

Article

U.S. Foreign Relations Law from the Outside In

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INTRODUCTION

In the fall of 1982, a striking exchange occurred between senior officials from the United States and the People’s Republic of China (PRC). A class of

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investors had sued China in U.S. federal court for failing to pay interest on bonds that the Imperial Chinese Government issued in 1911 to fund the construction of the Hukuang Railway.¹ The court received no response, so it entered a default judgment, paving the way for the attachment of over \$41 million in PRC assets.² Upon learning of this development, China's paramount leader Deng Xiaoping asked U.S. Secretary of State George Shultz to order the court to remove the threat to the assets, but Shultz refused.³ Such an order, Shultz explained, would be impossible due to the separation of powers.⁴ Confused, Deng asked, "What is the separation of powers?"⁵ Shultz dispatched State Department Legal Adviser Davis Robinson to Beijing to explain.⁶

Fast forward now to 2013 and consider a veritable photo negative of Deng's ignorance. In *Kiobel v. Royal Dutch Petroleum*, the Supreme Court granted certiorari and ordered supplemental briefing on whether a nexus to U.S. territory should be required for an actionable claim under the Alien Tort Statute (ATS),⁷ which confers jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁸ To aid the Court's deliberation, legal advisers from the foreign ministries of the United Kingdom and the Netherlands co-filed an amicus brief with an American lawyer, arguing for a narrow reading of ATS authority.⁹ This filing demonstrated not only an awareness of the existence and function of the U.S. Supreme Court and amicus briefs, but also detailed knowledge of a specific statute and associated case law.¹⁰ If Deng was a novice at American government, the British and the Dutch seemed to be experts.

These disparate episodes and many others like them raise common questions about foreign knowledge of U.S. foreign relations law—the field of domestic law that "governs how [the United States] interacts with the rest of the world."¹¹ Does it matter whether foreign governments understand U.S. foreign relations law? Do they understand it in fact, or do they operate in conditions of "acoustic separation"¹² from the community of American legal actors who study, design, and apply this law, resulting in foreign misperception or ignorance? If

1. See *Jackson v. People's Repub. of China*, 550 F. Supp. 869, 870-73 (N.D. Ala. 1982) (describing the lawsuit).

2. *Id.* at 874, 877.

3. MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 44 (2010) (statement by former Legal Adviser Davis R. Robinson).

4. *Id.*

5. *Id.* (paraphrasing Secretary Shultz).

6. *Id.*

7. *Kiobel v. Royal Dutch Petroleum Co.*, 565 U.S. 961 (2011).

8. 28 U.S.C. § 1350.

9. Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 405480.

10. *Id.* at *29-33.

11. Curtis A. Bradley, *What is Foreign Relations Law?*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* 3 (Curtis A. Bradley ed., 2019).

12. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634-35 (1984).

foreign epistemic conditions vary cross-nationally or by issue, what accounts for that variation? And what, if anything, should U.S. foreign relations law do to shape the quality and pervasiveness of foreign knowledge?

For the most part, the U.S. government has not taken these questions seriously. The U.S. intelligence community generally does not seek to ascertain or account for foreign knowledge of U.S. foreign relations law in generating intelligence products for policymakers.¹³ To the extent that U.S. officials touch upon questions of foreign knowledge in open sources, they do so only by way of assumptions. Those assumptions, moreover, are usually unacknowledged and very markedly without explanation, much less a proffer of evidentiary support. Consider three examples, each involving a legal authority of longstanding and recurring significance.

First, in a series of enactments since 1975, Congress has established procedures for the expedited adoption of certain types of international trade agreements.¹⁴ These procedures, which are currently available under so-called Trade Promotion Authority (TPA),¹⁵ require Congress to vote on approval of a qualifying agreement on an expedited basis and without the possibility of amendment.¹⁶ In doing so, the procedures aim “to reduce the likelihood of congressional tampering with [a presidentially negotiated] deal and hence to reassure America’s negotiating partners” that the deal will not unravel.¹⁷ Yet the expectation of foreign reassurance depends on an assumption of foreign legal knowledge: If U.S. partners understand that federal law bars Congress from amending a deal negotiated under TPA,¹⁸ they can rest assured that the prospect of U.S. ratification hinges primarily on the degree of congressional support for the text that emerges from international negotiations, and TPA will achieve its purpose. But if those partners are unaware of TPA or misinformed about its effect, they might miscalculate the chances of ratification by assuming the possibility of congressional revision, and TPA will fail to deliver the reassurance that its authors envisioned. However likely foreign sophistication might seem, TPA’s legislative history contains no evidence that Congress vetted that critical premise.¹⁹

Second, in the 1968 case of *Zschernig v. Miller*,²⁰ the Supreme Court reviewed an Oregon probate statute that precluded nonresident aliens from inheriting any part of an estate unless they enjoyed a right under the law of their

13. Telephone Interview with Joseph W. Gartin, Former Chief Learning Officer, U.S. Central Intelligence Agency (Dec. 10, 2020).

14. See generally IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS (2018) (discussing the history and features of TPA).

15. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, Title I, 129 Stat. 320.

16. 19 U.S.C. § 2191(d)–(g).

17. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 448 (1988).

18. 19 U.S.C. § 2191(d).

19. See generally LEGISLATIVE HISTORY OF THE TRADE ACT OF 1974: P.L. 93-618 (1974).

20. 389 U.S. 429; see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419-20 (2003) (declining to overrule *Zschernig* and applying the framework set forth in Justice Harlan’s *Zschernig* concurrence).

own country to receive estate proceeds “without confiscation.”²¹ *Zschernig* held the statute unconstitutional as applied because Oregon courts had used it to assail the law of communist countries—a practice that could very well “impair the effective exercise of the Nation’s foreign policy.”²² Yet the likelihood of such an adverse effect depended, at least in part, on the pervasiveness of foreign ignorance: If communist regimes were uninformed about American federalism, they might have mistakenly attributed the incendiary critiques of Oregon courts to the federal government and retaliated against the United States as a whole. In this scenario, *Zschernig* is relatively easy to justify in practical terms, because it reduced the likelihood of state actions that might interfere with U.S. diplomatic relations. But if communist regimes correctly perceived that the fifty states are substantially independent from Washington and do not speak for the United States, those regimes were unlikely to mistakenly attribute the actions of Oregon courts to the federal government and, all else equal, less likely to retaliate against the United States.²³ In this scenario, *Zschernig* is harder to justify because it took power away from Oregon to mitigate a questionable risk of national blowback. The premise of foreign ignorance here contrasts starkly with the assumption of foreign sophistication in the context of TPA, but the Court cited no supporting evidence.²⁴

Third, Congress overrode President Richard Nixon’s veto to enact the War Powers Resolution (WPR) in 1973.²⁵ The WPR seeks to regulate the President’s ability to use military force by, among other things, requiring him to report to Congress within forty-eight hours of introducing U.S. armed forces into “hostilities.”²⁶ It also generally requires the President to “terminate” any use of those forces within sixty days after introducing them into hostilities unless Congress declares war, authorizes the use of force, extends the sixty-day period by law, or is physically unable to meet as a result of an armed attack on the United States.²⁷ In vetoing this legislation, Nixon argued that it would undermine the U.S. ability to reassure allies and deter enemies by signaling to foreign audiences that the President’s domestic legal authority to engage in military action could easily expire after a short period of time.²⁸ Like TPA but unlike *Zschernig*, this position rests on an assumption of foreign sophistication—an assumption that foreign governments will study the WPR and consider it in

21. OR. REV. STAT. § 111.070 (1957) (repealed 1969).

22. *Zschernig*, 389 U.S. at 435-40.

23. Consistent with this possibility, the Department of Justice explained in an amicus brief that the U.S. government “does not contend that the application of [the Oregon statute] to the facts of this case constitutes an undue interference with the conduct of the foreign relations of the United States.” Brief for the United States as Amicus Curiae, *Zschernig v. Miller*, 389 U.S. 429 (1968), 1967 WL 113577, at *15 n.10.

24. See *Zschernig*, 389 U.S. at 430-41.

25. Pub. L. No. 93-148, 87 Stat. 555 (1973).

26. *Id.* § 4(a).

27. *Id.* § 5(b).

28. See 119 CONG. REC. 34,990 (1973) (reprinting a copy of the President’s veto message, which argued that the WPR “would seriously undermine this Nation’s ability to act decisively and convincingly in times of international crisis” and that, as a result, “the confidence of our allies in our ability to assist them could be diminished and the respect of our adversaries for our deterrence posture could decline”).

predicting the actions of the President.²⁹ Unfortunately, it is hard to know whether that position is justified, in part because, as Matthew Waxman explains, “there remains a dearth of good historical evidence as to how foreign leaders interpret political maneuvers within Congress regarding threatened force.”³⁰

Scholars, meanwhile, have echoed or simply ignored official assumptions about foreign knowledge. This is true in political science, where foreign knowledge of U.S. law is at best presupposed in game-theoretic accounts of international relations,³¹ and in legal academia, where a number of commentators have assumed foreign sophistication in arguing that the United States can use foreign relations law to transmit signals of national intentions to foreign governments.³² Some, for instance, have posited that the President can underscore to foreign partners the reliability of a U.S. commitment to an international agreement by ratifying the agreement as an Article II treaty, which

29. In the 1980s, the Reagan administration made a similar argument against congressional restrictions on the presence of U.S. forces in Lebanon. See Steven R. Weisman, *White House Warns a War Powers Fight Hurts U.S. Interests*, N.Y. TIMES, Sept. 17, 1983 (quoting a senior White House official for the proposition that “any restrictions” imposed by Congress on the American commitment of troops “are certainly read and understood beyond the shadow of a doubt by the Syrians and the Soviets”).

30. Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1674 (2014).

31. See, e.g., THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 28 (1960) (“[I]f the executive branch negotiates under legislative authority, with its position constrained by law, and it is evident that Congress will not be reconvened to change the law within the necessary time period, then the executive branch has a firm position that is visible to its negotiating partners.”); James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994) (hypothesizing that a threatened use of force from the leader of a democracy will tend to be more credible to a foreign adversary because elected leaders cannot back down without suffering significant domestic political costs, and thus assuming that an adversary will correctly identify a threat as emanating from the leader of a democratic government, perceive that leader as holding municipal legal authority to decide whether to follow through on the threat, and understand the municipal election laws that condition the risk of electoral punishment for backing down); see also Waxman, *supra* note 30, at 1678 (explaining that “it is difficult . . . to find even passing references to questions of legal doctrine or reform in political science scholarship on threats of force”).

32. See Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113, 124-25 (2003) (arguing that “legislative participation [in treaty-making] sends a credible signal about the seriousness with which the president views the treaty”); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2533 (2006) (suggesting that congressional authorization for the use of force should be constitutionally required where the adversary is a democracy, because a democratic government is likely to perceive such authorization correctly as a signal of the seriousness of an American commitment to use force); J. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777, 783 (1989) (arguing that ambiguity “in the allocation of competence and the uncertain congressional role [with respect to the use of force] will sow uncertainty among those who depend on U.S. effectiveness for security” and that “[s]ome reduction in U.S. credibility and diplomatic effectiveness may result”); John K. Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5, S5 (2002) (arguing that the “president risks the hazards of seeking legislative approval” of international agreements in order to “send other nations a costly, credible signal of U.S. commitment to the obligations of the treaty”); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 94 (1991) (“A credible threat of the sort found in the declaration of war on Japan represents to America’s enemy as well as to its own people that the United States is willing to subordinate to the war effort all preferences for other public goods.”); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 3-4, 36 (2011) (justifying the co-existence of alternative procedures for the adoption of international agreements on the ground that each procedure sends a different type of signal to foreign partners); see also Waxman, *supra* note 30, at 1675 (discussing the potential impact of foreign understandings of the separation of war powers on the President’s ability to deter adversaries).

requires the advice and consent of two-thirds of Senators present,³³ instead of ratifying it as a sole executive agreement, which requires no legislative authorization.³⁴ The significance of such a signal, however, depends on the unsubstantiated premise that foreign governments understand pertinent federal law. The *Restatement (Third) of the Foreign Relations Law of the United States* asserts that “all [foreign] states may be presumed to know that the President of the United States cannot make a treaty without the consent of the Senate,”³⁵ but the *Restatement* offers no support for that assertion.³⁶

All of this, I argue, is problematic. While it is likely true that assumptions of foreign knowledge or ignorance are warranted with respect to some governments on some issues, analysts cannot sensibly draw final conclusions about the practical merits of many aspects of U.S. foreign relations law without first ascertaining the nature and extent of foreign governmental knowledge of that law. In other words, the absence of meta-knowledge—U.S. knowledge of foreign knowledge—is a precarious state of affairs. Those who neglect foreign epistemic conditions or take them for granted risk overconfidence in the law’s functional strengths and weaknesses, along with government actions and legal reforms that are suboptimal and even adverse to U.S. interests.³⁷

To elaborate and address this risk, this Article develops an everted approach to U.S. foreign relations law. Arguments in the field typically proceed from the “inside out,” in the sense that they focus on internal (domestic) authorities to justify legal conclusions with significant external (international) implications. The text and structure of the Constitution, judicial precedent, legislative intent, assessments of institutional competency, and historical practice thus dominate legal discourse on the adoption of trade agreements, the role of the fifty states in foreign affairs, war powers, and the process of treaty-making, among numerous other topics.³⁸ In contrast, I argue that American legal actors should also approach U.S. foreign relations law from the “outside in,” by recognizing the importance of the global epistemic environment in which U.S. foreign relations law operates, by developing meta-knowledge of this field, and by using that knowledge to improve the law’s design and implementation. If

33. U.S. CONST. art. II, § 2, cl. 2.

34. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 7-8 (2018) (explaining sole executive agreements). For examples of this kind of signaling argument, see Goldsmith & Posner, *supra* note 32, at 124-25; Setear, *supra* note 32, at S5.

35. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311 cmt. c (Am. L. Inst. 1987).

36. See *id.*

37. For other recent critiques of traditional functionalist reasoning in U.S. foreign relations law, see, e.g., Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT’L SEC. J. 316 (2019) (arguing that judges accord excessive deference to the executive branch in foreign affairs cases under the guise of functionalism); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935-49 (2015) (arguing that common functionalist justifications for a distinctive approach to foreign relations law are unpersuasive).

38. See, e.g., CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 39-41 (7th ed. 2020) (describing originalist, practice-based, structural, prudential, and judicial precedent-based arguments as the kinds that are “most relevant to foreign relations law”).

traditional, inside-out reasoning is parochial in orientation, outside-in is globally empathic, encouraging American analysts to draw insights about the law's utility by placing themselves in the position of the foreign governments that must anticipate and respond to U.S. actions in international affairs.³⁹ From an American perspective, this is comparative law in reverse.

The Article proceeds in four parts. Part I clarifies the stakes of meta-knowledge. The longstanding dominance of inside-out analysis has discouraged domestic legal actors from examining the nature and extent of foreign knowledge on U.S. foreign relations law, but there are several reasons to conclude that the presence or absence of such knowledge matters a great deal. As I explain, foreign knowledge can affect foreign compliance with U.S. foreign relations law, global perceptions of the content of international law, global perceptions of U.S. compliance with international law, foreign relations law's ability to transmit signals that shape foreign perceptions of U.S. intentions, and the risk of miscalculation and even conflict in U.S. bilateral relations. The failure to take foreign knowledge seriously is thus a significant weakness. Without meta-knowledge, American courts, officials in the political branches, and scholars simply cannot know whether many areas of the law are optimally designed and applied to advance national interests.

The next two parts commence a long-term project in the development of meta-knowledge. Part II contends that the condition of foreign knowledge is nonobvious. Reviewing nearly eighty years of semiannual reports to Congress under the Foreign Agents Registration Act (FARA),⁴⁰ I provide evidence that foreign governments have retained U.S. legal counsel on matters involving U.S. foreign relations law to varying extents over the postwar period, both individually and collectively. Along with a series of country-specific illustrations and theoretical arguments, the FARA evidence suggests cross-national, issue-based, and historical variation in the degree of foreign governmental engagement with and fluency in U.S. law. From this perspective, blanket assumptions of the sort that undergird TPA, *Zschernig*, and Nixon's veto of the WPR, among other examples, are unlikely to reflect conditions on the ground.

Part III produces meta-knowledge by offering an immersive case study on Japanese understandings of U.S. foreign relations law. Drawing on four months of field research in Japan, where I collected scholarly publications from the

39. In focusing on foreign *governments*, I bracket questions about knowledge of U.S. foreign relations law among foreign publics, for two reasons. First, foreign public knowledge is less likely to carry direct consequences for U.S. foreign relations, especially when those relations involve undemocratic states that can act with comparatively little regard for popular preferences. See generally JESSICA L.P. WEEKS, *DICTATORS AT WAR AND PEACE* (2014) (examining domestic influences on foreign policy decisions in authoritarian regimes). Second, the condition of foreign public knowledge is less interesting in the sense that it seems less likely to vary. That is, aside from discrete pockets of knowledge within foreign academic communities and among foreign corporate actors, it seems highly probable that foreign publics generally lack knowledge of U.S. foreign relations law. Cf., e.g., Alex Spillius, *British Anti-Americanism "Based on Misconceptions,"* THE TELEGRAPH (Aug. 17, 2008), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/2575395/British-anti-Americanism-based-on-misconceptions.html> (reporting poll results showing that "[m]ore than 50 percent [of British residents] presumed that polygamy was legal in the US, when it is illegal in all 50 states").

40. Pub. L. 75-583, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611-621).

National Diet Library, examined newspaper archives, obtained records under Japan's freedom-of-information act,⁴¹ and interviewed nearly fifty scholars and government officials in the Ministry of Foreign Affairs (MOFA) and the Ministry of Economy, Trade, and Industry (METI),⁴² the case study reveals the various pathways by which the Japanese government tends to acquire relevant forms of knowledge and illuminates the nature and extent of Japan's sophistication. The case study provides a model for efforts to understand epistemic conditions in other countries, carries significant implications for U.S.-Japan relations, and suggests hypotheses for empirical research.

Part IV concludes by laying out an agenda for the implementation of the outside-in approach. This agenda consists of academic studies and official policies to cultivate meta-knowledge, a systematic re-evaluation of foreign relations law's functional merits in light of outside-in dynamics, and legal and policy measures to calibrate the selective transmission of legal information to foreign governments based on national interests. Such efforts are likely to enhance U.S. foreign relations law's ability to promote positive outcomes for the United States in areas ranging from war powers and human rights to international trade.

As a final note of introduction, this Article obviously focuses on the foreign relations law of the United States, but every country has an analogous body of domestic law that governs interactions with the rest of the world.⁴³ In that sense, the arguments set forth below are fundamentally universal in their relevance. It will be up to foreign scholars and officials to adapt the outside-in approach to the laws and interests of their own jurisdictions.

I. THE STAKES OF META-KNOWLEDGE OF FOREIGN RELATIONS LAW

Many aspects of federal and state law promote the diffusion of U.S. legal knowledge,⁴⁴ but it is generally assumed that the effective operation of the U.S. legal system depends only on epistemic conditions among the American polity and those present within the United States: Government officials must know U.S. law to create, interpret, and apply it. Citizens must understand the law to evaluate reforms and make informed choices in elections. And businesses operating in the

41. Gyōseikikan no Hoyūsuru Jōhō no Kōkai ni Kansuru Hōritsu, Law No. 42 of 1999 (Japan).

42. Prior to conducting the interviews, I received an exemption determination from the Marquette University Institutional Review Board (IRB Protocol ID 1806024937). Letter from Jessica Rice, IRB Manager, Off. of Rsch. Compliance, Marquette Univ., to Ryan Scoville, Professor of Law, Marquette Univ., 1 (July 10, 2018) (on file with author).

43. See generally THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11 (introducing a field of "comparative foreign relations law" and examining aspects of the foreign relations law of several countries).

44. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action."); 1 U.S.C. § 202 (providing for the publication of the U.S. Code); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that stare decisis "promotes the . . . predictable . . . development of legal principles"); *United States v. Vasarajs*, 908 F.2d 443, 448 (9th Cir. 1990) ("Despite the fact that most citizens do not keep abreast of every statutory development, that statutes are published and available to the public in the first place means that citizens can fairly be charged with constructive notice of the laws that bind them.").

United States must know the law to comply with regulatory requirements. This assumption has resulted in a substantial literature on the domestic condition of U.S. legal knowledge⁴⁵ and in public and private programs to ensure the successful national diffusion of pertinent resources and expertise.⁴⁶ Its corollary is a tendency to ignore the significance of foreign sophistication on U.S. law.⁴⁷

Such an orientation is reasonable as a general matter. After all, most of U.S. law has no external application⁴⁸ and is of little to no immediate concern to most of the world beyond U.S. borders. But as this Part argues, the tendency to ignore foreign epistemic conditions is counterproductive in the domain of U.S. foreign relations law, where the quality and pervasiveness of foreign knowledge can exert material influence over five distinct phenomena: (1) the likelihood of foreign governmental compliance with pertinent aspects of this law; (2) global perceptions of the content of international law; (3) global perceptions of U.S. compliance with international law; (4) foreign relations law's ability to signal national intentions; and (5) the risk of miscalculation in U.S. bilateral relations.

The importance of meta-knowledge directly follows. To elaborate this point, I posit that conditions of foreign knowledge and U.S. meta-knowledge interact to form any of four epistemic dyads on any given issue in a bilateral relationship. First, the U.S. government might know that the foreign government

45. See generally CHRISTOPHER DREISBACH, CONSTITUTIONAL LITERACY: A TWENTY-FIRST CENTURY IMPERATIVE (2016) (discussing knowledge of the U.S. Constitution in the United States).

46. See, e.g., *The Legal Literacy Initiative*, LIBRS. WITHOUT BORDERS (last visited Mar. 11, 2020), <https://www.librarieswithoutborders.us/legal-literacy-initiative> (describing an initiative to curate and deliver "digital legal materials directly to [U.S.] communities, meeting people where they are and providing them with the digital skills to access the resources that answer their questions").

47. This tendency is apparent in several strands of legal scholarship. First, while there are a number of important works on legal epistemology, none of them address *foreign* knowledge of domestic law. See, e.g., Dan-Cohen, *supra* note 12; Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261 (1993). Second, American scholarship on comparative law examines foreign law rather than foreign understandings of American law. See Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 452 (2009) ("The essence of comparative law is the act of comparing the law of one country to that of another. Most frequently, the basis for comparison is a foreign law juxtaposed against the measure of one's own law."). Finally, a number of scholars have considered the significance of certain features of the international environment in which U.S. foreign relations law operates, but those features do not include foreign epistemic conditions. See generally JOHN YOO & JULIAN KU, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER (2012) (analyzing globalization's implications for U.S. foreign relations law); Daniel Abebe, *The Global Determinants of U.S. Foreign Relations Law*, 49 STAN. J. INT'L L. 1 (2013) (arguing that the degree to which domestic law constrains the President in foreign affairs should depend in part on the contemporary structure of international politics); Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 CHI. J. INT'L L. 125 (2009) (hypothesizing that judicial deference to the executive increases when international politics place strong constraints on the state and decreases when international politics impose weak constraints); Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65, 67 (2016) (arguing that foreign actors can use activities such as litigation and public criticism to affect "the power within a single branch or the allocation of power among the three branches of the US government, particularly in the area of intelligence activity"); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002) (arguing that longstanding features of the constitutional law of foreign relations should be reexamined in light of the advent of globalization); see also Waxman, *supra* note 30, at 1675 n.186 (suggesting that scholars have paid insufficient attention to questions about foreign knowledge of the separation of war powers).

48. See, e.g., *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.").

is knowledgeable about pertinent aspects of U.S. foreign relations law. Second, the U.S. government might know that the foreign government is ignorant about this law. Third, the U.S. government might be unaware of the fact that the foreign government is knowledgeable. And finally, the U.S. government might be unaware of the foreign government's ignorance. To borrow from former Secretary of Defense Donald Rumsfeld, U.S. foreign relations law will be either a known known, a known unknown, an unknown known, or an unknown unknown,⁴⁹ as shown in Table 1.

Table 1: The Four Epistemic Dyads of U.S. Foreign Relations Law

	Foreign Government Knowledgeable About U.S. Foreign Relations Law	Foreign Government Unknowledgeable About U.S. Foreign Relations Law
U.S. Government Knowledgeable About Foreign Knowledge	Known-Known	Known-Unknown
U.S. Government Unknowledgeable About Foreign Knowledge	Unknown-Known	Unknown-Unknown

The following Sections develop a theory on how these dyads affect the U.S. government's ability to advance national interests in relation to each of the five phenomena set forth above. According to this theory, meta-knowledge will enhance the U.S. government's ability to (A) enforce U.S. foreign relations law; (B) harmonize U.S. and foreign perspectives regarding the content of international law; (C) manage the U.S. reputation for compliance with international law; (D) use foreign relations law to signal national intentions; and (E) appreciate and adjust to strategic risks.

A. Effective Enforcement

Certain areas of U.S. foreign relations law impose obligations specifically on foreign governments. In some cases, these obligations accompany access to privileges or benefits that emanate from the United States, such as a diplomatic presence in Washington.⁵⁰ In other cases, the obligations exist as requirements

49. CNN, *Rumsfeld / Knowns*, YOUTUBE (Feb. 12, 2002), <https://www.youtube.com/watch?v=REWeBzGuzCc>.

50. See, e.g., Foreign Missions Amendments Act of 1983, Pub. L. No. 98-164, title VI, §§ 602, 603, 97 Stat. 1042, 1042-43 (mandating that the head of each foreign mission to the United States prepare and transmit to the Secretary of State a report on the insurance coverage of mission members); Foreign

to abide by and remediate violations of substantive federal or state laws of general application, such as the common law of torts.⁵¹

Many of these laws aim to shape the actions of foreign governments in relation to the United States itself. For instance, in order to purchase or lease defense articles under the Arms Export Control Act, a foreign country must agree to maintain the articles' security, not to transfer them to third parties, and not to use them for unapproved purposes without the President's consent.⁵² Countries that violate this requirement may lose their eligibility for credits, cash sales, and arms deliveries.⁵³ Similarly, in order to operate in the United States, many agents of foreign governments must register with the Attorney General under the Foreign Agents Registration Act (FARA).⁵⁴ Those who fail to do so can be fined, imprisoned for as long as ten years, and removed from the United States.⁵⁵

Other laws aim to hold foreign governments accountable under international law. In perhaps the best-known example, federal courts for several decades used their jurisdiction under the Alien Tort Statute (ATS) to impose civil liability against foreign officials responsible for international crimes such as genocide and crimes against humanity.⁵⁶ Federal courts have also held foreign officials liable under the Torture Victim Protection Act (TVPA), which authorizes actions for money damages against those who violate international

Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, title I, § 128(a), 101 Stat. 1343 ("A foreign mission may not allow any unaffiliated alien the use of any premise of that mission which is inviolable under United States law . . . for any purpose which is incompatible with its status as a foreign mission, including use as a residence.").

51. See, e.g., 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages[.]"); *Rimkus v. Islamic Repub. of Iran*, 575 F. Supp. 2d 181, 196-99 (D.D.C. 2008) (explaining that Section 1606 enables plaintiffs to sue foreign sovereigns on substantive causes of action that are available against private individuals under federal, state, or international law, and holding that plaintiffs were entitled to compensatory damages against Iran on a claim for intentional infliction of emotional distress).

52. 22 U.S.C. § 2753(a).

53. 22 U.S.C. § 2753(c)(1).

54. 22 U.S.C. § 612(a); see also 50 U.S.C. § 851 ("[E]very person who has knowledge of, or has received instruction or assignment in, the espionage, counter-espionage, or sabotage service or tactics of a government of a foreign country or of a foreign political party, shall register with the Attorney General[.]").

55. 22 U.S.C. § 618(a)(2); 18 U.S.C. § 951(a).

56. 28 U.S.C. § 1350; see, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (reversing the district court's dismissal of ATS claims, among others); Renewed Judgment at 1, *Kadic v. Karadzic*, 93-CV-01163 (S.D.N.Y. Dec. 9, 2020) (renewing the entry of default judgment against the defendant and thereby awarding tens of millions of dollars in compensatory and punitive damages under the ATS for genocide, crimes against humanity, and other offenses). Federal courts began adjudicating these kinds of claims in 1980, when the Second Circuit upheld the exercise of ATS jurisdiction over a claim involving a Paraguayan government official's torture of a Paraguayan national in Paraguay. See *Filartiga v. Penarala*, 630 F.2d 876 (2d Cir. 1980). The Supreme Court, however, has imposed strict limits on ATS jurisdiction in recent years. See, e.g., *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (holding that an actionable claim under the ATS requires plaintiffs to establish that conduct relevant to the focus of the statute occurred within the United States). As a result, few if any ATS claims against foreign officials are likely to succeed going forward. See William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), <https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/> (suggesting that "it is hard to see how traditional ATS cases against individual defendants can continue," given the Court's decision in *Nestlé*).

norms against torture and extrajudicial killing.⁵⁷

The condition of foreign knowledge in these areas is significant because it determines the efficacy of U.S. legal requirements. In many cases, knowledge is likely to facilitate compliance.⁵⁸ All else equal, foreign recipients of U.S. defense articles who hope to maintain good relations with the United States should be more likely to honor a U.S. prohibition against unauthorized retransfer if aware of it, and foreign officials should be less likely to engage in torture if cognizant that U.S. law provides a private right of action against those who commit torture.⁵⁹ Knowledge might contribute to compliance in these cases by reducing normative uncertainty and enabling deterrence.⁶⁰

In other cases, legal knowledge could facilitate *non*compliance by making it easier for foreign governments to identify and exploit doctrinal loopholes and enforcement gaps.⁶¹ All else equal, adherence to U.S. restrictions on the retransfer of U.S. defense articles should be less likely if foreign recipients learn that the United States does not strictly enforce its regulations on arms exports,⁶² and foreign officials should be less likely to honor an international prohibition against torture if aware that ATS plaintiffs rarely succeed in collecting money judgments.⁶³ Whether foreign knowledge facilitates noncompliance rather than compliance in any given context may depend on factors such as the condition of the bilateral relationship in question and the interests of the foreign government.

