

Is the President Bound by the Geneva Conventions

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IS THE PRESIDENT BOUND BY THE GENEVA CONVENTIONS?

Derek Jinks† & David Sloss††

The United States is party to several treaties that regulate the conduct of war, including the 1949 Geneva Conventions on the Protection of War Victims. These treaties require belligerent states, as a matter of international law, to accord fair and humane treatment to enemy nationals subject to their authority in times of war. Moreover, these treaties are, as a matter of domestic law, part of the Supreme Law of the Land. The scope and content of the Conventions have assumed central importance in debates about U.S. policy toward al Qaeda and Taliban detainees held at Guantanamo Bay, Cuba. Critics charge that several aspects of U.S. policy toward the detainees violate the Conventions. In response, the Bush Administration maintains, among other things, that the Conventions are not binding on the President as a matter of domestic law because the President has the constitutional authority to violate the Conventions in the interest of protecting national security. This Article evaluates the Bush Administration's claim.

The Administration's position has certain nontrivial virtues. Even if the United States has no legal right to violate the treaties as a matter of international law, good reasons exist to recognize an implied power to violate (or supersede) treaties as a matter of domestic law. The central question is who should have this authority: the President or Congress. Professors Jinks and Sloss consider in detail three variations of the Administration's position. The President's power to violate treaties might stem from (1) the President's law-making authority; (2) the President's law-breaking authority; or (3) the President's unfettered discretion to interpret U.S. treaty obligations. Following detailed consideration of each variation, Professors Jinks and Sloss conclude that the President has no authority to violate a treaty obligation if Congress has the authority under Article I to enact legislation superseding

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that treaty obligation. Because the rules embodied in the Geneva Conventions address matters within the scope of Congress's Article I powers, the President lacks the constitutional power (absent congressional authorization) to violate these treaties. Building on this claim, the authors also argue that the President lacks the unilateral authority to violate the Conventions because the existence of international rules empowers Congress to regulate matters governed by the treaties, even if those matters would otherwise be subject to the President's exclusive power. Finally, the authors suggest that there is some meaningful role for courts to play in enforcing treaty obligations—irrespective of whether the President's interpretation of any given treaty is entitled to substantial deference. In short, the authors conclude that the President is bound by the Geneva Conventions, both as a formal legal matter and as a practical matter.

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We have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly . . . in conditions for which they were never intended, and we may well wonder in view of the precedents now established whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged.¹

INTRODUCTION

During wartime, the executive branch tends to accrue greater powers at the expense of its legislative and judicial counterparts.² Throughout most of U.S. constitutional history, the powers accrued by the executive branch during wartime reverted back to the other branches in peacetime.³ This reversion did not occur, however, at the end of World War II.⁴ As one distinguished scholar observed, "for the first time in . . . history there [was], following a great war, no peacetime Constitution to which [the American people could] expect to return in any wholesale way, inasmuch as the Constitution of peacetime and the Constitution of wartime ha[d] become . . . very much the

¹ Charles Evans Hughes, Address at Harvard Law School, June 21, 1920, *reprinted in* ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 102 (1954).

² See EDWIN S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 168 (1947).

³ See *id.* at 168–72.

⁴ *Id.* at 172.

same Constitution.”⁵ Another respected scholar, writing at the end of the Vietnam War, warned that “unless the American democracy figures out how to control the Presidency in war and peace . . . our system of government will face grave troubles.”⁶

Recently, in the context of the “War on Terror,” President Bush has attempted to build on precedents established during past wars to support extraordinarily broad claims of executive power. In 2002, a top legal advisor in the Justice Department told the White House that “the President enjoys complete discretion in the exercise of his Commander-in-Chief authority.”⁷ Moreover, the legal advisor added, “Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief.”⁸ In short, when the President invokes his Commander-in-Chief power, he is free to take any action that he believes will promote national security, and Congress is powerless to interfere with the exercise of presidential prerogative.⁹

The Bush Administration’s sweeping claims of executive power have not gone unchallenged. In *Hamdi v. Rumsfeld*, the Supreme Court held that a U.S. citizen held captive in a military prison as an alleged “enemy combatant” has a right to challenge the factual basis of his detention.¹⁰ In *Rasul v. Bush*, the Court held that aliens imprisoned at Guantanamo Bay, Cuba (“Guantanamo”) as “enemy combat-

⁵ *Id.*

⁶ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at x (1973).

⁷ See Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 33 (Aug. 1, 2002) [hereinafter Bybee Memo].

⁸ *Id.* at 34.

⁹ Several recently declassified memoranda from high-level legal advisors argue that Congress lacks the authority to condition, in any meaningful way, the exercise of the President’s Commander-in-Chief power. See, e.g., *id.* (arguing that the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 18 U.S.C. §§ 2340–2340A (Torture Act), does not apply to interrogations undertaken pursuant to the President’s Commander-in-Chief authority); Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees 10–11 (Jan. 9, 2002) [hereinafter Yoo/Delahunty Memo] (disclaiming the applicability of the War Crimes Act to conduct authorized by the President by reference to the President’s “plenary authority” as Commander in Chief); U.S. DEP’T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATION IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONCERNS 24 (2003) [hereinafter WORKING GROUP REPORT ON DETAINEE INTERROGATION] (“In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy.”); *id.* (asserting that the President has “complete discretion in exercising the Commander-in-Chief power” and that “[a]ny effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President”).

¹⁰ See *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633, 2648 (2004).

ants” have a right of access to U.S. courts.¹¹ While *Hamdi* and *Rasul* impose significant limitations on executive power in wartime, the Court’s decisions leave a number of crucial questions unanswered.

One such question is whether the President possesses the constitutional authority to violate treaties that regulate the conduct of warfare. Currently, the Bush Administration is holding approximately six hundred prisoners at Guantanamo, most of whom were captured during the armed conflict in Afghanistan.¹² Assuming that neither the Taliban nor the al Qaeda detainees qualify as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War (“POW Convention”),¹³ as the Bush Administration maintains,¹⁴ they are still entitled to the protections of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Civilian Convention”),¹⁵ which applies to all “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict . . . of which they are not nationals.”¹⁶ The Bush Administration claims that it is treating the Guantanamo detainees “in a manner consistent with the principles of [the Conventions].”¹⁷ Even so, the Administration reserves the right to deviate from specific requirements of the Conventions “to the extent appropriate and consistent with military necessity.”¹⁸

Is the President bound, in any meaningful sense, by the Geneva Conventions? Do the treaties, applicable only in a time of war, condi-

¹¹ See *Rasul v. Bush*, 542 U.S. ___, 124 U.S. 2686, 2698–99 (2004).

¹² See Michael Kilian, *Guantanamo Detainees Get Chance to Argue for Release*, CHI. TRIB., May 19, 2004, at 17 (reporting that “roughly 600” individuals were detained at Guantanamo).

¹³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention].

¹⁴ See Press Release, White House Press Secretary Ari Fleischer, Statement on the Geneva Convention (May 7, 2003) [hereinafter Press Statement], at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>. For an analysis of issues related to the classification of the detainees as POWs, see *infra* notes 77–85 and accompanying text.

¹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Convention].

¹⁶ *Id.* art. 4. The Bush Administration has suggested that the Civilian Convention does not apply to the al Qaeda detainees because they are “unlawful combatants” and the Civilian Convention applies only to “civilian non-combatants.” See Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002) [hereinafter Fact Sheet], at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>. On February 7, 2002, President Bush issued a directive formalizing the policy described in the Fact Sheet. See Memorandum from the President, to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Directive on Treatment of Detainees], available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html>. This position is difficult to reconcile with the language of the Convention quoted above. See *infra* Part V.E (discussing the detainees’ status under the Civilian Convention).

¹⁷ See Fact Sheet, *supra* note 16.

¹⁸ See *id.* (stating that Guantanamo “detainees will not receive some of the . . . privileges afforded to POWs” under the POW Convention).

tion the exercise of the President's Commander-in-Chief power? The Bush Administration would answer both questions in the negative.¹⁹ As a matter of international law, it would be untenable to claim that the United States has a legal right to disregard its obligations under the Geneva Conventions.²⁰ The Administration's claim, however, is primarily one of domestic, rather than international law.²¹ The "Bush position" boils down to this: even assuming that the Geneva Conventions are binding on the United States as a matter of international law, they do not bind the President as a matter of domestic law because the President has the constitutional authority to violate specific provisions of the Conventions to protect national security.²² This article evalu-

¹⁹ See *supra* text accompanying notes 7–9. As part of the claim that the President enjoys complete discretion as Commander in Chief, Bush Administration lawyers argued that the President has the constitutional authority to suspend application of the Geneva Conventions—even if doing so is inconsistent with the Conventions, and with international law generally. See Yoo/Delahunty Memo, *supra* note 9, at 28–32. The President expressly endorsed this view in his directive concerning the treatment of al Qaeda and Taliban detainees. See Bush Directive on Treatment of Detainees, *supra* note 16. Indeed, the Administration has made clear that its decision to treat detainees in a manner consistent with the Geneva Conventions is not dictated by law. See *id.* Moreover, the approach taken by the Justice Department in analyzing these questions strongly suggests that the Department of Justice lawyers think the President is not bound by the Conventions. The legal memoranda are structured around the analysis of domestic criminal statutes, and they discuss international law only insofar as it is relevant to the interpretation of the statutes in question (or simply as a matter of policy). For example, the views of the Office of Legal Counsel (OLC) regarding the application of the treaties to the Guantanamo detainees are structured around an analysis of the War Crimes Act, 18 U.S.C. § 2241. See Yoo/Delahunty Memo, *supra* note 9, at 1–2. As a consequence, the Yoo/Delahunty Memo is riddled with inexplicable gaps in its analysis. For example, the memo analyzes whether contemplated policies would constitute "grave breaches" of the Conventions—provisions of the treaties covered by the War Crimes Act—but fails to analyze whether specific policy options would violate provisions of the Conventions that do not violate domestic statutes. *Id.* at 2–11. Similarly, the OLC's analysis of the legality of "counter-resistance" interrogation techniques is structured around an analysis of the Torture Act. See Bybee Memo, *supra* note 7. The clear implication is that the OLC believes that international law hinds the President only if incorporated directly into statutes.

²⁰ See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1987) [hereinafter RESTATEMENT (THIRD)] ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."). This section embodies the *pacta sunt servanda* doctrine. See *id.* cmt. a.

²¹ See, e.g., Bybee Memo, *supra* note 7. The Bush Administration has also adopted the position that, as a matter of international law, the Guantanamo detainees do not qualify as prisoners of war under the POW Convention. See, e.g., Bush Directive on Treatment of Detainees, *supra* note 16. While this issue is discussed briefly below, this Article focuses primarily on the Justice Department's argument that the President has the constitutional authority to violate treaties governing the treatment of wartime detainees.

²² The Bybee Memo, *supra* note 7, emphatically endorses the view characterized here as the "Bush position." Other internal Bush Administration documents also endorse this position. See, e.g., WORKING GROUP REPORT ON DETAINEE INTERROGATION, *supra* note 9; Yoo/Delahunty Memo, *supra* note 9. When the Bush Administration declassified some of these documents, press reports indicated that the Administration repudiated some of the legal analysis in the Bybee memo. See, e.g., Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 23, 2004, at A1. The Administration, however,

ates the domestic constitutional arguments both for and against the Bush position.

This Article is the first to offer a sustained analysis of the President's constitutional authority to violate a treaty that is the supreme law of the land. Several scholars have analyzed the President's authority to terminate treaties in accordance with international law.²³ One should recognize, however, that treaty termination and treaty violation raise distinct constitutional issues. A presidential decision to terminate a treaty in compliance with international law is generally considered consistent with the President's constitutional duty to "take Care that the Laws be faithfully executed."²⁴ In contrast, a presiden-

did not repudiate the Bush position. In fact, shortly after releasing the declassified documents, White House Counsel Alberto Gonzales convened a press briefing to clarify the Administration's position. See Press Briefing, White House Counsel, Judge Alberto Gonzales (June 22, 2004) [hereinafter Press Briefing], available at www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html. At that press briefing, a reporter asked Judge Gonzales:

[I]s it the opinion of this administration that "just as statutes that order a President to conduct warfare in a certain manner would be unconstitutional, so, too, are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks." Is that good law in this administration?

Id. Judge Gonzales did not disavow this statement of the Bush position. Instead, he asserted that the President "has not exercised his Commander-in-Chief override." *Id.* This statement implies that Judge Gonzales believes that the President has the constitutional power, as Commander in Chief, to override statutes (and treaties) that regulate the interrogation of enemy combatants. In short, the statement implies that the White House Counsel accepts the Bush position.

²³ See, e.g., DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* 161-72, 181-206, 248-306 (1986) (reviewing various terminations of treaties by independent Presidential action throughout U.S. history and analyzing the termination of the 1954 Mutual Defense Treaty between the United States and Taiwan by President Carter, which was the subject of *Goldwater v. Carter*, 444 U.S. 996 (1979)); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 211-14 (2d ed. 1996) (discussing the terms for breaching or terminating a treaty); Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 Nw. U. L. REV. 577, 586-95, 613-17 (1980) (discussing *Goldwater v. Carter* and its invocation of the "sole organ" theory, first articulated in the *Curtis-Wright* opinion, which holds that the President is the sole organ of the federal government in international relations, and reviewing other historical instances of sole presidential termination of treaties); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 491-92 (2004) (discussing the political branches' sovereign power to denounce treaty obligations); Louis Henkin, Editorial Comment, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647 (1979) (discussing the President's power to terminate treaties in light of *Goldwater v. Carter*, and whether Congress can take legal action against the President if the President unilaterally terminates a treaty); David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L. J. 931, 977-94 (1978) (proposing greater Congressional involvement in the treaty termination process).

²⁴ U.S. CONST. art. II, § 3; see Michael J. Glennon, *Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 MICH. L. REV. 1542, 1554 (1997) (book review) (stating that lawful treaty termination violates neither the *pacta sunt servanda* rule nor the President's duty under the Take Care Clause); cf. HENKIN, *supra* note 23, at

tial decision to breach a treaty, in contravention of international law, may violate the President's duty under the Take Care Clause.

Scholars have also published numerous articles concerning the President's authority to violate customary international law (CIL).²⁵ Treaties raise different constitutional issues, however, because the Supremacy Clause expressly states that treaties, like statutes, are the "supreme Law of the Land."²⁶ Of course, the majority view is that CIL is also "supreme over the law of the several States,"²⁷ but this does not mean that CIL and treaties have coequal status within the hierarchy of federal law. For example, while federal regulations are supreme over state law, they rank lower than statutes in the federal hierarchy, because Congress enacts statutes, whereas agencies create regulations. Similarly, one could argue that CIL ranks lower than treaties in the federal hierarchy, because the Senate approves treaties, whereas CIL evolves from state practice without legislative action.²⁸ Regardless, this Article's purpose is not to defend a particular position regarding

212 (remarking that the President's duty to execute the laws, "including treaty-law, presumably ceases to exist when the treaty ceases to exist").

²⁵ See generally *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (compiling a series of short essays exploring whether the President may violate customary international law); *Agora: May the President Violate Customary International Law? (Cont'd)*, 81 AM. J. INT'L L. 371 (1987) (continuing the debate); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985) (evaluating the constitutional basis for executive power to violate CIL); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988) (arguing that the President is not bound by international law, except where statutes or constitutional provisions duplicate international law rules).

²⁶ U.S. CONST. art. VI, cl. 2.

²⁷ See RESTATEMENT (THIRD), *supra* note 20, § 111(1) (differentiating between "international law" and "international agreements of the United States," but stating that both prevail over state law); see also *id.* § 115 cmt. e (remarking that "any rule of customary international law[] is federal law"). The prevailing view is that CIL is federal common law. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . ."); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (noting the "settled proposition that federal common law incorporates international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is also well settled that the law of nations is part of federal common law."). Professors Bradley and Goldsmith have criticized the position that federal common law incorporates 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). But see Harold Hongju Koh, *Commentary, Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (rebutting the "revisionist" claims made by Bradley and Goldsmith). The Supreme Court recently settled part of this debate, recognizing that some CIL is federal common law. See *Sosa v. Alvarez-Machain*, 542 U.S. ___, 124 S. Ct. 2739, 2765-66 (2004).

²⁸ See, e.g., Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555, 576-77 (2002) (contending that Article III of the Constitution grants federal courts the power to adjudicate claims arising under CIL, but that CIL does not preempt conflicting state law because it is not one of the types of federal law included in the Supremacy Clause). Professor Ramsey does not explicitly compare CIL to treaties, but his analysis implies that treaties rank higher than CIL because treaties have preemptive force under the Supremacy Clause.

the domestic status of CIL. The point is that questions involving the President's alleged power to violate treaties raises distinct constitutional issues. Therefore, even if the President does possess the constitutional authority to violate CIL, it does not necessarily follow that the President has the constitutional authority to violate a treaty that is the supreme law of the land.

The question of whether the President is bound by the Geneva Conventions also implicates unique issues involving the President's Commander-in-Chief power.²⁹ The Conventions belong to a fairly small class of treaties that regulates the conduct of warfare. Scholars have written extensively about the relationship between the President's Commander-in-Chief power and Congress's power to declare war.³⁰ In addition to the Declare War Clause,³¹ however, the Constitution grants Congress several other powers related to the conduct of warfare.³² Strikingly, there is very little commentary on the relationship between these congressional powers and the President's Commander-in-Chief power.³³ This relationship is important for the purposes of this Article because law-of-war treaties address some matters that are arguably subject to the President's exclusive constitutional authority as Commander in Chief.³⁴ Matters subject to the President's exclusive authority are, by definition, beyond the scope of

²⁹ See U.S. CONST. art. II, § 2, cl. 1 (designating the President as "Commander in Chief of the Army and Navy of the United States").

³⁰ See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); John C. Yoo, *War and Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002); see also Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002) (responding to Professor Yoo's critique of *Textualism and War Powers*).

³¹ U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to "declare War").

³² See *id.* art. I, § 8, cl. 10 (granting the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); *id.* art. I, § 8, cl. 11 (granting the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* art. I, § 8, cl. 12 (granting the power "[t]o raise and support Armies"); *id.* art. I, § 8, cl. 13 (granting the power "[t]o provide and maintain a Navy"); *id.* art. I, § 8, cl. 14 (granting the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"); see also PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 195 (2002) (remarking that "both Congress and the President have additional powers that bear on the use of military force").

³³ *But see* Lieutenant Colonel Bennet N. Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 73 (1965) (arguing operational control of the armed forces falls within the exclusive province of the President as Commander in Chief). Hollander does not address whether the President may violate treaties (or CIL) regulating the conduct of war. In fact, Hollander suggests that the law of nations and the law of war limit the scope of the President's Commander-in-Chief power. See *id.* at 58 (quoting Justice Story's dissent in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 147 (1814)). Hollander does not assert that the regulation of military operations is beyond the scope of the treaty power. In short, Hollander does not analyze the problem considered in this Article. Part IV offers a sustained analysis of the issues Hollander identifies, insofar as they implicate the distribution of constitutional authority to violate treaties. See *infra* Part IV.C.

³⁴ See *infra* notes 377–96 and accompanying text.

Congress's Article I powers.³⁵ It is firmly established that Congress has the power to violate U.S. treaty obligations within the scope of Article I by enacting legislation that supersedes a particular treaty provision as a matter of domestic law.³⁶ If the Geneva Conventions govern matters beyond the scope of Congress's Article I powers, however, then either the President has the constitutional authority to violate the treaties or the federal government as a whole lacks the power.

This Article contends that the President never possesses the unilateral authority to violate a treaty; he must always obtain congressional approval. Moreover, the courts have a meaningful role to play in enforcing treaties. Part I provides general background information on the Geneva Conventions. Part I also discusses the range of policies and procedures adopted by the Bush Administration that may be inconsistent with U.S. obligations under the Conventions.

Parts II through V each address a different version of the claim that the President is not bound by the Geneva Conventions. Part II rebuts the argument that the President is not bound by the Geneva Conventions because the Conventions lack the status of supreme federal law. Part II demonstrates that, prior to September 11, 2001 (9/11), the Geneva Conventions were the supreme law of the land under the Supremacy Clause. Moreover, legislation enacted since 9/11 has not altered the domestic status of the Conventions in any material respect.

Part III analyzes the relationship between treaties and the President's independent lawmaking authority, assessing whether the President has the authority to supersede the Conventions as a matter of domestic law. On November 13, 2001, President Bush issued an executive order relating to the detention, treatment, and trial of certain enemy aliens (Military Order).³⁷ President Bush's Military Order authorized the Secretary of Defense to prescribe rules governing conditions of detention and to issue regulations for trials before military commissions.³⁸ Insofar as regulations adopted pursuant to the Military Order conflict with certain provisions of the Geneva Conventions, the question arises whether the Military Order supersedes the relevant

³⁵ See, e.g., HENKIN, *supra* note 23, at 86–96 (discussing the distinction between “concurrent” and “exclusive” powers). “Concurrent” powers are shared between the President and Congress, but Congress is powerless to interfere in areas where the President exercises “exclusive” authority. See *id.*

³⁶ See *infra* note 189.

³⁷ See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].

³⁸ See Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. pt. 9 (2003) [hereinafter DOD Order]. Only regulations for trials before military commissions have been published; rules governing the conditions of detention have not.

treaty provisions as a matter of domestic law. Part III contends that, although the President has a limited power to create federal law by issuing unilateral executive orders, any conflict between the Military Order and the Geneva Conventions must be resolved in favor of the treaties.

Part IV confronts the central question raised in this Article: whether the President has the constitutional authority to violate the Geneva Conventions. The analysis proceeds in three parts. First, Part IV rebuts the claim that the President, as Commander in Chief, has the constitutional authority to violate federal statutory and constitutional law in order to protect national security in emergency situations. Second, this Part demonstrates that the President's duty to "take Care that the Laws be faithfully executed"³⁹ includes a duty to execute treaties. Therefore, the President must obtain congressional authorization for any policy that contravenes a treaty provision that is the law of the land. Third and finally, this Part considers the claim that treaties regulating the conduct of warfare constitute a special case, and that the President must have the constitutional authority to violate such treaties insofar as they regulate conduct beyond the scope of Congress's Article I powers. Part IV rejects this claim for two reasons. Even if this claim were valid, it would apply only to a small fraction of the Geneva Conventions because most of the Conventions' provisions address matters within the scope of Congress's legislative powers. Also, when the United States ratifies treaties regulating the conduct of warfare, the act of ratification alters the allocation of power between the President and Congress, thereby empowering Congress to regulate matters that would otherwise be subject to the exclusive control of the President as Commander in Chief.

Part V addresses the issue of constitutional separation of powers as applied to the President and the courts with respect to treaty interpretation. The Bush Administration has suggested that the President is not bound by the Geneva Conventions—at least not in any practical sense—because the President has unfettered discretion to interpret the treaties as he sees fit.⁴⁰ Although the Geneva Conventions do present some treaty interpretation issues that raise nonjusticiable political questions, Part V demonstrates that the Conventions also present some treaty interpretation questions that are well within the scope of judicial competence. Therefore, the President's power to interpret the Conventions is subject to judicial control.

³⁹ U.S. CONST. art. II, § 3.

⁴⁰ See *infra* note 506 and accompanying text.

I

BACKGROUND

Part I contains two sections. The first section provides an introduction to the Geneva Conventions. The second section presents an overview of Bush Administration policies that may be inconsistent with U.S. obligations under the Conventions.

A. The Geneva Conventions

The United States is party to several multilateral treaties that govern the conduct of war. Together, these treaties constitute the law of war.⁴¹ Because our argument directly addresses the legal status of only one aspect of this law, it is important to provide some background on the law of war generally, and the specific contributions of the Geneva Conventions. The law of war encompasses two distinct bodies of rules. The *jus ad bellum* governs the lawful use of force, while the *jus in bello* governs the conduct of war.⁴² The *jus in bello* is further subdivided into Geneva law and Hague law.⁴³ Comprised principally of the four 1949 Geneva Conventions⁴⁴ and the two 1977 Additional Protocols, Geneva law is a detailed body of rules concerning the treatment of victims of armed conflict.⁴⁵ Embodied principally in the 1899 and 1907 Hague Conventions, Hague law prescribes the acceptable means and methods of warfare, particularly with regard to tactics and general conduct of hostilities.⁴⁶ Though Geneva law and Hague law overlap, the terminology distinguishes two distinct

⁴¹ See Rear Admiral Michael F. Lohr & Commander Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 465 n.2 (2003) (defining the law of war as the "part of international law that regulates the conduct of armed hostilities," which encompasses "treaties and international agreements to which the United States is a party, [as well as] applicable customary international law" (citation omitted)).

⁴² See INGRID DETTER, *THE LAW OF WAR* 156-58 (2d ed. 2000).

⁴³ See *id.* at 158-59.

⁴⁴ There are four Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; POW Convention, *supra* note 13; Civilian Convention, *supra* note 15.

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000) (remarking that "Geneva law . . . emphasizes protection of the victims of war, the sick, the wounded, prisoners, and civilians").

⁴⁶ See, e.g., Convention (IV) Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV]; see also Meron, *supra* note 45, at 243 (describing Geneva law as governing the conduct of hostilities).

regimes: one governing the treatment of persons subject to the enemy's authority (Geneva law), and the other governing the treatment of persons subject to the enemy's lethality (Hague law). International humanitarian law embraces the whole *jus in bello*, in both its Geneva and Hague dimensions.⁴⁷

The four Geneva Conventions on the Protection of War Victims form the core of Geneva law. These treaties were drafted in 1949, in the wake of World War II. The war revealed several important deficiencies in the law of war which the Conventions were designed to address. Specifically, the conditions under which the rules applied were poorly defined; the rules inadequately protected various categories of vulnerable persons subject to the authority of the enemy; the rules failed to provide any protection in non-international armed conflict; and the rules were not adequately enforced.⁴⁸

First, the Geneva Conventions apply in all cases of armed conflict between two or more states, regardless of whether either of the states has issued a formal declaration of war.⁴⁹ That is, the treaties apply whenever there exists a *de facto* state of armed conflict between states. Moreover, parties to these treaties remain mutually bound, even if an opposing state is not a party to the treaties.⁵⁰

Second, each of the four Conventions prescribes detailed rules defining the proper treatment of one category of "protected persons"—the sick and wounded on land; the sick, wounded, and shipwrecked at sea; prisoners of war; and civilians. The central idea of these treaties, as alluded to earlier, is to establish a minimum standard for the treatment of persons subject to the authority of the enemy (e.g., persons captured and detained by the enemy). For example, under Geneva law, POWs have the following rights: (1) the right to humane treatment while in confinement (including important limita-

⁴⁷ See Meron, *supra* note 45, at 239 (noting that the term "international humanitarian law" is "increasingly used to signify the entire law of armed conflict"); see also DETTER, *supra* note 42, at 156–63 (surveying the bodies of law potentially applicable in situations of armed conflict); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 n.10 (2004) (providing background and terminology on the law of war).

⁴⁸ See generally GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 80–114 (1994) (summarizing the views of governments and the International Committee of the Red Cross (ICRC) at the Diplomatic Conference leading to the drafting of the four Geneva Conventions).

