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## CREDIBILITY AND WAR POWERS

*Ganesh Sitaraman\**

### INTRODUCTION

In late August 2013, after Syrian civilians were horrifically attacked with sarin gas, President Barack Obama declared his intention to conduct limited airstrikes against the Syrian regime of President Bashar al-Assad. A year earlier, President Obama had announced that the use of chemical weapons was “red line” for the United States.<sup>1</sup> Advocates for military action now argued that if the credibility of American threats diminished, dictators would have license to act with impunity.<sup>2</sup> President Obama himself seemed to embrace this justification for action. “The international community’s credibility is on the line,” he said in early September. “And America and Congress’s credibility is on the line.”<sup>3</sup>

For all the talk of credibility, political scientists have offered devastating critiques of credibility arguments in the context of military threats. They have demonstrated not only that the concept is often deployed in incomplete and illogical ways but also that as a historical matter, a country’s “credibility” based on its reputation and past actions has little or no effect on the behavior of opponents in high-stakes international crises. In the crises in the run-up to World War I, in the Berlin crises of the late 1950s and early 1960s, and even in the crises leading to World War II, threats from countries that had previously backed down were not seen as less credible by their opponents. In some cases, the threats were even thought to be *more* credible.

For constitutional lawyers, this research should be particularly troubling because credibility has migrated from foreign policy into the constitutional law of war powers. In a series of opinions, including on

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<sup>1</sup> President Barack Obama, Remarks by the President to the White House Press Corps (Aug. 20, 2012), *available at* [www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps](http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps).

<sup>2</sup> Michael Crowley, *The Two Big Reasons Obama Might Strike Syria*, TIME SWAMPLAND (Aug. 26, 2013), <http://swampland.time.com/2013/08/26/the-two-big-reasons-obama-might-strike-syria>.

<sup>3</sup> Jennifer Epstein, *President Obama: America's Credibility on the Line in Syria*, POLITICO (Sept. 4, 2013, 4:25 PM), <http://www.politico.com/story/2013/09/obama-america-credibility-syria-96254.html>.

Somalia (1992), Haiti (2004), and Libya (2011), the Justice Department's Office of Legal Counsel (OLC) has argued that the credibility of the United Nations Security Council is a "national interest" that can justify presidential authority to use military force without prior congressional authorization.<sup>4</sup> This Essay argues that the credibility justification for the use of force should be removed from the constitutional law of presidential war powers. Incorporating credibility as one of the "national interests" that justify presidential use of force expands the President's war powers significantly without a legitimate policy justification.

### I. UNDERSTANDING CREDIBILITY

As a justification for the use of military force, the preservation of credibility is ubiquitous in foreign policy. President Clinton thought that if the United States failed to uphold its commitments in Somalia after the Black Hawk Down incident, then "[o]ur own credibility with friends and allies would be severely damaged. Our leadership in world affairs would be undermined . . ."<sup>5</sup> President Reagan argued that if the United States failed to confront guerrillas in Central America, "our credibility would collapse."<sup>6</sup> Years earlier, President Truman said that defeat in Korea "would be an open invitation to new acts of aggression elsewhere."<sup>7</sup> For decades during the Cold War, credibility arguments were prominent in game theory analyses of deterrence, arms control, and U.S.-Soviet relations.<sup>8</sup> Despite the importance of these theories, political scientists at the time acknowledged that they "know remarkably little" about credibility<sup>9</sup> and had "neither theoretically grounded expectations nor solid evidence" of how behavior affects expectations of future action.<sup>10</sup> More recently, political scientists have turned to serious study of credibility. These studies call into

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<sup>4</sup> Auth. to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at \*10 (Apr. 1, 2011) [hereinafter *Libya Opinion*]; Deployment of U.S. Armed Forces to Haiti, 28 Op. O.L.C., 2004 WL 5743940, at \*4 (Mar. 17, 2004) [hereinafter *Haiti Opinion*]; Auth. to Use U.S. Military Forces in Som., 16 Op. O.L.C. 6, 11 (1992) [hereinafter *Somalia Opinion*].