Meta-knowledge would thus help the U.S. government identify compliance risks and appropriate strategies to strengthen the efficacy of relevant legal requirements. In the known-known dyad, where the United States knows that a foreign government understands those requirements, U.S. officials will appreciate that any noncompliance occurs for reasons other than foreign

57. Pub. L. No. 102-256, 106 Stat. 73 (1992); *see, e.g.*, Judgment at 1, *Warfaa v. Ali*, 05-CV-701 (E.D. Va. May 21, 2019) (entering judgment on a jury verdict of compensatory and punitive damages under the TVPA against a colonel in the Somali National Army).

58. *Cf., e.g.*, Susan L. Ostermann, *Regulatory Pragmatism, Legal Knowledge and Compliance with Law in Areas of State Weakness*, 53 L. & SOC'Y REV. 1132 (2019) (finding that compliance with environmental laws in India and Nepal correlated positively with knowledge about those laws among local populations).

59. *Cf. Torture Victim Protection Act of 1989: Hearing Before the Subcommittee on Immigration and Refugee Affairs of the S. Committee on the Judiciary*, 101st Cong. 18 (1990) (testimony of David P. Stewart, Assistant Legal Adviser, U.S. Department of State) (explaining that the purposes of the Torture Victim Protection Act are "to deter torture and extrajudicial killing, to punish those who engage in abhorrent acts, and to provide a means of compensating their victims").

60. *Cf., e.g.*, Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 174-76 (2004) (identifying legal knowledge as a precondition to deterrence in criminal law).

61. *Cf., e.g.*, Steven Klepper, Mark Mazur & Daniel Nagin, *Expert Intermediaries and Legal Compliance: The Case of Tax Preparers*, 34 J.L. & ECON. 205, 228 (1991) (finding that expert advice on tax-return preparation encourages the underreporting or nonreporting of income in areas of legal ambiguity).

62. *Cf. OFFICE OF INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF STATE, (U) AUDIT OF DEPARTMENT OF STATE DIRECTORATE OF DEFENSE TRADE CONTROLS EXPORT LICENSING PROCESSES* (Feb. 2019), <https://www.stateoig.gov/system/files/aud-si-19-07.pdf> (reporting that DDTC does not consistently adhere to internal controls for arms exports).

63. *Cf. Cortelyou C. Kenney, Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1067-85 (2015) (reporting that few plaintiffs have been able to collect on their ATS judgments).

ignorance—namely, lack of foreign capacity or will to comply.⁶⁴ These officials will know that efforts to enhance foreign compliance should focus not on the simple provision of legal information but rather on measures that presuppose legal sophistication, such as penalty enhancements for stronger deterrence.⁶⁵ In the context of known-unknown, where the United States knows that a foreign government is uninformed about pertinent U.S. legal obligations, U.S. officials will know that foreign ignorance may very well result in noncompliance.⁶⁶ These officials will understand that enhancements in penalties or other remedies against unlawful acts will do little to bolster deterrence and that efforts to cultivate foreign knowledge are necessary to improve compliance.⁶⁷ In contrast, officials will be ill-equipped to identify appropriate enforcement strategies in the absence of meta-knowledge.

B. Harmonization in International Law

Some areas of international law incorporate elements of foreign relations law into international law's formal doctrinal architecture. In doing so, international law empowers foreign relations law to dictate the outcome of international legal analysis.

The Vienna Convention on the Law of Treaties offers an illustration. Article 46 provides that a state may not challenge the validity of its own consent to a treaty on the ground that the consent was “expressed in violation of a provision of its internal law regarding competence to conclude treaties . . . unless that violation was manifest and concerned *a rule of its internal law of fundamental importance*.”⁶⁸ Because Article 46 establishes that “failure to comply with [municipal] constitutional provisions” may at times vitiate “consent given in due form by an organ or agent ostensibly competent to give it,”⁶⁹ foreign governments cannot apply the Article to evaluate the validity of U.S. consent without also applying pertinent aspects of U.S. constitutional law, including the separation of powers with respect to treaty negotiation and adoption.⁷⁰ For

64. Cf., e.g., Robinson & Darley, *supra* note 60, at 174-76 (identifying legal knowledge, capacity to comply, and the will to comply as prerequisites to deterrence).

65. Cf., e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 13-15, 197-201 (1995) (discussing limits in scientific, technical, bureaucratic, and financial capacity as reasons for noncompliance with treaty obligations and arguing that technical assistance and capacity building are important tools for improving compliance).

66. Cf., e.g., Robinson & Darley, *supra* note 60, at 174-76 (identifying legal knowledge as a prerequisite to deterrence in criminal law).

67. Cf., e.g., Ostermann, *supra* note 58 (reporting evidence that legal knowledge correlates positively with compliance).

68. Vienna Convention on the Law of Treaties art. 46.1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). The United States has not ratified the Vienna Convention but nevertheless accepts that “many of [its] provisions” constitute customary international law and bind the United States as such. *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 12, 2020).

69. Draft Articles on the Law of Treaties with Commentaries, 2 Y.B. INT’L L. COMM’N 241-42 (1966). For background on Article 46, see Hannah Woolaver, *From Joining to Leaving: Domestic Law’s Role in the International Legal Validity of Treaty Withdrawal*, 30 EUR. J. INT’L L. 73, 84-93 (2019).

70. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 175-211 (2d ed. 1996) (summarizing the powers of the President and Congress with respect to Article II treaties).

example, if Congress were to contest the validity of U.S. consent to a treaty on the view that the President violated the Appointments Clause by designating the U.S. negotiators without first obtaining the Senate's advice and consent,⁷¹ foreign partners would be unable to ascertain the validity of the treaty under international law without interpreting the Appointments Clause itself.⁷²

Similarly, in mutual defense treaties with Australia, Japan, New Zealand, the Philippines, South Korea, and members of the North Atlantic Treaty Organization (NATO), the United States pledges to meet an armed attack against the treaty partner(s) in a designated geographic area in accordance with U.S. "constitutional processes" pertaining to the use of force.⁷³ In this way, the separation of war powers conditions U.S. obligations under international law to engage in collective self-defense in a variety of contexts. If the Constitution were to require congressional authorization for the use of force in defense of Japan in a particular case,⁷⁴ for example, international law in the form of the U.S.-Japan security treaty that incorporates U.S. "constitutional provisions and processes"⁷⁵ could oblige the United States to engage in that use of force only in the event of such authorization.⁷⁶ U.S. allies (and enemies) must therefore understand the separation of war powers in order to appreciate the nature of U.S. treaty obligations.⁷⁷

71. See U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors" and "other public Ministers"). Congress's argument in this hypothetical would accord with the original meaning of the Appointments Clause, which appears to have required the Senate's advice and consent for the appointment of treaty negotiators. See generally Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907 (2019) (collecting evidence on this point).

72. Vienna Convention on the Law of Treaties, *supra* note 68, art. 46.1.

73. Mutual Defense Treaty Between the United States and the Republic of the Philippines art. IV, Aug. 30, 1951, 3 U.S.T. 3947; Security Treaty Between the United States, Australia, and New Zealand art. IV, Sept. 1, 1951, 3 U.S.T. 3423; Mutual Defense Treaty Between the United States and the Republic of Korea art. III, Oct. 1, 1953, 5 U.S.T. 2360; Treaty of Mutual Cooperation and Security Between the United States and Japan art. V, Jan. 19, 1960, 11 U.S.T. 1632; North Atlantic Treaty art. 11, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

74. See, e.g., April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, 1, 11 (May 2018) (suggesting that the President cannot use force offensively without congressional authorization if the anticipated "nature, scope, and duration" of the conflict would "rise to the level of a war in the constitutional sense").

75. Treaty of Mutual Cooperation and Security Between the United States and Japan, *supra* note 73, art. V.

76. Over the years, the executive branch has taken different positions on the effect of a mutual defense treaty on the need for congressional authorization to use force. Compare Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A U.S. Op. O.L.C. 185, 186 n.5 (1980) (stating that "treaties may not modify the basic allocation of powers in our constitutional scheme" and that mutual defense treaties "are generally not self-executing regarding the internal processes of the signatory powers") with Overview of the War Powers Resolution, 8 U.S. Op. O.L.C. 271, 274 (1984) (stating that the President has "constitutional authority as Commander-in-Chief to direct United States Armed Forces into combat without specific authorization from Congress . . . [t]o carry out the terms of security commitments contained in treaties").

77. Knowledge of the U.S. Constitution has also been necessary for foreign governments to understand U.S. obligations under a significant number of treaties that do not involve mutual defense. See, e.g., U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights [ICCPR], 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (subjecting the Senate's advice and consent to the ICCPR to the reservation that "Article 20 [of the treaty] does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States"); Treaty of Friendship, Reciprocal

Other links are more subtle. Settled doctrine holds that customary international law (CIL) arises from “a general and consistent practice of states followed by them from a sense of legal obligation.”⁷⁸ This doctrine does not explicitly reference foreign relations law, but the two are nevertheless connected insofar as the foreign relations laws of national governments dictate or comprise the various state practices that might qualify as general and consistent.⁷⁹ Analysts cannot reach informed conclusions about the CIL status of universal jurisdiction, secondary sanctions, or corporate liability for violations of internationally recognized human rights, for example, without considering municipal legal authorities on those topics, all of which count as foreign relations law.⁸⁰ Of course, U.S. law constitutes only a part of the global practice that may or may not qualify as general and consistent on any given issue, but the United States has been “the world’s primary maker of and participant in” the state practice that has formed CIL since the mid-twentieth century.⁸¹ For better or worse, this influence has buttressed CIL’s practical connection to U.S. foreign relations law.

The condition of foreign knowledge in these areas of linkage is consequential because it affects foreign perceptions of the content of international law. Where international law incorporates U.S. foreign relations law and foreign understanding of U.S. law is sophisticated, foreign governments will be more likely, all else equal, to agree with the United States on the meaning and effect of international law. Where the two bodies of law are connected but

Establishments, Commerce, and Extradition Between the United States and Switzerland art. I, Nov. 25, 1850 (“The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the Constitutional or legal provisions as well Federal as State and Cantonal of the contracting parties.”).

78. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 35, § 102(2).

79. See MALCOLM N. SHAW, INTERNATIONAL LAW 83 (6th ed., 2008) (“States’ municipal laws may in certain circumstances form the basis of customary rules.”).

80. See, e.g., 18 U.S.C. § 1651 (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”); Exec. Order No. 13810, 82 Fed. Reg. 44705, 44706-07 (Sept. 20, 2017) (imposing sanctions on foreign financial institutions that “knowingly conducted or facilitated any significant transaction” with sanctioned individuals or in connection with trade with North Korea); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) (holding that common law causes of action based on ATS jurisdiction do not apply to foreign corporations). These authorities fall comfortably within a widely accepted definition of foreign relations law. See Bradley, *supra* note 11, at 3 (defining foreign relations law as municipal law that “governs how [a] nation interacts with the rest of the world”).

81. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853-54 (1998); see also KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 78-79 (2d ed. 1993) (suggesting that major powers exert the greatest influence over the content of CIL, in part because other states “pay more heed to the opinion of those powers than to that of minor states”); INTERNATIONAL LAW ASSOCIATION COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW 26 (2000) (observing that “the more important participants” in international affairs “play a particularly significant role in the process” of creating CIL). To be sure, the growing multipolarity of contemporary international relations raises the distinct possibility that the United States will in the future exert less influence over CIL than it has in the past. See generally William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L.J. 1 (2015) (discussing this shift and its implications). But U.S. practice seems likely to continue to exert significant—even if less than dispositive—influence. See, e.g., Joseph S. Nye, Jr., *The Twenty-First Century Will Not Be a “Post-American” World*, 56 INT’L STUD. Q. 215 (2012). In that sense, U.S. foreign relations law is likely to remain as an important ingredient for assessments of CIL in many areas.

foreign understanding of U.S. law is limited or incorrect, foreign governments could very well reach conclusions about international law that diverge from those of the United States, with potentially adverse consequences for U.S. bilateral relationships.⁸²

Meta-knowledge would thus help the United States to understand and act to correct foreign perceptions of certain areas of international law, thereby reducing some of the cross-national differences of perspective that have given rise to the field of comparative international law.⁸³ In the known-known dyad, the United States will be well-positioned to anticipate foreign views on questions of international law that hinge on foreign relations law, and U.S. and foreign perspectives will be more likely to align. In the known-unknown dyad, meta-knowledge will enable the United States not only to identify foreign misunderstandings of U.S. foreign relations law that might foster idiosyncratic views of international law, but also to correct those misunderstandings and thus contribute to the harmonization of national perspectives. Such corrections might take place directly, through candid conversations with foreign interlocutors or the presentation of diplomatic *démarches*, or they might occur indirectly and over time, through the operation of programs that generate greater exposure to U.S. law among foreign officials and legal experts.⁸⁴ In contrast, the United States will be ill-equipped to anticipate foreign views and correct misunderstandings without meta-knowledge, allowing cross-national differences of perspective to persist.

C. Reputation Management

U.S. foreign relations law often serves as the vehicle by which the United States honors or flouts international legal obligations. This occurs because international law imposes obligations primarily on sovereign states,⁸⁵ and because the United States is a juridical entity that often acts by means of domestic legal measures.

Consider two contrasting examples. First, the United States ratified the Chemical Weapons Convention (CWC) in 1997 and thus undertook an obligation to “prohibit natural and legal persons under its jurisdiction” from

82. International law and foreign relations law are not always connected. Indeed, some rules of international law explicitly deny the relevance of foreign relations law to international legal analysis. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 68, art. 27 (providing that a party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”). In disputes that hinge on the application of these rules to the United States, foreign governments can reach persuasive conclusions without any understanding of U.S. foreign relations law.

83. *See, e.g.*, Anthea Roberts, *Crimea and the South China Sea: Connections and Disconnects Among Chinese, Russian, and Western International Lawyers*, in *COMPARATIVE INTERNATIONAL LAW* 116-28 (Anthea Roberts et al. eds., 2018) (discussing differences between Western and Chinese perspectives on the law of the sea, and between Western and Russian perspectives on the legality of Russia’s annexation of Crimea).

84. *See, e.g.*, 22 U.S.C. § 2452(a)(2)(i) (authorizing the financing of “visits and interchanges between the United States and other countries of leaders, experts in fields of specialized knowledge or skill, and other influential or distinguished persons”).

85. *See, e.g.*, Case of the S.S. “*Lotus*” (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 1927) (“International law governs relations between independent States.”).

using, developing, producing, acquiring, stockpiling, or retaining chemical weapons.⁸⁶ Congress then enacted a form of foreign relations law—the Chemical Weapons Convention Implementation Act of 1998⁸⁷—to fulfill this obligation under the treaty. Second, the United States acceded to the Protocol to the Convention Relating to the Status of Refugees⁸⁸ in 1968 and thus agreed not to “impose penalties, on account of their illegal entry or presence [in the United States], on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in [U.S.] territory without authorization.”⁸⁹ Some contend that recent administrations have violated this obligation by using what amounts to yet another instantiation of foreign relations law—i.e., the Immigration and Nationality Act and accompanying regulations⁹⁰—to punish asylum seekers along the southern border with gratuitous detention⁹¹ and even criminal prosecution.⁹²

In these kinds of cases, foreign knowledge is consequential because it shapes the reputational effects of U.S. action. Where U.S. foreign relations law faithfully implements international law and foreign governments know that it does, the United States stands to bolster its reputation for compliance with international obligations.⁹³ Where U.S. foreign relations law implements international law and foreign governments are ignorant of that fact, the United States is less likely to obtain the reputational benefits that compliance is often said to generate.⁹⁴ Where U.S. law fails to implement international legal obligations and foreign governments know it, the United States could very well suffer reputational harm for noncompliance.⁹⁵ And where U.S. law fails to

86. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction arts. I, VII(1)(a), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103–21, 1974 U.N.T.S. 317.

87. 18 U.S.C. § 229; *see also* *Bond v. United States*, 572 U.S. 844, 848 (2014) (explaining how the statute implements the treaty).

88. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

89. *See id.* at art. 1(1) (“The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.”); Convention Relating to the Status of Refugees art. 31(1), *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

90. *See* 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”); 8 C.F.R. § 1236.1(8) (providing that any officer authorized to issue a warrant of arrest “may, in the officer’s discretion,” release a noncriminal alien upon proof that “release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding”).

91. *See, e.g.,* LARA DOMÍNGUEZ, ADRIENNE LEE & ELIZABETH LEISERSON, ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, U.S. DETENTION AND REMOVAL OF ASYLUM SEEKERS: AN INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS 18-20 (June 20, 2016), https://law.yale.edu/sites/default/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

92. *See* Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW. U. L. REV. 717 (2020) (arguing that prosecuting refugees violates U.S. obligations under the Protocol to the Refugee Convention).

93. *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71-85 (2008) (arguing that a state’s compliance with international law generates reputational effects in international society).

94. *Cf. id.* at 85-91 (arguing that compliance creates reputational benefits under an assumption of complete information).

95. *Cf. id.* at 71-85 (suggesting that noncompliance leads to reputational injury).

implement international obligations and foreign governments are unaware, the United States is more likely to escape reputational harm despite the noncompliance.⁹⁶

Meta-knowledge would thus inform U.S. assessments of the reputational benefits and costs of compliance and noncompliance, respectively. In the known-known and known-unknown dyads, U.S. officials can be reasonably confident about whether and how foreign governments will perceive pertinent U.S. legal actions. But in the other two dyads, this confidence will give way to uncertainty and perhaps even miscalculation. In the unknown-known dyad, U.S. officials might mistakenly assume the absence of foreign knowledge and thus underestimate the reputational harm of noncompliance. In the unknown-unknown dyad, these officials might mistakenly assume the presence of foreign knowledge and thus overestimate the reputational harm of noncompliance.

D. Effective Signaling

U.S. officials sometimes act on the premise that they can use U.S. foreign relations law to transmit signals of national intentions to foreign governments. On this view, the law can operate as a sort of official semaphore through which the United States shapes foreign perceptions of current U.S. policies or actions, along with foreign expectations concerning future actions.

Signaling considerations have influenced official deliberations over whether to pursue legislation authorizing the use of military force for decades.⁹⁷ In one of the more recent examples, the Obama administration submitted to Congress a draft authorization for the use of military force (AUMF) against the Islamic State of Iraq and the Levant (ISIL).⁹⁸ This legislation would have approved the “use of the Armed Forces of the United States as the President determines to be necessary and appropriate against ISIL or associated persons or forces.”⁹⁹ But the AUMF also would have expired after three years and enabled only those actions that did not amount to “enduring offensive ground combat

96. This logic may at times play a role in decisions to classify and thereby withhold from the public domain not only evidence of official acts that are illegal under international law, but also evidence of the domestic legal authority that facilitates such acts. *See, e.g.*, Steven Aftergood, *OLC Torture Memos Declassified*, FED’N OF AM. SCIENTISTS (Apr. 17, 2009), https://fas.org/blogs/secretcy/2009/04/olc_torture_memos/ (describing four George W. Bush-era Office of Legal Counsel opinions on torture as among “the most fiercely protected classified records of recent years.”).

97. *See* FREDRIK LOGEVALL, *EMBERS OF WAR: THE FALL OF AN EMPIRE AND THE MAKING OF AMERICA’S VIETNAM 467-68* (2012) (explaining that former Secretary of State John Foster Dulles sought congressional authorization for the use of air and naval power in Indochina in 1954 on the view that passage of such a resolution might deter Chinese expansionism and in doing so render the use of force unnecessary); Matthew Waxman, *Eisenhower and War Powers*, *LAWFARE* (Sept. 18, 2020, 8:01 AM), <https://www.lawfareblog.com/eisenhower-and-war-powers> (discussing the deterrent value of congressional resolutions pertaining to the use of force in Formosa and the Middle East in the 1950s).

98. *See* Letter from Barack Obama, President of the United States (Feb. 11, 2015) (available at Off. of the Press Sec’y, Letter from the President — *Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-United-states-armed-forces-connection> (linking to Draft AUMF, available at https://obamawhitehouse.archives.gov/sites/default/files/docs/aumf_02112015.pdf).

99. *Id.*

operations.”¹⁰⁰ These restrictions led Senator James Inhofe, among others, to reject the President’s proposal on the ground that it would “telegraph the wrong message.”¹⁰¹ According to Inhofe, a broader and more flexible authorization would have been preferable because it would have “sen[t] a clear signal of our resolve to partners and allies that we will support them until ISIL is defeated.”¹⁰² The President’s proposal thus failed in Congress.¹⁰³

Similar considerations appear to influence treaty-making. Settled constitutional law holds that the President can conclude international agreements in the form of Article II treaties, which require the advice and consent of two-thirds of Senators present; congressional-executive agreements, which require the approval of simple majorities of both houses of Congress; and sole executive agreements, which require no legislative approval.¹⁰⁴ Given that all of these forms constitute a “treaty” for purposes of international law,¹⁰⁵ and given that it is often extremely difficult for the President to secure the Senate’s advice and consent,¹⁰⁶ some have found it puzzling that Presidents ever pursue Article II treaties in place of executive agreements.¹⁰⁷ The reported answer to this puzzle is that Presidents sometimes prefer the Article II route on the view that the willingness and ability to secure the Senate’s endorsement underscores to foreign counterparts the reliability of the U.S. commitment.¹⁰⁸

Finally, signaling considerations loom large in judicial invocations of the

100. *Id.*

101. *Inhofe’s Response to the President’s AUMF*, JAMES F. INHOFE: U.S. SENATOR FOR OKLAHOMA (Feb. 11, 2015), <https://www.inhofe.senate.gov/newsroom/press-releases/inhofes-response-to-the-presidents-aumf>; see also Amber Phillips, *President Obama’s Push for Military Authorization to Fight ISIS Won’t Go Anywhere in Congress. Here’s Why.*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/07/3-reasons-congress-wont-authorize-obamas-use-of-force-against-the-islamic-state/> (explaining that Congress was unlikely to adopt President Obama’s proposed AUMF, in part because Republicans believed that imposing “limits on presidential authority in time or scope would essentially be telegraphing America’s plans to the enemy.”).

102. *Inhofe’s Response to the President’s AUMF*, *supra* note 101. In contrast, some scholars have suggested that an AUMF should be viewed as constitutionally unnecessary for military operations against terrorist organizations. See Nzelibe & Yoo, *supra* note 32, at 2533-34. One of the stated assumptions behind this position is that terrorist organizations are unlikely to correctly perceive an AUMF as a signal of the seriousness with which the United States is contemplating the use of force. *Id.*

103. Scott Wong, *GOP: Obama War Request is Dead*, THE HILL (Apr. 13, 2015), <https://thehill.com/policy/defense/238619-gop-obama-war-request-is-dead>.

104. See Daniel Bodansky & Peter Spiro, *Executive Agreements Plus*, 49 VAND. J. TRANSNAT’L L. 885, 892-93 (2016) (summarizing these forms).

105. See Vienna Convention on the Law of Treaties, *supra* note 68, art. 2(1)(a) (“‘Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

106. See Curtis Bradley, Oona Hathaway & Jack Goldsmith, *The Death of Article II Treaties?*, LAWFARE (Dec. 13, 2018, 10:00 AM), <https://www.lawfareblog.com/death-article-ii-treaties> (explaining that “the Senate has been a barrier to all but the most uncontroversial Article II treaties” and that it is “difficult, if not impossible, to get two-thirds of the Senate to agree on anything, much less a treaty.”).

107. See, e.g., Lisa A. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRES. STUD. Q. 440, 440 (2005).

108. *Id.* at 453-61. A number of legal scholars have also embraced this logic. See *supra* note 32 (citing sources). But see Curtis A. Bradley, *Article II Treaties and Signaling Theory*, in THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 123 (Paul B. Stephan & Sarah A. Cleveland eds., 2020) (questioning the signaling theory of Article II treaty utilization).

“one voice” doctrine, which invalidates state or federal legislation that is likely (in the eyes of a reviewing court) to cause foreign governments to perceive established features of U.S. foreign relations law or lawful aspects of U.S. foreign policy as incoherent.¹⁰⁹ The 2015 case of *Zivotofsky v. Kerry* offers an illustration.¹¹⁰ There, the Supreme Court considered the constitutionality of a federal statute that required the Secretary of State to record “Israel” as the country of birth on the passports of certain Jerusalem-born U.S. citizens.¹¹¹ Neither Congress nor the President understood this statute as effecting a formal change in U.S. recognition policy,¹¹² which for decades maintained neutrality on Jerusalem’s status,¹¹³ but President George W. Bush and President Barack Obama both refused to implement the statute out of concern that it interfered with their authority over recognition.¹¹⁴ The Court in *Zivotofsky* agreed, holding that the power to recognize foreign borders rests exclusively with the President and that the statute infringed this power by requiring the President to make diplomatic representations that were inconsistent with the official position of neutrality.¹¹⁵ Among other things, this conclusion relied on the logic of signaling: After discussing evidence of official criticism and public protest against the passport statute in Palestine,¹¹⁶ the Court explained that the United States must “speak . . . with one voice”—i.e., emit one signal—on recognition in order to avoid foreign confusion.¹¹⁷

The condition of foreign knowledge is significant because it determines whether these kinds of considerations are persuasive. It is consequential whether an AUMF sends the right message to foreign partners and adversaries only if they are sufficiently knowledgeable about U.S. law to ascertain whether an AUMF has been adopted, understand its contents, and draw appropriate conclusions about its political significance in light of the procedural requirements of bicameralism and presentment.¹¹⁸ If any of those conditions fails, the signal that an authorization produces may very well fail to shape the perceptions of foreign audiences as intended. Likewise, the question of whether

109. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (invalidating a state statute in part because it compromised the President’s capacity to speak for the United States with one voice in dealing with other governments to resolve insurance claims against European companies arising out of World War II).

110. 576 U.S. 1 (2015).

111. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

112. Brief for Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 22, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 3660504, at *5; Brief for the United States Senate as *Amicus Curiae* Supporting Petitioner at 20-21, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (No. 13-628), 2014 WL 3767419, at *20-21; Transcript of Oral Argument at 25, 35, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (No. 13-628).

113. Statement by the President Announcing Recognition of the State of Israel, PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN, 1948, at 258 (1964). *But see* Mark Landler, *Trump Recognizes Jerusalem as Israel’s Capital and Orders U.S. Embassy to Move*, N.Y. TIMES (Dec. 6, 2017) (reporting that the Trump administration abandoned the neutrality policy).

114. *Zivotofsky*, 576 U.S. at 6-8.

115. *Id.* at 29.

116. *Id.* at 8.

117. *Id.* at 14 (quoting *Garamendi*, 539 U.S. at 424) (internal quotations omitted).

118. See U.S. CONST. art. I, § 7, cl. 2 (establishing these requirements).

the President should ever use the Article II treaty process to signal to foreign governments the reliability of a U.S. guarantee matters only if those governments understand the domestic law that makes it both relatively difficult to ratify an Article II treaty and relatively easy to ratify an executive agreement.¹¹⁹ Without foreign knowledge of the domestic-law forms of international commitment, any differences in the international signals that they emit are of little consequence. And *Zivotofsky* is persuasive from a signaling perspective only if pertinent foreign audiences were sufficiently informed about U.S. law to know that the passport statute existed but also sufficiently uninformed to mistakenly conclude that it terminated the policy of neutrality.¹²⁰ To the extent that Palestine and other foreign governments understood the statute's limited effect,¹²¹ they were able to make sense of multiple voices, and *Zivotofsky*'s one-voice reasoning lacked force in the context of that case.

Meta-knowledge would thus help officials to determine whether signaling arguments are persuasive. In the known-known dyad, officials can assess with confidence that relevant foreign audiences will draw appropriate inferences from U.S. legal developments. Equipped with this knowledge, officials will know that they can use the law to shape foreign perceptions in desired ways and that foreign confusion of the sort that might require one voice is relatively unlikely. In the known-unknown dyad, officials will know that they cannot use the law as a signaling device and that one voice may be necessary to mitigate the risk of foreign confusion. In either case, meta-knowledge will ensure that official actions are informed by the epistemic environment in which the law operates.

In contrast, the absence of meta-knowledge risks the under- or over-use of the law as a signaling device, along with the under- or over-use of the one-voice doctrine as a solution to the risk of foreign confusion. In the unknown-known dyad, U.S. officials might mistakenly conclude that a legal measure would fail to inform foreign perceptions as desired and thus decline to pursue it even though it could have succeeded. For their part, courts might mistakenly perceive that one voice is necessary to avert foreign confusion and thus unnecessarily centralize power over foreign affairs by invalidating state or federal legislation.¹²² In the

119. See Bodansky & Spiro, *supra* note 104, at 892-93 (describing this law).

120. Cf. *Zivotofsky*, 576 U.S. at 71-74 (Scalia, J., dissenting) (“[The passport statute] has nothing to do with recognition.”); *supra* note 112 (citing evidence that Congress and the President understood the statute as leaving the neutrality policy in place).

121. The Court explained that the Palestine Liberation Organization Executive Committee, the Fatah Central Committee, and the Palestinian Authority Cabinet “had all issued statements claiming that the Act ‘undermines the role of the U.S. as a sponsor of the peace process.’” *Zivotofsky*, 576 U.S. at 8 (citing Joint Appendix at 231, *Zivotofsky v. Kerry*, 576 U.S. 1 (2014) (No. 13-628), 2014 WL 3541505). Yet a careful reading of the underlying evidence reveals little support for the idea that the Palestinian government objected specifically due to a mistaken impression that the Act had changed U.S. recognition policy. See Joint Appendix at 228-29 (excerpting a State Department cable that described Palestinian reactions). Indeed, a second cable not cited in *Zivotofsky* states only that “media and public” in the Middle East believed that the Act had changed the policy. *Id.* at 224. The Palestinian government certainly objected, but it seems plausible that it did so for other reasons, such as opposition even to purely symbolic U.S. support for Israel.

