ARTICLE

Statutory International Law

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International law pervades the U.S. Code. This will come as a surprise to many Members of Congress, as well as to those who accept the common trope that Congress is ignorant about or hostile to international law. It also may be news to foreign affairs scholars who study those areas in which Congress necessarily must interact with international law, such as where the Senate provides advice and consent to treaty ratification or Congress enacts implementing legislation to further U.S. treaty commitments. Even those who have examined these high-profile congressional interactions with international law likely are not attuned to the breadth and depth of Congress' voluntary engagement with international law in a wide variety of situations in which it legislates.

The little-discussed proliferation of international law throughout U.S. statutes—termed here "statutory international law"—is the launching point for this Article. Because limited attention is paid to congressional engagement with international law, current legal literature lacks a descriptive and theoretical account of when, why, and how Congress engages with these norms to advance its legislative goals. This Article is the first to systematically examine the phenomenon of statutory international law.

Tracking how these norms find their way into statutes reveals the critical but often unseen influence of the Executive on the language of legislation. Further, the presence of statutory international law in the U.S. Code has important implications for the development of customary international law. It accelerates the amount of state practice that the Executive and courts produce and correspondingly empowers the United States to shape customary international law. Further, Congress' role in creating statutory international law reduces customary international law's notorious democracy deficit. In the domestic context, statutory international law introduces new factors to inform ongoing debates about the Charming Betsy canon of statutory interpretation, while highlighting confounding effects on the separation of powers in foreign affairs.

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I. INTRODUCTION

Members of the First Congress were intimately familiar with the writings of international law publicists such as Emmerich de Vattel, Hugo Grotius, and Samuel von Pufendorf.[1] Members of the 115th Congress surely are not. At the extreme, some argue that Congress has limited patience for international law and international institutions.[2] In this view, Congress sees international law as infringing on U.S. sovereignty, running contrary to U.S. national interests, and challenging concepts of American exceptionalism. But the caricature of Congress as institutionally resistant to international law is plainly wrong. After all, the Senate has a constitutionally mandated role in providing advice and consent to treaty ratification, which it exercises on a periodic, if not regular, basis.[3] Further, Congress is constitutionally empowered to define and punish offenses under the law of nations, an authority it has employed to criminalize various acts.[4]

Even those who paint a more nuanced portrait of the congressional relationship with international law tend to focus on the Senate's role in authorizing the Executive to assume international obligations for the United States, on bicameral statutes allowing the Executive to conclude international agreements, or on statutes enacted by Congress to implement U.S. treaty obligations. These are important points at which Congress and international law intersect, to be sure, but examining these intersections does not fully illuminate Congress' relationship with international law.

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1. Sarei v. Rio Tinto, 671 F.3d 736, 804 (9th Cir. 2011) (Kleinfeld, J., dissenting) ("Vattel is an authority because the First Congress relied on him."); 3 ALBERT DE LAPRADELLE, THE CLASSICS OF INTERNATIONAL LAW xxxv (James Brown Scott ed., Charles G. Fenwick trans., 1916) (asserting that Vattel was seen as "the most competent, the wisest, and the safest guide, in all the discussions of Congress . . . and in all diplomatic correspondence, especially that concerned with questions of legality"); Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States,* 3 AM. J. INT'L L. 547, 550 (1909); Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 548 (2012).

2. Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 537 (2011) ("Congress's skeptical attitude toward international law has appeared in various guises over the years."); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 368 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411–16 (2000); Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 29 HARV. J. L. & PUB. POL'Y 65, 66 (2006) ("[I]t is doubtful that customary international law limits the war on terror in any meaningful way. In the end, most politicians will not resist the urge to shove customary international law out of the way."). For a more general argument that the United States often is hesitant to embrace international law, see ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003) ("[T]he United States remains mired in . . . an anarchic Hobbesian world where international laws and rules are unreliable.").

3. U.S. CONST. art. II, § 2.

4. U.S. CONST. art. I, § 8, cl. 10.

Once one looks deeper—past high-profile congressional controversies over treaties such as the U.N. Convention on the Law of the Sea, and past the well-understood congressional interactions with treaties, congressional-executive agreements, and implementing legislation—one finds that international law pervades the U.S. Code, appearing in dozens of lower-profile U.S. statutes. Congress, it turns out, employs international law in a wide variety of ways, some of which express a congressional objection to international law, but many of which embrace that law.[5] These international law-utilizing statutes (which this Article calls "statutory international law" or "SIL") operate like capillaries throughout the corpus of the U.S. Code, delivering small doses of international law to help minimize conflicts between U.S. law and behavior, on the one hand, and foreign behavior and expectations, on the other.[6] Statutory international law addresses a wide variety of subjects, including tax, trade, maritime, criminal, military, human rights, and foreign relations issues. This Article is the first to systematically document and examine the phenomenon of SIL.

Congress affirmatively incorporates international law with some frequency—as a way to define concepts, set boundaries around executive action, or authorize the Executive to enforce international law against others. For instance, U.S. statutes use international law to define which governments should not receive World Bank funds,[7] to require the Executive to heed international law when undertaking various acts in international waters,[8] and to impose sanctions on states that use chemical or biological weapons in violation of international law.[9] Congress clearly knows how to reject or override international law, but it often softens the blow by

5. Some scholars have worried that Congress insufficiently fails to incorporate international law into its decision-making. *See, e.g.*, Steve Charnovitz, *Correcting America's Continuing Failure to Comply with the* Avena *Judgment*, 106 AM. J. INT'L L. 572, 581 (2012) ("Some new thinking is needed on how best to integrate international law into congressional decision making. Although the House and the Senate have hundreds of committees and subcommittees, none of them have *international law* in their names."); Allan Gerson, *Congress and International Law: The Case of UN Funding—Are We Deadbeats?*, 92 AM. SOC'Y INT'L L. PROC. 328, 328–32 (1998) (arguing that some in Congress disdain international law, while others believe that international law advances U.S. policy interests); Robert Turner, *Does International Law Matter to Congress?*, 92 AM. SOC'Y INT'L L. 321, 321 (1998) (stating that Congress "does not understand international law any better than most Americans do"). None of these authors considers in any depth the extent to which Congress incorporates international law into legislation or analyzes when, why, and how this occurs.

6. Some have suggested that a better term for the sets of laws I describe might be "international statutory law," because the law discussed here is, at bottom, statutory law, not international law. I have employed the term "statutory international law" to reflect the idea of international legal norms being incorporated into statute and to avoid suggesting that the statutes discussed here apply in any legal system other than that of the United States.

7. 22 U.S.C. § 262d (2014).

8. *See infra* note 49 (listing series of statutes related to maritime sanctuaries, sunken vessels, and other activities that implicate the high seas).

9. 22 U.S.C. §§ 5604–05 (1991).

giving the President the ability to waive statutory provisions that other states likely would view as violating international law.[10]

Even if Congress is not, in general, hostile to international law, there are a number of reasons to believe that modern Congresses are not well educated about international law. How, then, does Congress come to understand international law's relevance as it drafts a particular statute, and why does Congress employ international law concepts in its legislation? This Article argues that an important part of this puzzle is solved by understanding the Executive's institutional role in creating SIL. In at least some examples of SIL, the Executive has helped identify the relevance of international legal concepts to particular pieces of draft legislation and persuaded Congress to include those concepts in the statute. Congress has independent strategic reasons to enact SIL, to be sure, including because Congress agrees substantively with the rule, wishes to reduce its drafting costs, or hopes to use SIL to shift interpretive burdens to the other branches. However, executive pressure is an important exogenous reason for the production of SIL.

Understanding SIL—including the types of SIL that exist, the fact that Congress has various instrumental reasons to create this law, and the Executive's role in its creation—helps sharpen our understanding of how customary international law does and should develop. International law scholars recite that a state's legislation may serve as a form of state practice, which is a seminal part of customary international law. But the analysis often stops there.[11] This Article begins to unpack the different ways in which a state's domestic statutes may help form, entrench, and evolve customary international law. It highlights the ways in which SIL can serve as a state practice multiplier by stimulating both the Executive and the courts to interpret domestic legal provisions that have meaning on the international plane. It also identifies SIL's role in reducing customary international law's democracy deficit, because a democratically elected body produces SIL.

On the domestic front, a deeper understanding of SIL sheds additional light on the justifications often cited for the use of an interpretive tool called the *Charming Betsy* canon.[12] This canon provides that, where possible, courts should interpret ambiguous statutes as being consistent with international law. Scholars disagree about how to justify the canon, although several authors recently have critiqued the "congressional intent" justification,

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10. *See infra* Part II.C.iv.

11. For one exception, see Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 414–15 (2014) (discussing the possible role of a state's domestic statutes in enhancing other states' perception that the state is committed to a given customary rule).

12. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

which argues that the canon serves as the courts' best estimate of what Congress would have wanted the courts to do.[13] This Article raises the possibility that the breadth of SIL reflects a congressional engagement with international law that makes the "congressional intent" justification more satisfying. It also identifies the process by which SIL often emerges as having implications for the separation of powers in foreign affairs.

To be clear, a holistic assessment of Congress' approach to international law must take into account not only the statutes with which this Article is concerned but also the Senate's provision of advice and consent to ratification of treaties and statutes that authorize congressional-executive agreements and implement treaty obligations. Much work has been done on the latter types of congressional engagement, however, and virtually none on the former. This Article therefore focuses only on these seemingly spontaneous congressional engagements with international law, which rounds out our understanding of the full set of congressional interactions with international law.

In Part II, this Article will identify, classify, and analyze the sometimes unexpected ways in which Congress employs SIL. In Part III, it will turn to the reasons why Congress chooses to employ SIL. While Congress has a number of independent instrumental reasons to employ international law in domestic statutes, the executive branch often is a critical driver behind international law's inclusion, playing both a seen and unseen role in shaping some of these statutes. As part of the analysis of what stimulates the production of SIL, this Part will identify and evaluate the processes by which SIL comes about, including both the ways in which congressional staffers develop an appreciation for international law's value and the ways in which the Executive influences draft statutory language.

In light of this deeper understanding of when and why Congress uses statutory international law and of the role the Executive plays in its creation, Part IV will address the doctrinal and normative implications that follow in international and domestic law. In particular, this Part will argue that a robust use of SIL in U.S. law provides the United States with important advantages in shaping customary law and the interpretation of treaty terms. This Part will also argue that certain types of statutes should be given greater weight than others in the formation of customary international law. In short, a careful study of the U.S. Code paints a more nuanced story of Congress' relationship with international law than has been told to date.[14] This Article tells that story.

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13. *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

14. One author has conducted an empirical analysis of Congress' references to international law in floor debates. Kevin L. Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115 *passim*

II. CLASSIFYING STATUTORY INTERNATIONAL LAW

A variety of academic literature exists on Congress' constitutional relationship with international law, including work on whether Congress may act beyond the bounds of its Article I power in implementing treaty obligations,[15] whether Congress may violate international law as a constitutional matter,[16] the Senate's role in providing advice and consent to treaties,[17] the permissible scope of congressional-executive agreements,[18] Congress' role in conducting diplomacy,[19] and the "define and punish" clause.[20] Scholars have also written about the *Charming Betsy* canon, under which courts interpret ambiguous statutes in a manner consistent with international law.[21] But this work alone cannot tell the full story about how Congress interacts with international law, because it fails to consider the significant number of cases in which Congress chooses to employ international law in garden-variety statutes—what I term "statutory

(2015). Cope speculates that Members of Congress invoke international law in debates either because domestic constituencies favor U.S. compliance with international law or because Congress is attempting to signal to foreign constituencies a U.S. commitment to international law. Although Cope recognizes that Congress is less hostile to international law than some assert, his hypotheses do not consider the highly salient interactions between Congress and international law in the form of SIL or explore in depth the Executive's role in stimulating Congress to embrace international law. *See also* KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION 53–54 (2013) (demonstrating that Members of Congress invoke foreign norms in floor debates and committee reports as part of a policy rationale for adopting domestic legislation).

15. Nicholas Q. Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1886 (2005); David Sloss, Bond v. United States*: Choosing the Lesser of Two Evils*, 90 NOTRE DAME L. REV. 1583, 1593–94 (2015).

16. David Golove, *The Supreme Court, the War on Terror, and the American Just War Constitutional Tradition*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 561 (David L. Sloss et al. eds., 2011) (arguing that Congress is constitutionally required to observe the laws of war); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009) (arguing that for the United States the constitution is always supreme over international law).

17. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012); Howard Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking*, 18 MICH. J. INT'L L. 445 (1997).

18. Oona Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009); Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Peter Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001).

19. Ryan Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331 (2013).

20. Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015); Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (evaluating "define and punish" clause in historical context); Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009).

21. Bradley, *supra* note 13 (arguing that *Charming Betsy* canon is best conceived as a way to enforce separation of powers among the three branches, not as a reflection of legislative intent or judicial respect for international law); Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1217 (2008).

international law."[22] This Part identifies what the Article means by "statutory international law," describes the methodology by which I located these statutes in the U.S. Code, and explores the various ways in which Congress uses international law in these statutes.

A. Defining Statutory International Law

The broadest construction of the concept of "statutory international law" (SIL) would include *any* instance in which Congress references, uses, or incorporates international law concepts in a statute, including in laws implementing U.S. treaty obligations. However, a premise of this Article is that there is something valuable in exploring those cases in which Congress employs international law without an obvious external trigger. This Article is not concerned with those cases in which another actor formally confronts Congress with an international law decision, as when the Executive asks Congress to delegate the authority to enter into international agreements such as trade agreements or asks it to enact implementing legislation. Congress often produces SIL in these cases, but a variety of scholarship has already grappled with the legal questions that arise from those contexts. This Article instead focuses on a far less examined set of statutes: those in which Congress uses international law in a seemingly self-generated way. References to SIL herein are generally meant to capture this narrower category of statutes.

As discussed at greater length *infra*, SIL includes both general and specific references to customary international law (or the law of nations) and treaties.[23] Thus, a statute might rely on the law of nations to provide a definition of a prohibited behavior, or the statute might invoke a particular maritime treaty to which the United States is not a party as the source of a process that a U.S. official must nevertheless follow. The former is an example of a general reference to customary law; the latter is an example of a specific reference to a treaty.[24]

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22. Professor John Coyle recently argued that one way for international law to gain greater traction in U.S. courts is for Congress to incorporate more of it into statutes. John Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433 (2015). This Article demonstrates the extent to which this incorporation already happens and sheds light on the process by which it occurs.

23. *See infra* Part II.C.

24. *See* Coyle, *supra* note 22, at 477–79 (describing competing options of "codification of international law" and "incorporating a rule by reference," and identifying that Congress may do so on a general or specific basis).

B. Methodology

I undertook a thorough search for statutes that met the criteria identified in Section A. I identified over one hundred statutes in which Congress either (1) incorporated or referred to "international law," the "law of nations," "treaties," the "law of war," or a specific treaty as the basis of a right, obligation, or limitation; or (2) rejected or overrode U.S. treaty or customary obligations.[25] It was not possible to search systematically for all references to specific treaties, given the vast number of treaties to which Congress might have incentive to refer in statute.[26] I also searched in legal databases for cases or scholarship that discussed "claw-back" or "blocking" statutes—that is, statutes that other states enact to retaliate or push back against a U.S. statute that they think violates international law. This identified some (though likely not all) U.S. statutes that are inconsistent with international law. I also examined scholarship that identified various U.S. violations of international law and isolated those instances in which the alleged violations occurred because the United States had enacted a statute contrary to its international law obligations.

I did not include statutes that refer to international law in non-operative provisions, such as in preambles or "senses of Congress." That use of international law, while not without import, costs Congress relatively little to produce because it does not impose binding legal obligations.[27] In contrast, SIL that incorporates a given rule of international law reflects a binding commitment by Congress to that law. I attempted to exclude any statute that serves to implement a U.S. treaty obligation. I also excluded statutes specifically intended to bring the United States into compliance with the decision of an international body, because those are situations in which an external actor has forced Congress to confront international law.[28]

While many of the statutes discussed herein squarely fit into these parameters, a decision to treat a particular statute as SIL sometimes required

25. For a full list of statutes, see Annex.

26. In a number of cases, I already was aware that a particular statute invoked a treaty by name and was able to search by treaty title. A search for the word "convention" turned up other specific treaties. In most cases I did not search for individual treaties by name.

27. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577–78 (2008) (noting that congressional resolutions provide information that can affect behavior but are cheaper for Congress to enact than hard law).

28. Congress occasionally has repealed statutes that international tribunals have held to violate international law, thereby evincing a strategic recognition of the value of international law compliance. *See, e.g.*, Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 2006, 118 Stat. 2434, 2597 (repealing the Anti-Dumping Act of 1916 in the wake of a WTO decision against the United States); American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 409, 118 Stat. 1418, 1500 (amending the Internal Revenue Code of 1986 to repeal provisions related to the foreign sales of corporations in the wake of a WTO decision against the United States).

an element of judgment. For example, I assessed that the statute that criminalizes the counterfeiting of foreign currency was an effort to incorporate a customary international law requirement into the U.S. Code, even though the statute itself does not refer to international law.[29] Likewise, I included statutes that Congress enacted in the shadow of treaties that authorize, but do not require, state parties to criminalize certain acts.[30] It is likely that I failed to unearth some statutes that constitute SIL. For example, if Congress crafted a statute that attempted to incorporate an international norm but did not specifically refer to international law in the text, my search may not have identified it as SIL even though the statute would meet the definition of SIL used in this Article.

