ARTICLES

In Praise of *Neagle*

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I. INTRODUCTION

In re Neagle[1] is an obscure (albeit colorful) nineteenth century case that decided a no-brainer legal issue.[2] The Supreme Court held that if a Supreme-Court justice's life is threatened, the Executive may provide the justice with a bodyguard. *Neagle* should have lapsed into obscurity[3], but in the last sixty years, it has become a go-to precedent for an expansive unilateral presidential power to launch military attacks on foreign nations.[4] This essay explores *Neagle's* relevance to the law of foreign affairs and the Constitution.

Neagle actually involved a case within a case. The Court's ho-hum decision that the president has power to protect the lives of Supreme Court justices has no significance today. To repeat, it is a no brainer. The important aspect of the case is the Court's reliance upon a then well-known foreign affairs incident to support the existence of implied constitutional powers. In 1853, an American sloop-of-war threatened to attack an Austrian naval vessel in order to rescue Louis Koszta,

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1. Cunningham v. Neagle, 135 U.S. 1 (1890). The case actually has two names. It was denominated *In re Neagle* in the trial court. 39 F. 833 (N.D. Cal. 1889). In the Supreme Court, it was styled *Cunningham v. Neagle*. 135 U.S. To add to the confusion, the running head of *Cunningham* in the U.S. Reports is *In re Neagle*. Today most people call it *In re Neagle*. There are three good treatments of the *Neagle* case. *See* CARL SWISHER, *The Terry Tragedy*, *in* STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 321, 321-61 (1930); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 276-83 (1997); John Harrison, *The Story of In re Neagle: Sex, Money, Politics, Perjury, Homicide, Federalism, and Executive Power*, *in* PRESIDENTIAL POWER STORIES 133 (Christopher Schroeder & Curtis A. Bradley eds., 2009). Swisher's book is the best for the case's colorful background.

2. In *Neagle*, "the Court spent considerable energy demonstrating what no one would now deny. . ." Henry Monaghan, *The Protective Power of the Presidency,* 93 COLUM L. REV. 1, 61 (1993).

3. The case bemused Professor John Harrison: "W]hat is this soap opera doing in the *United States Reports*?" Harrison, *supra* note 1, at 133. Rather than emphasize the Court's treatment of implied presidential authority, Harrison analyzed the case in terms of federalism and the growth of the national government's authority to interfere with states. Harrison, *supra* note 1, at 133. Owen Fiss's Holmes-Devise treatment relegated *Neagle* to two sentences with no analysis of the issues. 8 OWEN M. FISS, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-191029-30 (1993).

4. *See infra* notes 10-18 and accompanying text.

an American citizen,[5] held prisoner in the Austrian ship.[6] The *Neagle* Court clearly stated that this incident was an example of the Executive's implicit unilateral constitutional authority to risk war in rescuing Americans held captive overseas.[7]

As a matter of taxonomy, we must distinguish between a state's right under international law and a state's internal allocation of powers. There is little doubt that under international law a state may, in some circumstances, properly use force to protect its nationals overseas,[8] but *Neagle's* discussion of the Koszta Affair did not involve international law. Rather, *Neagle*/Koszta addressed the internal law issue of whether the Executive has unilateral power to protect our citizens abroad. The Koszta Affair involved the Constitution's allocation of powers between the president and the Congress.

The *Neagle*/Koszta Principle has never been mentioned in any judicial opinion dealing with the president's foreign-affairs powers.[9] In contrast, the Executive Branch has been touting the importance of *Neagle*/Koszta for over a century.[10] Legal advisers used the principle to justify the rescue of the crew of the spy-ship *Mayaguez*.[11] When President Jimmy Carter launched an unsuccessful surprise attack on Iran, *Neagle*/Koszta was there. Carter's White House Counsel advised "The President's [C]onstitutional power to use the armed forces to rescue

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5. Actually, Koszta was a Hungarian who had applied for U.S. citizenship. The Secretary of State later defended the rescue on the basis that Koszta had applied for citizenship and was domiciled in the United States. *See infra* note 113 and accompanying text.

6. *Neagle*, 135 U.S. at 64-65.

7. *Id. Accord id.* at 84-85 (Lamar, J., dissenting).

8. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002); *see also* EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 570-72 (1915) (discussing "Koszta's Case").

9. In the *Youngstown Sheet & Tube Co. v. Sawyer*, Chief Justice Vinson dissented and used *Neagle* for the general proposition that the president has implied constitutional powers. 343 U.S. 579, 687 (1952). The Chief Justice made no mention of the Koszta Affair. Nor did he portray *Neagle* as related to the president's foreign-affairs powers.

In *Haitian Refugee Center, Inc. v. Gracey*, the court used Neagle to support the president's interdiction of illegal immigration on the high seas. 600 F. Supp. 1396, 1400 (D.D.C. 1985). The court did not mention the Koszta Affair. In a lengthy decision affirming the trial court's decision, the appellate court made no mention of *Neagle*. *Haitian Refugee Center*, 809 F. 2d 791 (D.C. Cir. 1987).

10. In 1912, the solicitor of the Department of State relied upon *Neagle's* treatment of Koszta to establish implied authority to use military force to protect our citizens overseas. U.S. Dep't of State, Right to Protect Citizens in Foreign Lands, Memorandum of the Solicitor for the Department of State, October 5, 1912 45-56 (3rd ed. 1933).

11. Regarding the Mayaguez rescue, Roderick Hills, Counsel to the President, explained that "[w]e should not assume that Congress would lightly interfere with the true constitutional war powers of the president—and what could be more at the heart of the true power than assuring . . . the safety American citizens?" Anthony Lewis, *He Was Concerned about the Legal Prohibition on All Indochina Combat*, NEW YORK TIMES (May 18, 1975) (quoting Hills). *Accord*, *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Maraguez Incident: Hearings before the Subcomm. on Int'l Sec. & Scientific Affairs of the H. Comm. on Int'l Relations*, 94th Cong. 29-31 (1975) (memorandum supplied by the Dep'ts of State and Defense regarding the President's authority to use the armed forces to evacuate U.S. citizens and foreign nationals from areas of hostility") [hereinafter *War Powers*]. *See also* Monaghan, *supra* note 2, at 71.

Americans illegally detained abroad is clearly established [by] *In re Neagle*."[12] In the aftermath of 9/11, Professor John Yoo was in the Office of Legal Counsel (OLC). He loved *Neagle* and cited it for an expansive presidential "power to [provide]. . . 'all the protection implied by the nature of the government under the Constitution."[13] He obviously read *Neagle* as establishing presidential power to rescue Americans abroad.

Neagle's embrace of the Koszta Affair can also be glimpsed behind the curtains in a number of other attacks on foreign nations. When President Ronald Reagan bombed Libya, his State Department legal adviser testified, "The President has constitutional power as Commander-in-Chief and as the nation's principal authority for the conduct of foreign affairs, to direct and deploy U.S. forces in the exercise of self-defense, *including the protection of American citizens from attacks abroad*."[14] Likewise, when President Bush invaded Panama, he explained that it was done in part "to protect American lives. . ."[15] *Neagle*/Koszta popped up again when we invaded Grenada.[16] In 1989, *Neagle* appeared to limit the extraterritorial reach of the Posse Comitatus Act.[17] A few decades later in 2014, *Neagle*/Koszta made another appearance, this time to support targeted airstrikes in the Middle East.[18]

In addition to *Neagle*, the Executive Branch has relied upon another ancient relic, *Durand v. Hollins*,[19] to support a broad array of unilateral military operations overseas. *Durand* is a quite obscure 1860 trial-court decision. Sometimes

12. The Situation in Iran, Hearing Before the S. Comm. on Foreign Relations, 96th Cong., at 48 (1980) (legal opinion by Lloyd Cutler). *See infra* notes 198-202 and accompanying text.

13. The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 188 (2001). Whether *Neagle* provides a proper basis for this broad ranging power is questionable. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 348 n.54 (2d ed. 1996).

14. *War Powers, Libya and State-Sponsored Terrorism: Hearings before the Subcomm. on Arms Control, International Security and Science of the Comm. on Foreign Affairs*, 99th Cong. 18 (1986) (emphasis added).

15. Letter from George Bush, President of the U.S., to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, on United States Military Action (Dec. 12, 1989).

16. Professor Henry Monaghan inferred that the legality of the invasion of Grenada was based upon *Neagle*. Monaghan, *supra* note 2, at 71. In the popular imagination, the purpose of the Grenada invasion was to protect U.S. medical students endangered on the island. *See*, *e.g.*, HEARTBREAK RIDGE (Warner Bros., Inc. 1986). In a national television address, President Ronald Reagan announced our invasion of Grenada "to protect innocent lives, including up to a thousand Americans, whose personal safety is, of course, my paramount concern." Remarks of the President and Prime Minister Eugenia Chales of Domenica Announcing the Deployment of United States Forces to Grenada, 2 PUB. PAPERS 1506 (Oct. 25, 1983). Similarly, Deputy Secretary of State Kenneth Dam insisted that the invasion was mounted "to secure and evacuate endangered U.S. citizens." U.S. Dep't of State, Bureau of Pub. Affairs, The Larger Importance of Grenada 4 (Nov. 4, 1983).

17. Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 331-32 n.9 (1989). For another 1989 use of *Neagle*, *see* Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 176-77 (1989) [hereinafter Authority to Override].

18. Targeted Airstrikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 99 (2014).

19. 8 F. Cas. 111 (S.D. N.Y. 1860). *See infra* notes 137-80 and accompanying text.

the Executive uses *Durand* in tandem with *Neagle*,[20] and sometimes not. In 1970, Assistant Attorney General, later Chief Justice, William Rehnquist used *Durand* as authority for a major invasion of Cambodia.[21] The next year the Secretary of State used *Durand* to establish a "broad discretion in determining when to use military force abroad in order to respond quickly to threats against American citizens and their property."[22] The Supreme Court, however, has never seen *Durand* as relevant to the President's implied unilateral constitutional war powers. Indeed, the Court has never even cited *Durand*. Nor, but for one lonely trial court,[23] has any other court ever noticed *Durand's* existence.

Proponents and opponents of expansive Executive Power have embraced or dismissed *Neagle*/Koszta and *Durand*. Each side has taken an instrumental approach to these two precedents.[24] Neither side has carefully analyzed *Neagle*/Koszta or *Durand*. Each side uses or dismisses these precedents according to their political preference. A careful analysis of *Neagle* establishes its existence as a powerful precedent for unilateral presidential authority in the absence of limiting Congressional legislation.[25] The same cannot be said for *Durand*.[26]

In recent decades, Congressional authorizations/delegations, called Authorizations for Use of Military Force (AUMF),[27] have diminished the Executive's need to rely upon *Neagle*/Koszta and *Durand*. A 2002 AUMF authorized the invasion of Iraq,[28] and another gave the President a more general authority to deal with terrorism related to the 9/11 attacks.[29] These two AUMFs, however, do not grant the president unlimited global war power. The more general, 9/11 Authorization is confined to presidential actions related to individuals and nations involved in

20. *See, e.g.*, *War Powers*, *supra* note 11; Authority to Override, *supra* note 17, at n.21; Memorandum Opinion for the Attorney General, 16 Op. OLC 8, 12 (1992).

21. The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321, 327 (1970).

22. *War Powers Legislation: Hearings Before the S. Comm. on Foreign Relations*, 92d Cong. 494 (1971). The Executive advanced this same position in later Congressional Hearings on the War Powers Resolution. *War Powers*, *supra* note 11, at 88 (statement of Monroe Leigh, Legal Advisor to the U.S. Dep't of State).

23. Rappenecker v. United States, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980).

24. This problem in national security analysis is not unique to *Neagle*/Koszta and *Durand*. *See* JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION ix, 8 (2002).

25. *See infra* notes 69-133 and accompanying text.

26. *See infra* notes 137-80 and accompanying text.

27. As a matter of Constitutional theory and practice, AUMFs serve three related purposes. In terms of concurrent powers, an AUMF makes clear that Congress does not seek to limit the president's power. In terms of actions within the Congress's power but not within the president's, an AUMF serves to delegate otherwise unavailable powers to the president. Finally, an AUMF helps to resolve difficult situations in which the scope of a president's power is unclear. For an excellent discussion of all past and present AUMFs that carefully analyzes their use and legality, *see* Michael Ramsey & Matthew Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741, 808-10 (2023).

28. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

29. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

the 9/11 attacks.[30] Our two hoary judicial relics from the nineteenth century are still relevant if an AUMF is not available.