⁴⁹ See Geneva I, *supra* note 44, art. 2(1); Geneva II, *supra* note 44, art. 2(1); POW Convention, *supra* note 13, art. 2(1); Civilian Convention, *supra* note 15, art. 2(1). The Conventions also apply in all cases of "partial or total" military occupation. See Geneva I, *supra* note 44, art. 2(2); Geneva II, *supra* note 44, art. 2(2); POW Convention, *supra* note 13, art. 2(2); Civilian Convention, *supra* note 15, art. 2(2).

⁵⁰ See Geneva I, *supra* note 44, art. 2(3); Geneva II, *supra* note 44, art. 2(3); POW Convention, *supra* note 13, art. 2(3); Civilian Convention, *supra* note 15, art. 2(3); see also Meron, *supra* note 45, at 248–51 (examining the significance of this system of reciprocity).

tions on coercive interrogation tactics);⁵¹ (2) due process rights if subject to disciplinary or punitive sanctions;⁵² (3) the right to release and repatriation upon the cessation of active hostilities;⁵³ and (4) the right to communication with (and the institutionalized supervision of) protective agencies.⁵⁴ The POW Convention also prohibits reprisals against POWs⁵⁵ and precludes the use of POWs as slave laborers.⁵⁶ In addition, the treaties define, with some precision, the categories of persons protected by them.⁵⁷

Third, the Geneva Conventions specify fundamental humanitarian protections applicable to all persons subject to the authority of a party to a conflict—even if the conflict is not international (e.g., a civil war). These protections, first codified in common Article 3 of the Conventions, govern the treatment of persons no longer taking active part in the hostilities.⁵⁸ All such persons are entitled to humane treatment and, in the case of criminal charges, to a fair trial by “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵⁹

Finally, the Conventions establish an enforcement and implementation scheme with three important features: (1) states must impose criminal sanctions for grave breaches;⁶⁰ (2) warring parties must designate a neutral state or organization as a “Protecting Power” empowered to monitor compliance with the treaties during armed conflicts;⁶¹ and (3) states must provide substantial due process protections designed to ensure some measure of judicial or administrative oversight of the treatment accorded war detainees.⁶²

In summary, the Geneva Conventions govern the treatment of detainees—and others subjected, in some formal way, to the authority of the enemy—in times of armed conflict. These treaties outline modest but important humanitarian guarantees, emphasizing rights to humane treatment, communication, due process, a fair trial, and repatri-

⁵¹ See POW Convention, *supra* note 13, art. 13; see also *id.* arts. 17–19 (concerning interrogation); *id.* arts. 21–48.

⁵² See *id.* arts. 99–108.

⁵³ See *id.* arts. 117–118.

⁵⁴ See *id.* arts. 8–11.

⁵⁵ See *id.* art. 13.

⁵⁶ See *id.* arts. 49–57.

⁵⁷ See, e.g., POW Convention, *supra* note 13, art. 4; Civilian Convention, *supra* note 15, art. 4.

⁵⁸ See Geneva I, *supra* note 44, art. 3(1); Geneva II, *supra* note 44, art. 3(1); POW Convention, *supra* note 13, art. 3(1); Civilian Convention, *supra* note 15, art. 3(1).

⁵⁹ See Geneva I, *supra* note 44, art. 3(1)(d); Geneva II, *supra* note 44, art. 3(1)(d); POW Convention, *supra* note 13, art. 3(1)(d); Civilian Convention, *supra* note 15, art. 3(1)(d).

⁶⁰ See, e.g., POW Convention, *supra* note 13, arts. 129–31.

⁶¹ See, e.g., *id.* art. 8.

⁶² See, e.g., *id.* arts. 5, 99–108, 129.

ation. Compliance with the Conventions is to be monitored by administrative and judicial tribunals in the detaining state,⁶³ as well as by a neutral "Protecting Power."⁶⁴ Violations of the Conventions give rise to individual criminal liability.⁶⁵ These features, taken together, provide a viable legal framework that strikes the proper balance between military necessity and humanitarian ideals.

The Conventions entered into force on October 21, 1950,⁶⁶ and the United States ratified all four Conventions in July 1955.⁶⁷ In 1956, the U.S. Army revised its Field Manual on the Laws of War⁶⁸ to reflect the numerous important developments codified in the Geneva Conventions.⁶⁹ As of June 2004, over 190 states have ratified the Conventions.⁷⁰

In 1977, two Additional Protocols to the Conventions were opened for signature. These Protocols sought to elaborate, clarify, and extend the protective schemes of the Geneva Conventions.⁷¹ The First Additional Protocol, governing international armed conflicts, sought to resolve several important ambiguities in Hague law that governed the means and methods of warfare.⁷² The Second Additional Protocol sought to elaborate upon the rules applicable to non-international armed conflicts.⁷³ Although these treaties enjoy broad international participation,⁷⁴ the United States has not ratified either Protocol.⁷⁵

⁶³ See, e.g., *id.*

⁶⁴ See, e.g., *id.* art. 8.

⁶⁵ See, e.g., *id.* art. 130.

⁶⁶ See Geneva I, *supra* note 44; Geneva II, *supra* note 44; POW Convention, *supra* note 13; Civilian Convention, *supra* note 15.

⁶⁷ See Geneva I, *supra* note 44; Geneva II, *supra* note 44; POW Convention, *supra* note 13; Civilian Convention, *supra* note 15.

⁶⁸ DEP'T OF THE ARMY, FM 27-10, DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE (1956) [hereinafter DEP'T OF THE ARMY, FM 27-10].

⁶⁹ See *id.* (reprinting the Geneva Convention for use by U.S. army personnel).

⁷⁰ See International Committee of the Red Cross, States Party to the Geneva Conventions and Their Additional Protocols (June 6, 2004) (documenting 191 ratifications to the 1949 Geneva Conventions), at http://www.icrc.org/eng/party_gc.

⁷¹ See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 2-4 (1982).

⁷² See, e.g., Protocol I, *supra* note 45, arts. 48-58 (requiring means of attack calculated to reduce risk of harm to civilians and civilian objects); see also BOTHE ET AL., *supra* note 71, at 16 (noting that Part III of Protocol I "is concerned with methods and means of warfare").

⁷³ See Protocol II, *supra* note 45, art. 1; see also BOTHE ET AL., *supra* note 71, at 604 (reporting that "[b]etter protection for the victims of non-international conflicts was one of the main issues" contributing to promulgation of the Additional Protocols).

⁷⁴ See International Committee of the Red Cross, *supra* note 70, § 7 (documenting 161 ratifications of Protocol I and 156 ratifications of Protocol II).

⁷⁵ The United States signed both Protocols in 1977. President Ronald Reagan transmitted Protocol II to the Senate for its advice and consent, but the Senate never consented to the treaty. See Letter of Transmittal from President Ronald Reagan, Protocol II Addi-

B. Possible Treaty Violations Since September 11

This Section argues that since September 11, the Bush Administration has adopted a range of policies and practices that are inconsistent with U.S. obligations under the Geneva Conventions.⁷⁶ The purpose of this Section is not to definitively prove this assertion, but rather to demonstrate that several policies and practices pursued in the War on Terror raise nontrivial concerns under the Geneva Conventions.

tional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-international Armed Conflicts, S. TREATY DOC. NO. 2, 100th Cong., at III (1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987). Nonetheless, the United States has acknowledged that it is bound by portions of the Protocols "that constitute a codification of customary international law." W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 519 & n.55 (2003).

⁷⁶ This Article emphasizes U.S. policy with respect to the treatment of detainees at Guantanamo, notwithstanding the detainee abuse scandal at Abu Ghraib prison in Iraq. See DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Prepared by Major Gen. Antonio M. Taguba) [hereinafter TAGUBA REPORT], available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html>; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, Apr. 30, 2004, at 42. This Article focuses on Guantanamo for two reasons. First, several aspects of the U.S. policy in Guantanamo are flatly inconsistent with U.S. treaty obligations. See, e.g., Fact Sheet, *supra* note 16 (outlining the Bush Administration's policy with respect to detainees in Guantanamo); Press Briefing, *supra* note 22 (describing in great detail the evolution of U.S. policy regarding treatment of Guantanamo detainees and announcing the release of many Administration orders and memoranda defining and debating the contours of this policy). The Administration's orders and memoranda regarding the U.S. policy at Guantanamo are available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html>.

Second, the precise contours of formal U.S. policy in Iraq are unclear. The Administration concedes that the conduct at Abu Ghraib violated the Geneva Conventions. See, e.g., *Pentagon Officials: Interrogation Techniques Lawful*, AP NEWSWIRE, May 13, 2004 (quoting Marine General Peter Pace, Vice Chairman of the Joint Chiefs of Staff, and Deputy Defense Secretary Paul Wolfowitz, both of whom acknowledge that the abuse constituted violations of the Geneva Conventions). The Administration maintains that this conduct was contrary to U.S. policy. Cf. Dep't of Defense, Defense Department Background Briefing (May 14, 2004) (discussing the U.S. interrogation plan and insisting that U.S. policy was to apply the Geneva Conventions in Iraq), available at <http://www.defenselink.mil/transcrip/2004/tr20040514-0752.html>; Richard W. Stevenson, *White House Says Prisoner Policy Set Humane Tone*, N.Y. TIMES, June 23, 2004, at A1 (same). Moreover, the military has initiated criminal proceedings against several soldiers deemed directly responsible for the abuse at Abu Ghraib. See Thom Shanker, *At Iraqi Prison, Rumsfeld Vows to Punish Abuse*, N.Y. TIMES, May 14, 2004, at A10 (reporting statements by Secretary Rumsfeld suggesting that the perpetrators would be tried in U.S. courts). Although some evidence strongly suggests that U.S. policy concerning interrogation methods and conditions of detention in Iraq was inconsistent with the Geneva Conventions, see, e.g., John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 29; Seymour M. Hersh, *Chain of Command*, NEW YORKER, May 9, 2004, at 38, there is insufficient information at the time of this writing to draw definitive conclusions, see Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, at 38. In addition, there is good reason to think that any policy improprieties at the policy level resulted from an ill-conceived strategy to transplant detainee policies in Guantanamo into Iraq. See, e.g., Douglas Jehl & Eric Schmitt, *Afghan Policies on Questioning Landed in Iraq*, N.Y. TIMES, May 21, 2004, at A1. In other words, sustained reflection on the legality of U.S. practices in Guantanamo is, in an important sense, also an analysis of U.S. policy in Iraq.

Potential violations can be divided into four categories. First, the procedures utilized by the Bush Administration to classify war detainees are arguably deficient under Geneva law. Second, the merits of these classification decisions are themselves questionable under the terms of the treaties. Third, the treatment accorded the detainees in Guantanamo is arguably inconsistent with the Geneva Conventions, irrespective of whether the detainees are entitled to POW status. Fourth, the contemplated trials by special military commissions are arguably inconsistent with the Conventions' fair trial and due process guarantees, again regardless of the detainees' "status." These four categories illustrate two types of potential violations. The first two categories consist of possible treaty violations arising from the U.S. decision to deny POW status to the Guantanamo detainees. By contrast, the second two categories consist of possible violations arising from the treatment accorded these detainees, however they are classified under Geneva law. The balance of this Section considers each type of potential violation in more detail.

Some argue that the U.S. government improperly denied the Guantanamo detainees POW status.⁷⁷ The official U.S. government position is that neither Taliban nor al Qaeda fighters qualify as POWs because they fail to satisfy international standards defining "lawful combatants."⁷⁸ This position is arguably deficient under Geneva law in at least two respects: (1) the U.S. determination that the detainees are not POWs is flawed because it relies on a misreading of the POW Convention; and (2) the U.S. must, irrespective of the merits of this classification, treat the detainees as POWs until a "competent tribunal" has determined that they do not qualify for POW status. The first criticism questions the U.S. interpretation of Article 4 of the POW Convention, which identifies those persons entitled to POW status (Article 4 issue),⁷⁹ whereas the second criticism questions the U.S. in-

⁷⁷ See, e.g., Gwyn Prins, *9/11 and the Raiders of the Lost Ark*, 35 CORNELL INT'L L.J. 611, 617-18 (2002) (asserting that the decision to set up independent tribunals, and the decision to let U.S. Secretary of Defense Donald Rumsfeld unilaterally make this decision, were incorrect); Erin Chopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, HUM. RTS. BRIEF, Spring 2002, at 6, 6 (remarking that "the [Bush Administration's] unilateral decision to deny all detainees [POW] status . . . suggest[s] the U.S. government has improperly interpreted its obligations under the Conventions").

⁷⁸ See Secretary of Defense Donald H. Rumsfeld and General Richard Myers, Dep't of Defense News Briefing (Feb. 8, 2002), at http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html; Fact Sheet, *supra* note 16. For a summary of the government's position, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 475-80 (2002); Mike Allen & John Mintz, *Bush Shifts Position on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

⁷⁹ See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5 n.15 (2001) (discussing the applicability of the Article 4 criteria for POW status to Taliban and al Qaeda fighters). Article 4 of the POW Convention identifies

interpretation of Article 5 of the treaty, which establishes presumptive POW status in all cases of doubt and prescribes the procedure for determining the legal status of captured fighters (Article 5 issue).⁸⁰ In both respects, U.S. policy is arguably inconsistent with the minimum requirements of the POW Convention.

several categories of persons protected by the Convention. See POW Convention, *supra* note 13, art. 4. With respect to Article 4, one important question is whether the four criteria expressly applied to “militia and other volunteer corps” in paragraph (A)(2) also limit the scope of paragraph (A)(1) concerning members of the armed forces. There is some question as to whether members of the regular armed forces must have a command structure, wear uniforms, carry arms openly, and generally comply with laws of war to qualify for POW status. On the other hand, the text of (A)(1) does not make reference to “regular” armed forces. Indeed, it extends coverage to “members of militia and other volunteer corps forming part of” the armed forces—and, inexplicably, this reference to “militia and other volunteer corps,” unlike the reference in (A)(2), is not qualified by the four criteria. This textual anomaly strongly suggests that the four criteria apply only to “militia and other volunteer corps” not part of the “armed forces” of the state, and that captured fighters covered by (A)(1) are POWs irrespective of whether they satisfy the four criteria. See, e.g., George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 768–69 (1981) (arguing that Article 4(A)(2) criteria apply only to certain “irregular armed forces” and asserting that “[m]embers of regular, uniformed armed forces do not lose their [prisoner of war] entitlement no matter what violations of the law their units may commit, but the guerrilla unit is held to a tougher standard”).

⁸⁰ See, e.g., Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571, 591 (2002); Inter-American Commission on Human Rights, Request for Precautionary Measures, Detainees in Guantanamo Bay, Cuba (IACHR March 12, 2002) (on file with authors) (granting, in part, petitioners’ request for precautionary measures, and urging the U.S. “to take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal” in accordance with Article 5 of the POW Convention). The POW Convention establishes that captured combatants are presumptively entitled to POW status when their status is unclear. Specifically, Article 5 provides:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

POW Convention, *supra* note 13, art. 5. In response, the United States maintains that the status of Taliban and al Qaeda detainees was not in doubt. See, e.g., Katharine Q. Seelye, *Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (quoting Secretary of Defense Rumsfeld that “[t]here is no ambiguity in this case”). Long-standing U.S. policy provides for Article 5 tribunals, however, whenever the detainee asserts POW status or asserts facts that would entitle him to POW status. See U.S. ARMY, ARMY REGULATION 190–8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (OCT. 1, 1997) [hereinafter ARMY REG. 190-8] (establishing procedures for the treatment of POWs, including procedures for conducting tribunals). In addition, substantial evidence suggests that, as an objective matter, there was some doubt as to the status of these detainees. Several dozens of the detainees have been released over the course of the last two years, and reports indicate that many more may be released in the wake of the Supreme Court rulings in *Rasul* and *Hamdi*. In fact, the Defense Department has now established “Combatant Status Review Tribunals” to determine the legal status of the detainees. See Neil A. Lewis, *U.S. Is Readying Review for Detainees in Cuba*, N.Y. TIMES, July 17, 2004, at A10.

The United States maintains that the Guantanamo detainees do not qualify for POW status. The United States also maintains that the assignment of POW status to these detainees would be bad policy. Specifically, the U.S. argues that neither the Taliban nor al Qaeda detainees satisfy the express requirements of the POW Convention, and that POW protections would impede the investigation and prosecution of suspected terrorists.⁸¹ Of particular concern are: (1) restrictions on the interrogation of POWs;⁸² (2) the criminal procedure rights of POWs, which might preclude trial by special military commissions;⁸³ and (3) POWs' right to release and repatriation following the cessation of hostilities.⁸⁴ In short, the U.S. has denied POW status to the detainees, at least in part, because the Administration views the rights afforded to POWs under the Convention to be inconsistent with U.S. policy objectives.⁸⁵ Irrespective of the merits of these concerns, U.S. policy is manifestly inconsistent with Geneva law if the procedures utilized to classify these detainees were insufficient, or if the classification determinations were inaccurate in fact or erroneous in law.

⁸¹ See, e.g., Yoo/Delahunty Memo, *supra* note 9.

⁸² Under the POW Convention, the detaining authority may not subject POWs to coercive questioning, and POWs are required only to provide name, rank, and serial number to interrogators. See POW Convention, *supra* note 13, arts. 17–18; see also Jeremy Rabkin, *After Guantanamo: The War over the Geneva Conventions*, NAT'L INTEREST, Summer 2002, at 15, 19 (defending denial of POW status to Taliban and al Qaeda detainees, in part, on this ground); cf. Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 335–36 (2002) (arguing that neither al Qaeda nor Taliban detainees should be defined as POWs under the POW Convention and afforded all the protections of the Convention); Ruth Wedgwood, Editorial, *The Rules of War Can't Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A11 (same).

⁸³ See Military Order, *supra* note 37. The POW Convention provides that POWs facing criminal charges are entitled to trial by court-martial or regular civil court. See POW Convention, *supra* note 13, arts. 99, 102; Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1423–24 (2002); Neal K. Katyal & Laurence H. Tribe, Essay, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263–66 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 324–26 (2002); Diane F. Orenlichter & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 659–63 (2002). Under this view, denying POW status would leave open the possibility of trying detainees before military commissions for violations of the law of war.

⁸⁴ See POW Convention, *supra* note 13, art. 118 (recognizing the right to repatriation); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 353 (2002).

⁸⁵ The internal memoranda on the issue indicate that there was some support for assigning the detainees POW status. See, e.g., Memorandum from William H. Taft, IV, Legal Advisor, Department of State, to White House Counsel Alberto Gonzalez, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002) [hereinafter Taft Memo] (arguing that the United States should classify detainees as POWs irrespective of whether they satisfy the formal requirements of the POW Convention).

Furthermore, the treatment of these detainees is arguably deficient under the Geneva Conventions even if the U.S. has lawfully denied them POW status. Assuming the detainees are not POWs, they are still "protected persons" under common Article 3, and many of them are protected under the Civilian Convention. The Civilian Convention guarantees rights to "unlawful combatants" that are nearly identical to the rights assured to POWs under the POW Convention.⁸⁶ Thus, by denying the protections of the POW Convention to the Guantanamo detainees, the U.S. is violating many of the rights to which they are legally entitled under common Article 3⁸⁷ and the Civilian Convention.⁸⁸

⁸⁶ See Jinks, *supra* note 47 (discussing the rights provided under both Conventions); see also *infra* text accompanying notes 524–39 (assessing the Bush Administration's claim that "unlawful combatants" are not protected by the Civilian Convention).

⁸⁷ For example, common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." See Geneva I, *supra* note 44, art. 3; Geneva II, *supra* note 44, art. 3; POW Convention, *supra* note 13, art. 3; Civilian Convention, *supra* note 15, art. 3. Thus, many of the arguments against trial of POWs by military commission apply with equal force to persons protected under common Article 3. See *infra* notes 109–19 and accompanying text. The President expressly determined that common Article 3 does not apply to the war on terrorism because the conflict is "international in scope." See Bush Directive on Treatment of Detainees, *supra* note 16; Yoo/Delahanty Memo, *supra* note 9. Although an extended analysis of this claim is beyond the scope of this Article, it suffices to say that it is plainly incorrect as a matter of law. By its terms, common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." See Geneva I, *supra* note 44, art. 3; Geneva II, *supra* note 44, art. 3; POW Convention, *supra* note 13, art. 3; Civilian Convention, *supra* note 15, art. 3. In the Administration's view, this language makes clear that the provision governs only armed conflicts confined to the territory of one state. The text, structure, and history of the provision, however, demonstrate that it applies to all armed conflicts not involving two or more opposing states. See generally Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) (arguing that the laws of war, including common Article 3 of the Geneva Convention, apply to noninternational armed conflicts, such as 9/11). Common Article 3 was revolutionary because it regulates wholly internal matters as a matter of international humanitarian law. If the provision governs wholly internal conflicts, as the "one state" interpretation recognizes, then the provision applies a fortiori to armed conflicts with transnational dimensions. The language of the provision limiting its application to the "territory of one of the High Contracting Parties" simply makes clear that application of the provision requires a nexus to the jurisdiction of a state party to the treaty. *Id.* at 41. In addition, the Administration's interpretation produces several inexplicable regulatory asymmetries. In the Administration's view, the Conventions would cover international armed conflicts and wholly internal armed conflicts, but would not cover armed conflicts between a state and an armed group with a transnational presence. The Conventions also would not cover internal armed conflicts that spill over an international border into the territory of another state. The only reasonable reading of the provision is that it applies to all "armed conflicts" not covered by common Article 2—the provision defining international armed conflict within the meaning of the Geneva Conventions. *Id.* at 38–41.

⁸⁸ See, e.g., Civilian Convention, *supra* note 15, art. 31 (restricting interrogation methods); *id.* arts. 65–76 (specifying criminal procedure rights); *id.* arts. 132–35 (providing for release and repatriation). The Civilian Convention guarantees the detainees a right of access to a canteen to purchase "foodstuffs and articles of everyday use, including soap and

The claim that Geneva law does not protect the detainees provided the foundation for U.S. detention policy at Guantanamo. The “interrogation rules of engagement” are the clearest—and perhaps most controversial—aspect of this policy.⁸⁹ Unencumbered by international legal obligation, the Administration has crafted an interrogation policy motivated solely by U.S. policy preferences. In Part V, this Article analyzes in some detail the legality of the interrogation techniques authorized for use in Guantanamo.⁹⁰ It is sufficient here to point out only that these “counter-resistance” techniques clearly violate the Geneva Conventions—if the Conventions do indeed protect the detainees—in that they involve various forms of coercion and intimidation, including implied threats of violence and other forms of gross mistreatment.⁹¹

The POW Convention obligates the detaining power to protect POWs “against [all] acts of violence or intimidation and against insults and public curiosity.”⁹² It also provides that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”⁹³ Likewise, the Civilian Convention provides that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”⁹⁴ This Convention also provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”⁹⁵ Simply put, the techniques authorized by the Department

tobacco.” Civilian Convention, *supra* note 15, art. 87. The Administration has explicitly stated, however, that the detainees will not receive “access to a canteen to purchase food, soap, and tobacco.” Fact Sheet, *supra* note 16.

⁸⁹ Military memoranda declassified in the wake of the Abu Ghraib prison scandal referred to the interrogation policies as the “interrogation rules of engagement.” See, e.g., R. Jeffrey Smith & Josh White, *General Granted Latitude at Prison*, WASH. POST, June 12, 2004, at A1.

⁹⁰ See *infra* Part V (analyzing interrogation policy as an illustration of the kind of Convention-based claims that might succeed in court).

⁹¹ See *infra* text accompanying notes 540–48 (describing and analyzing specific interrogation techniques).

⁹² POW Convention, *supra* note 13, art. 13.

⁹³ *Id.* art. 17.

⁹⁴ Civilian Convention, *supra* note 15, art. 27. This provision makes clear that the protection against violence and threats of violence is part of the right to “humane treatment.” *Id.* This is important for two reasons. First, Article 5 of the Civilian Convention requires that all civilians, even “unlawful combatants,” be treated humanely. *Id.* art. 5. Second, common Article 3 requires that all enemy combatants be treated humanely in all circumstances. *Id.* art. 3.

⁹⁵ *Id.* art. 31; see also POW Convention, *supra* note 13, art. 17.

of Defense (DOD) are plainly inconsistent with these obligations.⁹⁶ Indeed, the Secretary of Defense acknowledged, in his April 2003 Order authorizing these tactics, that several of the techniques are inconsistent with provisions of the POW Convention.⁹⁷

Finally, the contemplated criminal trials by an ad hoc military commission arguably violate the fair trial rights recognized in the Geneva Conventions.⁹⁸ As discussed above, the procedures for trial by military commission fail to satisfy POW Convention requirements.⁹⁹ Indeed, there is little room for meaningful disagreement on this point, because the POW Convention unqualifiedly requires the detaining state to “assimilate” POWs into the legal regime governing its own armed forces.¹⁰⁰ Specifically, the POW Convention requires that POWs be tried before the same courts and according to the same procedures as members of the detaining state’s armed forces.¹⁰¹ Thus, POWs detained and charged by the United States must be tried by regular courts-martial.¹⁰² Accordingly, the POW Convention prohibits trial by ad hoc military commissions—regardless of whether the procedures utilized therein satisfy basic due process requirements—because the right to assimilation precludes the use of special procedures.

In addition, the procedures that the DOD has prescribed for trials by military commission may fall short of the minimum guarantees recognized in the Geneva Conventions.¹⁰³ The Conventions ensure substantial fair trial rights to all detainees. Indeed, the Civilian Convention provides due process rights that mirror in most respects those

⁹⁶ See *infra* text accompanying notes 540–48 (assessing the interrogation techniques authorized by the Department of Defense (DOD) under Article 31 of the Civilian Convention).

⁹⁷ See Memorandum from Secretary of Defense Donald Rumsfeld, to the Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003) [hereinafter Rumsfeld April 2003 Memo], available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>.

⁹⁸ Fifteen detainees have been designated for trial by military commission. See Press Release, Dep’t of Defense, Presidential Military Order Applied to Nine More Combatants (July 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0987.html>. Charges have been referred in several of these cases. See, e.g., John D. Banusiewicz, Yemeni Detainee to Face Military Commission, AM. FORCES INFO. SERVICE, July, 14, 2004, available at http://www.defenselink.mil/news/Jul2004/n07142004_2004071406.html; K.L. Vantran, Guantanamo Detainees Charged with Conspiracy to Commit War Crimes, AM. FORCES INFO. SERVICE, Feb. 24, 2004, available at http://www.defenselink.mil/news/Feb2004/n02242004_200402246.html.

⁹⁹ See sources cited *supra* note 83 (summarizing this point).

¹⁰⁰ See POW Convention, *supra* note 13, arts. 82–106.

¹⁰¹ *Id.* art. 102.

¹⁰² See, e.g., Paust, *supra* note 79, at 17 n.39.

