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## The Constitutional Power To Interpret International Law

**ABSTRACT.** What is the force of international law as a matter of U.S. law? Who determines that force? This Essay maintains that, for the United States, the U.S. Constitution is always supreme over international law. To the extent that the regime of international law yields determinate commands in conflict with the Constitution's commands or assignments of power, international law is, precisely to that extent, *unconstitutional*. Further, the force of treaties (and executive agreements) to which the United States is a party is always subject to the constitutional powers of Congress and the President to supersede or override them as a matter of U.S. domestic law. It follows from the Constitution's allocation of power exclusively to U.S. constitutional actors that the power to interpret, apply, enforce—or disregard—international law, for the United States, is a U.S. constitutional power not properly subject to external direction and control. The power “to say what the law is,” including the power to determine the content and force of international law *for the United States*, is a power distributed and shared among the three branches of the U.S. government. It is not a power of international bodies or tribunals. This understanding of the relationship of international law to the U.S. Constitution's allocation of powers in matters of war and foreign affairs has important implications for many contemporary issues and the United States's actions with respect to compliance with international treaties and other international law norms in the areas of criminal law enforcement, the conduct of war, war prisoner detention and interrogation practices, and the imposition of military punishment on unprivileged enemy combatants.

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**INTRODUCTION**

“International Law” is all the rage. The subject is one of the hottest courses in the law school curriculum. And it is frequently the focus of great public attention, given events in the post-9/11 world. Has particular conduct by the United States “violated international law”? Is some contemplated—or completed—course of conduct “consistent with international law”? These are very much the questions of the day.

But what is the force of international law *as a matter of the constitutional law of the United States*? To what extent is international law, whatever its content and the method for making or discerning its content, binding as U.S. law? More pointedly, to what extent is international law *not* recognized as authoritative by the U.S. Constitution? Just as importantly, *who determines* the force and content of international law—who interprets and applies it, authoritatively, for the United States? May international bodies define legal norms for the United States? Is interpretation of international law’s commands uniquely within the province of international tribunals? Or, quite the reverse, is it “emphatically the province and duty” of U.S. officials to say (for the United States) “what the law is,”<sup>1</sup> *including international law* to whatever extent it is thought binding on American policymakers? If international law is, in some instance, in conflict with other commands or powers of the U.S. Constitution, how should such conflicting legal requirements and obligations be reconciled by courts and policymakers acting on behalf of the government of the United States?

These, too, are the vital questions of the day. Yet they are surprisingly undertheorized. These fundamental constitutional questions concerning international law are often shortchanged by international law scholarship, which frequently brushes by them, blithely assuming that the United States is bound by international law if that is what the regime of international law says, without giving serious attention to the acute U.S. constitutional problem posed by such an assumption. In part, this is attributable to the parochialism of academic legal specialties. “International Law” scholars form their own niche—clique, even—within the academy. Few international law scholars are also serious U.S. constitutional law scholars. The reverse is also the case to a large extent (though more and more constitutional law scholars have gravitated to

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* employed this phrase in describing the judicial power to interpret the Constitution independently of the views of the other branches. In this Essay, I consider the power to interpret international law as it is possessed and exercised by all three branches of the U.S. government.

interests in the field of international law).<sup>2</sup> The result is a kind of segregation of legal thinking. International law has become, ironically, intellectually isolationist and parochial, excluding critique from a U.S. constitutional law perspective and declining (in the main) to engage with it.

My thesis in this Essay is a straightforward one and, from the perspective of basic postulates of U.S. constitutional law, should be an obvious one: *for the United States, the Constitution is supreme over international law*. International law, to the extent it issues determinate commands or obligations in conflict with the U.S. Constitution, is *unconstitutional*. Where there exists a conflict between the U.S. Constitution's assignments of rights, powers, and duties, and the obligations of international law, U.S. government officials must, as a matter of legal obligation, side with the Constitution and against international law, because the Constitution, and not international law, is what they have sworn to uphold. As a matter of domestic constitutional law, U.S. law *always* prevails over inconsistent international law.

Not all international law is of such description, of course. There is no necessary conflict between U.S. law and international law. To the contrary, some international law is explicitly made part of U.S. law by the terms of the Constitution itself. Article VI of the Constitution, for example, makes treaties to which the United States is a party part of "the supreme Law of the Land."<sup>3</sup> Other provisions of the Constitution appear to authorize various government actors to use international law as a predicate for the exercise of certain powers or duties. But in such cases—just as with the case of international law norms that might conflict with U.S. law—the Constitution remains supreme in determining the content and force of international law for the United States.

The constitutional supremacy thesis has an important corollary: as a matter of U.S. constitutional law, the constitutional power to interpret, apply, and enforce international law for the United States is not possessed by, is not dependent upon, and can never authoritatively be exercised by actors outside the constitutionally recognized Article I, Article II, and Article III branches of the U.S. government. The power to interpret and apply international law for

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2. This includes constitutional scholars of the U.S. law of foreign relations, an area that intersects with international law. Among the leading lights in this growing area are Curtis Bradley, Brad Clark, Robert Delahunty, William Dodge, Jack Goldsmith, Saikrishna Prakash, Michael Ramsey, Carlos Vasquez, and John Yoo. I cite many of these scholars' work in this Essay. Nonetheless, it remains the case that most scholars of international law give scant attention or consideration to the relevance of U.S. constitutional law. Few seem prepared to acknowledge, or to consider, that U.S. law and U.S. interpreters may be (for the United States) of more relevance than the norms established by the regime of international law.

3. U.S. CONST. art. VI, cl. 2.

the United States is a power vested in officers of the U.S. government, *not* in any foreign or international body. As a matter of U.S. constitutional law, the United Nations does not and cannot authoritatively determine the content of international law for the United States. As a matter of U.S. constitutional law, the International Court of Justice (ICJ) does not and cannot authoritatively determine the content of international law for the United States. As a matter of U.S. constitutional law, *no* international body authoritatively determines the content of international law for the United States.

Rather, the power to interpret international law for the United States is a power distributed among the three branches of the U.S. government, in a manner determined by the Constitution's separation of powers. The Congress interprets and applies international law for purposes of exercising its legislative constitutional powers to define and punish offenses against "the Law of Nations,"<sup>4</sup> thereby enacting (or declining to enact) legislation for carrying into execution treaties of the United States, and for purposes of exercising its autonomous constitutional judgment with respect to the decision whether or not to initiate ("declare") a state of war.<sup>5</sup> The President interprets and applies international law for purposes of exercising the Article II executive power to conduct the nation's foreign relations and the constitutional powers of the President as the nation's military Commander in Chief. And the courts interpret and apply international law for purposes of exercising their adjudicative constitutional powers with respect to lawsuits presenting questions of interpretation of treaties and other matters of international law.

These interpretive spheres overlap to some degree. But there are also areas of autonomous power for each branch. Each branch has a limited, exclusive power to determine the content of international law for purposes of its own powers. In accordance with the Constitution's scheme of separation of powers, *none* of the branches is literally bound by the views or actions of the others. And in accordance with the Constitution's exclusive assignment of U.S. lawmaking, law-executing, and law-adjudicating functions to actors designated by the Constitution, none of the branches is bound in any way by the views or actions of *non*-U.S. actors.

Part I of this Essay, to which I give the Clausewitzian subtitle "The Fog of International Law," comprehensively addresses the surprisingly elusive (to most modern international law scholars) question of the status of international law as a matter of U.S. law. Confusion about the force of international law within the U.S. legal order leads to further confusion and unclear thinking

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4. *Id.* art I, § 8, cl. 10.

5. *Id.* art. I, § 8, cl. 11.

about who possesses the power to interpret and apply international law provisions and norms for the United States. I argue, first, that the Constitution mandates as a matter of U.S. domestic law the supremacy of the Constitution over international law in all respects; and, second, that in each major instance in which the Constitution incorporates international law as part of U.S. law, it retains the U.S. legislative, executive, and judicial power to determine—and revise—that content. The force of international law, for the United States, is a matter of U.S. law.

Part II, entitled “The Power To Say What International Law Is (for the United States),” addresses the interpretation of international law, for the United States, as an aspect of the Constitution’s separation of powers. In this Section, I offer a detailed map of the U.S. constitutional power to interpret and apply international law.

Section II.A discusses Congress’s power to interpret and apply international law in making U.S. law. The Congress, I submit, possesses exclusive constitutional power to determine the content of, and apply in the form of U.S. domestic criminal law, international law, as an aspect of its power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>6</sup> In addition, Congress possesses substantial constitutional power to pass laws it fairly judges “necessary and proper” for executing the treaty power of the United States and, further, to enact laws contravening or superseding the requirements of such treaties as a matter of U.S. domestic law (pursuant to one or another of its enumerated legislative powers).<sup>7</sup> These legislative powers to some extent “bound” the President’s power to interpret and apply international law. For example, the President has no constitutional power to prosecute or punish an asserted violation of international law except in conformity with Congress’s legislative power. This does not, however, mean that Congress lacks power to delegate its authority, in accordance with constitutional standards concerning the permissible scope of such delegations (whatever these may be). Nor does it preclude the traditional view, long accepted by the courts (at least until

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6. *Id.* art. I, § 8, cl. 10.

7. For a powerful argument against an overbroad interpretation of the treaty-executing legislative powers of Congress, see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005), which contests the view embodied in the Supreme Court’s decision in *Missouri v. Holland*, 252 U.S. 416 (1920), that a treaty may expand Congress’s constitutional powers beyond what would otherwise be the limits set by Article I, Section 8. One may agree with Rosenkranz’s argument and yet recognize a broad sphere of legislative power to pass laws for carrying into execution treaties of the United States. See *infra* notes 124-126 and accompanying text.

recently<sup>8</sup>), that Congress, by authorizing war, by necessary implication authorizes the President to impose military punishment for violation of the law of war, in accordance with *the President's* interpretation thereof, against enemy combatants, as an incident of the President's wartime military powers as Commander in Chief.

Section II.B turns to executive power—the President's power—to interpret international law, as an aspect of the President's executive power over foreign affairs. The President possesses the constitutional power authoritatively to interpret and apply—and to terminate or suspend—treaties to which the United States is a party, for purposes of determining and conducting the nation's external relations with other nations, organizations, groups, and non-U.S. persons. The President also has the constitutional power to interpret and apply—or to disregard entirely—nontreaty customary international law norms, for the same purposes of executing the nation's foreign and external relations. Finally, the President possesses the exclusive constitutional power, as the military's Commander in Chief, to direct the conduct of the nation's military actions (where constitutionally authorized) and to interpret and apply international and domestic law relevant to those military actions. Significantly, however, the President possesses no constitutional power to make or rescind domestic U.S. law in connection with the exercise of any of these powers; nor does the President possess legitimate constitutional power to initiate war. These are powers of Congress, not of the President.

Section II.C discusses the judiciary's power to interpret and apply international law. My thesis here is that courts may interpret and apply treaties and statutes of the United States that touch on matters of foreign relations and international law in any "case or controversy" presented to them, the same as with any other matter of federal law. Such treaties and statutes are part of the law of the United States recognized by the Supremacy Clause of Article VI of the Constitution. Beyond this, courts exercising common law or admiralty court powers may interpret and apply customary international law, but only where no contrary written federal law (the Constitution, federal statutes, or U.S. treaties) applies. That is the better understanding of certain traditionally accepted but analytically loose canons of statutory interpretation, such as the

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8. The Supreme Court's decisions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and to a lesser degree *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), are departures from the traditional understanding that constitutional authorization to wage war delegates all decisions concerning the manner of the conduct of such war, including matters of detention and appropriate military punishment of enemy prisoners, to the President, pursuant to his powers as Commander in Chief of the nation's armed forces. I discuss these issues later in this Essay. See *infra* Section III.B.

*Paquete Habana* and the *Charming Betsy* canons, which in some of their formulations are misleading and even unsound.

Part III of the Essay considers the logically straightforward but occasionally dramatic implications of these propositions for several important contemporary issues of war, peace, prisoner detention, interrogation, and torture. First, nothing in international law *constitutionally* may constrain the exercise by the United States of the decision to engage in war (*jus ad bellum*). International law constitutionally may not *require* the United States to go to war; nor may international law constitutionally *authorize* the United States to go to war, in the sense of serving as a substitute for the U.S. constitutional requirements for deciding upon war (however those are most properly understood). The weight to be accorded principles of international law in this regard is committed to the constitutional judgment of U.S. actors.

Second, international law may not of its own force, or as interpreted by non-U.S. actors or bodies, constitutionally constrain the *manner* in which the U.S. wages war (*jus in bello*), including rules for the treatment and questioning of captured enemy persons, except insofar as those principles constitutionally are made part of U.S. domestic law, and even then only to the extent and in the manner determined by U.S. actors' interpretation of this U.S. domestic law. This is not to say that the policies embodied in international law norms may not, or should not, form important policy considerations for U.S. officials. They may, and often they should. It is to say only that those are *policy* considerations, not binding "law" within our constitutional regime.

The propositions of this Essay provide a new perspective on—and often a critique of—the flurry of Supreme Court decisions in the areas of war powers, foreign affairs, and international law that has followed in the aftermath of September 11, 2001: *Hamdi v. Rumsfeld*,<sup>9</sup> *Rasul v. Bush*,<sup>10</sup> *Hamdan v. Rumsfeld*,<sup>11</sup> and *Boumediene v. Bush*<sup>12</sup>—the war prisoners cases—and *American Insurance Ass'n v. Garamendi*,<sup>13</sup> *Sosa v. Alvarez-Machain*,<sup>14</sup> *Medellín v. Dretke*,<sup>15</sup> *Sanchez-Llamas v. Oregon*,<sup>16</sup> and *Medellín v. Texas*.<sup>17</sup> It also furnishes a perspective on—

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9. 542 U.S. 507 (2004).
  10. 542 U.S. 466 (2004).
  11. 548 U.S. 557 (2006).
  12. 128 S. Ct. 2229 (2008).
  13. 539 U.S. 396 (2003).
  14. 542 U.S. 692 (2004).
  15. 544 U.S. 660 (2005) (per curiam).
  16. 548 U.S. 331 (2006).
  17. 128 S. Ct. 1346 (2008).

and to some extent a defense of—the controversial Department of Justice legal opinions concerning the (non)applicability of the Geneva Conventions and the (narrow) interpretation of the Convention Against Torture and Congress’s criminal legislation implementing those treaties.<sup>18</sup>

## I. THE FOG OF INTERNATIONAL LAW

Carl von Clausewitz famously referred to the “fog” of war as a metaphor for the inability to think clearly and sensibly in the midst of battle once the forces of war have been unleashed.<sup>19</sup> “Fog” is likewise a useful image for the phenomenon of unclear thinking about international law in contemporary legal and political discourse. Once the idea of international law has been unleashed, its rhetorical salience frequently seems to overtake careful thought.

What precisely is the force of international law as a matter of U.S. law, under the U.S. Constitution? How does it affect—*does* it affect—the U.S. constitutional law of war and foreign affairs powers? My contention is that international law is not binding law on the United States, and cannot be binding law except to the extent provided in the U.S. Constitution. That extent is very limited and subject to several important constitutional overrides—empowerments or restrictions that nearly always permit international law requirements to be superseded by contrary enactments or actions of U.S. governmental actors.

The result is that international law is primarily a *political* constraint on the exercise of U.S. power, not a true legal constraint; it is chiefly a policy consideration of international relations—of international politics. International law may be quite relevant in that sense. But it is largely *irrelevant* as a matter of U.S. law. While the legal regime of international law may consider international law supreme over the law of every nation, the U.S. Constitution does not.

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18. See *infra* Section III.B. This Essay is a work of synthesis. I stake no claims here with respect to dramatic originality, but draw heavily on arguments and conclusions first reached by others. I owe tremendous intellectual debts to the many scholars (and courts, and Founding-era theorists like Alexander Hamilton) cited throughout this Essay. My aim here is to distill and refine—and perhaps punch home with emphasis, and extend to their full logical conclusion—propositions that may have been advanced at earlier times in history, in judicial and executive branch opinions, and in the best of academic legal scholarship concerning foreign affairs and war powers.

19. CARL VON CLAUSEWITZ, ON WAR 140 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1976) (1832).

It follows that, to the extent international law is thought to yield determinate commands or obligations in conflict with the U.S. Constitution's assignments of powers and rights, international law is, precisely to that extent, *unconstitutional*—practically by definition. In such cases, U.S. government actors must not—constitutionally speaking, may not—follow international law.

The argument for the supremacy of the Constitution over international law within the American legal regime is remarkably straightforward. Article VI provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof,” and federal treaties—about which I will say much more presently—are “the supreme Law of the Land.”<sup>20</sup> For emphasis, the Supremacy Clause (or “Supreme Law Clause”<sup>21</sup>) adds the words, “and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>22</sup> But the implication of the supremacy of federal law would be, in any event, that supreme federal law would bind those who exercise authority under the Federal Constitution and prevail over *any* “Thing” inconsistent with such law—not just state constitutional, statutory, or common law, but anything at all inconsistent with supreme federal law.<sup>23</sup> This would obviously include international law, or any other species of foreign law. The Constitution, and other federal law the Constitution designates as supreme, trumps any other source or body of law.

Moreover, again under Article VI, U.S. officials (both federal and state) swear an oath to uphold the U.S. Constitution and U.S. law, not international law. The Oath Clause states, in pertinent part: “The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution . . . .”<sup>24</sup> This reinforces the effect of the Supreme Law Clause, by

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20. U.S. CONST. art. VI, cl. 2.

21. I have suggested this different label in other writing. See Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U.L. REV. 857, 859 n.6 (2009).

22. U.S. CONST. art. VI, cl. 2.

23. See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2713-14 (2003) [hereinafter Paulsen, *The Irrepressible Myth of Marbury*].

24. U.S. CONST. art. VI, cl. 3. I have discussed the importance of the Oath Clause in other writing, as it relates both to constitutional interpretation and constitutional obligation. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260-67 (2004) [hereinafter Paulsen, *The Constitution of Necessity*]; Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 23, at 2725-27; Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1290-92 (2008); Michael Stokes Paulsen, *The Most Dangerous*

making the obligation to adhere to supreme federal law not simply a matter of abstract theory but also one of personal moral and constitutional obligation for all who would exercise any form of government authority under the U.S. constitutional regime. (The President is constitutionally required to swear a highly specific oath, which makes his personal constitutional duty to the Constitution yet clearer.<sup>25</sup>) Thus, where U.S. law and international law might be thought to conflict, U.S. officials—the President, the Congress, the federal courts, all state officials—are *constitutionally* required, by the document that confers or frames their powers, and by the oaths they have been constitutionally required to swear, to follow U.S. law and not international law.

To put the point as starkly and directly as possible: any President of the United States who would follow international law in preference to U.S. law would violate his (or her) oath of office in the most fundamental of ways. The President and all other federal and state officials must be loyal to the Constitution and U.S. law, and not to any foreign, external authority. Indeed, this is exactly the concern that motivated the Framers and influenced the drafting not only of the Oath Clauses of Article II and Article VI, but of various other provisions of the Constitution. These provisions include the natural-born citizen requirement concerning the President; the citizen-duration requirements for the President, senators, and representatives; the Foreign Emoluments (or “Foreign Princes”) Clause; and arguably even the Title of Nobility Clauses.<sup>26</sup> At seemingly every turn, the Constitution is concerned with assuring the fidelity of U.S. government officials to the U.S. constitutional

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*Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 257-62 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*].

25. U.S. CONST. art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”). On the force and importance of the Presidential Oath Clause, see Paulsen, *The Constitution of Necessity*, *supra* note 24, at 1260-67.
26. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”); *id.* art. II, § 1, cl. 5 (requiring that the President have been a resident of the United States for fourteen years); *id.* art. I, § 2, cl. 2 (requiring that House members have been a citizen of the United States for seven years); *id.* art. I, § 3, cl. 3 (requiring that Senate members have been a citizen of the United States for nine years); *id.* art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *id.* art. I, § 10, cl. 1 (“No State shall . . . grant any Title of Nobility.”).

regime and to the supremacy of U.S. law that that regime prescribes.<sup>27</sup> For the Framers, that fidelity meant (and still means) *not* being governed by foreign law, foreign rulers, or undue foreign influence.

A certain measure of confusion on this point results from the fact that some of what constitutes “international law” within the regime of international law is *also* U.S. law, or may provide the basis for the exercise of U.S. constitutional powers, under the Constitution. In such cases (to which I turn presently) there is no intrinsic conflict between international law and the U.S. constitutional regime. But it is nonetheless important to keep the two spheres analytically distinct. Some international law is U.S. law, but some is not. And all international law that is U.S. law or is made into U.S. law must then be understood and applied *as U.S. law*, and not as external “international law.” Its meaning is its U.S. law meaning, and its interpretation is committed to U.S. constitutional actors.

Let us consider, then, the three broad categories of international law in terms of their legal force within the U.S. constitutional regime: treaties to which the United States is a party, nontreaty executive agreements, and customary international law (CIL) norms and principles.