There have been sporadic claims that AUMFs are unconstitutional,[31] but it seems unlikely that the Supreme Court would overturn an allocation-of-powers practice that Congress and the President have been using for decades.[32] More significantly, the federal courts bend over backwards to support the president in national security cases.[33] The courts routinely defer to Executive branch decisions on national security issues. In this context, deference does not always mean accepting the Executive's construction of the applicable law. Sometimes the courts do so,[34] but the courts have also developed an array of procedural concepts that result in a refusal to overturn an Executive decision.[35]

The most important limitations to AUMFs lie in the scope of their authorizations/delegations, which is a matter of statutory interpretation. In this regard, the Executive Branch might give the broadest plausible (and perhaps implausible[36]) reading of a Congressional delegation. When the stakes are high enough, legal advisers have a pronounced tendency to support their president's desire as best they can. Robert Jackson, who was one of the most respected attorneys general in our history, once said, when he served the President, "I claimed everything, of course, *like every other Attorney General does*. It was a custom that did not leave the Department of Justice when I did."[37]

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30. The Act authorizes the president to take action against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the [9/11 attacks], or harbored such organizations or persons, in order to prevent any future attacks." *Id.*

31. *See* Ramsey & Waxman, *supra* note 27, at 160-62, 164-66 (discussing such claims).

32. The only court to consider this issue ruled that AUMFs are constitutional. Doe v. Bush, 323 F. 3d 133, 143 (1st Cir. 2003).

33. *See* William R. Casto, *Robert Jackson's Critique of Trump v. Hawaii*, 94 ST. JOHN'S L. REV. 335, 336 (2020). The Court's approval of confining thousands of our innocent and law-abiding citizens to mild concentration camps during World War II is but the most infamous example. Korematsu v. United States, 323 U.S. 214 (1944).

34. *See, e.g.*, Durand v. Hollins, 8 F. Cas. 111 (S.D. N.Y. 1860). For a more modern example, *see* Korematsu v. United States, 323 U.S. 214 (1944).

35. *See infra* notes 47-48 and accompanying text.

36. At the conclusion of a long and successful teaching career, Kingman Brewster concluded "that every proposition is arguable." DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 192 (2007) (quoting Brewster).

37. 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 920 (Philip B. Kurland, Gerhard Casper & Gerald Gunther eds. 1975) (emphasis added) [hereinafter LANDMARK BRIEFS]. Jackson was discussing advice that he had given Franklin Roosevelt. William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. L. HISTORY 1 (2012). For more examples of Executive overreach, *see* WILLIAM R. CASTO, ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT 59-82, 154-59 (2018) (discussing destroyers-for-bases deal and torture lawyers of Washington); *infra* note 198 and accompanying text (discussing the Iranian hostage crisis); *infra* notes 209-10 and accompanying text (discussing use of armed forces in Somalia); POWELL, *supra* note 24, at 9-13 (describing the President's compliance with the timely notification requirement of § 501 (B) of the National Security Act, 10 O.L.C. 159 (1986) as "a simple and indeed unembarrassed failure").

> Consistent with the references above, Professor Bruce Ackerman presents a strong, structural analysis that reaches the same conclusion. *See* BRUCE ACKERMAN, *Executive Constitutionalism*, *in* THE

The Executive Branch cannot always be relied upon to act within the bounds of Congressional legislation. If so, the courts, in theory, have the ability to check Presidential overreach, but t'is many a slip twixt the cup and the lip. In practice, the courts have demonstrated an almost unlimited deference to the president in national security cases.[38] For different reasons, Congress also is unlikely to check the president.[39]

Despite the strong tradition of judicial deference in national security cases, the current Supreme Court's Major Questions Doctrine[40] might be used to check a particularly egregious misinterpretation of an AUMF. This Doctrine is a judicial limitation on the Executive's use of Congressional authorizations to use rule making authority to implement a statute. Under this new Doctrine, the Court's conservative justices "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[41] If, for example, a president should construe the twenty-year-old 9/11 AUMF as authorizing a full scale military assault on Iran, a good case could be made that this attack would have "vast economic and political significance." Moreover, a strong argument can be made for applying the Doctrine when the purported delegation involves a Constitutional power specifically allocated to the Congress. Before joining the Court, Justice Amy Barrett wrote that a clear statement rule like the Major Questions Doctrine is particularly appropriate when the interpretive rule is "connected to a reasonably specific constitutional value."[42] A Congressional authorization to use military force against another nation fits her idea. In the context of an AUMF, the Doctrine guards the Constitutional value that the power to go to war is reserved to Congress.[43]

We simply do not know whether the Major Questions Doctrine would be the applied to a president's interpretation of an AUMF.[44] The purpose of mentioning

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DECLINE OF THE AMERICAN REPUBLIC 87, 93-95 (2010); *see also* Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. 13, 28 (2011). Professor Trevor Morrison has criticized Ackerman's analysis, but Morrison addresses the problem in general terms and does not take account of the crucial variable of whether the president views a project as extraordinarily important. *See* Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)).

38. *See supra* notes 33-35 and accompanying text.

39. *See infra* notes 126-30 and accompanying text.

40. *See, e.g.,* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 665 (2022); Biden v. Missouri, 142 S. Ct. 647 (2022); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

41. Ala. Ass'n of Realtors, 141 S. Ct. at 2488-89 (citations and quotation marks omitted).

42. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 178 (2010).

43. Barrett also argued that the interpretive rule "must actually promote the value it purports to protect." *Id.*

44. Indeed, we do not know when the major questions doctrine will be applied to any issue of Executive power. *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 287-90 (2022) (discussing ambiguities in the doctrine); Aaron Nielson, *The Minor Questions Doctrine*, 169 U. PENN. 1181, 1194 (2021) (discussing the controversy surrounding the doctrine). Perhaps the powerful inclination of judicial deference in national security cases would withstand the doctrine. For a thoughtful argument that a clear statement requirement should not be applied to an AUMF, *see* Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047,

the Major Questions Doctrine is merely to suggest that the Doctrine might be used to restrict a particular president's actions. If so, the *Neagle*/Koszta principle and *Durand* have renewed relevance.[45]

A complete understanding of the president's war powers would require an elaborate analysis of many related issues, including the definition of war,[46] the political question doctrine,[47] and others.[48] Custom and nonjudicial precedent may also play a proper role in assessing the president's war powers,[49] and past Executive legal opinions are part of these considerations. In assessing prior Executive Branch opinions, however, we should bear in mind that they are advocacy documents written to support the president's particular desires.[50] In contrast, the bulk of the present essay simply addresses the value and persuasiveness of two specific judicial precedents: *Neagle* and *Durand*. We begin with *Neagle*[51] and then turn to *Durand*[52]. Finally, the essay considers a few situations in which

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2102-06 (2005). This article, however, was written before the current Supreme Court unveiled its new, robust major question doctrine.

> In addition, there is a possibility that the doctrine is driven by the individual justices' personal approval of the substantive Executive action under review. *See* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1009 (2023). In this regard, it is conceivable that the conservative ("Republican?") justices might let stand a Republican president's wise course of conduct and overturn a Democratic president's wild adventure. So far, the new doctrine has only been used to thwart administrative initiatives of Democratic administrations. *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023); *see also* Sackett v. EPA, 598 U.S. 651 (2023).
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> As a matter of process jurisprudence and in fairness to the conservative justices, the Major Questions Doctrine likely stems from their nonpartisan agenda of curbing the power of the administrative state. Nevertheless, the Doctrine's scope is so ill defined that they may subconsciously allow their personal predilections on particular Executive actions to distort their application of the Doctrine.

45. *See* Matthew Waxman, *Remembering the Bombardment of Greytown*, LAWFARE (July 15, 2019), https://perma.cc/D9NP-K3LX (mentioning *Durand* as a possible basis for an attack on Iran).

46. The Executive Branch has elaborated a factors test to determine whether a particular action involves a war. *See infra* note 195 and accompanying text. The judiciary has not devised a rule of decision for this issue. *Compare* Cambell v. Clinton. 203 F. 3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring) *with id*. at 37 (Tatel, J., concurring).

47. *See* RICHARD H. FALLON, JR., JOHN MANNING, DANIEL MELTZER, & DAVID SHAPIRO, *Political Questions*, *in* THE FEDERAL COURTS AND THE FEDERAL SYSTEM 237, 260-66. (7th ed. 2015) [hereinafter FALLON] (discussing the political questions doctrine and applications, including those in external relation matters). For an example in the First Gulf War, *see* Doe v. Bush, 240 F. Supp. 2d 95, 96 (D. Mass. 2022) .

48. This includes the issue of standing. *See* FALLON, *supra* note 47, at 101-95; *Cambell v. Clinton*, 203 F. 3d at 19, 23 (2000) (concerning the intervention in Kosovo). In addition, problems of ripeness may preclude judicial review of national security issues. *See* FALLON, *supra* note 47, at 212-37; Dellums v. Bush, 752 F. Supp. 1141, 1144-46 (D.D.C. 1990) (concerning the First Gulf War).

49. *See*, *e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322-29 (1936). For a good analysis, *see generally* Geoffrey Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WILLIAM & MARY L. REV. 1149 (2001).

50. *See supra* notes 36-37 and accompanying text.

51. *See infra* notes 55-132 and accompanying text.

52. *See infra* notes 138-180 and accompanying text.

the Executive Branch has relied upon *Durand* and the *Neagle*/Koszta Principle.[53] *Neagle* is a strong precedent for unilateral presidential power. *Durand*, not so much.

II. THE *NEAGLE* CASE[54]

Neagle involved a convoluted[55] and ugly dispute between Sarah Althea Hill and William Sharon,[56] one of the richest men in the United States. Hill, a well-known and controversial[57] woman, sued Sharon in state court for divorce and a property settlement, where she prevailed.[58] She claimed that the two were married, but Sharon insisted that they were not. To further complicate the dispute, Sharon launched parallel litigation in federal court to establish that he was not married to Hill. After the state trial court ruled in Hill's favor, Mr. Sharon died, and Mrs. Sharon married David S. Terry.

Terry was Mrs. Sharon's defense attorney in federal court. He was a capable attorney and had served as Chief Justice of the California Supreme Court. Terry was 6'3" and weighed 250 pounds. He had a reputation for violence and customarily carried a bowie knife under his vest. Earlier in his career, he killed a U.S. Senator in a duel.

Mrs. Terry also had a reputation for violence and she usually carried a loaded revolver in her purse. As the case in federal court against her proceeded, she became furious with one of the federal judges handling the litigation. When she happened to encounter the judge on a train, she screamed at him and "seized the judge's gray hair and gave his head a violent shake."[59]

About three weeks after the "violent shake," the federal circuit court convened to announce its decision that Mr. Sharon had not married Mrs. Terry. Circuit Justice Field presided, and as he read the court's opinion, Mrs. Terry stopped him. She leapt to her feet and shouted, "You have been paid for this decision." In fairness to her, Field should have recused himself.[60] Pandemonium ensued. A

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53. *See infra* notes 181-214 and accompanying text.

54. Many of the facts related to the *Neagle* case are unclear. Indeed, "many crucial questions about what happened were at the time, and remain today, matters of serious dispute." Harrison, *supra* note 1. These disputes were important to the people involved but do not affect the Court's legal reasoning in *Neagle*.

55. *See* Walker Lewis, *The Supreme Court and a Six-Gun: The Extraordinary Story of In re Neagle*, 43 AM. BAR ASS'N J. 415, (1957) (recounting the intricate procedural details of the controversy). This procedural nightmare is not worth recounting.

56. *See generally* MICHAEL J. MAKLEY, THE INFAMOUS KING OF THE COMSTOCK: WILLIAM SHARON AND THE GILDED AGE IN THE WEST (2006) (providing a well-researched biography of William Sharon).

57. Hill was an independent and outspoken woman who acted in public disregard for the strong societal rules that relegated women to a second class status. *See* Milton D. Green, *In Re NEAGLE—A Study in Judicial Motivation—Part II*, 14 ROCKY MOUNTAIN L. REV. 86, 104 (1942). She spent the last four decades of her life in a mental institute. *Id.*

58. Sharon v. Sharon, 75 Cal. 1, 78 (1888).

59. SWISHER, *supra* note 1, at 332.

60. Field was a friend of Sharon, apparently stayed in one of Sharon's San Francisco hotels free of charge and received a $25,000 loan from Sharon that he never repaid. *See* MAKLEY, *supra* note 56, at 161, 202; *see also* KENS, *supra* note 1, at 277-78. Fortunately, Supreme Court justices no longer accept luxurious

marshal seized Mrs. Terry, and Mr. Terry bellowed, "No God damn man shall touch my wife." He then knocked the marshal to the floor with a blow that broke one of the marshal's teeth.

Other marshals frog-marched Terry out of the courtroom and into the hall. But Terry was not done. He reached under his vest and pulled out his bowie knife. Fortunately, the marshals were able to wrestle him to the floor and disarm him. The upshot was that Mr. and Mrs. Terry respectively spent six and three months in jail for contempt of court.[61] Justice Field took a train back to the Coast—the East Coast.