Several of these statutes have their roots in the early days of the Republic. The First Congress enacted a statute criminalizing violations of safe conducts and assaults on ambassadors as infractions of the law of nations.[31] This is not surprising, given the interest of early Congresses in ensuring that other states perceived the United States as a reliable member of the civilized community of nations.[32] Various neutrality acts, which represented a U.S. effort to ensure its neutrality in World War I consistent with international law requirements, date from 1917.[33] SIL is not just of historical interest, however; many examples of SIL are of more recent vintage, demonstrating that SIL is no anachronism.[34] Indeed, these more

29. H.R. REP. NO. 47-1835 (1882); *see also* U.S. v. Arjona, 120 U.S. 479, 487 (1887) (signaling a belief that Congress had enacted the criminal statute to ensure that the United States could protect a right secured by international law to foreign states).

30. Cleveland & Dodge, *supra* note 20, at 2265 (distinguishing between treaties that *require* the United States to punish conduct and those that *authorize* the United States to do so).

31. Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 118, § 28 (1790) (current version at 18 U.S.C. § 1545 (2012)).

32. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (O. Halsted ed., 1826); *see also* JAMES KENT'S COMMENTARY ON INTERNATIONAL LAW 427 (J.T. Abdy ed., 1866) (stating that the Continental Congress showed "great solicitude to maintain inviolate the obligation of the law of nations, and to have infractions of it punished"); Bradley, *supra* note 13, at 492 ("The possibility that breaches of international law could result in war, with other nations or with Indian tribes, had been a significant concern during the drafting of the Constitution."); David Golove & Daniel Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Eric Posner, Book Review, 101 AM. J. INT'L L. 509, 513 (2007) (reviewing ROBERT SCOTT & PAUL STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006)) ("In the United States . . . statutes that incorporate customary international law go back to the founding.").

33. *See, e.g.*, 18 U.S.C. § 967 (2012) (authorizing the President to prevent the departure from U.S. ports of vessels believed to be carrying arms or personnel to belligerent nations "in violation of the laws, treaties, or obligations of the United States under the law of nations").

34. *See, e.g.*, Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2576 (codified as amended at 10 U.S.C. § 948d (2012)) (creating jurisdiction over offenses under the laws of war); 18 U.S.C. § 7 (2012) (extending the special maritime and territorial jurisdiction of the United States to certain foreign vessels "to the extent permitted by international law"); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (1991)) (defining extrajudicial killing as excluding killings that "under international law" are lawfully

modern statutes best illustrate a puzzle with which this Article grapples: why and how does a Congress that today is less familiar with international law produce statutes that embrace it?

C. A Taxonomy of Uses

Congress employs international law in a host of ways. This Section constructs a taxonomy of the ways in which Congress employs SIL across a variety of subject areas. The first several categories illustrate cases in which Congress embraces international law as a positive source of rules. The last category, in contrast, discusses examples in which Congress tries to override or distance the United States from international law. Although not all of Congress' uses (and rejections) of international law fall into one or more of these categories, many do. Part III will consider why Congress employs SIL in these diverse ways.[35]

In each category of use, Congress has the choice between incorporating international law generally by reference and codifying specific terms drawn from a body of international law.[36] When Congress incorporates international law by reference, it does not "transcribe" the international rule into the U.S. Code, but merely refers to "international law" or the "law of nations" as the source of the regulating principle.[37] Congress thus leaves it to other actors in the U.S. system to ascertain which rules of international law are relevant. Alternatively, Congress can build the substance of the international rule directly into the statute.[38] While both types of statutes constitute SIL, it is particularly surprising when Congress decides to incorporate international law by reference. That is, at the time of the statute's enactment, Congress effectively envisions an evolution of U.S. law based on the ways in which foreign actors help shape that law and its interpretation over time.[39] That choice is unexpected, at least from a

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carried out under foreign authority). Though part of the TVPA implements the U.N. Convention Against Torture, this part of the TVPA serves to implement customary international law by creating a cause of action for extrajudicial killing. Cleveland & Dodge, *supra* note 20, at 2248. *But see* Presidential Statement on Signing the Torture Victim Protection Act of 1991, 1 PUB. PAPERS 437–38 (Mar. 12, 1992).

35. *See infra* Part III.

36. When it chooses the latter option, Congress either may reference in statute the body of law from which it is drawing, or simply incorporate the substantive rule without reference to its international law source.

37. Coyle, *supra* note 22, at 477–78.

38. *Id.*; *see also* JOHN M. RODGERS, INTERNATIONAL LAW AND UNITED STATES LAW 106 (1999) (noting that Congress can incorporate international law into U.S. law by referring generally to "international law" or by using a term that has an established meaning internationally).

39. *See, e.g.*, United States v. Hasan, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010), *aff'd as* United States v. Dire, 680 F.3d 446, 460 (4th Cir. 2012) ("The plain language of 18 U.S.C. § 1651 reveals that, in choosing to define the international crime of piracy by [reference to the law of nations], Congress

Congress whose modern image is one of skepticism about international and foreign influences on U.S. law.

i. Definitional Uses

In some cases, Congress employs international law to define a term in a statute. This Article terms this a "*definitional use*" of international law. For instance, in crafting a statute that criminalizes piracy, Congress instructed that international law will serve as the source of piracy's definition.[40] The statute states, "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[41] More recent Congresses have adopted similar approaches to defining terms. For instance, Congress has authorized the Secretary of Transportation to issue a license for ownership of a deepwater port if, among other things, the port "will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law."[42] The Transportation Secretary therefore must refer to substantive rules of international law when assessing whether a particular port will produce "unreasonable interference" with international navigation. Further, in a statute criminalizing the financing of terrorism, Congress drew directly from international law to define terms such as "armed conflict" and a "state."[43]

In other cases, Congress' reference to an international law definition is more oblique, but still recognizable. In a statute regulating U.S. foreign assistance policies, Congress has required the United States to use its "voice and vote" in international financial institutions such as the World Bank to channel assistance to states "other than those whose governments engage in . . . a pattern of gross violations of internationally recognized human rights."[44] This instructs the Executive to look to widely-accepted human

made a conscious decision to adopt a flexible—but at all times sufficiently precise—definition of general piracy that would automatically incorporate developing international norms regarding piracy. Accordingly, Congress necessarily left it to the federal courts to determine the definition of piracy under the law of nations based on the international consensus at the time of the alleged offense.").

40. 18 U.S.C. § 1651 (2012); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 734 (2008) ("Congress's power to 'define and punish . . . Offenses against the Law of Nations' gives the legislature substantial authority to decide what conduct violates international law.").

41. 18 U.S.C. § 1651 (2012). Likewise, in the well-known Alien Tort Statute, Congress authorized civil suits by aliens for torts committed "in violation of the law of nations." 28 U.S.C. § 1350 (2012); *see also* H. R. REP. NO. 102-367, pt. 1, at 4 (1991) (stating that the ATS should remain intact "to permit suits based on other [non-torture] norms that already exist or may ripen in the future into rules of customary international law").

42. 33 U.S.C. § 1503(c)(4) (2012).

43. 18 U.S.C. § 2339C(e)(10), (14) (2012); *see also* 18 U.S.C. § 2280(d)(21) (2012) (defining "territorial sea of the United States" with reference to international law).

44. 22 U.S.C. § 262d (2012); *see also* 22 U.S.C. § 2304(a)(2) (2012) (prohibiting provision of

rights treaties and customary international law to assess which states egregiously violate that set of human rights. Congress did something similar in the Torture Victim Protection Act of 1991 (TVPA), defining the term "extrajudicial killing" to exclude "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."[45] This requires the Executive to evaluate whether a particular killing was performed consistent with the foreign state's obligations under treaties such as the International Covenant on Civil and Political Rights, which bars the arbitrary deprivation of life and establishes baseline procedures for fair trials.[46]

ii. Boundary-Setting Uses

In other cases, Congress invokes international law to set the terms of executive action. We might think of this as a "*boundary-setting use*" of international law in statute, because Congress usually authorizes the Executive to take a particular action, but only within certain limits imposed by international law. In these cases, Congress effectively reminds the Executive of existing international obligations with which it must continue to comply after the statute is enacted, or carves out certain exceptions in statutes based on existing U.S. international commitments. For example, the Coastal Zone Management Act of 1972 (as amended) gives the Secretary of Commerce the power to work with U.S. states to manage, develop, and protect the coastal zone, but makes clear that the statute does not supersede or repeal several U.S. treaty obligations related to water rights.[47] By clarifying in the language of the statute that Congress intends to recognize or exempt from the new rule existing international law obligations, Congress is able to avoid the traditional "later-in-time" rule pursuant to which subsequent statutes override existing treaty obligations.[48]

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security assistance to governments that engage "in a consistent pattern of gross violations of internationally recognized human rights"); 22 U.S.C. § 6401(b) (2012) (stating that it shall be the policy of the United States to "seek to channel United States security and development assistance to governments other than those found to be engaged in gross violations of the right to freedom of religion"). These examples might also constitute "enforcement uses," as they reflect efforts by Congress to impose costs on states that consistently violate international human rights rules.

45. 28 U.S.C. § 1350 note, sec. 3 (1991); *see also* Sudan Peace Act, sec. 2(10), 116 Stat. 1504, codified at 50 U.S.C. § 1701 note (1977) (referring to acts of the Government of Sudan as genocide, "as defined by the Convention on the Prevention and Punishment of the Crime of Genocide").

46. International Covenant on Civil and Political Rights arts. 6, 14, Dec. 19, 1966, 999 U.N.T.S 171.

47. 16 U.S.C. § 1456(e) (1976).

48. RODGERS, *supra* note 38, at 108 (citing as an example 26 U.S.C. § 7852(d)(2) (2012), which states that no provision of the Internal Revenue Code shall apply if its application would be contrary to a U.S. treaty obligation in effect on August 16, 1954). For other examples, see 16 U.S.C. § 2412 (2012) ("Nothing in this chapter [related to Antarctic conservation] shall be construed as contravening or superseding the provisions of any international treaty, convention, or agreement, if such treaty,

Examples of boundary-setting uses are common. When administering statutes that involve acts in international waters, Congress has repeatedly directed executive agencies to comply with "general" or "generally recognized" "principles of international law" or "treaties to which the United States is a party *or other international obligations* of the United States."[49] Likewise, in the Foreign Sovereign Immunities Act (FSIA), Congress created a "treaty exception" that made the allocation of immunity and exceptions to immunity subject to international agreements that were in place at the time the FSIA was enacted.[50] The FSIA thus gives priority to then-existing treaties with which the FSIA might otherwise have conflicted and (therefore) have overridden. Congress has done the same with taxation rules, ensuring that the Executive applies income tax rules "with due regard to any treaty obligation of the United States that applies to such taxpayer."[51]

Within this category of boundary-setting uses, sometimes the reference to international law simultaneously authorizes and constrains.[52] For example, in the Uniform Code of Military Justice, Congress makes clear that

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convention, or agreement is in force with respect to the United States on October 28, 1978, or of any statute which implements any such treaty, convention, or agreement."); 16 U.S.C. § 2442 (2012) (stating that nothing in the chapter implementing U.S. obligations under Convention on Antarctic Marine Living Resources "shall be construed as contravening or superseding (1) the provisions of any international treaty, convention, or agreement, if such treaty, convention or agreement is in force with respect to the United States on Nov. 8, 1984, or (2) the provisions of any statute which implements any such treaty, convention, or agreement"); 18 U.S.C. § 4103 (2012) ("All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees, and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise."); 22 U.S.C. § 406 (2012) (exempting from statutory limitations on the export of war materials "trade which might have been lawfully carried on before the passage of this title [enacted June 15, 1917], under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof"); 42 U.S.C. § 2151 (2012) ("Any provision of this chapter or any action of the [Nuclear Regulatory] Commission to the extent and during the time that it conflicts with provisions of any international arrangements made after August 30, 1954 shall be deemed to be of no force and effect."); 46 U.S.C. § 60312 (2012) (nothing in shipping chapter affects "a right or privilege of a foreign country relating to tonnage taxes or other duties on vessels under a law or treaty of the United States").

49. *See, e.g.*, 10 U.S.C. § 113 note, 118 Stat. 2094 (2004) (protection of sunken military vessels) (emphasis added); 16 U.S.C. § 1435(a) (2012) (management of national marine sanctuaries); 30 U.S.C. § 1421 (2016) (issuance of permits for deepwater mining operations); 33 U.S.C. § 1912 (2012) (prevention of pollution from ships); 33 U.S.C. § 3804 (2012) (clean hulls); 42 U.S.C. § 9119 (2012) (issuance of permits for ocean thermal energy conversion facilities).

50. 28 U.S.C. § 1604 (2012); *see also* Simon v. Republic of Hungary, 812 F.3d 127, 135 (D.C. Cir. 2016) (noting that the FSIA's "baseline grant of immunity to foreign sovereigns is '[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of th[e] Act'").

51. 26 U.S.C. § 894 (2012).

52. *See* Kent, *supra* note 20, at 846 (noting that CIL may serve both as a restriction on and source of government power); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012), *in* 54 HARV. INT'L. L.J. ONLINE 1, 11 (Dec. 2012) ("International law is not purely constraint[;] it frees us and empowers us to do things we could never do without law's legitimacy.").

the provisions conferring jurisdiction over courts martial do not deprive military commissions of jurisdiction over offenders or offenses "that by statute or the law of war may be tried by military commissions."[53] Through this language, Congress allows the Executive to look to the law of war as an affirmative justification for using a commission in a particular case, but also constrains the Executive from using commissions in cases that the law of war does not tolerate. The 2001 Authorization for the Use of Military Force provides another example of simultaneous authorization and constraint.[54] In an opaque but important reference to international law, Congress' use of the phrase "necessary and appropriate" to modify the type of force it authorized the Executive to take after the September 11th attacks has been treated (not least by the Executive) as imposing international law constraints on that use of force.[55]

As Part III will describe, the Executive often plays a role in urging Congress to include international norms in statutes. Where that results in a "boundary-setting use" of SIL, this means—perhaps counter-intuitively—that the Executive itself has urged Congress to constrain the Executive's own actions.

iii. Enforcement Uses

Finally, Congress has crafted various statutes to facilitate both the Executive's and the judiciary's ability to enforce international law, which this Article terms an "*enforcement use*" of international law.[56] The famous Alien Tort Statute (ATS) is an early example of an enforcement use of international law coupled with a definitional use of international law. The ATS facilitates the judiciary's ability to adjudicate certain international law violations by creating federal jurisdiction over civil actions by aliens for torts committed in violation of "the law of nations or a treaty of the United

53. Uniform Code of Military Justice, 10 U.S.C. § 821 (2012).

54. Authorization for Use of Military Force, Pub. L. No. 107-40; 50 U.S.C. § 1541 note (2012).

55. Memorandum from Respondents Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 312 (D.D.C. 2009) (No. 08-442) (stating that law of war principles inform the understanding of what is "necessary and appropriate"); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091, 2094 (2005) (describing 2001 Authorization to Use Military Force as regulated by the laws of war, which both authorize and constrain).

56. *See, e.g.*, 18 U.S.C. § 1653 (2012) (deeming anyone engaging in acts declared to be piracy in bilateral treaties to which the United States is a party to be a pirate punishable by life imprisonment); 33 U.S.C. §§ 384–85 (2012) (authorizing condemnation of vessels used for piracy, as defined by law of nations); Protection of the Commerce and Coasts of the United States, Act of May 28, 1798, ch. 48, 1 Stat. 561 (authorizing President to seize armed vessels that had captured U.S. vessels and property in violation of the law of nations).

States."[57] The Supreme Court has concluded that the statute captures a "narrow set of violations of the law of nations" that are susceptible to being reviewed by courts and that also threaten "serious consequences in international affairs."[58] More recently, in the TVPA, Congress established a civil remedy for two international law torts: torture and extrajudicial killing.[59] As the ATS does, the TVPA allows victims of international law violations by foreign states to seek civil remedies in U.S. courts.

Likewise, in the FSIA, Congress lifted immunity from jurisdiction of foreign states in cases where "rights in property taken in violation of international law are in issue," when certain other factors are met.[60] This provision interacts with the Second Hickenlooper Amendment, which prohibits federal courts from applying the act of state doctrine in cases in which a sovereign state has taken property "in violation of the principles of international law."[61] Together, these provisions require that courts deny international law violators certain advantages in litigation.

Congress also has occasionally required the Executive to negotiate agreements or principles with other states to establish cooperative responses to treaty violations by third states. In the Nuclear Non-Proliferation Act of 1974, Congress mandated that the Executive seek to negotiate with other states to "adopt general principles and procedures, including common international sanctions, to be followed . . . in the event that any nation violates the principles of the Treaty."[62] This reflects a congressional effort to stimulate the Executive to enforce the Non-Proliferation Treaty, even against states that were not parties.

Sometimes these statutes directly authorize the President to enforce international law against actors who violate that law.[63] A statute addressing the control and elimination of chemical and biological weapons requires the President to impose sanctions on foreign countries that use chemical or biological weapons "in violation of international law."[64] The President triggers those sanctions if he determines that a foreign country has used such weapons, though the statute includes waiver authority.[65] Occasionally Congress will prohibit the Executive from providing foreign assistance to states that are not complying with their treaty obligations, as it did in 2006

57. 28 U.S.C. § 1350 (2012).

58. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

59. 28 U.S.C. § 1350 note (1991).

60. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2012).

61. Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2006).

62. 22 U.S.C. § 3243 (2012).

63. *See, e.g.*, 22 U.S.C. § 462 (2016) (authorizing the President to use military force to detain foreign vessels at U.S. ports when, "by the law of nations or the treaties of the United States," those vessels are not authorized to depart).

64. 22 U.S.C. § 5605 (2012).

65. 22 U.S.C. §§ 5604–05 (2012).

in an effort to penalize Mexico for acting in a manner inconsistent with the U.S.-Mexico Extradition Treaty.[66] Or Congress will authorize the Executive to reimburse a private actor who a foreign state required to pay a fee in violation of international law, and then urge the Executive to take appropriate action to collect that fee from the violating state.[67]

Sometimes "enforcement use" statutes take a slightly different approach: they authorize the President to take measures consistent with international law, but they also contain provisions allowing the President to take steps that would otherwise be *inconsistent* with international law because another state has failed to provide the United States with reciprocal treatment.[68] In other words, these statutes allow the President to apply counter-measures under international law. Counter-measures are acts that otherwise would be contrary to the international obligations of the injured state toward the responsible state, but which may lawfully be taken in response to the responsible state's violations of its obligations toward the victim.[69] Because customary rules of state responsibility contemplate that states may impose counter-measures on each other in the face of international law violations, this form of SIL is consistent with international law despite the fact that it contemplates an act that, absent the other state's violation, would be a breach of an international legal obligation.[70]

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66. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 109-102, § 583, 119 Stat. 2172 (2006) (allowing the Secretary of State to avoid the bar if she certifies that the application of such a restriction to a particular country is contrary to U.S. national interests); *see also* 22 U.S.C. § 2370a (2012) (stating that the Executive may not provide money under the Foreign Assistance Act or Arms Export Control Act to a state that has expropriated property but not offered prompt, adequate, and effective compensation in accordance with international law); International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519 (1981) (conditioning assistance to El Salvador on Presidential certification that El Salvador was making a "concerted and significant effort to comply with internationally recognized human rights").

67. 22 U.S.C. § 1980a(a), (e) (2012).

68. 19 U.S.C. § 2411 (2012) (mandating that the U.S. Trade Representative take action to enforce rights of the United States under any trade agreement where a treaty partner has violated those rights); 22 U.S.C. § 254c(a) (2012) ("The President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission . . . which result in . . . less favorable treatment than is provided under the Vienna Convention [on Diplomatic Relations]."); 22 U.S.C. § 288 (2012) (authorizing the President to withdraw status and immunities from international organizations such as the U.N., to which the United States had a treaty obligation to provide status and immunities, where the President determines that the organization is abusing its privileges and immunities). However, section 288 goes on to authorize the President to withdraw the organization's status "for any reason," which appears to authorize the President to take that action even if it would not constitute a lawful countermeasure under international law.

69. International Law Commission, Draft Articles on State Responsibility, arts. 49–52.

70. *Id.*; *see also* Kent, *supra* note 20, at 854 (suggesting that the source of Congress' power to impose countermeasures flows from the Define and Punish Clause).

iv. Rejecting International Law

Not all SIL positively embraces international law. Indeed, Congress sometimes enacts statutes through which it clearly intends to *reject or override* existing international legal rules. The statute informally known as the "Hague Invasion Act" is a well-known example; it authorizes the President to use force to rescue U.S. service members detained on the order of the International Criminal Court.[71] Such a rescue almost certainly would violate the U.N. Charter. Another example is the state sponsors of terrorism exception in the FSIA, a provision that was enacted over President Bush's veto. Many, including the executive branch, believe that the exception violates the rule of international law that immunizes states from being sued in each other's courts for their sovereign acts.[72]

Sometimes Congress simply legislates in a way inconsistent with an existing U.S. treaty obligation; it might also express its view that the Executive should renegotiate that treaty obligation to achieve a different result.[73] In yet other cases, Congress inserts provisions into statutes that preclude certain actors from relying on international law as a cause of action

71. 22 U.S.C. § 7427 (2012) (authorizing the President to "use all means necessary and appropriate to bring about the release of" U.S. and allied citizens detained by (or at the request of) the International Criminal Court); *see also* Anti-Terrorism Act of 1987, 22 U.S.C. § 5202(3) (2012) (prohibiting the Palestine Liberation Organization from maintaining offices in New York, notwithstanding U.S. obligations under a treaty with the United Nations to grant observer missions certain rights); Byrd Amendment, 50 U.S.C. § 98–98h (2016) (quoted in Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972)) (effectively requiring the Executive to lift a trade embargo on Southern Rhodesia, notwithstanding a Security Council resolution mandating the embargo).

72. 28 U.S.C. § 1605A (2012). President Bush's veto message stated that, "[c]ontrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages" under the provision that became 1605A. Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 2 Pub. Papers 1592 (Dec. 28, 2007).

73. *See, e.g.*, 16 U.S.C. § 1824 (2012) (requiring special permits for foreign fishermen on the high seas adjacent to the U.S. territorial sea, notwithstanding U.S. obligations not to discriminate against foreign fishermen under the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, art. 7(2)(c), 17 U.S.T. 139, T.I.A.S. No. 5969). A related part of the statute required the Secretary of State to renegotiate that part of the 1958 Convention that pertains to fishing within or beyond the fishery conservation zone and that is inconsistent with the U.S. statute. 16 U.S.C. § 1822(b) (2012); *see also* United States v. Mys Prokofyeva, 536 F. Supp. 793, 796 (D. Alaska 1982) (discussing statute's abrogation of U.S. obligations under 1958 Convention).

or a defense to a crime,[74] or forbid courts from turning to international law as a rule of decision.[75]

Even in this group of "rejecting" statutes, Congress sometimes includes a provision that allows the Executive to waive designated statutory sections that are poised to pose particular conflicts with U.S. international legal obligations.[76] The Terrorism Risk Insurance Act of 2002, for instance, established a federal program for sharing public and private compensation for certain insured losses from terrorist acts.[77] The Act stated that the blocked assets of a terrorist party (which could include a state) shall be subject to execution or attachment to satisfy judgments against that party.[78] But the Act included a waiver provision allowing the President to prevent attachment of foreign property subject to the Vienna Conventions on Diplomatic and Consular Relations, because such attachment would violate the terms of those treaties.[79] Similarly, Congress enacted a provision requiring courts to attach various Iranian assets to satisfy court judgments that implicated Iran in terrorist acts. This provision potentially runs afoul of customary international law on sovereign immunity. However, to minimize an additional international law violation that would occur if the courts ordered the attachment of Iranian diplomatic property, Congress defined "blocked assets" subject to attachment as excluding diplomatic or consular property.[80]

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74. *See, e.g.*, Military Commissions Act of 2009, 10 U.S.C. § 948b(e) (2012) ("No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action."); Military Commissions Act of 2006, 18 U.S.C. § 2241 note (2006) ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . is a party as a source of rights in any court of the United States or its States or territories."); NAFTA Implementation Act, 19 U.S.C. § 3312(c) (2012) (precluding criminal and civil defendants from raising federal preemption defense based on NAFTA); 46A U.S.C. § 1903(d) (2012) ("Any person charged with a violation of this section [related to distribution of controlled substances on board vessels] shall not have standing to raise the claim of failure to comply with international law as a basis for a defense.").

75. 18 U.S.C. § 2241 note (2012) (providing that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting [the War Crimes Act]").

76. *See, e.g.*, Helms-Burton Act, 22 U.S.C. § 6085(b) (2012) (authorizing the President to suspend the effective date of secondary boycott statute where suspension is necessary to the national interests of the United States); Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(f)(3) (2012) (permitting President to waive attachment of diplomatic property of state sponsors of terrorism "in the interest of national security"). Congress inserted this provision of the FSIA at the Executive's request. President Clinton immediately invoked the waiver provision, explaining that "if applied to foreign diplomatic or consular property, section [117] would place the United States in breach of its international treaty obligations." Statement by President William J. Clinton upon signing H.R. 4328, 34 Weekly Comp. Pres. Doc. 2108 (Nov. 2, 1998).

77. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 2002 H.R. 3210, § 101(b) (2002).

78. *Id.* § 201(a).

79. *Id.* § 201(b).

80. 22 U.S.C. § 8772(d)(1)(B)(ii) (2012) (excluding from attachment "property subject to the

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On balance, Congress appears surprisingly attuned to international law as it legislates, even when its overall statutory goal may be controversial or provocative from an international relations perspective. Congress also seems unexpectedly willing to rely on international law as a way to shape statutes. And the fact that Congress sometimes incorporates international law by reference, rather than by codifying its provisions in specific terms, imports into the U.S. Code an unexpected flexibility within those statutes across time, as international law itself changes. The next Part explores how and why Congress, a political body generally thought to have limited interest in international law, produces this type of statute.

III. WHY CREATE STATUTORY INTERNATIONAL LAW?

Having explored the "what" of statutory international law, a second set of questions arises: Why does Congress create SIL? What influences on (and within) Congress help shape SIL? How does SIL come about as a matter of process? And how potent is the role of the executive branch, which often is seen as a strong advocate for U.S. compliance with international law?

This Part offers two primary sets of explanations for why Congress enacts SIL. One set of reasons is instrumental: the use of international law can benefit Congress itself. The other set of reasons is structural: external players (including, in particular, the Executive) and a subset of congressional staffers prompt or persuade Members of Congress to do so. In advancing this last argument, this Part highlights that some congressional staffers serve in the executive branch at an earlier stage of their careers.[81] This leads to a type of inter-branch "cross-pollination" that helps explain how knowledge about international law is diffused through congressional committees and why certain staffers may be attuned to the advantages of relying on concepts derived from international law.

A. Instrumental Reasons

This Section identifies and analyzes several strategic reasons why Congress may incorporate or reject international law in different contexts. Given the general perception that Congress is indifferent to international

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Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes").

81. Likewise, officials who join the executive branch often have spent time working as congressional staffers, though this direction of pollination is less important for the creation of SIL.

law at best and hostile to it at worst, it is particularly informative to consider the reasons Congress produces SIL. After all, the SIL considered in this Article reflects those cases in which Congress voluntarily identifies international law as relevant; it is not otherwise confronted with a formal stimulus to do so, such as a request by the Executive for advice and consent to ratification of a treaty or for implementing legislation. By excluding the more obvious, constitutionally-driven congressional interactions with international law, we may better isolate reasons why Congress finds it advantageous to draw on international law as it legislates.

This Section begins with three strategic or instrumental reasons why Congress may adopt SIL: substantive agreement with the rule, an effort to shift the interpretive burden to another branch of government, and a desire to minimize transaction costs. The Section concludes by discussing reasons why Congress may use SIL to reject international norms.

i. Substantive Acceptance of the International Rule

First, Congress simply may wish to signal its approval of the substantive content of the international legal rule. That is, the policies that undergirded the creation of the international rule in the first place may track the policies Congress hopes to advance in pursuing legislation.[82] In these cases, we may be confident that Congress (or at least congressional staff and some Members) has engaged with the substance of international law and actively supports that legal rule.

In the most robust form of this justification, Congress may produce SIL because an underlying customary international law (CIL) rule is so strong that Congress concludes that it has an obligation to enact legislation to facilitate the application of the rule. For example, in enacting a law criminalizing the counterfeiting of foreign currency, Congress stated:

> Preservation of the public peace is therefore a principal duty and power of the United States . . . . It seems . . . to be clear that the Constitution vests in Congress power to define and punish as offenses against the law of nations [] everything which is done by a citizen of the United States hostile to the peaceful relations between them and foreign nations, or which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb its peace and security.[83]

In a softer form, Congress may draw from international law because it believes that the law sets forth a reasonable rule, even if Congress does not

82. RODGERS, *supra* note 38, at 124.

83. H.R. Rep. No. 48-1329, at 1–2 (1884). In *U.S. v. Arjona*, a case challenging this statute, the

believe that it has an obligation to codify an international rule on the topic. Congress' frequent references to the "exclusive economic zone" in maritime statutes—a term drawn from the U.N. Convention on the Law of the Sea, to which the United States is not a party—are a prime example of a decision to invoke an international law concept based on substantive agreement with its content.[84] Other contexts in which Congress has drawn from international law because it apparently approves of the norms are cases in which Congress has not only implemented U.S. treaty obligations relating to counter-terrorism but also has extended those statutes to reach individuals not covered by the plain language of the treaty.[85] Likewise, statutes such as the TVPA express Congress' substantive agreement with the international rule against torture and extrajudicial killing.[86] This rationale helps explain most of the "definitional uses" of SIL discussed in Part II.C.i. of this Article, wherein Congress turns to international law as the source of the substantive rule about which it is legislating.

Further, Members of Congress may invoke international law because they believe that their constituents would support its inclusion, whether or not the Members themselves embrace the substantive international rule at issue. There is some evidence to support this claim. Professor Katerina Linos has demonstrated that American citizens respond positively to information they receive about foreign models for addressing particular policy problems and that, as a result, politicians use foreign models to advance their projects.[87] She notes, "Indeed, an endorsement from the U.N. elicits stronger positive responses than a range of other endorsements, including endorsements from domestic experts."[88]

Supreme Court stated that the law of nations "requires every national government to use 'due diligence' to prevent a wrong being done within its dominion to another nation . . . and because of this, the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized." U.S. v. Arjona, 120 U.S. 479, 484 (1887); *see also* Alien Tort Statute, 28 U.S.C. § 1350 (2012).

84. *See* 16 U.S.C. § 1811 (2012); 22 U.S.C. § 1980a (2012); 46 U.S.C. § 6101 (2012).

85. *See, e.g.*, 18 U.S.C. § 831 (2012) (implementing the Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101); 18 U.S.C. § 2332f (2012) (implementing the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. Treaty Doc. No. 106-6 (2002), 2149 U.N.T.S. 256); 49 U.S.C. § 46502 (2012) (implementing the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, but applying criminalization provisions to cover nationals of non-states parties to the Convention).

86. 28 U.S.C. § 1350 note (1991); *see also* Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2006) (illustrating Congress' support for the norm against expropriation without fair compensation); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2012).

87. LINOS, *supra* note 14, at 38; *see also* Cope, *supra* note 14, at 1143 (finding support for the hypothesis that international law arguments could resonate with an American electorate).

88. LINOS, *supra* note 14, at 38.

ii. Inter-Branch Burden-Shifting

Second, this use of international law may effect inter-branch burden-shifting. When Congress incorporates international law concepts in statute, it puts the onus on the Executive and, in some cases, the courts to ascertain the precise parameters of the rule captured by the statute, rather than force congressional drafters to do so.[89] Though the drafters will want to understand what they are authorizing or requiring, the use of international law shifts more of the interpretive burden to the Executive, especially when the statute will face court challenges that the Executive must defend. As Professor Daphna Renan notes:

> Congress is more likely to "make" policy on its own when those decisions appease identifiable constituencies . . . and when those decisions do not require technical expertise. Congress, however, will delegate policymaking away . . . when specific beneficiaries are more elusive and effective policymaking depends on technical information. Similarly, Congress is more likely to delegate where effective policymaking is likely to slip under the radar, but poorly formed policy "can have disastrous effects."[90]

SIL often arises in situations in which there are few specific beneficiaries and effective policymaking depends on a sophisticated grasp on international law concepts. This burden-shifting occurs in all three types of use categories: definitional, boundary-setting, and enforcement. Although this burden-shifting occurs in many federal statutes that the Executive must interpret, invocations of international law bring with them a need for a particular kind of expertise—and for the capacity to engage with other states to assess foreign interpretations of international law—that the use of standard statutory terms does not.[91] The Executive may welcome this

89. In the criminal context, using terms from international law may also shift the burden onto individual defendants to ascertain precisely what conduct international law forbids. This fact led Justice Livingston to dissent in *U.S. v. Smith*, which was a piracy prosecution. He argued that "it would seem unreasonable to impose upon that class of men, who are the most liable to commit offenses of this description, the task of looking beyond the written law of their own country for a definition of them." 18 U.S. 153, 181 (1820).

90. Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1070 n.137 (2016) (citing DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 203, 206 (1999)). For a statute that may fit this category, see 46A U.S.C. § 1903(b) and (c) (2012) (repeatedly referring to the 1958 Convention on the High Seas as a definitional source for various terms used in statute).

91. *See, e.g.*, U.S. v. Hasan, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010) ("[T]he Court concludes that both the language of 18 U.S.C. § 1651 and Supreme Court precedent indicate that the 'law of nations' connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus definition at the time of the alleged offense.").

burden-shifting because it believes that it is better suited than Congress to interpret international law and to assess what kind of reception its interpretations will receive in other states.

iii. Transaction Cost Reduction

Third, incorporating by reference a concept that has well-understood parameters may lower Congress' own transaction costs. This use of international law can save time and reduce the amount of research and drafting that legislative counsel must undertake ex ante. Further, where a statute is one of a series or type, the invocation of international law may become habitual. The use of SIL can also lower the transaction costs that would be triggered by the need to frequently update fixed statutes to conform them to externally shifting international legal rules.[92] Even if the use of a "floating" international law definition introduces some measure of instability into the meaning of a provision of domestic law, Congress and the Executive reasonably may conclude that the cost of the instability is outweighed by the need that otherwise would arise to periodically revisit and update the statute. The Executive presumably also appreciates that "floating" definitions reduce interstate tensions; more static statutory language could produce more U.S. international law violations.