122. Cf. Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 7 SUP. CT. REV. 233, 234, 242-45 (2013) (explaining how the one-voice doctrine “centraliz[es] . . . foreign affairs decision making in the federal government vis-à-vis the states and centraliz[es] . . . foreign affairs decision making in the President vis-à-vis Congress.”).

unknown-unknown dyad, the risk is that officials will mistakenly believe a foreign government to be well-informed about U.S. law. Here officials might pursue a legal measure even though the epistemic prerequisites for effective signaling are absent, and courts might permit a multiplicity of voices even though one voice may be necessary to avoid foreign confusion.

E. Awareness of Strategic Risk

Finally, it is at least plausible that foreign relations law helps drive U.S. action in international affairs. In other words, it is at least plausible that the law is not merely epiphenomenal of domestic politics or other forces that shape U.S. action vis-à-vis foreign governments, but rather carries independent causal significance.¹²³

The theoretical foundation for this view comes from the liberal school of international relations theory, which posits that the state is “not an actor but a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors” who possess variegated preferences with regard to foreign affairs and compete with one another through domestic political and legal institutions to secure state support for those preferences.¹²⁴ From this perspective, foreign relations law is causally significant because it is not neutral—by allocating power internally, it inescapably privileges the distinctive preferences of some domestic groups over others in ways that, in effect, constitute the preferences of the state itself.¹²⁵

The interplay between U.S.-Iran relations and the law of war powers offers an example. In 2015, the permanent members of the U.N. Security Council, Germany, and Iran announced an agreement whereby Iran would submit to intrusive inspections and abandon certain resources and technologies that it had acquired in pursuit of nuclear weapons in exchange for relief from nuclear-related economic sanctions.¹²⁶ In May 2018, however, President Trump announced U.S. withdrawal from this agreement,¹²⁷ and his administration subsequently imposed a series of new economic sanctions in addition to reinstating old sanctions.¹²⁸ Iran responded by undertaking a variety of

123. See, e.g., Tom Ginsburg, *War and Constitutional Design* 37 (undated) (unpublished manuscript), available at http://minervaextremelaw.haifa.ac.il/images/Ginsburg-2014-War_and_Constitutional_Design.v11.pdf (finding that “a legislative role in decisions about war tends to lead to fewer conflicts.”).

124. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 516-20 (1997).

125. See HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION 99-128 (1997) (“How power is shared affects whose preferences are most likely to dominate policy making. Thus, the institutional relationship between the executive and the legislature in democracies is of central importance in understanding the domestic side of international cooperation.”).

126. S.C. Res. 2231 (July 20, 2015).

127. Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

128. See *Re-imposition of the sanctions on Iran that had been lifted or waived under the JCPOA*, U.S. DEP’T OF TREASURY (Nov. 4, 2018), <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions/re-imposition-of-the-sanctions-on-iran-that-had-been-lifted-or-waived-under-the-jcpoa> (providing information on sanctions that have been imposed on Iran since the end of U.S. participation in the Joint Comprehensive Plan of Action).

provocative actions—including shooting down an American drone¹²⁹ and launching a missile strike on Saudi Arabia.¹³⁰ In this context, some suggested that there was a real risk of conflict.¹³¹

The basic features of the domestic law that would govern the initiation of such a conflict are fairly well-settled. The Constitution “reserves to Congress the authority to ‘declare War’ and thereby to decide whether to commit the Nation to a sustained, full-scale conflict” with Iran.¹³² In addition, Congress holds exclusive power to authorize and appropriate funding for military operations,¹³³ as well as to authorize the use of force without declaring war by enacting a statute to that effect.¹³⁴ The President, however, is far from powerless: the Constitution grants him authority to direct troops in the field of battle¹³⁵ and to use military force without congressional approval in defense against an ongoing or imminent attack.¹³⁶ Through the War Powers Resolution, Congress generally accepted that the President can introduce U.S. forces into “hostilities” without legislative action for sixty to ninety days.¹³⁷

From the perspective of liberal theory, it is likely that this body of law played a material role in the construction of the risk of war between the United States and Iran. In 2019, U.S. military action against Iran would have been hard to imagine if the Constitution had granted exclusive authority over the use of force to the House of Representatives, which was dominated at the time by Democrats,¹³⁸ many of whom were publicly skeptical of the Trump administration’s hawkish policy on Iran.¹³⁹ But because the Constitution instead

129. *Strait of Hormuz: US Confirms Drone Shot Down by Iran*, BBC NEWS (June 20, 2019), <https://www.bbc.com/news/world-middle-east-48700965>.

130. Eric Schmitt, Farnaz Fassihi & David D. Kirkpatrick, *Saudi Oil Attack Photos Implicate Iran, U.S. Says; Trump Hints at Military Action*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/world/middleeast/iran-us-saudi-arabia-attack.html>.

131. See, e.g., Nicholas Kristof, *Trump Plays Chicken with Ayatollah*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/opinion/sunday/trump-iran-strikes.html> (worrying that the United States and Iran “may now be on the brink of war”).

132. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 74, at 4.

133. See U.S. CONST. art. I, § 8, cls. 12, 13 (providing that Congress has the power to “raise and support Armies” and to “provide and maintain a Navy”); *id.* § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

134. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the use of force against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”).

135. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”); The President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Supp. Op. O.L.C. 321, 334 (1970) (arguing that it would be unconstitutional for Congress to “attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the armed forces”).

136. See President’s Authority to Conduct Military Operations Against Terrorists, 25 Op. O.L.C. 188, 212 (2001) (discussing the President’s authority to use force without congressional authorization to defend the nation against an attack).

137. 50 U.S.C. § 1544(b).

138. *Mid-Term Elections: Democrats Win House in Setback for Trump*, BBC NEWS (Nov. 7, 2018), <https://www.bbc.com/news/world-us-canada-46120373>.

139. Catie Edmondson & Nicholas Fandos, *Senate Rejects Curb on Trump’s Authority to Strike Iran*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/trump-iran-senate.html>.

allocates substantial war powers to the President,¹⁴⁰ the use of force against Iran seemed quite plausible.¹⁴¹

Liberal theory thus suggests that only foreign governments that understand the separation of war powers can identify whose preferences count as U.S. preferences and, in turn, accurately assess the prospects for war (among other events). At one extreme, if relevant Iranian officials perceived the U.S. Constitution as allocating to the President exclusive authority over the decision to use force, they might have mistakenly disregarded the preferences of Congress in attempting to anticipate the nature and likelihood of an American attack. At the other extreme, if those officials perceived the Constitution as allocating exclusive authority to Congress, they might have mistakenly disregarded the preferences of the President. In between, Iranian officials likely paid attention to both the President and Congress if they correctly perceived the use of force as a domain of shared authority. Given the configuration of Presidential and congressional preferences in 2019,¹⁴² each of these scenarios would have yielded a different Iranian expectation—and degree of surprise—regarding the use or nonuse of force by the United States.

Meta-knowledge would thus enable the United States to ascertain and adjust to the perceptual features of its strategic environment. To continue with the example of Iran: in known-known, U.S. officials will know that Iran understands and gives appropriate weight to the separation of war powers in seeking to anticipate U.S. action. In the known-unknown dyad, officials will know that Iran lacks the legal expertise necessary to account for U.S. foreign relations law's influence over the likelihood of conflict. In both contexts, meta-knowledge will facilitate more accurate assessments of the risk of Iranian surprise and enable the United States to appropriately calibrate its strategic posture. In contrast, the absence of meta-knowledge is likely to interfere with the U.S. ability to anticipate Iranian reactions. If U.S. foreign relations law empowers domestic hawks but the United States operates in the unknown-known dyad, for example, the United States may very well underestimate Iran's awareness of the objective risk of conflict. If the law empowers hawks but the epistemic context is unknown-unknown, the United States may fail to appreciate that Iran lacks awareness of the full extent of its jeopardy.

II. THE ENIGMA OF FOREIGN KNOWLEDGE

In addition to overlooking and thereby obscuring the stakes of meta-knowledge of U.S. foreign relations law, the traditional inside-out paradigm has implicitly discouraged the empirical investigation of foreign knowledge. Legal scholars have not attempted such investigation.¹⁴³ Political scientists have

140. See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 74 (discussing the Justice Department's view on the scope of the President's authority to use military force without congressional approval).

141. Demetri Sevastopulo, *Trump's 'Maximum Pressure' Iran Strategy Stokes War Fears*, FIN. TIMES (June 17, 2019), <https://www.ft.com/content/0dbe64a8-9051-11e9-b7ea-60e35ef678d2>.

142. See *supra* note 138 (discussing the results of the 2018 mid-term elections).

143. See *supra* note 32 (citing works that have presupposed foreign knowledge without further

examined the role of perception in international relations, but their work has focused on perceptions of national military capabilities and intentions, rather than perceptions of municipal law.¹⁴⁴ Moreover, the U.S. intelligence community generally does not seek to ascertain or account for foreign knowledge of U.S. foreign relations law in generating intelligence products for policymakers.¹⁴⁵ Some officials in the State Department, the Defense Department, and other components of the executive branch might organically acquire impressions regarding the legal sophistication of their interlocutors,¹⁴⁶ but the U.S. government does not systematically pursue meta-knowledge.¹⁴⁷ In short, rigorously sourced meta-knowledge generally does not exist.

This Part plants a seed of correction, arguing that the absence of empirical research is a problem because the condition of foreign knowledge is not only nonobvious, but quite plausibly contrary to the broad assumptions that undergird TPA, *Zschernig*, and the WPR, among various other authorities.¹⁴⁸ Specifically, this Part uses theoretical insights, historical sources, and data collected from eighty years of official reports to Congress under the Foreign Agents Registration Act (FARA)¹⁴⁹ to suggest that there are reasons to anticipate substantial—even extreme—variation in foreign sophistication regarding U.S. foreign relations law. The plausibility of such variation underscores a need for meta-knowledge in place of bare assumptions.

A. *Indicia of Knowledge*

To U.S. observers, it may seem likely that all foreign governments today are familiar with at least the basic features of U.S. foreign relations law. How could the German government not know the difference between an Article II treaty and a sole executive agreement? How could North Korea not realize that the power to initiate the use of force now rests primarily with the President? How could relevant officials in Australia not understand U.S. doctrine on the extraterritoriality of federal statutes?

Indeed, these sorts of assumptions are longstanding. The decision to issue the Declaration of Independence made little sense unless the Framers assumed that foreign governments would receive and understand the document.¹⁵⁰ And it

investigation).

144. See generally, e.g., ROBERT JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (1976).

145. Telephone Interview with Joseph W. Gartin, Former Chief Learning Officer, Central Intelligence Agency (Dec. 10, 2020). Some intelligence analysts have a legal background, but they do not, as a general matter, apply that background in their work. For example, there are no sub-categories of analysts who are responsible for law-centric analysis. Nor do analysts receive formal training on the relevance or the means of assessing foreign sophistication on U.S. law. The primary reason is lack of demand for such meta-knowledge from policymakers. *Id.*

146. *Id.*

147. *Id.*

148. Cf. *supra* pp. 3-5 (discussing the broad assumptions of foreign knowledge or ignorance that undergird TPA, *Zschernig*, and the WPR).

149. 22 U.S.C. §§ 611-621.

150. Cf. DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 31 (2007) (“The Declaration was the culmination of a series of documents designed by the Continental

is well known that the Framers designed parts of the Constitution to signal to foreign governments that the United States would be a responsible and trustworthy nation.¹⁵¹ Such an effort was without practical effect unless the Framers assumed that foreign governments would learn about and comprehend the Constitution's relevant provisions. Among American scholars, assumptions of foreign knowledge remain common today.¹⁵²

Such assumptions are consistent with a variety of circumstantial evidence. Since 1978, over forty governments have filed roughly seventy amicus briefs to express positions on cases pending before the U.S. Supreme Court.¹⁵³ In *Kiobel v. Royal Dutch Petroleum*, for example, Argentina, Germany, the Netherlands, and the United Kingdom filed briefs addressing whether the Court should impose a territorial limit on claims that are actionable under the Alien Tort Statute.¹⁵⁴ Foreign governments have also filed amicus briefs in numerous cases pending before lower courts.¹⁵⁵ The choice to retain counsel and weigh in on these cases suggests at least a degree of knowledge of the underlying legal issues.

Other evidence of knowledge has surfaced outside the context of litigation. In response to some states' adoption of taxation methods that harmed British corporations, the United Kingdom enacted legislation retaliating not against the United States as a whole, but instead against the specific states that levied the taxes.¹⁵⁶ In doing so, the U.K. government displayed an awareness of federalism under American law. The Soviet Union demonstrated knowledge of the distinction between Article II treaties and congressional-executive agreements in 1979 by specifying the former as the preferred means of securing a ban on new types of ballistic and cruise missiles.¹⁵⁷ Shortly after the Supreme Court held in

Congress to shape the 'Opinions of Mankind' across the British Empire (before July 1776) and then in the wider world (by the Declaration itself).")

151. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1002-05 (2010) (discussing how the "grant of admiralty jurisdiction to the federal courts—with their constitutionally guaranteed independence from the legislative and executive branches—was an important signal to European powers of the willingness and capacity of the new nation to uphold its legal obligations").

152. See, e.g., Martin, *supra* note 107, at 445 (suggesting that if the President enters into executive agreements with foreign governments in order to evade legislative opposition, "[o]ther states would then see these agreements as a sign of lack of domestic support . . . and would therefore become more reluctant to sign on").

153. Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 297-306 (2016).

154. Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 2165334; Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, *supra* note 9; Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 379578.

155. See Spiro, *supra* note 47, at 684 n.131 (explaining that "[a]micus participation by foreign governments is becoming routine").

156. See Finance Act, 1985, pt. II, ch. I, § 54 & sched.13, P 5 (eliminating tax credits for companies based in a "province, state or other part of a territory outside the United Kingdom" that adopts the disfavored tax method), *reenacted in* Income and Corporations Taxes Act, 1988, pt. XVIII, ch. III, § 812 & sched.30, PP 20-21; see also Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1265 (1999) (discussing the use of this legislation against California and other states).

157. See Don Oberdorfer, *Incremental Step: Pact Far Short of Carter's Initial Goal*, WASH.

United States v. Alvarez-Machain that the U.S.-Mexico extradition treaty does not preclude cross-border abductions,¹⁵⁸ the Mexican government showed that it understood the Court's decision by demanding a treaty amendment to close the loophole that the Court had identified.¹⁵⁹ And U.S. partners have at times insisted that Washington convert executive agreements into Article II treaties in order to signal a more serious commitment of aid or security.¹⁶⁰ These instances suggest that there have been, at a minimum, discrete pockets of knowledge within certain foreign governments at certain moments in time.

We can also draw a reasonable inference of knowledge from the Foreign Agent Registration Act (FARA), which generally requires every agent of a foreign principal to register with the Department of Justice (DOJ) before lobbying or engaging in other activities on the principal's behalf.¹⁶¹ Since 1942, DOJ has provided periodic reports to Congress on the total number of FARA registrations.¹⁶² Because FARA defines "foreign principal" to include foreign governments¹⁶³ and defines "agent of a foreign principal" to include one who "within the United States represents the interests of [a] foreign principal before any agency or official of the Government of the United States,"¹⁶⁴ the reports have included registrations by American lawyers who represent foreign governments. As shown in Figure 1, the registrations indicate that such representation has been common for decades.¹⁶⁵ In the 1960s, for example, lawyers filed registrations for this kind of work over eight hundred times. The registrations also indicate fluctuating levels of foreign governmental engagement with the U.S. legal system over time, with a general trend toward more engagement rather than less.¹⁶⁶

POST, May 11, 1979 (reporting that former Soviet Foreign Minister Andrei Gromyko rejected a U.S. proposal to use a congressional-executive agreement rather than an Article II treaty to formalize the ban, due to the allegedly "inferior" status of congressional-executive agreements).

158. 504 U.S. 655, 666 (1992).

159. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11.

160. See, e.g., Bernard Gwertzman, *Turkey Pressing for More Arms Aid*, N.Y. TIMES, Mar. 21, 1986, at A3 (explaining that the Turkish government, "upset at the failure of the United States to live up to promises in an executive agreement," proposed a "formal treaty under which Turkey would be guaranteed as much aid as the largest American aid recipient gets," and that Turkey sought the treaty "to insure Senate endorsement of high aid levels"); Stuart Auerbach, *Pakistan Seeking U.S. Guarantees in Formal Treaty*, WASH. POST (Jan. 18, 1980), <https://www.washingtonpost.com/archive/politics/1980/01/18/pakistan-seeking-us-guarantees-in-formal-treaty/49301e83-c3f7-4499-b32d-11b34a36be61/> (explaining that Pakistan sought to convert a 1959 defense agreement with the United States into an Article II treaty because the latter would, in Pakistan's view, serve as a clearer signal of long-term U.S. commitment).

161. 22 U.S.C. § 612.

162. *Id.* § 621; see also *FARA Reports to Congress*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/nsd-fara/fara-reports-congress> (last visited Aug. 14, 2019) (providing links to the reports).

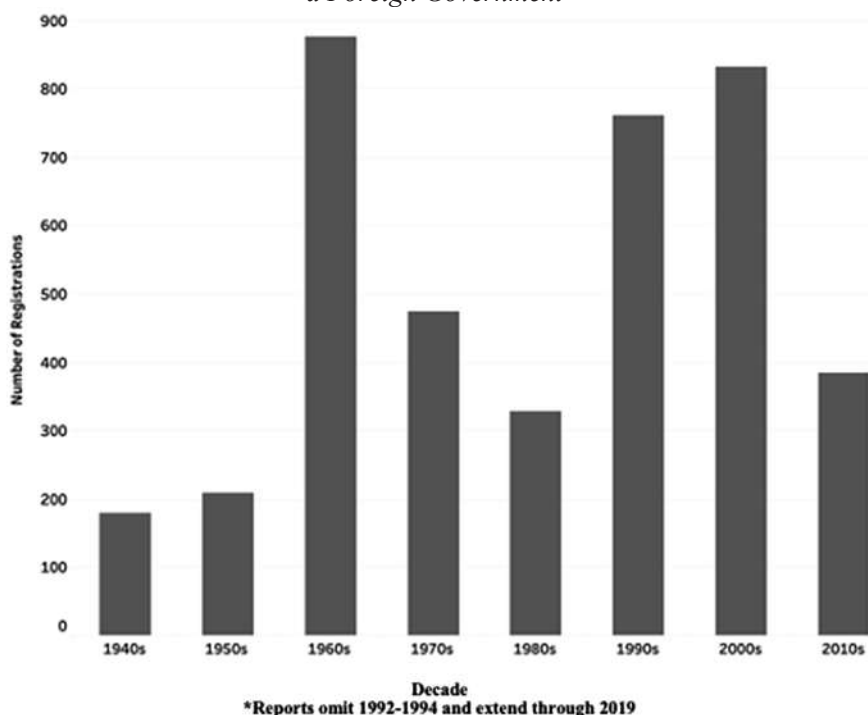
163. 22 U.S.C. § 611(b)(1).

164. *Id.* § 611(c)(1)(4).

165. I obtained the numbers in Figure 1 by tallying the number of legal-service registrations in the FARA reports for each decade. See Ryan M. Scoville, *FARA Data*, <https://ryanscoville.files.wordpress.com/2021/05/new-fara-data-1.xlsx> (compiling the underlying data).

166. Cf. Spiro, *supra* note 47, at 682-83 (suggesting that foreign countries are increasingly sophisticated about "internal U.S. governance structures").

Figure 1: FARA Registrations for the Provision of a Covered Legal Service to a Foreign Government



FARA reports are often vague about the services that American lawyers have been providing, but a significant portion of those services appear to involve foreign relations law. For instance, a 2017 report indicates that Cameroon hired Squire Patton Boggs to provide counsel regarding the African Growth and Opportunity Act,¹⁶⁷ which enhances U.S. market access for Sub-Saharan African countries that have established or are making progress toward a market-based economy and the rule of law, among other benchmarks.¹⁶⁸ A 2004 report shows that Japan retained the law firm of Caplin & Drysdale to provide information on U.S. tax treaties and counsel regarding “the formulation of Japan’s policy for negotiation of a revised Japan-U.S. tax treaty.”¹⁶⁹ And a 2002 report discloses that Shaw Pittman “contacted members of Congress, congressional staffers, and U.S. Government officials to discuss issues such as the implementation of . . . the North American Free Trade Agreement” on behalf of the Mexican Ministry of Commerce and Industrial Development.¹⁷⁰ Although foreign governments

167. U.S. DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO THE CONGRESS OF THE UNITED STATES ON THE ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED [hereinafter FARA REPORT], FOR THE SIX MONTHS ENDING JUNE 30, 2017, at 23, <https://www.justice.gov/nsd-fara/page/file/1021601/download>.

168. 19 U.S.C. § 3703.

169. U.S. DEP’T OF JUSTICE, FARA REPORT FOR THE SIX MONTHS ENDING JUNE 30, 2003, at 139, <https://www.justice.gov/file/991546/download>.

170. U.S. DEP’T OF JUSTICE, FARA REPORT FOR THE SIX MONTHS ENDING JUNE 30, 2002, at 195, <https://www.justice.gov/file/991501/download>.

may not always understand or utilize the information that lawyers present to them, it seems clear that foreign officials often seek and obtain information about U.S. foreign relations law in the course of these interactions, resulting in at least a degree of foreign knowledge in many cases.

Moreover, FARA reports are likely to vastly understate the total volume of legal work that American lawyers have performed for foreign governments, for two reasons. First, while concerns about foreign influence have grown since the 2016 presidential election and generated a number of high-profile FARA prosecutions,¹⁷¹ DOJ “for decades mostly ignored” the statute.¹⁷² Lawyers who were aware of this fact may have frequently declined to register on the view that there was little risk in noncompliance.¹⁷³

Second, by its terms, FARA does not cover many types of legal services. The registration requirement generally applies to any lawyer who “represents the interests of [a foreign government] before any agency or official of the Government of the United States,”¹⁷⁴ but it does not apply to those who provide legal representation outside the United States,¹⁷⁵ before state or local governments,¹⁷⁶ or in “judicial proceedings, criminal or civil enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record.”¹⁷⁷ Put another way, lawyers who represent foreign governments must register under FARA only if their work entails domestic and largely informal interaction with Congress or the executive branch. The numbers in Figure 1 would almost certainly be much higher if DOJ had a longstanding practice of vigorous enforcement and the statute covered all forms of legal services.

B. *Indicia of Ignorance*

At the same time, there is reason to suspect that material deficiencies in foreign knowledge are common. We can see this most easily by recognizing that there are often shortcomings even in domestic knowledge of U.S. law. One noteworthy example occurred in March 2015, during the height of international

171. See David Laufman, *Paul Manafort Guilty Plea Highlights Increased Enforcement of Foreign Agents Registration Act*, LAWFARE (Sept. 14, 2018, 1:58 PM), <https://www.lawfareblog.com/paul-manafort-guilty-plea-highlights-increased-enforcement-foreign-agents-registration-act> (discussing Manafort’s guilty plea).

172. Katie Benner, *Justice Dept. to Step Up Enforcement of Foreign Influence Laws*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/fara-task-force-justice-department.html>.

173. Cf. Ken Silverstein, *I’ve Covered Foreign Lobbying for 20 Years and I’m Amazed Manafort Got Busted*, POLITICO MAGAZINE (Oct. 17, 2017), <https://www.politico.com/magazine/story/2017/10/30/paul-manafort-indictment-foreign-lobbying-russia-probe-215764> (explaining that “only about half of foreign lobbyists bother[ed] filing under FARA” in the early 1990s and that “it’s surely gotten worse since then”).

174. 22 U.S.C. § 611(c)(1)(4).

175. See *id.* (defining “agent of a foreign principal” as one who “within the United States represents the interests of [a foreign government] before any agency or official of the Government of the United States”) (emphasis added).

176. *Id.*

177. 22 U.S.C. § 613(g).

negotiations over the fate of the Iranian nuclear program.¹⁷⁸ Hoping to discourage Iran from entering an agreement with the Obama administration, over forty Republican Senators wrote an open letter to explain to Iran “[the U.S.] constitutional system” with regard to the adoption of international agreements.¹⁷⁹ One part of this letter stated that although the President negotiates agreements, “Congress plays the significant role of ratifying them.”¹⁸⁰ That explanation, however, was technically incorrect. While it is true that the President negotiates and that Congress must at times consent to the result, it is the President—not Congress—who ratifies agreements.¹⁸¹ More generally, Congress has perceived legal errors as sufficiently common among federal judges to warrant a multi-layered system of appellate review,¹⁸² including review for “plain error.”¹⁸³ If U.S. officials—including those with extensive legal training and experience—are capable of misunderstanding U.S. law, surely their foreign counterparts are as well.

Indeed, those counterparts will often encounter unique hurdles. Some will face language barriers or lack the financial resources to retain American experts on a regular basis. Others will be familiar with civil law rather than the common law. Still others will serve under an authoritarian or other form of government that is structurally dissimilar to that of the United States. To varying degrees, these hurdles are likely to complicate efforts to understand U.S. law by rendering it inaccessible or fostering mistaken impressions.¹⁸⁴

Significant gaps in foreign understanding also seem likely if we simply reverse the inquiry: How sophisticated is the U.S. government on the foreign relations laws of foreign jurisdictions? Notwithstanding nascent academic interest in the field of comparative foreign relations law,¹⁸⁵ knowledge of foreign relations law is limited among American scholars¹⁸⁶ and may be even more so

178. See *Timeline of Nuclear Diplomacy with Iran*, Arms Control Association, ARMS CONTROL ASSOC., <https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran> (last visited Dec. 2020) (highlighting key developments in the negotiations).

179. *Letter from Senate Republicans to the Leaders of Iran*, N.Y. TIMES (Mar. 9, 2015), <https://www.nytimes.com/interactive/2015/03/09/world/middleeast/document-the-letter-senate-republicans-addressed-to-the-leaders-of-iran.html>.

180. *Id.*

181. *The Senate's Role in Treaties*, UNITED STATES SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited June 23, 2019); see also Jack Goldsmith, *The Error in the Senators' Letter to the Leaders of Iran*, LAWFARE (Mar. 9, 2015, 5:55 AM) (pointing out the error).

182. See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) (discussing the error-correction function of appellate courts).

183. See *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (discussing appellate review for plain error under Federal Rule of Criminal Procedure 52(b)).

184. *Cf.*, e.g., JERVIS, *supra* note 144, at 283 (“Often without realizing it, most decision-makers draw on their knowledge of their own domestic political systems in their efforts to understand others.”); see also Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur, 2 ILC YB. 90, 142 (1953) (discussing the “serious inconvenience” involved in official efforts to resolve questions about the constitutional law of foreign states).

185. See generally THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11.

186. See Curtis A. Bradley, *Preface*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11, at ix (suggesting that “there is much that we still do not know about foreign relations laws and practices around the world”); Oona A. Hathaway, *A Comparative Foreign*

among senior officials. President Trump, for example, was initially unaware that the laws of European countries require the United States to negotiate trade agreements with the European Union rather than individual members such as Germany.¹⁸⁷ To accept the likelihood of deficiencies in foreign knowledge is to recognize merely that some governments could very well suffer from comparable forms of ignorance.

Finally, deficiencies in foreign knowledge seem likely from a legal ontological perspective. Law is much more than the verbal formulations that comprise legal doctrine. The rule that a federal court can exercise personal jurisdiction over a foreign defendant only if the defendant has at least “minimum contacts” with the forum, for example, provides little insight on the quality and quantity of contacts that will suffice in practice.¹⁸⁸ In addition, even where a statement of law is determinate on its face, its application must always cohere with a broader network of rules and meta-rules in order to generate a conclusion that is persuasive even in a narrow, syllogistic sense. For instance, knowledge of the text of the Foreign Sovereign Immunities Act (FSIA)—which, among other things, withholds immunity from judicial jurisdiction in cases involving a claim for “personal injury or death . . . occurring in the United States and caused by the tortious act or omission of [a] foreign state”¹⁸⁹—is of little use in predicting the outcome of an immunity adjudication if the background rules of statutory interpretation are unsettled or unknown.¹⁹⁰

Moreover, even advanced doctrinal knowledge is rarely sufficient to understand whether relevant decisionmakers are likely to view any given legal conclusion as persuasive. As Karl Llewellyn once explained, analysts must also possess an embedded sensibility—a “situation sense”¹⁹¹—of legal merit. A casual observer might interpret Congress’s explicit power to “declare War”¹⁹² as establishing that only Congress can authorize the use of force, but such an assessment would be incorrect, not because it misapprehends the semantic meaning of the words that comprise the Constitution’s text, but instead because it fails to appreciate that those words operate in a complex sociolegal milieu featuring competing interpretive modalities, historical inertia, pragmatic concerns, multiple sources of authority, and subtle hierarchies of legitimacy and

Relations Law Agenda, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11, at 84-86 (explaining that Western knowledge of the foreign relations law of countries in the Global South is particularly limited).

187. Lucy Pasha-Robinson, *Angela Merkel ‘Had to Explain Fundamentals of EU Trade to Donald Trump 11 Times’*, THE INDEPENDENT (Apr. 24, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/angela-merkel-donald-trump-explain-eu-trade-11-times-germany-chancellor-us-president-a7699591.html>; *see also* Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1706-24 (2020) (discussing difficulties that American judges encounter in seeking to ascertain the law of authoritarian states).

188. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

189. 28 U.S.C. § 1605(a)(5).

190. *Cf. generally* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006) (discussing historical shifts in dominant views on statutory interpretation).

191. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 59-61, 121-57 (1960).