After the fracas in the federal forum, the Terrys made many threats against Justice Field. The next year, Field was in D.C. and preparing to return to his circuit court duties in California. Members of Congress from the West Coast warned the attorney general that Field's life would be in danger, so the attorney general directed the U.S. Marshal for California to hire a special deputy to protect Field. The marshal picked David Neagle, who was a well-known gunslinger. He had ridden with Wyatt Earp in Tombstone, Arizona, and was "a man of small stature but strong, left handed, and quick with a gun."[62]

When Field returned to California, Neagle accompanied him as the justice went up and down the coast. While the two men were on route from Los Angeles to San Francisco, their train stopped in Lathrop, and they went to a local restaurant for breakfast. Unfortunately, Mr. and Mrs. Terry were also on the train, and Mr. Terry confronted Field in the restaurant. Terry punched the justice twice in the head, and Neagle leaped to his feet. Neagle was a little guy, "never weighing more than 145 pounds."[63] In contrast, Terry dwarfed the tiny marshal. Moreover, Neagle knew that Terry routinely carried a bowie knife. The marshal, who was "quick with a gun," drew his revolver and killed Terry on the spot.[64]

The local sheriff arrested Neagle for murder, but the federal circuit court quickly freed him from state-court prosecution by issuing a writ of habeas corpus. Capable legal historians have properly read *Neagle* as a story of federalism and

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gifts and "loans" from the ultrarich, or perhaps they do. There is some evidence that Mr. Sharon originally filed the suit in federal court on Justice Field's advice. KENS, *supra* note 1, at 277–78.

> In addition to Field's misconduct, District Judge Lorenzo Sawyer had an ethics problem. 2 THE DIARY OF JUDGE MATTHEW P. DEADY 1871-1892: PHARISEE AMONG PHILISTINES 502 (Malcolm Clark Jr. ed., 1975) ("[The] Sharon estate [agreed] to advance the funds necessary to publish 11 Sawyer containing the case of *Sharon v. Hill*.") Sawyer was one of the federal judges that decided Sharon's suit against his wife. *Id.*

61. In addition, a federal grand jury indicted Terry for assault. *Id*. at 558.

62. SWISHER, *supra* note 1, at 345.

63. ROBERT K. DEARMENT, *Dave Neagle: 1847-1925*, in 3 DEADLY DOZEN: FORGOTTEN GUNFIGHTERS OF THE OLD WEST 104, 104 (2010).

64. CARL SWISHER, *The Terry Tragedy*, *in* STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 321, 345-49 (1930); After the notoriety that Neagle gained protecting Justice Field, he spent most of the rest of his life protecting wealthy individuals and wealthy corporations. ROBERT K. DEARMENT, *Dave Neagle: 1847-1925*, in 3 DEADLY DOZEN: FORGOTTEN GUNFIGHTERS OF THE OLD WEST 104, 126-29 (2010).

the federal government's relentless intrusion upon state power,[65] but that is not how the justices saw it. The Court approached *Neagle* as a straightforward matter of statutory and constitutional construction. The federal habeas-corpus statute empowered the federal courts to grant habeas relief to an officer, "in custody for an act done or omitted in pursuance of a law of the United States."[66] There was no statute authorizing marshals to protect federal judges, but the Court construed the habeas statute to extend protection to conduct under the Executive Branch's implied Constitutional authority. The majority reasoned that "any obligation fairly and properly inferable from that instrument [the Constitution] . . . is a 'law' within the meaning of the [habeas corpus act]."[67] The two dissenting justices read the habeas statute as limited to action pursuant to specific Congressional legislation.[68]

III. THE KOSZTA AFFAIR: A CASE WITHIN A CASE

In support of an implied presidential power to protect federal judges, the Court turned to a then well-known 1853 foreign policy dispute between the United States and the Austro-Hungarian Empire.[69] In 1848, a wave of popular uprisings erupted in Europe. The Conte di Cavour and Guisepe Garabaldi eventually succeeded in Italy, but in Hungary the uprising led by Louis (Lajos) Kossuth failed. Martin Koszta (approximately pronounced Costah[70]), who was Hungarian, fought alongside Kossuth and fled with Kossuth to the Ottoman Empire, today's Turkey. Then – like Kossuth – he emigrated to the United States. In America, Koszta renounced his allegiance to Hungary, which was part of the Austro-Hungarian Empire. He then declared under oath an intent to become an American citizen. In 1853, Koszta was in Smyrna, Turkey, on some personal business[71] and ran into trouble with the Austrian government.

The Austrians remembered Koszta's freedom-fighting activities. They directed their navy to seize and hold him in the *Huszar*,[72] a brig of war that was in the Smyrna harbor. American officials on the scene believed that the Austrians planned to take him back to Austrian territory, try him, and hang him.[73] Shortly after the Austrians seized Koszta, the United States sloop-of-war *Saint Louis*

65. *See* JAMES W. ELY JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (CHIEF JUSTICESHIPS OF THE UNITED STATES SUPREME COURT) 186-87 (2012); Harrison, *supra* note 1, at 133-63. Of course, Ely and Harrison are right; the case involved a federal court freeing a defendant from a state criminal prosecution.

66. Cunningham v. Neagle, 135 U.S 1, 58 (1890) (quoting Rev. Stat. §753).

67. *Id*. at 59.

68. *Id*. at 77–79.

69. *See generally* ANDOR KLAY, DARING DIPLOMACY: THE CASE OF THE FIRST AMERICAN ULTIMATUM (1957).

70. *Id*. at 19.

71. A plausible case can be made that Koszta was in Turkey for reasons inimical to Austria. *See id*. at 5.

72. In American correspondence, the *Huszar* was called the *Hussar*. *See, e.g*. John Brom to Commander Ingraham, June 28, 1853, *reprinted in* H.R. DOC. NO. 91, at 15 (1852).

73. KLAY, *supra* note 69, at 88 (quoting Smyrna Consul Edward Offley to Captain Duncan Ingraham that "the poor fellow [would be] carried off and hung. . ."); Letter from John P. Brown, U.S. Charge

sailed into port. Following a recommendation from the American embassy in Istanbul, Captain Duncan Ingraham, the sloop's commander, resolved to free Koszta from the *Huszar*.

In *Neagle*, the Court noted that Captain Ingraham "was compelled to train his guns on the Austrian vessel."[74] A midshipman recorded in his diary that Captain Ingraham ordered his crew "to quarters, shot and shell passed up to the guns, and everything soon assumed a warlike aspect."[75] Ingraham was prepared to rescue Koszta by force of arms. Fortunately, the Austrians blinked and a compromise was reached. The Austrians turned their prisoner over to the French consul, who after careful consideration, gave Koszta to the Americans.

The *Neagle* Court noted that Captain Ingraham's action "met the approval of Congress, who voted a gold medal to [him] for his conduct in the affair."[76] Congress's approval was in the form of a joint resolution that expressed "the high sense entertained by Congress of his gallant and judicious conduct."[77] The measure passed the House and the Senate and was signed by President Franklin Pierce. It was a law.

Justice Samuel Miller, writing for the majority, threw the Koszta Affair in the dissenters' faces.[78] He sarcastically queried: "Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this action?"[79] Apparently the justices came up with Koszta Affair on their own. None of the briefs mentioned the Affair.

Justice Lucius Lamar II and Chief Justice Melville Fuller dissented. They did not want to dissent, and Fuller wrote a friend, "it was very painful to dissent but it was simply duty."[80] Lamar and Fuller believed that relief was not available under

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d'Affairs, to William L. Marcy, U.S. Sec'y of State (July 5, 1853), *reprinted in* H.R. DOC. NO. 91, at 15 (1852) ("[Koszta] could only expect an ignominious death").

74. Cunningham v. Neagle, 135 U.S. 1, 64 (1890).

75. R.C. Parker, *A Personal Narrative of the Koszta Affair*, 53 U.S. NAV. INST. PROC. 289, (1927) (quoting the diary of Ralph Chandler). Chandler continued. "Our guns were loaded each with a round shot and a shell, the men armed with cutlasses, and pistols . . . Bulkheads are knocked down, yards slung, and rigging snaked down, and the array of amputating instruments that were displayed on the steerage table . . . was enough to chill one's blood." *Id*. at 295-297.

76. *Neagle*, 135 U.S. at 64.

77. J. Res. 24, 33d Cong., (1854), 10 Stat. 594.

78. *Neagle*, 135 U.S. at 64.

79. *Id.* (Michael Glennon has presented a clever reading of *Neagle*. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 76 (1990). He notes that at the end of the opinion, the Court points to an act of Congress giving the U.S. marshals the same power that state sheriffs have. *Neagle*, 135 U.S. at 68 (citing REV. STAT. §788). Therefore, he concludes that the "Court based its holding on the finding of prior Congressional authorization, not plenary executive power." MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 76 (1990). His analysis should be dismissed out of hand. All that he has established is that *Neagle* may have alternate holdings. Moreover, the Court devoted over 20 pages to its Constitutional analysis and only a page to REV. STAT. §788.)

Glennon never hints at or alludes to the Court's discussion of the president's implied Constitutional power to rescue Americans held captive in foreign countries. One wonders why a book entitled *Constitutional Diplomacy* would fail to discuss the president's constitutional power over an important Constitutional issue dealing with our relations with foreign countries.

80. WILLARD J. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES 1888-1910 141 (1950) (quoting Melville Fuller to John Morris).

the plain meaning of the habeas statute. In their view, the appointment of a bodyguard required authorization in the form of an act of Congress.

The dissenters expressly recognized the relevance of the Koszta Affair and gave it careful consideration.[81] Like the majority, Lamar and Fuller agreed that Captain Ingraham's action was a proper exercise of implied constitutional authority vested in the president. However, they distinguished the Affair as turning on the Executive's implied power over foreign affairs: "such action [in the Affair] was justified because it pertained to the foreign relations of the United States."[82] In other words, the justices in *Neagle* unanimously[83] agreed that the president has implied constitutional authority to use military force to protect the lives of Americans overseas.

In a well-known book,[84] Professors Francis Wormuth and Edwin Firmage insisted without elaboration, "[I]t seems clear that [Captain Ingraham's] action was illegal when undertaken but was later ratified by the Congressional commendation and gold metal."[85] Some have uncritically accepted this bald assertion.[86] Professors Wormuth and Firmage, however, do not directly cite a single source to support their wishful fantasy that Captain Ingraham's action was illegal.

From the context of the professors' claim of illegality, it seems that they relied upon two sources that they cited in the same chapter just a few pages earlier. They mentioned that in 1827, Secretary of State Henry Clay advised that the Navy should not intervene to protect our sailors imprisoned in foreign ports.[87] The professors also referred to the 1868 Hostage Act, which authorized the President to effect the release of our citizens unjustly imprisoned overseas. The

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81. *Id*. at 84-85.

82. *Id*. at 84.

83. Actually, Justice Field recused himself, from *Neagle*. *Neagle*, 135 U.S. 1, 76. It is highly unlikely, however, that he disagreed with his fellow justices' unanimous treatment of the Koszta Affair. The notion that Field might have denied the lawfulness of his bodyguard's action brings to mind Emile Borel's Infinite Monkey Theorem. *See* Emile Borel, *La Mecanique Statistique et Irreversibilite*, 3 J. PHYSICS: THEORIES AND APPLICATIONS 189, 189-96 (1913); *see also* ARTHUR S. EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 72 (1927). It is mathematically possible that Field thought his protector acted without lawful authority, but no one believes so. In any event, Justice Nelson's decision in the *Durand* case may be inserted in the technical void created by Field's recusal. *See infra* notes 137-40 and accompanying text.

84. *See, e.g*., STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 86 (5th ed. 2011) [hereinafter DYCUS]; David Alder, *The Steel Seizure Case and Inherent Presidential Powers*, 19 CONST. COMMENT 155, 180-83 (2002); William Bradford, *The Duty to Defend Them: A National Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1442 (2004); Curtis Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law and Practice-Based Change*, 19 N.Y.U. L. REV. 689, 715-18 (2016); Jane Stromseth, *Understanding Constitutional War Powers: Why Methodology Matters*, 106 YALE L. J. 845, 852 (1996).

85. FRANCIS WORMUTH & EDWIN FIRMAGE, TO CHAIN THE DOG OF WAR 154 (2d ed. 1989).

86. *See* Aaron Haviland, *Misreading the History of Presidential War Powers, 1789-1860,* 24 TEX. REV.L. & POL. 481, 488 (2020); CONG. RES. SERV., R41989, *Congressional Authority to Limit Military Operations* (2011)*, in* 126 TERRORISM: COMMENTARY ON SECURITY DOCUMENTS: THE INTERSECTION OF LAW AND WAR 195, 206 n.53 (Kristen Boon, Aziz Huq, Couglas C. Lovelace Jr. eds., 2012); DYCUS, *supra* note 84, at 77.