Sometimes all three of these reasons together will prompt Congress to create SIL. Consider the crime of piracy, which has existed in U.S. law since 1819.[93] Using a definition of piracy drawn from international law reduces Congress' transaction costs because Congress can avoid spending time and energy periodically updating the definition. Using piracy's international law definition also reduces criticisms from foreign actors about undue exercises of jurisdiction that might follow if Congress fixed a broad definition in statute but the international understanding of the crime subsequently contracted.[94] Finally, by using an international law definition of a crime, Congress has delegated to executive prosecutors and to courts the job of

92. *See* United States v. Dire, 680 F.3d 446, 460 (4th Cir. 2012) ("[A]ccording to the [district] court, the Act of 1819's simple incorporation of the law of nations made sense, because it relieved Congress of 'having to revise the general piracy statute continually to mirror the international consensus definition.' As written, the Act of 1819, and now 18 U.S.C. §1651 (1948), 'automatically incorporate[]' advancements 'in the definition of general piracy under the law of nations.'") (citations omitted); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (acknowledging possibility of modern causes of action arising under Alien Tort Statute's "law of nations" language).

93. United States v. Smith, 18 U.S. 153 (1820).

94. In fact, this happened. In 1820, the international crime of piracy only applied to acts committed outside a state's three-mile territorial waters. Today, however, territorial waters extend twelve miles from shore. As a result, a person committing robbery at sea eight miles into a state's territorial waters is no longer committing international piracy. *Hasan*, 747 F. Supp. 2d at 625.

selecting the definition of piracy that applies at the time the Executive charges a given offense.

More recently, Congress required the President to impose sanctions on foreign countries that use chemical or biological weapons in violation of international law.[95] In creating this SIL, which reflects both definitional and enforcement uses of international law, Congress required the President to punish states engaged in those unlawful uses because it agreed with the underlying substantive goals captured by international regulations of these weapons. It also delegated to the Executive the determination that such activities had occurred, because the Executive, armed with intelligence agencies and overseas diplomats, is much better suited to making that assessment than Congress.[96] The statute also is sensitive to potentially changing international norms about which weapons fall within the international law prohibition, which means that Congress need not periodically amend the statute to keep current with those changes.

iv. Reasons Congress Rejects International Law

Notwithstanding those three reasons to embrace international law in statute, there are cases in which Congress *rejects* international law, as the Supreme Court has held that it may.[97] In some contexts, the statute is actively hostile to international law, usually when Congress wishes to make a political point by objecting to the sovereignty-infringing nature of a treaty (as with the "Hague Invasion Act," directed against fears that U.S. service members might be prosecuted in the International Criminal Court).[98] In other cases, Congress may be acting based on a misunderstanding of the international rule that its statute violates. For example, there is some evidence that Congress did not understand what obligations the United States bore toward the United Nations when it enacted the Anti-Terrorism Act, which purportedly limited the ability of the Palestine Liberation Organization to maintain a U.N. mission.[99] Another reason Congress may reject an international legal concept is that Congress does not believe that the underlying norm rises to the level of CIL, even if other states believe

95. 22 U.S.C. §§ 5604–05 (2012).

96. *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

97. The Paquete Habana, 175 U.S. 677 (1900) (stating that customary international law applies when relevant as a rule of decision except where there is a controlling legislative or executive act); Whitney v. Robertson, 124 U.S. 190 (1888) (later-in-time statutes may trump treaties); William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531 (P. Bekker, R. Dolzer & M. Waibel eds., 2010).

98. 22 U.S.C. § 7427 (2012).

99. United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1468–71 (S.D.N.Y. 1988).

that it does.[100] Relatedly, even if Congress does view a particular rule as CIL, it may decide to enact a statute in an effort to alter the CIL rule.[101]

Alternatively, Congress may feel free to craft statutes that create tension with international law while recognizing that courts have proven willing to apply the *Charming Betsy* canon to interpret statutes in a manner that mitigates tensions between international and domestic law.[102] In this story, Congress can achieve an expressive "victory" if it believes that it can benefit politically from distancing itself from international law without having to worry about real costs to the United States that might flow from a clear breach of international law. This possible justification assumes, however, that congressional drafters are aware of the *Charming Betsy* canon, something that work by Abbe Gluck and Lisa Bressman calls into question.[103] Finally, in some cases Congress seems willing to enact statutes that violate international law because the affected actors are "international bad actors" such as Iran and Syria.[104]

B. Structural Reasons

Section A posits instrumental reasons that Congress creates SIL. But there is another key reason that Congress creates SIL: structural pressure to do so, including from external actors. The Executive plays an outsized role in providing this external impetus, given its prominent position among the three branches in developing, interpreting, and enforcing international law. In addition, certain types of congressional staffers, by virtue of their background and experience, have internalized the ways in which the United

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100. Several U.S. criminal statutes take an aggressive approach to jurisdiction, which puts the statutes in some tension with international law. However, states continue to develop and expand the concept of prescriptive jurisdiction. *See, e.g.*, United States v. Howard-Arias, 679 F.2d 363, 369–71 (4th Cir. 1982), cert. denied, 489 U.S. 874 ("Congress, in enacting section 955a(a) [the 1980 Marijuana on the High Seas Act], was acutely aware of applicable international law and enacted that provision pursuant to its understanding that the United States had jurisdiction to create a crime proscribing possession of a controlled substance with a general intent to distribute by any person aboard a stateless vessel on the high seas.").

101. *See* Note, *supra* note 21, at 1224 (arguing that judicial use of the *Charming Betsy* canon—which assumes that Congress intends to act consistent with international law—encroaches on Congress' CIL-making powers).

102. For example, the court in *United States v. PLO* went to great lengths to interpret the Anti-Terrorism Act as consistent with international law. 695 F. Supp. at 1468–71; *see also* Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (3d Cir. 2004); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001).

103. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

104. The "state sponsors of terrorism" exception in the Foreign Sovereign Immunities Act offers a good example. Other examples include those statutes that authorize the President to violate international law when another state seems to have violated international law first. As discussed above, it may be permissible under the international law of counter-measures for the United States to violate certain international obligations in these situations. *See* text accompanying notes 68–69.

States may benefit from including concepts derived from international law in the U.S. Code. Other actors, such as non-governmental organizations, play a role as well.

Indeed, the analysis in Section A does not resolve the antecedent question of how Congress becomes aware of relevant provisions of international law from which it might wish to draw as it crafts SIL. International law is a relatively obscure area of law, and not one to which many lawyers and law students (let alone policy makers) are exposed as a matter of course. As discussed *infra*, some congressional staffers are well aware of international law, but they hardly make up the majority of all staffers.[105] Even Members of Congress who sit on committees that oversee subjects implicating international law may have limited expertise in international law and foreign policy. A recent policy report quotes a former Member of Congress asking, "Have members of the foreign affairs committee been to the State Department? It's shocking how little interchange occurs."[106] The report also quotes several executive officials who bemoan the general lack of expertise among legislative staffers, and who think that legislative staff who understand the complicated issues facing executive agencies are "overwhelmingly in the minority."[107]

How, then, do international law references—including some that are highly detailed or obscure—make their way into statutes such as the ones this Article considers? SIL appears in laws related to trade, crime, foreign relations, customs, the environment, taxation, human rights, and maritime issues (to name a few). Those statutes emerge from different committees that have differing levels of exposure to international law. And yet emerge they do. This Section considers the structural influences that stimulate Members and congressional drafters to learn about international law and incorporate it into the bills on which they work.

i. Executive Branch Influence

Article II of the Constitution authorizes the President to "recommend to [Congress'] consideration such measures as he shall judge necessary and

105. *See infra* Part III.B.ii.

106. Partnership for Public Service, *Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch* 8 (2015) [hereinafter *Government Disservice*] (quoting former Representative Jim Leach and noting that few members travel abroad, which limits opportunities for lawmakers to meet world leaders and get fresh insights into the effect of U.S. policies abroad). *But see* Scoville, *supra* note 19, at 336–37 (describing contacts between Members of Congress and foreign officials).

107. *Government Disservice*, *supra* note 106, at 9; *see also* Charles Clark, *Are Underqualified Congressional Staff Impeding Oversight, Wasting Agencies' Time?*, GOV'T EXEC., Mar. 10, 2016 (describing a letter from five long-time observers of Congress asking lawmakers to form a Joint Committee on the Capacity of Congress).

expedient."[108] There is extensive legal and political science literature about the roles of Congress and the President in the formation of legislative policy. Some writing focuses on how the President develops his legislative program, including by presenting Congress with draft bills; however, this work discusses the Executive's role only at a high level of generality.[109] Only recently has legal scholarship begun to examine retail-level exchanges among executive and congressional staff in shaping the language of bills.[110] Professors Abbe Gluck and Lisa Bressman have noted that agencies "can be very useful partners in the drafting process."[111] Professors Christopher Walker and Ganesh Sitaraman likewise have identified an important role for the Executive in statutory drafting, although neither focuses on international law (an area in which the Executive has a particularly important role, given its prominent constitutional power to conduct foreign affairs) nor identifies the diverse avenues through which the Executive's perspective finds its way into congressional staff work.[112] This Section picks up where Walker's and Sitaraman's work leaves off, exploring specific interactions between executive officials and congressional staffers in the creation of a particular type of statute.

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108. Art. II, § 3. By statute, the President must submit a proposed budget to Congress before the first Monday in February each year. 31 U.S.C. § 1105(a) (2012).

109. *See, e.g.*, ANDREW RUDALEVIGE, MANAGING THE PRESIDENT'S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION 41–42 (2001) (compiling numbers of legislative proposals sent by Presidents to Congress between 1949–96); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818–19 (1996) (describing Executive's role in offering legislative initiatives); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1 (2002) (parsing "recommendations" clause as matter of constitutional interpretation); Rajiv Mohan, Chevron *and the President's Role in the Legislative Process*, 64 ADMIN. L. REV. 793, 798–801 (2012) (discussing executive action under the Constitution's "recommendations" clause); James P. Pfiffner, *The President's Legislative Agenda*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (1988) ("[I]t is a commonplace in the last decades of the twentieth century that the president is our chief legislator.").

110. *See* Gluck & Bressman, *supra* note 103, at 910 (noting the "hunger for empirical data about legislative drafting" and citing only one other (2002) study of eighteen Judiciary Committee staffers); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 337 (2013) (stating that "[a]gency and DOJ employees drafted bills, provided congressmen with analyses, testified at hearings, and even served as ghostwriters for committee reports and floor speeches"); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 107–08 (2015) (describing types of technical assistance executive actors provide on policy or drafting issues). Chris Walker's recent report also explores this issue through interviews with executive agency employees. Christopher Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Legislative Drafting*, Draft Report for Admin. Conf. of the U.S. (2015), https://www.acus.gov/sites/default/files/documents/technical-assistance-draft-report.pdf [hereinafter ACUS Report].

111. Gluck & Bressman, *supra* note 103, at 1000.

112. Sitaraman, *supra* note 110, at 103–05 (describing executive branch authorship of legislation); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 (2015); *see also* ACUS Report, *supra* note 110, at 4, 11 (noting that little information is publicly available about the role of federal agencies in providing technical drafting assistance to Congress).

Although it is difficult to identify and document specific exchanges between executive and congressional staffers that result in particular pieces of statutory international law,[113] interviews with a number of congressional and executive officials shed light on various avenues of executive influence.[114] The more formal legislative history of various examples of SIL also reveals the Executive's influence on the statutory language.

a. Executive-Initiated Language

In some cases, particularly where the subject of the legislation has significant implications for international law, the Executive drafts the entire underlying bill.[115] The Foreign Sovereign Immunities Act (FSIA) is a high-profile example.[116] Sovereign immunity has deep roots in international law. It reflects the long-standing concept of sovereign equality, which embraces the idea that one state should not be forced to subject itself to the jurisdiction and courts of another state.[117] It is therefore not surprising that the Executive produced the House bill that became the FSIA. The House Report states: "H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report."[118]

The Departments of State and Justice also produced the Senate version of the bill, "in consultation with members of the bar and the academic community . . . . In the early 1970s, a number of draft bills [related to sovereign immunity] were prepared and submitted for comment to many authorities and practitioners in the international law field."[119]

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113. Walker's surveys and interviews reveal that much of the work here transpires via emails (which are not made public) and telephone calls (the existence and content of which are not recorded). ACUS Report, *supra* note 110, at 24.

114. In 2013–14, I interviewed several current and former executive employees and congressional staffers who work on international law issues. Although the interviewees asked to remain unidentified, I asked about their work histories, their encounters with international law while serving as staffers, their overall impressions about Congress' familiarity with international law, and the role of the executive branch in developing references to international law in draft statutes.

115. For an early example, see 18 U.S.C. § 482 (2012) (criminalizing the production or counterfeiting of foreign bank notes). The legislative history states that "the State Department has recommended this bill and desires its passage; that it seems to meet the requirements; and therefore return it to the House with the recommendation that it do pass." H. Rep. 47-1835 (1884).

116. 28 U.S.C. §§ 1602–11 (2012).

117. Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181, 185 (2012).

118. H.R. Rep. No. 94-1487, at 6 (1976).

119. S. Rep. No. 94-1310, at 11 (1976) (discussing S. 3553). For a discussion of non-executive external influences, *see infra* Part III.B.ii.

Two decades later, when Congress amended the FSIA to make certain state property, including diplomatic property,[120] subject to attachment and execution of judgments, the Executive persuaded Congress to include a provision permitting the President to waive attachment and execution against diplomatic property of state sponsors of terrorism "in the interests of national security."[121] At the time he signed the bill, President Clinton invoked the waiver provision, explaining that "if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations."[122] The Executive thus prompted Congress to include a provision in the statute that ensured that the United States could remain in compliance with its international obligations. This latter amendment to the FSIA is representative of how the Executive helps to ensure that a given statute avoids authorizing activities that would be inconsistent with U.S. international law commitments—by publicly proposing modest adjustments to the draft language to ensure it avoids (inadvertently) treading on existing U.S. international legal obligations.

Other examples of executive-initiated SIL provisions in statutes appear throughout the U.S. Code.[123] For instance, the Executive successfully urged the House to ensure that the United States was not testing, storing, or disposing of lethal chemicals or biological warfare agents in international waters or in foreign countries in violation of international law. Congress did so by mandating that the Defense Department give the Secretary of State notice of proposed Defense Department disposals and an opportunity to assess whether such activities would violate international law.[124]

b. Other Sources of Executive Input

120. 28 U.S.C. § 1610(f) (2012).

121. *Id.* at § 1610(f)(3).

122. William J. Clinton Presidential Statement on Signing the Omnibus Consolidated and Emergency Supplement Appropriations Act 1999 (Oct. 23, 1999).

123. *See, e.g.*, 16 U.S.C. § 1811 (2012) and H. Rep. 99-165 (June 10, 1985) (Congressman Jones noting that the amendments to section 1811 to include the term "exclusive economic zone" were adopted to "conform the Act with the assertion of authority contained in the President's EEZ Proclamation"); 42 U.S.C. § 9101(a)(1)–(3) (2012); *Hearing on H.R. 6154 Before the House Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 96th Cong. 443–44 (1980) (statement of Morris Busby, Ambassador, U.S. Dep't of State); 137 Cong. Rec. 6025 (1991) (describing the need for proposed subsection 8 of 18 U.S.C. § 7 due to the Department of Justice's difficulties in obtaining federal jurisdiction over certain crimes committed by or against U.S. nationals on cruise ships and noting that "international law recognizes the right of a nation to apply its laws extraterritorially in such cases").

124. 50 U.S.C. § 1513(2) (2012). In introducing the House amendment containing this language, Rep. Nedzi of Michigan explained that the Defense Department had suggested the amendment, which was designed to ensure better communication between the State and Defense Departments when U.S. armed forces reached agreements with foreign forces about storage of hazardous materials. 115 Cong. Rec. 28,427 (Oct. 3, 1969).

Several other formal avenues exist for executive input into draft bills. One is executive testimony before Congress on the substance of legislation. For example, in 1964 Congress sought to amend the International Claims Settlement Act of 1949 to authorize private claims against Cuba and China. A draft of the bill (H.R. 12259) contained provisions that would have vested frozen Cuban government and private assets in the U.S. Government. Then-State Department Legal Adviser Leonard Meeker testified about the Department's opposition to that provision. He stated, "We have supported vigorous adherence to international standards of fair treatment [of foreign investments]. The proposed legislation would derogate from the principles we believe in, and it could seriously affect our efforts to protect U.S. investment abroad."[125] The final version of the statute omitted the asset-vesting provision.[126]

Another avenue for input is through the Office of Management and Budget, in the form of Statements of Administration Policy (SAPs).[127] These SAPs may remind Congress of existing international obligations that Congress should take into account, or may indicate to Congress that proposed provisions might violate international law.[128] Even when the Executive concludes internally that a particular piece of draft legislation would violate international law, the Executive likely will be cautious about putting that view in a formal document such as an SAP. If the United States asserted in writing that a particular draft provision would violate international law and the bill nevertheless passed as written, foreign states adversely affected by the new statutory provision would have significant ammunition to challenge or critique the United States. SAPs unrelated to SIL do not run a similar risk of agitating foreign actors.[129]

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125. 110 Cong. Rec. 21,685 (Aug. 12, 1964) at 143.