#### A. *The Trouble with Treaties*

Treaties of the United States *are* part of the “supreme Law of the Land,” under the clear terms of Article VI. The Supreme Law Clause states that, after the Constitution and federal statutes, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>28</sup> And some extremely important treaties, central to the regime of

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27. I do not here enter the debate (except in this footnote) over the propriety of judicial citation to foreign sources of law in the course of interpreting U.S. law. My position is that such citation is not constitutionally problematic, so long as foreign law is not somehow deemed to control the understanding of U.S. law. Aside from that limitation, courts are free to cite and discuss whatever they like. This may create certain bad judicial habits, and lead to sloppy analysis and poor conclusions. But bad habits are not in and of themselves unconstitutional.

28. U.S. CONST. art. VI, cl. 2. For a powerful, systematic argument that the textual order and the structural logic of the three types of federal law listed in this provision imply a Constitution-statute-treaty hierarchy, see Vasana Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006). Kesavan’s argument challenges conventional doctrinal formulations about the relative federal law status of federal statutes and treaties, suggesting that the last-in-time rule, which treats the two as having equivalent status, is wrong and that a treaty generally may not of its own force supersede the legal force of an earlier-enacted statute. See also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 302-07 (2005) (making a similar argument in more telescoped form).

international law and obviously highly relevant to the conduct of war, are explicitly part of U.S. law. These include, most prominently, the U.N. Charter, the Geneva Conventions, the Convention Against Torture, and the statute of the International Court of Justice. These treaties are part of supreme federal law, by virtue of their enactment as such pursuant to the constitutional process for treaty-making specified in Article II of the Constitution: the President has power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>29</sup>

But it is important to keep in mind that when international treaties become domestic law, they are U.S. law. They may—they obviously do—also have legal force as international law and consequently give rise to obligations within the legal regime of international law. But the force and the interpretation they have as law within those two different legal regimes—the U.S. constitutional regime and the regime of international law—may be quite different. There are important constitutional limitations on the legal force of treaties as a matter of U.S. law. I offer four simple but important points about treaties’ status under the U.S. Constitution.

First, and most obviously, a treaty may not override the Constitution. The Constitution is “higher” federal law; the Constitution trumps treaties. Just as the Constitution prevails over any inconsistent statute enacted by Congress<sup>30</sup> or any inconsistent executive act taken by the President<sup>31</sup> or (in theory at least) any inconsistent decision of the judiciary,<sup>32</sup> the Constitution prevails over any provision contained in a federal treaty that is inconsistent with a rule specified in the text of the Constitution.

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29. U.S. CONST. art. II, § 2, cl. 2.

30. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

31. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215 (2002) [hereinafter Paulsen, *Youngstown Goes to War*].

32. See, e.g., Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 679-81 (1995) (arguing that the Constitution is supreme over any precedents inconsistent with it); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005) (arguing that judicial decisions inconsistent with the Constitution are unconstitutional and should have no prospective stare decisis force); Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 23, at 2731-34 (arguing that judicial decisions at variance with the Constitution are unconstitutional and of no legal force, under the reasoning of *Marbury*). See generally Paulsen, *The Most Dangerous Branch*, *supra* note 24 (arguing that the President is not bound to execute judicial decisions that are contrary to his interpretation of the Constitution).

The principle is obvious enough in the abstract; it is when one thinks about what this means in practice that the power of this principle begins to become clear. It follows, for example, that a treaty cannot deprive Congress, the President, or the courts of any of their constitutional powers. Nor can a treaty override constitutional rights of U.S. citizens. (A treaty provision cannot impair First Amendment or Fifth Amendment rights, for example.) Thus, a treaty cannot override or impair Congress's constitutional power to declare war or the President's constitutional executive power and military power as Commander in Chief (whatever these are understood to be).<sup>33</sup>

Thus, the U.N. Treaty, for instance, cannot override Congress's power to declare war. It may not commit the United States to military action unless Congress authorizes it. And it may not *bar* U.S. military action, as a matter of U.S. constitutional law, if Congress *has* authorized it.<sup>34</sup> In terms of U.S. domestic constitutional authority with respect to the decision to go to war, the

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33. Under current doctrine, "it is widely conceded that a duly enacted treaty cannot itself authorize a new expenditure, impose a new internal tax, create a new federal crime, raise a new army, or declare a war." AMAR, *supra* note 28, at 304. But why the limited roster? The issue—the relationship between treaties and statutes under the Constitution—has long proved a difficult one for courts and scholars. One possible correct statement of general principle is that a treaty may not *usurp*, *preclude*, *preempt*, or *irrevocably commit* the exercise of legislative power. Stated more simply, a treaty may not accomplish a result that effectually removes from Congress the ability to exercise its legislative power over a matter.

This general principle straddles (and accommodates) three prominent, somewhat competing, views of the treaty-statute relationship: (1) the last-in-time rule of present doctrine; (2) the view (associated with Akhil Amar and Vasana Kesavan, *see supra* note 28) that statutes always trump treaties; and (3) the view that treaties always require implementing legislation to have a domestic law effect. Under the last-in-time rule, Congress must retain full power to *rescind* or *override* a treaty enactment—and certain treaty enactments clearly cannot be undone as easily as done. War initiation, spending, and disposing or transfer of property seem to fit that description. Under the statutory supremacy view, Congress's statutes always trump treaties—and it might well be thought to follow that this has a comparable dormant preemptive effect on certain treaty enactments that cannot be undone as readily as done. And finally, under the non-self-execution view, no treaty may create any domestic legislative effect.

Under any of these views, I submit, a treaty may not declare war in Congress's stead or bar Congress from declaring war. An exactly parallel argument can be made with respect to the President's constitutional powers as Commander in Chief, and the judicial branch's power to decide cases within its jurisdiction.

34. Congress has the domestic constitutional legislative power lawfully to initiate war and the President does not. For a brief defense of this point, see Paulsen, *Youngstown Goes to War*, *supra* note 31, at 239. For excellent and thorough textual, structural, and historical presentations, see Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007); and Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

U.N. Treaty—which by its terms bans war and purports to limit treaty parties’ military actions<sup>35</sup>—is of essentially no consequence as a legal restriction on what U.S. government officials may do in this regard. So too with the Geneva Conventions’ provisions concerning the conduct of war, about which I will have more to say below.<sup>36</sup> If the President’s conduct of military operations (including matters concerning the capture, detention, interrogation, and military punishment of lawful and unlawful enemy combatants) otherwise falls within his exclusive constitutional power as Commander in Chief of the nation’s military, the provisions of the Geneva Conventions (and other treaties) cannot restrict those powers.<sup>37</sup>

The second limitation on the force of treaties flows from the first. Just as treaties may never trump the Constitution, treaties may always be trumped by a subsequent statute. This is true whether one accepts the “last-in-time” rule with respect to the relative force of statutes and treaties (the traditional view) or the hierarchical rule that statutes *always* trump treaties.<sup>38</sup> Under the traditional view that statutes and treaties possess equal status as U.S. law—both are subordinate to the Constitution but each is equal to the other—a later-enacted statute trumps an earlier-enacted treaty. So, as noted in the preceding paragraph, if Congress declares war in a circumstance inconsistent with a U.S. treaty (like the U.N. Treaty), the later declaration of war trumps the treaty obligation, as a matter of U.S. domestic constitutional law. Indeed, this applies to any species of legislative enactment within the scope of Congress’s constitutional powers.

To make the point concrete: if the best reading of Congress’s September 18, 2001, Authorization for Use of Military Force (AUMF) is that it authorizes war making in circumstances inconsistent with the U.N. Charter, the September 18 joint resolution prevails over the U.N. Charter, at least as a matter of U.S.

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35. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”). *But cf. id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”).

36. See *infra* Section III.B.

37. I discuss this issue at length in Part III. For a general discussion of the Commander-in-Chief power, see Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807 (2006) [hereinafter Paulsen, *The Emancipation Proclamation*].

38. As noted, the hierarchical view is thoroughly defended in Kesavan, *supra* note 28.

constitutional law.<sup>39</sup> Similarly, if Congress passes a Military Commissions Act of 2006 (MCA) that contradicts, or interprets narrowly, the Geneva Conventions or the Convention Against Torture, the MCA prevails over the Conventions as a matter of U.S. law.<sup>40</sup>

The point may be stated more generally. It follows, I submit, from the fact that a treaty may not restrict a constitutional power, that the subsequent exercise of a constitutional power supersedes, in legal effect, anything to the contrary in the treaty. (This has important specific implications for the exercise of presidential powers, as well as congressional powers, as I shall explain presently.)

Third, treaties are often not self-executing under U.S. domestic law, but frequently require implementing legislation that might narrow the treaties' impact as a matter of U.S. law.<sup>41</sup> Thus, while treaties may serve as an alternative means of enacting binding U.S. domestic law norms, they more frequently create only international obligations. Just as domestic law may supersede or repudiate such obligations, it may instantiate them as federal statutory commands in different forms. These commands may be narrower than the international law obligation. Or the international law obligation might not be given force as binding domestic law at all.

Fourth, and perhaps most importantly, the President possesses, as an aspect of the "executive Power" to direct and conduct the nation's external relations, the power to interpret, apply, suspend, supersede, or terminate U.S. treaty obligations as they concern our relationship with other nations. This remains a controversial point, and no specific Supreme Court decision has embraced it to date,<sup>42</sup> but it follows logically from the principle that treaties

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39. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001); see *infra* Section III.A; cf. *Karnuth v. United States*, 279 U.S. 231, 241 (1929) (concluding that a provision of the Jay Treaty was "brought to an end by the War of 1812").

40. See *infra* Section III.B.

41. Chief Justice Roberts's careful opinion for the Court in *Medellin v. Texas*, 129 S. Ct. 360 (2008), sets forth this distinction clearly. The distinction dates back to an early opinion by Chief Justice John Marshall. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

42. The en banc decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), *vacated on other grounds*, 444 U.S. 996 (1979) (mem.) remains the single best judicial exposition of the President's treaty-termination power. The case is the famous, paradigmatic constitutional challenge to President Jimmy Carter's termination of a mutual defense treaty with the Republic of China (Taiwan) as part of his foreign policy decision to recognize the People's Republic of China, rather than the government at Taiwan, as the government of China. The Supreme Court effectively upheld the denial of relief to plaintiffs challenging President

may not trump the Constitution. Simply put, if the President's Article II executive power includes the power over foreign affairs (except where a specific power is assigned to Congress),<sup>43</sup> a treaty may not extinguish or limit such constitutional power; accordingly, the President's subsequent (later-in-time) exercise of that constitutional power over foreign affairs supersedes in legal effect anything to the contrary in the treaty.

How does this presidential treaty-supersession power play out in practice, and how far does it extend? A complete exposition would be an article of its own, but the main outlines can be sketched briskly: when the President of the United States terminates a treaty pursuant to his constitutional powers under Article II, he does not literally repeal a U.S. domestic law enactment. If a treaty is self-executing, or if it has been implemented by congressional legislation, the President's foreign affairs power does not rescind its domestic law effect. That result can only be accomplished by subsequent legislation (or by a subsequent, repealing self-executing treaty made in accordance with Article II's specified process). As a matter of U.S. constitutional law, the President's foreign affairs power can terminate only the foreign affairs obligation of the treaty. (Once again, it is possible that the regime of international law might regard such presidential actions as a breach or violation of the treaty, not its lawful termination. My point here is simply that, within the regime of the U.S. Constitution, the President's action is a lawful, effective exercise of the President's constitutional powers to alter the nation's foreign relations commitments on the international plane.)

Does the President's foreign affairs power include the power to take *lesser* actions—that is, less dramatic and absolute than outright treaty termination—with respect to the continuing legal force of treaties? The greater power does not always include the lesser, of course. But here it does: the President's

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Carter's action, but on a mixture of justiciability and merits grounds, with no opinion commanding a majority of the Court. *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring) (providing the opinion of four Justices who found the issue a nonjusticiable political question); *id.* at 997 (Powell, J., concurring) (finding the issue not "ripe"); *id.* at 1006 (Brennan, J., dissenting) (voting to affirm the District of Columbia's conclusion on the merits); see *infra* notes 51-54 and accompanying text (discussing *Goldwater* at greater length).

For an excellent academic defense of the President's treaty-termination power, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 264-65 (2001).

43. This is the well-developed theory of Saikrishna Prakash and Michael Ramsey's definitive article. Prakash & Ramsey, *supra* note 42. Prakash and Ramsey cautiously reserve the question of whether the President may terminate a treaty in violation of international law, limiting their conclusion to treaty termination in accordance with a treaty's express terms. *Id.* at 265, 324-27. The caution, in my view, results from what actual historical practice has seen, not from any intrinsic limitation on the textual argument.

foreign affairs power is not an all-or-nothing blunt instrument, but fairly admits of application in finer gradations. The President may decide that an existing treaty's requirements should be abandoned in part and followed in part—that the United States's current foreign policy interests (as determined by the President) do not necessitate repudiation of the entirety of a treaty's obligations. Applying the presidential equivalent of a "severability" determination, the President may determine that as a matter of the United States's relations with other nations, it is practical and sensible to leave as much of the treaty in operation as is fairly possible, discarding only what he judges must be discarded and repudiating nothing more.<sup>44</sup> If this is correct, it means that the President may repudiate a treaty in whole or in part.

Taking the analysis one step further—if the treaty-supersession power may be exercised in fine, rather than as an indivisible lump, it should follow that the President may determine that the United States's national foreign policy interests trump a treaty's obligations *as applied* to a particular case (so to speak) but do not require the conclusion that a treaty must be repudiated in its entirety, once and for all. Just as courts sometimes may determine that a law is not unconstitutional on its face but may be unconstitutional as applied, the President may determine that a treaty should remain legally operative on its face but not as applied. (Again, this is only with respect to the United States's foreign relations obligations as a matter of U.S. domestic constitutional law.) Put rather more bluntly—undiplomatically, as it were—the President may determine that a treaty should not be followed in a particular situation, where contrary to the nation's interests.

One more step: if the President may decide that a treaty itself ("on its face") is not at an end but is simply not to be followed in a particular situation for a particular foreign policy reason ("as applied"), it follows that the President (or his or her successor) subsequently may restore the treaty's application if the President judges that circumstances have changed. There exists now a new as-applied situation and the President may determine that the treaty now applies. Put more colloquially and straightforwardly, the President possesses a practical constitutional power to *suspend* the obligations of a treaty.

Note finally that all of this presupposes a presidential power of treaty *interpretation*. To determine that a treaty should be terminated outright,

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44. This is similar to the Supreme Court's explication of modern severability doctrine. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). For an excellent general treatment of the doctrine, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993). Under presidential severability of treaty obligations, as under current judicial doctrine, the presence of a severability provision in the text of the severed legal instrument is not strictly necessary to conclude that particular requirements are severable.

abrogated in part, or suspended in its operation in a particular case or at a particular time, the President obviously must first determine what the treaty's terms *mean*. The President (with the assistance of subordinate executive branch officials) interprets the treaty for purposes of determining its legal effect and the desirability and form of the actions that the executive branch will take with respect to that treaty in the exercise of the President's foreign affairs power. That interpretation is not binding on the other branches of the U.S. government, of course—just as the President's exercise of his constitutional foreign affairs powers is not binding on the conduct of the other branches of the national government, within the U.S. constitutional scheme of separation of powers. But neither are the other branches' interpretations of the treaty binding on the President. (I shall have more to say about this in Part II, below.)

The President thus may decide, in good faith, that the best understanding of a treaty is that it does not in fact impose a treaty-law constraint on the United States, in opposition to the President's determination of appropriate U.S. foreign policy. In such case, there is no need for the President to repudiate, abrogate in part, or suspend the treaty—each arguably more sensitive and potentially provocative actions. To be sure, a dubious treaty interpretation may present the same diplomatic problems. And one legitimately can question whether too-creatively construing a treaty, so as to avoid the possible diplomatic consequences of terminating it or suspending it, really does avoid those consequences.<sup>45</sup> But in principle, where honestly engaged in, the power of the President to interpret the treaty is a lesser-included power of the foreign affairs power generally and the treaty-supersession power more specifically.

It thus follows, logically, from the President's constitutional power with respect to foreign affairs, that the President possesses the constitutional power to terminate, abrogate, suspend, and interpret treaties of the United States. His actions do not bind the other branches of the U.S. government or repeal or rescind the domestic law effects of a self-executing or legislatively implemented treaty. But they may authoritatively alter the nation's (present) international law obligations, at least as a matter of U.S. constitutional law.

There are many historical—and recent—illustrations of this presidential power to authoritatively alter the nation's international law obligations, and I

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45. So, too, one can question whether the avoidance canon in the domestic judicial context really avoids anything. See William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1495-97 (1997).

will discuss a few presently. But I begin with a hypothetical illustration that presents nearly all of the above points at once.

Suppose that the United States has an existing, constitutionally valid, lawful, and binding treaty relationship with a foreign nation, a group of foreign nations, or an international body consisting of several member nations. Suppose that the terms of the treaty appear materially to constrain the United States's autonomy—its freedom to act independently or unilaterally, in its own best interest as it judges that interest—with respect to the decision to use or not to use military force. In particular, the treaty seems to make the United States's decision about whether or not to go to war contingent on the views of one or more of its treaty partners. For purposes of simplicity, reduce the hypothetical to the simple proposition that the treaty permits France in effect to tell the United States what it must or must not do, with respect to war.

Enter a new President. Let's call him "President George W." The treaty predates President George W.'s entry into office and he believes that circumstances have changed materially since the time the treaty was made. He believes that the treaty is at least somewhat ambiguous as to how precisely it applies to the situation at hand. And President George W. believes it would now be bad for the interests of the United States for France (or any other nation for that matter) to dictate, or unduly influence, the United States's decision about whether to go to war under the circumstances. President George W. would rather that the United States go it alone.

Now, within the realm of the conduct of foreign relations, may President George W. announce that the U.S. interprets the treaty in a certain way, so as to preserve its freedom of unilateral action? Or, if such an interpretation is not fairly possible, does the President have the constitutional power to terminate the treaty, to determine that it does not apply to the instance at hand, or simply to suspend the treaty's operation as an obligation of the United States to the other party or parties to the treaty?

As you have probably guessed, this hypothetical illustration is no hypothetical. It describes a real situation and a real president. "President George W." is, of course, President George Washington. The year is 1793. The treaty at issue is a mutual defense treaty with France dating back to the American Revolution—the famous accomplishment of the distinguished emissary, Benjamin Franklin.<sup>46</sup> But that treaty was made well over a dozen years earlier, with a rather different (and since decapitated) French legal regime, for a different set of circumstances. The situation at hand in 1793 was

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46. For a great account of Franklin in France, see Stacy Schiff, *A GREAT IMPROVISATION: FRANKLIN, FRANCE, AND THE BIRTH OF AMERICA* (2005).

yet another, different war between France and Britain, from which President Washington (formerly General Washington) was determined to keep the United States removed.

President Washington declared American neutrality in the war, artfully dodging the terms of the treaty. President Washington's unilateral action was attacked by, among others, James Madison, writing as Helvidius, on two grounds—first, that such action was contrary to the Constitution's assignment of the war power to Congress (a clearly incorrect position that Alexander Hamilton, writing as Pacificus, effectively ripped to shreds) and, much more plausibly, that such action was a violation of the treaty with France and thus a violation of international law.<sup>47</sup>

President Washington's Neutrality Proclamation neatly illustrates several of the aspects of the presidential treaty-supersession power set forth above. The Proclamation arguably *did* depart from the terms of the treaty. But whether understood as an outright termination of the treaty (a stance President Washington avoided), a temporary suspension of the treaty's operation for purposes of the situation at hand, a determination that changed circumstances rendered the treaty inoperative as applied, or a (somewhat creative) narrowing construction of the treaty's terms so as not to question its validity or continued operation in any other respect but also so as not to involve the United States in this war, that change in the international law obligations of the United States—cast in any of these forms—was within the President's constitutional power to effectuate as an aspect of the executive power over foreign affairs.<sup>48</sup>

Although the President constitutionally may interpret treaties to determine the scope of their obligations upon the United States as a matter of international law and determine whether the United States should honor any such obligations or depart from them, his actions do not control Congress's.

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47. For Madison's argument, see "*Helvidius*" No. 1 (Aug. 24, 1793), in 15 THE PAPERS OF JAMES MADISON 66, 70-72 (Thomas A. Mason, Robert A. Rutland & Jean K. Sissen eds., 1985); and "*Helvidius*" No. 2 (Aug. 31, 1793), in 15 THE PAPERS OF JAMES MADISON, *supra*, at 80, 81-84. Hamilton's refutation of Madison's argument that Congress's war power precludes executive neutrality power is set forth in "*Pacificus*" No. 1 (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett & Jacob E. Cooke eds., 1969).
48. Alexander Hamilton's "*Pacificus*" defense of the propriety of the Washington Administration's actions remains the classic exposition of the President's foreign affairs power, embracing (by implication) the treaty-interpretation and treaty-termination authority of the President. "*Pacificus*" No. 1, *supra* note 47, at 33.