87. WORMUTH & FIRMAGE, *supra* note 85, at 153 (quoting Clay).

Act specified, however, that the president's action must "not amount . . . to acts of war."[88]

To be blunt, the professors' reliance on these authorities is utterly unpersuasive. There is nothing to indicate that Secretary Clay's 1827 advice was still binding policy in 1853. Indeed, we will see that Ingraham acted in accordance with official policy.[89] Moreover, the Secretary of State lacks authority to create rules for the Navy. Such rules must come from the President, the Secretary of the Navy, or some superior officer in Ingraham's chain of command. All of these officers expressly approved Ingraham's action.[90]

The professors' apparent use the Hostage Act is equally unpersuasive.[91] The Act became law over a decade after Captain Ingraham's action and cannot be read as retroactively outlawing his earlier conduct. In any event, the Act's plain meaning did not bar Koszta's rescue.[92]

The professors also claim that Ingraham "acted not under, but against the instructions of the President and the secretary of the navy."[93] Again, however, they provide no evidence whatsoever to support their wishful claim regarding Captain Ingraham's orders from his superiors.

Captain Ingraham had no doubts about his authority to rescue an American citizen, but he was concerned about Koszta's interim status as a person seeking citizenship.[94]

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88. *Id*. (quoting The Hostage Act, 22 U.S.C. §1732).

89. *See infra* notes 94-100 and accompanying text.

90. *See infra* notes 97-99 and accompanying text.

91. Perhaps their invocation of the Hostage Act involved an anachronism or a parallax of time. Viewed from 1890, when the justices wrote their *Neagle* opinions, the Hostage Act cast doubt on the legality of a hypothetical rescue in 1890. This seems to have been Raoul Berger's viewpoint. Raoul Berger, *Protection of Americans Abroad*, 44 U. CIN. L. REV. 741, 744 (1975). The justices, however, were addressing the president's implied constitutional authority in a situation where there is no limiting statute. Congress's authority to limit the president's implied power is an entirely different issue.

92. Any Executive Branch adviser worth her salt would advise that the Hostage Act does not bar Koszta's rescue. The Act speaks only to the release of American citizens, and Koszta was not a citizen. In addition, the Act only forbade conduct "amounting to acts of war." 22 U.S.C. §1732. Because the dispute was peacefully settled, there never was a war. To be sure, there is a strong argument that the Act implicitly bars action in a hypothetical case like the Koszta Affair. Moreover, an adviser would have an ethical obligation to counsel that her opinion on the Act's plain meaning might be rejected on the grounds of implicit meaning. *See* WILLIAM R. CASTO, *Conclusion*, *in* ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT 130, 136-39 (2018).

93. WORMUTH & FIRMAGE, *supra* note 85. This claim is demonstrably false. *See infra* notes 97-99. In an earlier article, Wormuth wrote, "Captain Ingraham acted without orders." Francis D. Wormuth, *Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 659 (1972). Professor Berger makes a similar misstatement. He insists that Captain Ingraham "acted entirely on his own." Berger, *supra* note 91. In fact, however, Ingraham acted on the advice of the U.S. embassy in Turkey. *See infra* note 96 and accompanying text.

94. *See supra* note 5 and accompanying text. Ingraham explained in a letter to the American minister to Turkey that "I then came to the conclusion that I could not claim Costa [Koszta] as an American Citizen, for had I done so I should have at once used force to obtain him, and this I would have no right to do unless he was clearly an American Citizen." *See* Rob Howell, *The Effect of the Martin Koszta Affair* on Foreign Policy, 5 FAIRMOUNT FOLIO J. HISTORY 40, 46 (quoting Ingraham to American Minister to Turkey George P. Marsh on June 28, 1853).

The United States Charge d'Affaires Brown did not purport to give Captain Ingraham an order.[95] Rather Brown gave the captain emphatic advice: "*I would take him out of the vessel.*"[96] Within the Navy, none of Ingraham's superiors questioned the legality of his action. The commander of the U.S. Mediterranean squadron gave his "entire approbation to the course pursued by Commander Ingraham."[97] Likewise, the Navy Department back in the United States assured Ingraham "that the prudence, promptness, and spirit which marked the part you bore in the transaction, is approved by this department."[98] More significantly, the Department advised that "The President desires that, on all occasions and in all parts of the globe visited by the American navy, the rights and the property of American Citizens should be watched over with vigilance and protected with energy."[99] Consistent with this statement of policy, just four years later, Secretary of State Lewis Cass told the British government that "our naval officers have the right – it is their duty – to employ the forces under their command . . . for the protection of the person and property of our citizens when exposed to acts of lawless outrage."[100]

Needless to say, the claim that Congress subsequently ratified Ingraham's action also has no support. Nothing in the Congressional joint resolution's words even hints that Ingraham's actions may have been unlawful. Nor in the Congressional debates, did any member of Congress suggest that Captain Ingraham acted unlawfully.[101] Likewise, the Supreme Court in *Neagle* gave not the slightest suggestion that the Koszta Affair was a case of perhaps unlawful conduct subsequently ratified by Congress. If this were so, the majority could not have stated that the Affair was a case of implied constitutional authority. Likewise, there would have been no need for the dissenters to distinguish *Neagle*/Koszta as a case of implied Executive power over foreign affairs.

In truth, the professors' treatment of the *Neagle* case makes no sense whatsoever unless they believed that *Neagle's* treatment of Koszta should be dismissed on the grounds that the Court's unanimous decision was in error. Notwithstanding what the Court plainly stated, there was no legal authority to rescue Koszta. This notion flies completely in the face of the common understanding that Supreme Court pronouncements on Constitutional law are authoritative. To paraphrase Percy Shelly, the professors "look before and after [*Neagle*], and pine for what is not."

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95. *See supra* notes 89-90 and accompanying text.

96. Letter from John P. Brown, Charge d'Affaires of the U.S., Constantinople, to Duncan N. Ingraham, Commander, U.S. Navy (June 28, 1853), *reprinted in* H. R. DOC. NO. 33-91, at 16-17 (emphasis original).

97. Letter from Silas H. Stringham, Commodore, Commanding U.S. Squadron, Mediterranean, to the U.S. Navy Dep't (Aug. 2, 1853), *reprinted in* H.R. DOC. NO. 33-91, at 5-6 (emphasis original).

98. Letter from J.C. Dobbin, U.S. Navy Dep't, to Duncan N. Ingraham, Commander, Commanding U.S. Sloop-of-war St. Louis, Mediterranean (Aug. 19, 1853), *reprinted in* H. R. DOC. NO. 33-91, at 4-5.

99. *Id.* Dobbins also noted "the officers of the navy [should] exercise due caution." *Id.* Obviously, Dobbins and the Navy believed that Ingraham had done so.

100. Letter from Lewis Cass to Lord Napier (April 10, 1857), *reprinted in* JOHN BASSETT MOORE, 7 A DIGEST OF INTERNATIONAL LAW, H. R. DOC. NO. 56-551, at 164 (1906).

101. *See* KLAY, *supra* note 69, at 745 (providing a lengthy discussion of the debate).

A. The Problem of Dicta

Many have assumed, without analysis, that the Court's discussion of the Koszta Affair is dicta[102] and therefore not the law. Perhaps so, but there is a reasonable argument that the Court's discussion was not dicta.[103] Moreover, by tradition, a statement is not a holding unless it is necessary to a court's decision. If the statement is not necessary, it is dicta. This traditional distinction between holding and dicta has witnessed a serious erosion in recent years.[104] A major problem contributing to the erosion of the dicta/holding distinction has been the lack of clear guidelines regarding when a judicial statement is necessary to a court's decision.[105]

Dicta means many things to many judges. The concept is so loose that at times it has approached becoming meaningless. At least one federal judge has candidly admitted in private that the distinction is "manipulated to get to where a [judge] wanted to go, in terms of the outcome of the case. [A judge would] ha[ve] a broad understanding of the holding, if [she] thought the [case] law was right . . . And if [she] didn't like the case [law], [she]'d think it was dicta."[106] In response to this vagueness, the federal Ninth Circuit has abandoned the requirement of necessity altogether and adopted an entirely new approach to the problem.[107] A number of states have done the same.[108]

Even for those who cleave to the old model of necessity[109], there is a reasonable argument that *Neagle's* treatment of the Koszta Affair is not dicta. Under an Analytical-Route model of dicta, a court's discussion is not dicta if the court's ultimate decision "can be reached only after first resolving other legal questions."[110]

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102. *See*, *e.g.*, Berger, *supra* note 91, at 743 ("sheerist dicta"); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 565 (1999) ("undeniably dicta"); CONG. RES. SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS at 206; CONG. RES. SERV., IF10534, DEFENSE PRIMER: PRESIDENT'S CONSTITUTIONAL AUTHORITY WITH REGARD TO THE ARMED FORCES (2022); Bradly & Galbraith, *supra* note 84, at 715. HENKIN, *supra* note 13, at 347 n.54. *See also* DYCUS, *supra* note 84, at 372.

103. *See infra* note 110 and accompanying text.

104. *See generally,* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 UNIV. CHI. L. REV. 1551 (2020); *see also* Michal Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

105. *See* Tyler, *supra* note 104, at 1556-65; Abramowicz & Stearns, *supra* note 104, at 1055-61.

106. Tyler, *supra* note 104, at 1569 (quoting the judge's comments).

107. *See* United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc); Tyler, *supra* note 104, at 1567-74 (discussing Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (en banc). In the *Johnson* case, Judge Kozinski explained:

> [W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.

256 F. 3d at 914. *Neagle*'s discussion of the Koszta Affair fits this definition. It was germane to the Court's decision, and the justices gave it reasoned consideration. *See* Tyler, *supra* note 104, at 1566.

108. *See* Tyler, *supra* note 104, at 1566 (Illinois, Arizona, and Minnesota).

109. *See*, *e.g.*, Leval, *supra* note 104.

110. Tyler, *supra* note 104, at 1562 (discussing Nat'l Fed. Ind. Bus. V. Sebelius, 567 U.S. 519 (2012)).

Neagle/Koszta fits the Analytical-Route model. There were two constitutional issues necessary to reach the Court's decision. First, the Court had to decide whether the Constitution vests the president with implied powers beyond its express grants. Then the Court had to decide whether these implied powers included authority to protect a Supreme Court justice. The Court relied upon the Koszta Affair to establish the general idea that the president indeed has implicit Constitutional powers. Having established the existence of implicit Constitutional authority, the Court then expanded the Koszta principle to encompass authority to protect the federal judiciary. If a judge liked the *Neagle* discussion, she might resort to this analysis.

Finally, *Neagle's* treatment of the Koszta Affair does not fit one of the important, functional bases of the holding/dicta distinction. Traditionally we have been reluctant to give effect to dicta because a court may not have carefully considered an issue not necessary to its decision.[111] A court may, in passing, simply and casually toss off a proposition. This legitimate concern, however, does not fit the *Neagle* justices' careful consideration of the Koszta Affair. The Court's treatment was by no means casual. The majority evidently raised the Affair in private discussions, and the dissenting judges gave careful thought to the matter. They agreed that Captain Ingraham had acted lawfully but distinguished his action as involving the president's implied Constitutional authority over foreign affairs. Like the majority, the dissenters believed that the Affair established an implicit authority in foreign affairs. Even firm supporters of the holding/dicta distinction agree that carefully considered dicta are entitled to respect.[112]

B. Congressional Precedent

Notwithstanding quibbles about dicta, American lawyers' love for the lore and law of judicial opinions has obscured another strong argument in favor of the president's implied constitutional power. In constitutional terms, the issue of implied presidential authority to use military force to protect Americans overseas is essentially a matter of separation of powers. Do the president and the Congress have exclusive or concurrent powers? In the Koszta Affair, this precise issue was raised by the Austrian charge d'affairs in Washington. He officiously argued that the U.S. Constitution "reserves the power of declaring war explicitly to Congress."[113] He continued by insisting that the right to start a war should not be given to "commanders of naval forces."[114] In reply, Secretary of State William Marcy fully addressed the applicable international law but ignored the

111. *See*, *e.g.*, Tyler, *supra* note 104, at 1255, 1261-63; Leval, *supra* note 104, at 1255 (quoting Cohens v. Virginia, 19 U.S. 264, 399-401 (1821)).

112. *See, e.g.,* Leval, *supra* note 104, at 1253.