126. 22 U.S.C. § 1643b (2012) (also requiring the Commission to receive and determine, "in accordance with applicable substantive law, including international law," the amount and validity of claims by U.S. nationals against the government of Cuba). For another example, see the 1980 Marijuana on the High Seas Act, where officials from the Drug Enforcement Agency, the State Department, the Department of Transportation, and the U.S. Attorney's Office in the Southern District of Florida testified before a House committee about the consistency of the draft legislation with international law principles of jurisdiction. United States v. Howard-Arias, 679 F.2d 363, 369 (4th Cir. 1982).

127. *See* Laurie Rice, *Statement of Power: Presidential Use of Statements of Administration Policy and Signing Statements in the Legislative Process*, 40 PRES. STUDS. Q. 686 (2010).

128. *See, e.g.*, Barack Obama, Statement of Administration Policy on S. 3414—Cybersecurity Act of 2012 (July 26, 2012) (reminding Congress that the bill "should take care not to duplicate existing domestic or international law enforcement frameworks"); George W. Bush, Statement of Administration Policy: H.R. 1—Implementing the 9/11 Commission Recommendations Act of 2007 (Jan. 9, 2007) ("[T]he bill fails to take into account the strong international support for, and the strong international and national legal authorities that already underpin, the Proliferation Security Initiative.").

129. Of course, a Statement of Administration Policy that criticized proposed legislation as unconstitutional might hand potential plaintiffs a tool for a subsequent lawsuit if the law were enacted as proposed.

The above discussion highlights examples of public executive influence that are traceable in legislative history. But informal modes of influence surely are even more common, though they are less public and therefore difficult to detect. As a result, these informal exchanges are less well explored in legal scholarship. Two recent articles discuss what is often termed "technical assistance."[130] Christopher Walker's survey of executive officials who are involved in rule drafting indicates that a very high percentage of those surveyed provide technical assistance to congressional staffers during the legislative drafting process.[131] This assistance ranges from formalized responses that pass through the Office of Management and Budget to far more informal guidance via telephone or email.[132] This form of assistance means that agency staff may send draft statutory language to their congressional peers (sometimes circumventing more formal requirements for these types of communications[133]) or provide comments on congressional staff-drafted language. Here, personal relationships matter. Executive agency officials and committee staff may develop close and long-standing relationships; where that occurs, committee staff reach out to agency personnel with whom they have positive working relationships to obtain informal feedback on draft legislation.[134]

Although Walker's survey did not include agencies that handle foreign affairs questions, such as the State and Defense Departments, it nevertheless captures some of the dynamics that take place in the creation of SIL. Even where the legislative history of a particular piece of SIL does not reveal the hand of the Executive, executive branch officials may well have provided input into the draft statute, identifying issues and proposing alternative language that renders the statute consistent with international law. These informal but critical relationships among and between executive and congressional staffers further explicate Congress' somewhat unexpected use of international law in statute, notwithstanding certain expectations about its limited interest in and knowledge about international law.

Finally, it is worth keeping in mind that the U.S. Code is home to dogs that did not bark.[135] It is difficult to systematically identify the *absence*, in particular statutes, of provisions in conflict with international law that arose

130. *See* Sitaraman, *supra* note 110, at 107 (defining "technical assistance" as "help from the executive branch on specific (hence technical) policy or drafting issues"); Walker, *supra* note 112.

131. Walker, *supra* note 112, at 1037.

132. ACUS Report, *supra* note 110, at 24.

133. *Id.* at 34.

134. *Id.* at 13.

135. There are a few high-profile examples of this, such as the repeated attempts to enact a statute that would preclude U.S. courts from citing international law when adjudicating cases. Constitution Restoration Act of 2005, S. 529, 109th Cong. (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005). There may be multiple reasons that the bills failed, but their hostile approach to international law seems likely to be one reason.

in draft versions of that statute and that Congress ultimately stripped from the draft. However, several individuals with executive branch ties indicated in interviews that they sometimes, when consulted on drafts, urged the deletion of particular provisions that would run afoul of international rules.[136]

c. Executive Motivations

The Executive has important reasons to urge Congress to craft SIL. Incorporating international law into statute can foster stability and predictability, particularly for the Executive, which tends to be the branch of government most concerned with managing U.S. legal obligations on both the domestic and international planes. When statutes create daylight between U.S. international and domestic legal obligations, it is the Executive that must navigate between the competing rules and bear the brunt of criticism, litigation, and sanctions by other states. As Professor Curtis Bradley puts it, "Congress has, in modern times, been more resistant on some international law issues than the executive branch has been; the executive branch interacts with the rest of the world more directly than Congress does."[137] SIL can help preserve the integrity of international law and, in so doing, help the Executive avoid conflicts with foreign actors.

Boundary-setting and definitional uses of SIL often advance this particular goal because they represent cases in which Congress draws parameters for executive behavior based on existing international rules. By ensuring that the Executive does not exceed the limits of what international law allows, SIL minimizes the chance for inter-state conflicts that often arise when a state transgresses international law limits. And by using terms drawn directly from international law (which foreign actors may see as both more familiar and more neutral), Congress may make particular statutes more palatable to non-U.S. actors who are potentially affected by those statutes. For instance, the TVPA's definitions of "torture" and "extrajudicial killing" were drawn from international law;[138] this might mitigate objections by states whose nationals face civil suits under the statute. The language also guards against prosecutions for killings undertaken consistent with international law.[139] Likewise, various boundary-setting examples of SIL that allow the Executive to waive certain statutory rules permit the Executive to

136. These were either people in the executive branch who had been consulted by a congressional staffer or congressional staffers who earlier had served in the executive branch.

137. *Bradley Book Examines International Law in the U.S. Legal System*, DUKE L. SCH.: NEWS (Jan. 2, 2013), https://law.duke.edu/news/bradley-book-examines-international-law-us-legal-system/ (noting that "Congress has occasionally had concerns about the United States giving up sovereignty to international institutions").

138. 28 U.S.C. § 1350 note, 106 Stat. 73 (1991).

139. *Id.*

avoid undertaking acts that would otherwise violate international law, such as interference with diplomatic property or sovereign immunity.

ii. Staffers' Executive Experience

Executive officials are not the only actors interested in embedding international law in statute. Certain congressional staffers may also drive the creation of SIL. At least three types of congressional staffers are likely to understand the advantages of relying on concepts derived from international law when crafting legislation in certain areas of the U.S. Code and may therefore urge the inclusion of those concepts in draft statutes.

First, some congressional staffers are knowledgeable about international law because they earlier served in positions in the executive branch that offered them significant exposure to that body of law. Scholarly discussions about the three branches tend, for reasons of abstraction or shorthand, to treat each branch as having personnel that are hermetically sealed from each of the other branches.[140] But treating the branches this way conceals important inter-branch influence. Staffers and clerks in all three branches have varied work histories, and many of them have spent time working in other branches.[141] Individuals' past experiences with international law

140. This is particularly true for scholars and courts that take a formalist approach to separation of powers. *See, e.g.*, John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) ("A formalist approach generally presupposes that the Constitution draws sharply defined and judicially enforceable lines among the three branches of government."). The same assumptions appear in policy-driven work as well. *See, e.g.*, Partnership for Public Service, *supra* note 106, at 7 ("[T]here is a pervasive sense that those running executive branch agencies and those serving in Congress often live in parallel universes—a condition that many believe has grown worse over time."). I have found no literature discussing the inter-branch personnel exchanges described here.

141. *See, e.g.*, Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy*, 94 B.U. L. REV. 449, 470 (2014) (noting that professional staff of intelligence committees "consist disproportionately of former intelligence community employees"); Norman Orenstein, *Defense, OPM Detailees Are Too Valuable to Limit*, AM. ENTERPRISE INSTITUTION (Oct. 29, 2003), http://www.aei.org/publication/defense-opm-detailees-are-too-valuable-to-limit (stating that many Pentagon employees have spent time working in Congress and describing the value to Congress of those year-long details); Congressional Fellowship Program (ACFP), Off. Chief Legis. Liasion, http://ocll.hqda.pentagon.mil/confellowship.aspx (describing Congressional Fellowship Program for Department of the Army); *David Abramowitz*, Geo. U. L. Ctr., https://www.law.georgetown.edu/faculty/abramowitz-david.cfm (explaining that he served for ten years in the State Department's Office of the Legal Adviser, and then ten years as a staffer for the House Foreign Affairs Committee); *A Conversation with Avril Haines, Deputy National Security Advisor*, Yale L. Sch. (Nov. 16, 2015), https://www.law.yale.edu/yls-today/news/conversation-avril-haines-deputy-national-security-advisor (explaining that she served as an attorney in the State Department's Office of the Legal Adviser, and then on detail to the Senate Foreign Relations Committee); *Whip Hoyer Announces Staff Changes*, Steny Hoyer (Mar. 4, 2014), http://www.democraticwhip.gov/content/whip-hoyer-announces-staff-changes-2 (explaining that he served as an attorney in the Defense Department's General Counsel's office before working for the House Foreign Affairs Committee). Some cross-pollination is high-profile: Michael Chertoff served as a federal judge before being appointed as the Secretary of Homeland Security. Ray Lahood was a seven-term Congressman who served as President Obama's Transportation Secretary. Former Senator Chuck Hagel became Obama's Secretary of Defense. But cross-pollination also happens at lower levels of government, as described

matter. Lawyers who have worked in the Legal Adviser's Office at the State Department or the General Counsel's Office at the Department of Defense necessarily learn substantive international law in those jobs. They also develop an ability to spot issues that would seem purely domestic to a casual observer but that may actually implicate U.S. international legal obligations.

A second category of staffers who know international law are executive branch employees on detail to Congress.[142] The Department of Justice (DOJ) has construed 2 U.S.C. § 72a(f) as providing implicit legal authority to assign executive branch personnel to various congressional committees.[143] The DOJ has concluded that such details do not violate constitutional principles, including the separation of powers, as long as the details are made on a reimbursable basis and "are advisory in nature, involve functions not required by the Constitution to be performed by an 'officer' of the United States, and where there are particularly compelling policy reasons for the assignment that outweigh any separation of powers concerns."[144]

The State Department's Office of the Legal Adviser has, for a number of years, detailed attorneys from its office to serve as deputy counsel for the Majority Staff of the Senate Foreign Relations Committee, usually in two-year rotations.[145] Several of these detailees have chosen to leave their State Department jobs and remain in Senate positions for years afterward.[146] Whether by virtue of their prior executive branch employment or because they are on temporary detail from the Executive, these individuals import their familiarity with international legal issues into situations that implicate international law, both in the context of proposed legislation and in policy debates more generally. This inter-branch cross-pollination is one way that individuals working in Congress come to know about international law and

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above.

142. These individuals technically remain executive branch officials while on detail.

143. Detail of Law Enforcement Agents to Congressional Committees, 12 Op. O.L.C. 184, 185 (1998), https://www.justice.gov/sites/default/files/olc/opinions/1988/09/31/op-olc-v012-p0184.pdf.

144. *Id.*

145. *See, e.g.*, 149 CONG. REC. 26,113 (2003) (statement by Senator Lugar seeking floor privileges for Michael Mattler, a detailee from the State Department to the Foreign Relations Committee staff); 151 CONG. REC. 5,669 (2006) (statement by Lugar requesting floor privileges for Jennifer Gergen and Joseph Bowab, State Department detailees to the SFRC); 159 CONG. REC. S2,231 (daily ed. Mar. 21, 2013) (statement by Mrs. Murray asking on behalf of Sen. Menendez for floor privileges for Margaret Taylor, State Department detailee to the SFRC); *Andrew Keller, Deputy Assistant Secretary for Counter Threat Finance and Sanctions*, U.S. Dep't of St. Bureau of Econ. and Bus. Aff., https://2009-2017.state.gov/r/pa/ei/biog/bureau/236155.htm (describing Keller's work in the Legal Adviser's Office and subsequently as Deputy Chief Counsel and Chief Counsel for the SFRC), on file with the Virginia Journal of International Law.

146. *See, e.g.*, Andrew Keller, *supra* note 145.

disseminate their understandings to other relevant congressional actors, including those who draft statutes.

A third type of congressional staffer who informs the structural story of SIL's creation is the long-time staffer on a committee whose jurisdiction necessarily implicates international law issues, such as committees that oversee trade and maritime activities.[147] Permanent staff have significant substantive experience, long-term incentives to provide sound advice to committee members, and knowledge of issues that often trail long political histories in their wake.[148] Staff that have spent years thinking about U.S. maritime interests, for instance, necessarily will be steeped in the treaties and customary rules that regulate inter-state maritime interactions. They therefore will be in a good position to identify situations in which draft legislation may run afoul of those rules. One way to avoid conflicts between legislation and international law is to build references to international law into the statutes, which ensures that the Executive can and will continue to act consistent with international rules in the wake of the newly enacted statute.

The role of long-term staffers in creating SIL may be on the decline, however. Because staff numbers are remaining steady even as the staffers face increasing demands on their time, "the actual capacity of congressional staff to engage seriously with issues has gone down—and stayed down."[149] Nevertheless, some Members and staff participate on U.S. negotiating delegations or undertake other foreign travel, which exposes them to various conversations about international law generally, as well as the specific aspect of international law that is the subject of the trip.[150] As long as there are

147. LEIPER FREEMAN, THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS 66–67 (1965) ("Many of the decisions reached in subsystems, though they be considered minor or detailed or insignificant when cast individually against a global backdrop, are collectively the stuff of which a large share of our total public policy is made. Emanating from the interactions of participants frequently characterized by their specialization and sheer staying power, these policies individually may lack the necessary glamor to attract wide interest."). That fact may be precisely what enables SIL to thrive. Freeman also notes, "By observing how and under what conditions specialists in certain areas of public policy are important determinants of that policy for the overall political system, one may sharpen his understanding of the importance of bureau-committee subsystems in the larger legislative-executive political setting." *Id.* at 7.

148. Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, THE ATLANTIC, Mar. 10, 2015, https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/.

149. *Id.* (arguing that an important way to rebuild Congress is to make working for Congress a viable long-term career, particularly for committee staff); *see also* ACUS Report, *supra* note 110, at 33 (noting that several agency officials "bemoaned the turnover in congressional staff"); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 846 (2014) ("[A]ll except for two House committees had staff retention rates below 60% in the period between 2009 and 2011.").

150. *See, e.g.*, JOINT COMMITTEE STAFF TRIP REPORT, INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE (S. Print 111-55 2010), *available at* https://www.gpo.gov/fdsys/pkg/CPRT-

committee staff with long-standing expertise in areas that necessarily implicate international law, we are likely to continue to see SIL emerge from those committees.

iii. Non-Governmental and Corporate Influences

Congressional views on international law are subject to external influences from non-executive branch actors as well. Notably, Members and staffers are briefed by, or receive testimony from, non-governmental organizations (NGOs), think tanks, and corporations on international law issues such as human rights, the laws of war, the environment, and arms control. These outside actors play an important role in encouraging Congress to draft laws that reflect international rules.

For example, in 2005, Congress sought to address the Bush Administration's interrogation policies in the wake of the Abu Ghraib revelations. One author describes how "staffers frequently relied on human rights organizations for information, particularly pertaining to specific violations and interpretations of international law."[151] Two leading human rights organizations, Human Rights Watch and Human Rights First, "maintained very close contact with Senator John McCain's office while the McCain amendment"—which prohibited U.S. officials from undertaking acts of cruel, inhuman, or degrading treatment against detainees—"was being considered."[152] Indeed, this example represents a situation in which Congress was more committed to a strict interpretation of international norms than the Executive was.[153]

Congress often summons representatives of human rights organizations to testify at committee hearings related to international law. To name just one case, in 2009 the Judiciary Committee's Subcommittee on Human Rights and the Law convened a hearing to assess U.S. implementation of human rights treaties.[154] The witnesses included not only representatives

111SPRT58002/html/CPRT-111SPRT58002.htm (describing participation of two SFRC staff members on the U.S. delegation to the ICC Review Conference negotiations in Kampala, Uganda); David Abramowitz, *Taking the Bull by the Horns: Congress and International Humanitarian Law*, 38 GEO. WASH. INT'L L. REV. 599, 604 (2006) (describing trips to Afghanistan to question Defense Department commanders about detainee treatment); Kelly Rogers, *US Players: Days Before Durban*, GLOBAL CONVERSATION, http://www.globalconversation.org/2011/11/26/us-players-days-durban (noting that an SFRC staffer planned to attend the 2011 climate change negotiations in Durban, South Africa). For a discussion of the various ways in which Members of Congress undertake foreign diplomacy, see Scoville, *supra* note 19.

151. SHADI MOKHTARI, AFTER ABU GHRAIB: EXPLORING HUMAN RIGHTS IN AMERICA AND THE MIDDLE EAST 68 (2009).

152. *Id.*

153. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOST. GLOBE, Jan. 4, 2006 ("The White House tried hard to kill the McCain amendment.").

154. *The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm.*

from the Departments of State and Justice, but also the President of Human Rights First.[155] The subcommittee also received submissions for the record from the ACLU, Amnesty International, the Center for Justice and International Law, and dozens of other rights groups.[156] Not surprisingly, the NGOs' perspective on international law does not always align with the government's, which means that Congress obtains multiple perspectives on the content and best interpretation of existing international law. These types of hearings, and the connections made with trusted human rights groups, can affect the contents of SIL.