For a modern echo of Hamilton's brilliant argument, see Prakash & Ramsey, *supra* note 42, at 252-65, which sets forth a comprehensive textual theory of the executive's power over foreign affairs under the Constitution; and *id.* at 324-39, which explicates this theory with reference to the actions of the Washington Administration.

(Congress could still have declared war, or issued letters of marque and reprisal, in 1793.<sup>49</sup>) Nor can the President's actions by themselves create new U.S. domestic law. (President Washington's Neutrality Proclamation could not, in and of itself, form the basis for domestic law prosecution and punishment of individuals for acts violating the neutrality policy, as courts at the time properly held. It remained for Congress to enact legislation making it a crime to violate the Neutrality Proclamation—which it did.<sup>50</sup>) But the President's unilateral interpretation or supersession of a treaty *can* alter the United States's international obligations, as a matter of U.S. law.

That is an extraordinarily significant power. The same reasoning that sustains the propriety of President Washington's Neutrality Proclamation sustains the propriety of President Carter's termination of the mutual defense treaty with Taiwan and President George W. Bush's termination of the Anti-Ballistic Missile treaty with (the remnants of) the Soviet Union.<sup>51</sup>

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49. May the President veto a declaration of war? The correct answer to this interesting side question is *yes*. Article I, Section 7, Clause 3 provides for presidential review and possible return with respect to “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary,” and a declaration of war falls within that category. U.S. CONST. art. I, § 7, cl. 3. No president has vetoed a war declaration. Presidential signature of war declarations has not been the consistent practice of all presidents, but this ought not be determinative of this issue. It is quite possible that practice has simply not conformed properly to the text of the Constitution. *See generally* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 81-86 (1991) (arguing that presentment and presidential approval is required for declarations of war and noting the inconsistency of some historical practice). At all events, it appears that the lawfulness of all unsigned declarations of war in our nation's history can be sustained on the theory that they became law without the President's signature, pursuant to Article I, Section 7, Clause 2. None was (inadvertently) “pocket vetoed.”
  50. The Grand Jury instructions of Chief Justice John Jay, and of Associate Justice James Wilson, and Congress's subsequent enactment of the Neutrality Act of 1794, are set forth in CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 21-23 (2003).
  51. Office of the Press Secretary, The White House, Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), <http://www.dod.mil/acq/acic/treaties/abm/ABMwithdrawal.htm>. For the Bush Administration's initial defense of the propriety of termination or suspension of the ABM Treaty, see Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Council (Nov. 15, 2001) [hereinafter November 15 Memorandum to Bellinger]. The Administration revised its legal position, retreating (in part) from its earlier view, in Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel 8-9 (Jan. 15, 2009) [hereinafter Bradbury Memorandum]. The earlier memorandum, however, appears to be a sound exposition of the rationale for executive treaty-termination and treaty-suspension powers, along the lines of the D.C. Circuit's opinion in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc).

President Carter's action was sustained by the D.C. Circuit, in an en banc per curiam majority opinion that ably limned (despite being produced on a very short time frame) some of the better constitutional arguments in support of this presidential power. Those arguments included the logically necessary existence of a power in the national government to terminate treaties; the absence of any legitimate textual argument for a congressional power to participate in treaty termination; the logical and textual flaw of suggesting that the power to terminate or abrogate treaties parallels precisely the power of treaty formation or amendment; the traditionally recognized general executive power over foreign affairs under Article II of the Constitution; and the power of the President to interpret and apply treaties to determine the nation's obligations under those treaties, to determine whether other nations have breached their obligations under such treaties, and to determine whether circumstances have so changed as to render the treaty temporarily inoperative.<sup>52</sup>

The Supreme Court vacated the opinion on a mixture of justiciability grounds, with no controlling opinion and only Justice Brennan voting to affirm on the merits.<sup>53</sup> The result of that foggy disposition is, as a practical matter, to

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(per curiam), *vacated on other grounds*, 444 U.S. 996 (1979) (mem.). The Bradbury Memorandum appears to be a political document intended to provide cover for some subsequent Bush Administration officials and contains little substantive analysis of the point at issue. I discuss *Goldwater* presently.

52. *Goldwater*, 617 F.2d at 703-07.

53. *Goldwater*, 444 U.S. at 996-97; see *supra* note 42 (reviewing the various opinions).

I will discuss the justiciability issues in *Goldwater* only very briefly. The political question doctrine's first two "prongs," as is nearly always the case, really disguised merits questions: does the Constitution supply a rule of decision committing the treaty-termination power to a particular branch's determination (in which case, the corrective *substantive* result is that that branch's judgment cannot be disturbed)? Does the Constitution *not* supply any rule of decision at all (in which case, the correct *substantive* result is to deny the claim of relief under the Constitution, leaving the outcome to other sources of law or to the political process). If, as I submit, treaty termination falls within the residuum of the President's Article II executive power over foreign affairs not altered by the war-making or treaty-making powers assigned to or shared with Congress, *that* is the answer supplied by the text. The third prong of the political question doctrine, a grab bag of policies for nondecision—apparently even if the Constitution's text *does* supply a rule or a default decision rule—strikes me as simply illegitimate. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 713 (1993) [hereinafter Paulsen, *A General Theory of Article V*].

Justice Powell's "ripeness" analysis in *Goldwater* is convoluted and confusing. The correct point is not that the dispute is *unripe* until Congress has acted—under that theory, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was "unripe" for judicial determination—but that no proper party with injury was before the Court. The only parties

leave treaty termination to the judgment of the President, at least so far as the courts are concerned. That is what happened with respect to the more recent notable example of unilateral presidential treaty termination: President Bush's termination of the Anti-Ballistic Missile Treaty similarly was made without any form of congressional approval. It, too, was sustained against judicial challenge, following to some extent the reasoning of the Supreme Court's disposition in *Goldwater v. Carter*, on the dual grounds that plaintiff U.S. representatives lacked standing to sue and that the issue was in any event a nonjusticiable political question.<sup>54</sup>

The treaty-supersession power has more dramatic implications yet. The same reasoning that justified President Washington's Neutrality Proclamation (and the many historical examples of unilateral presidential treaty termination) applies today to a treaty like the U.N. Charter, the Geneva Conventions, or the Convention Against Torture. The power to interpret and apply these treaty obligations, or to determine that they will no longer bind the United States, is—constitutionally and practically—the President's. The President's interpretive and executive powers with respect to international treaty obligations of the United States are thus quite obviously tremendously important ones with enormous consequences. While Congress may supersede a treaty for domestic law purposes by passing a statute, the President may repudiate a treaty (in whole or in part) for international purposes entirely on his own authority. (As we shall see presently, the President may maintain or re-create the international obligation of a treaty on his own, in the form of an "executive agreement," but may not properly create domestic U.S. legal obligations by such action.)

Thus, though treaties are part of the supreme law of the land under the U.S. Constitution, their legal force as they concern the international law obligations of the United States is, as a matter of U.S. law, always limited by (1) the Constitution's assignment of certain infeasible constitutional powers to the President and to Congress with respect to foreign affairs and war; (2) the power of Congress to enact inconsistent, overriding or limiting legislation;

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claiming injury were individual senators and representatives not constituting the number sufficient to act to block a treaty's termination (one-third plus one of the Senate, or, on the alternative theory, a majority of both houses of Congress). Such individual members lack *standing* to sue on behalf of the body or group. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (finding that a dissenting school board member has no individual standing to appeal an adverse judgment against the school district). They also lack standing to sue in their own right. See *Raines v. Byrd*, 521 U.S. 811 (1997) (stating that there is no individual member standing simply for challenging the constitutionality of enactments alleged to violate separation of powers principles).

54. *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

(3) the fact that many treaty commitments do not create self-executing U.S. domestic law obligations; and (4) the President's foreign affairs executive power to interpret, apply, suspend (in whole or in part), or even terminate a U.S. treaty's international obligation as a matter of U.S. law.

It is worth pausing to consider exactly what all of this means, for its implications are mildly stunning, especially with respect to U.S. war powers: it means that a treaty of the United States that is the law of the land under Article VI of the Constitution—be it the U.N. Charter, the Geneva Conventions or any other major agreement at the center of the contemporary regime of international law—may not constitutionally limit Congress's power to declare war or the President's Commander-in-Chief power to conduct war as he sees fit. It means that Congress always may act to displace, or disregard, a treaty obligation. It means that the President, too, always may act independently to displace, or disregard, a treaty obligation. It means that treaties, as a species of international law with the strongest claim to U.S. domestic constitutional law status, never meaningfully constrain U.S. governmental actors. Their force is utterly contingent on the prospective actions and decisions of U.S. constitutional actors.<sup>55</sup>

This conceptualization threatens all that the community of “international law” scholars hold most dear. For it seems to say that the United States may disregard the seemingly most sacred of international law treaty obligations almost at will. The answer to such a charge is *yes*, this analysis suggests precisely that. At least it does so as a matter of U.S. *constitutional law*. This does not mean, of course, that the United States must or should disregard important international law treaty obligations as a foreign policy matter. It certainly does not need to do so; other nations might validly regard such actions as a breach of international law; such nations might become very angry at the United States's actions (or they might not); and such breaches, and reactions, may have serious international political repercussions. These are very serious policy considerations. But as a matter of U.S. constitutional law, it remains the case that Congress, and the President, may lawfully take such actions, hugely undermining the force of such international treaties as binding national law for the United States.

The conclusion is blunt, but inescapable: international law in the form of U.S. treaties is primarily a *political* constraint on U.S. conduct—a constraint of international politics—more than a true *legal* constraint. The “binding” international law character of a treaty obligation is, as a matter of U.S. law, largely illusory.

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55. For important contemporary applications of these principles, see *infra* Part III.

*B. Executive Agreements*

All of these same points apply with respect to a second species of international law, so-called executive agreements. Indeed, the points apply with even greater force.

An executive agreement is exactly what the name implies. It is an agreement made by the executive—that is, the President—with some other nation or entity as an aspect of the exercise of the President’s foreign policy powers. It is not the same thing as a treaty for purposes of U.S. domestic law. It is not made in accordance with the lawmaking process for treaties specified in Article II of the Constitution. An executive agreement is an international compact, or deal, made by the President alone, without the two-thirds majority Senate consent required for Article II treaty formation.<sup>56</sup> Consequently, under the Supremacy Clause of Article VI, nontreaty international agreements made by the executive and not implemented by statute do not have the same force as U.S. domestic law that treaties and statutes do.

At least they *should* not be thought to have the same force. More on this point—and the tortured course of Supreme Court decisions departing from it—presently. But first, it should be noted that, while executive agreements may well constitute binding international law obligations of the United States (whatever their different U.S. domestic law status), they are at least as easily overridden by subsequent actions as treaties are, as a matter of U.S. domestic law. Indeed, they are even more readily superseded.

Recall the four ways in which treaties may be trumped, or their legal effect mitigated, by other features of the U.S. constitutional regime. Each applies a fortiori to nontreaty executive agreements.

First, an executive agreement may not trump the Constitution. If a treaty may not violate the Constitution, certainly a nontreaty agreement, made law neither by Article I nor Article II processes, cannot do so.

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56. I deal here primarily with what are often termed “sole executive agreements,” as distinguished from “congressional-executive agreements.” In the latter type of agreement, the President completes an international agreement either pursuant to delegated legislative authority or subject to later legislative implementation in the form of a statutory enactment (or sometimes both). In such instances, the international agreement is made U.S. domestic law by virtue of the exercise of one of Congress’s constitutional legislative powers. In my view, such agreements may be made U.S. law in such a manner *only* when they concern matters within the scope of Congress’s enumerated powers. This will overlap substantially, but incompletely, with the treaty-making power of Article II, which is plenary. See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

Second, an executive agreement may always be trumped by a subsequent inconsistent statute within Congress's powers. If the relationship status between treaty law and statutes is imperfectly clear, the relationship between a mere executive agreement, not enacted into domestic law in any form, and a subsequent contradicting law, is perfectly clear. An enacted law trumps a presidential agreement that is not a treaty.

Third, executive agreements are not self-executing as a matter of U.S. domestic law. Just as many treaties require implementing legislation to create enforceable domestic rights or obligations, *all* executive agreements should be thought to require legislative authorization or implementation to have domestic legal force. (As mentioned, this is in tension with certain notable Supreme Court decisions that I discuss momentarily.)

Fourth and finally, executive agreements, made by the President alone, may be terminated by the President alone. If the treaty-termination power is at least a difficult enough issue to require careful and nonobvious textual and structural analysis, executive agreement termination is not a tough issue at all. What one president may agree to, another president may disagree with and, at least prospectively, abandon or repudiate.

It is thus *at least* as easy to overcome, as a matter of U.S. domestic constitutional law, an executive agreement as it is to overcome a treaty. While the regime of international law may regard such agreements as creating binding obligations, the agreements properly have very little binding force as a matter of U.S. law.

Indeed, as noted, they should have *no* force as domestic law, since they are not law enacted in accordance with either Article I lawmaking or Article II treaty-making requirements. The Supreme Court has more than occasionally said otherwise, but nothing in what it has said meaningfully impairs the ability of the executive and legislative branches to *supersede*, by subsequent enactments or actions, whatever legal force an executive agreement might be thought to have had as domestic law.

The Court has held that unilateral executive agreements—agreements that are neither treaties nor authorized or implemented by legislation—constitute enforceable domestic law, ousting contrary federal law rights and powers<sup>57</sup> and

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57. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the Supreme Court unanimously upheld President Carter's executive order in implementation of an executive agreement settling the Iran hostage crisis of 1979-1980. President Carter's executive agreement committed to having all U.S. claims against Iranian assets resolved by an international claims tribunal; the executive branch's orders implementing that commitment essentially extinguished the legal rights and claims under domestic U.S. law of U.S. citizens and corporations—that is, the orders repealed or altered U.S. law. Congress did not enact

preempting contrary state law.<sup>58</sup> With all due respect, these decisions are manifestly unsound: the President may not, through his foreign affairs executive power, make new domestic law.<sup>59</sup> He can make a treaty. He can negotiate an executive agreement implemented by legislation within Congress's power. But he can no more make law on his own, through the exercise of the foreign affairs aspect of "the executive Power," than he can legislate on his own.<sup>60</sup>

*Dames & Moore v. Regan*, the 1980 Supreme Court decision upholding President Carter's executive agreement with Iran, which provided for release of American hostages seized at the U.S. Embassy in Tehran in exchange for release of frozen Iranian assets and the extinguishing of legal claims against Iran and its citizens, is a significant departure from the proper understanding of the Constitution in this regard. In *Dames & Moore*, the Court found implied unilateral presidential lawmaking authority to alter domestic legal rights and duties, resulting from a unilateral executive agreement with another nation. Its reasoning was thoroughly unpersuasive: though the President's actions had not been made law by treaty or by legislation, the President nonetheless possessed implied authority to act to resolve claims disputes, given that Congress had not demonstrably disagreed with the President's actions,<sup>61</sup> given Congress's general historical acquiescence in and periodic legislative authorization for other executive claims settlement agreements, and given Congress's grant of other emergency powers for dealing with such crises. Though no statutory provision authorized the President's actions, the Court nonetheless found that Congress's actions came within the general neighborhood of authorizing what the executive did, that similar things had been done before, and that Congress never told the President he could not do such a thing. The Court's decision was unanimous (Justice Stevens and Justice

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implementing legislation for this aspect of the executive branch's actions, and the Court found that existing legislative authorization for presidential emergency action, under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702(a)(1) (2000), did not go so far. *Dames & Moore*, 453 U.S. at 677.

58. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).
59. See Prakash & Ramsey, *supra* note 42, at 254-55 ("[T]raditional executive power did not include the power to enact foreign affairs legislation.").
60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (setting forth the proposition that the executive power does not include a unilateral power to make domestic law).
61. President Reagan ratified President Carter's actions. The Reagan Administration issued the Treasury Department regulations extinguishing private causes of action in U.S. courts, implementing the executive agreement. See *Dames & Moore*, 453 U.S. at 666.

Powell each wrote brief separate opinions),<sup>62</sup> but the decision's precedential weight is, perhaps, limited by the seeming necessity that the Court reach the result it did.<sup>63</sup>

*American Insurance Ass'n v. Garamendi*,<sup>64</sup> decided by a narrow 5-4 majority in 2003, is likewise a deviation from this understanding of executive agreements. In *Garamendi*, the Court found that the "National Government's conduct of foreign relations"<sup>65</sup> impliedly preempted state law inconsistent with such federal conduct—even where such federal foreign policy conduct was not reflected in law in the form of a treaty or statute. In principle, an executive agreement, though not enacted as Article VI law of the United States, nonetheless could have operative legal effect to preempt state law.<sup>66</sup> But this is clearly wrong in principle: the President, acting alone, may not enter into international agreements that have binding U.S. domestic legal effect without thereby rendering superfluous both Article II's treaty-making provisions and Article I's provisions for enacting statutes. Indeed, *Garamendi* does this absurdity one better, finding that there need not be an "executive agreement" at all, but merely an executive branch policy or practice, or mere discussions or negotiations involving foreign nations. Not only could the existence of an executive agreement preempt state law, but the *nonexistence* of an executive agreement apparently could do so, too.

At issue in *Garamendi* was a California law, the Holocaust Victim Insurance Relief Act of 1999,<sup>67</sup> requiring insurance companies doing business in California to disclose information about policies they wrote in Europe between 1920 and 1945—so that all could see who may have paid claims to the Nazis or

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62. *Id.* at 690 (Stevens, J., concurring in part) (joining the Court's opinion in the main, but declining to join the Court's "takings" discussion); *id.* (Powell, J., concurring in part and dissenting in part) (joining the Court's opinion on most points, but dissenting from the takings discussion).

63. The Court very nearly said as much. The Court first stressed that "the expeditious treatment of the issues involved . . . makes us acutely aware of the necessity to rest decision on the narrowest possible ground capable of deciding the case." *Id.* at 660 (majority opinion). The Court then warned against reading its decision as attempting to set forth generally applicable principles readily transferable to other situations: "We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Id.* at 661.

64. 539 U.S. 396 (2003).

65. *Id.* at 401 (emphasis added).

66. *Id.* at 416 ("Generally, then, valid executive agreements are fit to preempt state law, just as treaties are . . .").

67. Holocaust Victim Insurance Relief Act of 1999, CAL INS. CODE §§ 13800-13807 (West 2005 & Supp. 2009).

failed to pay survivors of Holocaust victims. The federal government had taken steps to resolve Holocaust-era insurance claims with foreign nations through diplomacy, but had neither produced executive agreements nor formally disapproved of state laws like California's. This was still sufficient to find federal-law preemption, according to the Court. As the majority put it, "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."<sup>68</sup>

This is preemption on stilts. One might call it "dormant kid-glove preemption." The logical implication of the *Garamendi* approach is that the President may preempt state law simply by announcing that it conflicts with his foreign policy, or that it might. The most sensible argument for this position is that the grant of general foreign policy power (and specific treaty-making power) to the President automatically preempts any state enactments that might affect foreign affairs in any way. While such an implied "field preemption" claim is not altogether implausible, it is still a rather extreme position. The implication is difficult to square with the text of the Constitution. The existence of the specific treaty-making provision of Article II with its two-thirds Senate majority consent requirement, coupled with Article VI's specific designation of treaties and enacted statutes as supreme law that preempts contrary state law, cuts against the field preemption view that an unexercised "dormant" foreign policy power preempts the field. But at least such a theory would not require the truly antitextual conclusion that the President may *enact* federal law on his own, by his foreign policy actions or pronouncements.

The Bush Administration apparently thought this the correct understanding of *Garamendi*, and acted on that view in a notable matter that came before the Supreme Court shortly after *Garamendi* had been decided, involving application of the Vienna Convention on Consular Relations to U.S. state criminal felony prosecutions. After *Garamendi*, one may well forgive the Administration of President George W. Bush for thinking that it could simply declare a foreign policy view and thereby preempt inconsistent state law—for that is, after all, what *Garamendi* essentially holds, or at least very strongly suggests. But the course of subsequent Supreme Court decisions on the Vienna Convention issue, culminating in *Medellín v. Texas*, suggests that the Roberts Court might be starting on the road back to a more textually defensible position.

