-defense Targeting*, *supra* note 61. Anderson, who is attributed with the name and paradigm of naked self-defense, does not argue that application of *jus in bello* standards would be unnecessary following a naked self-defense justification. *See* Anderson, *supra* note 202, at 8.

[215] *See* Corn, *Self-defense Targeting*, *supra* note 61, at 64–75.

[216] In public speeches or statements outlining the U.S. legal position with regard to strikes far from a hot battlefield, Obama Administration officials have persisted in the argument that they are in a non-geographically constrained armed conflict with Al-Qaeda and its affiliates. *See, e.g.*, Brennan Speech, Harvard Law School, *supra* note 56; Eric Holder, Attorney General, Remarks at Northwestern University School of Law (Mar. 5, 2012), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law [https://perma.cc/865R-VM6C]; U.N. Human Rights Council, *U.S. National Report Submitted in Accordance with Para. 15 (a) of the Annex to Human Rights Council Res. 5/1*, U.N. Doc. A/HRC/WG.6/9/U.S.A/1, 17–18 (Aug. 23, 2010). This has been reinforced by statements that a self-defense analysis is not necessary with each strike. For example, in a speech by counter-terrorism advisor John Brennan in 2011 outlining the policy on counter-terrorism strikes, he stated that, "Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time." Brennan Speech, Harvard Law School, *supra* note 56.

[217] *See, e.g.*, Koh Speech, *supra* note 203, at 14–15 (applying principles of proportionality and distinction that more closely resembled *jus in bello* than *jus ad bellum* concepts, e.g., describing the principle of distinction as requiring that "attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack").

[218] *See* Anderson, *supra* note 202, at 8–9.

passed and the targeted killing campaign has continued, "invocation of the NIAC, Al-Qaeda, and the AUMF was moving toward a ritual, purely formalistic invocation. In fact, targeted killings in Yemen (against AQAP, for example) were really instances of naked self-defense against new enemies because they increasingly were only notionally connected to the AUMF."[219]

B. *Unit and Individual Self-Defense as "Low-Threshold" or "Naked" Self-Defense*

Considering the forgoing discussion and the post hoc legal rationales provided for incidents such as those in Somalia and Syria, these extended self-defense operations and strikes might best be characterized as examples of Anderson's naked self-defense or Sofaer and Taft's low-threshold Article 51 self-defense. In many ways, the legal mandate offered by the theory of a global NIAC against Al-Qaeda and its affiliates offers advantages and limitations that parallel those of the 2001 AUMF in U.S. domestic law—while neither posit geographic constraints, they presumptively limit the armed conflict to engagements with or targeting of Al-Qaeda and their affiliates. Perhaps for this reason, where extended self-defense strikes or operations have taken place in contexts or against adversaries not clearly connected to the global war against Al-Qaeda, the Obama and Trump Administrations have generally not justified these operations as part of its global NIAC against Al-Qaeda and its affiliates (although the troops and aerial assets involved may well have been engaged in that conflict more broadly). Instead, they have tended to offer collective or national self-defense as the international legal rationale. For example, in its 2016 Legal Framework document, the Obama Administration asserted "furtherance of U.S. national self-defense" and support for the Somali government's armed conflict with Al-Shabab as the international legal basis for U.S. operations in the country.[220] In the Trump Administration's parallel 2018 report, the strikes in defense of imminent threats to U.S. and partner forces in Syria were justified as a matter of international law as an exercise of national and collective self-defense.[221]

The characterization of these strikes as an exercise of national self-defense is not altogether surprising given the trends described above, of increasingly embracing low-threshold strikes or operations as within the remit of Article 51 responses. Nonetheless, this does represent an escalation of this argument. Sofaer, Anderson, and Paust discussed the justification of Article 51 responses to anticipated threats by terrorist actors or groups. The self-defense strikes in the *Oil Platforms* case were presumptively in response to Iran's laying of mines in international waters, targeting of commercial vessels, and otherwise disrupting oil export in the Persian Gulf. As such, while these past discussions of low-threshold Article 51 attacks have not concerned threats that rose to the level of grave attacks, in the sense of full war or an existential threat to a state, they nonetheless considered

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[219] *Id.*
[220] Obama Framework Report, *supra* note 7, at 17.
[221] Trump 1264 Report, *supra* note 7, at 6.