Corporations, too, may share their views with Congress about international law. Recently, Microsoft's General Counsel testified before the House Judiciary Committee about litigation between the Department of Justice and Microsoft.[157] In that case, Microsoft argued that the United States should be required to use the Mutual Legal Assistance Treaty with Ireland in order to obtain data being held by Microsoft in Ireland.[158] During Smith's testimony, he urged the United States to update its mutual legal assistance agreements and argued for a new international framework to regulate data sharing. Corporations also may weigh in on treaties being considered by the Senate, as ExxonMobil and Lockheed Martin did in support of the Law of the Sea Convention.[159]

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In sum, there are a variety of reasons, both endogenous and exogenous to Congress, that explain why Congress chooses to employ international law. These reasons challenge the orthodox view that Congress does not interact with international law in a positive or sophisticated way. It is worth noting that, with a few exceptions, the types of statutes that make up the

on Human Rights and the Law of the Comm. on the Judiciary, 111th Cong. (2009), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57909/html/CHRG-111shrg57909.htm.

155. *Id.*

156. *Id.*

157. *International Conflicts of Law Concerning Cross Border Data Flow and Law Enforcement Requests: Hearing Before the Comm. on the Judiciary H.R.*, 114th Cong. (2016), https://judiciary.house.gov/hearing/international-conflicts-of-law-concerning-cross-border-data-flow-and-law-enforcement-requests/.

158. Microsoft Corp. v. United States (*In re* Warrant), 829 F.3d 197 (2d Cir. 2016).

159. *The Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 74 (2012) (statement of John Kerry, Chairman, S. Comm. on Foreign Relations) (quoting Bob Stevens, CEO of Lockheed Martin), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg77375/html/CHRG-112shrg77375.htm ("The multibillion dollar investments needed to establish an ocean-based resource development business must be predicated upon clear legal rights established and protected under the treaty-based framework of the Law of the Sea Convention, including the International Seabed Authority."); *id.* (statement of John Kerry, Chairman, S. Comm. on Foreign Relations) (quoting Rex Tillerson, CEO of ExxonMobil).

body of SIL tend to be lower profile.[160] This suggests that Congress may be most comfortable positively invoking international law when the political stakes and visibility of the statute that emerges are low. In those conditions, knowledgeable and sympathetic staffers and Members of Congress have shown that they are willing to include provisions of international law in statute.

IV. STATUTORY INTERNATIONAL LAW'S IMPLICATIONS

A clearer understanding of why and in what circumstances Congress employs SIL provides insights about both the international and U.S. legal systems. On the international plane, teasing apart the widespread existence of, and process for forming, SIL informs how we should evaluate legislation as a type of state practice that contributes to the formation and evolution of customary international law. Dissecting SIL also highlights, as a normative matter, the positive role Congress can play in creating, entrenching, and contributing to the evolution of CIL. Further, one persistent critique of CIL is that it lacks democratic legitimacy; the more that democratically elected bodies produce statutes that contribute to CIL's formation, the more that deficit subsides. On the domestic plane, the existence of SIL might strengthen the congressional intent justification for the *Charming Betsy* canon or suggest a new, executive-focused justification. At the same time, the Executive's involvement in drafting SIL further challenges the separation of powers imbalance in the foreign affairs arena and suggests an approach to judicial deference that should be sensitive to the type of SIL at issue.

A. International Law Implications

Customary international law constitutes binding international rules that result from a general and consistent practice by states (that is, "state practice"), followed by them from a sense of legal obligation (that is, "*opinio juris*").[161] The International Court of Justice has explained that this state practice must not only amount to a settled practice but also that the states undertaking that practice must "feel that they are conforming to what amounts to a legal obligation."[162]

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160. Two exceptions are the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2012), and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, though the latter is quite hostile to international law.

161. North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, at ¶¶ 43–44, 74, 77 (Feb. 20).

162. *Id.* at ¶ 74. As Prof. Andrew Clapham put it, "[W]e must look at what states actually do in their relations with one another, and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course." ANDREW CLAPHAM, BRIERLY'S LAW OF

International legal scholars generally list domestic statutes as a source of state practice.[163] These scholars have not, however, cracked open the "black box" of the legislature, either to examine how the body producing the state practice perceives what it is doing, or to ensure that an *opinio juris* accompanies the statutory enactment. Nor have scholars explored the wide variation in the strength of support that statutes provide to the formation of custom.[164] Instead, some states, scholars, and courts seem more inclined to treat the identification of state practice as a "nose-counting" game, simply asking how many states have enacted domestic laws on any given issue.[165] However, "[t]he hallmark of persuasive authority is engagement with the *reasons* for a practice or a decision rather than the counting of noses."[166]

Parts II and III examined how and why legislatures generally (and the U.S. Congress in particular) produce laws that draw from the international regime.[167] This Section analyzes domestic legislation as state practice, parsing the various ways that Congress can employ SIL to shape CIL. SIL interacts with CIL in at least two ways. First, Congress' legislative acts can contribute to the formation or entrenchment of CIL.[168] Second, and relatedly, those acts can help an existing rule of custom evolve in a new direction. After discussing these interactions between SIL and CIL, this

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NATIONS 57 (7th ed. 2012); *see also* Ingrid Wuerth, *International Law in Domestic Courts and the* Jurisdictional Immunities of the State *Case*, 13 MELB. J. INT'L L. 819, 828 (2012) ("Understanding why states behave in certain ways helps determine the uniformity and scope of purported developments in customary international law.").

163. *See, e.g.*, Int'l Law Comm'n, Second Rep. on the Identification of Customary International Law, U.N. Doc. A/CN.4/672, at 24 (2014); Int'l Law Comm'n, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, U.N. Doc. A/CN.4/L.872, at 6 (2016) (stating that forms of state practice include legislative acts, and that there is no predetermined hierarchy among the various forms of practice); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24 (8th ed. 2012) (listing, among other sources, diplomatic correspondence, policy statements, official manuals on legal questions, executive practices, legislation, and judicial decisions); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 17 (2d ed. 1997) (describing "national legislation, parliamentary and administrative practice, and the case-law of municipal tribunals" as valid sources of evidence of state practice).

164. For a general discussion of the role that clearly demarcated state practice such as statutes may play in helping maintain or alter CIL rules, see Verdier & Voeten, *supra* note 11.

165. George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 9 (1988).

166. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 151–52 (2005) (discussing the problem of relying on nose-counting of a given practice in foreign jurisdictions rather than assessing the reasons underlying each example of the foreign practice).

167. Of course, Congress may enact laws relevant to state practice even in cases in which those laws do not refer to general or specific international law. Nevertheless, SIL is a useful place to start in considering how to conceive of legislative state practice, because SIL by definition will implicate international legal concepts and relations.

168. Congress also has enacted laws that are not SIL but that stimulate the negotiation of subsequent treaties. For instance, the United States enacted the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012), from which states later drew to craft and conclude treaties such as the U.N. Convention Against Corruption.

Section argues that states, judges, and scholars should credit some types of SIL—such as SIL crafted with executive involvement—more heavily than they credit other types when evaluating the current status of a customary international rule.

i. SIL's Role in CIL Creation

The first way SIL interacts with custom is as a form of state practice that contributes to CIL's creation. Just as domestic courts can contribute to the creation of international law—because their opinions represent the practice of the forum state—so, too, can domestic legislatures contribute to international law's formation.[169] This can happen at two different stages in CIL's development. First, Congress produces both state practice and *opinio juris* when it decides to enact a rule and indicates that it is doing so because it believes that the rule already has become CIL. In these cases, the norm already has formed, and SIL reflects a congressional decision to convert the norm from one that sits exclusively on the international plane to one codified on the domestic plane. Many early U.S. statutes fall into this category, including laws criminalizing violations of safe conduct[170] and counterfeiting foreign securities[171] or bank notes,[172] and laws maintaining U.S. neutrality.[173] The Foreign Sovereign Immunities Act reflects an effort by Congress to codify what it perceived as long-standing customary rules related to sovereign immunity.[174] We might consider this to be CIL "entrenchment," although the line between the formation and entrenchment of custom is a gray one. Further, recall that the Executive often works closely with Congress to enact SIL—and sometimes provides the initial impetus for Congress to act. Thus, when Congress enacts SIL out of a sense of legal obligation, the statute offers a particularly potent example

169. *See* Ashley Deeks, *Domestic Humanitarian Law: Developing the Law of War in Domestic Courts*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (D. Jinks et al. eds., 2014) (discussing how domestic judicial decisions may serve to stimulate the creation of new international rules); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 60 (2011) (identifying role for domestic courts in law creation).

170. 18 U.S.C. § 1545 (2012).

171. 18 U.S.C. § 478 (2012).

172. 18 U.S.C. § 482 (2012).

173. 18 U.S.C. §§ 961, 967 (2012).

174. 28 U.S.C. § 1602–11 (2012). Of course, there were two versions of the rules of sovereign immunity: absolute (which precluded suits even for commercial activities by states) and restrictive (which did not). Congress evidenced its support for the latter rule, noting in § 1602, "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."

of CIL because it likely reflects executive concurrence with Congress' perception of the norm's customary status.

Alternatively, SIL can influence CIL development when Congress enacts a law that has international implications absent a sense that it is obligated to do so—that is, absent *opinio juris*. That law nevertheless may prompt other states to enact comparable laws. A density of state practice related to a particular behavior can hit a tipping point beyond which states believe that they *must* behave consistent with that rule as a matter of legal obligation (though density of state practice alone does not necessarily prompt this result). Further, a U.S. domestic statute on an international subject enhances other states' abilities to predict future U.S. actions. This predictability, in turn, might stimulate other states to make their own behavior more predictable, and ultimately help entrench a rule as custom.[175]

Congress' decision to enact the Torture Victim Protection Act may represent this type of state practice: Congress chose to provide jurisdiction and civil remedies to torture victims, although no such requirement exists in the Convention Against Torture or CIL.[176] We may eventually see other states establish similar causes of action, stimulated in part by the TVPA. At some point, the density of state practice may prompt other states to enact such legislation out of a sense of legal obligation, and CIL eventually might form. Requiring or urging the Executive by statute to enforce international law in certain situations may ultimately contribute not only to the customary status of the primary rule at issue, but also to the creation of secondary norms such as that of universal jurisdiction to prosecute a particular offense or civil causes of action for certain international law violations. Likewise, Congress' decision to apply privileges and immunities to the diplomatic missions of states that are not parties to the Vienna Convention on Diplomatic Relations may have reflected a growing, but not yet final, sense that such a norm was becoming customary.[177] At this nascent stage of law

175. *See* Verdier & Voeten, *supra* note 11, at 414 ("[I]f state A's legislature adopts a statute that directs its courts to apply absolute immunity, that statute will undoubtedly inform other states' expectations of the rule that state A will follow in the future.").

176. 28 U.S.C. § 1350 note (1991).

177. STAFF OF S. COMM. ON FOREIGN RELATIONS, 96th CONG., LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT 25 (Comm. Print 1979) (quoting Senate Foreign Relations Committee section-by-section analysis, section 3(a), stating that the application of the Vienna Convention to non-ratifying states "is consistent with the customary practice of nations," which stops short of stating that it is required by customary international law); *see also* 1 OPPENHEIM'S INTERNATIONAL LAW § 490 n.2 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("The [Vienna] Convention does not say to what extent it is declaratory of or alters customary international law. National legislation in certain countries, for example the Diplomatic Privileges Act 1964 in the UK, applies many provisions of the Convention to diplomatic representatives of all states and not only to those states parties to the Vienna Convention. This suggests that the rules which are provided for in the Convention are considered to be consistent with customary international law.").

development, the United States, including Congress, can play a significant role in shaping the facts and contours of the rule.[178]

These two different examples of CIL formation illustrate why it is important to examine Congress' reasons for enacting SIL when assessing what contribution the statute is making to custom. A boundary-setting use of SIL offers the strongest indication that Congress views the rule as binding on the United States (or at least that Congress believes that other states view the rule as binding). For example, in a variety of boundary-setting statutes, including one articulating U.S. sovereign rights to fish and manage fisheries, Congress has invoked the "exclusive economic zone" as providing both authorization for and limits to U.S. claims.[179] In a related Presidential Proclamation, President Reagan made clear that the part of the Law of the Sea Convention that defined the "exclusive economic zone" as extending 200 nautical miles from the baseline from which the territorial sea is measured generally reflected existing CIL.[180] The U.S. statutes that use the "exclusive economic zone" concept therefore entrench the concept deeper into custom. The fact that the United States is a non-party to the Law of the Sea Convention means that U.S. practice is likely to receive particular weight in calculating whether the exclusive economic zone's rule has become customary.[181]

Definitional uses may reflect Congress' *opinio juris*, but alternatively may represent a decision by Congress to simply lower its transactional costs by employing a term that will be familiar to the Executive and that requires less legislative drafting. Likewise, enforcement uses may reflect Congress' view that the norm violation it wants the Executive to punish is a serious violation of custom. But an enforcement use may also represent a strategic decision to increase Congress' political capital by targeting an otherwise unpopular foreign actor, using international law as the tool. In short, Congress will not always have produced state practice with an accompanying *opinio juris*, and those who study CIL formation should look carefully at the context surrounding SIL's creation.

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178. STEPHEN BREYER, THE COURT AND THE WORLD 246 (2015) (stating that to consider the background of foreign-related cases that the Court confronts is "to be able to see that if potential for influence exists in our engagement with the legal world beyond our shores, it is far likelier to be our influence on international law as yet unwritten than foreign influence on American law long enshrined").

179. 16 U.S.C. § 1811 (2012).

180. Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983). The definitions contained in the Proclamation and in Article 57 of the U.N. Convention on the Law of the Sea are identical.

181. When states parties engage in a practice that is consistent with a treaty, it is difficult to tell whether they are following that practice because of their treaty obligations or because they believe it is mandated by CIL. In contrast, a similar practice followed consistently by non-states parties provides stronger evidence for the existence of an independent CIL norm.

ii. SIL's Role in CIL's Evolution

SIL also offers Congress the chance to stimulate CIL's evolution. This can transpire in several ways. First, in enacting SIL, Congress can craft a slightly different version of an existing rule of CIL. For instance, as of the early 1900s, CIL provided that a state was entitled to exercise territorial jurisdiction over waters that extended up to three miles from the coast.[182] During prohibition, Congress enacted statutes granting U.S. officials the authority to board non-U.S. vessels further out—up to twelve nautical miles.[183] This 1922 statute thus pressed against the traditional CIL rule, although sixteen states subsequently agreed by treaty to allow U.S. officials to search and seize vessels beyond that twelve mile limit.[184]

By 1935, the Treasury Department faced a widespread smuggling problem, whereby smugglers (known as "rumrunners") would lurk just beyond the twelve nautical mile limit to avoid capture. The Treasury Department proposed a bill to expand the customs control area in which U.S. customs authorities could inspect ships suspected of smuggling. However, in proposing this extension, the Executive was careful to craft the language to comply with what it viewed as an international law requirement that "extraterritorial jurisdiction provisions be reasonably necessary to the protection of the revenue and the national welfare."[185] The Executive also took care not to employ this extension in cases in which the United States had existing treaties with other states that provided a contrary rule.[186] This offers an example of SIL that modifies aspects of an existing CIL rule to address changed circumstances. (Decades later, during the Third U.N. Conference on the Law of the Sea convened in 1973, negotiating states adopted the twelve nautical mile rule, which some viewed at the time as reflecting custom.[187]) One might consider the use of military commissions to try non-state actors, such as members of al Qaeda, or the creation of the

182. *See* 1 GREEN HAYWOOD HACKWORTH, U.S. DEP'T OF STATE, PUB. NO. 1506, DIGEST OF INTERNATIONAL LAW 628–29 (1940) (summarizing the views of delegates to the Conference for the Codification of International Law in 1930); 1 JOHN BASSETT MOORE, U.S. DEP'T OF STATE, A DIGEST OF INTERNATIONAL LAW 699 (1906) ("How far does the littoral sea extend? . . . Some recent conventional, legislative, or judicial acts have replaced the range of cannon . . . by a fixed distance of . . . three marine miles."). For a broader discussion of the evolving U.S. approach to the exercise of customs jurisdiction, see DAVID SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 155 (2016).

183. Tariff Act of 1922, § 581, 42 Stat. 858, 979 (1922).

184. SLOSS, *supra* note 182, at 155.

185. *Anti-Smuggling Act: Hearing on H.R. 5496 Before the H. Comm. on Ways & Means*, 74th Cong. 6 (1935) (statement of C.M. Hester, U.S. Dep't of the Treasury).

186. *Id.* at 4.

187. *See* J. Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 INT'L L. STUDS. 93, 94 (1994) (illustrating that by 1974 fifty-four states asserted twelve nautical mile territorial seas, whereas only twenty-eight asserted three nautical mile seas).

state sponsors of terrorism exception to sovereign immunity as other examples of attempts to initiate an evolution of CIL via SIL.[188]

Second, Congress can craft a statute that is flatly inconsistent with an existing customary rule. As the Supreme Court suggested in the *Paquete Habana* case, Congress may contravene a rule of CIL.[189] It will not be immediately apparent whether the anti-CIL statute simply will stand as a violation of international law or whether the statute will serve as a first shot across the bow in an effort to change the underlying CIL rule. That depends on how other states react to the U.S. statute and whether they incorporate similar rules into their own domestic laws.[190]

Third, by using SIL Congress can create a situation in which the Executive will, in the process of implementing the SIL, spell out new aspects of a rule (such as more detailed elements of a criminal offense), which contributes to the development and evolution of CIL. For instance, when Congress incorporates an international law concept such as piracy into a criminal statute, it stimulates the Executive to produce state practice that updates or fine-tunes the concept of "piracy." Which acts the Executive charges as piracy, what the Executive argues in its court filings about the meaning of the term, and what courts say about those arguments and the underlying statute all contribute to the development and shaping of the CIL norm against piracy.