The *Medellín* legal saga is an interesting one, highly instructive on the dual questions of the force of international law as a matter of United States law and

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68. 539 U.S. at 427.

the power authoritatively to interpret international law for the United States. The facts are set forth in detail in the Court's three opinions concerning the Vienna Convention treaty's application in the United States,<sup>69</sup> but can be summarized briefly. José Medellín is a Mexican national who participated in a 1993 gang rape and murder of two girls in Houston, Texas: Jennifer Ertman, age fourteen, and Elizabeth Pena, age sixteen. Medellín personally strangled at least one of the two girls with her own shoelace. Medellín was caught, given *Miranda* warnings, confessed, and was convicted of capital murder.<sup>70</sup>

But Houston police officers never told Medellín about his "consular rights" under the Vienna Convention on Consular Relations, a treaty to which the United States is a party. The Vienna Convention provides that if a person is arrested in a foreign country, he or she is to be informed of the right to notify, and request the assistance of the consul of, his home nation.<sup>71</sup> Medellín first raised the Vienna Convention question in post-conviction proceedings in Texas state court. The Texas courts found that the issue was waived by procedural default and that, in any event, the nonnotification of his consular rights did not affect the validity of his conviction. Medellín then sought federal habeas corpus relief.<sup>72</sup>

While Medellín's case was winding its way through the federal courts, the ICJ ruled in a case submitted to its jurisdiction, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*,<sup>73</sup> that the United States had violated the Vienna Convention and must provide a means of its choosing for reconsideration of convictions and sentences to determine whether the violations had prejudiced the defendants in their criminal cases. Medellín was one of the "other Mexican nationals" party to the *Avena* case. The ICJ decision in *Avena* "indicated that such review was required without regard to state procedural default rules,"<sup>74</sup> but the lower federal courts continued to deny habeas relief. The U.S. Supreme Court granted certiorari to decide whether the ICJ's decision was binding on the United States or, in the alternative, should be recognized as a matter of comity.

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69. *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellín v. Dretke (Medellín I)*, 544 U.S. 660 (2005) (per curiam).

70. *Medellín II*, 128 S. Ct. at 1354.

71. Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

72. *Medellín II*, 128 S. Ct. at 1354-55.

73. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

74. *Medellín II*, 128 S. Ct. at 1355.

Now, the Bush Administration almost certainly believed—correctly in my view, as set forth above—that international law decisions and general norms interpreting international law are, as a matter of U.S. constitutional law, not legally binding on the United States, even when the international law being interpreted and applied is a treaty to which the United States is a party, and part of the “Law of the Land” recognized by Article VI of the U.S. Constitution. Treaties are part of U.S. law, but the *interpretation* of treaty-law obligations is for the U.S. executive as an aspect of the foreign affairs power and, in an appropriate case, for U.S. courts.

But there’s the rub: the power of treaty interpretation, like interpretation of laws more generally, cannot readily be said to be an *exclusive* executive power; it is at best a power shared with the U.S. judiciary. There certainly could be no guarantee that the Supreme Court might not hold, as a matter of *its* independent interpretation of the treaty, that the ICJ’s decision was binding on the United States as a matter of U.S. law. The Administration likely viewed the prospect of such an adverse decision as a potential constitutional, practical, and political disaster. Given the composition of the Court in 2005, and the recent decisions adverse to the President’s position in the high-profile cases of *Hamdi v. Rumsfeld*<sup>75</sup> and *Rasul v. Bush*,<sup>76</sup> the Administration—counting noses on the Court—probably had reason to be concerned about this prospect. Rather than risk an adverse decision, President Bush announced that the Administration would, as a matter of the executive’s foreign policy determination—not as a matter of international law or treaty obligation—direct state court compliance with the ICJ decision in *Avena*, in the particular cases of the Mexican nationals who were parties in the ICJ proceedings (which would include Medellín). The President thus *ordered* state courts to reconsider their decisions in these cases, *as a matter of U.S. foreign policy*. Put another way, President Bush invoked his “*Garamendi* power” to preempt state law.<sup>77</sup> (President Bush further announced

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75. 542 U.S. 507 (2004).

76. 542 U.S. 466 (2004).

77. The President’s Memorandum to the Attorney General provided as follows:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in *Case Concerning Avena and the Other Mexican Nationals (Mexico v. United States of America)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Petition for Writ of Certiorari app. 187a, *Medellín II*, 128 S. Ct. 1346 (No. 06-984).

that the United States was withdrawing, prospectively, the United States's consent to ICJ jurisdiction in such matters—arguably, an example of presidential exercise of the power of (limited) treaty-termination.<sup>78</sup>)

The Supreme Court had granted certiorari, but had not yet heard oral argument in *Medellín v. Dretke* (*Medellín I*). In light of the President's actions, the Court dismissed the writ as improvidently granted,<sup>79</sup> leaving the matter to a second round in the Texas state courts, who (politely) refused to comply with the President's directive, finding that neither *Avena* nor the President's Memorandum was "binding federal law" that could displace state law limitations on filing successive habeas petitions.<sup>80</sup>

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Note that the President's Memorandum rests his action not on any binding character of the *Avena* decision, but on his own U.S. domestic law constitutional authority. He refers to the United States's "international obligations" under the *Avena* decision, but rests the authority to give effect to such obligations on his U.S. constitutional power. The Memorandum further directs state courts to "give effect" to the *Avena* decision not as binding law but in accordance with "general principles of comity." The President's directive is also carefully limited so as not to require such state court comity consideration in any instances other than those of the specific parties in *Avena*.

78. *Id.* at 1354.

79. *Medellín v. Dretke* (*Medellín I*), 544 U.S. 660, 667 (2005) (per curiam).

80. *Ex parte Medellín*, 223 S.W.3d 315, 352 (Tex. Crim. App. 2006). The state courts' actions raise an interesting side issue: does international law bind *state* government actors? The short answer is that *U.S. federal law* binds states, under the Supreme Law and Oath Clauses of Article VI, and the supreme law of the land includes all legally valid treaties of the United States. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) ("Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause . . ."). But treaties bind state courts (and elected officials) because they are *U.S. law*, not because they are international law. In principle, international law not enacted by treaty or statute as *U.S. law* is no more binding on state officials than on federal officials.

The somewhat longer answer is that the force of federal executive branch *interpretations* of *U.S. treaty obligations* is a more difficult question, turning on whether executive branch treaty interpretations are considered authoritative and binding generally as to the meaning of treaties as a matter of *U.S. law*. The view I have expressed here is that the President has the power authoritatively to interpret treaties (and other international law) for purposes of exercising his Article II executive power over foreign affairs, but that does not make his interpretations binding on other *U.S. actors* as a matter of domestic *U.S. law*. (Similarly, the President may not repeal the *U.S. domestic law status* of a ratified treaty.) President Bush's memorandum with respect to *Avena* did not even claim the status of a presidential interpretation of the underlying treaty, but merely represented his foreign policy judgment that the *Avena* judgments should be followed as a matter of domestic law, even if *not binding* as a matter of *U.S. law*. From a constitutional standpoint, President Bush's directive raised the question not of whether states are bound by international law, but whether they are bound, as a matter of domestic law, by presidential orders based on his foreign policy judgments not enacted into *U.S. law* by treaty or statute—a "*Garamendi* power" issue of dormant presidential foreign policy preemption and prescription of state action.

A betting man might well have predicted that the Supreme Court would reverse the Texas courts on the basis of *Garamendi*. But certain things had changed between 2005 and 2008. First, Judge John Roberts had become Chief Justice, replacing Chief Justice William Rehnquist. Second, Judge Samuel Alito had become an Associate Justice, replacing Justice Sandra Day O'Connor. And with the change in personnel had come a new intervening decision of the Court in *Sanchez-Llamas v. Oregon*, presenting the somewhat easier question of whether a violation of the Vienna Convention requires as a remedy a domestic exclusionary rule for subsequently obtained confessions.<sup>81</sup> The Court, in an opinion by Chief Justice Roberts, assuming *arguendo* that the Convention created judicially enforceable rights, found that the Convention itself did not require such a remedy and, in any event, did not bar state procedural default rules with respect to Vienna Convention claims.<sup>82</sup>

The latter point provided a new occasion for the Supreme Court to consider whether the ICJ's contrary view in *Avena*—that the Vienna Convention *does* oust a jurisdiction's procedural default rules—was binding in the United States. Before *Avena* had been decided, the Supreme Court had held that state procedural defaults did *not* violate the Vienna Convention, in *Breard v. Greene*.<sup>83</sup> Thus, the Supreme Court in *Breard* had interpreted an international treaty of the United States one way; the ICJ in *Avena* had interpreted it a different way, in a matter in which the United States had submitted to the ICJ's jurisdiction and had agreed (in another treaty, the U.N. Charter) to accept the ICJ's judgments. Which view should now prevail in U.S. courts?

The Court in *Sanchez-Llamas* held, significantly, that U.S. courts are not bound by international bodies' interpretations of treaties to which the U.S. is a party. Chief Justice Roberts's opinion of the Court rested this conclusion, correctly, on U.S. domestic constitutional law:

Under our Constitution, “[t]he judicial Power of the United States” is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” That “judicial Power . . . extend[s] to . . . Treaties.” And, as Chief Justice Marshall famously explained, that judicial power includes the duty “to say what the law is.” *If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law* “is

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81. 548 U.S. 331.

82. *Id.* at 346-59.

83. 523 U.S. 371, 375 (1998).

*emphatically the province and duty of the judicial department,” headed by the “one supreme Court” established by the Constitution.*<sup>84</sup>

This is a forthright, unabashed declaration of U.S. legal supremacy in interpretation of U.S. law, including treaties to which the United States is a party. Chief Justice Roberts’s opinion quickly went on to argue, in addition, that “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”<sup>85</sup> While each member of the United Nations had agreed to comply with specific judgments of the ICJ in which they were a party, such judgments were case-specific results, more like arbitration decisions than declarations of law. Moreover, the contemplated enforcement mechanism was international political pressure, not domestic judicial obligation. Thus, it was not as if the ICJ’s judgment purported to have domestic U.S. legal effect, even as a matter of international law. But the Chief Justice’s lead point remained unqualified: as a matter of U.S. constitutional law, international bodies’ interpretations of treaties (or other international law) cannot determine the decisions of Article III courts of the United States.

I will return to this point in Part II, concerning the U.S. constitutional power to interpret international law, as a general set of propositions.<sup>86</sup> *Sanchez-Llamas* and *Medellín v. Texas (Medellín II)* stand for the proposition that the constitutional power to interpret international treaties to which the United States is a party is a domestic U.S. constitutional power to be exercised by U.S. constitutional actors (including the federal courts), and that such a power can never be deemed ceded to non-U.S. actors or institutions.

To return to the *Medellín* narrative, *Sanchez-Llamas* is also a significant link in the chain of reasoning rejecting the President’s claimed power to transform nontreaty foreign policy determinations and actions into binding U.S. law. President Bush, as *Medellín I* was pending, had decided that U.S. policy would be to honor the *Avena* judgments in a case-specific manner and directed state courts to reconsider their judgments. In *Medellín II*, the Supreme Court held, again rightly (and again in an opinion by Chief Justice Roberts), that the President could not leverage his foreign policy power so as to make U.S. domestic law in such fashion. The Court first rejected *Medellín*’s argument

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84. *Sanchez-Llamas*, 548 U.S. at 353-54 (alterations in original) (emphasis added) (citations omitted) (quoting U.S. CONST. art. III, § 1; *id.* § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 777 (1803)).

85. *Id.* at 354 (footnote omitted).

86. See *infra* Part II.

that the *Avena* decision was binding on U.S. courts, following reasoning similar to *Sanchez-Llamas*.<sup>87</sup> While *Avena* might well create “an international law obligation on the part of the United States,”<sup>88</sup> it did not follow that it created “binding federal law enforceable in United States courts.”<sup>89</sup> The question of the “domestic legal effect” of the *Avena* judgment was quite a different one, the Court said, and the answer was that the treaty was more properly interpreted (by U.S. courts, of course) as not having such a self-executing, binding effect.<sup>90</sup> Along the way to deciding that first issue, the Court noted that treaties and international agreements could only be made, and only had legal force when made, in accordance with the processes specified in Article I and Article II:

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it.<sup>91</sup>

The Court concluded that, while it was of course possible that an international treaty obligation could, where made through these processes, create binding and conceivably even judicially enforceable U.S. domestic law obligations, “the particular treaty obligations on which Medellín relies do not of their own force create domestic law.”<sup>92</sup>

But if a non-self-executing *treaty* does not of its own force create domestic legal obligations, how is it possible that an *executive agreement* or *executive foreign policy judgment* could do so? That is the question that the Court in *Medellín v. Texas* considered next. The issue was whether President Bush could “unilaterally create federal law” by giving effect to an international body’s judgment that did not (and could not) itself create federal law.<sup>93</sup>

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87. *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1356 (2008).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1362 (citations omitted).

92. *Id.* at 1365.

93. *Id.* at 1367 n.13.

The Administration argued that the President possessed authority “to establish binding rules of decision that preempt contrary state law.”<sup>94</sup> That proposition, of course, follows from *Dames & Moore* and *Garamendi*, and the Administration’s brief was liberally sprinkled with supporting citations to those cases. Indeed, the Administration equated the President’s actions in directing that domestic legal effect be given to the ICJ judgments to the making of an executive agreement.<sup>95</sup> The Supreme Court rightly rejected that argument, and in so doing may have started down the road away from the unsound reasoning of *Dames & Moore* and *Garamendi*:

The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. . . . Once a treaty is ratified without provisions clearly according it domestic effect . . . whether the treaty will ever have such effect is governed by the fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.” . . . [T]he terms of a non-self-executing treaty can become domestic law only in the same way as any other law – through passage of legislation by both Houses of Congress, combined with either the President’s signature or a congressional override of a Presidential veto.

. . . .

. . . . As Madison explained in *The Federalist* No. 47, under our constitutional system of checks and balances, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law.” That would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty.<sup>96</sup>

True enough, but that would *also* seem “an apt description of the asserted executive authority” to create domestic law rights and obligations on the basis

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94. *Id.* at 1368 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Medellín II*, 128 S. Ct. 1346 (No. 06-984)).

95. *See id.*; *see also* Brief for the United States as Amicus Curiae Supporting Respondent at 45, *Medellín v. Dretke (Medellín I)*, 544 U.S. 660 (2005) (No. 04-5928) (making a similar claim).

96. *Medellín II*, 128 S. Ct. at 1368-70 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006); *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961)).

of purely executive agreements – exactly as was the case in *Dames & Moore*. Just as clearly, it is an apt description of the proposition that generalized executive foreign policy “conduct” has the domestic law effect of preempting state law, as the Court concluded in *Garamendi*. Simply put, the reasoning of *Medellín v. Texas* refutes the false claims of *Dames & Moore* and *Garamendi*. If the President may not unilaterally make a non-self-executing treaty into a binding U.S. domestic law obligation, he surely may not unilaterally make an executive agreement into a binding U.S. domestic law obligation. In one case as in the other, the very nature of the agreement entered into not only refutes the notion that the President can exercise such unilateral power, but “also implicitly prohibits him from doing so.”<sup>97</sup> The President’s constitutional power to formulate and conduct U.S. foreign affairs, while it may create international law obligations as a matter of the legal regime of international law, is not a power to create U.S. domestic law. Period.<sup>98</sup>

But the most fundamental point—the mutability of executive agreements under U.S. law—remains, however one decides the question of whether such agreements properly have any U.S. domestic law status in the first place. Thus, even if one were to concede that executive agreements or other unilateral executive foreign policy actions could establish binding rules of decision as a matter of domestic law, it remains clear that such rules could always be undone. Whatever the status of such agreements as a matter of international law, executive agreements can be *unmade at will* by the executive or superseded by contrary legislation, and can never trump any power or right assigned by the Constitution. Executive agreements are international “law,” under the U.S. legal regime, only in the most disposable sense of the term.

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97. *Id.* at 1369.

98. In classic early Roberts Court fashion, Chief Justice Roberts’s opinion for the Court in *Medellín II* distinguished *Dames & Moore* and *Garamendi* as not quite apposite, rather than overruling them. The opinion noted that nothing in *Dames & Moore* or *Garamendi* (or in *Belmont v. United States*, 301 U.S. 324 (1937), or *United States v. Pink*, 315 U.S. 203 (1942)), pertaining to claims-settlement agreements required a different result. Without quite embracing those cases (“They are *based on the view that*” longstanding such practice raises a presumption of congressional consent, *Medellín II*, 128 S. Ct. at 1371 (emphasis added)), the opinion consigned them to a small corner: “The Executive’s narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.” *Id.* at 1372. Quite so. But in principle the constitutional rule that the President cannot alone make domestic law cannot be so narrowly and strictly limited, and this suggests that the *Dames & Moore-Garamendi* power should not merely be thought “strictly limited” but should be repudiated entirely.

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C. “Customary International Law”

The third type of international law, what is (customarily) referred to as customary international law, is the foggiest type of all. It refers to the norms and practices of nations, apart from treaties or other written agreements. Within the regime of international law, it is “law” inferred from “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>99</sup> It is, in effect, a body of unwritten international “common law” principles. As such, the system of international law regards it as just as binding as treaties or other written conventions.<sup>100</sup> Before so much of international law became treaty-fied in the late nineteenth and twentieth centuries, such customary international law, referred to at the time of the Framing of the Constitution as the Law of Nations,<sup>101</sup> was the dominant form of international law. Indeed, it would not be far wrong to refer to international law, at the time of the Framing of the Constitution, as largely consisting of principles of *natural law*, applicable to the conduct of nations (and their citizens) toward each other on the international plane. What we today call customary international law was, originally, a body of principles of just, proper, and proportionate conduct—right conduct—deduced from general principles of natural justice.

What is the force of customary international law as a constraint on the United States, as a matter of U.S. constitutional law? The short answer is that customary international “norms,” not embodied in treaties to which the United States is a party, are not part of the Article VI “supreme Law of the Land” of the United States *at all*.<sup>102</sup> Such norms are not “law” made in accordance with U.S. constitutional processes, as specified in Article I (legislation), Article II (treaties), or Article V (constitutional amendments)—the three processes set forth in the Constitution for the making of the three types of federal law. Accordingly, customary international law is not binding in any form on the President’s conduct of foreign affairs or on the exercise of any of his constitutional powers (including the Commander-in-Chief power to conduct

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99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

100. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, at xxiii-xxiv (2003) (“Treaties and customary international law have essentially equal weight under international law.”).

101. For discussion of the importance of the Law of Nations Clause of the Constitution, U.S. CONST. art. I, § 8, cl. 10, as a source of sweeping domestic U.S. legislative power, see *infra* notes 121-124 and accompanying text.

102. U.S. CONST. art. VI, cl. 2.

war).<sup>103</sup> The same holds true for Congress and the courts: customary international law is not in any constitutional way a binding constraint on the exercise by Congress of any of its constitutional legislative powers, nor does it validly supply a *binding* federal legal rule of decision in U.S. courts that ever prevails over other law.

That is not to say that customary international law is utterly irrelevant. To the contrary, such customary norms are a kind of international common law that the United States *may* choose to follow and apply as a matter of our foreign relations policies or practices (as the President determines), as a predicate and informative source for the exercise of Congress's enumerated legislative power to "define and punish . . . Offences against the Law of Nations,"<sup>104</sup> and as a source of common law norms for the exercise of the admiralty jurisdiction of federal courts (in the absence of contrary treaty or statutory law).<sup>105</sup> As I discuss below, the presence of international law norms can furnish the basis for the exercise of U.S. constitutional powers, in the exercise of policymakers' policy discretion and judgment. Customary international law is properly "part of our law"<sup>106</sup> in the sense that principles of natural international law, customary and well-accepted international practice, and the evolving norms of the international community may inform and justify the exercise of several U.S. government constitutional powers.

But as a matter of U.S. law, such international law *never* prevails over contrary enacted U.S. law or the otherwise-legitimate exercise of a constitutional power possessed by any of the branches of the U.S. government. Customary international law is simply not, and cannot be, *binding* on the United States as a matter of U.S. constitutional law, because it is not part of the binding "law" identified in Article VI and is not made exclusively by U.S.

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103. The customary common law of war at the time of the adoption of the Constitution may also provide interpretive guidance concerning the original understanding of the scope of action embraced by the Commander-in-Chief Clause and constitutional military powers of the President. See, e.g., Paulsen, *The Emancipation Proclamation*, *supra* note 37. For extensive elaboration, see *infra* Sections II.B., III.B.

104. U.S. CONST. art. I, § 8, cl. 10.

105. For a concise explanation of the notion that the Constitution's grant of admiralty jurisdiction is an unusual instance in which the grant of jurisdiction has been understood to entail the power of courts to develop and apply a body of general maritime law, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., concurring in part and concurring in the judgment).

106. I borrow here the familiar phrase from the case *The Paquete Habana*, 175 U.S. 677 (1900). See *infra* notes 108-110.

constitutional actors in accordance with U.S. constitutional processes laid out in Articles I, II, and V.<sup>107</sup>

There of course has been occasional loose language in Supreme Court opinions suggesting the contrary. But such statements by the Court are either best read narrowly, so as to save the Court from the embarrassment of contradicting the Constitution, or rejected outright (so as not to spare the Court such embarrassment). In the construe-to-avoid category, one may place, with only a little charity, the well-known case of *The Paquete Habana*.<sup>108</sup> The case is best understood as a simple prize case in admiralty, applying common law admiralty principles in the absence of any contrary law. In the course of applying such principles, the Court remarked,

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.<sup>109</sup>

Far from being a general charter of customary international law as United States law, *The Paquete Habana* notes (fairly innocuously) that customary international law can provide a common law rule of decision in prize cases, and that such a rule can be trumped by any other federal law rule of decision or by contrary action of any branch of the national government.<sup>110</sup>

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107. There is much recent literature on this subject. For two excellent and thorough treatments of the question of the domestic law effect of customary international law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); and Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

108. 175 U.S. 677.