situations where the national interest of the United States was at least notionally at risk. Instead applying this theory to situations where the threat forestalled is not even presumptively an attack on significant national interests, but simply the personal defense of troops (or their ground partners) wherever they are deployed overseas, would subtly shift the gravity and frequency with which states might resort to force under international law. It would lower the threshold of when states might respond in defense from something as serious (and hopefully irregular) as an existential attack or serious trespass of sovereign rights to something that is potentially as regular and foreseeable as a soldier coming under threat when deployed to a hostile environment. The lowering of this threshold is all the more likely given the pattern and global reach of U.S. special forces in the last decade.[222]

The extension of these *ad bellum* arguments to the personal self-defense of the some 8,000 special forces deployed globally[223] could in some ways be even more damaging to restraints on the use of force than its application to drone strikes. In part because of the significant controversy over drones, the U.S. has established a targeting process that involves significant time in surveillance, identification of the target, and legal clearance. Although the exact criteria underlying any targeting decision is not fully public (and has been critiqued),[224] the level of information that has been released suggests that the decision to strike a given individual or target involves some weighing of the necessity of addressing the threat, essentially a weighing of the threat to U.S. national interests versus other legal and policy concerns.[225] This builds in some implicit consideration of the gravity of the threat, as well as the potential for considering other secondary consequences, such as the potential violation of sovereignty or other international legal principles.[226] Such a process, however inadequate, would likely not be triggered when a special forces soldier comes under threat wherever he is deployed globally. Instead, the trigger of an exercise of sovereign self-defense would not involve any weighing of the larger national interest or damage to international norms, but simply the threat to the soldier, marine, or unit in that immediate moment. This is a process issue, but it could affect the degree to which the type of considerations that have been built into *jus ad bellum* principles are weighed, even as a matter of internal review.

A final consideration in terms of the impact for international law is the way that the emerging practice has blurred *jus ad bellum* and *jus in bello* distinctions,

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[222] The scope of special forces deployments is discussed in *supra* note 106.
[223] *See Statement of General Raymond A. Thomas*, *supra* note 106.
[224] *See, e.g.*, OUT OF THE SHADOWS, *supra* note 203, at 39–45.
[225] *See, e.g.*, Presidential Policy Guidance, *supra* note 203, at 3 (noting that the policy criteria for whether to authorize a targeted killing would involve weighing the risk of "future disastrous attacks against the United States").
[226] The gravity of the presumed threats in an overall environment are certainly considered in the decision to deploy forces, and perhaps would be given even greater weight in a decision to deploy ground forces as opposed to drones given the costliness of potential casualties. Thus, it is not that national security interests are not weighed writ large when troops are deployed, but that whether the risk presented by a particular attack on those deployed forces is given the same consideration in terms of *jus ad bellum* principles where the decision to initiate the attack is devolved to the tactical level.

thresholds, and restrictions. The unit and individual self-defense paradigm has emerged to play two roles: (1) to account for instances of the use of force within declared conflict situations like Afghanistan, in an *in bello* context, and (2) to justify resort to use of force outside declared conflict zones in places like Syria and Somalia, raising *jus ad bellum* questions. At a conceptual level, converting sovereign self-defense into not only a justification to engage in conflict, but also into a justification for the use of force at a tactical or operational level, arguably the preserve of *jus in bello*, is almost definitionally a muddying of the field and an erosion of the strict dualism of these approaches. It creates confusion about what standards are being used where this self-defense right is triggered in an *in bello* situation (as Corn had warned).[227] On the *jus ad bellum* front, it also reinforces the overall blurring and distortion created by the expanding geographic scope of the U.S. war on terror. Just as the conflict goes wherever Al-Qaeda members and affiliates go, following in their backpack, so to speak, the right to trigger Article 51 self-defense now goes wherever U.S. soldiers and their partners go, traveling in the soldier's backpack. Individual and unit self-defense does not do this alone—it depends on past U.S. jurisprudence and legal claims. But it deepens these claims and offers a new avenue for skirting *ad bellum* restrictions that are potentially more challenging to attack, given the difficulty of denying forces the ability to defend themselves.

V. Conclusion: A Paradigm Shift in Checking Recourse to War?

U.S. forces' reliance on individual and unit self-defense has expanded significantly since 2001, across a range of conflict situations. The greater reliance on self-defense has so far largely been driven by conflict exigencies, but has also been significantly enabled by where it sits within the U.S. interpretation of self-defense, connected to sovereign self-defense in terms of its international legal justification, and with the president's commander-in-chief authority in terms of its constitutional basis. Because of these connections, as these other legal paradigms were stretched under the post-September 11 security pressures, self-defense was pulled along with them.