<sup>5</sup> JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS 4–5 (1996) (quoting *Clinton's Words on Somalia: The Responsibilities of American Leadership*, N.Y. TIMES, Oct. 8, 1993, at A15).

<sup>6</sup> *Id.* at 2 (quoting *President Reagan's Address on Central America to Joint Session of Congress*, N.Y. TIMES, Apr. 28, 1983, at A12) (internal quotation mark omitted).

<sup>7</sup> *Id.* (quoting JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT 110 (1982)) (internal quotation marks omitted).

<sup>8</sup> See, e.g., HERMAN KAHN, ON THERMONUCLEAR WAR (1960); THOMAS C. SCHELLING, ARMS AND INFLUENCE (1966).

<sup>9</sup> Robert Jervis, *Deterrence and Perception*, INT'L SECURITY, Winter 1982/1983, at 3, 8.

<sup>10</sup> *Id.* at 9.

question the use of credibility arguments in the context of military threats.

### A. *Theories of Credibility*

The credibility of a threat is “the perceived likelihood that the threat will be carried out if the conditions that are supposed to trigger it are met.”<sup>11</sup> When people believe a threat will be carried out, it is credible; when they believe it is a bluff, the threat is not credible. Credibility is an audience’s perception. If the United States thinks its threats are credible, but opponents do not, then the threats are not credible. Credibility is also not universal. Different actors might assess the credibility of a threat differently — and different individuals within the same government might debate the credibility of a threat.<sup>12</sup>

Political scientists have identified five different theories by which people perceive threats as credible. The most prominent — and the one consistently invoked as “credibility” in foreign policy debates from Vietnam to Syria — is the *past actions* theory.<sup>13</sup> The past actions theory links credibility to a country’s historical record of fulfilling its threats. It has two central claims: First, credibility is determined by the historical evidence of a country’s actions. Second, there is a direct relationship between the perception that a country historically follows through on its commitments and the country’s credibility. The theory’s rationale is that past actions might illustrate something important about the adversary’s character, interests, or capacity to act. But the core of the theory is narrower: the likelihood of a country following through on a threat today is dependent on whether the country followed through on its threats in the past.

Commentators have also frequently offered a variation of the past actions theory of credibility that focuses on *reputation* arguments.<sup>14</sup> A reputation is a “judgment of someone’s character (or disposition) that is then used to predict or explain future behavior.”<sup>15</sup> Reputation arguments in international politics assume that decisionmakers attribute behavior to character or dispositional traits, rather than to situational factors (such as national interests, public pressure, or military capabilities). When decisions are attributed to situation, the assumption is that most people in the same situation would act the same way. When decisions are attributed to disposition, it means that this individual ac-

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<sup>11</sup> DARYL G. PRESS, CALCULATING CREDIBILITY: HOW LEADERS ASSESS MILITARY THREATS 10 (2005).

<sup>12</sup> *Id.* at 10–11.

<sup>13</sup> Discussion of the past actions theory draws heavily on PRESS, *supra* note 11, at 11–12.

<sup>14</sup> Discussion of the reputation theory of credibility draws heavily on MERCER, *supra* note 5, at 6–7.

<sup>15</sup> *Id.* at 6.

tor will behave a certain way, independent of the situation. Note that the reputation and past actions theories are not exactly the same: A nation's past actions may lead to a reputation if others interpret its behavior in dispositional rather than situational terms and then use that past conduct to predict similar behavior in the future. A nation's reputation, however, might also be ascribed to other dispositional traits (such as ideological commitments or inherent characteristics).

The leading alternative to the past actions and reputation theories of credibility is the *current calculus* theory.<sup>16</sup> Current calculus theory holds that credibility is not a function of past actions or reputation, but rather a function of a country's present capabilities and interests in a particular situation. On this theory, an adversary assesses credibility based on the country's ability to effectuate its threat and the costs and benefits to that country in enforcing its threat. Two other theories are worth noting. The *ingrained lessons* theory holds that decisionmakers do not look to the threatening country's history, but instead to their own history. For example, they will expect today's adversary to back down if their previous adversaries also backed down. The *never again* theory holds that breaking a commitment actually *increases* credibility of future threats because decisionmakers will understand that backing down a second time is too costly.