109. *Id.* at 700.

110. Whether customary international law might ever prevail over inconsistent *state* law depends on the correct interpretation of 28 U.S.C. § 1652, commonly known as the Rules of Decision Act (of *Swift v. Tyson* and *Erie Railroad Co. v. Tompkins* fame): "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2000).

The equally familiar, traditional interpretive canon known as the *Charming Betsy* canon (after the case of *Murray v. Schooner Charming Betsy*) posits that federal law should not be construed in such manner as to conflict with the customary law of nations “if any other possible construction remains.”<sup>111</sup> The *Charming Betsy* canon shares the problems with all interpretive canons that place a thumb on the interpretive scale in a particular policy direction. Like the construe-to-avoid canon with respect to potential conflicts of a federal statute with the Constitution, the *Charming Betsy* interpretive-push canon tends in its application to be either superfluous—adding an unnecessary and somewhat misleading and confusing layer to the analysis—or simply wrong. If the otherwise-correct interpretation of federal law does not in fact conflict with other law, then the construe-to-avoid canon is pure makeweight or hyperdecision-avoidance, a species of what might be called “activist judicial restraint.” If the otherwise-correct interpretation of federal law *does* in fact lead to a conflict, the conflict must be resolved. In such event, it is better for the conflict to be resolved forthrightly—the Constitution trumps a conflicting statutory command, rendering the statute unconstitutional—than through indirection (that is, construing the statute to mean what it does not say).

For the *Charming Betsy* canon, there is a further problem. The rule it suggests for reconciling a conflict between federal law and customary international law differs from—indeed, is the opposite of—the rule for reconciling a conflict between a federal statute (or treaty) and the Constitution. Customary international law, unlike the Constitution, does *not* prevail over contrary federal law. Thus, the interpretive push, if any, is always in an unnecessary, or else incorrect, direction. If the otherwise-correct interpretation of federal law does not conflict with customary international law, *Charming Betsy* is an unnecessary fire drill. And if the otherwise-correct interpretation of federal law *does* conflict with customary international law, the otherwise-correct interpretation of federal law should prevail. In such event, the *Charming Betsy* canon always pushes the interpretation the wrong way.

Nevertheless, the essential point is simply this: even under the strongest reading of the force of customary international law, it may always be displaced (just as treaties and executive agreements always may be displaced, only all the more clearly so) by any official action within the constitutional powers of the federal government. The opinion in *The Paquete Habana* is explicit on the point, and the Supreme Court has never suggested anything to the contrary. It follows that customary international law is likewise never a meaningful,

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111. 6 U.S. (2 Cranch) 64, 118 (1804); *see also* *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (employing a similar principle).

binding *legal* constraint on the international conduct of the United States. Customary international law is *not* part of United States law that in any serious way limits the actions of Congress, the President, or the federal courts.

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To summarize the argument so far: the Constitution mandates as a matter of U.S. domestic law the supremacy of the Constitution over international law in all respects. No norm, rule, principle, or command of the legal regime of “international law” in conflict with the Constitution’s vesting of U.S. powers or recognition of individual or group rights can be given effect, as a matter of U.S. law. And even where international law is not in conflict with the Constitution, but actually embraced within the Constitution’s terms, the Constitution’s provisions maintain the supremacy of U.S. law over international law. The Constitution’s assignment of powers makes every aspect of international law subject to being overridden by Congress, the President, or the courts.

The force of international law is thus largely an illusion. Once the fog has lifted, international law as it concerns the United States—treaties of the United States, executive agreements, customary international law norms and practices—can be seen as largely a matter of international politics and policy, not binding “law,” at least not in the sense in which law is usually understood. It is international relations or international politics dressed up as law. It may be highly relevant in that sense—that is, as a rhetorical, political trope—but it is essentially irrelevant as law. To misquote Clausewitz once again, international law is simply the continuation of international politics by other means.

## II. THE POWER TO SAY WHAT INTERNATIONAL LAW IS (FOR THE UNITED STATES)

What, then, of international bodies’ *interpretations* of international law, including international treaties to which the United States is party—such as the U.N. Charter, the Geneva Conventions, and the Convention Against Torture? Are international bodies’ (like the International Court of Justice’s) interpretations of these international treaties binding on the United States?

It follows from what has already been discussed that the answer must be *no*. As a matter of U.S. constitutional law, the interpretation of U.S. law, including U.S. treaties, cannot be authoritatively or finally vested in non-U.S. authorities. Such persons or bodies possess no part of the Constitution’s

authority. They are not officers of the government of the United States, within the meaning of that term as used in the Constitution.<sup>112</sup> They are certainly not Article III judges. Their decisions may not *govern* the United States. Nor may U.S. government actors cede their constitutional powers to such persons or entities. U.S. officials of course may *consider* what international organizations or courts have to say about America's international obligations. And surely the President may contract (by treaty or by executive agreement) with other nations to agree to submit certain disputes to resolution by international or neutral authorities, and thereby create international and moral obligations. But no such agreement literally may dictate or control the actions of U.S. government authorities. It follows that no decision of an international tribunal or court may be self-executing—binding on U.S. executive, legislative, or judicial authorities—consistently with the Constitution, unless U.S. law (self-executing treaty or statute) both makes it so and makes it so in a fashion permitted by the U.S. Constitution.<sup>113</sup>

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112. Article I, Article II, and Article III vest the legislative, executive, and judicial powers of the United States, respectively, in persons for whom specific U.S. citizenship, age, and residency requirements are a prerequisite, and in no other persons. The Appointments Clause of Article II of the Constitution prescribes in fine detail the process by which persons may be appointed by the President to exercise national governmental authority under the Constitution, and when Congress may prescribe for the appointment of inferior "Officers." U.S. CONST. art. II, § 2, cl. 2; see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 76-77 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 88-89 (1998). Michael Dorf and, separately, Henry Monaghan, offer fine recent analyses of these questions from the standpoint of political accountability and Article III. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103 (2008); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).
113. May the United States, by self-executing treaty or by act of Congress, provide that certain judgments of international tribunals automatically become binding as a matter of U.S. law (subject, always, to repeal or modification by virtue of the exercise of U.S. constitutional powers, which cannot be delegated away)? As discussed below, the U.S. Supreme Court's decision in *Medellín* artfully elides this difficult issue, seemingly stating only that its opinion does not *foreclose* an affirmative answer (and saying that only in dictum) and always leaving *that* determination to U.S. government officials. The better view, I submit, is that the power to enter a judgment or determination that has the status of United States law is an exercise of U.S. government power that can only properly be exercised by U.S. government officials. A self-executing treaty or an act of Congress that purported to delegate such power to foreign persons or bodies would violate the Constitution's exclusive assignment of U.S.

Indeed, the proposition may be stated more generally: to whatever extent “international law” legitimately may be thought a part of United States law, the power to interpret, apply, and enforce such international law *for the United States* is a U.S. constitutional power vested in U.S. constitutional authorities. That power is not possessed by, and cannot authoritatively be exercised by, non-U.S. actors. The meaning and application of international law, for the United States, is governed by the U.S. Constitution, not by the regime of international law.

The holdings and opinions in *Sanchez-Llamas v. Oregon* and *Medellín v. Texas*, discussed in Part I above, strongly support these conclusions. As noted, in *Sanchez-Llamas*, the U.S. Supreme Court specifically rejected the argument, advanced in an amicus brief of self-styled “ICJ Experts,” that “the United States is *obligated* to comply with the [Vienna] Convention, *as interpreted by the ICJ*.”<sup>114</sup> The ICJ’s interpretations may deserve “respectful consideration,” but they do not control American courts’ interpretations. “Under our Constitution, ‘[t]he judicial Power of the United States’ is ‘vested in one supreme Court’” and lower U.S. courts, and that judicial power emphatically includes the authority “‘to say what the law is,’” so far as the United States is concerned.<sup>115</sup>

*Sanchez-Llamas* is a declaration of U.S. interpretive independence with respect to international treaties to which the United States is a party. And it is a declaration of *constitutional* independence. Under the Constitution, only American office-holders recognized or created by that document, exercising authority under it, and holding office in a manner prescribed therein, may exercise U.S. governmental power—including the power authoritatively to interpret and apply, as law of the United States, international treaties. No foreign nation or group of nations, international body, or “world” court can dictate to American decisionmakers with respect to the interpretation of such treaties, consistently with the U.S. Constitution.

*Medellín v. Texas* reaffirmed and extended *Sanchez-Llamas*. Not only are the ICJ’s interpretations of treaties not binding on the United States, its judgments are not binding either, unless the United States determines that its law says they are. The binding effect of an international tribunal’s judgment, for the United States, is a matter of U.S. law:

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governmental powers to Article I, Article II, and Article III constitutional actors. See Bradley, *supra* note 112; Chen, *supra* note 112; Ku, *supra* note 112; Yoo, *supra* note 112.

114. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006).

115. *Id.* at 353 (quoting U.S. CONST. art III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

A judgment is binding only if there is a rule of law that makes it so. And the question whether ICJ judgments can bind [U.S.] domestic courts depends upon the same analysis undertaken in *Sanchez-Llamas* and set forth above. . . . We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so. And whether the treaties underlying a judgment are self-executing so that the judgment is directly enforceable as domestic law in our courts is, of course, a matter for this Court to decide.<sup>116</sup>

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: "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments . . ." <sup>117</sup> But *Medellín's* double negative dictum does not actually *hold* the reverse of the proposition not denied; the Court does not say, quite—indeed, appears careful to avoid saying—that a treaty *could* do such a thing. At all events, the issue is "of course, a matter for this Court to decide"—an escape hatch that preserves the supremacy of U.S. law and U.S. interpretation of international obligations made a part of U.S. law, as against any claims to supranational supremacy of any foreign body or tribunal.<sup>118</sup>

*Sanchez-Llamas v. Oregon* and *Medellín v. Texas* thus stand for the proposition of U.S. legal supremacy in interpretation of U.S. law, including treaty law. International bodies' interpretations of international law are not binding on the United States. And what is true for the courts logically holds true for the other branches of the U.S. government: the ICJ's interpretations of U.S. treaties cannot constitutionally bind the President or Congress any more than they can bind the Supreme Court.

How, then, is the power to interpret international law allocated as among the three branches of the U.S. national government? Like the power to interpret and apply law generally, the power to interpret international law is not specifically vested by the text of the Constitution in any one branch of government, but arises as a necessary incident to the exercise by each branch of

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116. *Medellín v. Texas (Medellín II)*, 128 S. Ct. 1346, 1364-65 (2008).

117. *Id.*

118. *Id.* at 1365. As suggested above, were the Supreme Court to hold that international judgments made by non-U.S. actors may be accorded automatic U.S. domestic law effect, such a holding would be in conflict with the Appointments Clause and the Constitution's exclusive assignment of U.S. government power to U.S. actors. See *supra* note 113.

the specific (and general) powers granted them by the Constitution.<sup>119</sup> The interplay of this separated, shared U.S. constitutional power to interpret international law is a function of the Constitution's separation of powers generally. Each branch has specified areas of exclusive or predominant interpretive power—its own emphatic duty and province to say what the law is. Each branch possesses important checks on the exercise of this power by others. And each is likewise checked in its own exercise of such power by the other branches' powers.

*A. Congress's Power To Interpret and Apply International Law as Domestic U.S. Law*

Congress possesses the U.S. legislative power to say what international law is—to ascertain, interpret and literally even to *define* it; to reduce it to domestic, enforceable law—for the United States. Though international law does not of its own force bind the United States, it can furnish the basis and supply the justification for the exercise of broadly cast enumerated legislative powers that the Constitution vests in Congress.

Consider the three most obvious, important examples. First, Congress possesses the specific enumerated power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>120</sup> The Law of Nations Clause empowers Congress to choose to write certain principles or rules of international law into U.S. law, by exercising this legislative power. But *Congress* must define the “Offences”; the regime of international law may not dictate to Congress what those offenses may or must be.<sup>121</sup>

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119. It is not the case (contrary to some popular misunderstanding in this regard) that the power to interpret the law (including international law) is vested solely, or even finally, in the Supreme Court. For discussion and refutation of this common myth, see Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 23; and Paulsen, *The Most Dangerous Branch*, *supra* note 24. Rather, the power to interpret law is a shared and separated power, divided among the three branches, with no one branch granted supremacy over the others. *See id.* at 228 (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” (internal quotation marks omitted) (quoting THE FEDERALIST NO. 49, at 255 (James Madison) (Gary Wills ed., 1982))).

120. U.S. CONST. art. I, § 8, cl. 10.

121. The MCA is, in part, exactly such an exercise of congressional power. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28,

The Law of Nations Clause power is the basis for that part of the MCA that defines (and provides for the punishment of) offenses against the customary international law of war, which is part of the Law of Nations.<sup>122</sup> The Law of Nations Clause is also the constitutional basis for the Alien Tort Statute, adopted more than two centuries earlier, which provides for federal jurisdiction (at least) and arguably a substantive cause of action (or at least the Supreme Court has so held) for claims to damages for violation of customary international law.<sup>123</sup>

It is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may *define* what *it understands to be* a violation of “the Law of Nations” and use this judgment as the basis for legislative enactments. This is, potentially, an enormous substantive legislative power. Given international law’s fogginess and (in part) common law nature, Congress possesses in effect a common-law-making power to pass criminal laws concerning matters it decides are a violation of the Law of Nations. To the extent that the original, eighteenth-century meaning of the Law of Nations was understood to be general principles of *natural law* applicable to the conduct of nations (and their citizens) with respect to one another, Congress has the extraordinarily sweeping enumerated legislative power to enact federal laws defining and punishing what it fairly considers to be violations of *international natural law*.

And if, as argued above, “customary international law” is not itself U.S. law, and if neither the international law regime’s understanding nor that of any international body can control or dictate U.S. actors’ interpretations of international law for the United States, then it follows that Congress is not constrained in the exercise of its Law of Nations Clause legislative power by “customary” international understandings of customary international law.

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and 42 U.S.C.). In particular, see *id.* subch. VII, § 950, which is entitled “Punitive Matters” and defines offenses.

122. *See id.*

123. The Alien Tort Statute provides that federal 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.” 28 U.S.C. § 1350 (2000). In *Sosa v. Alvarez-Machain*, the Court found that this language created a substantive cause of action for *some* types of claims in violation of international law. 572 U.S. 692, 712 (2004) (“Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”). Whether that is a correct interpretation of the statute is highly doubtful. *See id.* at 744-51 (Scalia, J., concurring in part and concurring in the judgment). But that issue is collateral to my point here: Congress surely possessed *legislative power*, under the Law of Nations Clause, to pass a statute of the type the majority believed the Alien Tort Statute to be.

Congress's views can be broader, narrower, or simply different. Just as *M'Culloch v. Maryland* recognized, correctly, that the breadth of the Necessary and Proper Clause confers a broad sphere of judgment on Congress in the exercise of its legislative power,<sup>124</sup> so, too, the Law of Nations Clause confers on Congress a very broad range of interpretive judgment to say what international law *is*, and a corresponding national and international lawmaking power.

A second broad congressional power with respect to international law, in some respects overlapping with the Law of Nations Clause power, is the Senate's shared role in treaty-making and Congress's legislative power to implement treaty obligations as a matter of U.S. domestic law pursuant to the Necessary and Proper Clause. This is the familiar and controversial *Missouri v. Holland* legislative power.<sup>125</sup> The outstanding recent scholarship of Nicholas Rosenkranz has called into question this chestnut, which held (in Justice Holmes's classic, overly sweeping language) that treaties could confer upon Congress domestic legislative powers exceeding the Constitution's (other) specific grants of legislative power, and ousting state law and general federalism limitations.<sup>126</sup> The short answer to this long-running dispute is that, while a treaty may not create new constitutional powers or rights (or erase existing constitutional powers or constitutional rights), Congress may enact by statute, pursuant to the Necessary and Proper Clause, whatever domestic legal rules the President, acting together with the Senate, could have enacted by self-executing treaty. Whatever the outer bounds of such power, there is no denying that this is another significant legislative power to deploy international law—in the specific form of a treaty of the United States—as a basis for domestic legislative power.

A parallel power exists, of course, with respect to executive agreements—and, by implication, with respect to other exercises of the nation's foreign affairs power. If the power to make (nontreaty) international agreements is part of the President's constitutional power over foreign affairs, Congress possesses power, under the Necessary and Proper Clause, to legislate in support of the President's legitimate exercise of this constitutional power, including the power to make laws carrying it into execution and proscribing

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124. 17 U.S. (4 Wheat.) 316, 324-25 (1819). For a brief originalist defense of the broad understanding of this enumerated legislative power of Congress (and other powers), see Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008).

125. 252 U.S. 416 (1920).

126. *Id.*; see Rosenkranz, *supra* note 7.

interference with the President's constitutional foreign policy actions.<sup>127</sup> Thus, Congress surely could have enacted a *Dames & Moore*-like statute, implementing the Algiers Accords as a matter of domestic U.S. law. Indeed, the dubious aspect of the *Dames & Moore* reasoning, as discussed above, is the suggestion that Congress should be treated as having enacted a *Dames & Moore*-like statute simply by virtue of (1) the enactment of other tangentially related laws, (2) the general history of acquiescence by Congress in executive claim settlement, and (3) the failure to specifically *forbid* such a ("self-executing") executive agreement by the President.<sup>128</sup> Returning to an example from much earlier in the nation's history, Congress quite properly enacted legislation attaching domestic criminal law enforcement consequences to violations of President Washington's 1793 Neutrality Proclamation.<sup>129</sup>

If executive agreements, and even unilateral presidential neutrality proclamations, may form the basis for congressional enactments under the Necessary and Proper Clause, is there much left in the area of presidential foreign policy actions that Congress could not carry into execution through domestic legislation? Probably not. The examples illustrate the third, general legislative power with respect to international law (again overlapping the ones already noted): Congress possesses legislative power to pass laws it judges necessary and proper for carrying into execution the President's foreign affairs powers within the sphere of his powers. Thus, not merely executive agreements, but executive negotiations, executive proclamations, or even benign executive inaction, might validly form the basis for Congress's exercise of its legislative powers. *Garamendi* may be wrong on its own terms, but Congress possesses power to enact a "*Garamendi* statute" ousting in gross or in fine state laws that Congress judges to be interferences (or potential interferences) with the executive power of the President over foreign affairs.

Finally, recall first principles: nothing in international law trumps Congress's constitutional powers. Congress may consider—it may interpret, and choose to apply (or not apply)—international law in exercising its constitutional powers. But Congress's constitutional powers remain Congress's constitutional powers. Thus, while international law may purport to limit or prescribe how Congress's war (or other) powers are to be used, no such

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127. Congress's early statute prescribing criminal penalties for violation of President Washington's Neutrality Proclamation is a perfect illustration of this principle. See Neutrality Act of 1794, ch. 50, 1 Stat. 381; Prakash & Ramsey, *supra* note 42, at 328-34, 346-54.

128. See *supra* notes 57-62 and accompanying text.

129. See *Medellín v. Dretke* (*Medellín I*), 544 U.S. 660 (2005) (per curiam).

command ousts Congress's exercise of its independent judgment with respect to the exercise of those legislative powers.

Considered in combination, Congress has enormous power to interpret and enforce international law, as a matter of U.S. law. This does not make Congress the supreme expositor of the United States position on international law questions. That power is shared with other branches of the national government, especially the President, and the exercise of those powers frequently may clash, posing sometimes difficult questions of where one power leaves off and another begins (or of how to reconcile conflicts in cases where Congress and the President arguably possess concurrent constitutional power). But within the scope of Congress's province to enact statutes, and subject to the limitations created by other branches' overlapping or superior powers, this much remains true: it is emphatically the duty and province of Congress to say what international law is, or will be, for the United States.

### *B. The President's Power To Interpret and Enforce International Law*

The President possesses U.S. *executive* power to interpret and apply international law as it concerns the nation's external relations and its exercise of military force. If the Constitution's grant of "the executive Power" is rightly understood as embracing the power to determine and direct the content of the United States's policies with respect to relations with other nations, this is truly an enormous sphere of constitutional power within which the President possesses authority to interpret the obligations of international law for the United States. If the Constitution's commissioning of the President as "Commander in Chief" of the nation's military force is rightly understood as embracing the traditional powers associated with the conduct of war, this too is an enormous sphere of constitutional power within which the President interprets the obligations of international law for the United States.

In addition to the power to make (and to interpret, terminate, or suspend) treaties and the power to enter into (and to interpret, terminate, or suspend) executive agreements, the President has the power faithfully to interpret international law as a body of general principles, not to *bind* him in the exercise of his powers over foreign affairs and as Commander in Chief, but as a resource upon which he may draw and a body of principles he may invoke, in support of his exercise of these powers. Put simply: the President has the largely discretionary power to adopt, interpret, and apply principles of international law, *as he thinks most proper*, as an aspect of the Article II "executive Power" with respect to foreign affairs and as an aspect of his powers as the military's Commander in Chief.