However, while a broader self-defense conception has certainly been enabled by post-September 11 claims about presidential war-making and Article 51 self-defense rights, an expansive self-defense practice also has the potential to extend these claims further, and to further erode domestic and international restraints on the resort to force. Individual and unit self-defense makes legal theories that enable the extension of unilateral sovereign and executive power more workable in practice, and makes it easier to extend these authorities to situations that are less likely to trigger public notice or other institutional or process constraints. Relying on individual and unit self-defense as the basis for force, both in a *jus ad bellum* and domestic constitutional sense, takes the decision to authorize

[227] In practice the lack of clarity on the standards governing self-defense when applied to soldier and unit defense has created ambiguity and issues in practice on the ground within the application of unit and soldier self-defense in Afghanistan and Iraq. Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 300–04.

force down to a question of threat perception at the tactical level. It effectively conflates a recognized right to defend oneself at the tactical level in dire situations with whether the nation should be engaging in hostilities there. In so doing, it obviates consideration of whether resorting to force is appropriate in that instance and merits the downstream consequences, both for international norms restricting the use of force and questions of separation of powers and democratic legitimacy. Consideration of these larger issues was built into the domestic constitutional and *jus ad bellum* framework. By bypassing these more traditional frameworks, self-defense sidesteps important brakes on the use of force. The fundamental issue raised by this expanding practice is similar to larger objections with other expansions of commander-in-chief authority and the self-defense basis for strikes since September 11. They place a premium on enabling short-term, tactical flexibility over democratic and international checks on the use of force.

Cabining this expansive use of self-defense and preventing the further erosion of restraints on use of force is challenging given how deeply entwined self-defense is with larger post-2001 U.S. international and domestic legal positions. To fully limit the risks of a too-expansive individual and unit self-defense would involve re-establishing limits within the Third Way approach, or re-asserting some gravity threshold for Article 51 strikes. Recent trends would seem to go against such a reversal. The OLC opinion regarding the use of force in Libya expanded rather than curtailed unilateral presidential war-making. Meanwhile, the U.S. has embraced the low threshold self-defense argument as its settled position since the 1980s and has relied on it more extensively in recent years to justify post-2001 drone campaigns (among other strikes). Though the legal claims and positions within these two paradigms have been highly disputed, they now appear to be significantly settled, having been ratified and approved by multiple administrations, by judicial action, and by legislative approval.[228] Nonetheless, the use of self-defense is still an emerging practice that has not been fully considered and whose outlines have not been fully drawn. There is still some potential to establish limits that would at least prevent self-defense from furthering this expansive framework.

On the international law front, a partial solution would be to try to delink individual and unit self-defense from the expansive sovereign self-defense interpretation. In a prior article on the *in bello* repercussions of an expansive self-defense doctrine, this author recommended reconceptualizing individual and unit self-defense as part of the combatant privilege under IHL, rather than viewing it as a subset of sovereign self-defense (as the U.S. conceives it) or from domestic criminal law (as many European countries do).[229] This would mean that self-defense would only operate where an armed conflict was recognized, and not beyond it. By cutting the link with sovereign self-defense, unit and individual self-

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[228] *See* Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L L. 628 (2016) (arguing that the Obama administration's adoption and expansion of the AUMF, and the ratification of these positions in the judiciary and by subsequent Congresses has anchored it as the framework for "indefinite war against an assortment of related terrorist organizations in numerous countries"); Lederman, *Why the Strikes*, *supra* note 148; Goldsmith & Waxman, *supra* note 192.
[229] Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 331–32.

defense could no longer double as both an *in bello* justification for force, and an *ad bellum* one (even the lower-threshold form of the Article 51 argument). This would reduce the issues related to blurring of lines between *in bello* and *ad bellum* under international law. Reinforcement of the distinction between principles governing resort to war and conduct in war might also indirectly contribute to greater consideration of the delineation between authorization to engage in war-making and tactical management of war-making in the separation of powers debate.

