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## Wishing International Law Away

But for its contemporary particularities, Michael Stokes Paulsen's essay *The Constitutional Power To Interpret International Law* would work comfortably as an excellent example of late-nineteenth-century legal scholarship, with all of its best and worst qualities. The piece makes for good reading; it is sweeping in scope, confident in tone, and certain of result. It is tightly argued in a self-contained order of doctrinal logics. Paulsen wears his ideology on his sleeve, not a bad thing. He is comfortable in the power of America's constitutional faith, assuming that the United States can and should go it alone except to the extent that it serves the national interest. International law is never more than an option, he argues, and not a very appealing one at that. Paulsen believes that the Constitution should and will keep international law at bay.

But developments in the real world, beyond the scholastic blinders of those who would keep us constitutionally pure, suggest a very different future. *The Constitutional Power To Interpret International Law* is ultimately an exercise in wishful thinking. Neither the writings of anti-internationalist scholars nor the parchment of the Constitution itself will suffice to sustain America's (formerly) splendid constitutional isolation. This is the downside of formalism and the old constitutional law scholarship, which takes no account of learning from other disciplines or of empirical evidence.<sup>1</sup> Developments on the ground are

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1. Paulsen's method thus looks more "intellectually isolationist and parochial" than that of his international law targets. There are a growing number of international law scholars engaged in important interdisciplinary work, among them Jeffrey Dunoff, Ryan Goodman, Andrew Guzman, Laurence Helfer, Kal Raustiala, and Anne-Marie Slaughter. See also Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 482-84 (2006) (expressing "optimism about the trend in international law scholarship"), *working paper available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=901991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=901991). Paulsen's list of "leading lights" in the area of foreign affairs and the Constitution is heavily tilted in favor of conservative scholars, and should also clearly include Sarah Cleveland, David Golove, Martin Flaherty, Oona Hathaway, Harold Koh, and Gerald Neuman, among others.

crucial to understanding the hydraulics by which international law will be imposed on the United States, constitutionally willing or not. Paulsen's analysis suffers from an ivory-tower blindness; it is compelling in a antiquarian, parlor-game sort of way.

Unlike some anti-internationalists<sup>2</sup>, however, Paulsen supplies some important constitutional tools for facilitating the supremacy of international law. Paulsen acknowledges critical roles for all three branches in the incorporation of international law. I agree that—as a matter of constitutional doctrine—for the most part this incorporation is optional. Where we part ways is on the probability of incorporation. The essay implicitly rejects the possibility that something so “foggy” as international law could be broadly operationalized.<sup>3</sup> I think it inevitable. Ultimately, the consistent incorporation of international law will tend to harden into law, with an end point of constitutional subordination.

My premise here is that international law enjoys the backing of powerful international actors, state and non-state, who are in a position to make the United States pay for nonconformity with international law. It is true that “[i]nternational law, in the main, is international politics conducted by other means.”<sup>4</sup> But it does not follow that “[t]he force of international law is thus largely an illusion.”<sup>5</sup> It is only an illusion to the extent that it lacks the backing of material power.<sup>6</sup> No doubt international law long lacked that backing. Recent years have demonstrated otherwise. International law may be an illusion to conservative constitutional scribes, but it is hardly so to policymakers of any political stripe.

Paulsen appears to assume (perhaps “emotionally or by habit of mind”<sup>7</sup>) that as long as international law is not formally binding, decisionmakers will opt out. The new international dynamic is likely to prove otherwise. This will surely be true of the executive branch, regardless of political orientation, as it comes to understand that failure to conform to international law will materially harm the national interest. As they become increasingly socialized to

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2. Although perhaps not rising to the level of categorical rejection, the essay betrays a clear contempt for international law and its study. See Robert Ahdieh, *The Fog of Certainty*, YALE L.J. ONLINE 41, 42 n.8 (2009).

3. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 119 YALE L.J. 1762, 1770-1800 (2009).

4. Paulsen, *supra* note 3, at 1831.

5. *Id.* at 1804.

6. International law is in this respect unexceptional; the same can be said of domestic constitutional law. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1830-40 (2009).

7. Paulsen, *supra* note 3, at 1824.

international norms, both Congress and the courts are also likely to be increasingly receptive to the incorporation of international law. Paulsen's "declaration of constitutional independence"<sup>8</sup> will become ever fainter as more actors abandon sovereigntist quarters in the face of compelling contrary interests.