192. U.S. CONST. art. I, § 8, cl. 11.

influence.¹⁹³ In Chad Oldfather's words, the task of identifying persuasive legal conclusions in such a context requires "long exposure to the field—a process of acculturation" through legal education and sustained professional immersion.¹⁹⁴

The importance of situation sense is likely to complicate foreign efforts to ascertain U.S. foreign relations law. Most foreign officials have not experienced the sort of extensive socialization in U.S. legal culture that would enable them to channel the argumentative sensibilities of the interpretive community that focuses on U.S. foreign relations law.¹⁹⁵ These officials almost certainly never worked in U.S. government positions that require frequent application of such law, and they generally do not maintain extensive contact with relevant American scholars.¹⁹⁶ Indeed, it is likely that many of these officials are unfamiliar with "foreign relations law," which generally is not recognized as a discrete field of academic knowledge outside the United States and Europe.¹⁹⁷ And insofar as national jurisdictions have their own legal cultures, with distinctive hierarchies, native patterns of legal argumentation, and idiosyncratic perceptions of persuasive merit,¹⁹⁸ the situation sense of a foreign legal community is unlikely to match that of its American counterpart. Foreign governments are thus at risk of error even if they succeed in identifying the verbal formulations that constitute the law's articulable substance.

It should come as no surprise, then, that evidence of foreign ignorance and

193. Cf. Curtis A. Bradley, *What is Foreign Relations Law?*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11, at 19-20 (explaining that the "public law of a country may be substantially different in practice from what appears in its formal written law . . . , making it difficult for outside observers to have an accurate sense of it").

194. Chad M. Oldfather, *Aesthetic Judging*, 52 U.C. DAVIS L. REV. 981, 990 (2018).

195. Cf. ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 54, 63, 66-67 (2018) (explaining that the number of internationally mobile students represents only "1.8 percent of all tertiary enrolments or two in one hundred students globally," and reporting that foreign students travel to France and the United Kingdom for legal studies far more often than to the United States); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories of Comparison in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 51 (1998) ("[A] valid examination of another legal culture requires immersion into the political, historical, economic and linguistic contexts that molded the legal system, and in which the legal system operates.").

196. The American Society of International Law's Interest Group on International Law in Domestic Courts holds annual workshops to provide scholars with an opportunity to discuss emerging research on U.S. foreign relations law. Since I first started attending these workshops in 2013, the participants have been almost exclusively American. Duke University School of Law, University of Virginia School of Law, and Yale Law School have each hosted an annual Foreign Relations Law Roundtable for similar purposes, but all participants to date appear to have been American. See, e.g., *Yale-Duke Foreign Relations Law Roundtable: Congress's Authority Over Foreign Affairs* (Sept. 28, 2018), <https://law.yale.edu/center-global-legal-challenges/events/yale-duke-foreign-relations-law-roundtable> (listing participants). That said, there is some evidence that foreign official interaction with American experts on foreign relations law may be increasing. See generally THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11 (including chapters by officials from the governments of Germany, Japan, and Switzerland).

197. See Joris Larik, *EU Foreign Relations Law as a Field of Scholarship*, 111 AJIL UNBOUND 321, 324 (2017) (discussing the general absence of foreign relations scholarship outside the United States and Europe); Campbell McLachlan, *Five Conceptions of the Functions of Foreign Relations Law*, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 11, at 21 (explaining that "foreign relations law" is "not a category of the law with wide acceptance across national legal systems").

198. See Rogelio Pérez-Perdomo & Lawrence Friedman, *Latin Legal Cultures in the Age of Globalization*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION 5 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) (observing that globalization has not eliminated cross-national differences in legal culture).

misunderstanding exists alongside indicia of foreign sophistication. Megan Donaldson has suggested that the “difficulty of distinguishing [U.S.] treaties from mere diplomatic correspondence became more acute” after World War II due to a massive increase in the volume of communications between the United States and foreign governments.¹⁹⁹ One result was that while “State Department officials were well-versed in diplomatic wording that conveyed distinctions between executive agreements and lesser texts, Congressional committees did not necessarily grasp these nuances, and nor did foreign governments.”²⁰⁰ In 2017, Turkish President Recep Tayyip Erdogan repeatedly pressured the Trump administration to end a federal criminal trial against Turkish nationals who had been charged with conspiring to violate U.S. sanctions on Iran.²⁰¹ In doing so, Erdogan seems to have betrayed ignorance about DOJ’s tradition of independence from politics in criminal matters, which sharply limits the utility of external political pressure for or against any particular prosecution.²⁰² And in reference to FARA, one agent recently reported that “‘there is a significantly greater likelihood that someone will propose to you something that’s illegal’ while working for foreign clients versus domestic ones,” the reason being that these clients—including governments—“don’t understand U.S. law” or “know what they’re doing, . . . don’t care, and are happy to find a consultant who feels the same.”²⁰³

FARA reports lend credence to these examples by indicating that some foreign governments procure U.S. legal analysis far less frequently than others. Figure 2 identifies the twenty-five governments associated with the highest number of legal-service registrations in the reports.²⁰⁴ The clear leader is Japan, which appeared in over 300 registrations, followed by Canada (180), the United Kingdom (129), China (114), Mexico (110), Israel (100), Saudi Arabia (86), France (72), and South Korea (63) to round out the top ten. In contrast, the reports show zero registrations since 1942 in connection with nearly forty governments, including Albania, Botswana, Laos, Malaysia, Mongolia, Niger, North Korea, Serbia, Slovakia, and Tanzania.²⁰⁵ Those same reports suggest that Iran has not procured a covered form of legal service since the severance of diplomatic

199. Megan Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, 111 AM. J. INT’L L. 575, 617-18 (2017).

200. *Id.*

201. Benjamin Weiser, *Erdogan Helped Turks Evade Iran Sanctions*, *Reza Zerrab Says*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/world/europe/erdogan-turkey-iran-sanctions.html>.

202. See generally Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 2 (2018) (arguing that from a historical perspective the “Department of Justice is independent of the President, and its decisions in individual cases and investigations are largely immune from his interference or direction”).

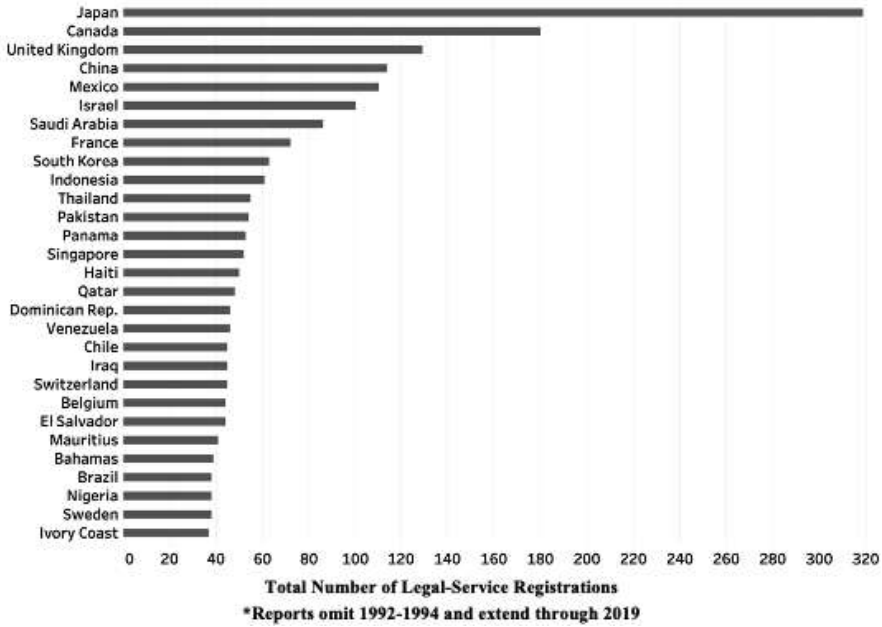
203. Megan R. Wilson, *Foreign Lobbying Law Open to Exploitation*, THE HILL (Nov. 28, 2017), <https://thehill.com/business-a-lobbying/362042-foreign-lobbying-law-open-to-exploitation>.

204. For a description of the data-collection and a link to the underlying data, see *supra* note 165.

205. The other states on which DOJ has not reported any legal-service registrations since 1942 are Andorra, Armenia, Burkina Faso, Burundi, Comoros, Gambia, Grenada, Guinea-Bissau, Kiribati, Madagascar, Mali, Mauritania, Moldova, Monaco, Namibia, Nepal, Papua New Guinea, Rwanda, Samoa, Slovenia, Solomon Islands, South Sudan, St. Lucia, Timor-Leste, Turkmenistan, Tuvalu, and Vanuatu. See Scoville, FARA Data, *supra* note 165 (reporting aggregate registration numbers over time).

relations in 1980,²⁰⁶ and that Cuba has not done so since the 1960s.²⁰⁷ It is a reasonable inference that these states have comparatively limited knowledge of U.S. law, as their governments are likely to have consulted with and obtained customized analyses from fewer American legal experts.

*Figure 2: FARA Registrations for the Provision of a Covered Legal Service to a Foreign Government Since 1942**



To be sure, it is premature to draw firm conclusions about foreign knowledge based on FARA patterns alone. Some governments might have fewer registrations because their officials independently understand relevant U.S. law and thus see no need to procure legal services that require registration. Other governments might have many FARA registrations due to frequent consultation with American lawyers on discrete issues, but lack sophisticated knowledge of U.S. law beyond the scope of such consultations. Yet this uncertainty merely underscores the enigmatic condition of foreign knowledge. Given that foreign governments vary markedly in terms of FARA registrations, that they have varied in this way across time, and that the epistemic implications of registration are uncertain, it is unsafe for U.S. legal actors to make broad assumptions about the state of foreign knowledge around the world. As a general matter, analysts can confidently say only that governments appear to vary in ways that seem likely to create significant cross-national variation in sophistication with respect to U.S. law.

206. See *Historical List of All Foreign Principals (Active and Terminated)*, U.S. DEP'T OF JUSTICE, https://efile.fara.gov/ords/fara/f?p=1381:136:15971270938171::NO::P136_CNTRY:IR (last visited Oct. 26, 2021) (reporting registered agents for Iran).

207. See *id.* (reporting registered agents for Cuba).

* * *

In sum, the condition of foreign knowledge of U.S. foreign relations law is both nonobvious and quite plausibly variable, rather than categorically present or absent as U.S. law often assumes.²⁰⁸ There is preliminary evidence of both sophistication and ignorance, along with changes over time. We can imagine, moreover, that foreign knowledge might vary in any number of ways. It might vary in terms of its breadth and depth, how timely and accurate it is, how it is obtained, and how accessible it is for relevant decisionmakers. It might vary by where it is located—in some states, relevant knowledge might be concentrated within a foreign ministry, while in others it might reside primarily in academia or be widely dispersed throughout society. And it might vary over time by what motivates its acquisition and in the degree to which it is utilized by government decisionmakers. At one extreme, a foreign government may be highly sophisticated about U.S. foreign relations law and perceive it as a reliable and even necessary guide. At the other extreme, a government may have no knowledge of the law, completely misunderstand it, or dismiss it as epiphenomenal. The plausibility of such variation suggests a need for rigorous empirical investigation in place of bare assumptions.

III. A CASE STUDY: JAPAN

Having established that meta-knowledge is needed, this Part begins to provide it by offering an immersive case study on Japan. Japan is an intriguing target for inquiry because it exhibits some well-known characteristics that suggest sophistication and others that suggest precisely the opposite. On the one hand, the country's high level of education and extensive security and economic ties to the United States indicate ample capacity and a strong motive to learn U.S. foreign relations law.²⁰⁹ From this perspective, it seems likely that the Japanese government is relatively sophisticated on pertinent legal questions. On the other hand, Japan has its own language and legal culture, along with a civil law rather than a common law tradition. It also has a different form of government than the United States. Rather than a federal system that vertically divides political authority between one national and many subnational jurisdictions, Japan has a unitary system in which subnational jurisdictions generally depend on the national government for administrative guidance and financial support.²¹⁰ Rather than a presidential system that separates the executive and legislative branches, Japan has a parliamentary system in which the legislature (the parliament) designates the chief executive (the prime minister) from among its own members.²¹¹ And rather than entrust all executive functions to a single individual

208. See *supra* pp. 3-5 (discussing examples).

209. See Japan, CIA World Factbook, <https://www.cia.gov/the-world-factbook/countries/japan/#military-and-security> (last visited Jan. 2021) (providing background information on Japan's economy, society, and military).

210. *Local Government, in JAPAN: A COUNTRY STUDY* 319 (Ronald E. Dolan & Robert L. Worden eds., 1994).

211. *Fundamental Structure of the Government of Japan*, ADMIN. MGMT. BUREAU, MINISTRY OF INTERNAL AFFS. & COMMC'NS (2007), http://japan.kantei.go.jp/constitution_and_government_

who is both the head of government and the head of state, Japan divides those functions between its prime minister and its emperor.²¹² Because these conditions could easily render U.S. law inaccessible or unfamiliar, the nature and extent of Japanese knowledge are uncertain at first glance.²¹³

To reduce this uncertainty, I traveled to Tokyo and the Kansai region in the fall of 2018 to conduct several months of field research. While there, I collected scholarly publications on U.S. foreign relations law at the National Diet Library, examined newspaper archives, requested records under Japan's freedom-of-information act, and conducted semi-structured interviews with nearly fifty scholars and government officials in the Ministry of Foreign Affairs (MOFA) and the Ministry of Economy, Trade, and Industry (METI). Along with American secondary sources, the resulting evidence sheds light on the extent to which Japan's legal academy, popular media, and official bureaucratic structures and practices have fostered or inhibited knowledge of U.S. foreign relations law within the Japanese government in recent decades. The case study thus facilitates more nuanced conclusions about the nature and extent of foreign knowledge in the context of one specific bilateral relationship and offers insights on the potential global determinants of foreign sophistication and ignorance. It also serves as a model for future case studies on other governments.

A. Legal Academia

The practices of Japanese academia seem likely to shape official knowledge in several ways. The quality and volume of Japanese scholarship on any given issue in U.S. foreign relations law will substantially determine whether officials have access to in-depth analysis in a format that is linguistically convenient and generally reflective of Japan's national interests. The presence or absence of university courses on U.S. foreign relations law will largely dictate whether future bureaucrats can study the law in a formal setting. And an abundance or scarcity of native academic specialists will affect the ability of government officials to seek out expert advice. This section thus examines the extent to which Japanese academia has fostered the study of U.S. foreign relations law in recent decades.

In stark contrast to prewar Japan, where academic research into American law was "extremely inactive"²¹⁴ and publications on U.S. foreign relations law

of_japan/fundamental_e.html (summarizing the structure of the national government).

212. *Id.*

213. See KENNETH B. PYLE, JAPAN RISING: THE RESURGENCE OF JAPANESE POWER AND PURPOSE 14 (2007) (suggesting that "no two societies are more different in their fundamental mores than the United States and Japan" and that the U.S.-Japan alliance "often has lacked genuine understanding" as a result); John O. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 CORNELL INT'L L.J. 403, 416-18 (1989) (discussing differences in U.S. and Japanese legal cultures and the effect of those differences on trade relations).

214. TANAKA HIDEO, EIBEIHO SORON 652 (1980) (translation mine). This inactivity reflected both the practical irrelevance of the common law in a fledgling civil-law jurisdiction and the international and domestic political climate of the day. With the rise of fascism and the Japanese military's growing influence over national politics, research on topics such as judicial review was widely regarded as "anachronistic." *Id.* at 653 (translation mine). Indeed, many scholars viewed U.S. law as "rubbish undeserving of academic inquiry." ITÔ MASAMI, AMERIKAHÔ NYÛMON 4 (1961) (translation mine).

were virtually nonexistent,²¹⁵ postwar Japan featured a “craze” for American legal studies.²¹⁶ With the occupation, U.S. authorities imposed a liberal constitution and major legal reforms in areas ranging from criminal procedure to land ownership, labor unions, education, and industrial organization, all in the name of reordering Japanese society to embrace democracy.²¹⁷ These reforms laid a “thick stratum of American legal principles” on top of the preexisting foundation²¹⁸ and raised questions about the nature of American law among scholars trying to make sense of the changes that had occurred.²¹⁹ In response, many began to travel to the United States for research,²²⁰ universities expanded instruction on U.S. law,²²¹ and the volume of scholarship grew far beyond anything produced up to that point.²²² In various respects, American civil society helped to facilitate these developments.²²³

To be sure, the immediate result was not a vast expansion in Japanese knowledge. Much of the initial research was “extremely superficial” and paid no attention to the social and historical context in which the law operated.²²⁴ One commentator lamented that the initial fruits of the craze were so limited that Japan’s understanding of even the most foundational aspects of American law

215. I found only five such publications from the advent of Japanese legal academia in the 1870s through World War II. See MATSUSHITA MASATOSHI, BEIKOKU SENSŌ KENRON (1940) (analyzing the separation of war powers under the U.S. Constitution); KIYOSAWA KIYOSHI, AMERIKA WA NIHON TO TATAKAWAZU 240-58 (1932) (same); Takayanagi Kenzō, *Beikoku Sansen to Daitōryō no Kengen*, 23 KAIZŌ 32 (1941) (discussing the President’s constitutional authority in wartime); Inui Seimatsu, *Beikoku Daitōryō no Gaikō Kengen*, 99 GAIKŌ JIHŌ 9 (1941) (explaining the President’s constitutional authority to conduct diplomacy); Tawara Shizuo, *Beikoku ni Okeru Jōyaku Teiketsuken Mondai*, 54 KOKUMIN KEIZAI ZASSHI 429 (1933) (summarizing John C. Cooper, Jr., *The Panamerican Convention on Commercial Aviation and the Treaty-Making Power*, 19 ABA J. 22 1933, which discusses whether the U.S. Constitution renders treaties supreme over state law). At nearly five-hundred pages in length, Matsushita’s *Beikoku Sensō Kenron* is easily the most substantial of these works and is recognized today as the first scholarly treatment of U.S. war powers in Japanese. See, e.g., MIYAWAKI MINEO, GENDAI AMERIKA NO GAIKŌ TO SEIGUN KANKEI 42-43 n.3 (2004) (describing the book in this way).

216. Kenzo Takayanagi, *Contact of the Common Law with the Civil Law of Japan*, 4 AM. J. COMP. L. 60, 69 (1955).

217. AOKI HITOSHI, “O-OKA SABAKI” NO HŌISHIKI: SEIYŌHŌ TO NIHONJIN 89-90 (2005); see also JENNIFER M. MILLER, COLD WAR DEMOCRACY: THE UNITED STATES AND JAPAN 39-51 (2019) (discussing the reforms).

218. AOKI, *supra* note 217, at 90 (translation mine).

219. See *Tokyo University Receives Gift of American Law Books*, 39 ABA J. 897, 899 (1953) (quoting Odaka Tomō, Dean of the Faculty of Law at the University of Tokyo, as saying that American legal studies became necessary after the war “to find out the appropriate way of interpretation and application of the postwar legal order”).

220. *Id.* at 898.

221. *Id.* at 899.

222. See Tanaka Hideo, *Amerikahō*, in GAIKOKUHŌ TO NIHONHŌ 300 (Itō Masami ed., 1966) (explaining that the volume of new scholarship on U.S. law from 1945 to 1966 was roughly six times larger than the volume produced throughout Japanese history prior to 1945).

223. For example, the Ford Foundation funded exchanges for students and faculty at leading Japanese and American law schools from 1954 to 1961. Takayanagi, *supra* note 216, at 69; see also MICH. STATE UNIV. INST. OF RSCH. ON OVERSEAS PROGRAMS, THE INTERNATIONAL PROGRAMS OF AMERICAN UNIVERSITIES 144-45 (1958) (explaining that the exchanges involved the law schools at Chūō, Keiō, Tōkyō, Waseda, Harvard, Michigan, and Stanford). Likewise, the West Publishing Company made a gift of roughly 800 volumes of the National Reporter System to the University of Tokyo in 1953. *Tokyo University Receives Gift of American Law Books*, *supra* note 219, at 897.

224. TANAKA, *supra* note 214, at 654 (translation mine).

remained rickety into the 1960s.²²⁵ Moreover, the craze ebbed somewhat after the occupation.²²⁶

Nevertheless, the legal academy became an increasingly reliable source of expertise over the long run. The quality of the research improved as scholars began to examine U.S. law in context.²²⁷ The research became more specialized, and foundational works appeared in subfields such as U.S. constitutional law, administrative law, antitrust law, civil and criminal procedure, labor law, and contract law.²²⁸ Joint projects with Americans became more common.²²⁹ Experts formed organizations such as the Japanese American Society for Legal Studies (*Nichibei Hōgakkai*),²³⁰ which now claims roughly six hundred members,²³¹ holds annual meetings²³² and case-law review sessions,²³³ and publishes *Amerika Hō*—the first journal dedicated exclusively to U.S. legal studies.²³⁴ Resources emerged to facilitate awareness of and access to the new literature.²³⁵ Moreover, instruction expanded to the point where a clear supermajority of both undergraduate and graduate law faculties now offer at least one course on the

225. ITŌ, *supra* note 214, at 11-12.

226. *Id.* at 11.

227. Higuchi Norio, *Hō*, in *AMERIKA KENKYŪ ANNAI* 149 (Abe Hitoshi ed., 1998).

228. *Id.* at 152-53.

229. *Id.* at 156.

230. See JAPANESE AMERICAN SOCIETY FOR LEGAL STUDIES, <http://www.kichi.j.u-tokyo.ac.jp/nichibei.html> (last visited June 9, 2020) (providing information about the society). Smaller groups of this type have also emerged. One is the Kansai Society for the Study of American Public Law (*Kansai Amerika Kōhō Gakkai*). Interview with Yokoyama Maki, Lecturer of Constitutional Law, Dōshisha Univ., in Kyōto, Japan (Nov. 7, 2018). Another is the American Constitutional Law Study Group (*Amerika Kenpō Kenkyūkai*). Interview with Itamochi Kengo, Assoc. Professor, Kōbe Univ. Sch. of Law., in Tokyo, Japan (Nov. 17, 2018).

231. JAPANESE AMERICAN SOCIETY FOR LEGAL STUDIES, *supra* note 231.

232. See, e.g., Nichibei Hōgakkai Sōkai Puroguramu (Sept. 10, 2005), <http://www.kichi.j.u-tokyo.ac.jp/2005meeting.html> (describing the program for the Society's 2005 annual meeting, which featured presentations on U.S. law and the war on terrorism).

233. See, e.g., Nichibei Hōgakkai Hanrei Kenkyūkai (Dec. 1, 2018), <http://www.kichi.j.u-tokyo.ac.jp/2018hanrei.html> (summarizing a case-law study group meeting at which the participants discussed, among other decisions, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018), which interpreted the Foreign Sovereign Immunities Act).

234. *Amerika Hō* published its first issue in 1965 and features original research, symposia, and summaries of Supreme Court cases, along with reviews of American law review articles and books. On occasion, this content addresses U.S. foreign relations law. See, e.g., Tsuchiya Takatsugu, *Daitōryō no Gaikō Seisaku Ketteiken*, *AMERIKA HŌ* 388 (No. 2, 2003) (reviewing H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002)). Following the establishment of *Amerika Hō*, older journals such as *Jurisuto* and *Hōgaku Seminā* also began to publish a steady stream of academic articles on American law. Uemura Taizo, *Hōgaku Eigo no Rekishi to Genzai ni Kansuru Ichikōsatsu*, *NIHON EIGO KYŌIKUSHI KENKYŪ* 143, 145 (No. 10, 1995).

235. One resource was EIBEI HŌ BUNKENMOKUROKU (Tanaka Hideo & Horibe Masao eds., 1966), which provided the first meticulous bibliography of Japanese works on American law. Prior to its publication, researchers had found it “remarkably inconvenient” to search for relevant books and articles, the effect of which was to inhibit Japan’s knowledge of its own literature. *Id.* at 2 (translation mine). Later in time, the rise of the internet is surely an even bigger development. See, e.g., *CiNii Articles*, NAT’L INST. OF INFORMATICS, <https://ci.nii.ac.jp/> (last visited Sept. 13, 2020) (open-access database of academic articles from Japanese journals).

common law,²³⁶ which tends to mean U.S. law.²³⁷

The study of U.S. foreign relations law has advanced considerably in this setting. In recent decades, Japanese legal scholars have produced numerous articles on many aspects of the field,²³⁸ including war powers,²³⁹ treaty implementation,²⁴⁰ the Foreign Sovereign Immunities Act,²⁴¹ the Alien Tort Statute,²⁴² the extraterritoriality of federal statutes,²⁴³ the Trade Promotion Authority,²⁴⁴ and Supreme Court cases such as *Zivotofsky v. Kerry*.²⁴⁵ Scholars have also published translations of the War Powers Resolution,²⁴⁶ an American textbook on U.S. trade law,²⁴⁷ and parts of the *Restatement (Third) on the Foreign Relations Law of the United States*.²⁴⁸ They have held symposia on

236. See *Eibeihō Kyōiku Genkyō Chōsa*, AMERIKAHŌ 342 (2008) (reporting that among sixty-three graduate schools of law that responded to a curricular survey, fifty-three had at least one course on the common law, and that among the ninety undergraduate faculties of law that responded to the survey, seventy-one had at least one course on the common law).

237. Interview with Kamiya Masako, Professor of Law, Gakushūin Univ., in Tokyo, Japan (Oct. 22, 2018) (suggesting that a majority of professors of Anglo-American law focus on American law because they tend to be more familiar with it).

238. For a list of over 200 academic publications on U.S. war powers, the Alien Tort Statute, and U.S. treaty-making, along with translations of the titles of those publications, see Ryan M. Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, <https://ryanscoville.files.wordpress.com/2021/01/academic-publications-1.xlsx> (uploaded Jan. 27, 2021). The broader literature on U.S. law also grew to massive proportions: An unannotated list of publications from 1976 to 1995 exceeds 1000 pages in length. See generally EIBEIHŌ KENKYŪ BUNKEN MOKUROKU, 1976-1995 (1998).

239. See, e.g., Anami Haruya, *Datsukokka Terorizumu no Jidai no Daitōryō Sensō Kengen*, AICHI KENRITSU DAIGAKU GAIKOKUGOGAKUBU KIYŌ 1 (No. 45, 2013) (discussing the war powers of the President in the context of the war on terrorism).

240. See, e.g., Matsuyama Yūhei, *Amerika Gasshūkoku ni Okeru Jidōjishi Jōyaku ni Kansuru Joronteki Kenkyū*, 48 FUKUOKA DAIGAKU DAIGAKUIN RONSHŪ 79 (2016) (examining the doctrine of treaty non-self-execution under U.S. law).

241. See, e.g., Nishitatenō Sonoko, *Beikoku Shuken Menjohō ni yoru Jūgun Ianfu Soshō*, SEKAI JINKEN MONDAI SENTĀ KENKYŪ KIYŌ 161 (No. 11, 2006) (explaining the role of the Foreign Sovereign Immunities Act in litigation over the Japanese government's responsibility for the use of "comfort women" during World War II).

242. See, e.g., Iwasawa Yūji, *Amerika Saibansho ni Okeru Kokusai Jinken Soshō no Tenkai (Ichi)*, 87 KOKUSAIHŌ GAIKŌ ZASSHI 160 (1988) (analyzing the use of international law in human rights litigation under the Alien Tort Statute).

243. See, e.g., Kutsuzawa Takehiko, *Shōken Torihikihō no Ikigai Tekiyō*, 3 HONGO HŌSEI KIYŌ 75 (1994) (discussing the extraterritoriality of the Securities Exchange Act).

244. See, e.g., Takii Mitsuo, *Beikoku no Bōeki Kōshō to Bōeki Sokushin Kengen*, 3 ŌBIRIN RONKŌ 1 (2012) (explaining Trade Promotion Authority and its use in recent decades).

245. See, e.g., Tomii Yukio, *Amerika Kenpō ni Okeru Kokka Shōnin Kengen no Shozai*, 56 HŌGAKKAI ZASSHI 295 (2015) (explaining the *Zivotofsky* decision).

246. *Sensō Kengenhō*, 13 GAIKOKU NO RIPPŌ 113 (Miyawaki Mineo trans., 1974).

247. MATSUSHITA MITSUO, AMERIKA TSŪSHŌHŌ NO KAISETSU (1989) (translating THOMAS V. VAKERICS, DAVID I. WILSON & KENNETH G. WEIGEL, ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS (1987)).

248. See *Kokusai Keizai Kankeihō: Amerika Taigaikankeihō Risuteitomento Saado Yori*, 19 KOKUSAI SHŌJI HŌMU 420 (1991) (introducing a translation of Part VIII of the RESTATEMENT (THIRD), which addresses the law of international economic relations); *Amerika Taigai Kankeihō Daisan Risuteitomento (Ichi)*, 88 KOKUSAIHŌ GAIKŌ ZASSHI 69 (1989) (introducing a translation of Part IV of the RESTATEMENT (THIRD), which addresses topics such as extraterritorial jurisdiction, the act-of-state doctrine, and foreign sovereign immunity); see also Nomura Yoshiaki, *Amerika Kokusai Kankeihō Risuteitomento no Kaitei ni Tsuite*, 85 KOKUSAIHŌ GAIKŌ ZASSHI 70 (1987) (explaining changes made from the RESTATEMENT (SECOND) to the RESTATEMENT (THIRD)); Matsushita Mitsuo, *Notes: Restatement (Second), Foreign Relations Law of the United States*, AMERIKAHŌ 267 (No. 2, 1967) (summarizing the RESTATEMENT (SECOND)).

topics such as the Supreme Court's use of foreign and international law.²⁴⁹ And they have written books on war powers²⁵⁰ and the relationship between domestic and international law in the United States.²⁵¹ This work comprises a shadow literature that American scholars have not engaged with or recognized.