¹⁰³ See DOD Order, *supra* note 38 (outlining trial procedures).

provided by the POW Convention.¹⁰⁴ Moreover, the Conventions establish minimum procedural rights for any person charged with serious violations of their substantive rules, irrespective of that person's status under the Conventions.¹⁰⁵ As a result, any person prosecuted for Geneva Convention violations, regardless of that person's status as a "protected person," must be provided with "safeguards of proper trial and defence, which shall not be less favorable than" those outlined in the POW Convention.¹⁰⁶ Specifically, Article 105 of the POW Convention provides for basic fair trial rights, including the right to counsel of the defendant's choice, the right to confer privately with counsel, the right to call witnesses, and the right to an interpreter.¹⁰⁷ Likewise, Article 106 grants accused persons the same right of appeal as that available to members of the detaining power's armed forces.¹⁰⁸

The DOD procedure also violates common Article 3, which applies to all war detainees. Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁰⁹ Although this rule is somewhat abstract, it clearly prohibits punishment without a "previous judgment,"¹¹⁰ suggesting that formal adjudication is required. Moreover, the body pronouncing this judgment must be "regularly constituted,"¹¹¹ which suggests that it must be established in law and not specially convened for punishment of the adversary. Furthermore, the adjudicating body must be "a regularly constituted court,"¹¹² which implies that there must be adequate safeguards in place to ensure the impartiality, independence, and fairness of the institution issuing the judgment. Finally, common Article 3's reference to "judicial guarantees which are recognized as indispen-

¹⁰⁴ The Civilian Convention does not include "assimilation" rights, but the specific fair trial rights recognized in the Convention are identical to those found in the POW Convention. See Civilian Convention, *supra* note 15, arts. 64-76, 126, 146-47.

¹⁰⁵ See, e.g., Civilian Convention, *supra* note 15, art. 146. This is an important source of fair trial rights in this context, because the Administration asserts the authority to try by military commission only those persons accused of violations of the laws of war. See, e.g., Alberto Gonzales, *Martial Justice, Full and Fair*, N. Y. TIMES, Nov. 30, 2001, at A27 (maintaining that persons subject to trial by military commission "must be chargeable with offenses against the international laws of war").

¹⁰⁶ Geneva I, *supra* note 44, art. 49; Geneva II, *supra* note 44, art. 50; POW Convention, *supra* note 13, art. 129; Civilian Convention, *supra* note 15, art. 146.

¹⁰⁷ POW Convention, *supra* note 13, art. 105.

¹⁰⁸ See *id.* art. 106.

¹⁰⁹ *Id.* art. 3.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

sable by civilized peoples"¹¹³ establishes an evolving standard that, by design, tracks relevant customary international law.¹¹⁴

The military commission procedures arguably fail to satisfy the requirements of common Article 3 in several respects. For example, the commissions themselves arguably do not constitute impartial, independent tribunals,¹¹⁵ nor do they qualify as "tribunals established by law" or as "regularly constituted courts."¹¹⁶ In addition, the DOD procedures deprive defendants of any meaningful right to counsel¹¹⁷ and limit defendants' ability to mount an effective defense by restricting the right to confront witnesses and compel process.¹¹⁸ Finally, the procedures do not recognize a right to appeal to a higher regularly constituted tribunal.¹¹⁹

¹¹³ *Id.*

¹¹⁴ See, e.g., LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 86–88 (2002). Common Article 3 arguably requires that all war detainees be accorded the basic fair trial rights recognized in major human rights treaties. *Id.*; see International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171, 175–77 [hereinafter ICCPR]; African Charter on Human and Peoples' Rights, June 27, 1981, arts. 3, 6, & 7, 1520 U.N.T.S. 217, 246–47; American Convention on Human Rights, Nov. 22, 1969, arts. 7, 8, & 9, 9 I.L.M. 673; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5, 6, & 7, 312 U.N.T.S. 221, amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess. arts. 9–11, at 72, U.N. Doc. A/810 (1948).

¹¹⁵ See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR THE MILITARY COMMISSIONS* 9–10 (2003) [hereinafter LCHR, *TRIALS UNDER MILITARY ORDER*] (arguing that the military commission scheme is "particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary or the legislature, and none of the participants has both standing and an interest to challenge possible abuses").

¹¹⁶ See Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 687–90 (2002).

¹¹⁷ One problematic aspect of the rules is that civilian counsel (i.e., the counsel chosen by the accused) can be excluded from "closed Commission proceedings" and denied "access to any information protected under [the procedure's security exclusion]." DOD Order, *supra* note 38, §§ 4(C)(3), 6(B)(3), 6(D)(5); see also Paust, *supra* note 116, at 690 (warning that "[t]he right of an accused to legal counsel of choice might be in jeopardy" as a result of DOD rules).

¹¹⁸ The procedures drastically curtail the right of confrontation. Cross-examination of witnesses by the accused is authorized only with respect to witnesses "who appear before the Commission." DOD Order, *supra* note 38, § 5(I). Witnesses can also provide testimony "by telephone, audiovisual means, or other means," by "introduction of prepared declassified summaries of evidence," "testimony from prior trials and proceedings," "sworn [and even] unsworn written statements," and "reports." *Id.* § 6(D); see Paust, *supra* note 116, at 688–89.

¹¹⁹ Verdicts issued by the military commissions may be appealed to specially established "Review Panels." See DOD Order, *supra* note 38, § 6(H)(4); see also LCHR, *TRIALS UNDER MILITARY ORDER*, *supra* note 115, at 4 (criticizing the absence of a right to appeal guilty verdicts to a civilian court); Paust, *supra* note 116, at 685–86 (discussing the deficiencies of the appellate process under the DOD rules).

II

THE DOMESTIC STATUS OF THE GENEVA CONVENTIONS

This Part addresses the argument that the President is not bound by the Geneva Conventions because the Conventions lack the status of law within the domestic legal system. The analysis is divided into two sections. The first section demonstrates that the Geneva Conventions were the law of the land under the Supremacy Clause before September 11, 2001. The second section shows that Congress has not enacted legislation since September 11, 2001 that supersedes the Conventions as a matter of domestic law.

A. The Domestic Status of the Conventions Before September 11

President Truman transmitted the Geneva Conventions to the Senate on April 25, 1951,¹²⁰ the Senate gave its consent to ratification on July 6, 1955,¹²¹ and the United States formally ratified the treaties on July 14, 1955.¹²² This section demonstrates that the Conventions had the status of supreme federal law within the domestic legal system prior to September 11. The first subsection addresses those portions of the Conventions for which implementing legislation is constitutionally required. The second subsection addresses those provisions for which implementing legislation is not constitutionally required.

1. *Provisions for Which Implementing Legislation Is Constitutionally Required*

Some provisions of the Conventions require implementing legislation under the Constitution. For example, most scholars agree that a treaty provision "requiring states parties to punish certain actions . . . could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense."¹²³ Certain provisions of the Geneva Conventions obligate the United States to impose criminal sanctions for conduct that constitutes a "grave breach" of the Conventions.¹²⁴ Thus, implementing legislation may be consti-

¹²⁰ SENATE COMM. ON FOREIGN RELATIONS, GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, S. EXEC. REP. NO. 84-9 (1955), *reprinted in* 84 CONG. REC. 9958, 9963 (1955) [hereinafter SENATE REPORT].

¹²¹ *See id.* at 9972-73.

¹²² *See* POW Convention, *supra* note 13, intro.

¹²³ RESTATEMENT (THIRD), *supra* note 20, § 111 cmt. i. A minority view holds that implementing legislation is not constitutionally required to give domestic legal effect to treaty provisions requiring criminal sanctions. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 59-62 (1996).

¹²⁴ *See* Geneva I, *supra* note 44, art. 49 (obligating states "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be commit-

tionally required to give domestic legal effect to the "grave breaches" provisions.

Nonetheless, when the United States ratified the Geneva Conventions, the Executive Branch expressed the view that it was unnecessary to enact new implementing legislation for the grave breaches provisions, because "it would be difficult to find any of these [grave breaches] which, if committed in the United States, are not already violations of the domestic [criminal] law of the United States."¹²⁵ The Senate Foreign Relations Committee agreed with this assessment.¹²⁶ Thus, at the time of ratification, the political branches agreed that the constitutional requirement for implementing legislation was satisfied by preexisting criminal legislation. Forty years later, however, the political branches decided that existing legislation was inadequate. As a result, Congress enacted the War Crimes Act of 1996 to impose federal criminal sanctions for grave breaches of the Geneva Conventions.¹²⁷ Thus, since 1996, the U.S. treaty obligation to impose criminal sanctions for grave breaches has been fully incorporated into domestic law by virtue of a combination of federal statutes that implement various provisions of the Geneva Conventions.¹²⁸

Aside from the grave breaches provisions, there is one other aspect of the Geneva Conventions for which implementing legislation may be constitutionally required. Article 74 of the POW Convention and Article 110 of the Civilian Convention provide that relief ship-

ted, any of the grave breaches of" Convention I, which are defined in Article 50); Geneva II, *supra* note 44, art. 50 (imposing a similar obligation with respect to grave breaches of Convention II, which are defined in Article 51); POW Convention, *supra* note 13, art. 129 (imposing a similar obligation with respect to grave breaches of Convention III, which are defined in Article 130); Civilian Convention, *supra* note 15, art. 146 (imposing a similar obligation with respect to grave breaches of Convention IV, which are defined in Article 147).

¹²⁵ *Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G Before the Senate Comm. on Foreign Relations*, 84th Cong. 24 (1955) [hereinafter Senate Hearing] (statement of Richard R. Baxter, Office of the General Counsel, Dep't of Defense).

¹²⁶ See SENATE REPORT, *supra* note 120, at 9970 (

The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions

).

¹²⁷ Pub. L. No. 104-192, 110 Stat. 2104 (1996) (

Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

). One year later, Congress amended the statute to establish criminal liability for other war crimes, in addition to grave breaches of the Geneva Conventions. See Pub. L. No. 105-118, § 583, 111 Stat. 2436 (1997) (codified at 18 U.S.C. § 2441 (2004)).

¹²⁸ See War Crimes Act of 1996, H.R. REP. NO. 104-698, at 3-7 (1996).

ments for POWs and civilian internees shall be exempt from import duties.¹²⁹ The Constitution provides that “[a]ll Bills for raising Revenue shall originate in the House of Representatives.”¹³⁰ Some authority suggests that this constitutional provision may preclude use of the treaty power to amend preexisting laws that impose duties on imports.¹³¹ Even if implementing legislation is constitutionally required to give domestic effect to these articles, legislation enacted prior to U.S. ratification of the Conventions provided the President with the requisite statutory authority to implement these provisions.¹³² In sum, there are a few articles of the Geneva Conventions for which implementing legislation may be constitutionally required. Nevertheless, those articles have the status of supreme federal law within the domestic legal system because Congress has enacted appropriate legislation to incorporate them into domestic law.

2. *Provisions for Which Implementing Legislation Is Not Constitutionally Required*

The Supremacy Clause provides that “all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land.”¹³³ This provision means that all treaties the United States ratifies have the status of supreme federal law, unless a particular treaty provision exceeds the scope of the treaty-makers’ domestic lawmaking powers, or a subsequent inconsistent treaty or statute supersedes the treaty provision at issue.¹³⁴ Most provisions of the Geneva Conven-

¹²⁹ See POW Convention, *supra* note 13, art. 74; Civilian Convention, *supra* note 15, art. 110.

¹³⁰ U.S. CONST. art. I, § 7, cl. 1.

¹³¹ See SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 183–99 (John Byrne & Co. 1916) (1904) (documenting the fact that, by the middle of the 19th century, the political branches had developed a tacit understanding that treaties involving concessions in tariff duties would not have domestic effect in the absence of implementing legislation).

¹³² See Senate Hearing, *supra* note 125, at 59 (Letter from Assistant Attorney General to Chairman of Senate Foreign Relations Committee) (noting that 19 U.S.C. § 1318 “provides that during a war or national emergency the President may authorize the Secretary of the Treasury to permit the duty-free importation of food, clothing, and other supplies for use in emergency relief work”). The letter adds that “it may be appropriate to revive” a World War II statute that specifically authorized duty-free importation of “articles addressed to prisoners of war and civilian internees in the United States.” *Id.* However, Congress apparently decided that it was not necessary to revive that statute, because Congress never enacted any such legislation.

¹³³ U.S. CONST. art. VI, cl. 2.

¹³⁴ For a detailed exposition of this interpretation of the Supremacy Clause, see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 46–55 (2002). A competing interpretation of the Supremacy Clause holds that a treaty provision has the status of supreme federal law, unless the treaty-makers intended to prevent a particular provision from having domestic legal effect. See, e.g., Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 700–710 (1995). Even under this interpretation of the Supremacy Clause, however, most provisions of the

tions are well within the scope of the treaty-makers' domestic lawmaking powers.¹³⁵ For such provisions, the Constitution does not require implementing legislation and Congress has not enacted such legislation.¹³⁶ Even so, the various provisions of the Geneva Conventions for which there is no implementing legislation have the status of supreme federal law because the Supremacy Clause grants them that status.

One might object that a treaty has the status of supreme federal law only if the treaty-makers intended it to have that status.¹³⁷ As a matter of constitutional law, this objection is misguided because a treaty's status as supreme federal law is determined by the Constitution. The treaty-makers lack the power to alter the relevant constitutional rules by manifesting their intent to deprive a treaty of its status as "Law of the Land" under the Supremacy Clause.¹³⁸ Nonetheless, for present purposes, the authors will assume that the treaty-makers' intentions bear some relevance to the question of whether the Geneva Conventions are the law of the land. Given this assumption, analysis of the domestic legal status of treaty provisions for which there is no implementing legislation requires discussion of whether the treaty-makers intended the Geneva Conventions to be self-executing.

The Senate record associated with ratification of the Geneva Conventions does not contain any general statement by either the Senate

Geneva Conventions are supreme federal law because there is no evidence that the treaty-makers intended to prevent them from having domestic effect. For further discussion of this point, see *infra* notes 140–58 and accompanying text.

¹³⁵ This statement is based on two assumptions: (1) most provisions of the Conventions address matters that fall within the scope of Congress's Article I powers; and (2) the treaty-makers have the power to create domestic law within the scope of Article I because most of Congress's Article I powers are concurrent, not exclusive powers. A detailed defense of the first assumption appears in Part IV.C below. Most scholars agree with the second assumption, but Professor Yoo has argued that the treaty-makers cannot utilize the Article II treaty process to create domestic law within the scope of Congress's Article I powers. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Rejoinder*]. For detailed criticism of Yoo's thesis, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999), and Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

¹³⁶ When the Senate consented to the Conventions' ratification, the Senate report stated explicitly "that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." SENATE REPORT, *supra* note 120, at 9971. The report then recommends a few minor changes in federal statutes. *Id.* Apart from these few items and the war crimes legislation noted above, see *supra* notes 127–28 and accompanying text, there has not been any legislation to implement the Conventions.

¹³⁷ See, e.g., RESTATEMENT (THIRD), *supra* note 20, § 111(4)(a) (stating that a treaty is non-self-executing and, therefore, will not be given effect as law in the absence of implementing legislation, "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

¹³⁸ For a detailed defense of this position, see Sloss, *supra* note 134.

or the executive branch suggesting that the Conventions, as a whole, are either self-executing or non-self-executing. There are a few statements indicating that particular provisions of the Conventions are non-self-executing,¹³⁹ from which one might infer that the treaty-makers considered the vast majority of Convention provisions to be self-executing. The fact that both the Senate and the executive branch stated that most of the Conventions' provisions could be implemented without enacting new legislation reinforces this inference.¹⁴⁰ Even so, aside from the few provisions explicitly said to be non-self-executing, the Senate record as a whole otherwise provides weak evidence of the treaty-makers' intentions regarding the self-executing or non-self-executing character of the Conventions.

In contrast, the subsequent practice of the U.S. military provides fairly strong evidence that the executive branch has understood the Conventions to have the status of supreme federal law. On October 1, 1997, the government published Army Regulation 190-8, which establishes policies and procedures "for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI), and other detainees (OD) in the custody of the U.S. Armed Forces."¹⁴¹ Notably, this regulation cites the Geneva Conventions, rather than any federal statute, as the legal basis for the military's authority to promulgate the regulation.¹⁴² Moreover, the regulation states that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."¹⁴³ In short, the U.S. military has expressly stated that the Geneva Conventions are directly binding on all U.S. military forces as a matter of domestic law, even where they conflict with the military's own regulations.

Some courts have concluded that language in the Geneva Conventions calling for implementing legislation demonstrates that the

¹³⁹ See, e.g., SENATE REPORT, *supra* note 120, at 9970 ("It should be emphasized, in any event, that the grave breaches provisions cannot be regarded as self-executing . . ."); *id.* at 9969-70 (discussing Articles 53 and 54 of Geneva I, which concern the use of the Red Cross symbol by private parties, and noting that "[i]t is the position of the executive branch that the prohibition of articles 53 and 54 is not intended to be self-executing").

¹⁴⁰ See Senate Hearing, *supra* note 125, at 59 (letter from Assistant Attorney General to Senator George) (stating that, upon ratification of the Conventions, "the United States will be required to enact only relatively minor legislation" to implement the Conventions); SENATE REPORT, *supra* note 120, at 9971 ("From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.").

¹⁴¹ ARMY REG. 190-8, *supra* note 80, § 1-1(a).

¹⁴² *Id.* § 1-1(b).

¹⁴³ *Id.* § 1-1(b)(4).

treaty drafters intended the Conventions to be non-self-executing.¹⁴⁴ This argument is mistaken for two reasons. First, the treaty language at issue merely calls for legislation “to provide effective penal sanctions for persons committing” grave breaches.¹⁴⁵ Thus, at most, this language suggests that the treaty drafters intended the grave breaches provisions to be non-self-executing.¹⁴⁶ The language does not manifest an intention that the Conventions as a whole would be non-self-executing. Moreover, the Conventions obligate parties “to enact any legislation necessary” to achieve certain ends.¹⁴⁷ The phrase “any legislation necessary” is intended to accommodate differences between domestic legal systems that *always* require implementing legislation for treaties (dualist systems) and domestic legal systems that *never* require implementing legislation for treaties (monist systems).¹⁴⁸ The language does not actually manifest a specific intention for the grave breaches provisions to be non-self-executing. Rather, it manifests the treaty-makers’ recognition that broad-based multilateral treaties must be drafted in a manner that accounts for the variety of domestic legal systems in which the treaty is to be implemented.

Judicial opinion is divided on the question of whether the Geneva Conventions are self-executing. Two district courts have expressly held that at least some provisions of the Geneva Conventions are self-

¹⁴⁴ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the POW Convention and the Civilian Convention “expressly call for implementing legislation” and that “[a] treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing”); *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1463 (S.D. Fla. 1990) (“The Geneva Conventions expressly call for implementing legislation, and therefore . . . are not self-executing.”), *rev’d*, 963 F.2d 332 (11th Cir. 1992).

¹⁴⁵ See Geneva I, *supra* note 44, art. 49; Geneva II, *supra* note 44, art. 50; POW Convention, *supra* note 13, art. 129; Civilian Convention, *supra* note 15, art. 146. There are a few other articles of the Conventions that call for legislation dealing with specific aspects of the Conventions. See, e.g., Geneva I, *supra* note 44, art. 54 (“The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.”). However, there is no general provision requiring implementing legislation for the Conventions as a whole.

¹⁴⁶ As noted above, under U.S. constitutional law, the “grave breaches” provisions would be non-self-executing in any event, because implementing legislation is constitutionally required for a treaty provision that obligates the United States to impose criminal sanctions for designated conduct. See *supra* notes 123–24 and accompanying text.

¹⁴⁷ See Geneva I, *supra* note 44, art. 49; Geneva II, *supra* note 44, art. 50; POW Convention, *supra* note 13, art. 129; Civilian Convention, *supra* note 15, art. 146.

¹⁴⁸ For example, the Netherlands has a monist legal system, so treaties never require implementing legislation. See Pieter van Dijk & Bahiyih G. Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 CHI.-KENT L. REV. 413, 418 (1991). In contrast, the United Kingdom has a dualist system, in which treaties always require implementing legislation. See Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 481–83 (1991) (discussing differences in incorporation of treaties into domestic law in both “monist” and “dualist” systems).

executing.¹⁴⁹ In contrast, the majority of courts that have explicitly addressed the question have held that the Conventions are not self-executing.¹⁵⁰ A simplistic division into majority and minority views, however, obscures more than it clarifies. The cases supporting the view that the Conventions are not self-executing generally claim that the Conventions are non-self-executing because they do not create a private right of action.¹⁵¹ Nevertheless, the conclusion that the Conventions do not create a private right of action is entirely consistent with the proposition that the Conventions have the status of supreme federal law. In *American Insurance Association v. Garamendi*,¹⁵² the Supreme Court enjoined the enforcement of a California statute that required insurance companies to disclose information about “insurance policies issued to persons in Europe, which were in effect between 1920 and 1945.”¹⁵³ The Court held that certain bilateral agreements between the United States and European governments preempted the California law.¹⁵⁴ Despite the fact that none of the

¹⁴⁹ See *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (holding that “the [POW Convention], insofar as it is pertinent here, is a self-executing treaty”); *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (“[G]iven the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing.”), *aff’d* 117 F.3d 1206 (11th Cir. 1997).

¹⁵⁰ See *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (stating that the first and second Geneva Conventions are not self-executing), *rev’d on other grounds sub nom.* *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2633 (2004); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (determining that the POW Convention is not self-executing); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808–09 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that neither the POW Convention, nor the Civilian Convention is self-executing); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (rejecting child custody claim based on Articles 24 and 49 of the Civilian Convention because “there is no evidence that any of the general language relied upon by plaintiffs was intended to be self-executing”); *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996) (holding that the POW Convention is not self-executing); *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1462–63 (S.D. Fla. 1990) (denying claim based on common Article 3 and stating that “the Geneva Conventions are not self-executing”); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424–26 (C.D. Cal. 1985) (rejecting claim based on the 1929 Geneva Convention, in part because the 1949 POW Convention is not self-executing).

¹⁵¹ See, e.g., *Hamdi*, 316 F.3d at 468 (holding that the POW Convention is not self-executing, because “the document, as a whole, [does not] evidence an intent to provide a private right of action” (quoting *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992))); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (finding that the Conventions do not create a private right of action); *Huynh Thi Anh*, 586 F.2d at 629 (stating that there is no evidence that the Civilians Convention “was intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries”); *Handel*, 601 F. Supp. at 1425 (“In the absence of authorizing legislation, an individual may enforce a treaty’s provisions only when it is self-executing, i.e., when it expressly or impliedly provides a private right of action.”).

¹⁵² 539 U.S. 396 (2003).

¹⁵³ *Id.* at 409.

¹⁵⁴ *Id.* at 420–27. The Court’s preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298 [hereinafter U.S.-Germany

bilateral agreements created a private right of action,¹⁵⁵ the Court granted relief to private plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause.¹⁵⁶ Thus, *Garamendi* supports the proposition that international agreements of the United States have the status of supreme federal law under the Supremacy Clause, regardless of whether they create a private right of action.¹⁵⁷

Only three published judicial opinions have explicitly addressed the question of whether the Geneva Conventions qualify as supreme federal law under the Supremacy Clause, and all three agree that the Conventions are the law of the land.¹⁵⁸ In contrast, none of the cases

Agreement]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, U.S.-Aus., 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, Jan. 18, 2001, U.S.-Fr., Temp. State Dep't No. 01-36. All three agreements acknowledge the creation of certain funds or foundations by European governments designed to compensate victims for harms suffered during World War II. All three agreements provide that the designated funds or foundations are the exclusive remedy for victims. See, e.g., U.S.-Germany Agreement, *supra*, art. 1(1) ("The parties agree that . . . it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.").

¹⁵⁵ The bilateral agreements manifest the drafters' expectations that the agreements may be invoked defensively in U.S. courts. See U.S.-Germany Agreement, *supra* note 154, art. 2(1) (

The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.

). In *Garamendi*, however, the insurance companies did not invoke the bilateral agreements defensively. Rather, they sued the Insurance Commissioner of the State of California to enjoin enforcement of the California law. See *Garamendi*, 539 U.S. at 412. There is nothing in the language of any of the agreements to suggest that the drafters anticipated, or intended to authorize this type of private lawsuit. Thus, the plaintiffs in *Garamendi* implicitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that did not create a private right of action. See David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1194-97 (2000) (contending that the Supremacy Clause creates an implied private right of action for some treaty-based preemption claims against state officers).

¹⁵⁶ See *Garamendi*, 539 U.S. at 427-29.

¹⁵⁷ One could argue that *Garamendi* was wrongly decided insofar as it equated sole executive agreements with treaties. See David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003) (elaborating the differences between various categories of international agreements). Regardless, the central point here is that a treaty that does not create private rights of action, might still have the status of supreme federal law under the Supremacy Clause.

¹⁵⁸ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (stating that the POW Convention "under the Supremacy Clause has the force of domestic law"), *rev'd sub nom. Rumsfeld v. Padilla*, 542 U.S. ___, 124 S. Ct. 2711 (2004); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002) (stating that the provisions of the POW Convention at issue in the case "are a part of American law and thus binding in federal courts under the Supremacy Clause"); *United States v. Noriega*, 808 F. Supp. 791,

holding the Conventions to be non-self-executing explicitly address the status of the Conventions under the Supremacy Clause. Thus, unanimous judicial precedent supports the proposition that the Geneva Conventions, at least in substantial part, have the status of supreme federal law under the Constitution.

In sum, with respect to the vast majority of Convention provisions for which implementing legislation is not constitutionally required, judicial precedent supports two conclusions. First, the Conventions are non-self-executing in the sense that they do not create a private right of action. Second, and most important for the purposes of this Article, the Conventions are self-executing in the sense that they have the status of supreme federal law under the Supremacy Clause.

B. Legislation Since September 11

One could argue that, in the wake of September 11, Congress has authorized violations of the Geneva Conventions. This section refutes that argument. At the outset, it is important to emphasize that Congress has not expressly authorized the President to violate the Geneva Conventions. Nevertheless, it might be argued that two congressional acts implicitly authorized violations of the Conventions: the joint congressional resolution authorizing the use of force against those responsible for the September 11 attacks (Joint Resolution) and the USA Patriot Act of 2001 (Patriot Act). This section demonstrates that the authorization to use force does not implicate U.S. obligations under the Geneva Conventions, and the Patriot Act, at most, enacts a few modest qualifications of U.S. obligations under the Civilian Convention.

1. *The Joint Congressional Resolution Authorizing the Use of Force*

The Joint Resolution does not authorize the President to violate the Geneva Conventions. By its terms, the Joint Resolution authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁵⁹

794 (S.D. Fla. 1992) (stating that the POW Convention "is undoubtedly a valid international agreement and 'the law of the land' in the United States"), *aff'd* 117 F.3d 1206 (11th Cir. 1997).