113. Letter from Johann Georg Hulsemann, Charge d'Affaires of the Empire of Austria, to William Marcy, U.S. Sec'y of State (Aug. 29, 1853), *reprinted in* U. S. DEP'T OF STATE, CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D'AFFAIRES OF AUSTRIA: RELATIVE TO THE CASE OF MARTIN KOSZTA 3-8 (Jun. 30, 1925).

114. *Id.* at 7.

impertinent remarks about the separation of powers issue.[115] Marcy evidently and properly believed that issues of domestic law were beyond the purview of a foreign power.

The Court in *Neagle* described and endorsed a powerful legislative precedent for an implied Executive authority to protect Americans overseas. Congress saw no separation of powers problem and embraced Captain Ingraham's conduct. *Neagle's* citation of congressional approval indicates that the Court saw this legislative approach as a significant constitutional precedent.

Obviously, the concept of dicta has no relevance whatsoever to legislation.[116] The Congress' joint resolution applauded Captain Ingraham's conduct. Congress approved the Executive's action. Moreover, the resolution was a law. This enactment is strong evidence that Congress embraced the Executive's unilateral constitutional authority to use military force to protect our citizens overseas.[117]

The most respected and most influential analysis of separation of powers in foreign affairs cases in our nation's history is Justice Robert Jackson's concurring opinion in the *Steel Seizure Case*.[118] Jackson advised: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all the Congress can delegate."[119] In this situation, a decision that the president has acted unconstitutionally "usually means that the Federal Government as an undivided whole lacks [constitutional] power."[120]

Standing alone and without regard to the Court's endorsement in *Neagle*, the joint resolution regarding the Kozsta Affair is a good precedent for the President's implied constitutional authority. When the joint resolution is joined with the Court's unanimous endorsement, the president's unilateral authority is established beyond cavil.

C. Neagle *in the Twenty-first Century*

Professor Henry Monaghan does not like the Koszta principle because it "means that the President can commit acts of war anywhere."[121] He is correct, but the principle's broad scope is inevitable and desirable. The principle's breadth stems from the concept of discretion. In protecting our citizens abroad,

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115. Letter from William Marcy, U.S. Sec'y of State, to Johann Georg Hulsemann, Charge d'Affaires of the Empire of Austria, (Sept. 26, 1853), *reprinted in id.* at 8-27.

116. The only remotely comparable concept is legislative history, and there is nothing in the many pages of Congressional debate to suggest that Congress doubted Captain Ingraham's lawful authority. *See* Dobbin, *supra* note 98.

117. Some have argued that Congress ratified Captain Ingraham's unlawful act, but to repeat: there is no evidence whatsoever to support this wishful thinking.

118. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952); *see also* POWELL, *supra* note 37, at 55, 69-73.

119. *Youngstown*, 343 U.S. at 635.

120. *Id.* The best interpretation of Jackson's limiting word "usually" is that Congress may not confer a power that is within the exclusive power of another branch. *See* Castro, *supra* note 37, at 94. This limitation has no relevance to Executive action to protect Americans abroad.

121. Monaghan, *supra* note 2, at 70; *see also* GLENNON, *supra* note 79, at 75.

a president weighs many related and unrelated considerations. Which way to go is a complex political question. For different reasons, neither the courts nor the Congress are likely to second guess the president in a national security case.

National security issues can be subdivided into three different but related categories: issues of fact, issues of policy, and issues of authority. For example, Captain Ingraham had to decide whether Koszta was actually in danger. Then, with input from the diplomatic corps, Ingraham had to decide as a matter of policy whether saving Koszta was worth the chance of war with a major European power. These kinds of issues are beyond the kin of the courts. Finally, there was the issue of the Constitution's allocation of powers among the three branches of government. Did the Executive have unilateral authority to rescue Koszta?

On the surface, Ingraham's decision that Koszta actually was in peril is no different from an ordinary tort case in which a court has to decide whether a driver should have seen another oncoming vehicle. The jury's decision in this tort case involves a simple allocation of loss between two people. If a court errs in allocating loss in a tort case, we do not like the error, but after an appeal that may or may not correct the error, we accept the result. The harm of an erroneous judgment is limited to the parties to the litigation. But a judicial review of Ingraham's actions involves more than simple loss allocation between private parties. The review may have consequences well beyond the private interests of the parties. Do we want a court thousands of miles away and years after the fact to second guess the commander's decision? Moreover, a judicial review of an officer's actions could have an undesirable impact upon negotiations between the United States and an interested foreign state.[122] In any event, the factual issue of whether Koszta was actually in danger was inextricably intertwined with the policy issue of whether the United States should risk a war with Austria.[123]

The second issue confronting Commander Ingraham was whether he should risk starting a war with a major European power. Obviously, no court is equipped to review and balance the myriad considerations implicated by this policy issue. Courts should not be empowered to determine such a fundamentally political question.[124] This issue is a classic political question in which there is "a lack of judicially discoverable and manageable standards for reading it."[125] Absent guidance from the Congress or the Constitution, the judiciary simply lacks the ability to review the wisdom of a president's decision in national security matters.

In contrast to the political question of whether to risk a war, allocating powers among the branches of government is a more straightforward matter of Constitutional interpretation. The *Neagle* Court clearly believed that, in the absence of Congressional guidance or limitation, the Executive had Constitutional authority to protect Koszta by risking a war with Austria.

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122. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964).

123. For an example, if there were only slight evidence that Koszta was in danger of being executed, the Executive should be less inclined to risk a war.

124. *See* POWELL, *supra* note 37, at 131-32.

125. Baker v. Carr, 369 U.S. 186, 217 (1963). *See supra* note 47 and accompanying text.

The president's decisions are also subject to legislative review.[126] If the Congress disagrees with a president's exercise of her protective war power, the Congress may, in theory, check the president. Congress, however, is unlikely to second guess a president's national security decisions. Justice Jackson noted "[t]he rise of the party system has made a significant extra constitutional supplement to real executive power ... Party loyalties and interests, sometimes more binding than law, extend [the president's] effective control into branches of government other than his own."[127] As we have seen in recent years, members of the president's party are reluctant to check presidential abuses. As an empirical fact, members of the president's party in Congress are highly unlikely to second guess their president's conduct. The two impeachments and trials of Donald Trump exemplify this dynamic.

Even if—like Professor Monaghan—we do not like the Koszta principle, it is the law. When a unanimous Supreme Court decides an issue of Constitutional law, that is the law. To be sure, we might convince the Court as a matter of policy to overturn a prior, well-settled decision.[128] But until that happens, the Koszta/*Neagle* principle is law. Moreover, it is good law. The simple fact is that Captain Ingraham was confronted by an emergency. If he waited to consult his superiors and his superiors decided to consult Congress, the Austrians would have spirited Koszta away and hanged him. Without the Koszta/*Neagle* principle, our government would be powerless to protect our citizens abroad in an emergency. This problem could be solved by an AUMF giving the president general authority to use military force in emergency situations, but Congress has not done so.

The *Neagle*/Koszta principle is a necessary exception to Congress's war power. In 1853, Captain Ingraham had to act promptly to rescue Koszta from danger. He could not consult with the president, and the president could not refer the matter to Congress. Prompt Congressional action was impossible.

Perhaps today's virtually instantaneous world-wide communication renders *Neagle*/Koszta unnecessary, but there are strong arguments that the principle retains its significance. Emergencies still arise today, and only the president is able to act promptly. If the president lacks unilateral authority to act, legislation is necessary. But the immense political friction in the two branches of Congress may preclude prompt action. For example, there is credible evidence that during the Iran Hostage Crisis, Republican operatives sought political gain by forestalling the hostages' release by a Democratic president.[129] In addition there is the ordinary, nonpolitical Congressional inertia that precludes prompt action.[130]

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126. Surely no one believes that presidents have an exclusive power, beyond Congressional power, to take the country to war. At the same time, however, a president's decision may, as a practical matter, effectively tie the Congress's hands. *See* WILLIAM CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 181-83 (2006).

127. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952).

128. *See*, *e.g.*, Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938); Brown v. Bd of Education of Topeka, 347 U.S. 483, 495 (1954).

129. *See infra* note 201 and accompanying text.

130. *See* POWELL, *supra* note 37, at 100-02.

As a practical matter, it may take weeks or even months for the Congress to resolve an emergency. To be sure, Congress's inertial problem is remedied by existing AUMFs, but these delegations of war powers do not operate worldwide. Nor does the War Powers Resolution remedy the problem of Constitutional authority. That Resolution does not grant the president any authority. It requires consultation, but merely consulting with Congress gives the president no legal authority.

Another consideration related to the use of military action to protect American citizens is the problem of secrecy. As a matter of military tactics, a surprise attack is more likely to succeed than an anticipated attack. Thus, the assassination of Osama Ben Ladin would have been impossible without secrecy.

Some members of Congress are perfectly capable of guarding secrets, but we know in our heart of hearts that some members are perfectly incapable of doing so.[131] An emergency requiring secret Congressional action puts us between a rock and a hard place. Small subsets of trustworthy representatives and senators lack Constitutional power to approve military actions, but a secret enactment by the whole Congress is impossible.

Finally, the problem of retribution should be considered. There is a world of difference between rescuing a citizen and punishing a malefactor. There usually is no need for prompt or secret action in cases of retribution, and *Neagle*/Koszta does not address this issue. Moreover, the stakes in the case of retribution are strategic—not tactical.

There may, however, be situations in which retribution also protects American citizens. If so, *Neagle*/Koszta becomes pertinent. For example, in 1986 agents of the state of Libya bombed a night club in Berlin, Germany, killing one U.S. soldier and wounding 64 other Americans. President Ronald Reagan responded by bombing Libya. His action obviously was designed to punish Libya, but he also saw the attack as a preemptive strike to deter future attacks on our citizens.[132] In explaining the bombing, the State Department Legal Adviser made no reference to retribution and based the president's authority solely upon the protection of American citizens from future attacks. That "authority is most compelling in a situation such as this, where the use of force is essential to deter an immediate and substantial threat to the lives of Americans."[133] This goal of preempting future attacks on our citizens clearly implicates the *Neagle*/Koszta principle.

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131. For example, in the Iran Hostage Crisis, President Carter deemed secrecy essential to the rescue operation's success. Although required by law to inform Congress of a military operation to rescue American hostages held prisoner in Iran, the president did not do so. Lloyd Cutler, the president's White House Counsel, remembered that even the Speaker of the House wasn't given advance notice. Cutler later explained, "We knew if [we] went to [Speaker] Tip O'Neill, he would have told somebody else before the day was out, and we needed the advantage of surprise." Morrison, *supra* note 37, at 1735 (quoting the July 8, 1989, interview with Lloyd Cutler).

132. He described the bombing as a "pre-emptive action" designed to provide Libya's dictator "with incentive and reasons to alter his criminal behavior." President Ronald Reagan, Address on Libya (April 15, 1986).

133. Statement by Abraham D. Sofaer, U.S. Dep't of State Legal Adviser, before the Subcomm. On Arms Control, Int'l Sec., Sci. of the H. Foreign Affairs Comm. (Apr. 29, 1986).

In the Libya attack, the question arises whether the likelihood of future attacks on Americans was sufficient to warrant the bombing. Maybe the bombing was a case of pure retribution and guarding against future attacks was a pretext. Perhaps so, but it is highly unlikely that a court or Congress would second guess the president on this specific issue.

IV. THE *DURAND* CASE

Neagle/Koszta is a powerful Supreme Court precedent for the president's unilateral Constitutional authority to start a war. Clearly an armed attack by the United States navy upon a powerful European country is an act of war by any plausible definition.[134] Does the principle extend to other situations not involving the wellbeing of our citizens? Perhaps so. Long ago, the great common-law judge Benjamin Cardozo noted the "tendency of a principle to expand itself to the limit of its logic."[135] In practice the Executive Branch has turned to another ancient precedent to augment or expand the Koszta/*Neagle* principle.[136] In *Durand v. Hollins*,[137] Justice Samuel Nelson, riding circuit, significantly expanded the protective principle that the Court endorsed in *Neagle*.

Durand was a child of the California Gold Rush and involved a classic example of gunboat diplomacy.[138] After the discovery at Sutter Creek, tens of thousands of Americans wanted to get to California, and the shortest and cheapest way was to take a ship to Central America, cross over to the west coast, and sail to California. Cornelias Vanderbilt and others incorporated the Accestory Transit Co. (ATC) in Nicaragua to transport Americans to the Pacific coast. Unfortunately, Greytown,[139] a small port on the east coast, became a thorn in ATC's side. The little town frequently interfered with ATC's business operations.

Greytown's interference came to a head in 1854 when an American employee of ATC murdered a local man.[140] Greytown authorities tried to arrest the murderer, but the American minister to Nicaragua intervened. A group of angry locals surrounded the house where the ambassador was staying, and someone

134. *But see infra* note 195 and accompanying text.

135. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). This tendency is especially pronounced when an attorney advises her president on the extent of the president's power. During oral argument in the *Steel Seizure* Case, former attorney general Jackson candidly admitted that in advising his president, "I claimed everything, of course, *like every other Attorney General does*. It was a custom that did not leave the Department of Justice when I did." 48 LANDMARK BRIEFS, *supra* note 37 (emphasis added).

136. *See supra* notes 19-22 and accompanying text.

137. Durand v. Hollins, 8 F. Cas. 111 (S.D. N.Y. 1860).

138. For an extremely well researched book on the events leading to *Durand*, *see* WILL SOPER, "GREYTOWN IS NO MORE!" THE 1854 RAZING OF A CENTRAL AMERICAN PORT, THE U.S. BUSINESSES BEHIND ITS DEMISE, AND THE LASTING FOREIGN POLICY LEGACY (2023). For a short but insightful essay, *see* Mathew Waxman, *supra* note 45. Soper's book is well reviewed in Tyler R. Smotherman, *Greytown, Great Power Politics and History's Grey Areas*, 24 J. NAT'L SECURITY L. & POL'Y (2024).

139. Greytown was also called San Juan del Norte. In 1848, the British seized the town and renamed it Greytown after Charles Edward Grey who was the governor of Jamaica. *See* SOPER, *supra* note 138, at 5.

140. *See* SOPER, *supra* note 138, at 7-14.

threw "fragments of a broken glass bottle, which struck Mr. Borland [the ambassador], and slightly wounded him in the face."[141] In addition, there was an allegation that residents of Greytown had stolen a load of food supplies from ATC. This alleged theft, however, may not have happened, and if it did, the property's value was grossly exaggerated.[142]

Back in Washington, the Franklin Pierce Administration resolved to chastise Greytown for its apparent misconduct. Secretary of Navy James Dobbins gave Commander George Hollins a written order to teach Greytown "that the United States will not tolerate these outrages, and they have the power and the determination to check them."[143] Hollins' orders were quite broad. As a practical matter, he had to be entrusted with enormous discretion because timely communication with Washington was impossible in the age of sail.[144] When his ship, the *Cyane*, reached Greytown, Hollins ordered the town to make reparations that could not be met, and he then bombarded the port.[145] Afterwards, he landed sailors and marines, who burned the town to the ground.[146] In Commander Hollins' report of the bombardment, he stated that his intent was "to inculcate a lesson never to be forgotten."[147] James Buchanan, our minister to the Court of St. James, told the

141. Letter from Ambassador Solon Borland to William Marcy, Sec'y of State (May 30, 1854) (attachment A), *reprinted in* S. DOC. NO. 33-85, at 6 (1854).

142. SOPER, *supra* note 138, at 17 (quoting the New York Tribute, Aug. 3, 1854, which said that whether there actually was a theft "is a matter of uncertainty"). The property, valued at "16,000 ($477,000 in 2002), was cornmeal and flour, presumably in barrels. *See* SOPER, *supra* note 138, at 58. This amount of food stuff could not have fit in the 20 foot rowboat used to carry away stolen food. *See* SOPER, *supra* note 138, at 58.

143. Letter from James C. Dobbin, Sec'y of the Navy Dep't, to George N. Hollins, Commander (June 10, 1854), *reprinted in* S. DOC. NO. 33-85, at 21 (1854). Secretary Dobbin understood that Commander Hollins' actions might include violence against the town. His written orders continued, "It is, however, very much to be hoped that you can effect the purpose of your visit without a resort to violence and destruction of property and loss of life." *Id.*

144. *See* Waxman, *supra* note 45.

145. The bombardment of Greytown is similar to an incident a few years earlier off the coast of East Africa. The tiny sultinate of Johanna imprisoned the captain of an American whaler. *See* Keventh Stevens, *Of Whaling Ships and Kings: The Johanna Bombardment of 1851*, 18 PROLOGUE MAGAZINE, Spring 1986, at 241-49; SOPER, *supra* note 138, at 152-55. When Secretary-of-State Daniel Webster learned of the captain's plight, he told Navy-Secretary William Graham that "such an outrage cannot be permitted to go unpunishable by this government." *See* Keventh Stevens, *Of Whaling Ships and Kings: The Johanna Bombardment of 1851*, 18 PROLOGUE MAGAZINE, Spring 1986, at 244 (quoting Daniel Webster to William Graham on Sept. 6, 1850). Webster urged the Navy to restore the imprisoned captain's liberty and to seek reparations. *Id.* Webster cautioned, like in Greytown, that the "actual application of force is to be avoided [except in the case of] absolute and indispensable necessity." *Id.* at 244. Pursuant to the Navy Secretary's order, the USS *Dale* bombarded the sultinate and obtained reparations. Not much can be made of the Johanna incident. There is no evidence that any branch of the federal government ever reviewed or considered the legality of the bombardment.

146. Captain Hollins also dispatched a landing party to a nearby port, and the sailors took a large amount of gun powder – worth between $6,000 and $12,000 – and dumped it into the ocean. *See* SOPER, *supra* note 138, at 173-74. The owner later recovered a judgment against the United States for a taking without compensation. *See* Wiggins v. United States, 3 Ct. Cl. 412, (1867).

147. Letter from George N. Hollins, Commander, to James Dobbin, Sec'y of the Navy Dep't (July 16, 1854), *reprinted in* S. DOC. NO. 33-85, at 29 (1854).

British that he thought that the bombardment was unauthorized,[148] but President Pierce fully supported the wanton destruction.[149]

A. Reprisals and American Property

Some of the property destroyed by the *Cyane* belonged to Calvin Durand, an American citizen, and he sued Commander Hollins for damages in the federal circuit court[150] in New York. "[L]ong-forgotten"[151] Supreme Court Justice Samuel Nelson, who was riding circuit, considered Durand's complaint and dismissed it. Nelson reasoned, "It is to [the president], the citizens abroad must look for protection of person and property."[152] The duty of protecting "the lives or property of the citizens [abroad] must, of necessity, rest in the discretion of the president."[153]

The *Durand* case significantly expands the Koszta/*Neagle* principle. There was no emergency in Greytown, and no American was held hostage. *Durand* holds that the president's power extends to reprisals[154] after an American interest has been harmed, and OLC has so opined.[155] In *Durand*, Justice Nelson was not reviewing an emergency decision. In addition, Nelson extended the president's implied power beyond the protection of our citizens to the protection of property.

As constitutional precedent, *Durand* is not nearly as strong as *Neagle*/Koszta. Simply put, *Durand* is not a unanimous Supreme Court analysis of the Constitution.[156] How is Justice Nelson different from any other no-name federal judge from the 1850s?[157] To be sure, his decision was not dicta, but to repeat, his holding was simply an obscure trial court decision. It was not a unanimous Supreme Court decision.

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148. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 45 (3d ed. 2013). A few years later, when Buchanan was president, he insisted that he would "have no authority to enter the territories of Nicaragua to prevent the destruction of the transit and protect the lives and property of our own citizens." *Id.* at 45-46.

149. Franklin Pierce, *Second Annual Message* (1854), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 2806, 2813-17 (J. Richardson ed., 1897).

150. Durand v. Hollins, 8 F. Cas. 111, 111 (S.D. N.Y. 1860). Until 1891, the circuit courts were the primary federal trial courts. *See* FALLON *supra* note 47, at 29-30.

151. POWELL, *supra* note 37, at 11.

152. *Durand* at 112.

153. *Id.*

154. Reprisals are no longer lawful under international law, but this illegality is only a matter counseling hesitation in so far as a president's decision is concerned. There is a strong argument that the president has concurrent power to violate international law. *See* Bradley & Goldsmith, *supra* note 44, at 2099.

155. *See infra* note 190 and accompanying text.

156. Edward Corwin erroneously described *Durand*, which is a federal trial court decision, as providing "the highest judicial sanction" for Commander Hollins' conduct. EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 228 (5th rev. ed. 1984). Corwin also insists that *Durand* was "one of the precedents relied upon by Justice Miller in the *Neagle* case." *Id.* Justice Miller's opinion, however, makes no mention of *Durand*.

157. Various scholars have described him as "average," "plodding," "an unimpressive plodder," and "mediocre." William B. Meyer, *Samuel Nelson and Judicial Reputation*, 48 J. SUP. CT HIST. 299, 300 (2023).

B. The Problem of Discretion

Many who have criticized *Durand* have mistaken the facts of the case for the judge's legal analysis.[158] The destruction of Greytown was a clear case of abuse of discretion, but the government's obvious misconduct at Greytown does not delegitimize the judge's legal analysis.[159] A critique of the *Durand* opinion should address the judge's legal reasoning – not the particular, egregious facts of the case.

As a matter of Constitutional law, Nelson's ancient trial court decision should stand or fall based upon the strength of his analysis from a twenty first century perspective. From our modern vantage point, the primary problem with *Durand* is the astonishing breath of Nelson's language. His opinion can be read as asserting that any time the property of Americans is imperiled anywhere in the world, the president has discretion to launch a military attack on the nation where the property is located.[160] This is a shock-your-conscience assertion. There seems to be no limit other than the president's personal and political judgment. This cannot be. For years, we have argued about the president's unilateral war powers, but surely no one actually believes that the president has unilateral power to take the country to war any time she wishes. Surely, the Constitution's commitment of the war power to the Congress does not allow such a breathtaking allocation of Executive power.

Robert Jackson served for years at the highest levels of the Executive Branch and on the Supreme Court. He fully understood the dangers of executive discretion but was strongly inclined to defer to the president on national security matters. On two notable occasions, however, he wrote opinions to overturn a president's important discretionary national security decision.[161] His approach suggests a way to limit *Durand*. Jackson would not second guess the wisdom of a president's decision. Instead, he concluded in these two cases that the president was legally preempted from exercising any discretion whatsoever.

In 1952, the United States was at war in Korea, and an impending labor strike threatened the steel industry's ability to supply war materials.[162] To avert the threatened cut off, President Truman seized the steel industry. His action resulted in the *Steel Seizure* Case[163] in which the Supreme Court ruled that the seizure was unconstitutional. Jackson concurred in the decision and wrote a separate opinion that is generally viewed as the most important separation of powers opinion in the nation's history. Jackson refused to consider the wisdom of the president's

158. *See*, *e.g*. WORMUTH & FIRMAGE, *supra* note 85, at 37-41; ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY 55-56 (1973); Berger, *supra* note 91, at 741-42.

159. *Accord*, Smotherman, *supra* note 138, at 13.

160. *See* GLENNON, *supra* note 79, at 75. To date the Executive has not relied upon this aspect of *Durand*. But that does not mean that the Executive would not do so in a matter close to the president's heart. *See supra* notes 36-37 and accompanying text.

161. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Vinson, C.J., concurring); Korematsu v. United States, 323 U.S. 214, 242 (1944) (Roberts, J., dissenting).

162. *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE (1994).

163. *Youngstown*, 343 U.S. at 528-89 (1952).

decision that the threatened strike presented a national security emergency. During oral argument, he bluntly stated, "[i]t is not our decision to decide what is an emergency."[164] Instead he concluded that the Congress, through legislative action, had barred the president from seizing the steel industry. Under this approach, the Court did not review the wisdom of the president's decision. Rather the Court ruled that Congress had deprived the president of discretion to act.

Korematsu v. United States,[165] a Japanese internment case, also involved the president's authority to act in the realm of national security. Again, Jackson refused to consider whether national security concerns warranted the president's action. Instead, he wrote, in dissent, that the Constitution deprived the president of power to imprison innocent citizens based solely upon their ancestry.

Jackson's approach to preempting presidential discretion should be used to limit *Durand's* reach. When Cardozo noted the tendency of a principle to expand to the limit of its logic,[166] he also described a traditional common law technique for limiting a principle's expansion. The principle's expansive tendency "may be counteracted by the tendency to confine itself within the limits of its history."[167] Neither Justice Nelson nor the president saw the Greytown bombardment as an exercise of war powers. At least, they did not see the destruction of Greytown as a military attack on a foreign nation. As a matter of traditional common law reasoning, *Durand* addressed the Executive's power to launch police actions or reprisals against piratical enclaves and perhaps failed states. But the case is silent on the president's unilateral authority to attack a foreign state. It simply does not address this more significant authority.

When President Franklin Pierce addressed the Greytown bombardment, he insisted that Greytown was not "an organized political society." Rather, he believed that the port was "a marauding establishment [–] a piratical resort of outlaws or a camp of savages."[168] In other words, he portrayed the bombardment as a police action against marauding pirates and not an act of war.[169]

When Durand sued six years later, Commander Hollins' defense counsel, who was the U.S. Attorney from the Southern District of New York,[170] planned to argue that "usurpers" had taken over Greytown and that the port was "without a government which any civilized nation recognizes."[171]At the trial, itself, he argued that the Executive Branch "had a right to protect the persons and property

164. 48 LANDMARK BRIEFS, *supra* note 37, at 923.