This Essay focuses on the past actions and reputation theories, and given their dominance in foreign policy, refers to them together as "credibility arguments."

### B. *The Logical Limits of Credibility Arguments*

In the context of military threats and the use of force, credibility arguments suffer from some important limitations. First, because both past actions and reputation are based on audience interpretations, a country can have multiple reputations and a single action can create different reputations among different audiences.<sup>17</sup> To some, following through on a threat demonstrates resolve; to others, foolishness. Second, action in one context might not migrate into reputation in another.<sup>18</sup> If the United States sets a "red line" on a fishing issue for Micronesia and then backs down, it is unlikely to send a signal to Iran that all American "red lines" are bluffs. The Iranians may ignore the Micronesian case because it is fundamentally different from their own.

Third, if we assume that credibility matters, then both sides know that it matters, and both sides can take it into account. Social scien-

<sup>16</sup> Discussion of the three remaining theories of credibility draws heavily on PRESS, *supra* note 11, at 20–29.

<sup>17</sup> See MERCER, *supra* note 5, at 7.

<sup>18</sup> See George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 595, S102–09 (2002).

tists call the resulting problem *recursion*,<sup>19</sup> but we generally know it as the “if she knows that I know that she knows . . .” problem. Take Syria.<sup>20</sup> If we assume Assad is simpleminded, and the United States backs down, then Assad will think he can use chemical weapons again. But if Assad also knows that credibility is important, and the United States backs down, then Assad knows President Obama has paid a reputation cost in bluffing. Perhaps some in the United States will even say “never again!” If Assad then uses chemical weapons again, it will be harder for Obama to bluff a second time. As a result, backing down the first time actually makes any future threat by Obama *more* credible. And Assad knows this. Now take it one step further. If Assad knows that Obama knows this, then Assad will reason that Obama’s threat is a bluff because Obama knows Assad will think Obama’s action is more credible. “Keeping the logic straight is difficult,” as Jonathan Mercer puts it, “but it is also irrelevant: no one knows how many rounds the game will go on, for there is no logical place to stop.”<sup>21</sup> Credibility arguments are self-defeating because if we assume they matter, everyone else knows they matter too — and can account for them. Because the recursion game goes on ad infinitum, it is impossible to determine what policy to pursue.

### C. Evidence from History

Credibility arguments could also be justified with real world evidence. For example, data could shed light on the manner of leaders’ credibility determinations: Do they actually pay attention to the disposition of the opponent based on their past actions? Or do they undertake a current calculus and focus on interests, capabilities, and the immediate situational context?

In a series of qualitative studies, political scientists have shown that past actions and reputation theories of credibility have little historical basis for support.<sup>22</sup> When leaders evaluate their opponents, they assess threats based on current calculations, not on past actions. And when leaders have justified conflicts based on preserving a reputation for resolve, others have not always interpreted their actions as was intended. Note that these studies are limited to the context of military

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<sup>19</sup> Jonathan Mercer, *Bad Reputation*, FOREIGN AFF. (Aug. 28, 2013), <http://www.foreignaffairs.com/articles/136577/jonathan-mercero/bad-reputation>.

<sup>20</sup> Mercer applies recursion to Syria along these lines. *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> There are also some quantitative studies, which have mixed findings. As Professor Daryl Press notes, these studies suffer from selection effects problems because “aggressors disproportionately challenge those they expect will back down.” PRESS, *supra* note 11, at 15; *see also* Douglas M. Gibler, *The Costs of Reneging: Reputation and Alliance Formation*, 52 J. CONFLICT RESOL. 426, 430–31 (2008).

threats and international crises. Scholars hypothesize that military threats might differ from other contexts because the stakes are so high that leaders analyze the situation instead of using heuristics like reputation.<sup>23</sup> These findings therefore do not extend to all international issues.<sup>24</sup>