With respect to the presidency, the Bush Administration proved an unlikely control test. Even allowing for continuity in America's longstanding sovereigntist culture,<sup>9</sup> the early Bush years were extreme in their hostility to international law and institutions. The Bush Administration withdrew from the Kyoto process on climate change; vigorously opposed emerging international regimes in such areas as biological weapons and small arms trafficking; and denounced the U.S. signature to the Rome Statute establishing the International Criminal Court. In the wake of 9/11, the Administration evinced a determination not to be bound by international law norms with respect to anti-terror policies. It invaded Iraq notwithstanding a clear majority view in the international community that the action violated norms relating to the use of force.

By the end of the Administration, however, the Bush presidency had largely capitulated to the power of international law. Abandoning its take-no-prisoners stance on the ICC, the United States supported a 2005 U.N. Security Council referral to the court on Darfur. In 2006, the State Department Legal Adviser "acknowledge[d] that [the ICC] has a role to play in the overall system of international justice,"<sup>10</sup> an unthinkable pronouncement through a first-term optic. In July 2008, Bush joined a G-8 pledge to reduce greenhouse gases. With respect to the Vienna Convention on Consular Relations, the Administration attempted to impose a World Court judgment on the states in a core area of state authority. President Bush launched a major push late in his second term to win Senate ratification of the U.N. Convention on the Law of the Sea, a treaty which by its terms delegates self-executing decisionmaking authority to an international tribunal.<sup>11</sup> "Cowed by accusations of earlier 'unilateralism,'"

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8. *Id.* at 1806 (emphasis removed).

9. See Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9.

10. Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J., June 14, 2006, at A4.

11. See United Nations Convention on the Law of the Sea annex VI, Dec. 10, 1982, 1833 U.N.T.S. 397. Reservations to ratification are barred under the agreement, *id.*, with the result that parties must agree to the self-executing nature of the tribunal decisions.

lamented the editors of the *National Review*, “the [A]dministration now bends over backwards to placate the ‘international community.’”<sup>12</sup>

The shift was no less evident on the security front. In the wake of the Iraq debacle, the use of ground forces was never a serious option against rogue regimes in Iran and North Korea. On the anti-terror front, the Bush White House backed down from its earlier bluster. On such issues as torture, rendition, black sites, and above all Guantanamo, the Administration retreated from positions that had previously been presented as non-negotiable.

It is true that in none of these episodes did the Bush Administration cite international law as the cause of its retreat. It never announced itself bound by law, and as a formal legal matter it could have stayed the course. But that’s beside the point. Opposition by international actors, framed in international law terms, was a major factor in the decisionmaking process. Where Paulsen ascribes the Bush retreat on the Vienna Convention to a domestic litigation risk assessment,<sup>13</sup> the move is more plausibly explained as a response to vigorous international condemnation shadowing the treaty violation (or, translated into interagency terms, the State Department surely supported the Bush move more than the Department of Justice). On the security front, in particular, if the Bush Administration had had its way, it would have continued to ignore the international law critiques. David Addington, the Administration’s post-9/11 constitutional point-man, fiercely (and at first, successfully) resisted the acceptance of any exogenous constraints on U.S. anti-terror practices.<sup>14</sup> Yet defiance was costing too much in terms of the war on terror and the national interest generally, and the Bush Administration ultimately succumbed to the force of international law.

By way of a domestic law analogy, the Bush Administration retained freedom of action to defy international law in the same way that I can kill my neighbor. There is nothing to stop me from doing so (assuming I have the physical capacity), but obviously I will pay a high price for the act in the face of law backed by material power. The Administration could have continued to

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12. Editorial, *The Mysterious Case of the Law of the Sea*, NAT’L REV. ONLINE, Oct. 30, 2007, <http://article.nationalreview.com/?q=NmM4NGY5M2RhNDg5ZWRmODIyYWVIM2U4YmI1Zjg1OGQ=>.

13. Paulsen, *supra* note 3, at 1793. That assessment was misguided, of course: the Court would have upheld a refusal to comply with the International Court of Justice’s decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), available at <http://www.icj-cij.org/docket/files/128/8188.pdf>. As it was, *Medellín v. Texas*, 128 S. Ct. 1346 (2008) further depleted presidential power by denying the effect of the presidential memo.

14. See JANE MAYER, *THE DARK SIDE* 64 (2008) (quoting a participant in a White House meeting as saying, “[i]f you favored international law, you were in danger of being called ‘soft on terrorism’ by Addington”).

defy international opposition to Guantanamo, for example, but the penalties involved were too steep to justify the anti-terror benefits. Going forward, that will increasingly be the case with respect to U.S. conduct perceived as inconsistent with international law. Paulsen allows that international law “may influence the President’s judgment.” It is rather more the case today that international law *will* influence that judgment, else a heavy price will be paid in terms of the national foreign policy interest.