This re-interpretation would face resistance among U.S. forces and officials, given that individual and unit self-defense have been viewed as subsidiaries to sovereign self-defense for several decades now in the U.S. interpretation; however, it might be possible given the still "emerging" nature of this practice and the lower profile nature of the unit/individual self-defense concept (in contrast to the more vested interests in the larger executive power and Article 51 paradigm claims).

On the domestic law front, there are a number of measures that might be taken to address the way that individual and unit self-defense contributes to separation of power and democratic legitimacy problems. At a minimum, there should be more concerted effort to identify and to publicly explain how U.S. forces are using individual and unit self-defense justifications in situations like the use of force incidents in Syria or Somalia, or the special forces engagements in Syria and Niger. In response to questions about the legal basis for these incidents, the immediate Pentagon responses appeared flat-footed and confused, not quite justifying these strikes under the same legal framework as other targeting in the war against Al-Qaeda, but also not quite recognizing them as something else. The vague, ad hoc, and poorly substantiated responses are problematic because they reinforce the underlying ambiguity of individual and unit self-defense. It is this lack of clarity and poorly defined thresholds and limits that allow self-defense to be extended to novel conflict situations and engagements in hostilities, even where doing so might undermine other use of force frameworks and foreign policy positions. Greater transparency about where self-defense is being used and its connection with other legal authorizations or paradigms might contribute to the development of clearer standards and limitations on this practice, and begin to limit the sort of mission creep that has emerged with individual and unit self-defense in recent years. Greater transparency in how self-defense is being used might also force a reduction in some of the problematic uses of individual and unit self-defense, notably where Congress has not clearly authorized armed conflict engagement.

There may also be some technical amendments that would contribute to greater limits and delineation on when unit and individual self-defense may be relied upon. In addition to recognizing the right of its forces to defend themselves in conflict situations, the United States also has individual self-defense provisions in its criminal code (as a defense against criminal liability) and in the Uniform Code for Military Justice ("UCMJ"), which applies to U.S. forces deployed in non-active

combat situations.[230] This has created a bifurcated approach, with self-defense responses that arise in the context of armed conflict applying the self-defense provisions found in the SROE, and forces on peacetime deployments (for example, a soldier deployed in Okinawa who responded in self-defense in a bar room brawl) using the UCMJ provisions. This bifurcated approach has been reinforced in thousands of preliminary investigations of U.S. forces' conduct in Iraq and Afghanistan and in military justice tribunals related to self-defense claims. However, in the two cases touching on this issue that have gone to trial, there have been contradictory findings. The court in *United States vs. Behenna*,[231] seemed to endorse this bifurcated approach, while in *United States v. Holmes*,[232] the court applied the domestic UCMJ provisions without considering the ROE standards, despite the fact that the incident took place during an armed conflict deployment.[233] The split in jurisprudence makes it unclear when the wartime self-defense ROE standards prevail versus when only self-defense as a criminal defense under the UCMJ is available.[234]

Resolving this split might not only clarify confusion about which standards apply in certain ambiguous situations, but may also present an opportunity to limit the situations in which tactical individual and unit self-defense are available. The split might be designed such that self-defense in its wartime ROE form is not available in engagements and locations where Congress has not approved of a war-time engagement. In essence, if special forces were deployed on presidential authority on a mission that was part of the normal conduct of foreign and diplomatic affairs, without congressional consultation or full buy-in, they might defend themselves with the same authority and to the same degree as U.S. civilians abroad

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[230] Congress has explicitly declared that U.S. domestic law applies extraterritorially where it concerns acts by members of the U.S. armed forces serving overseas and those accompanying them. 18 U.S.C. § 3261. However, members of the armed forces are subject to the Uniform Code of Military Justice (chapter 47 of title 10). *Id*; s*ee also*, JOINT SERVICE COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES, r. 916(e) (providing a limited right to self-defense where there are reasonable grounds to believe there is a threat of grievous bodily harm or death); United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) (recognizing that R.C.M. 916 represents well-established principles of the law of self-defense).

[231] United States v. Behenna, 71 M.J. 228 (2012).

[232] U.S. v. Holmes, 2010 CCA LEXIS 497 (N-M. Ct. Crim. App. Apr. 27, 2010).