In the most extensive research on credibility theories, Professor Daryl Press reviewed thousands of pages of archival documents and found that the current calculus theory, not the past action theory, best explains decisionmaking in the “appeasement crises” of the 1930s, the Berlin crises of the late 1950s and early 1960s, and the deliberations during the Cuban Missile Crisis. On the past actions theory, the Nazis should have interpreted British and French threats as not credible because the Allies repeatedly backed down when Germany took aggressive steps in the 1930s. The historical evidence, however, shows that German leaders believed British and French threats were credible — even after the Allies backed down. For the German leaders, credibility was a function of the Allies’ power, not their reputation. Indeed, Press finds that German leaders almost never referenced past actions by the British and French. Accordingly, he concludes that appeasement was poor strategy not because the Allies undermined their credibility, but because it allowed Germany to increase its power.<sup>25</sup>

From 1958 to 1961, the world watched a number of Berlin crises unfold between the Soviets and the West. Soviet Premier Nikita Khrushchev set six-month deadlines for the Allies to withdraw from West Berlin, and he threatened to cut off access to the city. Yet every time, Khrushchev backed down. On the past actions theory, British and American leaders should have interpreted each successive threat as less credible. However, Press found that Soviet threats actually became *more* credible, not less credible.<sup>26</sup> During this same period, the Soviets expanded their nuclear arsenal; as their nuclear prowess grew, so did their credibility. Indeed, by the time of the Cuban Missile Crisis, American leaders strongly believed that Khrushchev would not back down if the United States acted in Cuba. Here too Press finds

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<sup>23</sup> PRESS, *supra* note 11, at 6.

<sup>24</sup> Reputation’s role in international law has long been debated. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (expressing skepticism); Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009) (dissecting the concept); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT’L & COMP. L. 379 (2006) (defending reputation).

<sup>25</sup> *See* PRESS, *supra* note 11, at 42–79; Daryl G. Press, *The Credibility of Power: Assessing Threats During the “Appeasement” Crises of the 1930s*, INT’L SECURITY, Winter 2004/2005, at 136.

<sup>26</sup> *See* PRESS, *supra* note 11, at 80–116.

that British and American leaders almost never mentioned Khrushchev's record of bluffing.<sup>27</sup>

In an important book on reputation, Mercer analyzed the crises leading up to World War I.<sup>28</sup> He finds that decisionmakers interpreted their adversaries' backing down based more on the specific situational context, rather than on the disposition of the actors.<sup>29</sup> Thus, when the Germans backed down, the Triple Entente of Britain, France, and Russia attributed those defeats to situational factors. To the extent they considered past actions, the Entente believed Germany would be *more* likely to follow through on its threats in the future because it had previously been defeated. Note also that both Press's and Mercer's cases stack the deck in favor of past actions theory: the players were the same, there were repeated crises in a short period of time, and the crises involved the same issues. These are precisely the situations in which we would expect past action theories of credibility to be most powerful at explaining behavior.

Looking specifically at military actions justified by credibility arguments, political scientists have also provided historical evidence that allies and adversaries do not necessarily interpret these actions as enhancing America's reputation or credibility. In a study of the Korean War, Mercer recounts how Secretary of State Dean Acheson believed that Western European allies were at "near-panic" over whether the United States would act.<sup>30</sup> They were not. When the British Cabinet met to discuss the issue, Korea was fourth on their agenda and some of the ministers could not locate Korea on the map.<sup>31</sup> Meanwhile, the French were concerned that the Americans would be *too* resolute. They worried that the United States would start a world war over what they saw as an area that was strategically unimportant.<sup>32</sup> In another study, Professor Ted Hopf analyzed the Soviet reaction to the United States's withdrawal from Vietnam. Hopf found that the Soviets did not see United States withdrawal as decreasing American credibility in the Cold War.<sup>33</sup>

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<sup>27</sup> See *id.* at 117–41.

<sup>28</sup> This discussion draws on MERCER, *supra* note 5.

<sup>29</sup> See *id.* at 213.