165. 323 U.S. at 242-48 (Jackson, J., dissenting).

166. *See supra* note 135 and accompanying text.

167. CARDOZO, *supra* note 135, at 51.

168. Pierce, *supra* note 149, at 2815.

169. *See* DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 120-21 (2005).

170. SOPER, *supra* note 138, at 147.

171. SOPER, *supra* note 138, at 147 (quoting John McKeon to Farris Streeter on Mar. 16, 1855).

of American citizens from injuries, or compel punishment on marauders who are not recognized by the United States . . . as a foreign power."[172]

So the case was presented to Justice Nelson as the chastisement of marauding pirates. The justice heeded this analysis and specifically penned his opinion to address the problem of piratical marauders. "The question," was, he wrote, "whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there."[173] Neither the president, nor the U.S. attorney, nor the judge saw Greytown as an attack on a foreign state. Justice Nelson simply did not consider the president's unilateral authority to launch a military operation against a foreign state.

Another lawyerly way to limit *Durand* is simply to dismiss it as bad case law. Why should anyone rely on *Durand*? Justice Nelson's opinion is well over one hundred years old. It is not as if Justice Nelson was a Learned Hand or a Henry Friendly. *Durand*, itself, is not part of any developing judicial principle that has endured to the present. In the last 180 years, only one court, and that a trial court, has noticed the case's existence.[174]

To be sure, the Executive Branch has frequently cited and relied upon *Durand*. Executive Branch legal opinions, however, are hardly disinterested expositions of the law. At least not so when the matter at hand is near and dear to the president's heart. When the stakes are high, legal advisers have a pronounced tendency to support the president's desire as best as they can.[175]

Endowing the president with discretionary war powers also raises the problem of pretextual war.[176] A president may go to war for a putatively proper reason but actually for an undisclosed improper purpose. President Pierce's defense of the Greytown bombardment may have been pretextual.

There is evidence that Commander Hollins was dispatched with unwritten orders to destroy the port. Before the *Cyane* sailed, there was a dinner party to discuss Greytown. Members of the ATC, land speculators, the clerk of the House of Representatives, Attorney General Caleb Cushing, and "perhaps [Navy] Secretary Dobbin" attended. Their alleged purpose was to determine how best to protect American commercial interests in Central America. To further this purpose, the group decided that Greytown should be destroyed and that the *Cyane* should be sent to make it so.[177] We cannot know whether this allegation is true.

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172. SOPER, *supra* note 138, at 149-50 (quoting the New York Tribune from Sept. 19, 1857, reporting the arguments of counsel).

173. Durand v. Hollins, 8 F. Cas. 111, 112 (S.D. N.Y. 1860).

174. Rappenecker v. United States, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980).

175. *See supra* notes 36-37 and accompanying text.

176. Pretextualism is also a significant problem in the international law regarding a state's right to protect its citizens in a foreign country. *See* FRANCK, *supra* note 8, at 76-96.

177. SOPER, *supra* note 138, at 64, 205 n.17 (extensively quoting the New York Tribune from July 29, 1854). To the same effect, but not reporting the dinner party, *see* SOPER, *supra* note 138, at 62 (quoting the New York Times from July 25, 1854) ("[i]ntimations that . . . the Transit Company . . . dictated in part the movement of the *Cyane* upon Greytown"); SOPER, *supra* note 138, at 66 (quoting the

Nevertheless, the claim is plausible and neatly illustrates the problem of pretextualism. The president would never have told the public that he destroyed Greytown to further American business interests in Central America. This problem of pretextual national security decisions may easily arise in our modern times.[178]

The Greytown example of pretextualism may or may not be true. It is, however, plausible and illustrates the problem of judicial review of executive war power decisions. As Justice Jackson cogently explained, no court would ever second guess the president's wisdom in these situations. Indeed, the federal court did not second guess the Executive's destruction of Greytown.[179] The serious problem of unlimited executive discretion can be avoided by limiting *Durand*'*s* reach. For example, this is a good argument that *Durand* should be limited to military operations against groups or entities that are not foreign nations.[180]

V. EXECUTIVE ADVICE IN ACTION

In recent years, most presidential military actions overseas have involved the Middle East, and the president has properly relied upon Congressional AUMFs[181] for these operations.[182] If the president unilaterally decides to engage in combat outside the Middle East, Koszta/*Neagle* and *Durand* undoubtedly will come back into play. Two pre-AUMF situations illustrate how these two cases will be used.

New York Times from Aug. 1, 1854) (ATC was "an important agency in this violent . . . proceeding. Their grievance was the cause, and the alleged insult to [the ambassador] the pretext."); SOPER, *supra* note 138, at 69 (quoting the New York Tribune from Aug. 10, 1854).

178. In 1983, President Ronald Reagan ordered the invasion of Grenada, ostensibly to protect the lives of American medical students on the island. A plausible case, however, can be made that the primary purpose was to thwart the influence of the communist Cuban government on the small island. *See* Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1555 n.63 (1988); FRANCK, *supra* note 8, at 86-88.

> Another plausible example of modern pretextualism is President William Clinton's 1998 missile strikes on an alleged terrorist chemical facility in Sudan. When the owners—like Calvin Durand—sued for damages, their attorneys alleged that the attack was a "Wag the Dog" operation stemming from President Clinton's unseemly relationship with a young female aide. SOPER, *supra* note 138, at 179-82 (quoting El – Shifa Pharm. Co. v. United States, 55 Fed. Cl. 751, 766) (2003)). This "Wag the Dog" assertion is plausible. *See* Robert Dallek, *Are Clinton's Bombs Wagging the Dog?*, L.A. TIMES (Aug. 21, 1998), https://perma.cc/75GX-NFWL; Vernon Loeb, *A Dirty Business*, WASH. POST (July 25, 1999), https://perma.cc/23PK-UDUN.

179. Durand v. Hollins, 8 F. Cas. 111, 112 (S.D. N.Y. 1860). Nor did the courts second guess the president's decision to launch missiles against Sudan. *See supra* note 174; *El-Shifa Pharm. Co*., 55 Fed. Cl. at 766 (2003).

180. *See supra* notes 166-73 and accompanying text.

181. *See supra* notes 27-45 and accompanying text.

182. For example, in 2014 OLC used Koszta/*Neagle* and *Durand* to support unilateral presidential authority to attack the Islamic State (ISIL). Authority to Order Targeted Strikes Against the Islamic State of Iraq and the Levant, 38 Op. O.L.C. 82, 98-99 (2014). The opinion became moot when the Executive decided to rely upon statutory authority. *Id.* at 82 n.1. *See also* Michael Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AM. J. INT'L L. 701, 709 (2016).

A. The Iran Hostage Crisis

The Iran Hostage Crisis[183] is a good example of the Executive's use of *Neagle*/ Koszta and *Durand*. In 1979, a popular uprising overthrew the Shah of Iran, and the people stormed the United States Embassy. They took 53 diplomatic personnel hostage and held them in unlawful captivity for 444 days. The Crisis was a running sore on President Jimmy Carter's presidency and contributed to his failure to be reelected.

In the Spring of 1980, President Carter resolved to mount a military attack to rescue the hostages. On April 24, the military helicoptered in a strike force to a remote spot in the dessert. The plan was to wait until the next night and then to drive into Tehran and rescue the hostages. Unfortunately, several of the helicopters failed, and one crashed. The president aborted the mission, and our forces withdrew without engaging the enemy.

Two months before the rescue operation, OLC gave a preliminary opinion on the president's unilateral authority to take action against Iran.[184] The opinion was for planning purposes[185] and addressed an array of options.[186]

One option was "a military expedition to rescue the hostages or to retaliate against Iran if the hostages are harmed."[187] Another option was, in a word, amorphous. The president wanted to know whether he could "attempt to repel an assault that threatens our interests in that region."[188] OLC opined that the president had unilateral authority to exercise both options.

OLC quoted the *Neagle* opinion for the general proposition that the president "derives authority from his duty to 'take care that the Laws be faithfully executed'" but ignored – made no mention of – *Neagle's* treatment of the Koszta Affair. This lacunae is puzzling. Surely OLC was not concerned about the principle's possible status as dicta. As Justice Jackson noted, the government tended to

183. For general coverage of the Crisis, *see* GARY SICK, ALL FALL DOWN (1985); CYRUS VANCE, HARD CHOICES (1983). For a good, short coverage, see DYCUS, *supra* note 86, at 369-75.

184. Presidential Power to Use the Armed Forces Abroad Without Statutory Authority, 4A Op. O.L.C. 185, 185-96 (1980) [hereinafter Presidential Power]. The Senate Committee on Foreign Relations asked for a "copy of any legal opinion prepared by the Attorney General on this matter [i.e., the Iran Hostage Crisis]," but the Executive did not provide the OLC opinion, probably because the opinion technically was given by the OLC and not the attorney general. *See* Letter from J. Brian, Assistant Sec'y of State, to Sen. Jacob Javits (May 30, 1980), *reprinted in The Situation in Iran*, *supra* note 12, at 47 [hereinafter Brian].

185. War Powers Resolution: Detailing of Military Personnel to the CIA, 4A Op. O.L.C. 197, 197 n.1 (1983).

186. One of the options was the mere "deployment . . . of the fleet on the Persian Gulf region." *Id*. The government also considered but rejected a blockade. Warren Christopher, *Introduction*, *IN* AMERICAN HOSTAGES IN IRAN, 1, 22 (P. Kreisberg ed., 1985). The preliminary opinion, however, addressed the mere presence of the fleet "at some risk of engagement." Presidential Power, *supra* note 184, at 185.

187. Presidential Power, *supra* note 184, at 185.

188. Presidential Power, *supra* note 184, at 185. We do not know what the president had in mind by threats to "our interests." Perhaps he was thinking about Iranian attacks on other states' oil tankers in the Persian Gulf.

"claim everything."[189] The most plausible explanation is that OLC sought to approve the broadest possible scope of presidential authority. The Koszta principle narrowly focused upon emergency rescues.

Although OLC did not rely upon the *Neagle*/Koszta rescue principle, it did rely upon *Durand*. In particular, the opinion literally emphasized the *Durand* court's language recognizing a unilateral presidential authority to "*retaliat[e]*."[190]

In addition to OLC's failure to use the *Neagle*/Koszta principle's endorsement of a rescue authority, OLC's treatment of *Durand* has two other interesting lacunae. For over a century, *Durand* had been described as a retaliation for an attack on an American diplomat.[191] Many attorneys would note that *Durand*, itself, involved an affront to diplomatic personnel, which was precisely the case in the Hostage Crisis. In discussing *Durand*, OLC made no mention of the hostages' diplomatic status.[192] To do so would have detracted from OLC's opinion that the president had a more general power to start a war if there were "an assault that threatens out interests." Nor did OLC consider *Durand's* statement regarding Greytown's status as a piratical enclave unrecognized by the United States. In the Hostage Crisis, the United Sates had not recognized the revolutionary government of Iran, and there was some thought that the Iran government could not control the revolutionaries holding our citizens hostage.

A plausible key to understanding the lacunae in OLC's analysis is to remember Justice Jackson's axiom that the government always "claimed everything." The opinion was forward looking, and OLC sought to justify the broadest possible presidential authority. *Neagle*/Koszta was limited to rescues. So, it was scratched. *Durand* involved an afront to an American diplomat. So, this part was scratched. Similarly, *Durand* involved an assault upon a piratical enclave. Again, this inconvenient fact also was scratched.

The OLC opinion also addressed the Hostage Act's treatment of the president's authority to obtain the release of American citizens unlawfully imprisoned. The Act gave the president full authority to obtain the citizens' release but limited the authority to actions "not amounting to acts of war." Because some of the president's options involved a land attack on Iran's capital, this explicit Congressional limitation presented a major roadblock to an attack on Iran.

The opinion on the Hostage Act is at best dodgy and at worst ridiculous. It begins by asserting that it is "not clear what Congress meant by the phrase 'not amounting to acts of war.'"[193] To be sure, this phrase is somewhat ambiguous, but there was no ambiguity in the context of the options under consideration.

189. *See supra* note 37 and accompanying text.

190. Presidential Power, *supra* note 184, at 187 (citing *Durand*) ("This history reveals that purposes of protecting American lives and property and *retaliating* against those causing injury to them are often intertwined.") (emphasis in original).

191. *See,* Right to Protect Citizens, supra note 8, at 59; Smotherman, *supra* note 138, at 272.

192. Presidential Power, *supra* note 184. The opinion mentions in passing that *Durand* involved an attack on the "United States Consul" but did not suggest that the consul's diplomatic status was significant. Presidential Power, *supra* note 184.