¹⁵⁹ Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The Joint Resolution characterizes the attacks as "armed attacks" against the United States in order to justify the use of force in self-defense.¹⁶⁰ Indeed, the Joint Resolution arguably characterizes the attacks as inherently unlawful acts of war, or "war crimes."¹⁶¹ Thus, the language of the Joint Resolution clearly contemplates executive action aimed at attacking and killing those responsible for the September 11 attacks, or capturing, detaining, and punishing any such persons. In this sense, it is clear that Congress contemplated the direct, severe application of U.S. power against a foe formally characterized as the enemy. Nonetheless, the question remains whether the Joint Resolution directly or implicitly authorizes the President to engage in conduct contrary to the Geneva Conventions.

Although the Joint Resolution does not expressly mention the Geneva Conventions, it may still implicitly authorize the President to violate the treaties. There are two versions of this argument: (1) by authorizing the President to use "all necessary and appropriate force," the Joint Resolution authorizes the use of *any* tactics deemed essential to prevent further attacks; and (2) the Resolution triggers the application of a network of laws (statutes, treaties, common law, and regulations) governing the use of force, which, in turn, authorizes the President to violate the Geneva Conventions. While the second argument is plausible, the first argument is not.

The first view does not withstand even casual scrutiny. The Joint Resolution is not a blanket authorization for the President to wage the War on Terror in any manner he sees fit. Although the Resolution authorizes the President to use "*all* necessary and appropriate force,"¹⁶² this phrase is best understood as an authorization to deploy U.S. forces in a range of operational settings, up to, and including, operations that constitute an armed conflict or war against another sovereign state. In other words, the Joint Resolution authorizes the President to take military action short of war, or, if necessary, to commit U.S. troops to war. Indeed, the language used in the Resolution mirrors that of previous and subsequent resolutions authorizing the use of force.

To read the Joint Resolution more broadly would be inconsistent with several important interpretive considerations. First, U.S. law criminalizes many violations of the Geneva Conventions.¹⁶³ It would be difficult to sustain a claim that Congress impliedly repealed various provisions of the U.S. penal code and the Uniform Code of Military

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See The War Crimes Act, 18 U.S.C. § 2441 (defining and setting penalties for war crimes).

Justice (UCMJ)¹⁶⁴ with a single, sweeping resolution. Second, given U.S. treaty obligations and the statutes and regulations incorporating them, the best reading of the Joint Resolution is that the law of war delimits the scope of “appropriate” force. No evidence suggests that the executive sought—or suggested the necessity of—discretion to conduct military operations in a manner inconsistent with U.S. treaty obligations. On the contrary, substantial evidence suggests that the U.S. military believes that it is in the strategic interest of the United States to comply with the laws of war.¹⁶⁵ Moreover, long-standing U.S. military regulations require all operations to be conducted in accordance with the Geneva Conventions.¹⁶⁶ This dense network of regulations, which is tightly coupled to the statutory provisions of the UCMJ, constitutes an important part of the backdrop against which Congress issued the Joint Resolution.

The second variant of this claim, although more plausible, is nevertheless flawed. According to this view, the Joint Resolution, *in conjunction with some other source or sources of authority*, empowers the President to take actions inconsistent with U.S. treaty obligations. This variant acknowledges that the Joint Resolution could not, by its own force, authorize the President to suspend statutes and treaties that might otherwise condition the exercise of the war-making power. Nevertheless, the Joint Resolution may constitute sufficient congressional authorization to activate other presidential powers, arising from specific statutes or the Constitution itself, which might allow the President to derogate from specific treaty obligations. The most salient example is the assertion that Congress has, in times of war, authorized the use of military commissions, and, insofar as the use of these special tribunals is inconsistent with the Geneva Conventions, Congress has authorized violations of the Conventions.¹⁶⁷

¹⁶⁴ 10 U.S.C. §§ 801–946 (2000).

¹⁶⁵ See, e.g., JUDGE ADVOCATE GENERAL’S SCHOOL, DEP’T OF ARMY, OPERATIONAL LAW HANDBOOK 10 (2003) (suggesting that it is DOD policy to comply with the “principles and spirit” of the “Law of War” in the conduct of all military operations); DEP’T OF DEFENSE, DIR. 5100.77, LAW OF WAR PROGRAM (Dec. 9, 1998) (establishing that, as a matter of U.S. policy, U.S. forces are to observe the law of war).

¹⁶⁶ See, e.g., DEP’T OF ARMY, FM 27–10, *supra* note 68; ARMY REG. 190–8, *supra* note 80, § 1.1(b)(4) (stating that, should conflicts arise, the Geneva Conventions take precedence over the regulation).

¹⁶⁷ To be clear, the argument is not that further congressional authorization is unnecessary. Rather, the argument is that the Joint Resolution constitutes wholly sufficient authorization for the use of military commissions. The two variants of this claim both assume that Congress, by authorizing the use of force, implicitly sanctioned the establishment of military commissions—even absent any other constitutional or statutory source of authority—because: (1) the resolution necessarily authorizes any action short of armed force in dealing with the 9/11 attackers in that the greater power includes the lesser; or (2) the use of military commissions itself constitutes the “use of force” within the meaning of the resolution. These are obviously strained readings of the resolution. After all, the resolution triggers a narrower range of emergency powers than would a formal declaration of war. In

From this perspective, the Joint Resolution arguably empowers the President to invoke the "Articles of War," including the provisions authorizing the use of military commissions.¹⁶⁸ Indeed, the central question driving the vigorous, ongoing debate over the President's power to issue the Military Order is whether the Joint Resolution is sufficient to trigger these other powers, or whether a formal declaration of war is necessary.¹⁶⁹ For the purposes of this Article, the important point is that the Joint Resolution arguably authorizes the use of military commissions only insofar as it activates the other sources of authority cited in the Military Order—namely Sections 821 and 836 of the UCMJ.¹⁷⁰

Section 821 provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.¹⁷¹

By its terms, this provision does not appear to authorize the establishment of military commissions.¹⁷² Nevertheless, in *Ex Parte Quirin*, the Supreme Court held that "Congress[, in what is now § 821,] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the

addition, the Constitution, as well as some treaties and statutes, govern the exercise of the President's war-making power and might prohibit or authorize the use of specific institutions such as military commissions. It is also important to note that the Supreme Court in *Quirin* did not sanction the use of commissions based solely on the fact that the Congress had declared war on Germany. See *Ex parte Quirin*, 317 U.S. 1, 26–29 (1942) (identifying two potential sources of authority to establish commissions: statute and the Commander-in-Chief power). Of course, some commentators argue that the Court's reasoning in *Quirin* suggests that a formal declaration of war is a necessary condition for the invocation of either basis. See, e.g., Katyal & Tribe, *supra* note 83, at 1280–83. The rather clumsy arguments outlined above must, therefore, be distinguished from the more plausible claim that the resolution read in conjunction with another power (the Commander-in-Chief power, for example) establishes the President's authority to convene military commissions. See *infra* notes 168–78 and accompanying text.

¹⁶⁸ See Uniform Code of Military Justice, 10 U.S.C. §§ 816–821, 904, 906.

¹⁶⁹ Compare Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002), with Katyal & Tribe, *supra* note 83.

¹⁷⁰ See Military Order, *supra* note 37, pmbl.; see also 10 U.S.C. § 821 (2000) (stating that the jurisdiction of courts-martial is not exclusive); *id.* § 836 (authorizing the President to prescribe all pretrial, trial, and post-trial procedures for military commissions).

¹⁷¹ 10 U.S.C. § 821.

¹⁷² See Katyal & Tribe, *supra* note 83, at 1285–87; see also Bradley & Goldsmith, *supra* note 169, at 252 (suggesting that the terms of the statute appear to "recognize[] a pre-existing non-statutory authority in the President"); David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825, 834 (1993) ("Although federal statute recognizes military commissions, it is clear that Congress considers them established . . . under the laws of war.").

law of war in appropriate cases”¹⁷³ and that “Congress[, in what is now § 821,] has authorized trial of offenses against the law of war before such commissions.”¹⁷⁴

Many commentators argue that the Court’s reasoning in *Quirin* is closely tethered to the facts of the case and should not apply outside of those unique circumstances.¹⁷⁵ Some also maintain that the Court’s interpretation of the predecessor of § 821 is implausible,¹⁷⁶ implying that the Supreme Court should perhaps revisit the issue.¹⁷⁷

¹⁷³ *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

¹⁷⁴ *Id.* at 29; see also RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 408–15 (5th ed. 2003); JUDGE ADVOCATE GENERAL’S SCHOOL, DEP’T OF ARMY, LAW OF WAR WORKSHOP DESKBOOK 206 (2000) (stating that UCMJ “[a]uthorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war” (emphasis added)); Bradley & Goldsmith, *supra* note 169, at 252–53 (“Although by its terms this provision recognizes a pre-existing non-statutory authority in the President, the Supreme Court in *Quirin* held that this provision also constitutes congressional authorization for the President to create military commissions.”). In fact, many critics of the result in *Quirin* acknowledge that the Court interpreted Article 15 of the Articles of War as congressional authorization for military commissions. See, e.g., Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 82 (1980); David J. Danelski, *The Saboteurs’ Case*, 1 J. S. CR. HIST. 61, 73 (1996). It is important to note that in *Quirin* the government also charged the German saboteurs under Article 82 of the Articles of War, a provision that authorized military commissions to try the offense of spying. See *Quirin*, 317 U.S. at 23. The Court, however, examined only the “law[s] of war” charges, and had “no occasion to pass on” the other charges. See *id.* at 46. In *Yamashita*, the Supreme Court, relying in part on *Quirin*, once again read the predecessor of § 821 as explicit congressional authorization for military commissions to try offenses against the laws of war. See *In re Yamashita*, 327 U.S. 1, 46 (1946); see also Bederman, *supra* note 172, at 836 n.55 (discussing the use of special military commissions over civilians in peacetime).

¹⁷⁵ The unique circumstances of the case included that the case was decided in the context of a formally declared, “total” war, that the charges were levied against only eight identified defendants, that the charges were supported by irrefutable evidence, and that the list of charges included alleged violations of statutes clearly assigning jurisdiction to military commission. See *Dep’t of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 79–80 (2001) (statement of Scott L. Silliman, Executive Director, Center on Law, Ethics and National Security, Duke University School of Law); Katyal & Tribe, *supra* note 83, 1280–83.

¹⁷⁶ See Belknap, *supra* note 174, at 88; Danelski, *supra* note 174 at 79–80; Katyal & Tribe, *supra* note 83, at 1283.

¹⁷⁷ See, e.g., Katyal & Tribe, *supra* note 83, at 1290–91 (advocating an overruling of *Quirin*). One difficulty with this view is that, for obvious reasons, courts do not lightly abandon stare decisis in the context of statutory interpretation. See *Hohn v. United States*, 524 U.S. 236, 251 (1998) (stating that “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation” (citation omitted)); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting) (outlining why heightened rules of *stare decisis* apply in statutory settings); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 1–16, 3–3, at 84 & n.42, 251–54 (3d ed. 2000). Moreover, it appears that Congress ratified the holding in *Quirin* when reenacting § 821. See ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE, S. REP. NO. 81-486, at 13 (1949) (“The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court. (*Ex Parte Quirin*, 317 U.S. 1 (1942)).”); accord UNI-

Irrespective of the merits of these contentions, the applicability of § 821 to the present circumstances turns, in substantial part, on whether individuals subject to the Military Order may, under the laws of war, be tried by special military tribunal. Even under the *Quirin* Court's reasoning, the statute authorizes the use of military commissions only insofar as the laws of war permit it. Therefore, to the extent that such tribunals violate the Geneva Conventions, this statutory provision does not authorize their use.¹⁷⁸

2. *The Patriot Act of 2001*

Like the Joint Resolution, the Patriot Act¹⁷⁹ does not *expressly* authorize the President to violate the Geneva Conventions. Nonetheless, some of the Patriot Act's provisions may have this effect because they are inconsistent with some of the United States's obligations under the Geneva Conventions, particularly when the Act's provisions target certain persons at certain times. Still, the Act implicates only a very narrow swath of Geneva law. Accordingly, this section contends that the Act, at most, derogates from a few rules established by the Civilian Convention concerning the treatment of enemy aliens on U.S. territory during armed conflict.

For the most part, the Patriot Act does not concern matters governed by the Geneva Conventions. This is not to say that the Act has little impact on the civil rights of persons subject to the jurisdiction of the United States, because it does. Nevertheless, the law enforcement powers augmented by the Patriot Act do not concern matters regulated by the laws of war. For example, the Act substantially expands the information-gathering and surveillance capacity of federal law enforcement and broadens the definition of terrorism and terrorism-related offenses, with the effect of increasing the available penalties for many federal crimes. In addition, the Patriot Act formalizes several modes of cooperation between law enforcement agencies. Although

FORM CODE OF MILITARY JUSTICE, H.R. REP. NO. 81-491, at 17 (1949); see also Bradley & Goldsmith, *supra* note 169, at 253 ("Congress in effect affirmed the [*Quirin*] Court's construction [of the statute] when, in 1950, it recodified Article 15 into 10 U.S.C. § 821 against the backdrop of the Court's construction.").

¹⁷⁸ The statute does suggest, however, that other statutes might authorize trial by military commission, irrespective of whether the laws of war would authorize such trials in other circumstances. This is an important point because the UCMJ does authorize the use of military commissions in some specific circumstances. See, e.g., 10 U.S.C. § 904 (2002) (providing that military commissions may impose the death penalty for the crime of "aiding the enemy"); *id.* § 906 (2002) (stating that military commissions may try the crime of spying during wartime); Military Tribunal Authorization Act of 2002, S. 1941, 107th Cong. § 3(b) (2002) (establishing military tribunal jurisdiction over "crimes against humanity targeted against United States persons").

¹⁷⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C.) [hereinafter Patriot Act].

there may be other grounds for objecting to such provisions, they do not violate U.S. treaty obligations under the laws of war.

Nonetheless, the "enhanced immigration" provisions in the Patriot Act are problematic, because they dramatically expand the power of federal law enforcement to detain non-citizens. Section 412 of the Act grants the Attorney General the authority to detain any alien whom he has "reasonable grounds to believe" has engaged in "activity that endangers the national security of the United States."¹⁸⁰ This Section requires the Attorney General either to begin removal proceedings against such an alien, bring criminal charges against the alien within seven days, or release the alien from custody.¹⁸¹ Nevertheless, any alien found to be removable, but whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods if the Attorney General certifies that release of the alien will "threaten the national security of the United States or the safety of the community or any person."¹⁸² Furthermore, this latter provision sharply limits the scope of judicial review available to any alien detained according to its terms.¹⁸³

When applied to nationals of a state with which the United States is at war, this provision may violate the Geneva Conventions because the detention of such individuals may constitute an unlawful deprivation of liberty under the Civilian Convention. The Civilian Convention authorizes states to detain enemy aliens present on their territory only if the alien directly participated in the hostilities, or if detention is otherwise necessary to preserve the national security of the detaining state.¹⁸⁴ In addition, countries party to a conflict must grant enemy aliens present on their territory the right to depart the enemy's territory voluntarily.¹⁸⁵ Despite these possible inconsistencies, one point is clear: the Patriot Act does not constitute general congressional authorization to violate these treaties.

III

THE PRESIDENT AS LAW-MAKER

As discussed above, certain DOD regulations and policies adopted to implement President Bush's Military Order may conflict with some provisions of the Geneva Conventions.¹⁸⁶ In light of these apparent conflicts, the question arises whether the Military Order su-

180 *Id.* § 412.

181 *Id.*

182 *Id.*

183 *Id.*

184 Civilian Convention, *supra* note 15, art. 42.

185 *Id.*, art. 35.

186 *See supra* Part I.B.

persedes conflicting provisions of the Geneva Conventions as a matter of domestic law. Although the Military Order relies in part on statutory authorization, the statutes which the Order invokes do not grant the President the authority to violate the Geneva Conventions.¹⁸⁷ Nevertheless, one could still argue that the Military Order supersedes the Geneva Conventions, because the President possesses the independent constitutional authority to issue a unilateral executive order¹⁸⁸ superseding a prior inconsistent treaty that is the supreme law of the land. This Part evaluates the merits of this argument.

It is well established that Congress can enact legislation that supersedes a previously ratified treaty as a matter of domestic law.¹⁸⁹ Thus, the precise issue under consideration here is a question of the constitutional distribution of power between the legislative and executive branches. Given that Congress undisputedly has the power to enact legislation that supersedes a previously ratified treaty, does the President also have an independent power to issue a unilateral executive order that supersedes a previously ratified treaty as a matter of domestic law? The first section below presents the argument in favor of a presidential power to promulgate orders that supersede prior inconsistent treaties. The second section explains why that argument is ultimately unpersuasive.

A. The Case for Presidential Lawmaking Power

In his famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁹⁰ Justice Jackson identified three categories of presidential action. The first category of presidential action includes presidential "acts pursuant to an express or implied authorization of Congress"¹⁹¹ (Category One lawmaking). The second category consists of presidential actions undertaken without "either a congressional grant or denial of authority"¹⁹² (Category Two lawmaking). The third category encompasses presidential actions that are "incompatible with the expressed or implied will of Congress"¹⁹³ (Category Three lawmaking).

¹⁸⁷ See *supra* Part II.B.

¹⁸⁸ In this Article, the term "unilateral executive order" refers to an executive order issued by the President on the basis of his independent constitutional authority. This category does not include executive orders that require express or implied congressional authorization. Since Congress has not authorized the President to violate the Geneva Conventions, the Military Order is unilateral, insofar as it purports to authorize policies that are inconsistent with U.S. obligations under the Conventions.

¹⁸⁹ See *Chae Chan Ping v. United States*, 130 U.S. 581, 600–602 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888); *Edye v. Robertson*, 112 U.S. 580, 597–99 (1884).

¹⁹⁰ 343 U.S. 579 (1952).

¹⁹¹ *Id.* at 635 (Jackson, J., concurring).

¹⁹² *Id.* at 637 (Jackson, J., concurring).

¹⁹³ *Id.* (Jackson, J., concurring).

Even before the rise of administrative agencies during the New Deal, the President and his subordinates routinely created law pursuant to express congressional authorization.¹⁹⁴ Currently, the Code of Federal Regulations contains thousands of pages of regulations promulgated by the executive branch on the basis of congressional authorization. Such regulations have the status of supreme federal law, at least insofar as the regulators are acting within the scope of legislative authorization.¹⁹⁵ In short, Category One presidential lawmaking has become so firmly entrenched in our legal system that its constitutionality cannot seriously be challenged.

Whereas the products of Category One lawmaking are often called "regulations," Category Two lawmaking yields "unilateral executive orders."¹⁹⁶ These executive orders are properly termed "unilateral," because they are adopted by the President without legislative authorization. Like Category One lawmaking, Category Two lawmaking has deep historical roots,¹⁹⁷ but its constitutional validity is less firmly established.¹⁹⁸ Accordingly, Justice Jackson concluded that the constitutionality of Category Two lawmaking "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."¹⁹⁹

Sole executive agreements exemplify the longstanding practice of Category Two lawmaking. A "sole executive agreement" is an international agreement concluded by the President on the basis of his independent constitutional authority, without legislative authorization.²⁰⁰

¹⁹⁴ See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (3d ed. 1994) (describing the historical development of administrative law prior to World War II).

¹⁹⁵ See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715-16 (1984) (holding that FCC regulations preempt Oklahoma law prohibiting advertising of alcoholic beverages on cable television).

¹⁹⁶ An executive order backed by congressional authorization would be considered Category One lawmaking. In contrast, an executive order promulgated by the President on the basis of his independent constitutional authority (i.e., a unilateral executive order) would be considered Category Two lawmaking. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁹⁷ Professor Corwin provides a detailed account of President Roosevelt's Category Two lawmaking before and during World War II. See CORWIN, *supra* note 2, at 47-50 (discussing seizure of private companies to ensure continued production of war material in the face of actual or threatened labor strikes); *id.* at 50-55 (discussing Presidential orders establishing administrative agencies that lacked legislative authorization); *id.* at 55-62 (describing the Roosevelt Administration's use of "administrative sanctions," which according to Professor Corwin "were in fact nothing short of blackmail"). In light of the Supreme Court's subsequent decision in *Youngstown*, some of Roosevelt's unilateral Presidential orders were probably unconstitutional.

¹⁹⁸ See *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) (describing Category Two lawmaking as a "zone of twilight").

¹⁹⁹ *Id.* (Jackson, J., concurring).

²⁰⁰ Terminology related to executive agreements is not entirely uniform. Commentators generally distinguish between "congressional-executive agreements," which are inter-

Between 1789 and 1989, the United States concluded more than 12,000 nontreaty international agreements, including 1182 such agreements before 1939, some of which were sole executive agreements.²⁰¹ The Supreme Court has consistently held that sole executive agreements have the status of domestic law and therefore supersede inconsistent state law.²⁰² Thus, notwithstanding the original constitutional design,²⁰³ it is now firmly established that the President has some independent authority to create domestic law by means of sole executive agreements.

Advocates of broad presidential powers could cite Supreme Court precedent involving sole executive agreements in support of a unilateral presidential power to supersede treaties domestically. In *United States v. Belmont*, the Supreme Court suggested that "all international compacts and agreements," including sole executive agreements, have the status of supreme federal law.²⁰⁴ Five years later, in *United States v. Pink*, the Court reiterated that "[a] treaty is a 'Law of the Land' under the supremacy clause . . . [and that] [s]uch international compacts and agreements as the Litvinov Assignment [a sole executive agreement] have a similar dignity."²⁰⁵ Since sole executive agreements "have a similar dignity" as treaties, a later sole executive agreement arguably supersedes an earlier treaty under the later-in-time rule.²⁰⁶

national agreements authorized in some fashion by Congress, and "sole executive agreements," which are international agreements concluded by the President on the basis of his independent constitutional authority. See HENKIN, *supra* note 23, at 215-224. Some commentators distinguish a third category of executive agreements that derive their authority from an earlier treaty. See, e.g., TRIMBLE, *supra* note 32, at 113-15.

²⁰¹ CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 103D CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14 (Comm. Print 1993) [hereinafter CRS Study]. Due in part to problems in distinguishing between sole executive agreements and congressional-executive agreements, it is unclear how many of these were sole executive agreements.

²⁰² See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that sole executive agreements with Germany, France and Austria preempt California statute); *Dames & Moore v. Regan*, 453 U.S. 654, 655-56, 659-60 (1981) (holding that sole executive agreement with Iran preempts state law breach of contract claims); *United States v. Pink*, 315 U.S. 203, 223-24 (1942) (holding that sole executive agreement with Russia preempts New York common law rules governing relative priority of competing creditors); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937) (same).

²⁰³ Professor Michael Ramsey has argued that the Framers did not intend to grant the President independent authority to create domestic law by means of sole executive agreements. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

²⁰⁴ *Belmont*, 301 U.S. at 331.

²⁰⁵ *Pink*, 315 U.S. at 230; see also RESTATEMENT (THIRD), *supra* note 20, § 115 n.5 ("A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law.")

²⁰⁶ The later-in-time rule holds that a later-in-time statute that conflicts with a previously ratified treaty trumps the earlier treaty for purposes of domestic law. See RESTATEMENT (THIRD), *supra* note 20, § 115(1)(a) ("An act of Congress supersedes an earlier . . . [treaty provision] as law of the United States if the purpose of the act to supersede the

Moreover, one could argue, there is no reason to distinguish between unilateral executive orders and sole executive agreements in this respect, because both are unilateral presidential acts.

Even in a purely domestic context, the Court has periodically upheld the validity of Category Two lawmaking. For example, in *United States v. Midwest Oil Co.*,²⁰⁷ Congress had enacted a statute declaring that public lands containing petroleum would be “free and open to occupation, exploration, and purchase by citizens of the United States.”²⁰⁸ Subsequently, the President issued an executive order making certain public lands temporarily unavailable for exploration and purchase to ensure “the conservation of a proper supply of petroleum for the government’s own use.”²⁰⁹ The Supreme Court upheld the validity of the executive order, despite the fact that it was issued without statutory authorization.²¹⁰ In so doing, the Court relied heavily on the previous practice of the political branches as a guide to constitutional interpretation.²¹¹ The Court noted that, prior to 1910, various Presidents had issued “at least 252 Executive orders making reservations [of public lands] for useful, though nonstatutory, purposes.”²¹² Thus, the Court concluded that Congress had acquiesced in this practice, and that its previous consent “operated as an implied grant of power.”²¹³ Thus, *Midwest Oil* stands for the proposition that the President has limited power to engage in Category Two lawmaking.²¹⁴

In sum, Supreme Court precedent involving both sole executive agreements and unilateral executive orders supports the claim that the President has independent constitutional authority to create supreme federal law by means of unilateral executive action. In *The Federalist*, John Jay stated that “[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal

earlier . . . provision is clear or if the act and the earlier . . . provision cannot be fairly reconciled.”). Under the later-in-time rule, a subsequent treaty also supersedes a prior inconsistent statute. *See id.* § 115(2).

²⁰⁷ 236 U.S. 459 (1915).

²⁰⁸ *Id.* at 466 (quoting from Act of February 11, 1897).

²⁰⁹ *Id.* at 467.

²¹⁰ *Id.* at 483.

²¹¹ *See id.* at 473 (stating that “in determining the . . . existence of a [constitutional] power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation”).

²¹² *Id.* at 471.

²¹³ *Id.* at 475.

²¹⁴ Some may disagree with the assertion that *Midwest Oil* supports the existence of a presidential lawmaking power, because the presidential order in that case was “executive,” rather than “legislative.” Granted, the executive order was “executive” in a formal sense, because it emanated from the President. It was “legislative” in a functional sense, however, because it had precisely the same effect as a statute limiting occupation and exploration of public lands. Therefore, *Midwest Oil* supports presidential lawmaking in a functional sense.

validity and obligation as if they proceeded from the legislature."²¹⁵ If, as Jay suggests, a unilateral executive order has as much legal validity as a statute, then one could argue that a unilateral executive order supersedes a prior inconsistent treaty, just as a federal statute supersedes a prior inconsistent treaty under the later-in-time rule. The following section explains why this argument is flawed.

B. The Limits on Presidential Lawmaking Power

A careful reading of the Constitution's text suggests that the Framers did not intend to grant the President the authority to create law without the participation of the legislative branch. The text grants the President "[t]he executive power."²¹⁶ Additionally, the President is the "Commander in Chief of the Army and Navy,"²¹⁷ has the "Power to grant Reprieves and Pardons for Offences against the United States,"²¹⁸ and has the power to "receive Ambassadors and other public Ministers."²¹⁹ These textual provisions, construed in accordance with their ordinary meaning, do not appear to grant the President any lawmaking authority. While the President has the power to make treaties,²²⁰ which are supreme federal law, a treaty does not become federal law unless it is approved by a two-thirds majority in the Senate.²²¹ Thus, the Treaty Power grants the President the authority to create law in conjunction with the Senate, but not by unilateral executive action.

Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."²²² The Framers' decision to use the word "all" to modify the phrase "legislative Powers" reinforces the conclusion that they did not intend to grant the President an independent lawmaking power. Although contemporary scholars of U.S. foreign relations law hold sharply differing views about the scope of the President's constitutional foreign affairs powers, they generally agree that the Framers did not intend to grant the President an independent lawmaking power with regard to foreign affairs.²²³

²¹⁵ THE FEDERALIST NO. 64, at 378 (John Jay) (Isaac Kramnick ed., 1987).