[233] Although the defendant killed a detainee during a period of armed conflict, in *Behenna* the judge confined his analysis to the UCMJ rules of court martial, arguing that at the moment the incident took place "Appellant was not in an active battlefield situation, that Mansur was not then actively engaged in hostile action against the United States or its allies, and that there were no other military exigencies in play." *Id.* at 234. The judge's dictum implies that had this been an active battlefield situation, with signs of hostile act or intent on the part of the individual who was killed, the criminal law concepts under the UCMJ would not have been controlling. *Id.* at 235-36. The one case that would have adjudicated the best approach for unit self-defense, the so-called *Haditha* case, was resolved through a plea bargain and never went to trial, leaving open the question of how these standards might apply in unit self-defense. *See* Tony Perry, *Marine gets no jail time in killing of 24 Iraqi civilians*, L.A. TIMES (Jan. 25, 2012); Gaston, *Reconceptualizing Self-Defense*, *supra* note 12, at 303 n. 89.

[234] For further discussion of the implications of the *Behenna* decision and military officers and lawyers' objections to the judgment, *see* Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31, at 4–6.

might, in keeping with the domestic law provisions of criminal self-defense (which for the forces in question would mean the self-defense provisions in the UCMJ). But they would not be able to, for example, call in a drone strike in defense of themselves or their partners, unless the situation was one that in and of itself received some level of congressional approval. Establishing clearer delineations between these two types of self-defense would not be a full solution—even if this limitation were established, arguably it could be surpassed if the situation in question resulted in a level of conflict that triggered a low-threshold Article 51 situation. This division also might be difficult to enforce given ongoing deployment patterns. However, it at least represents a partial check on a too expansive individual and unit self-defense practice and would clarify an open gap within U.S. jurisprudence on self-defense.

The larger issue raised by expansive self-defense is that it further enables a very broad use of presidential war powers, triggering larger separation of powers concerns. At the root of these separation of powers concerns, though, is a much greater and long-standing issue. The standing interpretation of the scope of presidential war powers, which would easily support most extended uses of individual or unit self-defense, is so broad largely because each time that presidents have pushed the envelope and seemingly surpassed constitutional or legislative limits on their war-making powers, Congress has responded with silence, acquiescence, or only rhetorical resistance. There is an even greater likelihood of congressional silence or acquiescence when it comes to the type of low footprint warfare that characterizes most of the extended individual and unit self-defense situations. As Jack Goldsmith and Matthew Waxman have argued, "[a] defining characteristic of light-footprint warfare… is that it occurs largely out of public view"[235] and "does not attract nearly the same level of congressional and especially public scrutiny as do more conventional military means."[236] Curbing inappropriate uses of individual and unit self-defense would thus require establishing a congressional review process that enabled greater congressional scrutiny and consultation in these light footprint campaigns. Goldsmith and Waxman propose having Congress ratify an overall counter-terrorism strategy every few years, and requiring regular reporting on it (rather than, for example, seeking a new congressional authorization for each engagement in a widespread and prolonged low footprint campaign).[237]

The recently introduced requirements of Section 1264 of the National Defense Authorization Act[238] offer a nod in this direction by requiring the administration to report on the legal and policy frameworks underlying any active military deployments and national security operations.[239] This requirement has

[235] Goldsmith & Waxman, *supra* note 192, at 10.
[236] *Id*. at 8.
[237] *Id*. at 18.
[238] 50 U.S.C. § 1549 (2018).
[239] The first report under this requirement is the Trump 1264 report, *supra* note 7. A similar report, provided voluntarily by the Obama Administration, that predates the 1264 report is the Obama Framework Report. Corn, *Should the Best Offense Ever Be a Good Defense?*, *supra* note 31.

forced a greater degree of transparency than in the past, and resulted in the most concerted, public rationalization on the use of self-defense so far. However, the level of reporting has still only been minimal, leaving many of the legal basis questions discussed in this article unresolved. It has also not so far appeared to curb extended uses of individual and unit self-defense, leading to operations that appear to exceed congressionally intended limitations on the use of force.