To provide a sense of the evolution and volume of this literature, I collected all Japanese legal academic books, book chapters, and journal articles that were published through 2018 and are at least primarily about either of two topics that tend to garner a lot of attention from American scholars of U.S. foreign relations law: (1) the separation of powers with respect to the use of military force and (2) the separation of powers with respect to the adoption, implementation, and termination of international agreements.²⁵² For a point of comparison, I also collected all American legal academic publications that are at least primarily about Article 9 of the Japanese Constitution,²⁵³ which provides in part that the “Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.”²⁵⁴ Figure 3 reports the total number of new publications on each of these topics by decade since the advent of Japanese legal academia in the 1870s.²⁵⁵

249. See *Amerika Saikōsai ni yoru Gaikokuhō Kokusaihō no Sanshō to Enyō*, 71 HIKAKUHŌ KENKYŪ 109 (2009) (featuring essays by Katsuta Takuya, Aizawa Hisashi, Murakami Masanao, and Miyagawa Shigeo).

250. See MIYAWAKI MINEO, *GENDAI AMERIKA NO GAIKŌ TO SEIGUN KANKEI* (2004); HAMAYA HIDEHIRO, *BEIKOKU SENSŌ KENGENHŌ NO KENKYŪ* (1990); MIYAWAKI MINEO, *AMERIKA GASSHŪKOKU DAITŌRYŌ NO SENSŌKENGEN* (1980).

251. See UNEMURA SHIGERU, *EIBEI NI OKERU KOKUSAIHŌ TO KOKUNAIHŌ NO KANKEI* (1967).

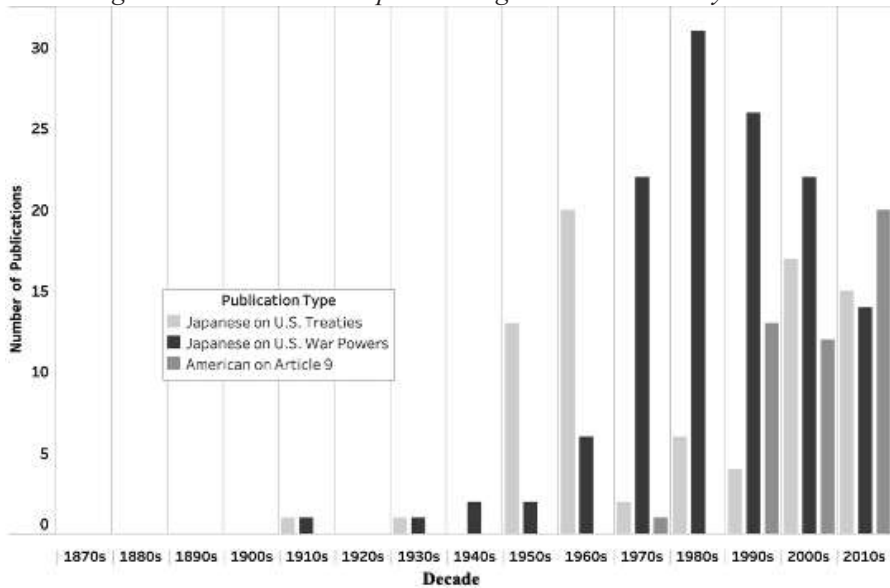
252. I defined the first category to include any scholarly publication focused at least primarily on the horizontal allocation of constitutional or statutory authority to approve, initiate, regulate, or terminate the use of military force by the United States in international affairs. Similarly, I defined the second category to include any publication focused at least primarily on the horizontal allocation of constitutional or statutory authority to enter into, implement, terminate, or withdraw the United States from an international agreement. The qualifier that a publication must be at least “primarily” focused on one of these topics is significant because the literature contains numerous books and articles that discuss U.S. foreign relations law in passing or as part of a larger analysis. See, e.g., Kyōtuka Sakutarō, *Jōyaku no Kokunai Jisshi Oyobi Tekiyō wo Meguru Jakkān no Mondai*, 56 KOKUSAIHŌ GAIKŌ ZASSHI 1 (1957) (analyzing the domestic implementation of treaties in England, the United States, and France). The numbers reported in Figure 3 would be much higher if I had defined the categories to include publications of this kind. With these definitions in mind, I used a number of strategies to find qualifying publications. First, I performed keyword searches of the National Diet Library's online catalog, using terms such as “戦争権限法” (War Powers Resolution), “宣戦条項” (Declare War Clause), “最高司令官条項” (Commander-in-Chief Clause), “条約条項” (Treaty Clause), and “議会が承認した行政協定” (congressional-executive agreement). See NDL ONLINE, <https://ndlonline.ndl.go.jp>. Second, I read the footnotes of relevant books and articles to find references to other relevant publications. Finally, I searched EIBEIHO KENKYU BUNKEN MOKUROKU, 1976-1995 (1998) and EIBEIHO KENKYU BUNKEN MOKUROKU, 1867-1975 (Tanaka Hideo & Horibe Masao eds., rev. ed. 1977), which provide extensive bibliographies of scholarship on U.S. law.

253. In addition to collecting three books on Article 9, I used HeinOnline's Law Journal Library to search for all articles, comments, notes, and reviews that were published in the United States through 2018 and contain the words “Article 9,” “Constitution,” and “Japan” or “Japanese” within forty words of one another. That search yielded 176 hits. In reviewing them, I determined that forty-two were at least primarily about Article 9.

254. NIHONKOKU KENPŌ [Constitution], May 3, 1947, art. 9 (Japan).

255. See Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (providing a link to the underlying data and a list of citations to the Japanese publications).

Figure 3: New Scholarship on Foreign Relations Law by Decade



Several conditions are apparent from these data. First, the volume of Japanese scholarship on U.S. war powers and U.S. agreements grew significantly in the decades following World War II. From a low of nearly zero throughout the pre-war period, the number of relevant books and articles rose to a combined high of approximately four per year in the 2000s. This is certainly not an overwhelming number, but it is consistent with the substantial increase in the overall volume of Japanese scholarship on U.S. law over the same period,²⁵⁶ and it suggests that Japan's legal academy has become a more plentiful source of knowledge. Second, political events appear to have played a role in shaping the interests of Japanese researchers. For example, U.S. treaty-making became a relatively popular topic in the 1950s and 1960s, which is when the United States and Japan ratified a set of important bilateral security treaties,²⁵⁷ and war powers gained attention alongside international controversy over the Vietnam War in the 1960s and 1970s.²⁵⁸ Third, Japanese scholarship on U.S. war powers and treaty-making has been more voluminous than American scholarship on Article 9 throughout most of the postwar period. This raises the possibility that Japanese

256. See Tanaka, *supra* note 222, at 300 (explaining that the volume of new scholarship on U.S. law from 1945 to 1966 was roughly six times larger than the volume produced throughout Japanese history prior to 1945).

257. See Treaty of Mutual Cooperation and Security Between Japan and the United States, Jan. 19, 1960, 11 U.S.T. 1632; Security Treaty Between the United States and Japan, Sept. 8, 1951, 3 U.S.T. 3329. For an example of scholarship that responded to this development, see Irie Keishirō, *Gyōsei Kyōtei to Anzen Hoshō Jōyaku*, 24 HÖRITSU JIHŌ 52 (1952) (discussing the use of an executive agreement rather than an Article II treaty to provide for the stationing of American troops in Japan).

258. See THOMAS R.H. HAVENS, FIRE ACROSS THE SEA: THE VIETNAM WAR AND JAPAN 1965-1975, at 192-212 (1987) (discussing protests against the Vietnam War in Japan in the late 1960s). For an example of scholarship on U.S. war powers and the Vietnam War, see Morone Sadao, *Betonamu Sensō to Saibansho*, 18 WASEDA DAIGAKU DAIGUIN HÖKEN RONSHŪ 195 (1978) (discussing the use of the political question doctrine in federal litigation over the war's constitutionality).

scholars have generally been more knowledgeable about U.S. foreign relations law than American scholars have been about comparable aspects of Japanese law.²⁵⁹

In terms of substance, the Japanese scholarship exhibits a number of characteristics. It is less empirical or interdisciplinary and more doctrinal than a lot of legal scholarship in the United States today.²⁶⁰ It cites extensively to American primary and secondary sources.²⁶¹ And it generally aims not to encourage American legal reforms, but rather to foster greater Japanese knowledge of U.S. law, either as a means of understanding or predicting the actions of the U.S. government or generating insights for potential reforms to Japanese law.²⁶²

As an example, consider a recent book titled *Gurōbaruka to Kenpō [Globalization and the Constitution]*, by Yamada Satoshi.²⁶³ Yamada begins the book by observing that although the interconnectedness of states has given rise

259. A small group of individuals stand out as the first significant contributors to Japan's postwar literature. One is Unemura Shigeru, a former professor at Kōnan University who wrote a collection of analyses on the relationship between domestic and international law in the United States and England in the 1960s. *See, e.g.*, UNEMURA, *supra* note 251. Another is Miyawaki Mineo, a former researcher at the National Diet Library who began publishing on U.S. war powers in the late 1970s, produced more scholarship on U.S. foreign relations law than anyone before or since, and garnered recognition as Japan's leading expert on the separation of powers under the U.S. Constitution prior to his retirement in 2010. *See Miyawaki Mineo Kyōju Ryakureki • Shuyō Gyōseki*, 9 RYŪKEIHŌGAKU 7, 7-12 (2010) (listing Miyawaki's professional accomplishments and major publications); Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (providing a list of citations to Miyawaki's work, along with translations of the titles); Ootsuka Toshiyasu, *Miyawaki Sensei wo Omou*, 9 RYŪKEIHŌGAKU 13, 14 (2010) (describing Miyawaki as Japan's leading expert on the separation of powers under the U.S. Constitution). A third significant contributor is Hamaya Hidehiro, a former professor at what is now Mie Chūkyō University, who wrote about U.S. war powers in the 1980s and 1990s. *See, e.g.*, HAMAYA, *supra* note 250 (analyzing the contours and significance of the War Powers Resolution).

A new generation of scholars now follows their lead. This group includes Tomii Yukio, a professor at Tokyo Metropolitan University whose writing tends to focus on war powers and other national-security-related aspects of U.S. law; Miyagawa Shigeo, a professor at Waseda Law School who has published a number of articles on the Alien Tort Statute and the implementation of human rights treaties in the United States; Tsuchiya Takatsugu, a professor at Kindai University who has examined the processes by which the United States enters into international agreements; and Matsuyama Yūhei, a scholar who specializes in treaty implementation in U.S. courts. *See Tomii Yukio*, TOKYO METRO. UNIV., <https://www.tmu.ac.jp/stafflist/data/ta/642.html> (last visited June 11, 2020); *Miyagawa Shigeo*, WASEDA UNIV., <https://researchers.waseda.jp/profile/ja.d04c5d988facfaeb3786a4b497188e95.html> (last visited June 11, 2020); *Tsuchiya Takatsugu*, KINDAI UNIV., <https://www.kindai.ac.jp/law/research-and-education/teachers/introduce/tsuchiya-takatsugu-7c0.html> (last visited June 16, 2020); *Matsuyama Yūhei*, RESEARCHMAP, <https://researchmap.jp/ymatsu01> (last visited June 16, 2020). Most of these experts studied law in the United States at one point or another.

260. *See, e.g.*, Matsuyama Yūhei, *Amerika Gasshūkoku ni Okeru Gyōsei Kyōtei ni Shoruikei to Kokunaiteki Kōryoku*, 52 FUKUOKA DAIGAKU DAIGAKUIN RONSHŪ 49 (2020) (examining the various forms of executive agreements in the United States, along with their domestic effects).

261. *See, e.g., id.* (citing a large volume of American scholarship and historical sources on executive agreements).

262. *Cf., e.g.*, Interview with Tomii Yukio, Professor of Law, Tokyo Metro. Univ., in Tokyo, Japan (Nov. 1, 2018) (explaining that he studies U.S. foreign relations law because he thinks that there are lessons to be learned and, in some cases, wants Japan to adopt reforms patterned after American law); Interview with Kubo Fumiaki, Professor of American Government and History, Univ. of Tokyo, in Tokyo, Japan (Oct. 4, 2018) (suggesting that knowledge of U.S. law makes it easier to predict U.S. actions in foreign affairs); Interview with Takahata Eiichirō, Professor of Law, Nihon Univ. Coll. of Law, in Tokyo, Japan (Oct. 31, 2018) (explaining that knowledge of U.S. constitutional law is necessary to understand the Japanese Constitution).

263. YAMADA SATOSHI, *GURŌBARUKA TO KENPŌ* (2017).

to a wide variety of international legal norms, those norms suffer from a democracy deficit insofar as they have emerged without adequate involvement from national legislative bodies.²⁶⁴ As he sees it, this is a problem for Japan as much as elsewhere, but it is also one that has received insufficient attention from Japanese commentators,²⁶⁵ so he turns to the law and legal scholarship of Germany and the United States in search of solutions. In a lengthy chapter on the U.S. Congress, Yamada discusses the distinctions between Article II treaties, *ex ante* and *ex post* congressional-executive agreements, and sole executive agreements under U.S. law;²⁶⁶ draws upon research by Oona Hathaway to explain that congressional involvement in the making of international agreements is generally quite limited;²⁶⁷ and explains the legal foundations of reforms that Hathaway has advocated to restore congressional involvement in the making of international law in the United States, including the use of “fast track” and “notice and comment” procedures in connection with the adoption of international agreements.²⁶⁸ Yamada then concludes that Japan should strengthen the Diet’s involvement in the formation of international norms by adopting similar reforms.²⁶⁹ Throughout the analysis, he demonstrates a knowledge of U.S. law and legal scholarship that is qualitatively indistinguishable from that of many American commentators.

Notwithstanding work of this kind, a number of current conditions are likely to limit the legal academy’s contribution to official understanding. First, scholars have not necessarily been effective at depicting operational realities. Perhaps most notably, the literature on war powers has paid more attention to Congress than it has to the executive branch: There are multiple books and dozens of articles on the War Powers Resolution²⁷⁰ but only two articles—both recent—that even mention the use-of-force opinions of the Justice Department’s Office of Legal Counsel (OLC).²⁷¹ Some of the literature has even focused on judicial precedent more than on law emanating from the executive branch. The discussion on war powers in a popular textbook on the U.S. Constitution thus covers the War Powers Resolution, *Korematsu v. United States*,²⁷² *Woods v.*

264. *Id.* at 1-2.

265. *Id.* at 2.

266. *Id.* at 101-04.

267. *See id.* at 104-18 (citing principally to Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 *YALE L.J.* 140 (2009)).

268. *See id.* at 120-76 (discussing Hathaway, *supra* note 267, at 239-66).

269. *Id.* at 185-86.

270. *See* Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (listing publications).

271. *See* Yokodaidō Satoshi, *Amerika Gasshūkoku ni Okeru Seifu no Kenpō Kaishaku*, REFERANSU 81 (No. 818, 2019) (discussing constitutional interpretation in the executive branch, including in OLC opinions regarding the use of force); Yokodaidō Satoshi, *Amerika no “Tero tonō Sensō” to OLC no Yakuwari*, 45 *KAGOSHIMA DAIGAKU HŌGAKU RONSHŪ* 85 (2011) (discussing OLC opinions pertaining to the war on terrorism).

272. 323 U.S. 214 (1944) (upholding the constitutionality of Japanese internment during World War II).

Cloyd W. Miller Co.,²⁷³ *United States v. Curtiss-Wright Export Corp.*,²⁷⁴ *The Prize Cases*,²⁷⁵ *Hamdi v. Rumsfeld*,²⁷⁶ *Rasul v. Bush*,²⁷⁷ and *Hamdan v. Rumsfeld*,²⁷⁸ but does not mention OLC.²⁷⁹ In contrast, an influential view in the United States holds that OLC has developed *most* of the U.S. domestic law on the use of force.²⁸⁰ Those who read only the Japanese publications are unlikely to appreciate that point.

Second, as in the United States, academic knowledge appears to be lumpy. On the one hand, there is considerable research on the horizontal separation of powers with respect to international agreements and the use of force,²⁸¹ and there is evidence that many scholars are knowledgeable about U.S. doctrines on the extraterritoriality of federal statutes.²⁸² On the other hand, only a handful of publications focus on U.S. law at the intersection of foreign affairs and federalism,²⁸³ and the academic community seems relatively unfamiliar with the underlying authorities.²⁸⁴ Indeed, one scholar explained that many in Japan find it mystifying that states such as California can take their own positions on matters implicating foreign affairs, including by enacting laws on issues such as “comfort women” and forced labor from World War II.²⁸⁵

Third, virtually all of the scholars I interviewed held the impression that the study of American law has become less popular in recent years, as measured by both course enrollment and the number of academic chairs devoted to the

273. 333 U.S. 138 (1948) (upholding Title II of the Housing and Rent Act of 1947 as a valid exercise of congressional war power).

274. 299 U.S. 304 (1936) (upholding a statute that empowered the President to prohibit certain arms sales as a lawful delegation of legislative power to the President in the field of foreign affairs).

275. 67 U.S. (2 Black) 635 (1862) (upholding the President’s naval blockade of the Confederacy during the U.S. Civil War).

276. 542 U.S. 507 (2004) (plurality opinion) (holding that U.S. citizens detained as enemy combatants must be given a meaningful opportunity to contest the factual basis for their detention before a neutral decisionmaker).

277. 542 U.S. 466 (2004) (holding that noncitizens in military custody in Guantanamo Bay may petition for review of the legality of their detention in federal court).

278. 548 U.S. 557 (2006) (invalidating the use of military commissions convened in violation of U.S. and international law).

279. See HIGUCHI NORIO, *AMERIKA KENPŌ* 77-79, 101-05 (2011).

280. See, e.g., Jack Goldsmith, *The Soleimani Strike: One Person Decides*, *LAWFARE* (Jan. 3, 2020, 5:45 PM), <https://www.lawfareblog.com/soleimani-strike-one-person-decides> (“[W]ith the exception of the 1973 War Powers Resolution, which has always been a very weak constraint, practically all of the law in this area has been developed by executive branch lawyers justifying unilateral presidential uses of force.”).

281. See Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (listing publications).

282. See, e.g., Interview with Aoki Setsuko, Professor of Law, Keio Univ., in Tokyo, Japan (Oct. 11, 2018) (explaining that many international lawyers in Japan have been interested in U.S. law on extraterritoriality); Interview with Murase Shinya, Professor of Law Emeritus, Sophia Univ., in Tokyo, Japan (Sept. 4, 2018) (explaining that there are many Japanese experts on the extraterritorial application of U.S. antitrust law).

283. See Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (listing publications).

284. See, e.g., Interview with Tamaruya Masayuki, Professor of Law, Rikkyō Univ. Fac. of L., in Tokyo, Japan (Oct. 3, 2018) (suggesting that federalism can be a challenging topic because it is unfamiliar); Interview with Kamiya, *supra* note 237 (same); Interview with Kimpara Kyōko, Professor of Law, Chiba Univ., in Tokyo, Japan (Oct. 17, 2018) (same); Interview with Aoki, *supra* note 282 (same).

285. Interview with Kubo, *supra* note 262.

field.²⁸⁶ The stated reasons were multiple, including a perception that U.S.-Japan relations are less important than they used to be;²⁸⁷ the Japanese government's decision to lower the passage rate on the bar exam after a brief period of liberalization in the mid-2000s;²⁸⁸ a resurgence of German influence in the study of constitutional law;²⁸⁹ an erosion in students' ability to understand written English;²⁹⁰ and the extreme socioeconomic inequality that manifests in the United States, which makes American social and legal models unattractive to many Japanese scholars.²⁹¹ These impressions may very well indicate a reduction in the academic contribution to official knowledge going forward.²⁹²

Fourth, university courses on American law or Anglo-American law are common but generally provide little if any insight on foreign relations law. With some courses covering both English and American law, there is a tendency for maximum generality that makes it difficult for instructors to cultivate deep knowledge on any particular topic.²⁹³ Lectures tend to be heavily case-centric and thus marginalize authorities that loom large in foreign relations law, such as historical practice, statutes, and the regulations, orders, and legal opinions that emanate from the executive branch.²⁹⁴ Enrollment is elective and limited²⁹⁵ and, at the undergraduate level, attendance is sporadic.²⁹⁶ Many of the instructors, moreover, are not dedicated specialists in American law, especially outside of the top schools.²⁹⁷ The lectures and reading materials might discuss aspects of

286. See, e.g., Interview with Nomura Yoshiaki, Professor Emeritus, Osaka Univ., in Osaka, Japan (Nov. 5, 2018) (suggesting that the number of people studying Anglo-American law has declined); Interview with Kimpara, *supra* note 284 (same).

287. Interview with Murata Kōji, Professor of Political Science, Dōshisha Univ., in Tokyo, Japan (Nov. 28, 2018).

288. Interview with Dan Rosen, Professor of Law, Chūō Univ., in Tokyo, Japan (Oct. 2, 2018) (explaining that the low passage rate incentivizes students to focus their studies on areas covered by the exam, which do not include American law); see also Shigenori Matsui, *The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 3 (2012) (discussing the initial reforms and subsequent retrenchment).

289. See, e.g., Interview with Itamochi, *supra* note 230 (explaining that German constitutional law is more influential than it used to be); Interview with Agawa Naoyuki, Professor of Law, Dōshisha Univ., in Kyōto, Japan (Nov. 7, 2018) (same).

290. Interview with Kamiya, *supra* note 237.

291. Interview with Kubo, *supra* note 262.

292. A separate but potentially related development is that the overall number of Japanese students studying at American universities has fallen by more than sixty percent over the past two decades, from nearly 46,000 students in the 2000/2001 academic year to roughly 18,000 in 2018/2019. INSTITUTE OF INTERNATIONAL EDUCATION, INTERNATIONAL STUDENT TOTALS BY PLACE OF ORIGIN, OPEN DOORS REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE (2019). In combination, these developments indicate a marked decrease in the transmission of academic knowledge from and about the United States to Japan.

293. Interview with Rosen, *supra* note 288. As a representative example, the introductory course on Anglo-American law at one university covers American contract law, case-law research methods, American tort law, the history of Anglo-American law, juries, the U.S. Constitution, the English Constitution, the English judicial system, and English private law. Itamochi Kengo, Syllabus for *Eibeihō* A, Kōbe Univ., Feb. 28, 2018 (on file with author).

294. Interview with Tamaruya, *supra* note 284.

295. Interview with Tomii, *supra* note 262.

296. See Interview with Satō Chiaki, Assoc. Professor, Faculty of Law, Aoyama Gakuin Univ., in Tokyo, Japan (Oct. 28, 2018) (reporting that eighty to ninety percent of undergraduate students do not regularly attend lectures and that some schools have adopted policies mandating attendance at a minimum of one-third of the lectures in any given course as a precondition for taking a final exam).

297. Interview with Tamaruya, *supra* note 284; Interview with Kamiya, *supra* note 237;

U.S. foreign relations law, but only occasionally and briefly.²⁹⁸ Given these conditions, it seems highly unlikely that college and law school students graduate with significant knowledge of the field.

Finally, the academy organizes legal knowledge in ways that do not promote pertinent forms of sophistication. Most fundamentally, there is simply no concept of “foreign relations law,” including with respect to the United States.²⁹⁹ This is reflected both in the absence of a settled term for the field in the Japanese language³⁰⁰ and in the uncertainty, if not confusion, that conversational references to foreign relations law are likely to generate.³⁰¹ Unsurprisingly, there appear to be no courses on U.S. foreign relations law.³⁰² Nor is there a self-identifying community of specialists who collaborate or regularly consult with one another in their research.³⁰³

Rather than embrace U.S. foreign relations law as a coherent domain of American law, Japan’s legal academy has thoroughly balkanized it.³⁰⁴ International lawyers have written on the Alien Tort Statute,³⁰⁵ specialists in Japanese constitutional law have examined the relationship between U.S. treaties

Interview with Kimpara, *supra* note 284. By one estimate, there are no more than approximately fifteen to twenty scholars nationwide who specialize exclusively in American law. Interview with Kinami Atushi, Professor of Law, Kyōto Univ., in Kyōto, Japan (Nov. 7, 2018). Others who teach the course tend to be specialists in Japanese law who draw upon selected features of American law as points of comparison. Interview with Kamiya, *supra* note 237.

298. Interview with Tomii, *supra* note 262; Interview with Rosen, *supra* note 288.

299. Interview with Yokoyama, *supra* note 230; Interview with Matsuda Hiromichi, Assistant Professor, Int’l Christian Univ., in Tokyo, Japan (Nov. 15, 2018). This is not because Japan lacks law that American scholars would view as foreign relations law. *See, e.g.*, Cabinet B.No. 72, 189th Diet Sess. (May 15, 2015); Cabinet B. No. 73, 189th Diet Sess (May 15, 2015) (expanding the authority of Japanese forces to participate in foreign conflicts). Nor is it due to the absence of associated research. *See, e.g.*, IWASAWA YŪJI, JŌYAKU NO KOKUNAI TEKIYŌ KANŌSEI (1985) (discussing the domestic application of treaties in Japan); TAKANO YŪICHI, KENPŌ TO JŌYAKU (1960) (analyzing the conclusion, effect, and implementation of treaties under the Japanese Constitution). One scholar surmised that the explanation instead lies with the government: Japan is not a federal state, the bureaucracy drives much of the lawmaking, and judicial review is uncommon, so there are fewer domestic legal complexities to the conduct of foreign relations and less need for an independent field to study them. Interview with Nishii Masahiro, Professor Emeritus, Kyōto Univ., in Kyōto, Japan (Nov. 7, 2018).

300. Compare Hazeyama Shigeki, *Jōyaku no Jidōshikkōsei to Kenryokubunrison*, 20 KUMAMOTO GAKUEN DAIGAKU KEIZAI RONSHŪ 41, 41 (2014) (referring to foreign relations law as “国際関係法” (*kokusai kankeihō*), which translates as “international relations law”) with *Amerika Taigai Kankeihō Daisan Risuteitomento (Ichi)*, 88 KOKUSAIHŌ GAIKŌ ZASSHI 69, 69 (1989) (referring to foreign relations law as “対外関係法” (*taigai kankeihō*), which translates as “foreign relations law”) and Satō Tetsuo, *Beikoku ni Okeru Shōgai-teki Kankeihō*, 14 HIROBA 4 (1961) (referring to foreign relations law as “渉外の関係法,” which translates as “external relations law”).

301. *See, e.g.*, Interview with Yamada Satoshi, Associate Professor of Law, Okayama Univ., in Tokyo, Japan (Dec. 8, 2018) (suggesting that scholars of Japanese constitutional law are unfamiliar with the term “foreign relations law”); Interview with Agawa, *supra* note 289 (explaining that U.S. foreign relations law is not well known even among Japanese experts in U.S. law).

302. It is difficult to prove a negative, but over the course of dozens of interviews, I did not encounter a single person who had ever heard of such a course.

303. *See, e.g.*, Interview with Tomii, *supra* note 262 (referring to himself as a “lone wolf” in his focus on U.S. foreign relations and national security law).

304. *See* Interview with Yokoyama, *supra* note 230 (explaining that the issues that Americans view as comprising U.S. foreign relations law are dealt with piecemeal by scholars from a variety of fields).

305. *See generally, e.g.*, Etō Junichi, *Jinken to Kanshū Kokusaihō*, 31 TŌYŌ HŌGAKU 341 (1988) (discussing the recognition and proof of customary international law in ATS cases such as *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

and state law,³⁰⁶ and experts in Japanese labor law have written about the extraterritoriality of federal statutes,³⁰⁷ to name just a few examples. The result is that much of the scholarship on U.S. foreign relations law over the postwar period has come from individuals whose primary expertise lies somewhere other than American law, with expertise in international law and Japanese constitutional law being particularly common.³⁰⁸ This condition reflects Japan's ubiquitous comparativism, which calls on nearly every kind of legal scholar to understand English, French, or German and to conduct research that accounts for the law of at least one developed country where one of those languages predominates.³⁰⁹ Today, aside from professors Tomii and Miyagawa,³¹⁰ specialists in American law who focus on U.S. foreign relations law are essentially nonexistent.³¹¹

Although it is entirely understandable that few Japanese scholars would specialize in a relatively narrow field of the law of a single foreign jurisdiction, the result could inhibit academic understanding in two respects. First, it could limit understanding of gestalt or field-level developments—such as the arguable shift toward the “normalization” of U.S. foreign relations law in modern Supreme Court cases³¹² and the complex multitude of legal dynamics that comprise the overall balance of authority pertaining to foreign affairs³¹³—by encouraging researchers to learn about only the component parts of the field that are relevant to another domain of legal knowledge. Second, it could limit understanding of the “situation sense” of U.S. foreign relations law by downplaying the importance of legal-cultural immersion and system-level expertise.³¹⁴ Either effect is likely, in turn, to diminish the Japanese legal academy's ability to contribute to official knowledge within Japan.

B. News Media

Government officials in Japan have historically relied in part on Japanese

306. See generally, e.g., Nakahara Seiichi, *Beikoku ni Okeru Shūhō to Jōyaku no Kankei*, MEIJI DAIGAKU TANKI DAIGKU KIYŌ 55 (No. 7, 1963) (analyzing this issue).

307. See generally, e.g., Yamakawa Ryūichi, *Amerkia Rōdōhō no Ikigai Tekiyō to Zaigai Shiten • Kogaisha*, 23 TSUKUBA HŌSEI 29 (1997) (discussing *inter alia* recent developments in the extraterritoriality of U.S. labor law).

308. See Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (listing areas of specialization for many authors).

309. See, e.g., Interview with Itamochi, *supra* note 230 (explaining that legal scholarship that does not reference foreign law is generally viewed as inferior in Japan).

310. See *supra* note 259 (discussing the work of Tomii and Miyagawa).

311. See, e.g., Interview with Kawase Tsuyoshi, Professor of Law, Sophia Univ., in Tokyo, Japan (Dec. 7, 2018) (explaining that Japanese scholars of American law tend to focus on topics that are generally unrelated to foreign affairs, such as juries, torts, contracts, and the Uniform Commercial Code, among others).