²¹⁶ U.S. CONST. art. II, § 1, cl. 1.

²¹⁷ *Id.* art. II, § 2, cl. 1.

²¹⁸ *Id.*

²¹⁹ *Id.* art. II, § 3.

²²⁰ *Id.* art. II, § 2, cl. 2.

²²¹ *Id.*

²²² *Id.* art. I, § 1.

²²³ See, e.g., Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10-11 (1993) (claiming that the President has "a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm," but that "the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting"); *id.* at 49 ("[P]residential authority [in the for-

Even so, all but the most rigid formalists must acknowledge that a fine line separates the functions of executing existing law and creating new law. Indeed, the difficulty of drawing bright lines distinguishing legislative and executive functions provides a partial explanation for the Supreme Court decisions approving presidential lawmaking through unilateral executive action. Despite the Court's past approval of presidential lawmaking, however, the analysis in this section shows that Supreme Court precedent is generally consistent with the following proposition: Although valid federal law created through unilateral executive action is supreme over state law, unilateral executive action that conflicts with a federal statute or treaty is invalid, unless the President is acting within the scope of his *exclusive* constitutional authority.²²⁴

This proposition is consistent with the overall structure of the Constitution, which purposefully divides power among the three branches of the federal government to limit the power of each.²²⁵ The President has a constitutional duty to "take Care that the Laws be faithfully executed;"²²⁶ this duty applies not only to statutes enacted by Congress but also to ratified treaties.²²⁷ If the President had the power to adopt a unilateral executive order that superseded federal statutes or treaties, his duty under the Take Care clause would be illu-

ign affairs context] stops well short of an independent, free-standing law-making authority."); Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234–35 (2001) (contending that the constitutional grant of "executive power" gives the President a "'residual' foreign affairs power," but that "the President is not a lawmaker, even in foreign affairs"); cf. H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529, 543, 560, 566 (1999) (acknowledging that there are "'autonomous' presidential powers," which Congress cannot lawfully regulate, including the power to "conduct foreign affairs and [protect] the national security" and the power to enter into sole-executive agreements, but noting that "although a sole executive agreement may well have international law implications, its legal force from the standpoint of the United States legal system seems debatable" because "[t]he President has no means beyond diplomacy to protect national security except for those instruments that congress sanctions and supports").

²²⁴ If the President acts pursuant to his exclusive constitutional authority, any conflicting federal statute would be invalid, because Congress lacks the power under Article I to legislate in areas constitutionally committed to the President's exclusive control. In contrast, there is no authority to suggest that the treaty-makers, acting pursuant to Article II, lack the power to create domestic law in areas within the scope of the President's exclusive constitutional authority. This Article considers whether the President has the constitutional authority to violate treaty provisions addressing matters within the scope of his exclusive authority as Commander in Chief. See *infra* Part IV.C.

²²⁵ See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1763–64 (1996) (discussing excessive concentration of power in state legislatures during the pre-Constitutional period); *id.* at 1767 (concluding that the Framers "understood that governmental power needed to be separated sufficiently to ensure that no one branch would ever again become as powerful as the state legislatures had").

²²⁶ U.S. CONST. art. II, § 3.

²²⁷ See *infra* notes 319–38 and accompanying text.

sory.²²⁸ Whenever the President did not want to execute a particular statute or treaty, he could simply issue a unilateral executive order to supersede the statute or treaty in question. Such a possibility would destroy the balance between the legislative and executive branches that the Framers wove into the constitutional structure.

1. *Limits on Sole Executive Agreements*

The Supreme Court has never held that sole executive agreements have the same rank as statutes and treaties in the domestic constitutional order. Supreme Court decisions involving sole executive agreements have all involved conflicts with state law, not federal law.²²⁹ Both *Belmont* and *Pink* involved conflicts between the Litvinov Agreement, a sole executive agreement with Russia, and New York common law rules governing the relative priority of competing creditors.²³⁰ *Dames & Moore* involved a sole executive agreement with Iran, which effectively terminated the petitioner's state law breach of contract action against the Atomic Energy Organization of Iran and transferred venue to a specially constituted arbitration tribunal.²³¹ More recently, *Garamendi* involved a conflict between a California statute and sole executive agreements with Germany, France, and Austria.²³² In none of these cases did the Supreme Court decide the relationship between sole executive agreements and federal statutes or treaties.²³³

While *Belmont* and *Pink* contain dicta suggesting that sole executive agreements have the same status as statutes and treaties,²³⁴ such

²²⁸ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("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.").

²²⁹ Franklin Roosevelt concluded an executive agreement with Great Britain in 1940—involving the delivery of fifty overage destroyers to Britain in exchange for the lease of sites for naval bases—that “was directly violative of at least two [federal] statutes.” See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 273 (5th rev. ed. 1984). Attorney General Jackson (later Justice Jackson) defended the agreement on the basis of the President's Commander-in-Chief power. *Id.* The constitutionality of the agreement was never tested in court.

²³⁰ See *United States v. Pink*, 315 U.S. 203, 203 (1942); *United States v. Belmont*, 301 U.S. 324, 324 (1937).

²³¹ See *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981).

²³² See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

²³³ Professor Phillip R. Trimble contends that, in *Dames & Moore*, the Supreme Court authorized the use of a sole executive agreement to supersede the Foreign Sovereign Immunities Act (FSIA). See TRIMBLE, *supra* note 32, at 138–39 (2002). However, this is an excessively broad reading of *Dames & Moore*. The *Dames & Moore* Court never explicitly stated that the executive agreement at issue superseded the FSIA. See *Dames & Moore*, 453 U.S. at 684–86. Moreover, Trimble's interpretation is inconsistent with the Court's stated intention “to rest decision on the narrowest possible ground capable of deciding the case.” *Id.* at 660.

²³⁴ See, e.g., *Pink*, 315 U.S. at 230 (stating that a treaty is “a ‘Law of the Land’ under the supremacy clause” and that sole executive agreements “have a similar dignity”); *Belmont*, 301 U.S. at 331 (stating that the Supremacy Clause establishes the supremacy of treaties

dicta are noticeably absent from both *Dames & Moore* and *Garamendi*.²³⁵ Moreover, most lower courts that have explicitly addressed the issue concluded that sole executive agreements do not supersede prior inconsistent statutes.²³⁶

The Supreme Court has also held, in numerous cases, that an administrative regulation that conflicts with a previously enacted statute is invalid.²³⁷ These cases are instructive because the Court has also held that valid federal regulations, like valid executive agreements, preempt conflicting state law.²³⁸ In effect, the Supreme Court treats administrative regulations as equivalent to federal statutes for the purpose of resolving conflicts between federal and state law, but views such regulations as subordinate to federal statutes when resolving conflicts between federal statutes and regulations. This approach makes sense. Statutes have a higher status than regulations within the hierarchy of federal law because statutes require the joint action of the legislative and executive branches, whereas a regulation is necessarily the product of unilateral executive action.²³⁹

over state law, and "the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government").

²³⁵ See *Garamendi*, 539 U.S. 396 (2003); *Dames & Moore*, 453 U.S. 654 (1981).

²³⁶ See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953) (holding that an "executive agreement was void because it was not authorized by Congress and contravened provisions of a statute"); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (stating that "executive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the 'supreme Law of the Land'"); *Seery v. United States*, 127 F. Supp. 601, 606-07 (Ct. Cl. 1955) (rejecting Government's contention that an executive agreement is equivalent to a treaty under the Supremacy Clause). *But see* *Etlimar Societe Anonyme of Casablanca v. United States*, 106 F. Supp. 191 (Ct. Cl. 1952) (suggesting that an executive agreement might supersede an earlier act of Congress) The proposition in *Etlimar* that an executive agreement has the same force of law under the Supremacy Clause as a treaty approved by the Senate was overruled by *Seery*. See *Seery*, 127 F. Supp. at 601-07.

²³⁷ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (invalidating FDA regulations that conflicted with Food, Drug and Cosmetic Act); *MCI Telecomm. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) (invalidating FCC rule that conflicted with Federal Communications Act); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (invalidating EPA rule that conflicted with Resource Conservation and Recovery Act).

²³⁸ See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704-05 (1984) (holding that FCC regulations preempted Oklahoma law prohibiting advertising of alcoholic beverages on cable television).

²³⁹ Statutes are the product of joint legislative and executive action, because the President has the power to veto legislation passed by Congress, and in turn, Congress has the power to override a presidential veto. See U.S. CONST. art. I, § 7, cl. 2; see also *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress."). Likewise, a valid regulation typically involves the participation of both legislative and executive branches: Congress enacts a statute to authorize presidential rulemaking. But the existence of a conflict between a statute and regulation necessarily implies that the regulation was not authorized by

Treaties, like statutes, require the joint action of the legislative and executive branches.²⁴⁰ In contrast, sole executive agreements, like regulations, involve unilateral executive action. Therefore, although sole executive agreements preempt conflicting state law, such agreements should be subordinate to treaties when resolving conflicts between two international agreements.²⁴¹ Moreover, if a sole executive agreement does not supersede a prior inconsistent treaty, it follows that a unilateral executive order cannot supersede a prior inconsistent treaty.

2. *Limits on Unilateral Executive Orders*

Even if one assumes that sole executive agreements have the same status as statutes and treaties, it does not necessarily follow that unilateral executive orders have an equivalent status. Sole executive agreements arguably deserve a higher status than unilateral executive orders, because sole executive agreements implicate the international legal obligations of the United States.²⁴² In contrast, unilateral executive orders are entirely creatures of domestic law.²⁴³

Despite the fact that a valid executive order is supreme over state law,²⁴⁴ a unilateral executive order can never supersede a prior inconsistent statute because a unilateral executive order that conflicts with a valid federal statute is per se invalid.²⁴⁵ *Little v. Barreme*²⁴⁶ illustrates this point. In 1799, during ongoing hostilities with France, Congress enacted a statute designed to suspend commercial intercourse be-

Congress, which means that the President was acting unilaterally with respect to the invalid portion of the regulation.

²⁴⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁴¹ From the standpoint of international law, there is no difference between a treaty and a sole executive agreement; both are considered "treaties." Thus, a sole executive agreement could supersede a prior inconsistent treaty for the purposes of international law. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 30(3), 1155 U.N.T.S. 331, 339 ("When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."). However, in terms of domestic law, the better view is that a sole executive agreement cannot supersede a prior inconsistent treaty, for the reasons explained above.

²⁴² Professor Henkin makes a similar argument. See HENKIN, *supra* note 23, at 504 n.198.

²⁴³ At times, Presidents have adopted unilateral executive orders for the purpose of implementing sole executive agreements. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (explaining that the "dispute involve[d] various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States . . . to comply with an Executive Agreement between the United States and Iran").

²⁴⁴ See CORWIN, *supra* note 229, at 440 n.10 (stating that executive laws are "endowed as against state authority with the supremacy of national law").

²⁴⁵ *Id.* at 439 n.10 ("Such regulations may not, of course, transgress the constitutional acts of Congress.").

²⁴⁶ 6 U.S. (2 Cranch) 170 (1804).

tween the United States and France.²⁴⁷ The statute authorized the President to seize "any ship or vessel of the United States on the high sea . . . bound or sailing to any place within the territory of the French republic or her dependencies."²⁴⁸ Although the statute covered only vessels sailing *to* France, the President subsequently issued an executive order authorizing seizure of vessels "bound *to or from* French ports"²⁴⁹ Acting pursuant to the executive order, Captain Little, the commander of an American warship, seized a ship sailing *from* a French port.²⁵⁰ Writing for the Court, Chief Justice Marshall held that the seizure was unlawful, even though it was consistent with the executive order,²⁵¹ because the executive order could not authorize action contrary to the statute.²⁵²

The Court's conclusion is especially noteworthy because Chief Justice Marshall suggested that the President, as Commander in Chief, might have had the constitutional power to authorize the seizure if Congress had not enacted legislation.²⁵³ Hence, by enacting legislation authorizing the seizure of vessels sailing *to* France, Congress effectively precluded the President from exercising his Commander-in-Chief power to order the seizure of vessels sailing *from* France. In short, an executive order that would have been constitutional under Category Two, if undertaken without "either a congressional grant or denial of authority,"²⁵⁴ was invalid under Category Three, because it was "incompatible with the . . . implied will of Congress."²⁵⁵

The conclusion that a unilateral executive order can never supersede a prior inconsistent statute implies that conflicts between an earlier-in-time treaty and a later-in-time executive order must also be resolved in favor of the treaty, at least insofar as the treaty is the law of the land. The Supreme Court has consistently held that treaties and

²⁴⁷ *Id.* at 177.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 178 (emphasis added).

²⁵⁰ *Id.* at 176, 178.

²⁵¹ The Court assumed, for the purpose of its analysis, that the seizure was consistent with the executive order. *See id.* at 178.

²⁵² *See id.* at 177-79. As a matter of statutory interpretation, one could have made a plausible argument that the executive order was supplementary to the statute, not contrary to the statute. However, that was not how the Court construed the statute.

²⁵³ *See id.* at 177 (

It is by no means clear that the president . . . who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.

).

²⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²⁵⁵ *Id.*

statutes have equal rank within our constitutional system, and, in the event of a conflict between a statute and a treaty, the later in time prevails.²⁵⁶ Since treaties and statutes are of equivalent rank, and statutes rank higher than unilateral executive orders, it follows that treaties also rank higher than unilateral executive orders. Therefore, a unilateral executive order can never supersede a prior inconsistent treaty that is the law of the land.

Core principles of democratic theory reinforce the soundness of this conclusion. In our democratic system of government, political power ultimately belongs to the people. Lawmaking by statute or treaty requires the participation of both the legislative and executive branches.²⁵⁷ The participation of both branches is intended to ensure that neither treaties nor statutes become law without a certain degree of popular support. In contrast, when the President creates law by means of a unilateral executive order, the safeguard of a legislative check on presidential authority is absent, thus a greater danger of creating law at odds with the will of the people exists. Inasmuch as unilateral executive orders have less democratic legitimacy than federal statutes or treaties, it is entirely appropriate that they rank lower in the hierarchy of federal law.

IV

THE PRESIDENT AS LAW-BREAKER

Presidents and their subordinates have often claimed that the President is free to disregard (i.e., violate) statutes, treaties, and even the Constitution itself in certain emergency situations.²⁵⁸ In a recent memorandum, Justice Department lawyers have asserted that President Bush has unlimited discretion to determine the appropriate means for interrogation of enemy combatants detained in the War on Terror.²⁵⁹ The memorandum further contends that treaties and statutes prohibiting torture—if applied to interrogation of enemy combatants—would be an unconstitutional infringement on the President's Commander-in-Chief power.²⁶⁰

²⁵⁶ See cases cited *supra* note 189.

²⁵⁷ See U.S. CONST. art. II, § 2, cl. 2.

²⁵⁸ See Monaghan, *supra* note 223, at 24–32 (discussing claims advanced by various Presidents in support of a Presidential power to violate the law in an emergency).

²⁵⁹ See Bybee Memo, *supra* note 7, at 39 (“Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”).

²⁶⁰ *Id.* at 31–39. It bears emphasis that the Geneva Conventions expressly prohibit torture of both POWs and civilians. See POW Convention, *supra* note 13, art. 130; Civilian Convention, *supra* note 15, art. 147. Common Article 3 also prohibits torture. See Geneva I, *supra* note 44, art. 3; Geneva II, *supra* note 44, art. 3; POW Convention, *supra* note 13, art. 3; Civilian Convention, *supra* note 15, art. 3.3

Part IV addresses the claim that the President has the constitutional authority to violate the law for the sake of protecting national security. The first section rebuts the argument that the President has the legal authority to violate constitutional and/or statutory law in emergency situations. The second section contends that the President's constitutional duty to "take Care that the Laws be faithfully executed"²⁶¹ includes a duty to execute treaties that have the status of supreme federal law. Therefore, the President lacks the unilateral authority to violate treaties, and he must obtain congressional authorization to violate a treaty that is law of the land.

The final section of Part IV considers whether the President's general duty to execute treaties applies to law-of-war treaties that impinge upon the President's Commander-in-Chief power. Although there are plausible arguments for exempting such law-of-war treaties from the President's general duty under the Take Care Clause, this section concludes that the President's duty to execute the law applies with equal force to law-of-war treaties that have the status of supreme federal law. Therefore, as a matter of constitutional law, the President must obtain congressional authorization if he wishes to violate such treaties. However, as a matter of constitutional fact, the President and his subordinates are unlikely to face sanctions for violating treaties if Congress and the public determine the violation was necessary to protect national security.

A. Presidential Emergency Power

1. *Historical Support for an Emergency Power*

Before any person can become President, he is required to take an oath to "preserve, protect and defend the Constitution of the United States."²⁶² Relying in part on this oath, several Presidents have claimed a power to violate the law in situations where national survival is at stake. For example, Thomas Jefferson once wrote:

The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of *saving our country when in danger*, are of higher obligation.²⁶³

Jefferson added that "[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, and

²⁶¹ U.S. CONST. art. II, § 3.

²⁶² U.S. CONST. art. II, § 1, cl. 8.

²⁶³ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 279 (Paul Leicester Ford ed., 1898).

property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means."²⁶⁴ Thus, even Thomas Jefferson, who was more wary than most Presidents of the dangers of unchecked executive power, recognized a presidential power to violate the law in order to protect and defend the nation.

Fifty years later, Abraham Lincoln sounded a similar theme. During a ten-week period in 1861, when Congress was not in session:

[President Lincoln] added 23,000 men to the Regular Army and 18,000 to the Navy, paid out two millions from unappropriated funds in the Treasury to persons unauthorized to receive it . . . suspended the writ of habeas corpus in various places, caused the arrest and military detention of persons "who were represented to him" as being engaged in or contemplating "treasonable practices"—and all this for the most part without the least statutory authorization.²⁶⁵

Lincoln defended his actions in a speech to a special session of Congress on July 4, 1861.²⁶⁶ During that speech, Lincoln posed the question: "[A]re all the laws *but one* to go unexecuted, and the government itself go to pieces, lest that one be violated?"²⁶⁷ As Professor Corwin noted, this question "logically implies that the President may, in an emergency thought by him to require it, partially suspend the Constitution."²⁶⁸ Lincoln himself made a similar point: "I felt that measures, otherwise unconstitutional might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it."²⁶⁹ Thus, faced with a choice between his duty to execute the law and his duty to maintain national integrity, President Lincoln asserted that his duty to preserve national unity was paramount.

Similarly, in the period before and during World War II, President Roosevelt advanced broad claims of presidential power. In September 1942, Roosevelt urged Congress to repeal an offending provision of the Emergency Price Control Act (EPCA).²⁷⁰ Additionally, Roosevelt made clear his intention to violate the provision if it was not repealed: "In the event that the Congress should fail to act,

²⁶⁴ *Id.* at 279.

²⁶⁵ CORWIN, *supra* note 2, at 16–17.

²⁶⁶ See Message to Congress in Special Session (July 4, 1861), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594–609 (Roy P. Basler ed., 1946).

²⁶⁷ *Id.* at 601.

²⁶⁸ CORWIN, *supra* note 2, at 16–17.

²⁶⁹ Alexander J. Groth, *Lincoln and the Standards of Presidential Conduct*, XXII PRESIDENTIAL STUD. Q. 765, 766 (1992) (quoting President Lincoln).

²⁷⁰ See CORWIN, *supra* note 2, at 62–64.

and act adequately, I shall accept the responsibility, and I will act.”²⁷¹ Professor Corwin analyzed Roosevelt’s message to Congress as follows:

The Message of September 7 can only be interpreted as a claim of power on the part of the President to suspend the Constitution in a situation deemed by him to make such a step necessary. The claim was not a totally unprecedented one . . . [referring to Lincoln]. But Mr. Roosevelt was proposing to set aside, not a particular clause of the Constitution, but its most fundamental characteristic, its division of power between Congress and President, and thereby gathering into his own hands the combined power of both. He was suggesting, if not threatening, a virtually complete suspension of the Constitution.²⁷²

In the end, there was no opportunity to test the validity of Roosevelt’s asserted presidential power to violate EPCA, because Congress enacted legislation to supersede the relevant portions of the statute.²⁷³

Building on these precedents, President Nixon went even further than any of his predecessors in advancing the claim that the President is above the law. Consider the following interview with David Frost:

FROST: So what, in a sense, you’re saying is that there are certain situations, . . . where the President can decide that it’s in the best interests of the nation or something, and do something illegal.

NIXON: Well, when the President does it, that means that it is not illegal.

FROST: By definition.

NIXON: Exactly. Exactly. If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President’s decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise, they’re in an impossible position.²⁷⁴

In short, Nixon claimed that if the President determines that a specified action is necessary to protect national security, then the action is lawful, even if it is prohibited by a federal statute.

In sum, lawyers within the Bush Administration can cite substantial executive branch precedent in support of their claim that the

²⁷¹ 88 CONG. REC. 7044 (1942). Roosevelt did not make the threat idly. The Dean of the Oregon Law School had previously told him that “if you decide that a certain course of action is essential as a war measure, it supersedes congressional action.” Monaghan, *supra* note 223, at 29.

²⁷² CORWIN, *supra* note 2, at 64–65.

²⁷³ See FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 439 (1990) (noting that “Roosevelt obtained the authorization he had sought, and signed the Stabilization Act on October 2, 1942”).

²⁷⁴ *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

President has the constitutional authority to violate federal statutes and treaties prohibiting torture of detainees held in the War on Terror. On the other hand, if the Constitution really does grant the President the authority to approve torture of detainees, it becomes difficult to identify the line that separates constitutional democracy from despotism. The next section subjects the claim of a broad presidential emergency power to critical scrutiny.

2. *Critical Evaluation of an Asserted Emergency Power*

The central claim of those who advocate a presidential power to violate the law in emergency situations is that the President's duty to protect and defend the nation sometimes takes precedence over his duty to execute the laws. It is helpful to distinguish between a weaker and stronger version of this thesis. The strong version asserts that the President has the sole constitutional authority to decide what specific actions are necessary to defend the nation, and that any action the President deems necessary is ipso facto lawful, regardless of any contrary constitutional or statutory provision.²⁷⁵ Under the strong version, neither the legislative nor the judicial branch has the constitutional authority to question the President's judgment that a particular course of action is required for national security. Impeachment is the only remedy for abuse of presidential power.

Whereas the strong version provides a constitutional defense of broad presidential emergency powers, the weak version offers a legal realist account of interbranch behavior in emergency situations. According to this account, Presidents tend to adopt an expansive view of executive power during perceived emergencies, and the legislative and judicial branches tend to defer to executive judgments regarding the situation. Under the weak version, presidential action that contravenes the federal constitution or statutes is illegal, and the existence of an emergency does not make it legal.²⁷⁶ As a practical matter, however, executive officers are unlikely to be subjected to civil or criminal sanctions for violating the law if: (1) they were acting within the scope of a presidential order; (2) the legislative and judicial branches agree

²⁷⁵ See *supra* text accompanying note 274 (quoting President Nixon); see also Brief for the Respondents at 25, *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633 (2004) (No. 03-6696) (stating that "[a] commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority"), available at 2004 WL 724020; *id.* at 41 (stating that "the Fifth Amendment does not restrict the Commander in Chief's constitutional authority to detain captured enemy combatants during ongoing hostilities.").

²⁷⁶ See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) (stating that an "[e]mergency does not create power . . . or diminish the restrictions imposed upon power granted").

there was a genuine emergency; and (3) the relevant presidential order did not constitute a gross abuse of executive power.

The weak version of the emergency power thesis, understood as a descriptive theory of interbranch collaboration in times of crisis, has much to recommend it. Nevertheless, courts have generally rejected the strong version because of the resulting concentration of power in the executive branch. For example, in *Hamdi v. Rumsfeld*,²⁷⁷ the Supreme Court entertained a habeas petition brought on behalf of Yaser Hamdi, an American citizen captured in Afghanistan during armed conflict between the United States and the Taliban.²⁷⁸ The Bush Administration claimed the authority to detain him indefinitely, “without formal charges or proceedings—unless and until it [the executive branch] makes the determination that access to counsel or further process is warranted.”²⁷⁹ The Supreme Court rejected this claim of executive prerogative, stating:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.²⁸⁰

The *Hamdi* Court insists that the judiciary plays a vital role in restraining executive power, even in wartime. This thesis is generally consistent with the original understanding of separation of powers. For example, Madison stated that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”²⁸¹ To guard against the excessive accumulation of power in a single branch, the Framers designed a system “in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually

²⁷⁷ 542 U.S. ___, 124 S. Ct. 2633 (2004).

²⁷⁸ *Id.* at 2635–36.

²⁷⁹ *Id.* at 2636.

²⁸⁰ *Id.* at 2650 (plurality opinion) (citation omitted). Justice O’Connor, writing for a plurality of four Justices, held that the President had statutory authorization to detain Hamdi, but only as long as “[a]ctive combat operations” are ongoing in Afghanistan. *Id.* at 2642. Moreover, to justify his continued detention, the government must prove that Hamdi is an “enemy combatant,” and he is entitled to present his own evidence to rebut the government’s allegations. *Id.* at 2648. Justice Souter, writing for himself and Justice Ginsburg, argued that Hamdi’s continued detention violates the federal Non-Detention Act, 18 U.S.C. §4001(a). *Id.* at 2653. Justice Scalia, writing for himself and Justice Stevens, argued that Hamdi’s continued detention is unconstitutional. *Id.* at 2674. Justice Thomas was the only Justice who supported the Bush Administration’s claim that it had the legal authority to detain Hamdi indefinitely. *Id.*

²⁸¹ THE FEDERALIST NO. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987).

checked and restrained by the others."²⁸² If the President could simply disregard the law in times of crisis, the Framers' careful effort to incorporate checks and balances into the constitutional design would be defeated.

One could argue that it makes no sense to interpret the Constitution in a manner that requires the President to obey the law in a situation where rigid adherence to law endangers national security. This objection misses its mark. There are undoubtedly times when the President can and will violate the law to defend the nation. In terms of constitutional law, however, the critical question is whether the legislative and judicial branches have the constitutional authority to challenge the President's judgment. We suggest that the Constitution is best interpreted to grant the other branches the authority to review presidential decisions after the fact. If the legislature agrees that the President responded wisely to the perceived emergency, then the legislature can enact laws to immunize executive officials from any civil or criminal liability arising from the legal infractions they committed.²⁸³ On the other hand, if the legislature decides not to immunize executive officials, then those officials should be held accountable for their conduct in a court of law.²⁸⁴

*Ex parte Merryman*²⁸⁵ provides a useful illustration of these principles. John Merryman, a citizen of Maryland, was a leading secessionist agitator during the Civil War.²⁸⁶ After he was arrested and detained by the military at Fort McHenry, he petitioned for a writ of habeas corpus.²⁸⁷ Chief Justice Taney personally issued the writ, ordering General Cadwalader to bring Merryman before him, despite the fact

²⁸² *Id.* No. 48, at 311 (James Madison).