An important illustration of this is President George W. Bush's 2002 decision that, notwithstanding the fact that no treaty obligation or principle of customary international law *legally required* him to apply the principles of the Geneva Conventions to members of al Qaeda or the Taliban, his constitutional powers as Commander in Chief and over foreign affairs *authorized* him to do so, at his discretion.<sup>130</sup> The power to interpret international law legitimately supported the President's power to interpret or suspend U.S. treaties (the Geneva Conventions) in ways that denied their force as binding U.S. legal obligations. Yet, conversely, the President's constitutional power to interpret international law supported the President's power to draw upon general international law principles, even though such principles are not binding on U.S. discretion, as a source of authority for his actions to *extend* protection to captured persons and to *subject* such persons to American military justice for violation of international norms.<sup>131</sup> The President's power to interpret and apply international law, pursuant to his executive power in foreign affairs, and his military authority as Commander in Chief, thus could be used in part as a shield and in part as a sword."<sup>132</sup>

Both positions flow from the President's constitutional power to interpret international law for the United States in the conduct of foreign and military affairs. International law may not constitutionally prevail over U.S. constitutional powers; the Constitution is sovereign over the regime of international law, as a matter of U.S. domestic law. But international law principles may supply a basis for the exercise of U.S. constitutional powers, including the President's largely discretionary powers over U.S. foreign policy and the conduct of U.S. military operations.<sup>133</sup> International law may not

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130. See Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def. 25 (Jan. 9, 2002) [hereinafter Yoo-Delahunty Memorandum].

131. See *id.* at 38-39, 41. For more extended discussion, see *infra* Section III.C.

132. As discussed briefly below, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), held, as a matter of U.S. separation of powers, that the President lacked power to impose military justice solely as a matter of his independent constitutional power as Commander in Chief. While this holding was in my view clearly wrong as a matter of the original understanding of the President's constitutional war powers, Congress responded promptly, pursuant to its constitutional powers, to legislate strongly in support of the President's understanding, with the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.). See *infra* Section III.C.

133. For a discussion of the constitutional powers of the President as Commander in Chief, and their relationship to background norms embodied in the traditional, customary understanding of the (natural) law of war (including what might today be termed customary international law), see Paulsen, *The Emancipation Proclamation*, *supra* note 37.

dictate the President's foreign policy choices. But international law, as interpreted and applied by the President, may influence the President's judgments.

In at least two important respects the President's power to interpret and apply international law does *not* give him a valid claim to constitutional power. The first such limitation is a corollary of Congress's legislative powers to define and punish offenses against the law of nations and to pass domestic legislation necessary and proper for carrying into execution treaties and the general foreign affairs powers of the President: *the President possesses no legislative powers of his own*. Aside from the President's participation in the lawmaking process by virtue of his Article I, Section 7 veto power, his authority and duty to recommend measures to Congress's consideration, and his political power skillfully to persuade Congress to adopt his preferred policies, the President's executive powers refute (in *Youngstown Sheet & Tube's* famous words) the proposition the he is to be a legislator.<sup>134</sup> The President's power to interpret international law, as regards our external relations and military conduct, does not mean that he can make law.

Plainly, the constitutional powers of Congress and the President to interpret and apply international law for the United States intersect and overlap in important respects. And therein lies some of the most potent separation-of-powers controversies of the years of George W. Bush's presidency: Congress's legislative powers under the Law of Nations Clause and the Necessary and Proper Clause embrace the power to define substantive offenses for violations of Congress's understanding of international law principles and also to prescribe a domestic law offense for violating Congress's understanding of U.S. treaty law requirements. The President's general "executive Power" with respect to foreign affairs and his specific power as Commander in Chief embrace the power authoritatively to interpret international law for the United States in its foreign relations policies and practices generally and in connection with the waging of military hostilities in particular. What if Congress's interpretation of international law in its several forms, for purposes of exercising its legislative powers, differs from the President's interpretation of such international law for purposes of exercising his executive and Commander-in-Chief powers?<sup>135</sup>

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134. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1951) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). See generally Paulsen, *Youngstown Goes to War*, *supra* note 31, at 215-17 (commending *Youngstown* in vindicating this principle).

135. Congress also possesses the power "to make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, another power arguably in tension

The answer is the same as for any other question involving the separation (and arguable overlap) of powers between Congress and the President. The correct substantive legal resolution will often be a matter of dispute. Sometimes it will be possible to say that there is an objective right answer to a specific issue. Other times, there is no such clearly correct resolution; Congress and the President simply have to fight it out, each with the powers at its disposal to enforce its view. The question of how Congress's and the President's overlapping powers to interpret and apply international law are reconciled, or accommodated, becomes a function of the pull and tug of competing interpreters and often of political power, personalities, circumstances, and compromise.

As with other issues of division and allocation of constitutional power, the Constitution does not supply a rule of interpretive priority. As James Madison put it in *The Federalist No. 49*, "The several departments being perfectly coordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . ." <sup>136</sup> Not even the courts—to whose role I turn next—possess an interpretive supremacy or primacy in this regard (notwithstanding current judicial supremacist assumptions to the contrary). <sup>137</sup> If the Constitution's text does not supply, with sufficient clarity, either a rule of construction or priority as between competing empowerments, or a sufficiently clear resolution that harmonizes an apparent conflict by reading one or another power as narrower (or broader) than claimed, the default answer has to be that the Constitution leaves the issue up for political grabs—that is, it remains part of the intrinsic separation-of-powers game of competition between or among branches devised by the Framers' structure.

With respect to international law, the phenomenon is perhaps especially acute. International law itself tends to be more vague, indefinite, and indeterminate in important respects than domestic statutory law. It embraces,

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with the President's authority under the Commander-in-Chief Clause, and thus another source of tension between Congress and the President in these areas. See Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 828 ("Congress's powers to make rules governing land and naval forces, whatever their scope as a general proposition, do not extend into the President's province to wage and conduct war. The Commander-in-Chief power, where it applies, marks the boundaries of Congress's general regulatory powers under Article I."). For further discussion of the intersection and interaction of these powers, as applied to important contemporary issues, see *infra* Section III.B.

136. THE FEDERALIST NO. 49, at 255 (James Madison) (G. Wills ed., 1982).

137. For a detailed presentation of this position, see Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 23; Paulsen, *The Most Dangerous Branch*, *supra* note 24; and Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349–51 (1999).

in various forms, “norms,” “principles,” “customs,” and the “practices” of nations. Even international treaties—written texts—because of their subject matter, because of their embrace of such general terms and vague standards, and because of their international, negotiated, and often elliptical diplomatic language, may prove more indeterminate than purely domestic enactments. Finally, these relatively vaguer sources of law frequently provide, as a matter of U.S. domestic law, sources of general power for one or more branches, not direct rules governing primary conduct. It should not be altogether surprising, then, that the interaction of congressional and presidential powers with respect to the interpretation of international law should be unclear or indefinite—and susceptible more to political resolution than to single, bright-line authoritative constitutional rules.<sup>138</sup>

*C. The U.S. Judicial Power To Interpret International Law for the United States*

It is emphatically the (nonexclusive) province of the judiciary to say what international law is.<sup>139</sup> Those who apply a rule in particular cases must of necessity possess the authority to expound and interpret it. U.S. courts decide cases where international law rules or norms (or enactments derived from such rules or norms) potentially supply rules of decision for determining the rights of litigants in cases within their jurisdiction. In such cases, courts must expound and interpret international law, as well as its relationship with U.S. domestic law.

There is nothing especially unusual or peculiar about this. International law is simply a species of law that may be invoked by parties in cases before U.S. courts. In some situations it is written, enacted federal law—treaties, for example—that must be interpreted according to the usual conventions for interpreting authoritative written legal texts (accounting for any specialized interpretive principles that might apply to specialized types of written legal documents). In some situations it may (or may not—another and related interpretive question about international law) be a species of “federal common law.” And in some situations it may simply be non-U.S. “foreign” law that

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138. I will attempt to analyze some of the leading issues of the past several years involving the U.S. domestic constitutional law of international law. See *infra* Part III. In some cases, the Constitution supplies a relatively determinate answer in support of a particular resolution. In other instances, the Constitution’s answer is that the question remains open for disputed political resolution. (That in itself is an *answer* supplied by the Constitution, of a particular type. It is an answer that says that neither side fairly may contend that the other position is flatly forbidden by the Constitution.)

139. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

nonetheless might in certain circumstances form a rule of decision in a U.S. court case (just as, say, French law or Bolivian law, or Kentucky law, sometimes might supply a rule of decision in a case within the jurisdiction of a U.S. federal or state court). The *status* of such law in relation to other legal rules potentially applicable to a case (for example, rules supplied by the U.S. Constitution)—the topic of this Essay—is also properly a subject of judicial evaluation and decisionmaking. The fact that certain legal rules may derive from international law and consequently may have important implications for United States foreign or military policy does not, without more, remove such legal issues from U.S. judicial cognizance. Or (to put it more bluntly and colloquially), there is no “foreign affairs exception” to the power of American courts to decide questions of international law or of U.S. law that draw upon norms of international law. There is no requirement of dismissal, abstention, or even substantive interpretive deference to the political branches, with regard to such questions of law. They are matters of independent judicial interpretive power.

This is not to say the opposite—that U.S. courts possess interpretive *supremacy* over other branches of government with respect to such issues. They do not; any such claim would be inconsistent with the Constitution’s system of separation of powers and its genuine division of federal government interpretive power among three co-equal branches of the national government.<sup>140</sup> But the courts do possess full, co-equal, co-ordinate, independent interpretive authority, along with Congress and the President. And while courts surely may *consider* what other branches, in the exercise of *their* co-ordinate interpretive power, have said about international law, they are just as surely not bound by those views.<sup>141</sup> The courts have the power to say what international law is, in the context of a judicial case.

What about the “political question” doctrine? Is not this formulation of the judicial power to interpret international law inconsistent with the statements of the Supreme Court, from time to time, that certain issues connected with foreign policy or military decisions of the President or Congress are (sometimes) nonjusticiable political questions?

Indeed, the theories *are* in conflict with one another. But this says more about the myriad problems with the political question doctrine than it does

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140. See generally Paulsen, *The Most Dangerous Branch*, *supra* note 24, at 228-41 (setting forth textual, structural, and historical evidence that the Constitution does not grant interpretive supremacy to any one branch of the national government).

141. An exception is that actions of the political branches within their constitutional powers to interpret and apply international law trump, and displace, contrary *common law* determinations by the judiciary.

about the proposition that courts may interpret and apply international law. As I have argued before (and will now argue again), the political question doctrine makes precious little sense. It is two-thirds false advertising (its first two “prongs” are really disguised merits inquiries); and it is one-third an invented judicial discretion to decline to decide a case within its jurisdiction for ad hoc policy reasons of the Court’s own choosing.<sup>142</sup>

The political question doctrine as it pertains to issues of international law, foreign affairs, and war powers is an apt illustration of the doctrine’s deficiencies generally. The doctrine’s first inquiry is whether there exists a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>143</sup> If this means to imply that such a finding is anything other than a decision on the merits of the claimed exercise of constitutional power, it is false advertising. If resolution of an issue of foreign policy, war, or the application of international law is “textually committed” to Congress or the President, that does not mean the issue lies outside the judicial power. It means that the *correct exercise* of the judicial power is to hold that the Congress, or the President, possesses the constitutional authority to pursue the policy it thinks best on the matter in question. That is a constitutional merits holding, not a nonjusticiability holding, and it may apply to many such questions of international law and foreign affairs. But that does not mean the judiciary is disabled from ruling on such matters generally.

So too with the political question doctrine’s second branch, which asks whether there is a “lack of judicially discoverable and manageable standards”<sup>144</sup> for invalidating actions of Congress or the President concerning war and foreign affairs. This too is a merits question. If the Constitution supplies no rule or controlling standard that makes such political action unlawful, then, on the merits, the courts have no legitimate constitutional authority to interfere with such action. Again, it is not that the judicial power does not exist in such instances. Rather, it is simply that the *correct exercise* of the judicial power, on the merits, is to leave a political policy decision undisturbed if the Constitution fails to supply a rule invalidating it. It is false advertising to label this as holding that the issue is a “nonjusticiable” political question. It is a justiciable

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142. See Paulsen, *A General Theory of Article V*, *supra* note 53, at 713-718 (criticizing the political question doctrine as applied to the constitutional amendment process); Michael Stokes Paulsen, *Marbury’s Wrongness*, 20 CONST. COMMENT. 343, 351 (2003) (challenging the political question doctrine’s validity and doubting whether *Marbury* can fairly be understood to support it).

143. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

144. *Id.*

constitutional question with a right answer on the merits—that the political branches’ actions do not violate the Constitution.

This type of merits-in-disguise use of the doctrine may account for certain judicial decisions in the areas of war and foreign affairs that are cast in terms of political question rulings. *Goldwater v. Carter* is once again a good illustration.<sup>145</sup> A plurality of four Justices found the issue of treaty termination to be a nonjusticiable political question, essentially because it involved a matter of foreign affairs traditionally thought committed to executive, not judicial, determination and because the Constitution did not speak clearly to the issue, leaving the courts with no discernable and principled standards by which to reach a contrary adjudication.<sup>146</sup> But that view can be expressed in more straightforward fashion as a merits holding. The matter of treaty termination is “textually committed” to the President in the sense that it is (as I argue above) an aspect of the general “executive Power” over foreign affairs, not altered by the Senate advice-and-consent requirement for treaty-making. There is a “lack of judicially discoverable and manageable standards” for resolving the issue so as to disturb the President’s action because the Constitution’s text, structure, and history, fairly construed, supplies no rule to the contrary; the courts would have to make something up in order to dislodge the status quo resolution.

The third part of the political question doctrine—a grab bag collection of policy reasons for judicial nondecision—is the only part that is actually a true doctrine of nonjusticiability. That part evaluates “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” “an unusual need for unquestioning adherence to a political decision already made,” and “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>147</sup> If the first two prongs of the political question doctrine are false advertising, this third spur is simply illegitimate. By hypothesis, for these factors to come into play, one must suppose that the Constitution’s text does *not* commit the matter to plenary political discretion and *does* supply a principled rule of law susceptible of judicial ascertainment and manageable application that would invalidate the political branches’ actions. Nonetheless, this branch of the doctrine posits, the judiciary will not decide the case in accordance with the Constitution’s rule—for what amount to highly dubious policy reasons: doing so might be taken as a “lack of respect” to a coordinate branch; there might be a need for “unquestioning adherence” to the (by

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145. 444 U.S. 996 (1979) (mem.).

146. *Id.* at 1002 (Rehnquist, J., concurring).

147. *Baker*, 369 U.S. at 217.

hypothesis) unconstitutional action the branch has taken; or it would occasion “embarrassment” if the courts were to contradict what the political branches have said on the point in question.

Come again? Judicial decisions invalidating legislative and executive acts occur all the time; that is what judicial review *is*. If this implies disrespect for coordinate branches, then all independent judicial review is barred by the political question doctrine. The exercise of independent judicial review to invalidate legislative or executive acts will *always* mean the “embarrassment” of “multifarious pronouncements” by different branches. If the political question doctrine says this is a vice, then independent judicial review (indeed, the whole notion of separation of powers) would be problematic. *Marbury v. Madison*<sup>148</sup> was wrong (on this view) in discerning the disrespectful power of judicial review of unconstitutional legislative acts, and *Youngstown Sheet & Tube Co. v. Sawyer*<sup>149</sup> showed an embarrassing lack of respect due a coordinate branch by invalidating, with its contradicting multifarious constitutional view, President Harry S. Truman’s unilateral seizure of the nation’s steel mills. No one would (or should) take such propositions seriously, yet that is just what this spur of the political question doctrine, taken seriously, implies.

Even in the area of foreign affairs, international obligations, and war, the Supreme Court rarely has relied on this branch of the doctrine, standing alone. Yet these types of considerations may help explain outcomes like the seeming nondecision in *Goldwater v. Carter*<sup>150</sup> and the decisions upholding various purely presidential executive agreements, like *Dames & Moore v. Regan*<sup>151</sup> (and before that, the *United States v. Pink*<sup>152</sup> and *United States v. Belmont*<sup>153</sup> cases). The Court’s seeming sentiment, in each instance, appears to have been that, irrespective of the merits, it simply ought not as a policy matter issue a decision that would (or might) muck up an important foreign policy action already taken, such as President Carter’s new diplomatic recognition of the People’s Republic of China (*Goldwater*) or his executive agreement making a deal with Iran for the release of American diplomatic personnel held hostage there (*Dames & Moore*). The decisions themselves were not cast explicitly in such

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148. 5 U.S. (1 Cranch) 137 (1803).

149. 343 U.S. 579 (1952).

150. 444 U.S. 996.

151. 453 U.S. 654 (1981).

152. 315 U.S. 203 (1942) (holding that executive agreements have a similar status as supreme U.S. law as do treaties).

153. 301 U.S. 324 (1937) (sustaining the validity of an executive agreement as taking precedence over state law).

terms. They were presented as decisions in which the judiciary lacked constitutional power to act (in *Goldwater*, on a combination of justiciability grounds, none commanding a majority of the Court) or as decisions on the merits resting to a substantial degree on deference to the political branches (*Dames & Moore*).<sup>154</sup>

This may have been good judicial politics—Alexander Bickel might have been delighted.<sup>155</sup> But it is not good constitutional law. The Constitution does not disable the judiciary from ruling on questions of international law and constitutional foreign affairs powers, when properly presented in a judicial case. And the Constitution’s separation of powers renders implausible any assertion that the judiciary exercises such interpretive power only in subordination to the views of the political branches.

The courts possess the U.S. judicial power to interpret and apply international law for the United States in cases presenting such issues. They may exercise that power independently of the views of the branches of U.S. government, and independently of the views of foreign bodies or judicial tribunals. (That is almost exactly what the Supreme Court said in the *Sanchez-Llamas* and *Medellin* cases.)

Part I of this Essay argued for certain strong rules concerning the force of international law as U.S. rule. In exercising the power to interpret international law, the courts should adhere to such rules: there is a difference between the authority to interpret international law and the correct exercise of that authority. Thus, in a case within judicial cognizance, the courts must recognize the priority of the U.S. Constitution over international law, in the event of a conflict between them. The courts must recognize the ways in which U.S. constitutional powers enable U.S. authorities to supersede or displace international law incorporated into U.S. law by treaty, statute, or executive action. And the courts must recognize the inherently “common law” nature of all degrees of customary international law and its very limited province within American law.

Thus, if there is room for objection to the spate of Supreme Court decisions since 2001 in this area of law (and there is plenty such room), it is not the *fact* of judicial invasion, but the *substance* of the judicial decisions themselves that properly forms the grounds for objection. It is not (for example), the fact that the Supreme Court had the audacity to interfere with executive or

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154. See *supra* text accompanying notes 145-146 (discussing *Goldwater*).

155. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (2d ed. 1988) (advancing the “passive virtues” of judicial decision avoidance).

congressional action in military and foreign affairs issues that makes cases like *Hamdi v. Rumsfeld*,<sup>156</sup> *Rasul v. Bush*,<sup>157</sup> and *Hamdan v. Rumsfeld*<sup>158</sup> troubling; it is the fact that the decisions were (at least arguably) wrong on the merits. It is on the merits of such questions that the debate is properly joined.<sup>159</sup>

### III. THE RELEVANCE AND IRRELEVANCE OF INTERNATIONAL LAW TO UNITED STATES LAW AND THE WAR ON TERROR

It follows from the above that international law, except to the extent made part of U.S. law (and then only until superseded by authoritative U.S. act) and as interpreted and applied by U.S. constitutional actors, cannot, consistent with the U.S. Constitution, lawfully constrain the actions of the United States with respect to war and peace. This has important implications for understanding and evaluating some of the more controversial aspects of the “war on terror” as conducted by the United States since September 11, 2001. In general, the charge that the United States has, in some respect or another, “violated international law” should have far less rhetorical and political salience than it has had in public discourse. International law is not, in the main, *law* for the United States. This perhaps impolitic proposition is one that nevertheless needs to be confronted and embraced.

More specifically, the foregoing discussion enables more appropriate discussion of the lawfulness of U.S. actions and policies from the perspective of U.S. domestic law, and especially the Constitution. And that discussion yields some significant specific conclusions. While it is not possible to address all such issues fully in a single article, it is worth at least some effort to think seriously about the implications of my thesis for some of the most important specific questions of the past several years. I will focus on two broad categories: (1) the relevance and irrelevance of international law to U.S. decisions *to wage* war; and (2) the relevance and irrelevance of international law to U.S. *conduct* of war, including matters of the capture, detention, interrogation, and military punishment of enemy combatants—a huge category of issues of enormous recent significance. (A third category, the force of international law as applied to U.S. courts’ enforcement of U.S. domestic criminal laws against foreign nationals, in the United States, is sufficiently illustrated by the discussion of the *Sanchez-Llamas* and *Medellín* cases earlier in this Essay.) My discussion is

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156. 542 U.S. 507 (2004).