312. See Sitaraman & Wuerth, *supra* note 37, at 1901 (arguing that the Supreme Court has in recent decades “treated foreign relations issues as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles”).

313. See, e.g., HENKIN, *supra* note 70, at 83-148 (summarizing key features of the separation of powers with respect to foreign affairs).

314. LLEWELLYN, *supra* note 191, at 59-61, 121-57.

news media as a material source of foreign intelligence.³¹⁵ Given this connection, it is plausible that the quality and quantity of any native reporting on U.S. foreign relations law will influence the extent to which these officials are aware of and understand pertinent legal developments. This Section thus examines public reporting on U.S. foreign relations law in Japan in recent decades.

Japanese news media have served as a robust source of information on the United States since at least the end of World War II.³¹⁶ Research from the 1990s, for example, finds that stories about the United States “loom[] extraordinarily large” in Japan’s television news programs,³¹⁷ comprising one-third of all foreign coverage and totaling roughly ten times the share of international reporting that American television news devoted to Japan within the same period.³¹⁸ Major Japanese newspapers, which have historically enjoyed circulation far in excess of even the most widely read American newspapers,³¹⁹ have also reported extensively on the United States³²⁰ and in doing so contributed to a “constant barrage of fact and detail about actions of the U.S. government and industry as related to Japan.”³²¹ Together these sources have shaped official understandings³²² and kept the Japanese public “remarkably well informed” about developments across the Pacific.³²³

To evaluate Japanese news coverage of U.S. foreign relations law in particular, I searched the archives of the *Asahi Shimbun*³²⁴—one of Japan’s leading newspapers³²⁵—for all articles mentioning either (1) the War Powers

315. See, e.g., Ken Kotani, *A Reconstruction of Japanese Intelligence: Issues and Prospects*, in INTELLIGENCE ELSEWHERE: SPIES AND ESPIONAGE OUTSIDE THE ANGLOSPHERE 181, 196 (Philip H.J. Davies & Kristian C. Gustafson eds., 2013) (explaining that Japanese policymakers “prefer to get information from newspapers” rather than the government’s intelligence services); Andrew L. Oros, *Japan’s Growing Intelligence Capability*, 15 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 1, 5, 13 (2002) (discussing the Japanese intelligence community’s extensive use of domestic news organizations as intelligence sources).

316. Tadokoro Masayuki, *The Media in U.S.-Japan Relations: National Media in Transnational Relations*, in NEW PERSPECTIVES ON U.S.-JAPAN RELATIONS 175, 190 (Gerry Curtis ed., 2000).

317. Ellis S. Krauss, *Media Coverage of U.S.-Japanese Relations*, in MEDIA AND POLITICS IN JAPAN 243, 249 (Susan J. Pharr & Ellis S. Krauss eds., 1996).

318. Stanley Budner et al., *American and Japanese Television News Coverage of Each Other’s Country: Study Goals and Methods*, in CREATING IMAGES: AMERICAN AND JAPANESE TELEVISION NEWS COVERAGE OF THE OTHER 9, 18-19 (Mansfield Center for Pacific Affairs ed., 1997) [hereinafter: CREATING IMAGES].

319. Tadokoro, *supra* note 316, at 184; Krauss, *supra* note 317, at 245 (explaining that newspaper circulation in Japan is more than double that of the United States and greater than that of any other industrialized country). *But see Shimbun Hakkō Busū to Fukyūdo*, NIHON SHIMBUN KYŌKAI, <https://www.pressnet.or.jp/data/circulation/circulation05.php> (last visited Jan. 25, 2021) (reporting that the number of copies printed fell by over forty percent from 2000 to 2020).

320. Stanley Budner, *Coverage in Context: Newspapers, Television, the Other Country, and the World*, in CREATING IMAGES, *supra* note 318, at 170.

321. Krauss, *supra* note 317, at 266.

322. See *supra* note 315 (citing Kotani and Oros, both of whom substantiate this point).

323. Krauss, *supra* note 317, at 266.

324. To access the archives, I used the online database *Kikuzo II Visual*, which contains all articles published in the *Asahi Shimbun* and its magazine (*AERA*) from 1879 to present. See *About Kikuzo II Visual*, https://database.asahi.com/help/eng/about_e.html (last visited July 1, 2020).

325. See *Jōi Sanshi Chōkan Hanbai Busū • Setai Fukyūritsu*, YOMIURI SHIMBUN MEDIA DATA (2020), <https://adv.yomiuri.co.jp/download/PDF/mediakit/general/mediadata2020/prefectures.pdf> (reporting subscription data by prefecture).

Resolution,³²⁶ which seeks to regulate the President's ability to use military force in international affairs, or (2) Trade Promotion Authority,³²⁷ which establishes procedures to govern the negotiation and adoption of certain types of trade agreements between the United States and foreign partners. As a point of comparison, I also searched for all articles mentioning the WPR or TPA in the archives of the *New York Times*³²⁸ and then tallied the annual number of qualifying articles in each of the sources up through 2018.³²⁹

The results, which are likely to be representative of the coverage that appears in other major Japanese newspapers,³³⁰ support a number of conclusions. First, as indicated below in Figures 4 and 5, the *New York Times* has reported on the WPR and TPA much more frequently than the *Asahi Shimbun*. From the WPR's enactment in 1973 through 2018, the *Times* published an average of 17.8 articles per year that mentioned the WPR, while *Asahi* published an average of only 1.2 articles per year. Similarly, from the enactment of the earliest iteration of TPA—fast track—in 1974³³¹ through 2018, the *Times* published an average of 15.4 articles per year that mentioned TPA, while *Asahi* published only 6.4 articles per year. The data thus show that *Asahi*'s coverage of the WPR and TPA has been comparatively limited. In doing so, the data suggest that a regular reader of the *Times* is more likely to have acquired familiarity with these authorities, as one might expect. Given that the WPR and TPA are relatively salient aspects of U.S. foreign relations law, it seems likely that others have received even less attention in the Japanese press.

Second, the two newspapers have exhibited different tendencies in terms of topical emphasis. The WPR and TPA are roughly equivalent in the extent of the attention they have received from the *Times*, with an average of 17.8 and 15.4 articles per year, respectively. Yet articles referencing TPA have been over five times more common than those referencing the WPR in *Asahi*, with averages of 6.4 and 1.2 articles per year, respectively. The uneven character of this coverage suggests that regular readers of *Asahi* have been more familiar with TPA than with the WPR. It also recalls the lumpiness of Japanese scholarship on U.S. foreign relations law and underscores the possibility of substantial, topic-based

326. Pub. L. No. 93-148, 87 Stat. 555 (1973). I used “戦争権限法” (War Powers Act) and “戦争権限決議” (War Powers Resolution) as keywords to find articles mentioning the War Powers Resolution.

327. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, Title I, 129 Stat. 320. To find articles mentioning TPA, I used “貿易促進権限” (Trade Promotion Authority), “ファスト・トラック” (Fast · Track), “ファストトラック” (Fast Track), “通商交渉権限” (Trade Negotiating Authority), and “貿易交渉権限” (Trade Negotiating Authority) as keywords.

328. See *New York Times Article Archive*, <https://archive.nytimes.com/www.nytimes.com/ref/membercenter/nytarchive.html> (last visited July 1, 2020). As search terms, I used “War Powers Resolution,” “War Powers Act,” “Trade Negotiating Authority,” “Fast-track negotiating authority,” “Fast-track authority,” “Fast-track trade,” and “Trade Promotion Authority.”

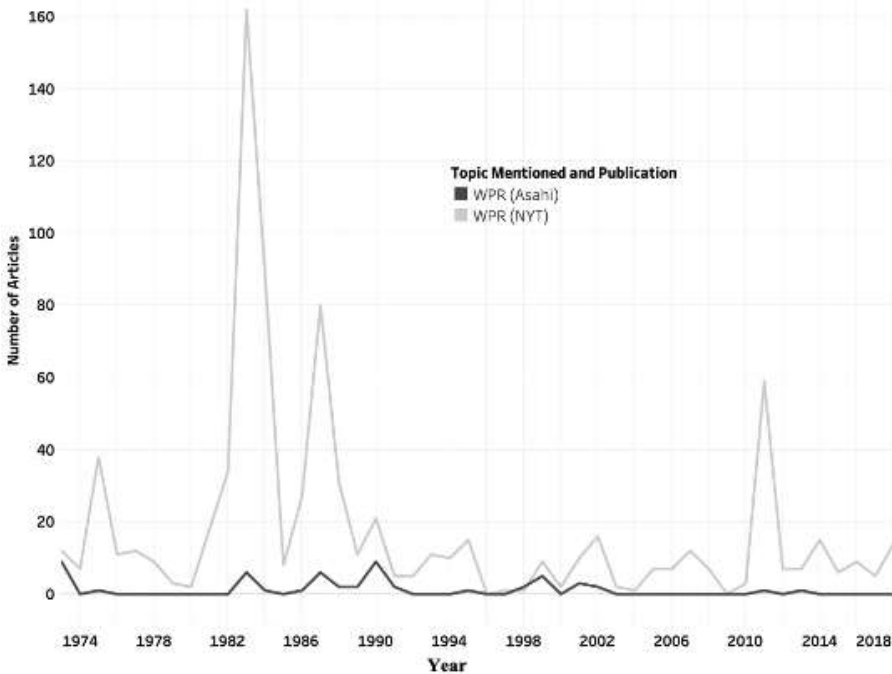
329. For access to the underlying data, see Ryan M. Scoville, *Newspaper Archives*, <https://ryanscoville.files.wordpress.com/2021/01/newspaper-archives-1.xlsx> (uploaded Jan. 27, 2021).

330. See Stanley Budner & Ellis S. Krauss, *Newspaper Coverage of U.S.-Japan Frictions: Balance and Objectivity*, 35 *ASIAN SURVEY* 336, 349 (1995) (explaining that major Japanese newspapers are “basically homogeneous and similar in style and policy” because they all strive to appeal to the same national market).

331. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978; see FERGUSSON & DAVIS, *supra* note 14, at 3 (explaining that TPA was originally known as “fast track” under the Trade Act of 1974).

variations in foreign knowledge.³³²

Figure 4: Newspaper Articles Mentioning the War Powers Resolution (WPR)



Finally, the data show that *Asahi*'s coverage has been episodic and event driven. WPR reporting peaked in 1973, when *Asahi* featured several articles on the law's enactment,³³³ and in 1990, during the leadup to Persian Gulf War.³³⁴ Similarly, articles referencing TPA spiked in 2015 in the midst of international negotiations over the Trans-Pacific Partnership (TPP).³³⁵ This is no surprise, but it is noteworthy that the events that seem to have driven U.S. media interest in U.S. foreign relations law are not necessarily the same as those that have driven Japanese media interest. On the one hand, TPA received comparably voluminous coverage in the *Times* and *Asahi* during negotiations over the TPP, which was important to both countries. On the other hand, the WPR received much greater attention from the *Times* in 1983, when the United States invaded Lebanon and

332. See *supra* p. 44 (discussing evidence that academic knowledge of some areas of U.S. foreign relations law is greater than others in Japan).

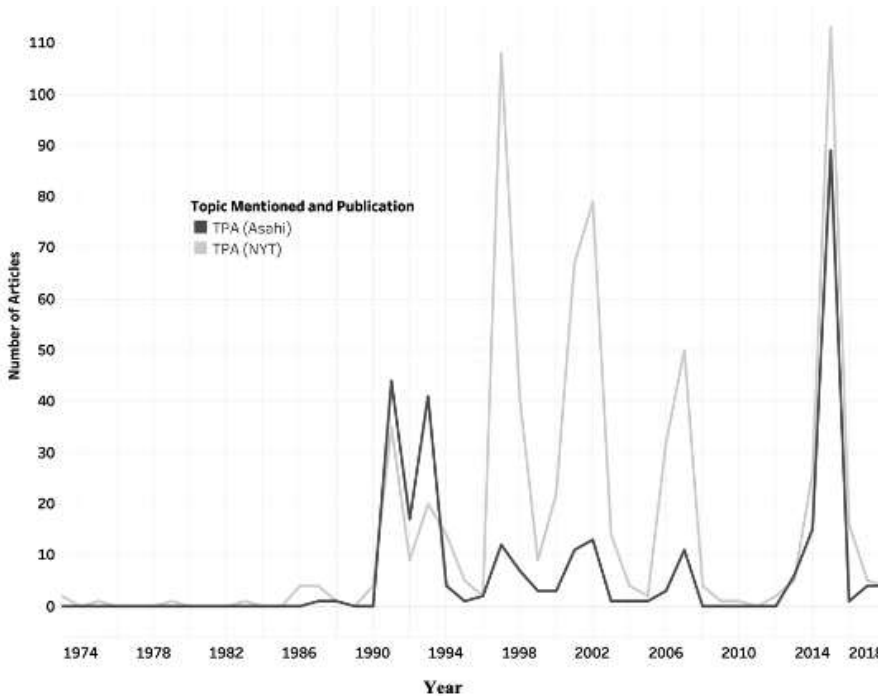
333. See, e.g., *Bei Sensō Kengenhō*, ASAHI SHIMBUN, Nov. 8, 1973, at 1 (reporting Congress's override of President Nixon's veto of the WPR).

334. See, e.g., *Beidaitōryō, Gikai ni Guntai no Sauji Haken wo Tsūhō*, ASAHI SHIMBUN, Aug. 11, 1990, at 7 (reporting that President Bush had, pursuant to the War Powers Resolution, formally notified Congress of his deployment of troops to Saudi Arabia, and discussing the content of the notice).

335. See, e.g., *Bei, TPP Shōnin Tetsuzuki Kaishi Gikai Shingi Nankō mo Daitōryō Shomei Tsūkoku*, ASAHI SHIMBUN, Nov. 7, 2015, at 6 (reporting President Obama's intention to sign the Trans-Pacific Partnership and submit it to Congress for approval in the spring of 2016, but also noting concerns that congressional approval may be delayed until after the 2016 election).

Grenada.³³⁶ This variation seems to reflect U.S. law's conditional relevance abroad: only some developments in U.S. foreign relations law have implicated Japan's national interests enough to warrant attention from major Japanese news media.

Figure 5: Newspaper Articles Mentioning Trade Promotion Authority (TPA)



As for substance, *Asahi's* coverage has been almost entirely descriptive. Take the WPR stories as an example. Some provided updates on procedural developments leading to the law's enactment,³³⁷ while others reported on subsequent proposals to amend it³³⁸ or its invocation in relation to U.S. involvement in a specific foreign conflict.³³⁹ References to the statute have typically been quite brief, but a significant number of articles provided details about at least some of its provisions. One of the most extensive descriptions

336. See, e.g., Steven V. Roberts, *House Votes Bill Applying War Law to Grenada Move*, N.Y. TIMES, Nov. 2, 1983, at A1 (reporting that the House of Representatives had approved legislation that would apply the WPR to the U.S. intervention in Grenada); Steven V. Roberts, *Senate Democrats Set to Force Issue Over War Powers*, N.Y. TIMES, Sept. 16, 1983, at A1 (discussing efforts by Senate Democrats to require President Reagan to obtain authorization under the WPR to keep U.S. Marines in Lebanon).

337. See, e.g., *Beigikai wo Tsūka: Sensō Kengenhōan*, ASAHI SHIMBUN, Oct. 13, 1973, at 2 (reporting that the WPR had passed in both houses of Congress but that President Nixon would almost certainly veto it and that Congress was unlikely to override the veto).

338. See *Daitōryō no Kainyū Seigen*, ASAHI SHIMBUN, Aug. 9, 1984, at 7 (reporting on a proposal to amend the WPR to require prior legislative approval for the deployment of U.S. forces).

339. See, e.g., *Sensō Kengenhō Tekiyō wo Tsūkoku*, ASAHI SHIMBUN, Oct. 26, 1983, at 1 (reporting that the Reagan Administration had, pursuant to the WPR, formally notified Congress of the deployment of U.S. forces to Grenada).

appeared in a short piece from 1975, which stated that the WPR “limits acts of war to circumstances in which there is (1) a declaration of war, (2) approval by treaty or otherwise, or (3) a national emergency occasioned by an attack on U.S. territory or property.”³⁴⁰ This piece further explained that in the event of a national emergency the statute “confers on the president the authority to dispatch military forces without congressional approval for up to sixty days.”³⁴¹ Likewise, an article from 1989 included a “terminology” section that defined the WPR as a law that aims to “restrict the president’s ability to start and expand war de facto without congressional approval through significant, long-term deployments of U.S. armed forces.”³⁴² The article then proceeded to summarize the WPR’s key provisions.³⁴³

American specialists would likely take issue with some of this reporting. Continuing with the example of WPR coverage, the statute does not endorse the idea that a treaty can independently authorize the use of force,³⁴⁴ but rather states explicitly that presidential “[a]uthority . . . shall *not* be inferred . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities.”³⁴⁵ Likewise, the WPR does not purport to “confer” authority on the President to introduce U.S. forces into hostilities in the event of an attack on the United States.³⁴⁶ Instead, the law merely recognizes the President’s preexisting constitutional authority to act without Congress in those circumstances.³⁴⁷ And despite publishing numerous articles that reference the WPR, *Asahi* has not published any articles referencing OLC analyses on the use of force.³⁴⁸ These kinds of deficiencies suggest that although *Asahi* may have helped to foster awareness of basic issues in U.S. foreign relations law, the newspaper has been less effective at cultivating accurate, much less nuanced, understandings of the field.

More generally, there is evidence that the Japanese press underreports on some topics and omits others altogether. U.S. Supreme Court opinions on foreign relations law have garnered little if any coverage.³⁴⁹ Stories on the Alien Tort

340. *Kotoba: Sensō Kengenhō*, ASAHI SHIMBUN, Apr. 16, 1975, at 5 (translation mine).

341. *Id.* (translation mine).

342. *Sensō Kengenhō <Yōgo>*, ASAHI SHIMBUN, Dec. 12, 1989, at 7 (translation mine).

343. *See id.* (summarizing Sections 3, 4, and 5 of the WPR, which address consultation, reporting, and congressional action, respectively).

344. *Cf. Kotoba: Sensō Kengenhō*, *supra* note 340, at 5 (suggesting that the WPR permits the President to commit acts of war without congressional approval when authorized by treaty).

345. Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 555 (1973) (emphasis added).

346. *Cf. Kotoba: Sensō Kengenhō*, *supra* note 340, at 5 (translation mine) (suggesting that the WPR confers authority on the President).

347. *See* Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973) (“It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States”); *id.* at § 2(c) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised . . . pursuant to . . . a national emergency created by attack upon the United States”).

348. This omission is reminiscent of the virtual absence of research on OLC in Japanese scholarship. *See* Scoville, *Japanese Bibliography on U.S. Foreign Relations Law*, *supra* note 238 (citing publications).

349. For example, October 14, 2020 searches on the Japanese-language version of Google News returned zero hits on the terms “Zivotofsky” and its Japanese equivalent (“ジヴォトフスキー”),

Statute—a popular topic among American commentators—are nonexistent.³⁵⁰ And notwithstanding the data on the WPR and TPA, there is some evidence that the media tend to focus too much on the actions of the President and not enough on Congress, thereby creating the impression that the President is “almighty.”³⁵¹ These tendencies are consistent with the observation—articulated by a number of legal academics—that Japanese news media are not a particularly good source of information on U.S. law.³⁵²

C. Government

Within the Japanese government, a significant portion of the responsibility for the conduct of Japan-U.S. relations lies with the Ministry of Foreign Affairs (MOFA) and the Ministry of Economy, Trade, and Industry (METI). In MOFA, the key unit is the North American Affairs Bureau, which has a staff of fifty to sixty officials³⁵³ who work on the formulation and execution of Japan’s foreign policy toward the United States and Canada³⁵⁴ and “take[] charge” of the “collection of information” on those countries.³⁵⁵ To carry out these functions, the Bureau organizes its personnel into a First Division that tracks U.S. and Canadian domestic politics and coordinates Japan’s overall foreign policy toward the United States and Canada,³⁵⁶ a Second Division that specializes in

suggesting that major media outlets in Japan did not report on the Supreme Court’s decision in *Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

350. October 3, 2020 searches on the Japanese-language version of Google News returned zero hits on “Alien Tort Statute” and its Japanese translation—“外国人不法行為法.” In contrast, searches using the Japanese translations of “War Powers Resolution” and “Trade Promotion Authority” returned twenty-three and one-hundred hits, respectively.

351. Interview with Kubo, *supra* note 262; *see also* Interview with Machidori Satoshi, Professor of American Politics, Kyōto Univ., in Kyōto, Japan (Nov. 7, 2018) (explaining that Japanese news media assign correspondents to the U.S. executive branch but often lack the human resources to do likewise with Congress, and arguing that this disparity has led to underreporting on and a general lack of public knowledge about Congress).

352. *See* Interview with David G. Litt, Professor of Law, Keio Univ. Law Sch., in Tokyo, Japan (Sept. 20, 2018) (explaining that descriptions of U.S. law in the Japanese press are not always accurate and suggesting that errors may occur in part because reporters have a tendency to approach American law professors in Japan as all-purpose experts on U.S. law); Interview with Kamiya, *supra* note 237 (explaining that Japanese reporting generally does not delve into technical legal issues); Interview with Kubo, *supra* note 262 (stating that it is rare for newspaper reports on U.S. law to provide much detail).

353. Interview with MOFA Official #4, in Tokyo, Japan (Sept. 30, 2018).

354. *About Us: Organization*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Oct. 17, 2019), <https://www.mofa.go.jp/about/hq/org.html>. A separate bureau handles Japan’s relations with Mexico and Central America, in addition to South America. Chunanbei Kyoku, *Latin American and Caribbean Affairs Bureau*, MINISTRY OF FOREIGN AFFS., <https://www.mofa.go.jp/mofaj/annai/honsho/sosiki/chunan.html>.

355. *About Us: Organization*, MINISTRY OF FOREIGN AFFS. OF JAPAN, *supra* note 354. The Fourth Division of MOFA’s Intelligence and Analysis Service (IAS) operates as an in-house intelligence organization focused on “Europe, the Americas, the Middle East and Africa,” but “collection and analysis of foreign intelligence” within the Ministry “primarily take place in day-to-day work in other regional and functional bureaus that remain in close contact with overseas embassies and consulates.” YUKI TATSUMI, JAPAN’S NATIONAL SECURITY POLICY INFRASTRUCTURE: CAN TOKYO MEET WASHINGTON’S EXPECTATIONS? 111-12 (2008); *see also* Kotani, *supra* note 315, at 184 (explaining that IAS “has long been regarded as a backwater in the ministry”). From this perspective, the North American Affairs Bureau is likely to play a bigger role than IAS in the collection of information about U.S. foreign relations law.

356. Gaimushō Soshikirei [Organizational Ordinance of the Foreign Ministry], Cabinet Order No. 249, art. 47 (2000) (last updated July 31, 2020), https://elaws.e-gov.jp/search/elawsSearch/elaws_search/lsg0500/detail/412CO0000000249_20160401_428CO0000000103/0?revIndex=2&lawId=412CO0000000249&openerCode=1#411.

economic affairs in Japan's relations with the United States and Canada,³⁵⁷ a Japan-U.S. Security Treaty Division that works on mutual security and defense issues under the Japan-U.S. Security Treaty of 1960,³⁵⁸ and a Japan-U.S. Status of Forces Agreement (SOFA) Office that handles matters connected to the presence of U.S. military forces in Japan.³⁵⁹ The First Division is the largest of these,³⁶⁰ and its Director holds authority to settle policy disagreements that arise among them.³⁶¹ For insights on the latest developments in Japan-U.S. relations and information that is not available in open sources, units within the Bureau communicate regularly with the Japanese embassy in Washington, D.C.,³⁶² which has more than one hundred diplomatic personnel.³⁶³

As for METI, responsibility for the conduct of Japan's trade relations with the United States lies primarily with the Trade Policy Bureau.³⁶⁴ One component of the Bureau—the Americas Division—has a staff of approximately fifteen officials³⁶⁵ who work on bilateral trade relations between Japan and the various countries of North and South America, including the United States.³⁶⁶ These officials monitor the implementation of trade agreements, manage day-to-day communications with U.S. trade envoys, and collect intelligence on U.S. trade and economic policies.³⁶⁷ Another unit—the Economic Partnership Division—has a staff of more than forty officials³⁶⁸ who negotiate bilateral and plurilateral economic agreements with the United States and other countries.³⁶⁹ Finally, the Bureau's Multilateral Trade System Department has a staff of approximately thirty officials³⁷⁰ who attend to Japan's relations with multilateral trade institutions such as the World Trade Organization (WTO).³⁷¹ Due to its close ties with Japanese industry, METI is often able to persuade MOFA to adopt its position in the event of inter-ministerial disagreement over trade matters.³⁷²

Some evidence suggests that officials in these units are capable of misunderstanding U.S. foreign relations law. To name one historical example, in the early 1970s officials acquiesced to an import-control plan that Japanese

357. *Id.*, art. 48.

358. *Id.*, art. 49.

359. Hokubeikyoku, Gaimushō, Nov. 21, 2013, <https://www.mofa.go.jp/mofaj/annai/honsho/sosiki/hokubei.html>.

360. See Interview with MOFA Official #3, in Tokyo, Japan (Oct. 15, 2018) (explaining that the First Division has a staff of approximately thirty).

361. *Id.*

362. Interview with MOFA Official #1, in Tokyo, Japan (Oct. 4, 2018); Interview with MOFA Official #7, in Tokyo, Japan (Oct. 4, 2018).

363. Interview with MOFA Official #3, *supra* note 360.

364. Interview with METI Official #4, in Tokyo, Japan (Dec. 21, 2018).

365. Interview with METI Official #1, in Tokyo, Japan (Oct. 5, 2018).

366. Keizaisangyōshō Soshikirei [Organizational Ordinance of METI], Cabinet Order No. 254, art. 39 (2000) (last updated July 31, 2020), https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=412CO0000000254.

367. *Id.*

368. Interview with METI Official #3, in Tokyo, Japan (Dec. 20, 2018).

369. Keizaisangyōshō Soshikirei [Organizational Ordinance of METI], art. 38; Interview with METI Official #4, *supra* note 364.

370. *Id.*

371. Keizaisangyōshō Soshikirei [Organizational Ordinance of METI], art. 5(2).

372. Interview with METI Official #4, *supra* note 364.

industry leaders had negotiated with a member of the U.S. Congress on the assumption that the congressman spoke for President Richard Nixon, only to find later that Nixon opposed the deal.³⁷³ In that case, the officials appeared to miscalculate due to a misunderstanding of the separation of powers, which allocates power over diplomatic negotiations to the President rather than Congress and thus diminishes the prospects for presidential approval of a congressionally negotiated agreement.³⁷⁴ Likewise, there is evidence that knowledge is not equally advanced in all areas. Two officials separately suggested that MOFA's understanding of the separation of war powers under U.S. law is more limited than its understanding of U.S. trade law, either because "there is no day-to-day need" to understand war powers³⁷⁵ or because the Japanese and American legal systems exhibit particularly disparate approaches to the use of force in international relations.³⁷⁶ A number of officials also expressed surprise at the notion that the U.S. Constitution ever permits the fifty states to enter into agreements with foreign governments.³⁷⁷

Certain conditions likely contribute to the potential for misunderstanding. First, intensive training on U.S. foreign relations law is unavailable, not only among the university law faculties from which many officials obtained their degrees,³⁷⁸ but also within the ministries themselves. MOFA's Foreign Service Training Institute (FSTI) delivers lectures on Japan-U.S. relations and on international law to new diplomats, but none of those lectures focus on topics in U.S. foreign relations law.³⁷⁹ Nor is such training available prior to an assignment to the Japanese embassy in Washington.³⁸⁰ Instead, officials learn on the job, as the need arises³⁸¹ or in ad hoc "research sessions" involving relevant personnel.³⁸² Similar patterns appear in METI.³⁸³ Multiple officials justified this practice on the ground that there is generally no need for expertise on U.S. foreign relations law.³⁸⁴ As one explained, "it is the U.S. side's responsibility"—not Tokyo's—to make sure an action or agreement accords with U.S. law.³⁸⁵

Second, personnel management systems in MOFA and METI often inhibit specialization. Most diplomats at MOFA rotate throughout the Ministry and its

373. I.M. DESTLER ET AL., *MANAGING AN ALLIANCE: THE POLITICS OF U.S.-JAPANESE RELATIONS* 95 (1976).

374. *Id.* at 95-96.

375. Interview with MOFA Official #4, *supra* note 353.

376. Interview with MOFA Official #7, *supra* note 362.

377. *See, e.g.*, Interview with MOFA Official #4, *supra* note 353.

378. *See supra* Part III.A (discussing conditions within Japanese law faculties).

379. Interview with MOFA Official #6, in Sagamihara, Japan (Nov. 14, 2018).

380. Interview with MOFA Official #9, in Tokyo, Japan (Oct. 16, 2018).

381. Interview with MOFA Official #5, in Tokyo, Japan (Oct. 25, 2018).

382. *See, e.g.*, Interview with MOFA Official #7, *supra* note 362 (explaining that MOFA's Economic Affairs Bureau has held research sessions on the North American Free Trade Agreement).

383. *See, e.g.*, Interview with METI Official #1, *supra* note 365 (explaining that although the Multilateral Trade System Department in METI's Trade Policy Bureau holds training sessions on the WTO, the Americas Division does not hold similar sessions on U.S. trade law).

384. *See, e.g.*, Interview with MOFA Official #7, *supra* note 362; Interview with MOFA Official #9, *supra* note 380.

385. Interview with MOFA Official #7, *supra* note 362.

numerous foreign postings every two to three years.³⁸⁶ Similarly, career bureaucrats in METI generally rotate into a new position every two years.³⁸⁷ Assignments are not always random,³⁸⁸ but it is not uncommon for officials in MOFA's North American Affairs Bureau and METI's Trade Policy Bureau to have previously worked exclusively on matters that are unrelated to the United States, and to move on to another unrelated assignment at the next rotation.³⁸⁹ Officials have weaker incentives and fewer opportunities to develop expertise on the United States and its legal system in this context.