<sup>30</sup> Jonathan Mercer, *Emotion and Strategy in the Korean War*, 67 INT'L ORG. 221, 234 (2013) (quoting Notes Regarding Meeting with Congressional Leaders, June 27, 1950 (June 27, 1950) (on file with the Harry S. Truman Library, Harry S. Truman Administration File, Elsey Papers)).

<sup>31</sup> *Id.* at 235.

<sup>32</sup> See *id.* at 236–37.

<sup>33</sup> TED HOPF, PERIPHERAL VISIONS (1994). The limits of this research are discussed in PRESS, *supra* note 11, at 16.



## II. CREDIBILITY AND PRESIDENTIAL WAR POWERS

Despite the widespread use of credibility arguments in foreign policy, political scientists have convincingly argued that these arguments suffer from logical flaws and have no significant basis in historical evidence when it comes to military threats. Nonetheless, these arguments have migrated into constitutional debates on war powers, and “credibility” has become an important justification for presidential war powers.

### A. *The Scope of Presidential War Powers*

The scope of the President’s power to order the use of military force without congressional approval is unclear as a matter of law. The original meaning of the Constitution’s provisions related to war and peace are seriously debated, the Supreme Court has never issued an opinion that delineates the specific scope of presidential war powers, and Congress and the President have not come to an agreement on the exact scope of these powers.<sup>34</sup> For practical purposes, the relevant legal framework comes from OLC in the Department of Justice. OLC has issued a number of opinions addressing the authority of the President to use force absent congressional approval.<sup>35</sup> These opinions seek to determine when the use of force amounts to “war,” which for constitutional purposes requires congressional authorization, and they rely heavily on historical practice and prior legal reasoning.<sup>36</sup> OLC’s opinions also identify credibility — particularly the credibility of the United Nations Security Council — as one element that contributes to the President’s independent constitutional authority to use force abroad.

The OLC’s 2011 opinion on the President’s authority to use military force in Libya is the most recent statement.<sup>37</sup> The Libya Opinion

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<sup>34</sup> The literature is voluminous, but for a flavor of these debates, see LOUIS FISHER, *PRESIDENTIAL WAR POWER* (3d ed. 2013); JOHN YOO, *THE POWERS OF WAR AND PEACE* (2005); and David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 720, 761–66, 770 (2008). As an interpretive matter, I follow the OLC’s basic pragmatism, recognizing some limitations on presidential war powers. See, e.g., Marty Lederman, *The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013, 1:21 PM), <http://opiniojuris.org/2013/09/01/syria-insta-symposium-marty-lederman-part-constitution-charter-intersection> (describing a “Clinton/Obama ‘third way’” on war powers). Of course, this approach is deeply contested. Compare YOO, *supra* (arguing for expansive presidential powers), with JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993) (arguing for expansive congressional authority).

<sup>35</sup> See, e.g., Libya Opinion, *supra* note 4, at \*10; Haiti Opinion, *supra* note 4, at \*4; Somalia Opinion, *supra* note 4, at 11.

<sup>36</sup> For a recent discussion of historical practice, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); and Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

<sup>37</sup> Libya Opinion, *supra* note 4.

sets forth a two-prong framework for assessing the President's authority to use force, absent congressional authorization. First, the military operation must serve "sufficiently important national interests" to justify presidential action based on the Commander-in-Chief and Chief Executive powers and the President's authority to conduct foreign relations.<sup>38</sup> Second, the military operation must have an anticipated "nature, scope, and duration" that does not constitute "war."<sup>39</sup> For purposes of credibility arguments, the national interest prong is the relevant element, and recent OLC legal opinions identify three different categories of "national interest" that can justify the President's independent authority to use force. Note that OLC opinions, such as the Libya Opinion, generally state that a *combination* of interests creates sufficient foundation for presidential action;<sup>40</sup> as a result, it is not clear whether some of these interests can independently provide a sufficient basis for presidential action.