²⁸³ *See, e.g.,* *The Apollon*, 22 U.S. 362, 366-67 (1824) (

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity.

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²⁸⁴ As a practical matter, an executive officer who violates federal law in the course of implementing a Presidential order is unlikely to face criminal charges during the tenure of the President who issued the order, because the President would not want to authorize criminal prosecution of a subordinate who obeyed him. The executive officer might face criminal prosecution, however, after a change of administration. Moreover, the officer could potentially be exposed to civil liability. *See, e.g.,* *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding a Navy Captain liable for damages for unlawful seizure of a ship, despite the fact that the President had authorized the seizure, because the seizure violated a federal statute).

²⁸⁵ 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

²⁸⁶ *See* CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 20 (expanded ed. 1976) (1951).

²⁸⁷ *See id.* at 20-21.

that President Lincoln had suspended habeas corpus.²⁸⁸ The general “politely but flatly refused to produce the prisoner, citing as authority the President’s order” suspending the writ.²⁸⁹ Taney published an opinion declaring that the President’s order suspending the writ and the subsequent detention of Merryman was illegal.²⁹⁰ As a matter of constitutional law, Taney’s analysis was unassailable. Even so, “Lincoln went right on exercising the power that the Chief Justice had branded palpably unconstitutional.”²⁹¹ Taney was forced to concede that he had no power to force the President to comply with the law.²⁹²

Three points emerge from this analysis. First, as a matter of constitutional fact, the President undoubtedly has some power to violate the law to protect national security. Second, as a matter of constitutional law, a Presidential decision that a particular action is essential for national security does not render an illegal action lawful. Third, “[s]o long as public opinion sustains the President, as a sufficient amount of it sustained Lincoln in his shadowy tilt with Taney and throughout the rest of the war, he has nothing to fear from the displeasure of the courts.”²⁹³

Some will object to a concept of “legality” that makes it unlawful for the President to do what is necessary to protect national security. Under this view, the law should be interpreted so that any presidential action that promotes national security is, by definition, legal. The central problem with this concept of legality, however, is that it fails to account for the inevitable tension between national security and individual liberty. A presidential action that is fully justified on national security grounds may nevertheless impose significant constraints on individual liberty. Thus, the critical constitutional question is whether the President’s judgment about the proper tradeoff between liberty and security is subject to legislative and judicial oversight. The Supreme Court has answered this question in the affirmative. In the words of Justice Souter:

For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory

²⁸⁸ *Id.* at 21.

²⁸⁹ *Id.* at 22.

²⁹⁰ See *Ex Parte Merryman*, 17 F. Cas. at 148–49.

²⁹¹ ROSSITER, *supra* note 286, at 23–24.

²⁹² See *Ex Parte Merryman*, 17 F. Cas. at 153 (“I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.”).

²⁹³ ROSSITER, *supra* note 286, at 25.

. . . . A reasonable balance is more likely to be reached on the judgment of a different branch.²⁹⁴

B. The President's Duty to Execute Treaties

Given that the President has a constitutional duty to "take Care that the Laws be faithfully executed,"²⁹⁵ the question arises whether that duty also applies to treaties. Professor Henkin contends that the President has a general authority to violate treaties.²⁹⁶ This section contends, however, that the Constitution is best interpreted to require the President to obtain congressional approval, in the form of legislation, if he wants to violate a treaty provision that is the law of the land.

1. *Treaty Termination and Treaty Violation*

Before discussing the President's duty to execute treaties, it is important to highlight the distinction between treaty termination and treaty violation. Under generally accepted principles of international law, there are a variety of legitimate reasons for terminating or withdrawing from a treaty.²⁹⁷ The parties to a treaty may jointly terminate a treaty either by consent of all the parties²⁹⁸ or by concluding a later treaty.²⁹⁹ A state may unilaterally terminate or suspend the operation of a treaty in response to a material breach by another party.³⁰⁰ A state may also invoke "the impossibility of performing a treaty,"³⁰¹ or "[a] fundamental change of circumstances"³⁰² as a ground for terminating, withdrawing from, or suspending the operation of a treaty. In

²⁹⁴ Hamdi v. Rumsfeld, 542 U.S. ___, 124 S. Ct. 2633, 2655 (2004).

²⁹⁵ U.S. CONST. art. II, § 3.

²⁹⁶ See HENKIN, *supra* note 23, at 214 ("The President can terminate a treaty or may decide to breach it."). Interestingly, this is one area where the Restatement does not adopt the views of its chief reporter. The Restatement says that "the President has the power, when acting within his constitutional authority, to disregard . . . an agreement of the United States." RESTATEMENT (THIRD), *supra* note 20, § 115 n.3 (emphasis added). The Restatement does not purport to define the constitutional limits on the President's authority to disregard treaties.

²⁹⁷ See Vienna Convention on the Law of Treaties, *supra* note 241, arts. 54-64 (listing the legitimate reasons why a country could terminate or suspend the operation of a treaty).

²⁹⁸ *Id.* art. 54(b).

²⁹⁹ *Id.* art. 59.

³⁰⁰ *Id.* art. 60. The rules for bilateral and multilateral treaties are different. For bilateral treaties, a material breach by one party is grounds for termination by the other. *Id.* art. 60(1). For multilateral treaties, a material breach by one party may be grounds for another party to unilaterally suspend the operation of the treaty, but a single party cannot unilaterally terminate the treaty. *Id.* art. 60(2). These rules "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character." *Id.* art. 60(5).

³⁰¹ *Id.* art. 61.

³⁰² *Id.* art. 62. Under the Vienna Convention, the changed circumstance justification is quite narrow. A party may not invoke changed circumstances "as a ground for terminating or withdrawing from [a] treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The

addition, a single party may unilaterally withdraw from a treaty in accordance with the withdrawal clause contained in the treaty.³⁰³ Most modern international treaties contain a withdrawal clause,³⁰⁴ and the Geneva Conventions are no exception.³⁰⁵

The Restatement asserts that the President has the constitutional authority "to suspend or terminate [a treaty] in accordance with" a termination clause in the treaty.³⁰⁶ This position makes sense from both a formal and a functional standpoint. As a formal matter, the President's power to execute the law³⁰⁷ clearly includes the power to execute a treaty termination or withdrawal clause that is the law of the land. From a functional standpoint, there are often prudential factors that favor a presidential choice to work with Congress in executing a termination or withdrawal clause.³⁰⁸ Nevertheless, when President Carter terminated a mutual defense treaty with Taiwan in accordance with the treaty's termination clause,³⁰⁹ a majority of the Supreme Court agreed that there is no judicially enforceable constitutional constraint that precludes the President from exercising a treaty termination clause unilaterally (i.e., without a congressional vote) on the basis of his Article II powers.³¹⁰ The Court correctly refrained from draw-

effect of the change is radically to transform the extent of obligations still to be performed under the treaty." *Id.* art. 62(1).

³⁰³ See *id.* art. 54(a) (permitting withdrawal from a treaty "in conformity with the provisions of the treaty").

³⁰⁴ RESTATEMENT (THIRD), *supra* note 20, § 332 cmt. a ("Modern agreements generally specify either a term for the agreement, or procedures whereby a party may withdraw; therefore, there will rarely be occasion to decide whether a right of withdrawal is implied . . .").

³⁰⁵ See Geneva I, *supra* note 44, art. 63; Geneva II, *supra* note 44, art. 62; POW Convention, *supra* note 13, art. 142; Civilian Convention, *supra* note 15, art. 158.

³⁰⁶ See RESTATEMENT (THIRD), *supra* note 20, § 339(a).

³⁰⁷ U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

³⁰⁸ Congress has sometimes played an active role in treaty termination. See HENKIN, *supra* note 23, at 490-91 n.143.

³⁰⁹ See *Goldwater v. Carter*, 617 F.2d 697, 699, 708 (D.C. Cir. 1979), *vacated by* 444 U.S. 996 (1979). The termination clause permitted termination by either party on one year's notice. See *id.* at 708.

³¹⁰ See *Goldwater v. Carter*, 444 U.S. 996 (1979). In *Goldwater*, nine Senators and sixteen members of the House of Representatives sued to block the President's unilateral termination of the Mutual Defense Treaty with Taiwan. See *Goldwater*, 617 F.2d at 709 (Wright, C.J., concurring). The Supreme Court vacated the D.C. Circuit opinion and remanded with instructions to dismiss the complaint. See *Goldwater*, 444 U.S. at 996. The Court produced four widely divergent opinions. Justice Rehnquist, writing for a plurality of four Justices, thought that the case presented a non-justiciable political question. See *id.* at 1002. Justice Powell, writing only for himself, thought that the case was not ripe, because neither the Senate nor the House of Representatives had taken a formal vote on the issue. See *id.* at 996. Justice Brennan, writing for himself, would have affirmed the President's unilateral authority to terminate a treaty. See *id.* at 1006-07. Justices Blackmun and White would have set the case for oral argument to give the matter plenary consideration. See *id.* at 1006. Justice Marshall concurred in the result without expressing any view on the issues. See *id.* at 996.

ing a constitutional line that would impose unnecessary constraints upon the President's exercise of his foreign affairs powers. The Court's decision reflects a tacit judgment that Congress, by political means, exercises sufficient control over the President's treaty termination power that additional constitutional restraints are unwarranted.³¹¹

The Restatement also asserts that the President has the constitutional authority, even in the absence of a treaty termination clause, "to make the determination that would justify the United States in terminating or suspending [a treaty] because of its violation by another party or because of supervening events."³¹² Clearly, the question of whether the United States should terminate or suspend a treaty in response to a violation by another party, or in response to changed circumstances, is not an appropriate question for judicial determination.³¹³ As between the President and Congress, both formal and functional considerations support a finding of executive power. As a formal matter, a determination that actions by a treaty partner constitute a "material breach" of a treaty is of an executive, not a legislative, nature. The same rationale applies with respect to a decision that recent developments render continued performance by the United States impossible. From a functional standpoint, the President is better able than Congress to make these types of determinations.³¹⁴ For these reasons, the Supreme Court has held explicitly that the President has the constitutional authority to implement a treaty despite an

³¹¹ See *Goldwater*, 617 F.2d at 708-09 (

Treaty termination is a political act, but political acts are not customarily taken without political support. Even if formal advice and consent is not constitutionally required as a prerequisite to termination, it might be sought. If the Congress is completely ignored, it has its arsenal of weapons, as previous Chief Executives have on occasion been sharply reminded.

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³¹² RESTATEMENT (THIRD), *supra* note 20, § 339(b).

³¹³ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (

[W]hether a treaty with a foreign sovereign had been violated by him, whether the consideration of a particular stipulation of a treaty had been voluntarily withdrawn by one party so as to no longer be obligatory upon the other, and whether the views and acts of a foreign sovereign, manifested through his representative, had given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty . . . were not judicial questions.

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³¹⁴ Under the Vienna Convention, a breach is "material" only if it violates "a provision essential to the accomplishment of the object or purpose of the treaty." Vienna Convention on the Law of Treaties, *supra* note 241, art. 60(3)(b). Impossibility is a legitimate ground for termination or withdrawal only "if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty." *Id.* art. 61(1). Application of these standards in concrete fact situations requires the expertise of the executive branch.

apparent violation by the other party.³¹⁵ The constitutional power to choose not to terminate a treaty in response to a breach by the other party necessarily includes the power to terminate if the breach is sufficiently serious.

The preceding discussion deals only with the President's constitutional authority to suspend, terminate, or withdraw from a treaty in compliance with international law. As long as a presidential decision to suspend, terminate, or withdraw from a treaty complies with international law, the President's action is consistent with his constitutional duty to "take Care that the Laws be faithfully executed."³¹⁶ The question of the President's authority to breach a treaty in violation of international law³¹⁷ raises very different constitutional issues, because a presidential breach of a treaty that is the law of the land is also a potential violation of the President's constitutional duty under the Take Care Clause.

2. *Treaty Violation and the Take Care Clause*

Under the Constitution, treaties are declared to be "the supreme Law of the Land"³¹⁸ and the President is obligated to "take Care that the Laws be faithfully executed."³¹⁹ As a textual matter, there are two possible interpretations of the word "Laws" in the Take Care Clause. The first interpretation holds that the word "Laws" includes treaties. The fact that the Supremacy Clause declares treaties to be "the supreme Law of the Land" lends support to this interpretation. Under this interpretation, it would seem that the President does not have the constitutional power to violate treaties because his duty to execute the Laws includes a duty to execute treaties.

The second interpretation holds that the word "Laws" in the Take Care Clause excludes treaties. The fact that the Supremacy Clause distinguishes between "Laws of the United States" on the one hand, and "Treaties" on the other,³²⁰ lends support to this interpretation. Under this interpretation, the President arguably possesses the constitutional power to violate treaties because he does not have a constitu-

³¹⁵ See *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913) (affirming the executive branch's decision to extradite U.S. national to Italy under bilateral extradition treaty, despite Italy's refusal to extradite Italian nationals to the United States).

³¹⁶ U.S. CONST. art. II, § 3.

³¹⁷ While international law sometimes authorizes suspension, withdrawal, or termination of a treaty, it never authorizes violation of a treaty. See Vienna Convention on the Law of Treaties, *supra* note 241, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

³¹⁸ U.S. CONST. art. VI, cl. 2.

³¹⁹ *Id.* art. II, § 3.

³²⁰ See *id.* art. VI, cl. 2 (stating that "the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land").

tional duty to “take Care” that treaties are “faithfully executed.” Although this textual argument initially appears plausible, it is ultimately untenable: Under this interpretation, the President would also have the power to violate the Constitution, because the Constitution, like treaties, is mentioned separately from “Laws” in the Supremacy Clause, but not in the Take Care Clause.³²¹

Historical materials support the view that the President’s duty under the Take Care Clause includes a duty to execute treaties that are the law of the land. Some early drafts of the Take Care Clause would have limited the Clause so that it applied only to federal statutes.³²² A later draft would have obligated the President to “take care that the laws of the United States be duly and faithfully executed.”³²³ At the end of the Convention, however, the Committee of Style deleted the words “of the United States.”³²⁴ According to one commentator, “[t]he deletion of this qualifying language . . . was probably intended to make clear that the Take Care Clause encompassed not only federal legislation, but also the other two forms of supreme federal law—the Constitution and treaties.”³²⁵

One of the earliest foreign relations controversies in the United States involved President George Washington’s Proclamation of Neutrality,³²⁶ which declared the neutrality of the United States in a war between France and other European powers.³²⁷ Opponents of the Proclamation argued, among other things, that the President’s declared policy of neutrality was inconsistent with U.S. obligations under Article XI of the Treaty of Alliance with France.³²⁸ Alexander Hamilton, writing in defense of the Proclamation, did not claim that the President had a constitutional power to violate the treaty.³²⁹ In fact, he claimed that the President’s power to issue the Proclamation derived in part from his constitutional duty to execute “the Laws, of

³²¹ Compare *id.* art. II, § 3 (declaring that the President “shall take Care that the Laws be faithfully executed”), with *id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”).

³²² See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244 (Max Farrand ed., 1966) (New Jersey Plan) (granting the Executive authority “to execute the federal acts”); *id.* at 292 (Hamilton Plan) (granting the Executive authority “to have a negative on all laws about to be passed, and the execution of all laws passed”).

³²³ 2 *id.* at 185 (draft Constitution submitted by Committee of Detail).

³²⁴ See *id.* at 600 (report of Committee of Style).

³²⁵ Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 602 n.65 (2002) (citation omitted).

³²⁶ See Proclamation of Neutrality (Apr. 22, 1793), reprinted in CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 13–14 (2003).

³²⁷ See *id.*

³²⁸ See Prakash & Ramsey, *supra* note 223, at 324–25.

³²⁹ See *Pacificus No. 1*, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett ed., 1969).

which Treaties form a part."³³⁰ James Madison disagreed with Hamilton's conclusion that the Proclamation was valid,³³¹ but he agreed with Hamilton's claim that the President's duty to execute "the Laws" included a duty to execute treaties.³³² Thus, both sides of the debate agreed that the President had a duty under the Take Care Clause to execute the treaty with France.

A few years later, another foreign relations controversy arose when President John Adams sought, in accordance with the Jay Treaty, to extradite Jonathan Robbins to Great Britain.³³³ Members of Congress challenged the President's authority to extradite Robbins on the ground that there was no statute authorizing extradition.³³⁴ John Marshall, who was then a member of the House of Representatives, defended the President's authority on the grounds that the President had a duty to take care that the Jay Treaty was faithfully executed.³³⁵ Marshall said:

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract [i.e., the treaty] by any means it possesses.³³⁶

At least one nineteenth century commentator also believed that the President's duty under the Take Care Clause included a duty to execute treaties.³³⁷ There is very little case law addressing the rela-

³³⁰ *Id.* at 38 (stating that the President's power to issue the Proclamation is "connected with" his responsibilities "as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent . . . as that Power, which is charged with the Execution of the Laws, of which Treaties form a part").

³³¹ See "*Helvidius*" Number 1, reprinted in 15 THE PAPERS OF JAMES MADISON 66, 69 (Thomas Mason et al. eds., 1985).

³³² See *id.* at 69 ("A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a *law*, and to be carried into *execution*, like all *other laws*, by the *executive magistrate*.").

³³³ See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 229–30 (1990).

³³⁴ See 10 ANNALS OF CONG. 595–618 (1800).

³³⁵ *Id.* at 613–14.

³³⁶ *Id.*

³³⁷ See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 136 (Phila., H. C. Carey & I. Lea 1825) (stating that the Take Care Clause "declares what is his [the President's] duty," and concluding that "[t]he constitution, treaties,

tionship between treaties and the Take Care Clause. Supreme Court opinions that do address the topic, however, unanimously support the view that the President's duty to execute "the Laws" includes a duty to execute treaties.³³⁸

3. *Structural and Policy Considerations*

If the President does have a general power to violate treaties, then either treaties are not law or the President has the power to violate the law. The latter proposition is at odds with the principle that our government is "a government of laws, and not of men."³³⁹ As to the former proposition, it is true that some treaty provisions lack the status of law within our domestic legal system. This Article has already demonstrated, however, that most provisions of the Geneva Conventions are the law of the land.³⁴⁰ Therefore, a general presidential power to violate the Geneva Conventions would effectively mean that the President is above the law.

Advocates of a presidential power to violate treaties might seek to avert this consequence by distinguishing among different types of law. The federal constitution and statutes are binding on the President. In contrast, a President is free to disregard an executive order issued by his predecessor, even though such an executive order has the status of "law."³⁴¹ One could argue that treaties are like executive orders, because both derive from the President's Article II powers. Thus, the claim that Presidents have a general power to violate treaties does not imply that the President is above the law. Rather, the President's

and acts of congress, are declared to be the supreme law of the land. He [the President] is bound to enforce them").

³³⁸ See *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (stating that the President's duty under the Take Care Clause "is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution'" (citation omitted)); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (declaring that "[t]he power to exclude or expel aliens . . . is to be regulated by treaty or by act of congress, and to be executed by the executive authority," regardless of whether the rules are derived from treaties or statutes); *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890) (questioning whether the President's duty to take care that the laws be faithfully executed is "limited to the enforcement of acts of congress or of treaties of the United States according to their *express terms*," or whether it encompasses "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution"); *The Amistad*, 40 U.S. 518, 571 (1841) (argument of Attorney General on behalf of the United States) ("The executive government was bound to take the proper steps for having the treaty executed A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed").

³³⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

³⁴⁰ See *supra* Part II.

³⁴¹ See *supra* note 244 and accompanying text.

power to violate the law applies only to laws that are promulgated on the basis of the President's Article II powers.

This argument is unpersuasive. It is true that the Treaty Power is an Article II power, whereas Congress's legislative powers are derived from Article I. In this sense, treaties differ from statutes. Treaties are similar to statutes, however, in that they require the joint action of the executive and legislative branches.³⁴² In contrast, an executive order can become law without any legislative participation.³⁴³ Thus, from a structural standpoint, the President should not be required to obtain congressional approval to violate an executive order because the President does not need such approval to adopt an executive order.³⁴⁴ On the other hand, the President must obtain legislative approval to violate a treaty provision that has the status of law because treaties require Senate approval in order to become law.³⁴⁵

³⁴² See "*Helvidius*" Number I, *supra* note 331, at 70 (

The power of treaties is vested jointly in the President and in the Senate, which is a branch of the legislature. . . . [T]here are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character.

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³⁴³ See *supra* notes 196–99 and accompanying text.

³⁴⁴ See *Taylor v. Morton*, 23 F. Cas. 784, 785–86 (C.C. Mass. 1855) (No. 13,799) ("Ordinarily, it is certainly true, that the powers of enacting and repealing laws reside in the same persons."), *aff'd* 67 U.S. 481 (1863).

³⁴⁵ The President might obtain legislative approval to violate a treaty by means of ordinary legislation that supersedes an earlier treaty for purposes of domestic law. See *infra* notes 364–71 and accompanying text. The President might also obtain legislative approval to abrogate a treaty by negotiating a new treaty with a foreign country that supersedes a prior treaty for purposes of international law. By granting its consent to ratify the new treaty, the Senate would authorize abrogation of the prior conflicting treaty. Either mechanism provides a legislative check on the President's power to violate a treaty without some form of legislative authorization.

The question arises whether absent a new agreement with a foreign country, a two-thirds Senate vote could grant the President legal authority to violate a treaty if he otherwise lacked such authority. This question must be answered in the negative. The Constitution grants the President plus two-thirds of the Senate the power to create domestic law by means of an agreement with a foreign country, but the President plus two-thirds of the Senate do not have any power to make law in the absence of an international agreement. Since they do not have the power to make law without an international agreement, it is untenable to claim that they have the power to "un-make" (or violate) law without an international agreement. See, e.g., *Taylor*, 23 F.Cas. at 786 (stating that, if the power to modify a treaty was vested exclusively in the President and Senate, then the "government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign"); see also THE FEDERALIST NO. 64, at 379 (John Jay) (Isaac Kramnick ed., 1987):

They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both

Policy considerations support this constitutional analysis. The United States has a long-term interest in promoting the development of an international system that is governed increasingly by agreed-upon legal rules, and less by sheer power politics.³⁴⁶ On the other hand, the United States, more than any other nation in the world today, has the power to thwart the development of an effective international legal order by shunning the agreed-upon rules when it is convenient to do so. Moreover, there are many situations where short-term interests provide incentives for the United States to violate international law. From a constitutional standpoint, the best way to promote our long-term interest in fostering the development of the rule of law in the international sphere is to have constitutional arrangements that make it more difficult for the United States to renege on its international commitments. A constitutional rule that grants the President a general power to violate treaties would make it too easy for the United States to breach its treaty obligations. In contrast, a constitutional rule that requires the President to obtain legislative approval to violate a treaty makes it harder for the United States to violate treaties, and helps promote our long-term national interest in strengthening the rule of law internationally.

A rule requiring the President to obtain legislative approval to violate a treaty would also increase the prospects of meaningful international cooperation. Substantial empirical evidence suggests that institutionalized legislative participation in the treaty process increases the credibility of U.S. commitments, thereby improving the prospects of meaningful international cooperation.³⁴⁷ Although this empirical work documents the importance of ex ante legislative influence (at the bargaining and ratification stages of international agreements), the advantages of legislative involvement would be substantially diminished if the President could unilaterally alter the domestic law status of treaties ex post. Critics might point out that legislative involvement at the bargaining and ratification stages conveys important information to other states about U.S. preferences, and some useful signaling function is served by ex ante legislative involvement even if the President may violate treaties without congressional authorization ex post. This point, we concede, is important and almost certainly correct. Nevertheless, many of the most important signaling benefits of legislative participation are sacrificed if Presidents may violate treaties unilat-

was essential to their formation at first, so must it ever afterwards be to alter or cancel them.

³⁴⁶ This has been a central theme in the work of Professor Koh. See Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 23-24 (2002).

³⁴⁷ See, e.g., LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 53-80 (2000); Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AM. POL. SCI. REV. 829, 830 (1998).

erally.³⁴⁸ Indeed, the signaling effect improves the prospects for international cooperation because it suggests an increased probability of implementation and compliance.³⁴⁹ Legislative involvement in treaty negotiation and ratification constitutes an important constraint on the exercise of executive power—suggesting that the legislature will not hinder the implementation of the agreement and that the executive is a reliable (because constrained) treaty partner.³⁵⁰

The main policy argument in favor of a presidential power to violate treaties relates to the President's need for flexibility in handling the unpredictable contingencies of foreign affairs. Although flexibility is important, the President already has ample flexibility even without a general power to violate treaties.

Three factors support this conclusion. First, if the political branches decide that a treaty imposes unacceptable limits on presidential flexibility, they can choose not to ratify the treaty³⁵¹ or to ratify with conditions specifically designed to preserve flexibility.³⁵² Second, if the President decides after ratification that a treaty imposes unacceptable constraints, he can suspend or terminate the treaty in accordance with its terms, or in accordance with generally recognized principles of international law.³⁵³ Third, if the President decides after ratification that the treaty imposes unacceptable constraints, he can ask Congress to enact legislation to authorize executive action inconsistent with the treaty. In the nineteenth century, the logistical difficulties involved in convening a special session of Congress made it difficult for the President to obtain prompt congressional action to

³⁴⁸ See MARTIN, *supra* note 347, at 53–80.

³⁴⁹ See *id.* at 62–65.

³⁵⁰ See, e.g., *id.* at 5 (

Unconstrained executive-branch actors can indeed bargain more flexibly. But such apparently powerful negotiators can find it difficult to put into effect the agreements they reach with such ease at the international table. Their lack of *ex ante* domestic constraints also gives them the capacity to act arbitrarily, making them unreliable partners in international cooperation in spite of their apparently enviable freedom of maneuver.

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³⁵¹ Every treaty limits presidential flexibility by imposing international legal constraints on the exercise of national sovereignty. Even if one adopts the view that the President has a constitutional power to violate treaties, a presidential decision to violate a treaty commitment of the United States will almost invariably incur political costs. Those political costs limit presidential flexibility by providing a disincentive to treaty violations in the first place. Therefore, the decision to ratify a treaty amounts to a decision that the costs of legal constraints on national sovereignty are outweighed by the benefits that the treaty offers.

³⁵² For example, when the United States ratified the Geneva Conventions, it adopted a reservation to preserve the right to impose the death penalty in circumstances that would otherwise be prohibited under Article 68 of the Civilian Convention. See 84 CONG. REC. 9972 (1955) (resolution of ratification for Civilian Convention).

³⁵³ See *supra* Part IV.B.1.

deal with national emergencies.³⁵⁴ In the twenty-first century, however, it is much easier for the President to obtain prompt congressional action, since members of Congress can travel to Washington in a matter of hours to respond to a national crisis. Additionally, Congress currently takes much shorter recesses than it did in the nineteenth century.³⁵⁵ It took only one week after the terrorist attacks of September 11, 2001 for Congress to enact a joint resolution authorizing the President "to use all necessary and appropriate force" to respond to the attacks.³⁵⁶ Thus, a constitutional rule requiring the President to obtain legislative approval to violate a treaty imposes fewer constraints on presidential flexibility today than it would have one hundred years ago.