157. 542 U.S. 466 (2004).

158. 548 U.S. 557 (2006).

159. I address in certain respects the merits of these decisions presently. See *infra* Section III.B.

necessarily broad-brush; a complete treatment would require an additional article. But the conclusions I present here, in telescoped form, follow from the premises set forth above.

*A. The Power To Initiate War—Jus ad Bellum*

Congress's constitutional power to initiate ("declare") war by legislative act, and the President's constitutional executive power to defend the nation against attacks,<sup>160</sup> embrace a subject matter that is of course also treated by international law, including the U.N. Charter. It is not my purpose here to discuss the international law of war as it concerns a nation's decision to use military force. Rather, my point is simply that nothing in international law *constitutionally* constrains the decision of the United States to go to war against an enemy. While international law may prescribe that some exercises of the decision of the United States to engage in war are unlawful within the regime of international law, such restrictions may not interfere with Congress's (and the President's) constitutional powers. They are, in U.S. domestic constitutional law terms, unconstitutional purported restrictions on U.S. actors. This applies whether international law purports to forbid military action or purports to require military action by the United States.

And significantly, it applies irrespective of the fact that international law commands and obligations may have been made part of U.S. law by treaty. For as noted above, a treaty may not foreclose Congress's constitutional power to declare war or the President's executive power with respect to war. Thus, whether Congress's justification for the authorizations of war in the September 18, 2001, AUMF, and with respect to the Iraq War<sup>161</sup> satisfied international law requirements is of no consequence as a matter of U.S. law. *Constitutionally*, these wars were legal, beyond question. The question of international law compliance is one of international politics and international relations, not one of binding U.S. law.

*B. The Power To Wage War—Jus in Bello*

International law has much to say about the manner in which war is conducted. Longstanding customary practices and norms have gradually given

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160. On the allocation of war power between Congress and the President, see Paulsen, *Youngstown Goes to War*, *supra* note 31, at 239.

161. Authorization for Use of Military Force Against Iraq Resolution of 2002, 50 U.S.C. § 1541 (2000 & Supp. V 2005).

way to an elaborate body of international treaty texts governing military practices in the waging of war, the treatment of civilian populations, and the treatment of captured enemy combatants. The United States is a party to some of the most important of these treaty provisions, including the four Geneva Conventions and the Convention Against Torture.<sup>162</sup> Arguments about the legal force and interpretation of these treaties as a matter of United States law have given rise to some of the most serious – not to mention vitriolic – disputes over the American conduct of the wars authorized by the 2001 and 2002 legislative enactments.

Some of these arguments have shed more partisan heat than scholarly light on the force, coverage, and meaning of these international agreements as a matter of U.S. treaty and statutory law. Some of this vitriol reflects simply strong, but nonlegal policy objections to United States policies with respect to military targeting, prisoner detention and interrogation, and military tribunal punishment. Clearly, there is vast room for policy debate over such matters. To the extent such arguments are cast in terms of the obligations of “law,” however, they are misleading. Law is something different from policy, and those who would conflate the two are simply mixing up categories, whether deliberately or not.

So, too, U.S. law is something different from international law. Constitutionally, U.S. law has domestic priority over non-U.S. international law. Some of the vitriol simply reflects an intense but legally unsound ideological commitment to the *opposite* proposition: the primacy of international law over any nation’s (including the United States’s) domestic constitutional law and the primacy of international bodies’ interpretations of international law over any nation’s (including the United States’s) interpretations of it. Such a position reflects disorganized thinking about the force of international law in relation to domestic law. Such a view appears to assume, sloppily, that just as U.S. national law trumps state law, international law trumps national law; the “bigger” jurisdiction’s law beats the “smaller” jurisdiction’s law. It has been the burden of this Essay to demonstrate that, as a matter of United States law, this is simply not so. Serious international law scholars should know this intellectually, but they often do not “know” it emotionally or by habit of mind. The consequence is a tendency to overvalue the importance of international law and the extent to which it binds nations,

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162. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, § 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

including the United States, and to disregard the structure, supremacy, and priority (as a domestic legal matter) of the U.S. Constitution.

Consider the most publicly prominent disputes over the Bush Administration's conduct of the war, as they concern matters touching international law.<sup>163</sup> First, there was President Bush's early 2002 determination, supported by a detailed Department of Justice legal memorandum, that the Geneva Conventions (and statutes providing criminal penalties for their violation) do not apply to the detention of captured members of al Qaeda or the Taliban (and the temporally attendant, but for the most part legally unrelated decision to detain many such unprivileged combatants at an offshore facility at Guantánamo Bay, Cuba).<sup>164</sup> Second, there was the heated controversy over the bounds of legally permissible interrogation of certain unprivileged combatants, posed by the Convention Against Torture and U.S. implementing legislation. This was also the subject of at least two (and possibly more) detailed Justice Department legal analyses, in late 2002 and again in 2004.<sup>165</sup> Third, there was the decision by President Bush, initially acting solely pursuant to his executive powers as Commander in Chief, to authorize the creation of military tribunals to try and punish violations of the laws of war determined to have been committed by captured unprivileged combatants, and the series of subsequent congressional enactments (the Detainee Treatment Act and the MCA<sup>166</sup>) and judicial decisions (most importantly, *Hamdan v. Rumsfeld*) addressing the same subject.

Common to each instance is the fact that international treaty law, made part of U.S. law through the Article II treaty process and in some instances implemented by federal criminal statutory prohibitions and penalties, applies to the conduct at issue. But also common to each instance are substantial

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163. I do not address here the notable controversies over military detention of captured U.S. citizen enemy combatants (the subject of the U.S. Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)), which primarily presents issues of U.S. domestic constitutional law, or over the National Security Agency's surveillance and interception of communications, which likewise presents primarily issues of domestic law that are mainly unaffected by international law considerations.

164. See Yoo-Delahanty Memorandum, *supra* note 130. The opinion was finalized and signed by Assistant Attorney General Jay Bybee as a formal legal opinion of the Office of Legal Counsel. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002). With respect to Guantánamo Bay, see Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., & John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001).

165. See *infra* note 205 and accompanying text.

166. See *infra* notes 200-202 and accompanying text.

questions about the proper interpretation of such treaties and laws, and also about the relationship of such provisions to the constitutional powers of the President as Commander in Chief of the nation's armed forces. In each instance, the Department of Justice took an aggressive position concerning the President's constitutional powers with respect to the interpretation of international law and his constitutional authority as Commander in Chief. In some respects, the Supreme Court rejected these positions. And in some respects, Congress in turn rejected some of the Court's rejections.

Consider first the Office of Legal Counsel (OLC) memorandum supporting the President's determination that the Geneva Conventions do not cover al Qaeda or the Taliban ("Yoo-Delahunty Memorandum").<sup>167</sup> I treat the issues raised in this OLC opinion at length, because they frame a paradigmatic case for the questions raised in this Essay. In addition, the Yoo-Delahunty Memorandum contains extraordinarily careful and sophisticated legal analysis of the difficult constitutional and international law questions presented—the President's treaty-termination and treaty-suspension power, the meaning of the third Geneva Convention's provisions, their applicability to the distinctive circumstances of al Qaeda and the Taliban, and their relationship to implementing criminal legislation by Congress. It is in many ways superior in comprehensiveness and coherence to any Supreme Court opinion that has touched on similar points. Some of its arguments may fairly be regarded as controversial. But the Yoo-Delahunty Memorandum is nonetheless an important illustration of executive branch interpretation of international law as U.S. law.

Most of the Yoo-Delahunty Memorandum's essential points should be considered very nearly beyond dispute. First, the Third Geneva Convention's (GCIII) core provisions and prohibitions, violations of which are punishable under the War Crimes Act enacted by Congress, do not apply to al Qaeda as a matter of law. The GCIII does not apply to nonstate actors, but only to lawful combatants of a nation that is a "High Contracting Party" to the treaty. Nations sign treaties; private terrorist organizations do not. Al Qaeda plainly is not a High Contracting Party, but an international terrorist organization. As such, its members are not covered by the Geneva Conventions. Moreover, the terms of the treaty only cover lawful combatants, and al Qaeda does not itself comply with GCIII's requirements in this regard: it is not a militia whose members are readily identifiable by uniform or insignia, nor does it bear arms

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167. Yoo-Delahunty Memorandum, *supra* note 130. As noted, the Yoo-Delahunty Memorandum was actually a circulated draft opinion that eventually became a final opinion, signed by Assistant Attorney General Bybee. See *supra* note 164. The final version is not materially different from the draft version.

openly and abide by the laws of war. It thus seems plain that the War Crimes Act's provision punishing "grave breaches" of the Geneva Convention do not concern military actions with respect to al Qaeda.<sup>168</sup>

The Yoo-Delahunty Memorandum also considers whether "Common Article 3" of the Third Geneva Convention (so called because the language is common to the several Geneva Convention treaties) applies. Violations of Common Article 3 are also made punishable under the War Crimes Act. Common Article 3 addresses the situation of an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."<sup>169</sup> The Yoo-Delahunty Memorandum interprets this provision, almost certainly correctly as an original matter, as applying to civil wars or insurgencies occurring within a country. This interpretation is more consistent with the language than the competing interpretation that would make Common Article 3 a universal catch-all providing protection to terrorist organizations. It is also far more consistent with the international legislative history of the making of the treaty itself, with U.S. legislative history concerning its ratification, with evidence concerning subsequent protocols (*rejected* by the United States) that would have extended the treaty's coverage to terrorist groups, and perhaps most importantly with the language and legislative history reflected in the War Crimes Act. The Yoo-Delahunty Memorandum makes these points, fairly and patiently considering alternative interpretations.<sup>170</sup>

An interesting side note: on the Common Article 3 point, the Supreme Court would four years later embrace the alternative, catch-all interpretation in *Hamdan v. Rumsfeld*.<sup>171</sup> Congress, in turn, repudiated the Supreme Court's interpretation of international law on this point a few months later, exercising its legislative powers to define and implement international law with a provision of the MCA that essentially restored the executive branch's view. This interesting back-and-forth-and-back illustrates that competing branches of the U.S. government can and do reach competing interpretations of international law, each within their different spheres, and that the ultimate resolution of such matters, turns on the interaction of the separation of powers and the varying powers and views of the different branches of the U.S.

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168. Yoo-Delahunty Memorandum, *supra* note 130, at 11-14.

169. *Id.* at 24 n.66.

170. *Id.* at 23-25.

171. 548 U.S. 557 (2006). The decision was five-to-three; the dissent was vigorous on this and other points. (Chief Justice Roberts was recused because he had decided the case—the opposite way—as a lower court judge.) In my view, the executive branch's interpretation was correct, and *Hamdan* was in error on this (and other) points.

government. None of this, of course, demonstrates which interpretation is correct or superior. Congress's enactment was clearly within its power to legislate with respect to the implementation (or supersession) of U.S. treaty obligations as a matter of domestic U.S. law.

Returning to the Yoo-Delahunty Memorandum of January 2002, the next important question was whether the Third Geneva Convention might cover the Taliban, even though it did not cover al Qaeda. Was the Taliban the "government" of Afghanistan? The memorandum conceded that this was "a more difficult legal question."<sup>172</sup> The memorandum ultimately concluded, based on executive branch factual understandings supplied by the State Department and the Defense Department, that the Taliban was more properly classified not as a true government but as a criminal gang or association of warlords, operating hand-in-glove with al Qaeda in Afghanistan. Afghanistan, the memorandum concluded, based on such understandings, lacked a true functioning government and was more akin to a "failed state" (like Somalia). This view was predicated in part on the President's constitutional power to "recognize" (or not) foreign nations' governments.<sup>173</sup> "It is clear that, under the Constitution, the Executive has the plenary authority to determine that Afghanistan ceased at relevant times to be an operating State and therefore that members of the Taliban militia were and are not protected by the Geneva Conventions," the memorandum stated.<sup>174</sup> The memorandum set forth the Constitution's relevant language, the supporting early interpretations of President George Washington, President Thomas Jefferson, Alexander Hamilton, and Justice John Marshall, and decisions of the Supreme Court consistently recognizing the executive's plenary power over foreign affairs.<sup>175</sup>

While it is certainly possible to disagree with the State Department's factual assessment of the circumstances of Afghanistan, or with the Defense Department's factual assessment of the nature of the Taliban organization, it is harder to dispute that the judgment concerning these facts most properly rests with the President, and that determinations based on that judgment fall within the scope of the President's Article II power over foreign affairs. This is true as a matter of U.S. constitutional separation of powers. And significantly, it is true irrespective of whether the regime of "international law" might reach a

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172. Yoo-Delahunty Memorandum, *supra* note 130, at 16-23.

173. Recall the relevance of this power to the various views expressed by the D.C. Circuit and by the Supreme Court opinions in the *Goldwater v. Carter* case, which involved President Carter's decision to recognize the People's Republic of China and to derecognize the competing government at Taiwan. *Goldwater v. Carter*, 444 U.S. 996 (1979) (mem.).

174. Yoo-Delahunty Memorandum, *supra* note 130, at 14.

175. *Id.* at 14-16.

different result. The authoritative judgment on this arguable question of international law, for the United States, remains a question of United States law committed to the authority of U.S. constitutional actors. The Yoo-Delahunty Memorandum sets forth, correctly, the President's authority to interpret international law, including international treaty law made part of U.S. law: "Part of the President's plenary power over the conduct of the Nation's foreign relations is the interpretation of treaties and of international law. Interpretation of international law includes the determination whether a territory has the necessary political structure to qualify as a Nation State for purposes of treaty implementation."<sup>176</sup> (Interestingly, President Bush ultimately decided that, while the Taliban was not, in the Administration's view, *legally entitled* to protection under the Geneva Conventions, he would exercise his foreign affairs and military Commander-in-Chief powers to extend, in practice, certain protections of the conventions to captured members of the Taliban.<sup>177</sup>)

The Yoo-Delahunty Memorandum continued that even if the Taliban were regarded as covered by GCIII as a High Contracting Party, the fact that Taliban forces, like al Qaeda, did not conform their conduct to the requirements of GCIII removed such forces from the terms and protections of the treaty.<sup>178</sup> Again, it is hard to dispute the legal propriety of, and authority for, this specific conclusion.

The Yoo-Delahunty Memorandum added a further argument (in the alternative) that touches prominently on one of the most important issues of the President's foreign affairs power with respect to treaty obligations under international law as discussed above: the power to terminate, abrogate, or suspend treaties. Even if the Taliban were regarded as the government of Afghanistan, the memorandum argued, it fell within the President's executive power over foreign affairs to decide whether, under the circumstances, the mutual obligations of the treaty should be deemed suspended. The memorandum noted that Afghanistan did not cease to be a party to the Geneva

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176. *Id.* at 16. The memorandum cited the Supreme Court's decision in *Clark v. Allen*, 331 U.S. 503 (1947), as supportive authority on this point. *Id.* *Clark* recognized the President's authority to determine whether postwar Germany was or was not in a position to perform treaty obligations under a prewar treaty.

177. Memorandum from George W. Bush, President, to the Vice President et al. (Feb. 7, 2002) [hereinafter Memorandum on Human Treatment] (accepting the Department of Justice's legal conclusions but declining to exercise authority in certain respects, and prescribing rules of treatment of detainees irrespective of the fact that Geneva Conventions may not legally entitle detainees to such treatment).

178. Yoo-Delahunty Memorandum, *supra* note 130, at 31-34.

Conventions as a consequence of the fall of its prior government and the military successes of the Taliban. Nonetheless, the memorandum laid out the constitutional authority of the President with respect to treaties and concluded that that power includes “the powers to suspend them, withhold performance of them, contravene them or terminate them.”<sup>179</sup> “The treaty power,” the memorandum continued, “is fundamentally an executive power established in Article II of the Constitution and therefore power over treaty matters after advice and consent by the Senate are within the President’s plenary authority.”<sup>180</sup> The memorandum cited the analysis of an earlier OLC memorandum addressing the propriety of proposed termination of the ABM treaty with successor nations to the U.S.S.R.<sup>181</sup> The Yoo-Delahunty Memorandum did not set forth at length the constitutional arguments supporting the President’s power to suspend treaties—those arguments were set forth in the earlier memorandum on the ABM treaty—so much as summarize and apply them. The Yoo-Delahunty Memorandum explained several historical instances in which the U.S. had acted in contravention of, or had in practical effect suspended, the obligations of the Geneva Conventions with respect to alien prisoners.

Consistent with the arguments of Part I of this Essay, the OLC’s analysis and application of the President’s treaty power was logical and correct. Interestingly, the Yoo-Delahunty Memorandum separately discussed whether, notwithstanding the validity of presidential suspension of provisions of the Geneva Conventions as a matter of U.S. constitutional law, such suspension might be regarded as a violation of international law: “[T]here remains the distinct question whether such determinations would be valid as a matter of international law.”<sup>182</sup> On this point, the memorandum expressed some doubts, and set forth the arguments on both sides, suggesting that “the better view” is that international law permitted treaty suspension in certain circumstances while simultaneously continuing to emphasize the distinction between that question of international law and the federal constitutional and statutory questions of presidential power and application of the War Crimes Act.<sup>183</sup> The international law issues, while legally having no direct bearing on the domestic U.S. law issues, “are worth consideration as a means of justifying the actions of

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179. *Id.* at 28.

180. *Id.*

181. *Id.* at 28 n.75 (citing November 15 Memorandum to Bellinger, *supra* note 51).

182. *Id.* at 31.

183. *Id.*

the United States in the world of international politics,” the memorandum said.<sup>184</sup>

This is an instructive and important distinction—and one that has been at the heart of my thesis here. International law, in the main, is international politics conducted by other means. International law may be highly relevant in that sense, but it is not binding and authoritative as law. Except to the extent it is made part of U.S. law by U.S. constitutional processes—and then always still subject to U.S. actors’ constitutional powers and superseding actions, and governed by U.S. actors’ legal interpretations—international law is not truly relevant as law with respect to U.S. actions in the conduct of war.

The Yoo-Delahanty Memorandum’s treatment of customary international law is a succinct and precise distillation of the arguments that CIL lacks valid legal force as a matter of U.S. law: the Constitution’s text nowhere recognizes general international law norms, other than treaties, as a source of federal law. The Supremacy Clause identifies only the Constitution, federal statutes, and treaties as federal law. To view nontreaty international law as automatically “part of our law” in the strong sense of possessing constitutional status as U.S. law would be inconsistent, not only with Article VI, but with the need to have granted Congress the power “[t]o define and punish . . . Offences against the Law of Nations.”<sup>185</sup> It would also be in tension with Article II’s careful description of how international law, in the form of treaties, can be made under domestic U.S. law. And it would potentially conflict in principle with the President’s constitutional powers as Commander in Chief of the nation’s armed forces. Moreover, in explaining the Constitution, the Framers never argued that international law was itself a source of federal jurisdiction. Early judicial decisions regarded customary international law norms as guidance “which the sovereign follows or abandons at his will.”<sup>186</sup> At most, such norms might provide common law rules of decision in cases otherwise within federal jurisdiction (by virtue of admiralty or diversity jurisdiction) where there is no other rule of law supplied by federal law (including a contrary rule supplied by executive practice or policy), but even this light, *Paquete Habana*-ish force is probably a relic of the pre-*Erie*, *Swift v. Tyson*-era view of general federal

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184. *Id.*

185. U.S. CONST. art I, § 8.

186. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.); see Yoo-Delahanty Memorandum, *supra* note 130, at 36 (citing *Brown v. United States*).

common law and ought not be viewed as surviving outside of federal admiralty jurisdiction (a specialized exception).<sup>187</sup>

The arguments against reliance on customary international law as a source of restriction on U.S. military action with respect to members of al Qaeda and the Taliban are almost literally overwhelming. No responsible U.S. lawyer would maintain the contrary, though as the Yoo-Delahunty Memorandum faithfully records, some international law scholars nonetheless have suggested in academic writing that international law forms part of the law which the President is obliged to take care to faithfully execute, under Article II, and that the President cannot act contrary to customary international law unless he believes its commands to be unconstitutional.<sup>188</sup> And, of course, attacks on the lawfulness of President Bush's actions with respect to al Qaeda and the Taliban (and attacks on the legal analysis of this memorandum) have continued to invoke general international law norms in such fashion.

The final collection of points in the Yoo-Delahunty Memorandum concern the President's exclusive constitutional authority as Commander in Chief and the relationship of that power both to international law and to domestic statutes. First, to read international law treaties (such as the provisions of the Third Geneva Convention), statutes of Congress (like the War Crimes Act), or customary international law as restricting presidential authority to direct the conduct of U.S. Armed Forces in the field would be, in the words of the memorandum, "a *possible* infringement on presidential discretion to direct the military."<sup>189</sup> Such a construction should be avoided, the memorandum concluded (citing well-established principles of statutory and treaty construction<sup>190</sup>), unless congressional intent to pose such a possible conflict is clear.