The narrowest and least controversial category of national interest is the power to repel attacks on the United States<sup>41</sup> and to "protect the lives and property of Americans abroad."<sup>42</sup> OLC opinions on presidential action in Iran (1980), Somalia (1992), Bosnia (1995), Haiti (2004), and Libya (2011) all reference this narrow authority,<sup>43</sup> as do a 1941 Attorney General opinion<sup>44</sup> and the 1860 case, *Durand v. Hollins*.<sup>45</sup>

More recently, OLC has identified "preservation of regional stability" as a possible national interest in its Libya (2011), Haiti (2004), and Bosnia (1995) opinions. The boundaries of the regional category are slippery, particularly as Presidents can argue that "regional stability" is vital, even in regions that may be of comparatively little strategic value to the United States.

The final category is the United States' interest in "maintaining the credibility of United Nations Security Council decisions."<sup>46</sup> In the

<sup>38</sup> *Id.* at \*10.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See, e.g.*, Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.")

<sup>42</sup> Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 121 (1979) [hereinafter Iran Opinion].

<sup>43</sup> Libya Opinion, *supra* note 4; Haiti Opinion, *supra* note 4; Proposed Deployment of United States Armed Forces into Bosnia, 29 Op. O.L.C. 327 (1995) [hereinafter Bosnia Opinion]; Somalia Opinion, *supra* note 4; Iran Opinion, *supra* note 42.

<sup>44</sup> Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 62 (1941).

<sup>45</sup> 8 F. Cas. 111, 111 (C.C.S.D.N.Y. 1860) (No. 4186).

<sup>46</sup> Libya Opinion, *supra* note 4, at \*12 (quoting Bosnia Opinion, *supra* note 43, at 333) (internal quotation mark omitted); *see also* Haiti Opinion, *supra* note 4, at \*4 (quoting Somalia Opinion, *supra* note 4, at 11).

Libya Opinion, the OLC quoted President Obama as saying that “[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security.”<sup>47</sup> It concluded that the President could find this a “substantial national foreign policy objective.”<sup>48</sup>

OLC opinions from Somalia (1992), Haiti (2004), and Libya (2011) all root the U.N. credibility argument in the Truman Administration’s opinion authorizing the use of military force in Korea.<sup>49</sup> That opinion noted that if the United States did not take action, then the United Nations would have “ceased to exist as a serious instrumentality for the maintenance of international peace,”<sup>50</sup> and it stated that the “continued existence of the United Nations as an effective international organization is a paramount United States interest.”<sup>51</sup> Despite frequent citation, the Korea Opinion — and other Cold War-era opinions — actually do not rely on credibility arguments.<sup>52</sup> Instead, they focus on enforcing collective security agreements<sup>53</sup> or on the President’s responsibility to “Take Care” that the laws, including treaties, be “faithfully executed.”<sup>54</sup> Importantly, this shift from the “Take Care” argument to a “credibility” argument turns a legal argument about treaty obligations into a policy argument about U.S. interests.

### B. *The Case Against Credibility*

The OLC’s policy argument that reliance on the credibility of the United Nations Security Council is a legitimate “national interest” that justifies presidential action without prior congressional approval is

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<sup>47</sup> Libya Opinion, *supra* note 4, at \*12 (alteration in original) (quoting President Barack Obama, Address at the National Defense University (Mar. 28, 2011)) (internal quotation marks omitted).

<sup>48</sup> *Id.* (quoting Somalia Opinion, *supra* note 4, at 12).

<sup>49</sup> Authority of the President to Repel the Attack in Korea (July 3, 1950), *in* 23 DEP’T ST. BULL. 173, 176–77 (1950).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 177.

<sup>52</sup> To the extent that the Korea opinion involved the “effectiveness” of the United Nations, it might be better interpreted in light of the broader context: the failure of the League of Nations, the recent establishment of the United Nations, and the Korea situation as the first major test of the institution. In this context, the “effectiveness” interest is less about the “credibility” of the United Nations in terms of past actions or reputation, and more about ensuring the continued existence of the infant organization.

<sup>53</sup> See, e.g., Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP’T ST. BULL. 474, 480–82 (1966) [hereinafter Vietnam Opinion]; Iran Opinion, *supra* note 42, at 186.

<sup>54</sup> This argument is controversial. See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1023–27 (2013); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 153–56 (1995); Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008).

troubling. Political science research, basic logical reasoning about credibility, and concerns about future OLC expansion of the “credibility” category all suggest that credibility arguments should be left out of the constitutional law of war powers.