In sum, textual, structural, historical, and policy considerations all support the conclusion that the President lacks an independent constitutional power to violate treaty provisions that have the status of supreme federal law.

C. The Commander-in-Chief Power and Law-of-War Treaties

Given that the President must obtain legislative approval to violate treaties, the question arises whether there should be an exception for law-of-war treaties. The argument in favor of such an exception can be summarized as follows. Certain provisions of law-of-war treaties regulate conduct that is constitutionally committed to the Commander in Chief, and is therefore beyond the scope of Congress's legislative powers. If the President was required to await congressional legislation to authorize violations of such treaty provisions, the federal government as a whole would lack the power to violate the treaty be-

³⁵⁴ The difficulty of securing prompt legislative action was one of the main factors that led President Lincoln to act unilaterally to suspend the writ of habeas corpus during the Civil War. See Message to Congress in Special Session (July 4, 1861), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, *supra* note 266, at 594, 601 (noting that a constitutional provision for suspending habeas corpus was intended only for "a dangerous emergency," and that "it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion").

³⁵⁵ At the beginning of the twentieth century, the 56th Congress ended on March 3, 1901, and the 57th Congress did not convene until December 2, 1901. See Office of the Clerk, U.S. House of Representatives, Session Dates of Congress, available at http://clerk.house.gov/histHigh/Congressional_History/Session_Dates. Thus, there was a continuous nine-month period when Congress was not in session. At the beginning of the twenty-first century, the 106th Congress ended on December 15, 2000, and the 107th Congress began on January 3, 2001. See *id.* Granted, the House of Representatives took ten different recesses in 2001, for a total of about 130 days in recess. *Id.* Even so, the House could easily have convened on short notice to respond to an emergency.

³⁵⁶ See Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. 107-40, 115 Stat. 224 (2001).

cause Congress cannot enact legislation beyond the scope of its Article I powers. Since the federal government must have the power to violate treaties, including law-of-war treaties, the President must have the independent authority to violate treaty provisions that regulate conduct within the exclusive purview of the Commander in Chief.

This section presents a four-part analysis of the argument summarized above. The first subsection defends the claim that the federal government as a whole has the power to violate treaties, including law-of-war treaties. The second subsection demonstrates that in the absence of international legal rules, the President as Commander in Chief would have the exclusive power to control battlefield operations in wartime, and Congress would lack the power to interfere with the President's conduct of these operations. The third subsection contends that Congress has the power under Article I to regulate the treatment of wartime detainees, and congressional legislation in that area does not impermissibly interfere with the President's exercise of his Commander-in-Chief power. Therefore, a constitutional rule requiring the President to obtain legislative approval to violate treaties governing the treatment of detainees would not deprive the federal government of the power to violate such treaty provisions.

Subsection four demonstrates that the creation of new international legal rules regulating battlefield operations alters the constitutional balance between Congress and the President. In particular, it argues that the creation of international rules governing the conduct of warfare activates Congress's power to regulate battlefield operations under the Define and Punish Clause³⁵⁷ in ways it could not absent such international rules. Finally, it argues that U.S. ratification of law-of-war treaties activates Congress's power under the Necessary and Proper Clause³⁵⁸ to regulate treaty-related conduct that, in the absence of such treaties, would be beyond the scope of Congress's legislative powers. Therefore, the claim that the President has the independent authority to violate law-of-war treaty provisions beyond the scope of Congress's legislative powers ultimately fails, because Congress has the power to enact legislation to supersede domestically any law-of-war treaty provision.

I. *The Federal Power to Violate Law-of-War Treaties*

The argument in favor of a presidential power to violate law-of-war treaties rests on two premises. The first premise is that the federal

³⁵⁷ U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish . . . Offences against the Law of Nations").

³⁵⁸ U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

government must have the power to violate such treaties. The second premise is that, in some cases, Congress lacks the power to do so because certain provisions of law-of-war treaties address matters within the exclusive purview of the Commander in Chief. This section defends the first premise. The following sections demonstrate that the second premise is incorrect.

There are two distinct lines of authority supporting the claim that the federal government has the power to violate law-of-war treaties. The first relates to the war powers of the federal government. The Supreme Court has affirmed that "the war power of the federal government . . . is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."³⁵⁹ Additionally, the Court has said:

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of means for resisting it.³⁶⁰

In light of these and similar precedents, Professor Henkin has remarked that "[t]he Supreme Court has never declared any limit to the war powers of Congress . . . or even intimated where such limits might lie."³⁶¹ Similarly, another commentator suggests that "the only limitation of the war power is necessity itself. It is as extensive in scope as circumstances require. It is complete, total, and adequate when both Congress and the President act in cooperation."³⁶² These authorities support the proposition that the federal government as a whole has the constitutional authority to violate law-of-war treaties in situations where such treaties would inhibit the power to wage war successfully.³⁶³

The second line of authority supporting the claim that the federal government has the power to violate law-of-war treaties relates to the later-in-time rule. *Taylor v. Morton*³⁶⁴ is the earliest reported judi-

³⁵⁹ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also* *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("The war power of the national government is the power to wage war successfully.")

³⁶⁰ *Hirabayashi*, 320 U.S. at 93.

³⁶¹ HENKIN, *supra* note 23, at 67.

³⁶² Hollander, *supra* note 33, at 55.

³⁶³ This Article is not claiming, as a factual matter, that law-of-war treaties do inhibit the federal government's power to wage war successfully. Rather, it claims, as a constitutional matter, that the federal political branches, when acting in unison, have the constitutional authority to violate specific provisions of law-of-war treaties if they decide that such violations are necessary for successful prosecution of the war effort.

³⁶⁴ 23 F. Cas. 784 (C.C. Mass. 1855) (No. 13,799), *aff'd* 67 U.S. 481 (1863).

cial decision that provides a coherent justification for the rule. Justice Curtis wrote the opinion in his capacity as a circuit justice. In his view, the case turned on the issue of whether Congress had the power to violate a treaty.³⁶⁵ He concluded that Congress must have the power to violate a treaty, because that power is an essential attribute of national sovereignty:

To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; *but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence.* That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to congress. That, inasmuch as treaties must continue to operate as part of our municipal law, . . . and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects, which the constitution has placed under that legislative power.³⁶⁶

Justice Curtis wrote his opinion in *Taylor v. Morton* in 1855.³⁶⁷ The Supreme Court first endorsed the later-in-time rule in 1871 in *The Cherokee Tobacco*.³⁶⁸ Over the next two decades, the Supreme Court reaffirmed the later-in-time rule in at least three different cases. All three cases effectively restated the rationale for the rule that Justice Curtis first articulated in *Taylor*.³⁶⁹ Indeed, all three cases cited *Taylor* and endorsed Justice Curtis's opinion.³⁷⁰ Thus, by the end of the nineteenth century, the later-in-time rule was firmly entrenched in Supreme Court jurisprudence on the strength of Justice Curtis's analysis. Moreover, his entire analysis was based on the assumption that the power to violate treaties is an essential attribute of national sovereignty. Therefore, the rationale underlying the later-in-time rule sup-

³⁶⁵ See *id.* at 786 (discussing whether Congress had the power "to refuse to execute" a treaty).

³⁶⁶ *Id.* at 786 (emphasis added).

³⁶⁷ See *id.* at 784.

³⁶⁸ 78 U.S. 616, 621 (1871). In that case, the Court did not provide any rationale for the later-in-time rule. It merely stated that "an act of Congress may supersede a prior treaty." *Id.* at 621 (citing *Taylor v. Morton* as authority for the proposition).

³⁶⁹ See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Edye v. Robertson*, 112 U.S. 580 (1884).

³⁷⁰ See *Chae Chan Ping*, 130 U.S. at 602 (stating that the issue of conflicts between treaties and statutes "was fully considered by Mr. Justice Curtis, while sitting at the circuit, in *Taylor v. Morton*"); *Whitney*, 124 U.S. at 194 (stating that the "subject was very elaborately considered at the circuit by Mr. Justice Curtis"); *Edye*, 112 U.S. at 597-98 (stating that Justice Curtis "in a very learned opinion exhausted the sources of argument on the subject" of conflicts between statutes and treaties).

ports the proposition that the federal government has the constitutional authority to violate law-of-war treaties.³⁷¹

As noted above, there is an important distinction between treaty termination and treaty violation, and there are several ways in which a treaty can legitimately be terminated in accordance with international law.³⁷² Moreover, the President has the constitutional authority to terminate treaties in accordance with international law.³⁷³ The Geneva Conventions, in particular, permit parties to denounce the treaties for any or no reason, subject to a one-year prior notification requirement.³⁷⁴ Therefore, one could argue that the power to violate treaties is not an essential attribute of national sovereignty because international rules governing treaty termination adequately protect the sovereignty of all nations.

The preceding argument has some persuasive force. A constitutional rule denying the federal government the authority to violate a treaty, however, might actually undermine the development of international law by inhibiting the United States from entering into otherwise acceptable treaties. Moreover, it is difficult to imagine that a modern U.S. court would embrace a constitutional rule denying the federal government the constitutional authority to violate a treaty provision if the political branches decided the provision restricted the nation's ability to wage war successfully. A court can justify a constitutional rule requiring the President to obtain legislative approval to violate a treaty on the grounds that courts have historically played an important role in policing the constitutional division of powers between the President and Congress.³⁷⁵ In contrast, there is virtually no judicial precedent supporting a constitutional rule that

³⁷¹ This conclusion is entirely consistent with the thesis, advanced by Professor David Golove, that "in exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law, [including] . . . the laws of war." David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364 (2003). While defending the claim that the laws of war constrain the President's authority as Commander in Chief, Professor Golove concedes that "the view that Congress is so limited raises large theoretical questions and is in tension with the so-called 'last in time' rule." *Id.* at 387.

³⁷² See *supra* notes 297-317 and accompanying text.

³⁷³ See *supra* notes 306-17 and accompanying text.

³⁷⁴ See Geneva I, *supra* note 44, art. 63; Geneva II, *supra* note 44, art. 62; POW Convention, *supra* note 13, art. 142; Civilian Convention, *supra* note 15, art. 158. Insofar as the Geneva Conventions codify customary international law, the United States would have an international legal obligation to comply with those customary norms, even if it denounced the Conventions. It is debatable, however, whether the President would have a domestic constitutional duty to comply with those customary norms. See *supra* note 25.

³⁷⁵ See, e.g., *Clinton v. New York*, 524 U.S. 417, 448 (1998) (holding that the Line Item Veto Act is unconstitutional); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that a one-House veto is unconstitutional); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (holding that the President lacked constitutional authority to seize steel mills).

invokes international law as a limit on the constitutional power of the federal government,³⁷⁶ thereby denying the national government the constitutional power to violate international law. There may come a time when the world is politically integrated to such a degree that an “international supremacy clause” becomes a viable option, but that time has not yet arrived.

2. *The Commander-in-Chief Power as a Limitation on Congress’s War Powers*

The remaining question is how that power to violate law-of-war treaties should be divided between the President and Congress. We contend that international laws of war shape the constitutional division of war powers between the legislative and executive branches. Subsequent sections address the impact of international laws of war on the allocation of war powers between the branches. This section addresses the constitutional division of war powers in the absence of international legal rules. Specifically, this section demonstrates that, in the absence of international legal rules, the President as Commander in Chief would have the exclusive power to control battlefield operations during wartime. Insofar as the President’s power is exclusive, Congress lacks the power to interfere with the President’s conduct of military operations.³⁷⁷

The Constitution grants Congress a wide array of war powers. Under Article I, Congress has the authority to “provide for the common Defence,”³⁷⁸ “raise and support Armies”³⁷⁹ and “provide and maintain a Navy,”³⁸⁰ “make rules for the Government and Regulation of the land and naval Forces,”³⁸¹ “define and punish . . . offenses against the Law of Nations,”³⁸² and “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”³⁸³ In addition, Congress is empowered to “make all Laws

³⁷⁶ *But see* *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315–16 (1870) (Field, J., dissenting) (contending that Congress lacks the constitutional authority to violate the laws of war).

³⁷⁷ The Article distinguishes here between “concurrent” and “exclusive” powers. In areas in which the President and Congress share “concurrent” powers, the President has the freedom to act independently, in the absence of congressional legislation, but he must conform his conduct to the requirements of any legislation that Congress enacts. In areas in which the President has “exclusive” power, congressional attempts to legislate are invalid insofar as they interfere with the President’s exercise of his exclusive powers.

³⁷⁸ U.S. CONST. art. I, § 8, cl. 1.

³⁷⁹ *Id.* art. I, § 8, cl. 12.

³⁸⁰ *Id.* art. I, § 8, cl. 13.

³⁸¹ *Id.* art. I, § 8, cl. 14.

³⁸² *Id.* art. I, § 8, cl. 10.

³⁸³ *Id.* art. I, § 8, cl. 11.

which shall be necessary and proper for carrying into Execution" any power vested in the federal government.³⁸⁴

Despite this impressive array of congressional war powers, the President's Commander-in-Chief power constitutes an important constraint on the scope of congressional power. The Commander-in-Chief power grants the President "the supreme command and direction of the military and naval forces."³⁸⁵ The reason for vesting this power in the President is obvious: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."³⁸⁶

Recognizing the need for the Commander in Chief to exercise unified control over the armed forces, the Supreme Court has affirmed the principle that there are constitutional limits on congressional authority to interfere with the President's operational control of the military in wartime. For example, Chief Justice Chase stated that Congress's war

power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief.³⁸⁷

He continued: "[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."³⁸⁸

Congress has rarely attempted to interfere with the President's operational control of the military in wartime. There was a notable exception during the Civil War, when President Lincoln was "subjected to unrelenting scrutiny by the powerful Joint Committee on the Conduct of War, which . . . insisted even on a say in the choice of field commanders and battle strategy."³⁸⁹ Not surprisingly, congressional meddling in the details of military operations frustrated the President's war effort. Indeed, "Robert E. Lee once remarked that the

³⁸⁴ *Id.* art. I, § 8, cl. 18.

³⁸⁵ THE FEDERALIST NO. 69, at 398 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

³⁸⁶ *Id.* NO. 74, at 422 (Alexander Hamilton).

³⁸⁷ *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring) (emphasis added); see also *Fleming v. Page*, 50 U.S. 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.").

³⁸⁸ *Ex parte* Milligan, 71 U.S. at 139 (Chase, C.J., concurring).

³⁸⁹ DAVID McCULLOUGH, TRUMAN 258 (1992); see also GEOFFREY PERRET, LINCOLN'S WAR: THE UNTOLD STORY OF AMERICA'S GREATEST PRESIDENT AS COMMANDER IN CHIEF 63, 74-75, 97 (2004) (telling of Lincoln's experience with the Congressional Committee on the Conduct of War); BRUCE TAP, OVER LINCOLN'S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR 7-8, 36-37 (1998) (same).

committee was worth two divisions to him.”³⁹⁰ Apart from this single episode of congressional overreaching, Congress has generally contented itself with issuing nonbinding resolutions that do not intrude upon the Commander in Chief’s authority to exercise control over battlefield operations in wartime.³⁹¹

Commentators generally agree that the President has exclusive authority over battlefield operations, and that Congress’s war powers are constrained by the need to avoid interfering with the President’s Commander-in-Chief power during wartime.³⁹² As one leading commentator has stated: “Congress declares war and provides the means for carrying it on, but the President decides how the war is to be conducted and directs the campaigns. . . . [I]n the field of military operations there are no limitations prescribed by the Constitution and the President’s power is therefore exclusive.”³⁹³ The President’s exclusive power includes “control of the movements of the army and navy” in time of war,³⁹⁴ as well as the power to decide “how the forces shall be used, for what purposes, the manner and extent of their participation

³⁹⁰ McCULLOUGH, *supra* note 389, at 258. Lee references only the strategic value of the information made public in the Committee’s hearings. See PERRET, *supra* note 389, at 332–33. The contemporary Congress, now experienced in “closed hearings” and other forms of confidential oversight of the executive, would likely do much better.

³⁹¹ Even in situations where individual Members of Congress objected to Presidential policy, Congress has been reluctant to enact binding legislation that would restrict the President’s operational control over the military during wartime. See, e.g., CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 123–25 (1920) (discussing congressional opposition to the deployment of U.S. troops in Siberia after World War I, which resulted in legislation that “was merely a request for information as to the general policy respecting Siberia and the maintenance of troops there”); see also Richard P. Longaker, *Introductory Note* to ROSSITER, *supra* note 286, at xi, xvii (discussing congressional opposition to the deployment of U.S. troops to Europe in 1951, resulting in a resolution in which “Congress seemed to accept the President’s power to dispatch troops independently”).

³⁹² See, e.g., HENKIN, *supra* note 23, at 103–04 (“It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President’s authority is effectively supreme.”); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* 84 (1990) (concluding that the President has exclusive authority over “operational battlefield decisions concerning the means to be employed to achieve ends chosen by Congress”); Holland, *supra* note 33, at 64 (“Once the nation is at war . . . the whole power of conducting it, as to manner, method, and means is for Presidential determination. He is the sole judge of the nature and extent of the exigencies, necessities, and duties demanded by the occasion.”).

³⁹³ BERDAHL, *supra* note 391, at 118. Professor Berdahl continues:

[N]either the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives [Congress] the command of the army. Here the constitutional power of the President as commander-in-chief is exclusive.

Id. (internal quotation marks omitted).

³⁹⁴ *Id.* at 121.

in campaigns, and the time of their withdrawal.”³⁹⁵ Any congressional effort to regulate these types of operational and tactical decisions in wartime would constitute impermissible interference with the President’s exercise of his Commander-in-Chief power.

Although Congress lacks the power—in the absence of international legal rules—to regulate the President’s conduct of battlefield operations in wartime, the United States is a party to certain law-of-war treaties that do regulate the means and methods of warfare.³⁹⁶ In light of the conclusion of subsection 1 (that the federal government has the power to violate law-of-war treaties), and the conclusion of this subsection (that Congress lacks the power to regulate battlefield operations in wartime), one might assert that the federal power to violate law-of-war treaties is exclusively vested in the President as Commander in Chief, at least insofar as law-of-war treaties regulate conduct that is beyond the scope of Congress’s Article I powers. Subsection 4 addresses this claim. First, however, subsection 3 considers whether Congress has the power, in the absence of international legal rules, to regulate the treatment of wartime detainees.

3. *Congress’s Concurrent Authority to Regulate Treatment of Detainees*

This subsection contends that the power to regulate the treatment of wartime detainees is shared between the legislative and executive branches. Therefore, a constitutional rule requiring the President to obtain legislative approval to violate treaties would not deprive the federal government of the power to violate treaty provisions concerning wartime detainees, because the Government and

³⁹⁵ *Id.* at 122. Professor Berdahl wrote these words in 1920. For the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the Commander in Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority. Given the tremendous changes in the technology of modern warfare, as well as the evolution of the international laws of war, some refinement of Professor Berdahl’s formulation may be appropriate. It is beyond the scope of this Article to address this issue in a comprehensive fashion. This Article suggests that rules governing the treatment of detainees fall on the concurrent side of the line. *See infra* Part IV.C.3. This Article also suggests that the development of the international laws of war expands the scope of Congress’s concurrent powers while diminishing the scope of the President’s exclusive powers. *See infra* Part IV.C.4.

³⁹⁶ *See infra* Part IV.C.4 (discussing treaties that regulate means and methods of warfare). The United States has the power to enter into treaties that regulate matters beyond the scope of Congress’s Article I powers because limits on Article I do not apply in the same way to the treaty power. *See Missouri v. Holland*, 252 U.S. 416 (1920) (holding a treaty between the United States and Great Britain was constitutional, even though it regulated a subject matter that Congress presumably could not regulate in the absence of a treaty).

Regulation Clause³⁹⁷ grants Congress the power to prescribe rules governing the treatment of wartime detainees.

Congress has the power under Article I “[t]o make Rules for the Government and Regulation of the land and naval Forces.”³⁹⁸ On its face, this provision is broad enough to empower Congress to prescribe rules for the treatment of military detainees. Moreover, the Government and Regulation Clause must be construed in light of the principle articulated by Chief Justice Marshall in *McCulloch v. Maryland*:³⁹⁹ “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”⁴⁰⁰ This principle supports a broad interpretation of Congress’s powers under the Government and Regulation Clause. Courts have adopted narrower interpretations of enumerated Article I powers in order to protect individual rights or state sovereignty.⁴⁰¹ But the Supreme Court has rarely, if ever, adopted a narrow construction of an enumerated Article I power in order to protect the President’s prerogatives as Commander in Chief.

The practice of the political branches is consistent with the view that Congress has the power to regulate the treatment of wartime detainees. Indeed, long before the drafting of the 1949 Geneva Conventions, Congress prescribed rules that directly regulated the treatment of wartime detainees.⁴⁰² These statutory schemes established detailed rules governing many aspects of military government, including the treatment of captured enemy combatants.⁴⁰³ Moreover, many Supreme Court cases assume, expressly or implicitly, that Congress has the power to make rules for the treatment of the enemy in times of war.⁴⁰⁴

In a recently declassified memorandum drafted by the Justice Department, the Assistant Attorney General asserted: “Congress may no

³⁹⁷ U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

³⁹⁸ *Id.*

³⁹⁹ 17 U.S. (4 Wheat.) 316 (1819).

⁴⁰⁰ *Id.* at 421.

⁴⁰¹ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (adopting a narrow interpretation of the Commerce Clause, in part to protect state sovereignty).

⁴⁰² See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 45, 931 (2d ed. 1920) (documenting long history of congressional regulation of the conduct of war through various iterations of the “Articles of War”); American Articles of War of 1775, 2 J. CONT. CONG. 111–23 (1775), reprinted in WINTHROP, *supra*, at 953; American Articles of War of 1786, 30 J. CONT. CONG. 316 (1786), reprinted in WINTHROP, *supra*, at 972.

⁴⁰³ See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 44–45 (1942) (holding that the Articles of War authorized the President to try captured enemy combatants by military commission in a manner consistent with the law of war).

⁴⁰⁴ See, e.g., *id.*; *In re Yamashita*, 327 U.S. 1, 7–8 (1946).

more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."⁴⁰⁵ Not surprisingly, the Justice Department failed to cite any authority for this unprecedented claim of executive prerogative. Moreover, in its most recent decision on the detention of enemy combatants, the Supreme Court rejected the Bush Administration's claim. The Court distinguished between the procedures governing "initial captures on the battlefield" and the procedures that apply "when the determination is made to continue to hold those who have been seized."⁴⁰⁶ The Court tacitly conceded that it could not review the rules governing initial captures, but it insisted on judicial review of the policies and procedures governing the continued detention of captured enemy combatants:

While we accord the greatest respect and consideration to the judgments of military authorities *in matters relating to the actual prosecution of a war* . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving [claims involving the continued detention of those who have been seized].⁴⁰⁷

Clearly, if the courts can review the claims of detainees without infringing on the military's primary function, then Congress can likewise regulate the treatment of detainees without risking such infringement.

As a practical matter, it is sensible to vest the President with responsibility for the "actual prosecution of a war," while entrusting the legislature with shared responsibility for prescribing rules governing continued detention of enemy combatants. Alexander Hamilton defended the unitary executive on the grounds that "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man."⁴⁰⁸ He contended that these are the qualities needed to ensure an energetic executive and, one might add, to ensure successful prosecution of a war. In contrast, he argued, a numerous legislature is "best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests."⁴⁰⁹ Whereas "activity, secrecy and dispatch" are

⁴⁰⁵ Bybee Memo, *supra* note 7, at 35; *see also id.* at 39 (

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.

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⁴⁰⁶ *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633, 2649 (2004) (plurality opinion).

⁴⁰⁷ *Id.* at 2649 (emphasis added).

⁴⁰⁸ THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁴⁰⁹ *Id.*

needed to ensure successful prosecution of a war, “deliberation and wisdom” are needed to regulate the treatment of wartime detainees held in long-term captivity. Therefore, it makes sense to construe the Government and Regulation Clause as granting Congress the power to prescribe rules for the treatment of wartime detainees, but not to interfere with the President’s control over battlefield operations.

Recall that the Geneva Conventions prescribe rules governing the treatment of persons captured and detained by enemy forces.⁴¹⁰ The Civilian Convention, for example, protects “those who, at any given moment and in any manner whatsoever, find themselves . . . *in the hands of a Party . . . of which they are not nationals.*”⁴¹¹ In addition, the POW Convention governs only those circumstances in which combatants are captured and detained by the enemy. Accordingly, the Conventions, for the most part, purport to govern the treatment only of persons no longer taking active part in hostilities.⁴¹² Thus, the vast majority of the provisions embodied in the Geneva Conventions address matters that are well within the scope of Congress’s Government and Regulation Power.⁴¹³

The argument in favor of a presidential power to violate law-of-war treaties boils down to two points. First, the President must have the power to violate law-of-war treaties because the federal government has a general power to violate treaties. Second, law-of-war treaties regulate conduct that is beyond the scope of Congress’s Article I powers. This section has demonstrated that the majority of the provisions embodied in the Geneva Conventions concern the treatment of wartime detainees and that, even in the absence of international rules,

⁴¹⁰ See *supra* Part I.A.

⁴¹¹ Civilian Convention, *supra* note 15, art. 4 (emphasis added).

⁴¹² For example, the POW Convention has a total of 143 articles, including 92 articles that address “Captivity,” and an additional 13 articles that address “Termination of Captivity.” See POW Convention, *supra* note 13. Moreover, the Convention specifically obligates parties to evacuate POWs “as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.” POW Convention, *supra* note 13, art. 19. Thus, the Convention’s primary focus concerns the treatment of individuals who have been removed from active combat zones.

⁴¹³ Some protections established by the Geneva Conventions regulate operational choices more directly, and thereby may impinge on the Commander-in-Chief power. Indeed, it is well understood that the law of war governs not only the treatment of captives, but also the very “means and methods” of warfare. These rules are, for the most part, codified in the Hague Convention, *supra* note 46, and the Additional Protocols to the Geneva Conventions, *supra* note 45. Some provisions of the Geneva Conventions also govern war tactics. For example, the Civilian Convention prohibits attacking civilian hospitals. See Civilian Convention, *supra* note 15, arts. 18–19. It also requires belligerents to allow free passage of medical supplies, objects necessary for religious worship, and foodstuffs, so long as the belligerent is satisfied that these consignments are for civilian use. *Id.* art. 23. The next subsection considers whether the President has the constitutional authority to violate treaty provisions that regulate the conduct of battlefield operations. See *infra* Part IV.C.4

the Government and Regulation Clause empowers Congress to regulate the treatment of wartime detainees. Therefore, even if the President did have the constitutional authority to violate treaties beyond the scope of Congress's Article I powers, the President would still be bound by most portions of the Geneva Conventions because the Conventions primarily address matters within the scope of Congress's legislative powers.