Third, licensed lawyers occupy a marginal position in MOFA and METI. While undergraduate law degrees from Japanese universities are common, practicing attorneys are rare among the ranks of career officials in both ministries,³⁹⁰ which tend to rely upon a small number of professional lawyers who work under term-limited employment contracts³⁹¹ and on a rotating group of permanent employees who are not licensed lawyers³⁹² to perform legal work. For example, the staff of MOFA's Bureau of International Legal Affairs includes fifty or sixty nonlawyer diplomats who are assigned to the Bureau on rotation and a revolving group of ten to twenty practicing attorneys who work under contract with MOFA.³⁹³ Similarly, all of the licensed attorneys in METI's Multilateral Trade System Department work under term-limited contracts.³⁹⁴ The use of these contracts has enabled the ministries to attract talent that would otherwise be unavailable,³⁹⁵ but it has also inhibited the development of legal expertise, as the attorneys often leave for comparatively lucrative opportunities in the private sector once their terms expire.³⁹⁶

386. Interview with MOFA Official #1, *supra* note 362; Interview with MOFA Official #3, *supra* note 360.

387. Interview with METI Official #3, *supra* note 368.

388. Interview with METI Official #2, in Tokyo, Japan (Oct. 26, 2018) (explaining that some officials develop expertise in one or two issue areas, such as the United States, over the course of their career); Interview with MOFA Official #1, *supra* note 362 (explaining that MOFA always makes sure that at least some of the personnel assigned to the Economic Affairs Bureau are knowledgeable about U.S. law).

389. Interview with METI Official #2, *supra* note 388; Interview with MOFA Official #4, *supra* note 353.

390. *See, e.g.*, Interview with METI Official #4, *supra* note 364 (explaining that there are no full-time trade lawyers on the permanent staff at METI); Interview with MOFA Official #5, *supra* note 381 (explaining that practicing lawyers at MOFA work under term-limited contracts).

391. *See* Interview with METI Official #3, *supra* note 368 (explaining that the initial contract for each attorney provides for a two-year term of employment, after which the attorney may receive an opportunity to renew for an additional five-year term); Interview with MOFA Official #5, *supra* note 381 (suggesting that MOFA usually contracts with attorneys for "one to three years") (translation mine).

392. *See, e.g.*, Interview with MOFA Official #8, in Tokyo, Japan (Nov. 19, 2018) (explaining that "many of the international law practitioners" in MOFA are nonlawyers) (translation mine).

393. Interview with MOFA Official #5, *supra* note 381.

394. Interview with METI Official #3, *supra* note 368.

395. METI had a program for hiring licensed attorneys on a permanent basis as late as the mid-1990s, but the program failed to attract sufficient talent. Interview with METI Official #3, *supra* note 368. To address this problem, METI adopted the practice of hiring attorneys under term-limited contracts with higher pay in the late 1990s. *Id.*

396. *See, e.g.*, Interview with METI Official #3, *supra* note 368 (suggesting that it is difficult to persuade attorneys to renew their contracts and stay in the Multilateral Trade System Department for long and that this problem inhibits the development of institutional memory); Interview with MOFA Official #4, *supra* note 353 (suggesting that MOFA's reliance on contract lawyers inhibits the development of

Finally, academic sources suggest that the Japanese government's intelligence capabilities have generally been lackluster since the end of World War II.³⁹⁷ As Richard Samuels explains, Japan's intelligence community was an "undersized, compromised, and . . . organizationally handicapped operation" throughout the Cold War.³⁹⁸ The Cabinet Research Chamber—now the Cabinet Intelligence Research Office (CIRO)—was created in 1952 to collate and analyze intelligence collected by other government agencies,³⁹⁹ but it was "barely functional" for decades and roughly "the equivalent of a nursery school" in comparison to the U.S. Central Intelligence Agency.⁴⁰⁰ Even decades later in 2013, CIRO had an estimated budget of approximately \$20 million and a staff of only 170 officials⁴⁰¹—a majority of whom were secondees from other agencies,⁴⁰² and many of whom had no background in intelligence.⁴⁰³ By comparison, the CIA's budget was 735 times larger and its staff 126 times larger around the same time.⁴⁰⁴ Although recent reforms have reportedly improved Japan's ability to collect and analyze intelligence, deficiencies remain.⁴⁰⁵ These conditions likely challenge the Japanese government's ability to incorporate accurate information about U.S. foreign relations law, among other topics, into decision-making processes.

All that said, the structure and staffing of MOFA's North American Affairs Bureau suggest that it is far from indifferent to the identification and resolution of legal questions affecting bilateral relations. In addition to the Treaty Division and SOFA Office's work on the implementation of specific agreements,⁴⁰⁶ the First Division contains a nonstatutory but "virtually permanent" subdivision that focuses on legal matters such as extradition and mutual legal assistance.⁴⁰⁷ According to one official, this subdivision is the only one of its kind in MOFA's regional bureaus and exists because legal questions arise with unparalleled frequency in Japan's relations with the United States.⁴⁰⁸ Moreover, the Second Division's staff in recent years has included a judge who works on secondment from the Ministry of Justice.⁴⁰⁹

legal expertise within the Ministry and that MOFA "need[s] more lawyers").

397. See, e.g., Andrew L. Oros, *Japan's Growing Intelligence Capability*, 15 INT'L J. INTELL. & COUNTERINTELL. 1, 4 (2002) (suggesting that "the Japanese state has far less 'intelligence power' . . . than states more often examined, such as the United States, the United Kingdom, and even Israel").

398. RICHARD J. SAMUELS, *SPECIAL DUTY: A HISTORY OF THE JAPANESE INTELLIGENCE COMMUNITY* 79 (2019).

399. *Id.* at 92.

400. *Id.* at 94.

401. Taro Kono, Sumio Mabuchi & Koichi Yamauchi, *Nihon-gata "Supai Soshiki" no Tsukurikata*, 128 CHŪŌ KŌRON 94 (Nov. 5, 2013).

402. See Kotani, *supra* note 315, at 183 (explaining that 100 of the 170 staff members "are on loan from other ministries and agencies").

403. SAMUELS, *supra* note 398, at 178.

404. See *The Black Budget*, WASH. POST, Aug. 29, 2013 (reporting a CIA budget of \$14.7 billion and a staff of 21,459 full-time employees).

405. See, e.g., SAMUELS, *supra* note 398, at 252-55 (discussing recent reforms and lingering problems of coordination within the Japanese intelligence community).

406. Hokubeikyoku, *supra* note 359.

407. Interview with MOFA Official #8, *supra* note 392 (translation mine).

408. *Id.*

409. Interview with MOFA Official #7, *supra* note 362.

METI's Trade Policy Bureau has undertaken similar efforts. The Americas Division temporarily added a Japanese attorney to its staff in recent years to assist with negotiations over the Trans-Pacific Partnership.⁴¹⁰ The Economic Partnership Division employed an attorney on a term-limited basis to work on international investment disputes.⁴¹¹ The Multilateral Trade System Department contains a Dispute Settlement Office, the staff of which includes five attorneys who work under term-limited contracts to handle legal disputes before the WTO.⁴¹² In 2008, the Bureau created an International Legal Affairs Office with a collection of personnel from the Dispute Settlement Office and the Economic Partnership Division in order to further empower legal perspectives.⁴¹³ And in 2017, the Bureau created the position of General Counsel for International Legal Affairs, in part to “collaborate with the U.S. Department of Commerce and the [U.S. Trade Representative’s] General Counsel Office to jointly promote cooperation in the enforcement” of trade rules.⁴¹⁴

Officials in these units manage to obtain information about U.S. foreign relations law from a variety of external sources. One of the most important is American law firms. Working through the Japanese embassy in Washington and consulates elsewhere in the United States, MOFA has retained these firms hundreds of times since the early 1950s and continues to consult with them on a “regular basis.”⁴¹⁵ Through this practice, Japanese diplomats have secured expert analysis on topics such as the extraterritoriality of U.S. law,⁴¹⁶ “diplomatic immunity issues,”⁴¹⁷ World War II-related litigation in federal court,⁴¹⁸ U.S. tax treaties,⁴¹⁹ and even pertinent areas of state law.⁴²⁰ Reports from the Justice Department suggest that MOFA has retained the firms most frequently to acquire legal insights on U.S. trade law and economic law, such as the Trade Agreements Act of 1979⁴²¹ and Section 301 of the Trade Act of 1974.⁴²² In contrast, those same reports indicate that MOFA has hired American attorneys to obtain analysis

410. *Id.*

411. *Id.*

412. *Id.*

413. Interview with METI Official #4, *supra* note 364.

414. TRADE POLICY BUREAU, “2017 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA, and IIA-” and “METI Priorities Based on the 2017 Report”, MINISTRY OF ECON., TRADE & INDUSTRY 4 (May 2017), https://www.meti.go.jp/english/report/data/2017WTO/pdf/0623_01a.pdf; Interview with METI Official #3, *supra* note 368; Interview with METI Official #2, *supra* note 388.

415. Interview with MOFA Official #1, *supra* note 362. The suggestion that MOFA has sought counsel hundreds of times is based on my review of the Justice Department’s annual FARA reports to Congress. See Scoville, *FARA Data*, *supra* note 165 (linking to the data compilation).

416. FARA REPORT FOR THE CALENDAR YEAR 1983, at 309.

417. FARA REPORT FOR THE CALENDAR YEARS 1988, 1989, 1990 AND 1991, at 663.

418. FARA REPORT FOR THE SIX MONTHS ENDING JUNE 30, 2001, at 158.

419. FARA REPORT FOR THE SIX MONTHS ENDING JUNE 30, 2002, at 139.

420. FARA REPORT FOR THE CALENDAR YEAR 1997, at 193 (reporting the provision of legal counsel to the Japanese consulate in connection with “difficulties . . . obtaining California driver’s licenses for Japanese nationals” under California Vehicle Code § 12801.5, which requires an applicant for a license “to submit satisfactory proof that the applicant’s presence in the United States is authorized under federal law”).

421. FARA REPORT FOR THE CALENDAR YEAR 1979, at 266.

422. FARA REPORT FOR THE CALENDAR YEARS 1988, 1989, 1990 AND 1991, at 685.

on U.S. war powers only twice.⁴²³ For their part, officials in METI's Trade Policy Bureau report that they frequently seek counsel on U.S. law from American law firms⁴²⁴ and have done so more often in recent years due to significant developments in U.S. trade law under the Trump administration.⁴²⁵ Indeed, METI's reliance on these firms, for matters pertaining to the United States and otherwise, has become so routine that the Bureau's Multilateral Trade System Department maintains a separate budget to pay for legal counsel.⁴²⁶ In the view of one official, this practice renders unlikely any misunderstanding of U.S. law within the Bureau.⁴²⁷

American law schools are another source of knowledge. In MOFA, junior officers take a multiyear sabbatical to study at a foreign university.⁴²⁸ The primary purpose is language training,⁴²⁹ but officers are free to choose the course of study through which they will learn a foreign language,⁴³⁰ and according to one official, law is "one of the more popular fields."⁴³¹ Similarly, in METI, junior officials train abroad for one or two years by studying subjects of their choosing at foreign graduate schools under a program administered by the National Personnel Authority (*Jinji'in*).⁴³² Although it is unclear how many study law in particular, the overall number of government officials who commence study in the United States each year with *Jinji'in* funding has increased from approximately twenty in the late 1980s to nearly one hundred in 2018.⁴³³ Moreover, six of the seven attorneys in METI's Trade Policy Bureau obtained both an LLM and a law license in the United States prior to entering government service.⁴³⁴ As a result, officials who have received formal training on U.S. law, including foreign relations law, currently occupy a number of influential positions in Japan's foreign policy bureaucracy.⁴³⁵

423. See FARA REPORT FOR THE CALENDAR YEAR 1981, at 267 (discussing counsel's preparation of a "report concerning political factors that would influence U.S. foreign policy decisions affecting U.S. obligations under the U.S./Japanese Treaty of Mutual Cooperation and Security of 1960, and the War Powers Resolution of 1973"); FARA REPORT FOR THE CALENDAR YEAR 1980, at 247 (reporting that a law firm "initiated work on Phase II of the War Powers Resolution Opinion on United States – Japan Mutual Defense Agreement").

424. Interview with METI Official #4, *supra* note 364; see also Interview with METI Official #1, *supra* note 365 (explaining that the Americas Division contacts American law firms once or twice a month).

425. Interview with METI Official #3, *supra* note 368.

426. Interview with METI Official #2, *supra* note 388.

427. Interview with METI Official #3, *supra* note 368.

428. Interview with MOFA Official #5, *supra* note 381.

429. Interview with MOFA Official #3, *supra* note 360.

430. Interview with MOFA Official #1, *supra* note 362.

431. Interview with MOFA Official #9, *supra* note 380 (translation mine).

432. Interview with METI Official #2, *supra* note 388.

433. These numbers reflect all ministries other than MOFA, whose officials do not study abroad under the *Jinji'in* program. I compiled the underlying data from annual reports published by Japan's National Personnel Authority from 1988 to present. See JINJI'IN, *Hakusho Detabesu Shisutemu*, <https://www.jinji.go.jp/hakusho/index.html> (last visited Nov. 4, 2020) (providing links to the reports); Ryan M. Scoville, *Jinji'in Data*, <https://ryanscoville.files.wordpress.com/2021/01/jinjiin.xlsx> (compiling the data).

434. Interview with METI Official #4, *supra* note 364.

435. See, e.g., Interview with MOFA Official #5, *supra* note 381 (explaining that they obtained an L.L.M. from Harvard Law School, where they studied topics such as war powers and Trade Promotion

Other sources also play an important role. Officials consult at times with think tanks and American or Japanese legal academics,⁴³⁶ along with publications such as law review articles.⁴³⁷ The advancement of Japanese scholarship on U.S. foreign relations law in recent decades has likely facilitated this practice.⁴³⁸ Although access appears to vary across organizational units, some officials use subscription services such as Westlaw⁴³⁹ and monitor U.S. and Japanese news media.⁴⁴⁰ The reporting tendencies of newspapers such as the *Asahi Shimbun* suggest that this practice provides officials with basic information on some of the significant developments in U.S. foreign relations law.⁴⁴¹ Embassy personnel in Washington ask legal questions directly to members of the U.S. executive branch and congressional staff.⁴⁴² In addition, officials confer with counterparts from other ministries,⁴⁴³ MOFA's Bureau of International Legal Affairs,⁴⁴⁴ and even friendly third-party governments. Several officials explained that those who need to understand U.S. law will tap one or more of these sources on an ad hoc basis, depending on the circumstances and the issue at hand.⁴⁴⁵

The cumulative result is reasonably pervasive knowledge of the basic features of pertinent areas of U.S. foreign relations law among MOFA and METI officials who work on Japan-U.S. relations, particularly in the area of trade.

Authority); Interview with Ministry of Defense (MOD) Official #2 (explaining that they took a course on U.S. foreign relations law while completing an L.L.M. at George Washington University Law School); Interview with MOFA Official #1, *supra* note 362 (explaining that they completed a course on U.S. trade law at Tufts University); Interview with METI Official #3, *supra* note 368 (explaining that they completed a course on U.S. constitutional law at the University of Michigan Law School); Interview with METI Official #1, *supra* note 365 (explaining that they completed a course on U.S. trade law at Georgetown University).

436. Interview with MOFA Official #7, *supra* note 362 (explaining that the Consulate General in Detroit had "regular contact" with the late John Jackson, who taught courses on U.S. foreign relations law and international trade law, among other topics, at the University of Michigan over the latter half of the twentieth century); Interview with METI Official #1, *supra* note 365 (explaining that METI officials have conferred with a Japanese scholar on U.S. Trade Promotion Authority).

437. Interview with MOFA Official #7, *supra* note 362.

438. *See supra* Part III.A.

439. *Compare* Interview with MOFA Official #7, *supra* note 362 (explaining that MOFA's First North America Division has access to subscription services such as Westlaw and that these services are used "often," including to research U.S. law), *with* Interview with METI Official #1, *supra* note 365 (explaining that METI's Americas Division does not use Westlaw or Lexis but relies on sources such as *Inside U.S. Trade*).

440. Interview with METI Official #1, *supra* note 365.

441. *See supra* Part III.B.

442. Interview with MOFA Official #1, *supra* note 362; Interview with MOFA Official #9, *supra* note 380; Interview with METI Official #2, *supra* note 388.

443. Interview with MOFA Official #1, *supra* note 362; Interview with METI Official #2, *supra* note 388; Interview with MOFA Official #7, *supra* note 362.

444. *See* Interview with MOFA Official #9, *supra* note 380 (suggesting that this happens on occasion). Two factors seem to limit the role of the Bureau of International Legal Affairs in the resolution of questions about U.S. law. First, the Bureau is not an office of general counsel, so MOFA does not funnel legal questions from the regional bureaus into the Bureau of International Legal Affairs as a matter of course. *See* Interview with METI Official #3, *supra* note 368 (suggesting that METI is the only ministry with an office of general counsel). Second, the Bureau specializes in international law rather than the law of foreign states, so its role in the resolution of questions about U.S. law is limited. Interview with MOFA Official #8, *supra* note 392.

445. Interview with MOFA Official #3, *supra* note 360; Interview with METI Official #1, *supra* note 365.

Illustrating as much, a number of officials expressed confidence in their understanding of salient aspects of U.S. trade law, including the Trade Promotion Authority,⁴⁴⁶ debates over the President's authority to withdraw from treaties such as the North American Free Trade Agreement (NAFTA),⁴⁴⁷ and Section 301 of the Trade Act of 1974.⁴⁴⁸ One MOFA official surmised that, in general, relevant units in the Japanese bureaucracy are "well informed,"⁴⁴⁹ while another suggested that they are "perfectly knowledgeable of relevant laws."⁴⁵⁰ Still another explained that, in at least one case where the Japanese government's policy preferences on a labor issue aligned with those of Congress but not the U.S. executive branch, Tokyo used its knowledge of TPA as a source of leverage in negotiations.⁴⁵¹ Similarly, one official from METI stated that senior leadership in the ministry understands "very well the essence of U.S. trade law and are aware of its complexities."⁴⁵² Some of these officials also demonstrated their own knowledge of the law by correctly describing certain parts of it.⁴⁵³ Others attributed institutional knowledge to factors such as the longstanding nature of the Japan-U.S. alliance⁴⁵⁴ and the transparency of American law.⁴⁵⁵ Some also indicated that knowledge is not limited to U.S. trade law but rather extends to areas such as the Foreign Sovereign Immunities Act⁴⁵⁶ and the different processes by which the United States enters international agreements.⁴⁵⁷

Records obtained under Japan's freedom-of-information-act⁴⁵⁸ corroborate these statements by showing that MOFA officials have studied the War Powers Resolution on a number of occasions.⁴⁵⁹ One document, a three-page memorandum titled "U.S. Policy Toward Iraq (Joint Resolution Authorizing the Use of Force Against Iraq from the Perspective of the War Powers Resolution)," shows that officials in the North American Affairs Bureau's First Division

446. Interview with MOFA Official #9, *supra* note 380.

447. Interview with METI Official #1, *supra* note 365.

448. Interview with MOFA Official #1, *supra* note 362; *see also* Interview with METI Official #3, *supra* note 368 (explaining that relevant METI officials are knowledgeable about Section 301, as well as Section 232 of the Trade Expansion of 1962).

449. Interview with MOFA Official #1, *supra* note 362 (translation mine).

450. Interview with MOFA Official #2, in Tokyo, Japan (Nov. 22, 2018) (translation mine).

451. Interview with MOFA Official #5, *supra* note 381.

452. Interview with METI Official #3, *supra* note 368 (translation mine).

453. *See, e.g., id.* (correctly describing the major procedural differences between Article II treaties and congressional-executive agreements under U.S. law).

454. Interview with MOFA Official #3, *supra* note 360.

455. Interview with MOFA Official #1, *supra* note 362 (explaining that U.S. law is relatively easy to access because of the open nature of American society and the U.S. government's tendency to publish legal authorities online).

456. *See* Interview with MOFA Official #8, *supra* note 392 (explaining that officials in MOFA's International Legal Affairs Bureau have knowledge of the Foreign Sovereign Immunities Act).

457. *See, e.g.,* Interview with MOFA Official #4, *supra* note 353 (stating that it is "common knowledge" in MOFA's International Legal Affairs Bureau that the United States enters into international agreements by different processes, such as those pertaining to Article II treaties and congressional-executive agreements).

458. Gyōseikikan no Hoyūsuru Jōhō no Kōkai ni Kansuru Hōritsu, Act. No. 42 of 1999.

459. I obtained the records by requesting "any documents concerning the interpretation, significance, or meaning of the American War Powers Resolution" ("アメリカの戦争権限法の解釈や意義又は定義に関する文書").

analyzed the WPR at length in October 2002,⁴⁶⁰ in the midst of U.S. congressional deliberations over various drafts of what became the 2002 AUMF on Iraq.⁴⁶¹ The memorandum begins with background information. It identifies the Declare War Clause and the Commander in Chief Clause as the “war powers provisions” of the U.S. Constitution,⁴⁶² notes that the United States has declared war only five times in its history,⁴⁶³ explains that the WPR “restricts the president’s ability to rely on the Commander in Chief Clause as an independent source of authority to use force” in the absence of a war declaration,⁴⁶⁴ and summarizes the statute’s major features.⁴⁶⁵

The memorandum then offers a number of detailed observations regarding the WPR’s historical application. It describes official practice under Section 3 of the statute,⁴⁶⁶ part of which states that the President “in every possible instance shall consult with Congress before introducing” U.S. forces into hostilities.⁴⁶⁷ The memorandum explains that in recent decades the executive branch has refused to acknowledge this requirement as binding and has thus provided reports “consistent with” rather than “pursuant to” it.⁴⁶⁸ The memorandum also highlights problems with Section 5, which requires the President to terminate the use of force in a variety of circumstances.⁴⁶⁹ In particular, “there are no examples of the withdrawal of U.S. forces” pursuant to Section 5,⁴⁷⁰ U.S. forces were engaged in hostilities in Kosovo in contravention of the limitations set forth in that provision,⁴⁷¹ the executive branch has called into question its constitutionality,⁴⁷² and the Supreme Court’s decision in *INS v. Chadha* suggests that the legislative veto set forth in Section 5(c) may be unconstitutional.⁴⁷³

The memorandum concludes by providing a side-by-side comparison of three draft authorizations for the use of force against Iraq: (1) S.J. Res. 45, which the memorandum describes as enjoying the support of the executive branch; (2) a bill supported by House leadership; and (3) a Biden-Lugar bill in the Senate.⁴⁷⁴ In each case, the memorandum highlights the draft’s relationship to the WPR, the stated purposes for which it would authorize force, and its relationship to pertinent resolutions of the U.N. Security Council.⁴⁷⁵ For example, whereas S.J.

460. Beikoku no Tai-Iraku Seisaku (Sensō Kengen hō no Kanten Kara Mita Tai-Iraku Gunji Kōdō Shōnin Gikai Gōdō Ketsugi), Hokubei Dai-ichi-ka, at 1 (Oct. 2002) (on file with author).

461. See H.R.J. Res. 114, 107th Cong. (2002).

462. Beikoku no Tai-Iraku Seisaku, *supra* note 460, at 1 (translation mine).

463. *Id.*

464. *Id.* (translation mine).

465. *Id.*

466. *Id.* at 2.

467. War Powers Resolution, § 3, Pub. L. No. 93-148, Nov. 7, 1973, 87 Stat. 555.

468. Beikoku no Tai-Iraku Seisaku, *supra* note 460, at 2 (translation mine).

469. War Powers Resolution, *supra* note 467, § 5(b).

470. Beikoku no Tai-Iraku Seisaku, *supra* note 460, at 2 (translation mine).

471. *Id.*

472. *Id.* (citing statements from former State Department Legal Adviser Abraham Sofaer and former White House Press Secretary Mike McCurry).

473. *Id.*

474. *Id.* at 3.

475. *Id.*

Res. 45 contained “no explicit language”⁴⁷⁶ indicating that it constitutes “specific statutory authorization” for purposes of WPR Section 5,⁴⁷⁷ the other two bills did.⁴⁷⁸ The memorandum concludes without further discussion, but its anonymous author(s) clearly viewed the WPR as an appropriate lens through which to evaluate the legal and practical implications of each draft. Other records obtained under Japan’s freedom-of-information act—an undated, one-page “outline” of the WPR and an undated, one-page summary of the statute’s “main points”—show that MOFA’s interest in the WPR has been recurring.⁴⁷⁹

* * *

In sum, there is reason to believe that MOFA and METI officials who work on Japan-U.S. relations are not experts in U.S. foreign relations law but are, nevertheless, reasonably well-informed about its basic features in pertinent areas, particularly trade. Japanese academia’s contribution to official knowledge has not been overwhelming, but the scholarship on U.S. foreign relations law has improved in quality and volume since the end of World War II, providing officials with ready access to in-depth analysis in their native language on a variety of topics. It is not uncommon for major Japanese news media to supply basic information on major developments in the field. And despite employment policies that appear to marginalize the perspectives of licensed attorneys, personnel practices that often inhibit the development of country expertise, the absence of intensive training on U.S. foreign relations law, and the government’s comparatively limited intelligence capabilities overall, relevant officials manage to tap a variety of sources—from U.S. law firms to congressional staff to navigate the legal dimensions of Japan-U.S. relations. In other words, the case study provides new meta-knowledge that on balance favors moving U.S. foreign relations law from the unknown-known dyad and into the known-known dyad in the context of U.S.-Japan relations as a general matter.

Given the theory presented in Part I, this finding is likely to carry significant implications for relations between Washington and Tokyo, at least in the short term. We can conclude that many relevant officials within the Japanese government currently understand the basic features of U.S. laws that purport to impose obligations on Japan. We can conclude that Tokyo today is reasonably likely to share U.S. views on aspects of international law that incorporate U.S. foreign relations law, and to understand both law-based signals of U.S. intentions and the extent to which the United States fulfills or violates its international legal obligations via municipal legal mechanisms. We can also conclude with

476. *Id.*

477. War Powers Resolution, *supra* note 467, § 5(b)-(c).

478. *Id.*

479. See [Sankō] Sensō Kengenhō War Powers Resolution of 1973 (Gaiyō), Japanese Ministry of Foreign Affairs (on file with author); Sensō Kengenhō (War Powers Resolution of 1973) (Shuyō na Pointo), Japanese Ministry of Foreign Affairs (on file with author). Although undated, the first document was clearly created in recent years, as it explains that President Trump used force against Syria without congressional authorization in 2017. *Id.*

reasonable confidence that Tokyo is generally able to make use of U.S. foreign relations law to interpret and predict U.S. action in international affairs. Although additional, updated assessments of Japan's epistemic conditions may be necessary in the long run, this meta-knowledge should, for the foreseeable future, aid U.S. efforts to ensure Japan's compliance with pertinent aspects of U.S. foreign relations law, to anticipate Japanese views on the content of international law, to predict the reputational consequences of U.S. compliance or noncompliance with international law in the context of U.S.-Japan relations, to use law to send signals to Japan, and to forecast Japanese expectations regarding future U.S. action.

IV. AN OUTSIDE-IN AGENDA

Of course, even with meta-knowledge pertaining to Japan, many questions remain. What kinds of epistemic conditions prevail in other countries? What factors predict the acquisition of foreign knowledge?⁴⁸⁰ What does sensitivity to foreign knowledge mean for American legal actors going forward? This Part helps to answer these questions by laying out an agenda for the implementation of the outside-in approach. The agenda consists of new academic research and official policies to cultivate meta-knowledge; a reevaluation of foreign relations law's functional merits in light of outside-in dynamics; and legal, policy, and academic reforms to calibrate the transmission of legal information based on national interests. Because the implications of the outside-in approach are wide-ranging, much of the analysis here is merely illustrative, leaving to others most of the task of evaluating the outside-in dimensions of U.S. foreign relations law's myriad forms and case-specific applications.

A. Advance Meta-Knowledge

Most obviously, implementing the outside-in approach will require additional work to develop meta-knowledge. In particular, scholars should conduct new empirical research on foreign epistemic conditions. One line of inquiry might use case studies to illuminate conditions in countries other than Japan, thereby generating further insights on the predictors of foreign knowledge and ignorance. A particularly intriguing strategy would examine official knowledge in countries that are highly dissimilar to Japan in terms of economic development, form of government, relations with the United States, and legal tradition, among other factors, and then compare findings to draw inferences about the determinants of foreign sophistication. Another line of inquiry might

480. A significant number of studies have examined influences on the global diffusion of legal models. *See, e.g.*, Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813 (finding that legal norms are more likely to spread among states that share a legal tradition). But while a foreign government's adoption of a U.S. legal model requires at least a degree of foreign knowledge about the model itself, it is possible for a foreign government to know U.S. law without adopting it. *See, e.g., supra* p. 2 (discussing British and Dutch critiques of the ATS, which lacks an equivalent in British and Dutch law). In other words, diffusion studies provide insufficient insight on the condition of foreign knowledge because the determinants of model-diffusion and of knowledge-diffusion are not necessarily the same.

use quantitative methods to test on a global scale for correlations between foreign knowledge and independent variables such as national wealth, language, and similarity to the United States with FARA data, foreign news content, and foreign scholarship serving as potential proxies for the dependent variable of official knowledge. Collaborations among U.S. legal scholars, political scientists, and foreign scholars would be valuable in these endeavors.