To address this, it may be appropriate to require both ratification of the overall strategic framework and a more routine reporting and notification process specific to individual deployments. This might be modeled on the existing process for covert actions authorized under Title 50,[240] in which presidential findings to engage in covert action must be reported to the House and Senate intelligence committees.[241] Similar proposals have been floated in the past by other scholars and policymakers. In a 2012 article on the convergence between military and intelligence operations, Robert Chesney noted weaker accountability for operations taking place far from a "hot" battlefield due to lower congressional awareness of such engagements in hostilities and proposed a similar reform of congressional notifications:

> Operations constituting "covert action" must be reported to the House and Senate Intelligence Committees; by contrast, the unacknowledged military operations discussed above are not subject to this requirement. A separate law requires notification to Congress when the armed forces are deployed in circumstances involving a likelihood of hostilities, but given the strict interpretation of "hostilities" adopted in relation to the conflict in Libya it seems clear that a considerable amount of unacknowledged military activity might escape notification to Congress under that regime as well. An effort was made in 2003 to close this gap by requiring unacknowledged military activity to be reported to the Intelligence Committees when activity occurs outside the geographic confines of

[240] Title 50 is the section of the U.S. Code that includes authority for CIA or intelligence operations. It is frequently contrasted with Title 10 of the U.S. Code, which deals with armed force and Department of Defense authorities. For more on these distinctions, the convergence between operations conducted under both authorities, and differing congressional oversight structures, see Andru E. Wall, *Demystifiying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT'L SEC. J. 85 (2011); Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. OF NAT'L SEC. L. & POL'Y, 539 (2012).

[241] 50 U.S.C. § 3091(a)(1) ("The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity."). The procedural requirements that the president must issue a written "finding" that the covert action in question is "important to national security," and that there must be "timely notice" of activities that require such a finding to congressional committees first appeared in the Hughes-Ryan Amendment of 1974. For a more thorough discussion of this original amendment, and how it was subsequently interpreted and defined in subsequent practice and legislation, *see* Chesney, *Military-Intelligence Convergence*, *supra* note 240, at 588–89, 592–601.

> a state where the United States has an overt combat presence. The effort failed in the face of resistance from the Pentagon and the House and Senate Armed Services Committees. It should be revived, but with notification being made to the Armed Services Committees, subject to an option for close-hold notifications, based on the Gang of Eight model.[242]

If such a congressional notification structure were put in place, Congress would not only renew a broad structure for counter-terrorism engagement, but would also then have to be notified of new deployments, or other significant changes in force levels, strategy, or situation. Some specification of the likely risks within the conflict situation or other legal or policy consequences of that deployment could also be required as part of that reporting. This would potentially avoid the sort of unknown conflict engagements like the one surrounding the four U.S. troops' deaths in Niger. In addition, it would address some of the potentially most problematic uses of individual and unit self-defense by closing down a loophole for avoiding congressional consultation. If some level of congressional notification and consultation is required for these low intensity deployments even when their only use of force would be via self-defense, then there would be less temptation to shoehorn effective war-making into this self-defense lens as a way to evade congressional scrutiny or objections. This would lower the risk of these self-defense responses happening with no level of public or congressional notice and accompanying process constraints.

A general critique of U.S. legal theories and practice since September 11 is that in trying to stretch the law to permit or rationalize its desired security response to transnational terrorist groups, it has blurred, elapsed, or stretched the boundaries of international and domestic law in ways that make its restrictions no longer meaningful.[243] The claim of an armed conflict that is everywhere and nowhere, with no foreseeable fixed end, has blurred the lines between war and peace, between tools of law enforcement and those of war, and between the standards governing these paradigms, International Human Rights Law and IHL. An expansive use of individual and unit self-defense can deepen the legal fog by increasing the number of contexts in which forces and their units are engaging in meaningful conflict activities untethered to any of the prescribed categories or their accompanying restrictions. No one contests that soldiers and marines, or their units have a right and a need to defend themselves in hostile situations. If anything, the combat experiences of the past two decades have demonstrated that threat-based determinations may have an important role to play in the context of today's

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[242] Chesney, *Military-Intelligence Convergence*, *supra* note 240, at 543. In especially sensitive covert actions, the President can limit advance notification to only the chairmen and ranking minority members of the House and Senate Intelligence Committees, the so-called "Gang of Eight." 50 U.S.C. § 3093(c)(2). *See* ALFRED CUNNING, CONG. RESEARCH SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS 2 (2009).

[243] *See generally* Modirzadeh, *supra* note 201 (arguing and mapping how the muddling of IHL and IHRL in "thickly legal" arguments since 2001 diluted the sharpness of the prevailing law and ultimately led to the framing of many U.S. operations and activities as not bound by international legal restrictions).

conflicts. What is important is that these threat-based determinations do not happen in a vacuum of legal guidance, and that this guidance firmly anchors this emerging practice to existing frameworks, with due consideration for maintaining appropriate checks on the use of force.