First, research in political science has demonstrated that credibility arguments are logically problematic and without serious historical support. Constitutional doctrine should not rest on such logically and factually flawed premises. All the other justifications for independent presidential authority have at least arguable policy justifications. The defensive interests in repelling attacks and protecting American lives and property abroad rely on the country’s obligation to protect its citizens. The regional interest, while certainly broader and opaque in its boundaries, can be justified on policy grounds. When the Bosnia Opinion (1995) referenced the American national interest in European security and stability, it was in the context of the recent end of a half-century-long Cold War that divided Europe — which itself was the product of a half-century defined by two world wars that began in Europe and led to American involvement.<sup>55</sup> Case by case, regional arguments can be contested, but they at least offer the possibility of a policy justification. Credibility arguments are on a far weaker foundation.

To be sure, one might argue that there is a difference between *national* credibility, which political scientists have investigated, and the credibility of international institutions. While the actor is different, the distinctions are minor. An international institution’s likelihood of acting in any given situation is understood *ex ante* to be a function, at least in part, of its procedures and decision rules. The U.N. Security Council, for example, is famously limited by the permanent five’s veto powers. If anything, this fact means that past actions and reputational credibility theories will almost invariably be *weaker* when applied to the United Nations, as compared to a single country, because action depends on multinational agreement.

Second, the United States interest in the “credibility” of the U.N. Security Council is questionable on its own terms. The Libya Opinion states that the United States is not required to act when the Security Council has authorized action.<sup>56</sup> The OLC has also explicitly recognized that the United States may use force without Security Council authorization.<sup>57</sup> The opinions thus allow the United States to abandon the credibility of the Security Council if the United States does not want to use force. This might not be too troubling, as it is surely pos-

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<sup>55</sup> Bosnia Opinion, *supra* note 43.

<sup>56</sup> Libya Opinion, *supra* note 4, at \*12.

<sup>57</sup> Haiti Opinion, *supra* note 4, at \*4.

sible for the President to have authority to act, but choose not to use it. But for those who defend the U.N. credibility argument, it should be extremely troubling that the United States can abandon the credibility of the Security Council if the U.N. does not authorize force and the United States wants to act anyway. Because the U.N. Charter's provisions limit the use of force in the absence of self-defense or a Security Council resolution,<sup>58</sup> U.S. action without U.N. authorization would actually *undermine* the United Nations' credibility. In other words, OLC is trying to have it both ways.

Third, the presence of credibility arguments in OLC opinions creates a risk that future opinions will build on these flawed foundations — expanding credibility from the U.N. to the nation's credibility more generally. The Kosovo case provides an example of creep in precedent. In the Libya Opinion, OLC referred to the 1999 Kosovo action as a “precedent.” In public discourse, Kosovo was justified in part on the credibility of NATO (there was no U.N. resolution for Kosovo).<sup>59</sup> If the Kosovo action is now “precedent,” it is possible that future OLC lawyers will expand the credibility justification to NATO, other international organizations,<sup>60</sup> or maybe even to the credibility of the United States' threats. The expansion of the credibility argument in constitutional doctrine is troubling because it could allow Presidents to bootstrap themselves into war. If the president knows that she can act independently to engage America in a conflict if there is a credibility interest at stake, then she has an incentive to create credibility interests. A strategic president could decide to declare “red lines” in order to build for herself the constitutional authority necessary to enforce those “red lines” in the future.<sup>61</sup>

While conscientious executive branch lawyering could obviously stop the country from sliding down this slippery slope, there is nonetheless a risk that future OLC opinions will expand credibility to encompass such situations.<sup>62</sup> Indeed, the Syria case suggests that the “national interests” prong is generally subject to slippage.<sup>63</sup> The U.N.

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<sup>58</sup> See U.N. Charter art. 2, 42, 51.

<sup>59</sup> Press Conference, President Bill Clinton (Mar. 18, 1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/03/19/clinton.presser/transcript.html>.