As suggested above, the point can be put more strongly yet: neither treaties nor statutes may be applied in a manner that violates the Constitution. Accordingly, a treaty or statute may not be applied in such a manner as to violate the President's Commander-in-Chief and executive powers. If those powers are properly understood to embrace the power of the President to determine how best to deploy troops, to determine matters of military strategy

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187. The arguments limned in this paragraph are presented in the Yoo-Delahunty Memorandum, *supra* note 130, at 34-39. For further discussion of the force of customary international law under U.S. law, see *supra* Section I.C. On the possible validity (or at least tolerable nature) of the admiralty exception, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739-42 (2004) (Scalia, J., concurring in part and concurring in the judgment).

188. Yoo-Delahunty Memorandum, *supra* note 130, at 34 (collecting sources).

189. *Id.* at 11 (emphasis added).

190. *Id.*

and tactics, to prescribe rules for engagement with the enemy, to decide on the means to be employed in such engagements, and to capture, hold, and interrogate members of an enemy force – as I submit they are<sup>191</sup> – it follows that nothing in international law, U.S. treaty law, or U.S. statutes constitutionally may interfere with the President’s choices in this regard.

To be sure, Congress has general legislative power to define “Offences against the Law of Nations” and a general power to provide rules for the “Government and Regulation” of the armed forces.<sup>192</sup> Those powers are best understood as bounded by the President’s power to command the nation’s military forces—to direct what actions the armed forces take. If a general regulation of military personnel conduct or a general definition of an offense against the Law of Nations contradicts a specific presidential military command concerning the use of force against enemies in time of constitutionally authorized war (including the use of force in interrogation of captured prisoners and the use of force to impose military punishment for violation of the laws of war), it is most doubtful that the general statute constitutionally may trump the Commander-in-Chief power of the President. While Congress legitimately may press its opposing position with the legislative powers at its disposal—action contemplated by the separation-of-powers game set up by the Constitution’s structure and the arguable overlap of competing powers in this area—the President properly may resist such views in favor of a robust conception of the Commander-in-Chief Clause powers. The President’s constitutional position may be a priori stronger, but that does not mean that Congress could not force concessions or limitations on presidential power in this area, as a practical matter. (That, of course, is what ultimately happened in the areas of detention, interrogation, electronic surveillance, and military commissions.)

The second point about the Commander-in-Chief power concerns the President’s discretion and authority to invoke international law principles *offensively*, against enemies who commit offenses against the international law of war—and similarly to apply such principles against U.S. soldiers as well, within the regime of military authority. The President’s authority to employ military commissions for the trial and punishment of enemy combatants was the subject of a separate (and only recently published) memorandum.<sup>193</sup> Both

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191. For a short explanation and defense, see Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 814.

192. U.S. CONST. art. I, § 8.

193. Memorandum Opinion from Patrick F. Philbin, Deputy Assistant Att’y Gen. to the President, on Legality of the Use of Military Commissions To Try Terrorists to the Counsel to the President (Nov. 6, 2001).

that memorandum and the Yoo-Delahunty Memorandum rest the power of the President to establish such military commissions in the *constitutional power* of the President, as Commander in Chief, to *interpret and apply the customary international law of war*, against enemy combatants and against members of the U.S. military forces. Thus, while international law may not trump or defeat the President's Commander-in-Chief power to direct the actions of U.S. military forces against an enemy, international law may furnish a body of substantive principles the President is *empowered* to discern and apply, as an *aspect of his* Commander-in-Chief powers.

The two main consequences of this view appear to be sound as a matter of the constitutional power to interpret and apply international law. First, the President possesses U.S. domestic law power to prescribe military punishment for enemy violations of the international law of war; and in so doing he is not bound by how the regime of international law might interpret such principles. Second, the President possesses U.S. domestic law power to prescribe military punishment for U.S. soldiers based on his understanding of international law (or, conversely, to authorize military conduct based on his understanding of international law); and in so doing he is, again, not bound by how the regime of international law might assess such matters.

In fact, President Bush, stating that he was acting “[p]ursuant to my authority as Commander in Chief and Chief Executive,” accepted the Department of Justice’s interpretation of international law that members of al Qaeda were not covered by the Geneva Conventions.<sup>194</sup> He agreed, further, that he had legal power to suspend the application of the Geneva Conventions to the conflict with the Taliban in Afghanistan (but nevertheless declined to do so). He also agreed that Common Article 3 did not apply to this conflict; he determined that Taliban detainees were unlawful combatants not qualifying as prisoners of war within the meaning of the Geneva Conventions; and he adopted as an exercise of his own constitutional authority, as a matter of policy, the principles of the Geneva Convention with respect to humane treatment of captured persons.<sup>195</sup> Separately, the President, acting on similar legal advice, instituted military commissions on his own authority as Commander in Chief.<sup>196</sup>

Some of these determinations and actions were rejected by the U.S. Supreme Court four years later in the highly controversial case of *Hamdan v.*

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194. Memorandum on Human Treatment, *supra* note 177, at 1.

195. *Id.*

196. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001).

*Rumsfeld*.<sup>197</sup> *Hamdan* struck down the President's order creating military commissions for trying and punishing unlawful enemy combatants for alleged crimes against the international law of war. The Court was deeply and bitterly divided, five to three. After dubious holdings that the Detainee Treatment Act did not withdraw jurisdiction, and that abstention until final military judgment was inappropriate, the majority (1) implicitly rejected the argument that the President possessed unilateral authority to establish military commissions by virtue of his constitutional power as Commander in Chief; (2) rejected the view that the Authorization for Use of Military Force of September 18, 2001, supported the President's action; (3) found that the Uniform Code of Military Justice (UCMJ) rejected military commissions as framed by President Bush; and (4) interpreted Common Article 3 of the Geneva conventions to apply and to require certain procedures that President Bush's executive order did not contain.

There is much wrong with the *Hamdan* decision, on each of these substantive points. The many problems with *Hamdan* have been laid out in detail elsewhere, by others, and I will not repeat those arguments at length here.<sup>198</sup> It is sufficient to note, for my purposes, that each of these central conclusions was almost certainly wrong, as a matter both of U.S. constitutional law and as a matter of international law, and that those wrong interpretations had potentially very serious consequences for U.S. national security policy (and may in the future have such consequences). But nonetheless, it lay within the judiciary's (nonexclusive) province to offer its independent interpretation of the law on these points, whether one views those holdings as correct or not. And the ultimate upshot of the Court's decision—as emphasized by the very narrow, far-more-succinct concurrence of four Justices<sup>199</sup>—was that the President lacked authority, in the Court's view, to take such actions *alone*. If Congress authorized military commissions, however, that was a different matter. This meant that any threats to U.S. interests posed by the *Hamdan* decision could be remedied by statute. And Congress could, in exercising its power to interpret international law in the course of exercising its legislative powers, modify the rules the Court found to derive from international law.

This is precisely what Congress (and President Bush) did, with the enactment of the MCA. The MCA is hugely significant, and a topic all its own.

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197. 548 U.S. 557 (2006).

198. For excellent treatments, see Samuel Estreicher & Diarmuid O'Scannlain, *Hamdan's Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403 (2006); and Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

199. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

For purposes of this Essay, however, the MCA illustrates several important points. First, Congress “held” that the enactment of the provisions of the MCA, with respect to procedures for trying terrorist war criminals by military commission, *satisfied all requirements of international law*—specifically including Common Article 3 of the Geneva Conventions—as far as U.S. law was concerned. Congress also determined that alien enemy unlawful combatants subject to the MCA could not invoke the Geneva Conventions as a source of rights in U.S. courts or military commissions, to that extent specifically limiting the force of international law (in the form of a U.S. treaty) as U.S. domestic law.<sup>200</sup> Stated simply, in terms of the thesis of this Essay: Congress thus interpreted international law, and defined the scope and force of international law norms, for the United States.

Second, Congress defined the substantive international law offenses for which military tribunals could try enemy combatants, as a matter of U.S. law, pursuant (apparently) to its powers to define and punish offenses against the Law of Nations and pursuant to its power to legislate with respect to carrying into execution U.S. treaty commitments. Thus, whether the President constitutionally may prescribe by executive order such offenses on his own as an aspect of his Commander-in-Chief power to employ military punishment against enemy war criminals (as I think he does), or not (as *Hamdan* held), Congress may, in the exercise of its legislative powers, cover much the same ground. With Congress and the President rowing in the same direction, there is no plausible issue of constitutional power; the President, acting pursuant to all of his own powers in addition to those that Congress grants by statute, acts at the apex of his constitutional authority.<sup>201</sup>

Third, Congress specifically declared that the judgments or interpretations of international law by international tribunals are to be of no consequence in interpreting U.S. law adopting (in whole or in part) international law norms or implementing international treaties. Thus, not only did Congress declare that the provisions of the War Crimes Act, as modified by the MCA, “fully satisfy the obligation under . . . the Third Geneva Convention for the United States to

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200. See Military Commissions Act of 2006 § 950(w), Pub. L. No. 109-366, 120 Stat. 2600, 2631-32 (codified in scattered sections of 18 and 28 U.S.C.); see *id.* at 2631 (“No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”).

201. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (Jackson, J., concurring). In doctrinal terms, the MCA placed congressionally defined offenses and military commissions in the strongest “*Youngstown* Category I” box.

provide effective penal sanctions for grave breaches which are encompassed in common Article 3,” but Congress also directed that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [the War Crimes Act].”<sup>202</sup>

Fourth, consistent with the view of arguably overlapping presidential and congressional powers with respect to international law, Congress in the MCA endorsed—and thus added its weight to—a broad understanding of *presidential* interpretive authority with respect to the meaning and application of the Geneva Conventions, including a power to prescribe additional standards of conduct (presumably for U.S. military and other personnel) and regulations for treaty violations as the President understands them:

As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.<sup>203</sup>

The MCA is, in significant part, a congressional exercise of the U.S. constitutional power to interpret international law. It is an exercise of that power in ways supportive of presidential understandings of international law and in opposition to the judicial understandings of international and domestic law set forth in *Hamdan*. And it is an exercise of that power in a fashion that makes clear the supremacy of U.S. interpretations of international law in U.S. courts.

*Hamdan*’s specific result was overturned by the MCA, but it nonetheless remains a highly consequential decision. The Supreme Court’s tendentious holding that the President’s independent constitutional authority as Commander in Chief does not include the power to prescribe military policies and actions concerning enemy combatants is (to borrow a phrase) a constitutional loaded gun, lying around waiting to cause grave harm to the nation.<sup>204</sup> A powerful case can be made that the executive branch should publicly repudiate it, as a matter of constitutional principle, although such action would entail certain political costs. Because any concrete, immediate

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<sup>202</sup>. Military Commissions Act of 2006 § 6(a)(2).

<sup>203</sup>. *Id.* § 6(a)(3).

<sup>204</sup>. See *Korematsu v. United States*, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

harm from the decision was so readily remediable by statute, President Bush chose not to take this course. The enactment by Congress of the MCA thus mitigated the specific harm of *Hamdan* but allowed its more diffuse (and speculative) harm to presidential power to remain unaltered. The cluster of issues framed by these several legal interpretive acts—executive, judicial, legislative—well demonstrate the division and separation, and practical interaction and resolution, of the constitutional power to interpret and apply international law for the United States.

*Hamdan* and the MCA also, clearly, touch upon the issue of the force of international law as it concerns the detention, treatment, and interrogation of captured enemy combatants. This has been, rather notoriously, the subject of considerable academic and political traffic, as well as the topic of several important and controversial Department of Justice legal memoranda during the Bush Administration.<sup>205</sup> The issues presented by the Administration's legal position, its critics' charges, and the responses of the Court and Congress, are obviously significant. Yet they nonetheless may be discussed more briefly; shorn of their explosive political and policy dimension, there is less to the legal controversy over these points than meets the eye.

To compress drastically: the Office of Legal Counsel analysis contained three broad parts. First, the Administration analyzed, in excruciating (and sometimes gruesome) detail, the legal definition of "torture" within the meaning of the Convention Against Torture, an international treaty of the United States, as implemented by U.S. statutory criminal law. "Torture," as used in these legal texts, is a specific legal term of art with a specific legal meaning, distinguishable from commonplace usage, and limited to an extreme category of specific-intent misconduct of a more serious nature than "cruel, inhuman, or degrading treatment," a statutory term from which it is explicitly distinguished. Not all of the government's statutory interpretation arguments on this point were persuasive, but neither were all of them necessary to the conclusion. Many of them were, in the nature of things, impolitic-sounding. If the memorandum had been intended for public consumption, it was a work of extraordinarily bad public relations. Obviously, however, it was not intended for that purpose, but rather to provide confidential legal advice to a client concerning a highly difficult and sensitive issue of law concerning extraordinary wartime conduct. A later memorandum (the "Levin

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205. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from John Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def. (Mar. 14, 2003); Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004) [hereinafter Levin Memorandum].

Memorandum”) superseding the earlier one does not materially alter the essential legal conclusion and ended up reaffirming all previous specific legal advice flowing from the earlier analysis. But it *was* intended for public consumption and public relations, and therefore removed tendentious, unnecessary, and impolitic arguments or contentions.<sup>206</sup> The two different-in-tone memoranda are interesting in part as an illustration of the difference between what classified, confidential legal advice looks like and what public-relations legal advice looks like. But the statutory-interpretation conclusion is in the main sound, and at all events eminently defensible.

The more interesting point concerns an argument made in the earlier Bybee Memorandum but deleted from the later Levin Memorandum: does the Commander-in-Chief power of the President preclude applying the torture statute to conduct authorized by the President in the context of war? The later memorandum avoids this point on the premise that President Bush had determined that United States policy was not to engage in torture, for any purpose, within the meaning of the statute; thus, there was no need for legal advice concerning the purely hypothetical situation of presidential authorization, as a military measure pursuant to his Commander-in-Chief power, of conduct believed to be in violation of the criminal statute.

The question of course merits an answer, at least as an abstract proposition. And part of that answer must be that, as a matter of separation of powers, Congress may not by the exercise of one of its general, enumerated legislative powers enact a statute that impairs the Commander-in-Chief power of the President (whatever one understands that power to be). This is, as discussed above, straight-out, old-fashioned *Marbury v. Madison* reasoning: Congress may not (properly) enact statutes that are substantively unconstitutional. It may not enact statutes that (purport to) violate individual rights; nor may it enact statutes that (purport to) intrude upon the constitutional powers of another branch of the national government. If indeed it is the case that the President, as Commander in Chief, possesses *all* constitutional power with respect to the exercise of force by the United States against its enemies, then it is also true that no act of Congress validly may subtract from that constitutional power. Just as the President’s constitutional Commander-in-Chief power trumps a treaty, it also trumps a statute.

To what types of actions does the trump-card Commander-in-Chief power of the President extend? As noted above, such power in practice is limited by

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206. The Levin Memorandum excludes the discussion, which had been present in the earlier memorandum, of affirmative defenses to criminal liability in the form of a “necessity” (or “choice-of-evils”) defense and a “self-defense” or defense-of-others defense. See Levin Memorandum, *supra* note 205.

the separation-of-powers game, and the pressures of Congress in the exercise of its trump-card powers (such as appropriations, and the power to authorize war, or to withhold or rescind such authorization). But in theory, such power properly extends to all matters of military strategy and conduct, including rules of engagement with respect to members of an enemy force. This includes interrogation. This includes the imposition of military justice and punishment. This includes torture. To put it bluntly (if over-dramatically): it is within the President's constitutional power as Commander in Chief of the nation's military force in time of war to determine whether (*or not*) to kill, capture, hold, interrogate, torture, or release members of the enemy armed forces. Note well: this is a statement about the Constitution's allocation of *power* with respect to these determinations. It is not a statement about how that power should be exercised.<sup>207</sup>

The alternative, of course, is that it is *Congress's* power to determine all these things, within the U.S. constitutional regime—that Congress could prescribe whether the executive may or must detain, interrogate, kill, or torture enemy combatants (or not). As a matter of the Constitution's division and allocation of powers, this is by far the less plausible conclusion. Congress's power to declare war is an on-off switch, not a thermostat. Congress has the power to initiate war and the President does not.<sup>208</sup> But once the switch is flicked on, the President has the power to conduct war and Congress does not. Congress's legislative powers to define offenses against the Law of Nations, to provide rules for captures, and to prescribe rules for the governance of the military are all significant legislative powers. But none, fairly construed, nor all combined, extends its reach into the President's power to direct the conduct of war; if it were otherwise, the Commander-in-Chief Clause would be a title only, not an independent, substantive presidential power. The power to prescribe the actions and conduct of the nation's armed forces against the enemy would be Congress's, as a result of the accumulated weight of several peripheral powers, none of which addresses the power of military command directly. This is hard to square with the text of the Constitution and with what we know of the history of the Framers' decisions in allocating war powers between Congress and the President.<sup>209</sup>

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207. See Paulsen, *The Emancipation Proclamation*, *supra* note 37, at 814, 827-31.

208. I have set forth a brief defense of this understanding of the text's division of war powers in other writing. See Paulsen, *Youngstown Goes to War*, *supra* note 31, at 239.

209. Saikrishna Prakash has recently published a brilliant and compelling work of scholarship arguing that Congress and the President possess *concurrent* power over these matters. Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008). The strength of Prakash's theory lies in historical evidence of

But the point of critics of the Bush Administration's position was not really that *Congress*, rather than the President, had the power to order the torture (or coercive interrogation) of enemy prisoners. The objection, rather, was to the specter of torture itself. The fact that Congress had prohibited such conduct by statute, implementing the Convention Against Torture, was merely the vehicle for making the charge of presidential lawlessness. (Surely the critics of President Bush would not have been more pleased if Congress, by statute, had *ordered* torture). The concern was not with Congress's prerogatives; the point was not a separation-of-powers point, but a torture point.

That point derives, ultimately, from ideals of international law, embodied in both the Geneva Conventions and the Convention Against Torture and from the policy and moral judgments about proper conduct in time of war (and otherwise) that are embodied in those international agreements. One can fairly argue about matters of policy and morality concerning captured enemy combatants. But that is largely beside the *legal* point. The legal point is that the force and interpretation of these treaties, for the United States, is a matter of U.S. constitutional law. And U.S. constitutional legal principles, properly understood, indicate that determining such force, interpretation, and continued validity is a power almost entirely committed to the foreign affairs and military powers of the President of the United States.

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some preconstitutional and postenactment practices that depart from the model I have outlined here. Such evidence is potentially probative of the original meaning and understanding of the Commander-in-Chief Clause and of the various powers assigned to Congress. In addition, Prakash's theory gives plausible content to both sets of powers. The weakness of the theory, however (which deserves a more complete response than space permits here), is that practice often does not conform to the meaning of the text; there are many possible explanations for why inconsistent practice may have occurred, may have been tolerated, and may fail to be fully probative of the correct understanding of the Constitution's text. While such practice cannot be disregarded, its evidentiary value in the interpretive enterprise is sometimes fairly debatable. In addition, Prakash's theory, while it acknowledges that the Commander-in-Chief Clause vests the President with substantive military powers to direct and command the actions of the nation's armed forces, simultaneously permits Congress to drain that grant of power of any autonomous force (or to attempt to do so). Aggressively employed, Congress could essentially "capture" all of the President's power of military command. Prakash's defense of concurrent congressional authority to regulate the conduct of war is the best argument advanced to date for that position, but it remains difficult to reconcile with giving full effective content to the Commander-in-Chief Clause as a substantive power of the President that is not given to Congress in the same terms. The better conclusion remains (in my view) that the Commander-in-Chief power is more properly understood as marking the *limits* of Congress's more narrowly stated minor military powers and not that those powers enable Congress potentially to occupy all of the same ground as the Commander-in-Chief power and to battle the President for primacy in matters of the actual conduct of U.S. forces in time of war.

The Justice Department legal memoranda did not say all this. Rather, for all the vitriol directed against the Administration's legal position, the memoranda's actual assertions with respect to the Commander-in-Chief power were remarkably restrained, seeking first to construe Congress's statute to avoid any potential conflict with the President's constitutional power and, in the end, denying the need to rely on any such vigorous assertion of constitutional prerogative at all.

## CONCLUSION

I conclude, briefly, with the questions with which I began: what is the force of international law, for the United States, and who determines that force and interprets and applies international law for the United States? For all the complexities and intricacies of the details, the summary answer is remarkably straightforward: under the U.S. Constitution, international law is only "law" for the United States when the U.S. Constitution makes it so or empowers U.S. constitutional officials to invoke it in support of their powers. Wherever the Constitution does make it so, such law is always controlled by the (sometimes conflicting) interpretations of the law by U.S. actors and never by the interpretations of international or foreign tribunals. And such international-law-as-U.S.-law is always subordinate to the superior constitutional powers of U.S. constitutional actors; it may be superseded, as a matter of U.S. law, almost at will.

The force of international law, as a body of law, upon the United States is thus largely an illusion. On matters of war, peace, human rights, and torture—some of the most valued matters on which international law speaks—its voice may be silenced by contrary U.S. law or shouted down by the exercise of U.S. constitutional powers that international law has no binding domestic-law power to constrain. International law, for the United States, is international policy and politics.