Consider another example. In defining the "special maritime and territorial jurisdiction [or SMTJ] of the United States," Congress included, "to the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States."[191] This boundary-setting use creates the opportunity for the Executive to test the scope of what international law permits by using this jurisdictional provision in a series of prosecutions that have unique facts. Each prosecution represents a further exploration of the meaning of active or passive personality prescriptive jurisdiction pursuant to the SMTJ statute. In fact, "there is little question today," in the wake of court decisions after Congress enacted the SMTJ statute, that U.S. law extends to completely foreign voyages in a number of contexts.[192] This is true notwithstanding earlier concerns about the validity under international law of extending the

188. Military Commissions Act of 2009, 10 U.S.C. § 948a (2012); 28 U.S.C. § 1605A (2012). As noted above, it is possible to view the state sponsors of terrorism exception as a simple international law violation, rather than an attempt to modify an existing rule.

189. The Paquete Habana, 175 U.S. 677, 700 (1900).

190. Domestically, if the SIL provision were challenged in court, a U.S. court could employ the *Charming Betsy* canon to interpret away the SIL provision's inconsistency with existing CIL.

191. 18 U.S.C. § 7 (2012).

192. Robert Peltz, *The Athens Convention Revisited*, 43 J. MAR. L. & COMM. 491, 518 (2012).

reach of U.S. law to those purely foreign voyages.[193] Subsequent cases thus tested the proposition set forth in the SMTJ statute, and courts (and presumably foreign audiences) have been willing to tolerate this extension of U.S. jurisdiction.

In short, to the extent that the United States seeks to increase its ability to affect the contours of existing CIL, Congress' use of SIL is an important but under-examined way to advance that goal.[194]

iii. Normative Implications

Several normative implications for customary law development follow from the fact that Congress often creates SIL, and uses SIL for different purposes.

a. Improved Democratic Legitimacy

One perennial concern about CIL is that it lacks democratic legitimacy. This is due to at least two factors. First, customary rules often are identified and interpreted by judges, who in most systems are not democratically elected, or by academics, who are even further removed from the state.[195] Second, by definition, customary norms form in a manner that deviates dramatically from methods that we usually associate with democracy. As Professor Steven Wheatley puts it:

> Custom creates particular problems in terms of democratic legitimacy, as there is no requirement that a particular state consents to the emergence of a new customary norm, or that a majority of states participate in its formation, or . . . that the practices of states accord with the wills of their respective peoples.[196]

The proliferation of legislative acts as state practice goes some way to addressing both of these concerns. First, SIL generally reflects interpretative

193. *Id.*

194. Professor Michael Van Alstine puts a more negative spin on this fact. He argues that judicial precedents are subject to erosion exogenously. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941 (2012). But the flip side of evolution in international law is that Congress, the courts, and the Executive can foster those changes too.

195. STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW 150 (2010) ("[T]he task of identifying and interpreting customary obligations often falls to non-state actors, judges, academics, etc, with no requirement to take into account the attitude of the state against whom the norms are opposed.").

196. *Id.*; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 857–58 (1997) (describing CIL as in tension with representative lawmaking); John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1193–94 (2007) (noting that customary international law is characterized by low accountability of lawmakers to democratic electorates and arguing that the "case for the primacy of international law would be much stronger were it subject to democratic control").

acts by a politically representative Congress—often with the input of the Executive—rather than non-elected judges. Indeed, we might wish to give particular weight to congressionally created state practice (in the form of SIL) because, in contrast to state practice emerging from the executive branch, SIL reflects a more time-consuming and resource-intensive process involving both political branches.[197] Second, when more state practice that contributes to CIL creation or entrenchment is produced by democratically elected officials, that dilutes the concern that the practice of the state fails to accord with the will of its people.[198] This would be particularly true if legislatures other than the U.S. Congress used international law in their statutes in similar ways. And for those who worry that CIL today is less tied to actual state practice,[199] the widespread appearance of SIL in U.S. law provides an attractive counter-example. Although the existence and use of SIL does not ameliorate the democratic critique that custom may form absent each state's consent, a heightened engagement by legislatures in CIL formation enhances the law's legitimacy.

b. State Practice Multipliers

Some of Congress' uses of statutory international law serve as state practice multipliers. That is, they create contexts in which various parties—the Executive, the courts, commentators—must assert at increased levels of detail what certain bodies of international law require. In the process of putting SIL into operation, U.S. actors articulate the meaning of CIL, whether in court briefs, judicial opinions, or executive declarations. This brings important clarity to customary norms that frequently remain unwritten and debatable, and also amplifies the U.S. interpretation of those norms (because states lacking SIL will have fewer occasions to articulate their views on CIL in formal channels).

Consider again the crime of "piracy." The U.S. Code defines "piracy" with reference to the "law of nations."[200] As a result, whenever the executive branch decides to prosecute an individual for piracy, it must specify to the court what activity it believes falls within that definition. In the recent case of *United States v. Hasan*, for instance, the defendants argued that piracy

197. If a given piece of SIL were enacted over an executive veto, that SIL would represent the views of only one political branch, though it would illustrate a particularly strong commitment to that piece of SIL by Congress because it would reflect the support of two-thirds of each House of Congress.

198. *But see* Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517, 521 (2013) (arguing that legislation shaping U.S. policy toward the World Bank may only engage a small set of Members and therefore may not enhance the democratic legitimacy of that international organization).

199. Bradley, *supra* note 13, at 512 (noting that the "new" CIL is less tied to state practice and consent).

200. 18 U.S.C. § 1651 (2012).

equated to robbery at sea, and the defendants' failure to board the ship and rob its passengers thus did not constitute piracy.[201] The Executive argued first that piracy under the law of nations as it stood in 1820 was capacious enough to include attempts of the type at issue there.[202] It argued in the alternative that contemporary practice defines piracy more broadly than "robbery on the high seas." The district court accepted the Executive's argument, holding that piracy, as defined by the law of nations, includes acts of violence committed on the high seas for private gain.[203]

Structurally, this is no different from how prosecutors and courts approach non-SIL statutes. The difference, of course, is that there is an international legal audience for cases such as the piracy example, because the fact of the prosecution helps flesh out the contemporary meaning *in international law* of acts of piracy. Indeed, when the Fourth Circuit considered on appeal the meaning of piracy, it turned to foreign cases for guidance.[204] This means that other state courts confronting questions of piracy might turn to U.S. cases for similar guidance, as indeed the U.K. Privy Council did in consulting the early Supreme Court case of *Smith v. United States*.[205] Those cases are stimulated by Congress (because it enacts SIL) and the Executive (because it relies on that SIL to undertake prosecutions). The audience for U.S. court decisions and other state practice on these types of questions is not just other courts but also treaty-makers. For instance, the starting point for the Geneva Convention on the High Seas, which the United States ratified in 1961 and which sought to codify state practice on piracy, had as its genesis a document cataloguing all judicial opinions on piracy (including, presumably, those of the United States).[206]

Enforcement uses of international law also can serve as state practice multipliers, particularly where Congress has given the executive branch flexibility to decide (or imposed a requirement that it decide) when another state has violated international law. These types of statutes offer the Executive the opportunity (and sometimes force the Executive) to assess when a particular foreign act violates international law, which helps clarify the boundaries of the norm, at least according to the United States. This SIL may also require the Executive to determine when a particular treaty norm rises to the level of CIL. Assume, for instance, that Syria was not a party to the Chemical Weapons Convention but allegedly employed chemical

201. United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010).

202. *Id.* at 622–23.

203. *Id.* at 632.

204. United States v. Dire, 680 F.3d 446, 457 (4th Cir. 2012) (discussing 1934 U.K. Privy Council decision on piracy—in which the Council concluded that actual robbery was not an essential element of piracy—and a case from the High Court of Kenya).

205. *Id.*

206. *Id.* at 458.

weapons in its non-international armed conflict. The Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 requires the President to determine whether a particular use of chemical weapons violates international law.[207] For the President to make that determination for non-party Syria, it would have to conclude that the use of chemical weapons by Syria in a non-international armed conflict violates CIL. SIL thus serves as a forcing mechanism by which the Executive must undertake certain international law analyses and, in many cases, publicize its findings. This, too, is a form of practice multiplication.

c. According SIL Normative Weight

Armed with a more nuanced view of Congress' international law-related actions, scholars, courts, the Executive, and foreign governments who wish to carefully evaluate CIL formation should recognize that not all acts of Congress (or any legislature) are the same for purposes of CIL creation. Indeed, we should accord greater or lesser weight to various U.S. statutes as state practice, depending on the type of statute it is and what we know about Congress' intent in enacting it.

For example, states and scholars should draw distinctions between statutes enacted after Congress signals that it intends to violate international law and statutes in which Congress gives no sign of being aware that an underlying international rule exists.[208] Arguably we should give the former greater weight than the latter in assessing whether the statute counts as a proposed rejection of (or revision to) CIL.[209] There may also be cases in which Congress enacts a statute (state practice) but does so entirely at the behest of the Executive, which believes that the statute, to be consistent with international law, must contain a particular provision.[210] Congress itself may be agnostic about whether the United States had an international legal obligation to conform U.S. law to that provision. Although it is unclear whether cases can exist in which one government actor effects the state

207. 22 U.S.C. § 5605(b)(1) (2012).

208. Such might be the case with the Anti-Terrorism Act, where Congress appeared confused about whether the United States bore international legal obligations to permit the Palestine Liberation Organization to keep a U.N. mission in New York.

209. Such an approach would raise comparable questions about the weight to give different forms of legislation emerging from other countries.

210. At the end of the nineteenth century, Congress enacted 18 U.S.C. § 482 (1882), which makes it an offense to counterfeit foreign currency. The State Department had urged Congress to do so. Eugene Kontorovich, *Discretion, Delegation and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1725 (2012) (citing H.R. Rep. No. 47-1835 (1882), which states, "[C]omity between nations should compel us to enact some such legislation"). This may be an example in which the Executive had the *opinio juris* and Congress executed the state practice.

practice and another effects the *opinio juris*, there are policy reasons to accept this approach.[211]

It is important to analyze *why* Congress uses international law in a particular statute. If Congress states, in enacting a rule, that the Executive must continue to prioritize competing U.S. treaty obligations, that statute may provide little information about the U.S. view of any particular international legal obligation (other than a recognition that such obligations exist). Likewise, if Congress employs a reference to international law merely to reduce its transaction costs (that is, using the internationally-derived term for convenience or as shorthand), that statute has little value for purposes of informing CIL. If, however, Congress is engaged in an enforcement use of international law, it might signal a U.S. belief about the potency of the underlying rule of international law and the importance of foreign state compliance with that rule. And if Congress employs international law in a definitional or boundary-setting way because it views that norm of international law as binding, that statute has significant value in the CIL context.

Further, when Congress enacts SIL that is accompanied by *opinio juris*, the international community should treat SIL as a particularly potent signal of the U.S. view about the international law provision implicated, because both branches have acted in concert to develop the statute. After all, the political branches must surmount significantly more procedural hurdles to produce a piece of SIL than the Executive alone must when crafting and delivering a speech discussing a particular international norm. Where both Congress and the Executive have accepted the inclusion of a particular provision of SIL suggesting that the international law rule is customary, that reflects dual-branch recognition of that rule. Observers thus should treat that provision as especially strong evidence of CIL's existence.

As the above Section illustrates, the robust use of SIL in U.S. law provides the United States with important advantages in shaping customary law and the interpretation of treaties from which Congress draws international law concepts. This suggests that there are broad benefits both in continuing to expose congressional members and staffers to substantive international law and in employing rules of international law in U.S. statutes.[212] This Section also suggests the value of continuing and even

211. There also could be cases in which neither Congress nor the Executive believes that international law requires the United States to reflect a particular provision of international law in a statute, so that neither branch would have the requisite *opinio juris*. There also might be cases in which Congress is the source both of state practice and *opinio juris*. My point is that those seeking to use state legislative acts to assess whether a particular rule is custom should proceed cautiously, and may have difficulty assessing the beliefs of the parties that drafted (and enacted) relevant statutes.

212. Walker proposes that executive agencies generally should engage in more extensive efforts to educate committee staffers about the agencies' statutory and regulatory schemes. ACUS Report, *supra* note 110, at 40.

expanding the number of executive details to congressional committees from all agencies that interact with international law on a regular basis. Finally, it illustrates that Congress can help shape how outside observers interpret SIL for CIL purposes, by clarifying either in the statute or in the legislative history why Congress has chosen to use a particular rule of international law.

B. Domestic Law Implications

Parts II and III of the Article explained why and how SIL comes into being and what roles the Executive, congressional staffers, and NGOs play in the process. Understanding these aspects of SIL sheds new light on several ongoing domestic debates about the *Charming Betsy* canon, the separation of powers in foreign affairs, judicial deference to executive interpretations of foreign relations statutes, and the Executive's own methods of statutory interpretation.

i. Charming Betsy's Underpinnings

The *Charming Betsy* canon provides that courts should construe ambiguous statutes, where possible, to be consistent with U.S. international law obligations.[213] The *Charming Betsy* canon rarely arises in the context of a pure example of SIL because, at least in those cases in which Congress is embracing international law, that statute intends to incorporate an international norm and does not pit that norm against an alternative domestic rule. However, Parts II and III shed new light more generally on how Congress approaches international law, and thus may inform our perspective on the underlying justifications for the canon.

Professor Curtis Bradley has identified three possible underpinnings for the canon: a reflection of legislative intent, judicial respect for international law, or respect for the separation of powers.[214] In the first construct, courts employ the canon because they believe that, in general, Congress intends to comply with international law when it legislates.[215] In the second construct, courts employ *Charming Betsy* because the courts see themselves as "agents of the international order" rather than as agents of Congress.[216] The third conception, which Bradley favors, is that *Charming Betsy* allows courts to seek guidance from the political branches—to which the Constitution commits

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

214. Bradley, *supra* note 13, at 484.

215. *Id.* at 495.

216. *Id.* at 498.

U.S. foreign relations—before concluding that a particular statute violates international law, thus reducing the number of occasions on which courts inadvertently place the United States in violation of its international obligations. Similarly, the canon requires Congress to decide specifically that it intends to violate international law, reducing the number of times that Congress inadvertently interferes with the Executive's foreign policy prerogatives.[217]

Scholars have debated precisely how strongly courts have applied the *Charming Betsy* canon. Professors David Sloss and Thomas Lee have illustrated that the Supreme Court historically made significant efforts to avoid applying a later-in-time statute in derogation of U.S. treaty obligations,[218] although more recently the Court seems to be applying a weaker version of the canon or not applying it at all.[219]

A deeper understanding of SIL puts more considerations on the table. The proliferation of SIL suggests that there is some reason to view as credible the legislative intent justification for the canon, and also introduces a further justification for the canon: the idea that the Executive's role in SIL formation may counsel for a stronger version of the canon. On the congressional intent front, the many examples of SIL considered in Part II reveal a Congress that often seeks to respect international law and to avoid unnecessary conflicts with foreign states. We might think that Congress generally means to minimize such conflicts and that *Charming Betsy*'s "legislative intent" underpinnings capture this well. We might also point to the various cases in which Congress explicitly rejected international law to illustrate that Congress clearly knows how to craft statutes to trump U.S. international obligations when that is its intended outcome.[220]

On the other hand, reliance on congressional intent raises difficult questions, including whether Congress ever can have a single intent regarding international law and how one ascertains likely intent.[221] It also is not clear that it is appropriate to extrapolate congressional intent across decades of practice. A study of SIL reveals a Congress that has demonstrated, over many decades, a nuanced understanding of the advantages that accompany U.S. compliance with international law both generally and specifically. But it remains unclear whether it is appropriate to extrapolate an overall "favorable congressional intent" toward international

217. *Id.* at 525–26.

218. Thomas Lee & David Sloss, *International Law as an Interpretive Tool in the Supreme Court, 1861–1900*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 16, at 134.

219. Melissa A. Waters, *International Law as an Interpretive Tool in the Supreme Court, 1946–2000*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 16, at 381 ("In the non-maritime context, the period was marked by strikingly few references to the *Charming Betsy* canon.").

220. *See, e.g.*, Uruguay Round Agreements Act, 19 U.S.C. § 3512(a)(2) (2006) (expressly precluding application of the *Charming Betsy* standard to any of the Uruguay Round Agreements).

221. Bradley, *supra* note 13, at 518.

law, particularly in view of the various (though less numerous) instances in which Congress specifically has rejected a provision of international law. In sum, the existence of SIL complicates the "legislative intent" justification for the *Charming Betsy* canon, though it does not conclusively determine the strength of that justification.

The Executive's role in helping Congress produce SIL may provide another justification for courts' use of a stronger version of the *Charming Betsy* canon, however. Part III illustrated that the Executive and Congress interact closely in at least some cases in which Congress is drafting a statute that implicates international law. When the Executive is involved, we usually expect the outcome to be a statute that contains language intended to be consistent with international law.[222] Where cases of ambiguity do arise—such that a court might turn to the *Charming Betsy* canon—those cases likely are triggered by a confluence of facts that the Executive, with Congress, failed to foresee. It thus would be consistent with both legislative and executive intent for a court to adopt a reading of the ambiguous statute that favored international law consistency.