<sup>60</sup> Indeed, military action in Vietnam was in part justified based on treaty commitments to SEATO. See Vietnam Opinion, *supra* note 53.

<sup>61</sup> See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. (forthcoming 2014) (manuscript at 25–26), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2316777](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316777).

<sup>62</sup> Compare JACK GOLDSMITH, THE TERROR PRESIDENCY 32–39, 79–80, 114–76 (2009) (arguing that Executive Branch lawyers can provide meaningful constraints), with BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87–119 (2010) (arguing the opposite).

<sup>63</sup> It is beyond the scope of this Essay to assess whether the “national interests” prong is generally too vague and amorphous to provide any serious constraint.

Security Council did not authorize action in Syria and the Obama Administration did not claim that U.S. persons or property were at risk. Still, President Obama seemed confident he could act without congressional authorization. Professor Harold Koh has offered a defense of the use of force in Syria, absent prior congressional authorization. Citing the Bosnia (1995) and Libya (2011) opinions, he identifies “promoting regional stability and preventing destruction of the near-century-old ban on chemical weapons” as sufficient national interests.<sup>64</sup> It is striking, however, that the latter interest is not referenced specifically in either of the opinions Koh cites. It is also worth noting that Koh’s argument is not a credibility argument, as it is defined here. The literature in political science — and the argument here — is about the *credibility of threats*, not the robustness of international norms (even if the word “credibility” is used to describe robustness). There may be non-credibility reasons to enforce international norms and one could debate whether those reasons are sufficient to justify unilateral presidential action,<sup>65</sup> but the point here is simply to bury credibility arguments. Given the possibility of slippage from current doctrine, credibility arguments are a loaded gun, ready to be fired by hawkish presidents who have willing executive branch lawyers.

A better approach would be for OLC to simply eliminate credibility from the “national interests” that justify presidential power to use force, in the absence of congressional authorization. This is not to say that credibility could not be used in rhetoric or as a policy justification (although its use should probably be viewed with skepticism, given the political science research). Rather, the credibility justification is sufficiently problematic that presidents should have to get congressional authorization to use force first.<sup>66</sup> Note also that removing credibility arguments from constitutional doctrine would not eliminate the United Nations from legal debates about the use of force. Security Council authorizations are still required as a matter of international law (outside self-defense). And if the United States wants to act outside of that constraint, presidents would still have an incentive to obtain U.N. authorization to build support in domestic and international public opin-

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<sup>64</sup> Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part I: Political Miscues and U.S. Law)*, JUST SECURITY (Sept. 26, 2013, 4:30 AM), <http://justsecurity.org/2013/09/26/koh-syria>.

<sup>65</sup> Constructivists, for example, might argue that norms exert weight in international affairs, and that these norms might therefore be an important “national interest” worthy of military enforcement. For a discussion of constructivism, see NICHOLAS GREENWOOD ONUF, *WORLD OF OUR MAKING* (1989); and ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

<sup>66</sup> For a discussion of the consequences congressional authorization might have on shaping the president’s ability to threaten force, see Matthew C. Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123 *YALE L.J. ONLINE* 297 (2013).

ion. Even more indirectly, of course, presidents could always argue that the U.N. Security Council's authorization provides a signal of how important the underlying policy issues are. But for purposes of *constitutional* authority, presidents would have to argue that they have new independent authorities to use force (such as enforcing U.N. resolutions or supporting international norms), resurrect legal arguments about the Take Care Clause and collective security treaties, or take their case to Congress — not rely on the questionable interest in the United Nations or the country's "credibility."

#### CONCLUSION

Credibility arguments are everywhere in foreign policy. From Truman to Reagan to Obama, presidents have argued that force was necessary not just to advance concrete interests but to preserve credibility. Constitutional lawyers have not been immune to these arguments, with executive branch legal opinions identifying the credibility of the United Nations as a national interest that justifies presidential authority to use force, absent prior congressional approval. However, political scientists have demonstrated that in the context of military threats, credibility arguments are logically problematic and have little historical support. Constitutional lawyers should not rely on these faulty foundations to justify unilateral presidential war powers.