193. Presidential Power, *supra* note 184.

OLC was considering whether the United States could mount "a military expedition"[194] against a foreign country—a land attack on the country's capital. It is difficult to believe that the contemplated military expedition did not amount to an act of war.[195]

OLC also engaged in a shell game of now you see it and now you don't. OLC blithely stated that "at least Congress did not seem to be attempting to limit the President's constitutional powers."[196] This puzzling statement only makes sense if the Hostage Act is analyzed in complete and rigorous insolation from the Constitution. If so, the Act can be viewed as a delegation by Congress of specific statutory authority, and the "not amounting to acts of war" language was solely intended as a limitation to the specific statutory—not constitutional—authority.

The problem with the Hostage-Act analysis is that OLC opined that the president had full Constitutional authority to attack Iran without any delegation from Congress. In other words, OLC believed that Congress had delegated authority to the president that the president did not need, and the limitation on acts of war applied only to the unnecessary delegation.[197]

On April 11, 1980, the president decided to mount a full scale military operation to rescue the hostages.[198] He could have asked Congress for an AUMF, but he did not. Secrecy was essential to the rescue, and an AUMF could not be enacted in secrecy. Instead, the president sought advice from Lloyd Cutler, his white house counsel. Apparently to assure secrecy, the president told Cutler that he could not seek assistance in providing an opinion on the lawfulness of the operation: "I had to do that by myself, not discuss it with anybody."[199] OLC was

194. *See supra* note 169 and accompanying text.

195. However, the present Department of Justice—with sufficient presidential encouragement—probably would have opined that for Constitutional purposes, Carter's invasion of Iran was not an act of war. In the years since the Iran Hostage Crisis, the Department has crafted an analysis that, in effect, distinguishes between little wars, which are not really wars, and big wars, which are. Under this analysis, "the President is allowed to take into account the anticipated nature, scope, and duration of the deployment." Deployment of United States Armed Forces to Haiti, 18 O:L.C. 173, 173 (1994). Using this approach, President Carter could have just said that the nature of armed attack was a precise surgical strike to rescue the American hostages, he "anticipated" no casualties, and the operation would only last four days. This factors analysis is ideally suited to enable OLC to green light a presidential decision.

196. Presidential Power, *supra*, note 184, at 189.

197. Perhaps OLC had in mind a sophisticated historical analysis. Perhaps in 1868, Congress believed that the President lacked authority to take some measures, short of war, to effect the release of hostages. *See* Abner Mikva & Gerald Neuman, *The Hostage Crisis and the "Hostage Act,"* 49 UNIV. CHI. L. REV. 292, 338 (1982). If so, strictly confining the limitation on the delegated authority is not quite so silly. Even under this analysis, however, the Congress apparently did not want the president to go to war to secure hostages' release.

198. JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 516 (1982).

199. White House Exit interview with Lloyd Cutler, Jimmy Carter Presidential Library (Mar. 2, 1981). Cutler did, however, manage to obtain permission to give the attorney general a heads up. Interview by Martha Kumar & Nancy Kassop with Lloyd Cutler, White House Interview Program (July 8, 1999).

shut out of the loop, apparently to ensure secrecy. The president sought Cutler's advice about a week before the operation began.[200]

Another reason for not seeking an AUMF is the possibility that if the president had done so, Republicans in Congress might have stalled his request until the Fall election. Keeping the hostages in captivity would have enhanced the likelihood of Republican candidate Ronald Reagan prevailing. There is credible evidence that in the run up to the election, a respected political operative toured the Middle East on Candidate Reagan's behalf urging that Iran would get a better deal if the hostages' release was postponed until after the election.[201]

Back in Washington, Cutler studied the applicability of the War Powers Resolution[202] and also the fundamental issue of presidential power. He gave oral

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200. In 1981, Cutler remembered that he "was not . . . involved . . . until a week or ten days before it actually happened." White House Exit Interview, *supra* note 199. About two decades later, he remembered that "he was called in four days before the rescue mission." Kumar & Kassop, *supra* note 199.

201. In the summer preceding the 1980 presidential election, John Connally, former governor of Texas, and Ben Barnes, former lieutenant governor, toured Middle East capitals to dissuade Iran from releasing the hostages before the coming Fall election.

> Forty three years later, Barnes recalled that Connally told Egyptian President Anwar el-Sadat as well as leaders of other countries, "Look, Ronald Reagan's going to be elected president, and you need to get the word to Iran that they're going to make a better deal with Reagan than they are Carter." Connally continued, "It would be very smart for you to pass the word to the Iranians to wait until after this general election is over."
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> After the two Texans returned to the United States in September, Connally conferred with William Casey, chairman of Reagan's campaign. Casey, who months later became President Reagan's director of the Central Intelligence Agency, wanted to know whether "they were going to hold the hostages." Until the 1980 election, Connally was a Democrat, but he bolted the party to support Reagan. After the election, President Reagan offered the post of Secretary of Energy to Connally, but Connally declined.
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> This sad episode is well documented in Peter Baker, *A Four-Decade Secret: One Man's Story of Sabotaging Carter's Re-election*, N.Y. TIMES (Mar. 18, 2023).
>
> The Democrats suspected candidate Reagan's shenanigans, and a bipartisan House task force considered the matter. The committee concluded that there was no evidence to support the Democrats' suspicions. *Id*. The committee, however, did not have access to Barnes's explosive testimony. *Id.*

202. The president had decided to launch a military rescue mission against Iran but for reasons of secrecy, did not want to inform Congress before the strike force landed in Iranian soil. The War Powers Resolution, however, required the president to inform the Congress "in every possible instance" before committing our armed forces "into situations where imminent involvement in hostilities is clearly indicated by the circumstances." War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555. The Resolution obviously applied to the insertion of our Army into an openly hostile country. Cutler danced around this problem by hypothesizing that the president's unilateral authority might give the president power to start a major war and that Congress had no authority under the Constitution to impinge upon the president's power. Of course, anything is arguable, but Cutler's analysis is strained. *See supra* notes 36-37 and accompanying text. In order to avoid an easy constitutional decision, Cutler purported to believe that the Resolution should be construed as not applying when the president wanted to launch an invasion of a foreign country. Cutler's smoke-and-mirrors opinion is wrong. It is broad enough to cover any inconvenient act of Congress in the field of foreign affairs could be viewed as an impingement on the president's foreign affairs power.

> To be sure, secrecy was essential to the rescue operation. The better point of valor would have been for Cutler to advise the president of the weaknesses of his analysis. *See* CASTO *supra* note 37, at 138. With this complete advice, if the president elected to act unlawfully, his attorney/advisor could

advice that the mission was within the president's power. The only record we have of Cutler's advice is an opinion that he wrote after the mission failed.[203] Because the president had narrowed the mission down to a straightforward rescue, Cutler did not address retaliation or a response to "an assault that threatened our interests in the region."[204] He relied upon the *Neagle*/Koszta rescue principle and also cited *Durand* in support of his narrowly focused opinion.

In theory, Cutler should have addressed the Hostage Act's troubling stricture that in securing the release of hostages, the president should use "means, not amounting to acts of war."[205] His written opinion, however, makes no mention of the Act. By the usual standards of advising clients, this lapse is improper. Nevertheless, attorney advisors to national leaders occasionally and presumably consciously elect to ignore significant legal problems.[206] Perhaps Cutler mentioned the problem in his oral advice to the president.

B. Somalia

In 1992, the president dispatched a significant military force to Somalia to enable the provision of humanitarian aid in the midst of a chaotic civil war.[207] Actual combat was expected, and bloody combat came to pass.[208] The humanitarian operation's purpose was to deliver food, medicine, and other relief, and this aid was administered in significant part by in-country Americans. Unfortunately, delivery of the aid was "being severely hampered by the breakdown of government authority in Somalia and, in particular, by armed bands who steal relief commodities for their own use."[209] The attorney general asked OLC whether our armed forces could be landed in Somalia to protect the operation.

The protection of our citizens abroad clearly fell within the scope of Koszta/*Neagle* and *Durand*,[210] but OLC chose to ignore Koszta/*Neagle*. Instead, the

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morally facilitate her president's lawless project. *See* William R. Casto, *Serving a Lawless President 72*, MERCER L. REV. 855, 85 (2021). Cutler orally advised the president to consult with Congress as soon as the strike force left its secret landing zone to attack Teheran. CARTER, *supra* note 198, at 528.

203. Cutler noted in his opinion that the mission had been called off after the debacle in the desert. *See also* Brian, *supra* note 184, at 47.

204. *See supra* note 188 and accompanying text.

205. Cutler dealt with this problem by ignoring it.

206. For example, in 1861 the Law Officers of the Crown failed to mention a practice or principle clearly relevant to the resolution of the Trent Affair. *See* William R. Casto, *The Effectiveness of Customary International Law: Stephen Lushing and the Trent Affair*, 22 WASH U. GLOB. STUD. L. REV. 1, 19-20 (2023). In 1940, Attorney General Robert Jackson ignored a pertinent statute in advising the president on the Destroyers-for-Bases Deal. *See* CASTO, *supra* note 37, at 72. In 2002, Jay Bybee and John Yoo failed to consider two Supreme Court decisions casting significant doubt on the president's constitutional power to order torture contrary to an act of Congress. *See* CASTO, *supra* note 37, at 155.

207. For a valuable and concise treatment of the Somalia Operation, *see* DYCUS, *supra* note 84, at 475-78.

208. One noteworthy battle has been graphically portrayed in book and film. MARK BOWDEN, BLACK HAWK DOWN (1999); BLACK HAWK DOWN (Columbia Pictures 2001).

209. Memorandum Opinion for the Attorney General, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, 16 O.L.C. 8, 6 (Dec. 4, 1992) [hereinafter Flanigan].

210. At first glance, there seems to be a bootstrap aspect to OLC's opinions. Could the president put Americans in peril and then claim that military intervention was necessary to protect them? OLC noted,

opinion cites and quotes extensively from *Durand*.[211] This choice is particularly strange because Koszta/*Neagle* was the more pertinent case. *Durand* was a retribution case and only tangentially involved the protection of our citizens.[212]

OLC saved Koszta/*Neagle* for another purpose. The Somalia operation was a joint project in which we shared our efforts with other nations. Therefore, an issue arose whether the president could engage in military operations to protect foreign nationals. In a breathtaking overreach, OLC boldly declared that Koszta/*Neagle* established the president's unilateral authority to protect foreign nationals overseas.

OLC explained that Koszta was a "case of intervention on behalf of a foreign national, one Martin Koszta [and] was cited approvingly by the Supreme Court in *In re Neagle*."[213] This reading of Koszta/*Neagle* is bizarre. In a century and a half, no one, including the Executive, had ever read the incident as establishing a constitutional principle that the president has a unilateral authority to launch military operations to protect foreign nationals overseas.[214] Until this unacceptable overreach, everyone had always assumed that Koszta/*Neagle* involved presidential authority to protect our own citizens.

CONCLUSION

Unlike Marc Anthony, I come to bury *Durand* but to praise *Neagle*. *Durand* entrusts the president with unilateral war powers subject to no apparent limit and beyond effective judicial or congressional review. The only thing left to check these unilateral powers is the president's personal and political judgement.

The President's judgment as a limitation should not be discounted. After all, he is the only elected official who has been selected to represent the entire country. We select him based upon our respect for her judgment. In addition, the president's otherwise unreviewable political judgment is informed, affected, and limited by other independent actors in our political system.[215] But the plan of the Constitution entrusts the decision to go to war to the collective wisdom of the Congress – not the president. To be sure, there are emergency exceptions like self-defense and the rescue of Mr. Koszta. Absent these exceptions, however, the Congress' collective wisdom – not the president's individual judgment – should control this matter.

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however, that "private United States nationals [already] are currently involved in relief operations in Somalia." *Id*. at 8.

211. *Id*. at 9-10.

212. *Durand* might be used to support a presidential power to forestall future attacks on U.S. citizens. *See supra* notes 132-33 and accompanying text.

213. Flanigan, *supra* note 209, at 11 n.3.

214. Koszta was a subject of the Austro-Hungarian Empire. Following OLC's bizarre logic, the president has a unilateral military authority to protect foreign nationals from their own government.

215. *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, (2012). *See also* Waxman, *supra* note 45, (discussing Congress's investigation and appropriation authority).

Finally, recent history forces us to consider the possibility that a president might be mentally unstable, irresponsible, and have no significant experience in our political society. This sad consideration surely counsels against the continuing validity of the *Durand* case. For Justice Jackson, the ultimate constitutional nightmare was that "the people [might] let the command of the war power fall into irresponsible and unscrupulous hands."[216]

216. Korematsu v. United States, 323 U.S. 214, 248 (1944).