Implementing the outside-in approach will also require the U.S. government to cultivate meta-knowledge and disseminate it to appropriate actors. The CIA, to name one obvious example, might adopt frameworks to incorporate assessments of foreign knowledge of U.S. foreign relations law into intelligence products for policymakers who hope to gauge the prospects of foreign compliance with U.S. law, assess foreign perceptions of international law, anticipate the reputational consequences of U.S. compliance or noncompliance with international law, use law to signal U.S. intentions, or evaluate the risk of law-based misperception in bilateral relations.⁴⁸¹ To the extent that meta-knowledge is acquired and relevant, the executive branch might also work to ensure its availability to Congress and the federal judiciary on pertinent matters through mechanisms such as congressional committee hearings and amicus briefs.⁴⁸² Given that the executive branch already possesses the capability to ascertain foreign knowledge of U.S. law,⁴⁸³ these measures are unlikely to require new investments in intelligence-collection capabilities.

B. Reevaluate Functional Merits

In addition, implementing the outside-in approach will require U.S. legal actors to reevaluate foreign relations law's practical merits in light of foreign epistemic conditions. In drawing attention simultaneously to the significance of those conditions and to foreign relations law's general failure to take them

481. Cf. Telephone Interview with Gartin, *supra* note 13 (explaining that this does not occur at present).

482. *Zivotofsky v. Kerry* illustrates how the executive branch has missed opportunities to share meta-knowledge with courts to date. In that case, the government argued in part that the need to speak with "one voice" on the recognition of foreign borders favors locating the recognition power exclusively with the President, but the government did little to inform the court about the external conditions that might render one voice necessary. See Brief for the Respondent, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), No. 13-628, 2014 WL 4726506, at *24-25. In other words, the executive branch did not reveal whether foreign governments properly understood the statute that was under review, or whether they had sufficient foreign relations law knowledge to follow other developments in U.S. recognition policy in the presence of multiple voices. *Id.* This may have occurred because relevant actors in the executive branch did not possess such information. It also may have occurred because those actors generally view the hoarding of meta-knowledge as optimal for the executive branch itself. One conceivable rationale for such a view is that hoarding avoids the risk of diplomatic friction in cases where a candid briefing before a federal judge would require executive branch lawyers to depict a foreign government as unsophisticated or deficient in U.S. legal knowledge. Another conceivable rationale is that hoarding meta-knowledge encourages judicial deference by preserving the informational advantage that the executive tends to enjoy over courts in cases that implicate foreign relations. Whether such a practice is optimal for the United States is a separate question. Cf., e.g., MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS (2019) (arguing in part that the nature of modern international relations disfavors judicial deference to the executive in many cases involving foreign relations).

483. See Telephone Interview with Gartin, *supra* note 13 (explaining that the intelligence community is capable of providing this kind of information to policymakers, should they ask for it).

seriously, the outside-in approach exposes traditional arguments about the functional merits of many legal arrangements as incomplete—as analytic half-loaves that neglect an important determinant of the law’s ability to advance national interests. In doing so, the approach encourages caution and modesty, rather than certitude, on the part of those who invoke practicalities to support or critique the law: We currently know very little about how the separation of war powers is understood abroad, but many suspect that executive primacy is optimal in this area, given the President’s unique ability to act quickly in times of crisis.⁴⁸⁴ Foreign knowledge of the constitutional power to recognize foreign borders is largely opaque, but many presume that executive exclusivity is the best arrangement, given that the President is better positioned to speak with one voice.⁴⁸⁵ And although we have never examined foreign knowledge of American federalism, most sense that federal control over foreign affairs is advantageous due to factors such as federal unity, expertise, and access to information.⁴⁸⁶ With a material element of the cost-benefit analysis largely unknown, the best an analyst can do at present is to make an educated guess on the overall merits of U.S. foreign relations law in many areas.

Reevaluating longstanding functionalist assessments from an outside-in perspective will help to correct this deficiency. Ideally, this reevaluation will cover all aspects of the field and recur as meta-knowledge improves and foreign knowledge evolves, thereby establishing outside-in analysis as a standard form of functionalism.⁴⁸⁷ In some cases, interpretive modalities, institutional arrangements, and legal doctrines may remain compelling or become even more so as analysts supplement traditional perspectives with outside-in insights. In other cases, legal positions may lose some of their force or even cease to persuade altogether, such that reform is in order. Two examples illustrate the point.

Executive Primacy. The Supreme Court observed decades ago that the President, “not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.”⁴⁸⁸ This opportunity has several sources, including the numerous U.S. embassies and consulates that enable American diplomats to interface directly with officials from virtually every foreign government, as well as the U.S. intelligence community’s robust capacity to synthesize and evaluate information from abroad. Congress, of course, has its

484. See, e.g., *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1, 7 (2011) (explaining that the President “holds ‘the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action,’ given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action”).

485. See *Zivotofsky*, 576 U.S. at 14 (2015) (holding that the President’s power to recognize foreign borders is exclusive, in part because “only the Executive has the characteristic of unity at all times”).

486. See, e.g., Michael D. Ramsey, *Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 372-73 (1999) (identifying these arguments).

487. Cf. Curtis A. Bradley, *The Irrepressible Functionalism in U.S. Foreign Relations Law*, in *FOREIGN RELATIONS LAW 4-5* (Curtis A. Bradley ed., 2019) (discussing common functionalist considerations, such as speed of decision and unity of message).

488. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

own tools for gathering information, including committee hearings, member travel, and subpoenas, but few of these enable direct access to foreign officials or other foreign sources of information on external conditions.⁴⁸⁹ In addition, the financial and human resources with which Congress might attempt to collect and assess evidence of foreign knowledge pale in comparison to the resources that are available to the executive branch.⁴⁹⁰ The President could thus bolster the practical case for centralizing power in the executive rather than Congress by directing some of those resources toward the collection and analysis of intelligence on foreign knowledge,⁴⁹¹ as an executive branch well-equipped with meta-knowledge would be uniquely positioned within the federal government to promote the effective enforcement of U.S. foreign relations law, harmonize U.S. and foreign perspectives regarding the content of international law, evaluate the reputational consequences of U.S. compliance with international law, ascertain the prospects for using law to signal national intentions in specific cases, and identify strategic risks in U.S. bilateral relations.⁴⁹² For the same reason, and for better or worse, the cultivation of meta-knowledge within the executive branch would also strengthen the practical argument for judicial deference to the President⁴⁹³ and for judicial restraint in foreign relations cases more generally.⁴⁹⁴

The Alien Tort Statute (ATS). The ATS provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁹⁵ Since 1980, this statute has attracted significant attention from American commentators as a vehicle for promoting internationally recognized human rights,⁴⁹⁶ and in some cases, courts have relied on it to adjudicate claims against foreign governments and foreign officials.⁴⁹⁷ The Supreme Court, however, has greatly restricted its availability in recent years.⁴⁹⁸ Some commentators have

489. See, e.g., *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) (“Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States.”); Gary E. Davidson, *Congressional Extraterritorial Investigative Powers: Real or Illusory?*, 8 EMORY INT’L L. REV. 99, 104-05 (1994) (discussing limits on the ability of Congress to subpoena aliens residing overseas).

490. Compare, e.g., *The Black Budget*, WASH. POST (Aug. 30, 2013) (reporting that the CIA—one of seventeen agencies in the U.S. intelligence community—had a staff of 21,459 full-time employees and a budget of \$14.7 billion in 2013) with VITAL STATISTICS ON CONGRESS, ch. 5 (2021), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress> (reporting that Congress and its support agencies had 19,571 staff members and a budget under \$4.1 billion in 2013).

491. Cf. Telephone Interview with Gartin, *supra* note 13 (explaining that the U.S. intelligence community is capable of collecting and analyzing this kind of information).

492. See Part I (discussing the benefits of meta-knowledge).

493. Cf. *Jama v. Imm. & Customs Enf’t*, 543 U.S. 335, 336 (2005) (discussing the Court’s “customary policy of deference to the President in foreign affairs”).

494. Cf. *Zivotofsky v. Clinton*, 566 U.S. 189, 213 (2012) (Breyer, J., dissenting) (arguing that the Constitution delegates foreign affairs powers primarily to the political branches, in part because decision-making in this area “often rests upon information readily available to the Executive Branch and to the intelligence committees of Congress, but not readily available to the courts”).

495. 28 U.S.C. § 1350.

496. See Stephen P. Mulligan, CONG. RSCH. SERV., R44947, *THE ALIEN TORT STATUTE: A PRIMER 1* (2018) (explaining that the ATS “has been the subject of intense interest in recent decades”).

497. Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1907 (2016).

498. See *supra* note 56 (citing sources).

supported this development,⁴⁹⁹ while others have lamented it.⁵⁰⁰ But whatever the other merits of those reactions, the outside-in approach suggests that they are premature from a practical perspective: Foreign official knowledge of the ATS is critical to its success as an instrument of rights promotion, and yet the nature and extent of that knowledge have never been entirely clear.⁵⁰¹ To the extent that officials have been unaware of the ATS, it is unlikely to have deterred human rights violations⁵⁰² or held value as a normative signal in international society, and the slow death of the ATS at the hands of the Supreme Court is largely inconsequential, particularly given that few plaintiffs have succeeded at recovering money damages.⁵⁰³ But insofar as foreign officials have been knowledgeable about the ATS, it may very well have helped to deter human rights violations and held value as a normative signal, and the Court's approach to the statute comes at a material cost to the advancement of international human rights. Meta-knowledge would thus help U.S. legal actors to decide whether it is worthwhile to try to revive the ATS,⁵⁰⁴ in addition to suggesting means of improving its deterrent and signaling effects.

C. Optimize Foreign Knowledge

Finally, the outside-in approach encourages U.S. efforts to optimize the nature and extent of foreign knowledge rather than accept prevailing conditions as given. In some cases, foreign understanding is likely to serve U.S. interests. Foreign comprehension of TPA, for example, is necessary for TPA to achieve its avowed purpose of reassuring trading partners that Congress will not tamper with presidentially negotiated trade agreements.⁵⁰⁵ But in other cases, foreign understanding may prove counterproductive. The TVPA, for instance, is less likely to deter torture if foreign officials are aware that plaintiffs rarely prevail.⁵⁰⁶ Optimizing foreign knowledge will thus require U.S. legal actors to adopt strategies of clarity and obfuscation that are tailored to the nature of the issue at

499. See, e.g., Eric Posner, *The United States Can't Be the World's Courthouse*, SLATE (Apr. 24, 2013), <https://slate.com/news-and-politics/2013/04/the-supreme-court-and-the-alien-tort-statute-ending-human-rights-suits.html> (applauding the Court's decision in *Kiobel v. Royal Dutch Petroleum* as curtailing "an example of thuggish American exceptionalism").

500. See, e.g., Beth Van Schaack, *Nestlé & Cargill v. Doe: What's Not in the Supreme Court's Opinions*, JUST SECURITY (June 30, 2021), <https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/> (describing the majority opinion in *Nestlé USA, Inc. v. Doe* as flawed in its logic, historical analysis, and interpretation of Supreme Court precedent).

501. Argentina, Germany, the Netherlands, and the United Kingdom have displayed knowledge of the ATS by filing amicus briefs on it with the Supreme Court. See *supra* note 154 (citing those briefs). Yet most ATS claims have not involved officials from those countries. See Scoville, *supra* note 497, at 1906 (finding that federal judicial assessments of customary international law, most of which have occurred in the context of ATS litigation, have typically concerned the legality of acts that occurred at least partly in the developing world). For a discussion on the dearth of empirical studies on the ATS, see Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1154-61 (2011).

502. Cf. Robinson & Darley, *supra* note 60, at 174-76 (identifying legal knowledge as a precondition to deterrence).

503. Kenney, *supra* note 63, at 1067-85.

504. Cf. Van Schaack, *supra* note 500 (arguing that Congress should amend the ATS to clarify that it applies to torts committed anywhere in violation of international law).

505. Cf. Putnam, *supra* note 17, at 448 (explaining TPA's rationale).

506. See *supra* p. 13 (discussing this issue).

hand, the foreign states that are implicated, and U.S. national interests. A variety of reforms could help to achieve the desired results.

International Legal Reforms. One set of reforms would seek to optimize foreign knowledge by means of international law. Multilateral treaties such as the European Convention on Information on Foreign Law (the London Convention) provide a model for how this might work.⁵⁰⁷ Under the Convention, contracting parties “undertake to supply one another . . . with information on their law and procedure in civil and commercial fields as well as on their judicial organization.”⁵⁰⁸ To implement this commitment, each party must establish a national liaison body to receive and take action on requests for information from other parties, and to transmit requests for information from its own judicial authorities.⁵⁰⁹ Upon receipt of a request, the liaison body “may either draw up the reply itself or transmit the request to another State or official body to draw up the reply,”⁵¹⁰ “transmit the request to a private body or to a qualified lawyer to draw up the reply,”⁵¹¹ or “refuse to take action . . . if its interests are affected by the case giving rise to the request or if it considers that the reply might prejudice its sovereignty or security.”⁵¹² Where a party elects to reply, the object “shall be to give information in an objective and impartial manner on the law of the requested State to the judicial authority from which the request emanated.”⁵¹³

It is conceivable that the United States would benefit from the adoption of similar agreements on foreign relations law. These agreements could help to establish official channels for the transmission of information from the executive branch to foreign judicial authorities, administrative agencies, and parliaments, in addition to facilitating U.S. access to expertise on the foreign relations law of foreign states. In doing so, the agreements might make it easier for the U.S. executive branch to selectively transmit pertinent information in light of national interests on a case-by-case basis.

Nonlegal Reforms. Another set of reforms would seek to optimize foreign knowledge by means of policy and other nonlegal measures. For example, subject to standard restrictions on justiciability, the Supreme Court might reasonably adopt a general policy in favor of granting certiorari to decide cases on foreign relations law where foreign knowledge would be advantageous.⁵¹⁴ In doing so, the Court could facilitate understanding by fostering a greater degree of national uniformity in the field and raising the global salience of emerging

507. See, e.g., Inter-American Convention on Proof of and Information on Foreign Law, 1439 U.N.T.S. 110 (1979); European Convention on Information on Foreign Law, 720 U.N.T.S. 147 (1968). The United States is not a party to these agreements.

508. European Convention on Information on Foreign Law, *supra* note 507, art. 1.

509. *Id.* art. 2.

510. *Id.* art. 6(1).

511. *Id.* art. 6(2).

512. *Id.* art. 11.

513. *Id.* art. 7.

514. Cf. Rule 10: Considerations Governing Review on Certiorari, Rules of the Supreme Court of the United States (2019) (providing that a writ of certiorari will be granted “only for compelling reasons” and identifying factors that the Court considers in deciding whether to grant writ, such as the existence of a circuit split).

doctrines.⁵¹⁵ Similarly, the executive branch might exert greater efforts to conduct embassy programming and other diplomatic activities with an eye toward the optimization of foreign knowledge.⁵¹⁶ Finally, to the extent that foreign knowledge is beneficial, legal scholars could also play a role in its promotion, including by publishing important works such as the *Restatement* and major casebooks in foreign languages, and by inviting more foreign scholars to participate in relevant academic conferences and research initiatives.⁵¹⁷

Reforms to Foreign Relations Law. A final set of reforms would optimize foreign knowledge by means of foreign relations law itself. Certain features of the law are likely to aid or complicate foreign governments' ability to ascertain associated rules of decision.⁵¹⁸ Lawmakers might thus add or remove those features depending on whether foreign knowledge is optimal.

Some of the features are terminological. Various aspects of foreign relations law explicitly incorporate international law by reference and thus render the meaning of U.S. law dependent upon a body of rules that are familiar around the globe. Among other places,⁵¹⁹ such rules appear in the Foreign Sovereign Immunities Act, which provides in part that foreign states lack immunity from the jurisdiction of U.S. courts in certain cases in which "rights in property taken in violation of international law are in issue."⁵²⁰ This kind of language is likely to facilitate foreign understanding insofar as it enables foreign governments to draw upon their knowledge of shared norms of international law to ascertain U.S. law.⁵²¹ In contrast, other areas of foreign relations law employ idiosyncratic terminology that is disconnected from international law. The WPR, for instance, refers to the existence or imminence of "hostilities" in provisions

515. There is anecdotal evidence that opinions from the U.S. Supreme Court garner more attention within foreign communities of legal analysts than do opinions from lower federal courts. See Nichibeï Hōgakkai Hanrei Kenkyūkai, *supra* note 233 (discussing a group of Japanese scholars who gather periodically to study and discuss U.S. judicial opinions, most of which are opinions from the U.S. Supreme Court).

516. See, e.g., Kokumushō Shuppan Butsu, *Beikoku no Tōchi no Shikumi – Rempō Seifu*, AM. CTR. JAPAN, U.S. DEP'T OF STATE, <https://americancenterjapan.com/aboutusa/translations/3162/> (last visited Dec. 29, 2020) (explaining the U.S. system of government in Japanese). One former Foreign Service officer suggested that although embassy personnel often seek to improve foreign understanding of the basics of American government, such efforts typically "are not directed, formal, or managed." Telephone Interview with Dan Spokojny, Former Foreign Service Officer (Jan. 22, 2021).

517. Cf. *supra* note 196 (noting the general absence of foreign scholars at relevant conferences in recent years).

518. Cf. Dan-Cohen, *supra* note 12 (suggesting that domestic criminal law selectively transmits information about itself to members of the general public, resulting in issue-based variations in the extent of public knowledge about criminal law).

519. See, e.g., 42 U.S.C. § 9118(a) ("The Secretary of the department in which the Coast Guard is operating shall, subject to recognized principles of international law, prescribe by regulation and enforce procedures with respect to any ocean thermal energy conversion facility or plantship licensed under this chapter . . ."); 18 U.S.C. § 1651 ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.")

520. 28 U.S.C. § 1605(a)(3); see also 28 U.S.C. § 1605A(a)(2)(A)(iii) (requiring federal courts to hear certain claims involving allegations of state-sponsored terrorism if, among other things, the "claimant has afforded the foreign state a reasonable opportunity to arbitrate . . . in accordance with the accepted international rules of arbitration").

521. See, e.g., *Fed. Republic of Ger. v. Philipp*, 141 U.S. 703, 710 (2021) (interpreting the statute to incorporate the "domestic takings rule," which has "deep roots . . . in international law").

on reporting and the automatic withdrawal of U.S. forces.⁵²² This term also appears in international law,⁵²³ but U.S. officials do not borrow its international law definition when applying the WPR.⁵²⁴ Partly for this reason, the meaning of the WPR is uncertain even in the eyes of many American observers.⁵²⁵

Other features concern the determinacy of foreign relations law. Some aspects of the law change infrequently, exhibit clear and simple doctrinal architectures, and appear in authoritative sources. Consider the rule that the President holds exclusive power under the Constitution to recognize foreign borders.⁵²⁶ The contours of this rule are relatively straightforward, highly unlikely to change, and identifiable by reference to a single Supreme Court opinion that is unquestionably authoritative.⁵²⁷ These features should help to limit foreign confusion about U.S. law on foreign state recognition. Other aspects of the law, however, present significant challenges. Nonjusticiable features of the separation of powers illustrate the point. Due to the general absence of judicial guidance and the Constitution's frequent textual indeterminacy, domestic actors often attempt to ascertain these rules by examining evidence of original meaning or historical practice,⁵²⁸ at times with help from legal scholars.⁵²⁹ Yet for many foreign observers, this task is almost certainly difficult. Original historical research requires fluency in English and an ability to navigate

522. See, e.g., War Powers Resolution, *supra* note 467, § 4 (providing that, absent a declaration of war, the President must report to Congress in any case in which U.S. forces are “introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances”).

523. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 (providing that civilians “shall enjoy general protection against dangers arising from military operations . . . unless and for such time as they take a direct part in hostilities”).

524. Compare Commentary of 1987, art. 51(3) ¶ 1944, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (explaining that direct participation in “hostilities” entails “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”), with *Libya and War Powers, Testimony Before the S. Foreign Rels. Comm.*, 112th Cong. 6-12 (2011) [hereinafter *Libya War Powers Testimony*] (statement of Harold Hongju Koh, Legal Advisor, U.S. Department of State), <https://2009-2017.state.gov/s/l/releases/remarks/167250.htm> (suggesting that “hostilities” in the WPR is “definable in a meaningful way only in the context of an actual set of facts” and that the U.S. role in the invasion of Libya did not qualify as hostilities because the mission, exposure of U.S. forces, risk of escalation, and military means were limited).

525. Oona A. Hathaway, *How to Revive Congress' War Powers*, TEX. NAT'L SEC. REV. POL'Y ROUNDTABLE 41, 43-46 (2019), <https://tnsr.org/roundtable/policy-roundtable-the-war-powers-resolution/#essay4>.

526. *Zivotofsky v. Kerry*, 576 U.S. 1, 7-32 (2015).

527. See *id.* (explaining the rule).

528. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012) (discussing the prevalence of historical-gloss arguments about the separation of powers).

529. See, e.g., John C. Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Couns., Memorandum for John Bellinger, III, Senior Assoc. Couns. to the President and Legal Adviser to the Nat'l Sec. Council Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty 20 (Nov. 15, 2001), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memoabmtreaty11152001.pdf> (citing Robert A. Friedlander, *Separating the Powers: Constitutional Principles and the Treaty Process*, 16 OKLA. CITY U. L. REV. 257, 260-61 (1991), in support of the proposition that “longstanding constitutional practice makes it clear that not every substantial modification of the United States’ treaty rights and obligations counts as an ‘amendment’ that has to be referred to the Senate for approval”).

sources that are numerous, scattered, and to varying degrees inscrutable without background knowledge of U.S. history.⁵³⁰ Reliance on American scholars is complicated by the fact that the influence of legal scholarship varies widely, not least because of political dynamics and hierarchies of institutional affiliation.⁵³¹ Foreign governments that are unfamiliar with these circumstances may have a difficult time distinguishing scholarship that is influential from that which is not. These governments might assume that salient practices from the recent past are indicative of legal mandates, but recent practice is a reliable guide only insofar as it reflects an interbranch settlement that is stable, which cannot be taken for granted.⁵³²

Still other features affect the law's transparency. The U.S. government ranks as one of the most open in the world in terms of public access to information about its laws and policies,⁵³³ and this likely facilitates foreign knowledge as a general matter.⁵³⁴ Indeed, if one knows where to look, the vast majority of U.S. foreign relations law is readily available online. Some elements of the law, however, are completely opaque because they are secret. In the early 2000s, DOJ's Office of Legal Counsel (OLC) issued opinions titled "The Constitutional Separation of Powers Over Foreign Affairs and National Security" and "The President's Authority to Provide Military Equipment and Training to Allied Forces and Resistance Forces in Foreign Countries," but neither is available to the public.⁵³⁵ The Foreign Intelligence Surveillance Court (FISC) has issued a number of secret opinions on surveillance.⁵³⁶ And Congress has in recent decades enacted a growing body of secret law in the form of classified addenda to Intelligence Authorization Acts, National Defense Authorization Acts, and Defense Appropriations Acts.⁵³⁷ Such secrecy operates as a robust barrier to foreign knowledge.

530. Cf. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (discussing methods for ascertaining the original public meaning of the Constitution); Shalev Roisman, *The Originalist Presidency in Practice?*, LAWFARE (Jan. 12, 2021, 2:01 PM), <https://www.lawfareblog.com/originalist-presidency-practice> (arguing that it is unrealistic to expect lawyers in the U.S. executive branch to undertake rigorous inquiries into the Constitution's original meaning).

531. Cf. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 419-26 (2000) (discussing the institutional affiliations and other characteristics of the most-cited scholars).

532. See, e.g., Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788-820 (2014) (describing a twentieth-century shift in practice whereby the President acquired power to terminate treaties without congressional approval).

533. See *Transparency of Government Policymaking, Index*, WORLD BANK (2017), <https://tdata360.worldbank.org/indicators/h7da6e31a?indicator=687&viz=choropleth&years=2017> (reporting that the United States ranks among the top ten percent of countries in terms of transparency in government policymaking).

534. See THE INTERAGENCY OPSEC SUPPORT STAFF, OPERATIONS SECURITY INTELLIGENCE THREAT HANDBOOK § 2 (1996), <https://fas.org/irp/nsa/ioss/threat96/part02.htm> ("Open-source intelligence is successful in targeting the United States because of the openness of American society.").

535. Daniel Van Schooten, *Titles of 13 New "Secret Laws" Revealed*, PROJECT ON GOV'T OVERSIGHT (POGO) (May 30, 2019), <https://www.pogo.org/analysis/2019/05/titles-of-13-new-secret-laws-revealed/>.

536. See Greg Margolis, *Free the FISC Opinions*, KNIGHT FIRST AMEND. INST. (Apr. 16, 2018), <https://knightcolumbia.org/news/free-fisc-opinions> (discussing the secrecy of FISC opinions and efforts by advocacy groups to improve transparency).

537. Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241, 259-75 (2015).

Finally, some features of the law affect foreign access to U.S. legal counsel. As the FARA data demonstrate, the expertise of American attorneys is generally available to foreign governments on a wide range of topics in foreign relations law and otherwise.⁵³⁸ Yet access to counsel is not guaranteed. The Treasury Department's Iranian Transactions and Sanctions Regulations, for example, require attorneys to obtain a specific license to provide Iran with any legal services other than those enumerated in a short list that includes "advice and counseling on the requirements of and compliance with" U.S. law and representation in U.S. legal and administrative proceedings.⁵³⁹ By implication, this regulation appears to preclude the provision of legal advice to Iran on topics such as war powers.⁵⁴⁰ Similar regulations apply to North Korea,⁵⁴¹ Cuba,⁵⁴² and Syria,⁵⁴³ thereby reducing the flow of legal knowledge from American lawyers to those governments on certain topics.⁵⁴⁴

A key challenge going forward is to determine whether the current manifestations of idiosyncratic terminology, indeterminacy, secrecy, and restricted access to counsel are optimal in light of U.S. national interests, and to pursue reforms that reduce or expand the presence of those features depending, at least in part, on whether foreign knowledge is beneficial. The need for such an effort stems from the fact that only some of the selective transmission under current law occurs by design. In the cases of secret addenda to federal statutes⁵⁴⁵ and regulations that restrict access to counsel,⁵⁴⁶ the law clearly aims to limit foreign understanding of itself. Yet in many other cases, selective transmission appears as an accidental byproduct of legal-design choices grounded in unrelated rationales. For example, U.S. officials appear to have embraced an idiosyncratic definition of the word "hostilities" in the WPR not because they hoped to limit foreign understanding of U.S. war powers, but rather as a domestic political compromise.⁵⁴⁷ Similarly, the Supreme Court held in *Sosa v. Alvarez-Machain* that ATS jurisdiction permits federal courts to create common-law causes of action for violations of modern norms of customary international law (CIL) that are "accepted by the civilized world" and defined with adequate specificity.⁵⁴⁸ This doctrine is likely to produce foreign confusion with regard to the kinds of conduct that are actionable, as it is largely untethered from the globally shared

538. See *supra* pp. 27-29.

539. Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.525 (2012).

540. See *id.* § 560.525(a) (enumerating categories of authorized legal services that do not include consultation on strategic questions in U.S.-Iran relations).

541. See North Korea Sanctions Regulations, 31 C.F.R. § 510.507 (2018).

542. See Cuban Assets Control Regulations, 31 C.F.R. § 515.512 (2015).

543. See Syrian Sanctions Regulations, 31 C.F.R. § 542.507 (2014).

544. Cf. *supra* p. 34 (discussing the absence of legal-service registrations under FARA for Cuba and Iran in recent decades).

545. See Rudesill, *supra* note 537, at 259-75 (discussing the rise of these addenda in recent years).

546. See *supra* notes 539-43 (citing examples of these regulations).

547. See *Libya War Powers Testimony*, *supra* note 524, at 5 ("Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes 'hostilities' for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions:").

548. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

rule of recognition for CIL.⁵⁴⁹ The Court, however, did not consider that effect, much less justify the *Sosa* test as a tool of selective transmission.⁵⁵⁰

The outside-in approach thus encourages U.S. officials to better account for foreign epistemic effects when choosing whether to add, remove, or retain idiosyncratic terminology, indeterminacy, secrecy, and restrictions on access to counsel. In treaty-making and other areas that seek to facilitate global cooperation or standardization, foreign ignorance may generally prove problematic as a source of confusion and cross-national differentiation. In these areas, appropriate reforms might replace idiosyncratic terminology with the lexicon of international law, combat indeterminacy by reducing judicial invocation of the political question doctrine, promote transparency through publicity, and encourage access to American legal expertise. In contrast, with respect to war powers and other areas that implicate the interests of hostile states, foreign ignorance could prove beneficial as a means of limiting the predictability of U.S. action. In those areas, the appropriate approach may very well include greater use of idiosyncratic terminology, enhancements in indeterminacy, more secrecy, and greater restrictions on access to American legal expertise.

CONCLUSION

For the most part, the field of U.S. foreign relations law has operated in analytical isolation from the external environment that it so clearly implicates. The law's inputs have been primarily domestic in origin, with considerations of text, original meaning, judicial precedent, historical practice, and institutional competencies dominating the analysis in both official sources and scholarship. This inside-out orientation serves important purposes, but it is incomplete, as foreign governmental knowledge of U.S. foreign relations law influences not only the likelihood of foreign compliance with pertinent elements of the law, but also global perceptions of the content of international law, global perceptions of U.S. compliance with international law, foreign relations law's ability to transmit signals that shape foreign perceptions of U.S. intentions, and the risk of miscalculation in U.S. bilateral relations. Analysts should therefore supplement traditional considerations with a novel paradigm—an outside-in approach—that advances meta-knowledge of U.S. foreign relations law, reevaluates the law's operational merits in light of foreign epistemic conditions, and seeks to optimize foreign sophistication by strategically deploying legal and policy tools to calibrate the selective transmission of legal information. A foreign relations law that embraces such an approach will be better positioned to advance national interests.

549. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 36, § 102(2) (explaining that CIL arises from “a general and consistent practice of states followed by them from a sense of legal obligation”).

550. See *Sosa*, 542 U.S. at 725-33 (justifying the test primarily by reference to early historical understandings, along with concerns about the separation of powers).