On this score, it makes a difference that international law is framed as such. Unlike mere policy, law creates a discursive feedback loop that is self-reinforcing and legitimizing.<sup>15</sup> Law amplifies power in a way that policy does not. As a matter of formal U.S. constitutional law, international law may be optional (and in that sense a matter of policy). But international law is becoming more irresistible in part because it is presented as law. To the extent it remains the nation’s principal agent in international affairs, the presidency will feel this pull most keenly.

Congress and the courts are also likely to feel the weight of international law’s material force, though the influence will be more indirect. Congress will be the most recalcitrant branch, with a sovereigntist culture dating back at least to the Bricker Amendment controversy of the 1950s. It has been most vigilant in policing against robust U.S. participation in international human rights regimes; with the Byrd-Hagel Amendment, the Senate voted 95-0 against moving forward on Kyoto, and Congress continues to obstruct the closure of Guantanamo. As presaged by legislative constraints on the use of coercive interrogation techniques, however, Congress may also come to understand that accepting international law serves the national interest. When it does, Paulsen’s constitutional vision equips them (in his characterization) with “an extraordinarily sweeping enumerated legislative power” in the form of the Law of Nations Clause, which has only recently made its way onto the radar screen of constitutional theory.<sup>16</sup>

As for courts, they are more evidently recognizing international law’s consequence. Though not subject to direct leveraging by international actors, the courts have long been sensitive to international norms, even to the end of

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15. See generally Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, CORNELL L. REV. (forthcoming 2009 or 2010), 62-66, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1405437](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1405437).

16. See J. Andrew Kent, *Congress’s Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007). Note that Paulsen allows Congress to incorporate not just positive international law but “international natural law,” Paulsen, *supra* note 3, at 1809, which in contemporary terms is largely coextensive with international human rights law.

diluting constitutional rights.<sup>17</sup> In recent years, federal judges have been more directly socialized to the reality of international law with the emergence of an international community of courts.<sup>18</sup> International human rights practice was decisive in the Supreme Court's invalidation of the death penalty against juvenile offenders in *Roper v. Simmons*.<sup>19</sup> It was also an important atmospheric in the detainee cases. In none of those decisions did international law supply the primary analytical hook. Once again, however, that fact does little to defeat the broader idea that judges are increasingly sensitive to international law. As with Congress and the Law of Nations Clause, Paulsen enables the courts as players in matters relating to international law and foreign relations by dismissing the political question doctrine. That position makes sense as interstate relations become more stable,<sup>20</sup> but it also removes an important barrier to the assimilation of international norms. Deprived of a jurisdictional shield, the anti-internationalists will inevitably suffer greater losses as courts add international law to their decisional armory.

So Paulsen opens the constitutional door to international law. But how far? By assuming that the United States will resist the incorporation of international law, he fails to focus on constitutional challenges that will become more pressing as international law becomes more irresistible—as a matter of law or policy—to federal decisionmakers. Although he seems inclined to find delegation to international tribunals and other institutions unconstitutional, he understands that the Supreme Court did not rule out the possibility in *Medellín*.<sup>21</sup> Would Paulsen find ratification of the Law of the Sea Convention unconstitutional on that basis? Would he expect the Court so to rule, and the executive branch to demur to that ruling? His essay devotes extended attention to the constitutional status of sole executive agreements, but none to the more prevalent practice of executive agreements approved by Congress.<sup>22</sup> International law is more deeply implicating state-level authorities as it

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17. See Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003).

18. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

19. 543 U.S. 551 (2005).

20. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 675-86 (2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=307979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=307979). Paulsen accurately ascribes the former bulwark of the political question doctrine to the concern that judicial intervention “would (or might) muck up an important foreign policy action already taken.” Paulsen, *supra* note 3, at 1820.

21. Paulsen, *supra* note 3, at 1807 (“To be sure, *Medellín* leaves open the possibility that a treaty could provide for automatic domestic law effect to be accorded an international tribunal’s judgment.”).

22. See Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

permeates such areas as criminal and family law, and yet the essay has almost nothing to say about *Missouri v. Holland*<sup>23</sup> and how federalism might intersect with his vision of the Law of Nations Clause.<sup>24</sup> Could the President enter into a treaty banning the death penalty, or better yet, could Congress simply enact a prohibition by statute upon finding the practice to violate “international natural law”? He never really tells us when “[i]nternational law . . . is unconstitutional”<sup>25</sup> in any way that matters. In this sense, Paulsen misses the point more than he gets it wrong.

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Preferred citation: Peter J. Spiro, *Wishing International Law Away*, 119 YALE L.J. ONLINE 23 (2009), <http://www.yalelawjournal.org/2009/09/29/spiro.html>.

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23. 252 U.S. 416 (1920).

24. See Symposium, *Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 921 (2008).

25. Paulsen, *supra* note 3, at 1765.