This account of SIL sheds additional light on the separation of powers justification for *Charming Betsy* as well. There are two variations of the separation of powers rationale: (1) the canon helps avoid the possibility that Congress inadvertently may tread on executive prerogatives, and (2) the canon allocates to the political branches (rather than the judiciary) the power to decide to violate international law. The way SIL often is formed reduces some of the persuasiveness of the first variation. Part III's discussion of the Executive's intimate role in the legislative process that produces SIL suggests that there will rarely be instances in which Congress enacts legislation that "inadvertently interferes" with the Executive's foreign policy prerogatives.[223] This justification also overlooks the fact that the President's veto power already limits the chance that Congress inadvertently may impose statutes on the Executive that violate international law. As a result, we might find aspects of the "separation of powers" justification somewhat less appealing.

Finally, to the extent that this Article's discussion of SIL highlights the many occasions on which the Executive seeks to ensure that statutes do not inadvertently put the United States in conflict with its international obligations, this finding provides support for courts to employ a strong *Charming Betsy* presumption when they become aware that the Executive had a hand in drafting the statute at issue.[224]

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222. There will, of course, be some cases in which both the Executive and Congress intend to craft a statute that is clearly inconsistent with international law.

223. *See id.* at 526.

224. As the Supreme Court indicated in *The Paquete Habana*, the Executive and Congress each

ii. Separation of Powers and Judicial Deference

The way in which SIL arises allows us to identify a possible confounding effect on the separation of powers. Professor Sitaraman has raised questions about how the Executive's role in legislative drafting might require us to revisit debates about delegation and judicial deference.[225] The process of SIL formation raises additional questions about how robust the separation of powers is in the foreign affairs area. That is, executive powers in foreign affairs may, as a practical matter, be even more robust and comprehensive than is traditionally understood. There is little dispute that the Executive has broad foreign affairs authority.[226] At the same time, Congress (at least notionally) balances executive foreign affairs powers through the declare war clause, legislative authority, and the power of the purse. But if a significant amount of legislative work in the foreign affairs area is strongly influenced by the executive branch, this residual balance in Congress may be even less potent than we generally think.

While the Executive's involvement in legislative drafting potentially disturbs the traditional balance whenever executive agencies are deeply involved in the legislative process, the imbalance might be more troubling in the foreign affairs area because the judiciary often accords extensive deference to the Executive.[227] The Executive therefore looks to be legislator, executive, and judiciary wrapped in one. This is not to say that the Executive should not help Congress identify conflicts with international law in draft statutes or help craft legislative solutions, particularly if we think it is in the U.S. interest generally to minimize conflict with foreign states. However, it does suggest that court judgments about how extensively to defer to the Executive's interpretation of these statutes should be sensitive to the Executive's hand in creating the statutory language.

What type of deference, then, should courts afford to executive interpretations of SIL? Is SIL more like a treaty, where courts recently have tended to be very deferential to the Executive's interpretation,[228] or more

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may affirmatively override CIL. If together Congress and the Executive produce SIL that unambiguously purports to reject or modify an existing rule of CIL, the *Charming Betsy* canon would not apply, because the statute is not ambiguous. This approach therefore would not interfere with the political branches' ability to alter or violate CIL.

225. Ganesh Sitaraman has identified some separation of powers ramifications of executive involvement in legislative drafting. Sitaraman, *supra* note 110, at 115, 124 (arguing that it may be appropriate to give agencies more deference, especially in the time period shortly after the statute is enacted, because the Executive was involved in the drafting).

226. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095 (2015).

227. *See* Harold Hongju Koh, *Why the Executive (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

228. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 326(2) (AM. LAW INST. 1987) (noting that executive treaty interpretation is entitled to "great weight"); Robert Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007). *Cf.* David Sloss, *Judicial*

like a foreign affairs statute, where courts have given the Executive something akin to *Chevron* deference?[229] After all, SIL that refers to treaties is a Mendelian hybrid of both. Further, while there is overlap between "foreign affairs" statutes and SIL, the concepts are not co-extensive. For example, prosecuting "piracy" under the law of nations does not obviously implicate foreign relations, particularly where the defendant is stateless or was detained in international waters.[230]

The optimal approach to judicial deference depends on which type of SIL is at issue. If the SIL serves a definitional or enforcement use, there is a good argument that the Executive should receive significant deference in interpreting the statute, because the interpretation requires a direct evaluation of what international law requires.[231] The Executive is uniquely suited to interpret these types of SIL because of its intimate role in creating the *underlying substance* of international law. After all, the Executive bears a much more explicit and independent law-creating role with regard to treaties and other international agreements than it does in other areas of law. This supports a claim that the Executive should have a particularly powerful role in interpreting these types of SIL, especially where an interpretation of such a statute has direct ramifications for future treaty negotiations.

If, in contrast, a court confronts a question about a boundary-setting use of SIL, it seems reasonable that the Executive should get less deference, on the theory that one wants to avoid having the fox guard the henhouse.[232] Professors Derek Jinks and Neal Katyal have made a similar argument: they believe that when international law is incorporated into domestic law, is made partly outside the Executive, and regulates the Executive, courts should not accord the Executive substantial deference in interpreting ambiguous treaties or statutes.[233] Many of the boundary-setting uses of SIL discussed in Part II would meet Jinks's and Katyal's conditions. Therefore,

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Deference to Executive Branch Treaty Interpretations: A Historical Perspective, 62 N.Y.U. ANN. SURVEY AM. L. 497 (2007) (discussing how courts generally did not defer to the Executive's interpretation of treaties before World War II).

229. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007). *But see* Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (arguing against deference to executive interpretations of certain international law-related statutes in which Congress intends to regulate executive action).

230. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment) ("[I]n the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him.").

231. *See supra* Parts II.C.i. and II.C.iii.

232. *See* Jinks & Katyal, *supra* note 229, at 1236.

233. *Id.* at 1234.

courts should give more modest, *Chevron*-like deference to executive interpretations of these types of SIL.[234]

Another way to approach this issue is to evaluate whether a particular provision of SIL reflects a delegation by Congress to the Executive to interpret international law. The statute requiring the Executive to assess whether a given use of chemical weapons violates international law offers a good example.[235] In this case, the argument for significant deference is persuasive because Congress has signaled that it wants the President to resolve the question. Where, in contrast, SIL sets a limit on executive action or delegates the interpretation to the courts, less deference is warranted.

iii. Executive Interpretation of Statutory International Law

Most scholarly work on methods of statutory interpretation focuses on the courts' role, with less written about the executive branch's tools of statutory interpretation. One important exception is the work of Professor Trevor Morrison, who has written about statutory interpretation within the executive branch, with a particular focus on the canon of constitutional avoidance.[236] As Morrison notes, statutory interpretation is a core function of the Executive, yet few have explored the interpretive tools or canons with which the Executive approaches foreign affairs statutes or statutes that engage international law.[237]

One obvious question arises from this exploration of SIL: should and does the Executive *itself* employ the equivalent of a *Charming Betsy* canon when it interprets statutes that implicate international law? The opportunity to do so might arise, for instance, in a case in which the Executive must interpret SIL that produces ambiguity in application, or when it must interpret a statute that intentionally conflicts with international law but contains ambiguous provisions about when or how the Executive may waive its application. There is good reason to think that the Executive in most cases interprets statutes in a manner consistent with commonly understood readings of international law, given the Executive's particular sensitivity to the problems that arise when the United States violates international law or adopts positions that deviate significantly from those of allies. The

234. This normative proposal would require some changes in the current judicial approach, which generally accords very strong deference to agency statutory interpretation when confronting foreign affairs statutes. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (finding that the Executive receives super-strong *Chevron* deference in interpreting foreign affairs statutes).

235. 22 U.S.C. §§ 5604–05 (2012).

236. Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (considering methods that the executive branch should use in interpreting statutes and suggesting that executive actors often have better access to and knowledge of statutory purpose than courts do).

237. *Id.* at 1190.

Executive thus presumably employs—explicitly or intuitively—a strong version of the *Charming Betsy* canon, and likely attempts to interpret ambiguous statutes in ways that avoid conflicts with foreign states. One's view of the reason for the canon affects whether the Executive should apply it, however. If one adopts the legislative intent purpose of *Charming Betsy*, executive use of the canon seems appropriate. If, however, one believes that *Charming Betsy* exists to allow the judiciary to promote international law compliance, then *Charming Betsy* is far less relevant to the Executive.

There may be cases in which the Executive wishes to interpret an ambiguous statute in a way that conflicts with international law (and thus seeks to disregard *Charming Betsy*).[238] Assuming the Executive has access to and knowledge of the statutory purpose behind a particular (ambiguous) international law reference, which Part III suggests that it often will, that knowledge should affect the Executive's interpretation of the statute. If the Executive is aware that Congress sought to produce a statute that was consistent with international law, the Executive should not be able to disregard that goal, even if ambiguous language resulted.[239] Judge Kavanaugh has suggested that courts may not invoke the *Charming Betsy* canon against the Executive.[240] He states, "Under basic principles of administrative law, the Executive generally has the authority to interpret ambiguous statutes within the bounds of reasonableness and, in so doing, to weigh international-law considerations as much or as little as the Executive sees fit."[241] But that lets the Executive off too easily. As Morrison puts it, "[E]xecutive actors may often face circumstances where, owing to their past negotiations and other interactions with Congress, they know precisely what was, and was not, intended by a particular statutory provision . . . [T]he executive officials' intimate knowledge of congressional intent and purpose removes the statutory ambiguity. . . ."[242] The Executive must bear the costs of its close involvement with SIL formation, just as it reaps the benefits from that involvement.

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238. The Executive seems to have taken competing views on the issue of how strongly its interpretation of statutes must be guided by international law. *Compare* Extraterritorial Apprehension by the Federal Bureau of Investigation (Mar. 31, 1980), *as reprinted in* 4B Op. O.L.C. 543 (concluding that it would be unreasonable to construe general statutory language as authorizing international law violations) *with* Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (June 21, 1989), *as reprinted in* 13 Op. O.L.C. 163 ("[T]he Executive acting within broad statutory discretion may depart from customary international law, even in the absence of an affirmative decision by Congress that international law may be violated."). I have not unearthed any specific writing on the issue, however.

239. Morrison, *supra* note 236, at 1246.

240. Al-Bihani v. Obama, 619 F.3d 1, 35–36 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

241. *Id.*

242. Morrison, *supra* note 236, at 1246–47.

C. Objections

One primary question raised by this Article is whether SIL is any different from other statutes. Executive agencies frequently provide expertise and drafting suggestions to Members of Congress and their staffers. And Congress commonly delegates authority to the Executive, which has the expertise to execute the laws and work through the nuances of the statutory text. What is so unique about SIL?

The answer is three-fold. First, Congress retains a residual reputation for a lack of familiarity with and skepticism about international law; it has no such reputation with regard to other types of domestic law or references built into statutes. Identifying and evaluating SIL illustrates that Congress engages often on this less familiar terrain. Second, and more importantly, when Congress produces SIL, it turns to a separate body of law outside the U.S. system. SIL is the only context in which this happens systematically. Because international law derives from, is interpreted by, and is changed by acts not only of the United States but also of many other foreign actors, it is useful to have a more carefully theorized understanding of when and how these influences arise in U.S. statutes.

Third, the Executive receives significant judicial deference in the realm of foreign affairs. It is therefore particularly important to be clear-eyed about how statutes in this area come into existence. Knowing more about the Executive's role in law-creation provides particular insight into the propriety of the level of deference that the Executive receives. But the Executive's role in the SIL area is also importantly distinct from its role in helping Congress craft other types of domestic statutes. In SIL, the Executive itself helped create the underlying rule (whether treaty or CIL) that Congress is importing into the statute, and that underlying rule has foreign authors too, which the Executive is best situated to help channel. In the standard contexts in which executive agencies work with Congress to shape language for purely domestic statutes, the Executive has important functional experience but no "side partners" whose views need to be channeled. In sum, SIL has several unique features that make it worth studying as an independent phenomenon.

V. CONCLUSION

Perhaps Congress is largely opportunistic and instrumental about its approach to international law, employing such concepts when it is convenient and flatly rejecting them when doing so is politically beneficial. But this Article's initial exploration of SIL reveals that Congress treats international law in a more nuanced and sophisticated way than conventional wisdom predicts. Indeed, international law is woven

throughout the U.S. Code. Particularly surprising are the cases in which Congress is willing to incorporate into U.S. statutes international law definitions and concepts that may change and evolve in ways that are not entirely within U.S. control. For those who think it beyond the pale that the United States would or should compromise its "sovereignty" by referring to (and, even more potently, binding itself domestically to respect) international law, the breadth of SIL should surprise them. For those actors, however, SIL should present a far more attractive U.S. engagement with international law than judicial references to foreign law, because SIL reflects shared decisions of the political branches about the value of certain international legal norms.[243] The executive branch and the diverse ways it influences congressional deliberations about SIL are a key to understanding this process. A better grasp of the phenomenon of SIL should enrich both U.S. foreign relations scholarship and international law scholarship that explores how domestic parliaments incorporate or reject international law and contribute to CIL formation. And in a world in which international tensions are rampant, SIL illustrates how a little international law, used in unobtrusive ways, can go a long way to avoiding foreign policy conflicts.

243. *See* JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND (2012) (describing objections to use of foreign law by U.S. courts).

VI. ANNEX

Compilation of Statutory International Law

10 U.S.C. § 113 note
10 U.S.C. § 802
10 U.S.C. § 821 (Uniform Code of Military Justice)
10 U.S.C. § 948b (Military Commissions Act of 2009)
10 U.S.C. § 7651

16 U.S.C. § 160i
16 U.S.C. § 1435(a)
16 U.S.C. § 1456(e)
16 U.S.C. § 1537 note (R)
16 U.S.C. § 1811
16 U.S.C. § 1824 (R)
16 U.S.C. § 2412
16 U.S.C. § 2442
16 U.S.C. § 5158
16 U.S.C. § 6909

18 U.S.C. § 7(8)
18 U.S.C. § 478
18 U.S.C. § 482
18 U.S.C. § 756
18 U.S.C. § 957
18 U.S.C. § 961
18 U.S.C. § 967
18 U.S.C. § 1545
18 U.S.C. § 1651
18 U.S.C. § 1653
18 U.S.C. § 1724
18 U.S.C. § 1956(b)
18 U.S.C. § 2274
18 U.S.C. § 2280(d)
18 U.S.C. § 2337
18 U.S.C. § 2339C(e)
18 U.S.C. § 2441 (R)
18 U.S.C. § 3058
18 U.S.C. § 3181
18 U.S.C. § 4103

19 U.S.C. § 1581(h)

19 U.S.C. § 1701
19 U.S.C. § 2411

22 U.S.C. §§ 254b and 254c
22 U.S.C. § 262d
22 U.S.C. §§ 288 et seq.
22 U.S.C. § 406
22 U.S.C. § 462
22 U.S.C. §§ 1643b, 1644b, 1645b
22 U.S.C. § 1972
22 U.S.C. § 1978
22 U.S.C. § 1980a(a) and (e)
22 U.S.C. § 2304(b)
22 U.S.C. § 2370(e)(2)
22 U.S.C. § 2370a
22 U.S.C. § 3243
22 U.S.C. § 5202 (R)
22 U.S.C. §§ 5604-05
22 U.S.C. § 6085(b)
22 U.S.C. § 6401(b)
22 U.S.C. § 7427 (R)
22 U.S.C. § 8772(d)(1)(B)(ii)

26 U.S.C. § 861 note (R)
26 U.S.C. § 894
26 U.S.C. § 7852(d)(2)

28 U.S.C. § 1330(a)
28 U.S.C. § 1350 (Alien Tort Statute)
28 U.S.C. § 1350 note (Torture Victim Protection Act of 1991)
28 U.S.C. §§ 1604; 1605(a)(3); 1609; 1610(f); 1610 note (Foreign Sovereign Immunities Act)
28 U.S.C. § 1605A (R)
28 U.S.C. § 1781
28 U.S.C. § 2241(c)(3)-(4)

30 U.S.C. § 1421

33 U.S.C. §§ 382
33 U.S.C. §§ 384-85
33 U.S.C. § 1503(c)(4)
33 U.S.C. § 1912
33 U.S.C. § 3804

42 U.S.C. § 2000dd (Detainee Treatment Act)
42 U.S.C. §§ 2151-52
42 U.S.C. § 7402(c)
42 U.S.C. § 9101(a)(1)-(3)
42 U.S.C. §§ 9118-19

46 U.S.C. § 107
46 U.S.C. § 6101
46 U.S.C. § 60312
46 U.S.C. § 70505 (R)
46A U.S.C. § 1903(b); (c)
46A U.S.C. § 1903(d) (R)

50 U.S.C. § 98-98h (R)
50 U.S.C. § 1513(2)
50 U.S.C. § 1541 note
50 U.S.C. § 3231

Not codified

- P.L. 109-102 (Foreign Appropriations Act) (2006), sec. 583
- Protection of the Commerce and Coasts of the United States, Act of May 28, 1798, ch. 48, 1 Stat. 561
- Terrorism Risk Insurance Act of 2002, P.L. 107-297, 2002 H.R. 3210, sec. 101(b), 201(a)
- International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519 (1981)
- Omnibus Consolidated Appropriations Act of 1997, P.L. 104-208 (Sept. 30, 1996), 110 Stat. 3009 (at 166), sec. 570
- Rev. Stat. 5346 (1889)

(R) = rejecting IL