4. *International Laws of War and the Separation of Powers*

This subsection argues that the creation of new international legal rules regulating battlefield operations alters the constitutional balance between Congress and the President. Assuming that, in the absence of controlling international legal rules, any congressional attempt to regulate "the general direction of military and naval operations" would be an unconstitutional infringement of the President's Commander-in-Chief power, once the United States ratifies a treaty that constrains the President's operational discretion, that treaty ratification empowers Congress to regulate in areas where it could not otherwise regulate. Therefore, the President does not need the independent authority to violate law-of-war treaty provisions beyond the scope of Congress's legislative powers because Congress has the power to enact legislation to supersede, as a matter of domestic law, any law-of-war treaty provision.

Two arguments support this conclusion. First, the creation of international rules governing the conduct of warfare activates Congress's power under the Define and Punish Clause to regulate battlefield operations in ways that it could not in the absence of such international rules. Second, U.S. ratification of law-of-war treaties activates Congress's power under the Necessary and Proper Clause to regulate treaty-related conduct that, in the absence of such treaties, would be beyond the scope of Congress's legislative powers.

a. *The Define and Punish Clause and the Division of War Powers*

The Define and Punish Clause⁴¹⁴ expressly empowers Congress to incorporate the law of nations, including treaties, into domestic law.⁴¹⁵ If there were no international legal rule prohibiting, for exam-

⁴¹⁴ U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . offenses against the law of nations").

⁴¹⁵ Article 25 of the Hague Convention prohibits the bombing of "undefended towns." See Hague IV, *supra* note 46, art. 25 ("The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."). This is the kind of rule that presents the greatest difficulty for our broad claim that the President has no unilateral authority to violate treaties. The rule purports to restrict the strategic options of states in time of war. In the absence of international rules, Congress arguably would not have the power to promulgate such a rule because it would infringe on the President's

ple, the bombing of undefended towns, then Congress could not create such a rule; it would be beyond the scope of Article I. Once the United States ratifies a treaty that prohibits the bombing of undefended towns, however, Congress has the power under the Define and Punish Clause to enact legislation establishing civil or criminal liability for a violation of the norm.⁴¹⁶

Moreover, Congress's power to punish individuals who violate international norms necessarily includes the power to immunize individuals who violate those same norms in cases where Congress decides that the infraction was justified.⁴¹⁷ Thus, if the President orders the air force to bomb an undefended town in violation of the Hague Convention, and Congress agrees that the President made a wise choice, Congress could enact a law on the basis of its Define and Punish power to immunize the military officers who executed the presidential order from any civil or criminal liability that might otherwise ensue.

There is an important difference, however, between legislation authorizing certain conduct (e.g., the bombing of undefended towns) and legislation creating immunity for those who engage in unauthorized conduct. Even if Congress accorded U.S. officials an unqualified immunity for the bombardment of undefended towns, this military tactic would still be illegal because it violates a treaty that has the status of law. Hence, although the Define and Punish Clause empowers Congress to immunize executive officers who violate the Geneva Conventions, it does not empower Congress to enact legislation authorizing such violations. Therefore, the Define and Punish Clause does not grant Congress the authority to enact legislation superseding law-of-war treaty provisions that address matters within the scope of the President's exclusive power as Commander in Chief, such as battlefield operations.

b. *The Necessary and Proper Clause*

The question remains whether Congress has the authority, given the existence of international rules, to enact legislation superseding any such rules. This Article argues that it does, pursuant to the Necessary and Proper Clause. If the Geneva Conventions impose opera-

exclusive Commander-in-Chief powers. This Part contends, however, that the emergence of an international rule reallocates law-making (and thus, law-breaking) authority between the political branches.

⁴¹⁶ Indeed, this is exactly what Congress has done. Article 25 of the Hague Regulations Respecting the Laws and Customs of War on Land is now part of the U.S. criminal code. See War Crimes Act, 18 U.S.C. § 2441. The House Report on the War Crimes Act specifically cites the Define and Punish clause as the source of congressional authority to pass the bill. See H.R. REP. NO. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

⁴¹⁷ See, e.g., HENKIN, *supra* note 23, at 68-70. This power also authorizes Congress to establish (or modify) civil remedies for violations of the law of nations. See *id.* at 69-70.

tional constraints that unacceptably compromise the ability of the Commander in Chief to wage war successfully, Congress has the authority to enact legislation superseding these problematic constraints because such legislation is "necessary and proper" for the execution of the President's power.⁴¹⁸

Congress has the power, pursuant to the Necessary and Proper Clause, to enact any legislation that expands the discretion of the Commander in Chief in the conduct of war.⁴¹⁹ In other words, this power authorizes Congress to make rules that empower the President to prosecute the war successfully. In this sense, the Necessary and Proper rationale provides independent support for the broader claim that Congress has the constitutional authority to enact legislation that supersedes the Geneva Conventions.

The claim advanced here is analogous to the Supreme Court's holding in *Missouri v. Holland*.⁴²⁰ In that case, the Court assumed that Congress lacked the power to regulate migratory birds in the absence of a treaty, but held that a treaty on migratory birds effectively gave Congress the power, under the Necessary and Proper Clause, to regulate in areas where it could not regulate in the absence of a treaty.⁴²¹ Critics might suggest that the *Missouri v. Holland* analogy fails because the Necessary and Proper Clause refers to laws "for carrying into Execution" the powers vested in the federal government.⁴²² In *Missouri*, the law at issue was designed to "carry into Execution" a treaty.⁴²³ Here, the issue is whether Congress has the authority to prevent the execution of a treaty. Critics could argue that these laws are not necessary or proper for carrying out the execution of the Treaty power. This Article claims, however, that legislation superseding the Conventions may be necessary and proper for carrying into execution the Commander-in-Chief power, not the Treaty power. The logic of *Missouri* applies to any legislation essential to the effective exercise of any power enumerated in the Constitution, including the Commander-in-Chief power.

418 See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 300-05 (2d ed. 1988) (describing the contours of Congress's power under the Necessary and Proper Clause); see also *id.* at 301 ("The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, as long as the ancillary power does not conflict with external limitations such as those of the Bill of Rights and federalism."); *supra* note 404 and accompanying text.

419 See U.S. CONST. art. 1, § 8, cl. 18 (granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" all other powers granted to the federal government, including the power to regulate the conduct of war).

420 252 U.S. 416 (1920).

421 *Id.* at 435.

422 See U.S. CONST. art. 1, § 8, cl. 18.

423 See *Holland*, 252 U.S. at 430-31.

The analytical structure of the argument presented in this section tracks closely the Court's reasoning in *Missouri*. It starts with the premise that, in the absence of international rules, Congress could not regulate the means and methods of warfare. For example, the President has exclusive authority, absent international rules, to decide whether to bomb "undefended towns." This section then posits formal international rules prohibiting specific means and methods of warfare, including the bombing of undefended towns. It finally concludes that since the international rule is binding on the President, legislation to remove the constraint is necessary and proper to execute the Commander-in-Chief power.⁴²⁴

Taking the analogy a step further, because the treaty power is a federal power, when the United States ratifies a treaty the act of ratification "nationalizes" the issue (per *Missouri*) and shifts the locus of decisionmaking from the state governments to the federal government. Similarly, because treaties have the status of law, the act of ratification "legalizes" the issue (as in the bombing of undefended towns) and thereby shifts the locus of decisionmaking from the President to Congress. Absent a treaty, the question of whether to bomb undefended towns is a question of policy for the President to decide. When the United States ratifies the treaty, however, a legal rule is created, and the President must comply with the legal rule unless Congress changes the law.

In short, absent controlling international laws of war, the President, as Commander in Chief, would have exclusive control over battlefield operations, and Congress would lack the power under Article I to interfere with such exclusive presidential control. By ratifying law of war treaties, however, the United States shifts the constitutional balance between Congress and the President. The act of ratification empowers Congress to regulate, under the Define and Punish and Necessary and Proper Clauses, matters governed by the treaty, even if those matters would otherwise be subject to the President's exclusive power.

⁴²⁴ As previously discussed, *see supra* Part IV.B, the international rule is binding on the President as a matter of constitutional law because the rule is embodied in a treaty that has the status of law, and the President has a duty to "take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

V

THE PRESIDENT, THE COURTS, AND
THE GENEVA CONVENTIONS

Part IV concluded that the President is bound by the Geneva Conventions. That conclusion provides little comfort to the foreign nationals detained at Guantanamo, if—as the Bush Administration maintains—U.S. courts cannot provide remedies for treaty violations committed by U.S. military officers. Indeed, if U.S. courts are powerless to enjoin ongoing treaty violations by the U.S. military, or to compensate victims for injuries sustained as a result of violations of the Conventions, then even if the President is bound in a formal sense, he is not bound in any practical way because executive officials may continue to violate the Conventions, secure in the knowledge that no one will stop them.

Part V addresses the role of the courts in ensuring that U.S. military officers and contractors comply with the Geneva Conventions. There is no question that the federal courts would adjudicate criminal prosecutions initiated by the federal government against individuals who allegedly breached the Conventions.⁴²⁵ Nevertheless, in cases in which private plaintiffs initiate suits against the federal government, government employees, or military contractors, the role of the courts may vary substantially depending upon the identity of the plaintiffs, the identity of the defendants, the nature of the relief sought, and the nature of the substantive claim. For example, Guantanamo detainees may have greater access to U.S. courts than prisoners held in Iraq or Afghanistan.⁴²⁶ Also, plaintiffs might evade the bar of sovereign immunity by suing military contractors rather than government employees.⁴²⁷ There are many possible permutations and combinations of plaintiffs, defendants, substantive claims, and remedial mechanisms. It is beyond the scope of this Article to explore all of them. Even so, some discussion of the proper role of courts is essential to counter the

⁴²⁵ The War Crimes Act makes it a federal criminal offense to commit a grave breach of the Geneva Conventions, or to commit a violation of Common Article 3. See 18 U.S.C. § 2441 (2002).

⁴²⁶ In *Rasul v. Bush*, the Court relied heavily on the fact that the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base to justify its holding that the federal district court had jurisdiction over a habeas petition presented by Guantanamo detainees. See *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686, 2696 (2004). It is unclear whether the Court would have reached the same result if the petitioners had been detained in Iraq or Afghanistan.

⁴²⁷ In a recent case, plaintiffs sued private contractors and their employees for abuses committed at Abu Ghraib prison in Iraq. See *Saleh v. Titan Corp.*, Amended Complaint, available at www.ccr-ny.org/v2/legal/docs/Amended-complaint.pdf. Notably, the complaint does not name any government entities or employees as defendants. This may be because claims for money damages against government employees would likely fail. See *infra* note 467.

view that the President is bound only in a formal sense and not in a practical sense.

One particular type of claim that Guantanamo detainees are likely to raise is a claim to enjoin the future use of interrogation techniques that violate the Geneva Conventions. Part V considers a variety of objections that government defendants might raise to prevent or circumscribe judicial review of such a claim. Potential objections include: (a) courts lack jurisdiction to entertain plaintiffs' claim; (b) the political question doctrine bars plaintiffs' claim; (c) sovereign immunity bars plaintiffs' claim; (d) the Geneva Conventions do not create privately enforceable rights; and (e) separation-of-powers principles mandate judicial deference to the executive branch's authoritative interpretation of the Geneva Conventions. Defendants are likely to raise some variant of most of these five objections in almost any lawsuit in which plaintiffs raise Geneva Conventions claims against federal employees or contractors. By addressing these five objections in the context of a suit to enjoin the future use of certain interrogation techniques, Part V will demonstrate that the President is bound by the Geneva Conventions, in a practical sense, because the courts do have a significant role to play in adjudicating some types of potential claims under the Conventions.

A. Jurisdiction

In *Rasul v. Bush*,⁴²⁸ aliens detained at Guantanamo filed habeas corpus petitions challenging the legality of their detention.⁴²⁹ In addition, they raised nonhabeas statutory claims challenging the conditions of confinement at Guantanamo.⁴³⁰ The government's brief asserted that *Johnson v. Eisentrager*⁴³¹ barred federal district court jurisdiction over both petitioners' habeas claims and their nonhabeas statutory claims.⁴³²

The Supreme Court ruled in favor of petitioners on both counts. First, the Supreme Court explicitly held that the federal habeas statute "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."⁴³³ Second, although the Supreme Court did not decide whether the District Court had jurisdiction over the nonhabeas claims, it did state that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military cus-

⁴²⁸ 542 U.S. ___, 124 S. Ct. 2686 (2004).

⁴²⁹ *See id.* at 2691.

⁴³⁰ *Id.*

⁴³¹ 339 U.S. 763 (1950).

⁴³² *See* Brief for Respondents at 1–2, *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686 (2004) (No. 03-334), available at <http://www.usdoj.gov/osg/briefs>.

⁴³³ *Rasul*, 124 S. Ct. at 2698.

tody outside the United States from the 'privilege of litigation' in U.S. courts."⁴³⁴ The Court identified two potential grounds for federal jurisdiction over petitioners' nonhabeas claims: the federal question statute⁴³⁵ and the Alien Tort Statute (ATS).⁴³⁶

In light of the Supreme Court's decision in *Rasul*, and its decision the next day in *Alvarez-Machain*,⁴³⁷ it is uncertain whether ATS grants the federal district courts jurisdiction to entertain claims by Guantanamo detainees against U.S. government officers to enjoin the future use of interrogation techniques violating the Geneva Conventions.⁴³⁸ It is clear in light of *Rasul*, however, that if there is a federal statute that creates a private cause of action for the Guantanamo detainees to challenge the interrogation techniques, the federal question statute grants federal district courts jurisdiction to entertain such a claim.⁴³⁹ Below, this Part suggests that the Administrative Procedure Act (APA)⁴⁴⁰ creates such a private right of action and thereby gives rise to federal question jurisdiction.⁴⁴¹

B. Treaty Interpretation and the Political Question Doctrine

Professor Yoo contends that the political question doctrine generally precludes judicial enforcement of treaties.⁴⁴² Although there is a grain of truth to Yoo's argument, he takes the argument too far. Some treaty interpretation issues raise nonjusticiable political questions. For example, Article 51 of Protocol I prohibits any "attack which may be expected to cause incidental loss of civilian life . . .

⁴³⁴ *Id.*

⁴³⁵ 28 U.S.C. § 1331 (2000).

⁴³⁶ 28 U.S.C. § 1350 (2000).

⁴³⁷ *Sosa v. Alvarez-Machain*, 542 U.S. ___, 124 S. Ct. 2739 (2004).

⁴³⁸ In *Alvarez-Machain*, the Court held that the ATS does not create a statutory cause of action for violations of international law, but it does grant federal courts jurisdiction to adjudicate claims in which the common law provides a cause of action for violations of international law. *See id.* at 2754–61. The Court adopted a fairly restrictive view of the types of international law violations that give rise to a federal common law cause of action, holding that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761–62. Claims alleging grave breaches of the Geneva Conventions, or violations of Common Article 3, would likely satisfy this standard. It is uncertain whether other alleged violations of the Geneva Conventions would satisfy the Supreme Court's newly adopted standard.

⁴³⁹ The federal question statute confers jurisdiction on federal district courts to hear cases "arising under" federal law. *See* 28 U.S.C. § 1331. This means, *inter alia*, that federal courts have jurisdiction to entertain any claim in which a federal statute creates a private right of action. *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 279–80 (3d ed. 1999).

⁴⁴⁰ Pub. L. No. 108-279, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

⁴⁴¹ *See infra* Part V.D.

⁴⁴² *See* John C. Yoo, *Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1325–28 (2002).

which would be excessive in relation to the concrete and direct military advantage anticipated."⁴⁴³ If the United States eventually ratifies Protocol I,⁴⁴⁴ some individual or group might file a lawsuit alleging a U.S. violation of Article 51. Such a claim would raise a nonjusticiable political question, however, because the application of Article 51 in any particular case requires a decisionmaker to weigh the potential loss of human life against the anticipated military advantage. This type of cost-benefit analysis is a political question, because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department,"⁴⁴⁵ and "a lack of judicially discoverable and manageable standards for resolving it."⁴⁴⁶

Nevertheless, not all treaty interpretation issues raise nonjusticiable political questions. For example, on April 16, 2003, Secretary of Defense Rumsfeld approved a set of twenty-four "counter-resistance techniques" to be used for "interrogations of unlawful combatants held at Guantanamo Bay, Cuba."⁴⁴⁷ Suppose that a group of Guantanamo detainees filed suit to enjoin the future use of some of these techniques on the grounds that specific techniques violate Article 31 of the Civilian Convention. Article 31 states that "[n]o physical or

⁴⁴³ Protocol I, *supra* note 45, art. 51(5)(b).

⁴⁴⁴ The United States signed Protocol I on December 12, 1977 but has never ratified it. See *supra* note 75.

⁴⁴⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962). Specific targeting decisions, which require someone to weigh the expected military benefit against the potential loss of civilian life, are arguably constitutionally committed to the President as the "Commander in Chief of the Army and Navy." U.S. CONST. art. II, § 2, cl. 1; see Hollander, *supra* note 33.

⁴⁴⁶ *Baker*, 369 U.S. at 217. A different situation would be presented if the government decided to prosecute a military officer who directed an attack that caused excessive loss of civilian life. The War Crimes Act, 18 U.S.C. § 2441, makes it a federal criminal offense to commit a war crime. See 18 U.S.C. § 2441(a) (2000). The term "war crime" includes, inter alia, conduct prohibited by Article 23 of "the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907." 18 U.S.C. § 2441(c)(2). Under Article 23, it is forbidden "[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering." Hague IV, *supra* note 46, art. 23(e).

In a civil suit brought by a private individual, the allegation that a military officer employed arms calculated to cause unnecessary suffering, or that an attack caused incidental loss of civilian life excessive in relation to the military benefit, would raise a nonjusticiable political question. Courts are not competent to second-guess the official judgment of the U.S. military that suffering was necessary (as in a civil suit against the military). In a federal criminal prosecution, however, there is nothing to prevent a court from deciding that an attack was "calculated to cause unnecessary suffering." Hague IV, *supra* note 46, art. 23(e). In cases where the military decides that suffering was unnecessary (as in a war crimes prosecution), courts are competent to decide whether the officer's action was "calculated to cause unnecessary suffering." *Id.*

⁴⁴⁷ Memorandum from Secretary of Defense, Donald Rumsfeld, to the Commander, US Southern Command (Apr. 16, 2003), available at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf.

moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."⁴⁴⁸

Application of the factors identified in *Baker v. Carr*⁴⁴⁹ demonstrates that such a claim is justifiable. First, there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department."⁴⁵⁰ Indeed, a determination as to whether a particular interrogation technique involves physical or moral coercion involves a straightforward application of law to fact, something that U.S. courts do on a daily basis in a wide variety of circumstances.

Second, there is no "lack of judicially discoverable and manageable standards for resolving" the question.⁴⁵¹ To the contrary, the Geneva Conventions specify in precise detail who are "protected persons."⁴⁵² Moreover, courts, no less than executive officials, are capable of determining what constitutes "physical or moral coercion."

Third, the question can be decided "without an initial policy determination of a kind clearly for nonjudicial discretion."⁴⁵³ Indeed, by ratifying the Geneva Conventions, the political branches made the initial policy determination to refrain from using physical or moral coercion against protected persons.

Fourth, a court could resolve these questions "without expressing lack of respect due coordinate branches of government."⁴⁵⁴ Although courts frequently defer to the executive branch's interpretation of a treaty, there are many cases in which courts have adopted interpretations that conflict directly with views espoused by the executive branch.⁴⁵⁵ In such cases, courts are not manifesting a lack of respect for the executive. Rather, they are exercising their constitutional power to decide cases in accordance with the "Constitution, the Laws of the United States, and Treaties made . . . under their Authority."⁴⁵⁶

Finally, the Bush Administration may claim that the War on Terror creates "an unusual need for unquestioning adherence to a political decision already made,"⁴⁵⁷ and that there is a "potentiality of embarrassment from multifarious pronouncements by various depart-

448 Civilian Convention, *supra* note 15, art. 31; *see also* POW Convention, *supra* note 13, art. 17.

449 369 U.S. 186 (1962).

450 *Id.* at 217.

451 *Id.*

452 *See supra* notes 77-85 and accompanying text; *see also infra* notes 524-38 and accompanying text.

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

454 *Id.*

455 *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 962 nn.37-39(1994) (citing cases in which the courts adopted interpretations of treaties that conflicted with the interpretations of the executive branch).

456 U.S. CONST. art. III, § 2, cl. 1.

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

ments on one question.”⁴⁵⁸ The treatment of prisoners at Guantánamo, however, has already generated substantial embarrassment by subjecting the United States to widespread criticism for its alleged failure to comply with international humanitarian and human rights law. A judicial decision on the issue could help ameliorate this problem, either by providing a reasoned opinion that substantiates U.S. compliance with international law, or by remedying previous noncompliance.

In sum, while the Geneva Conventions present some treaty interpretation issues that raise nonjusticiable political questions, the Conventions also present some treaty interpretation questions that are well within the scope of judicial competence. Specific cases will inevitably involve difficult line-drawing problems that will require a judgment as to whether a particular treaty interpretation issue falls within the scope of judicial competence. In such cases, the critical issue is determining who decides. Does the judiciary have the constitutional power to decide which treaty interpretation issues are justiciable, or must the judiciary defer to the President’s determination that a particular treaty interpretation issue is nonjusticiable? If the latter was true, then the President would not be bound by the Geneva Conventions.

In several cases decided by U.S. courts, the executive branch has espoused the view that the President, not the judiciary, gets the final say as to whether a particular treaty interpretation issue is nonjusticiable.⁴⁵⁹ No court has ever conceded this point, nor could any court do so without seriously damaging the separation of powers principles embedded in the constitutional structure. The Framers drafted a constitution that divides power in order to promote certain policy objectives, one of which is to maintain a balance among the branches.⁴⁶⁰ Judicial recognition of an executive power to decide, by presidential fiat, that certain treaty interpretation issues are nonjusticiable would destroy the balance between the executive and judicial branches to the detriment of the People, in whose name the President governs. The Constitution grants the judicial branch the power to determine which issues are justiciable and nonjusticiable so the judiciary can perform its constitutional function of protecting individuals from

⁴⁵⁸ *Id.*

⁴⁵⁹ See David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1483 (1999) (observing that the United States’s argument in an amicus brief to the Fourth Circuit “appeared to reduce to the proposition that *any* case implicating a treaty right is, upon the election of the executive branch, capable of being characterized as a political question and thus rendered nonjusticiable”).

⁴⁶⁰ See Flaherty, *supra* note 225, at 1729–30 (“The Founders embraced separation of powers to further several widely agreed-upon goals . . . including balance among the branches, responsibility or accountability to the electorate, and energetic, efficient government.”).

executive overreaching.⁴⁶¹ Therefore, the President is bound by the Geneva Conventions because his interpretation of some treaty provisions is subject to judicial review, and the power to determine which treaty provisions are justiciable belongs to the judicial branch.

C. Sovereign Immunity

In his concurring opinion in *Al Odah v. United States*,⁴⁶² Judge Randolph asserted that the Guantanamo "detainees' treaty and international law claims are barred by sovereign immunity."⁴⁶³ Like the political question doctrine, the doctrine of sovereign immunity undoubtedly bars some claims against federal officers and agencies under the Geneva Conventions, but it does not bar all possible claims and defenses under the treaties. For example, criminal defendants have invoked the Conventions as the basis for a defense to a federal criminal prosecution.⁴⁶⁴ In these cases, sovereign immunity does not apply because the doctrine bars only offensive claims against the federal government and its agents. Similarly, the federal habeas statute entitles an individual to a remedy if "[h]e is in custody in violation of the Constitution or laws or treaties of the United States."⁴⁶⁵ Sovereign immunity has never barred habeas corpus actions against federal officers.⁴⁶⁶ Thus, habeas petitioners who satisfy the jurisdictional and other requirements of the habeas statute, and who prove a violation of the Geneva Conventions, are entitled to relief under the statute without regard to sovereign immunity.

The APA provides a waiver of sovereign immunity for plaintiffs who seek relief other than money damages against federal officers.⁴⁶⁷

⁴⁶¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

⁴⁶² 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686 (2004).

⁴⁶³ *Id.* at 1149–50 (Randolph, J., concurring).

⁴⁶⁴ *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 552–58 (E.D. Va. 2002) (invoking defense based on POW Convention after U.S. citizen charged with violations of federal anti-terrorism statutes); *United States v. Noriega*, 746 F. Supp. 1506, 1525–28 (S.D. Fla. 1990) (raising defense based on POW Convention when Commander in Chief of Panamanian Defense Forces charged with various narcotics offenses).

⁴⁶⁵ 28 U.S.C. § 2241(c)(3) (1994) (emphasis added).

⁴⁶⁶ Petitions for writs addressed to individual officers do not implicate sovereign immunity. *See* LARRY W. YACKLE, FEDERAL COURTS 313 (1999) ("Actions for common law writs are prototypical officer suits, neatly avoiding the government's sovereign immunity.").

⁴⁶⁷ *See* 5 U.S.C. § 702 (1994) (

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed . . . on the ground that it is against the United States . . .

); *see also* H. REP. NO. 94-1656 (1976), *reprinted in* 1976 U.S.S.C.A.N. 6121, 6121 (stating that the purpose of the proposed amendment to the APA was "to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review").

The waiver applies, with some exceptions, to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.”⁴⁶⁸ A violation of individual rights protected by a treaty is a “legal wrong” within the meaning of the APA.⁴⁶⁹ Therefore, an individual seeking declaratory or injunctive relief against a federal officer for an alleged violation of his rights under the Geneva Conventions could potentially bring an APA claim. Of course, the APA provides for various limitations on its waiver of sovereign immunity.⁴⁷⁰ Accordingly, sovereign immunity may bar some claims for declaratory or injunctive relief involving alleged violations of the Conventions. The various limitations imposed by the APA will not bar all possible claims under the Geneva Conventions, however. Case-by-case decisions will be necessary to determine whether the APA applies in particular circumstances.

Assume, as above, that a group of Guantanamo detainees filed a suit to enjoin the future use of certain interrogation techniques approved by Secretary Rumsfeld on the grounds that specific techniques violate Article 31 of the Civilian Convention. This is similar to one of the claims raised by the plaintiffs in *Al Odah v. United States*.⁴⁷¹ In his

Whereas the APA provides a waiver of sovereign immunity for at least some plaintiffs who seek declaratory or injunctive relief for violations of the Geneva Conventions, sovereign immunity poses a larger hurdle for plaintiffs who seek money damages. The Federal Tort Claims Act (FTCA) does provide a waiver of sovereign immunity in some cases where plaintiffs seek money damages from the United States for torts committed by federal employees. See 28 U.S.C. § 2674 (2000) (providing that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances”). Substantive liability is determined, however, “in accordance with the law of the place where the act or omission occurred,” 28 U.S.C. § 1346(b)(1) (2000), and the remedy provided by the FTCA “is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter.” 28 U.S.C. § 2679(b)(1) (2000). Thus, the statutory scheme appears to preclude a damages remedy for a violation of the Geneva Conventions, unless that violation would give rise to a state tort law claim. Even assuming that the violation constitutes a tort under state law, the waiver does not apply to “any claim arising in a foreign country,” 28 U.S.C. § 2680(k) (2003), or to “any claim arising out of the combatant activities of the military or naval forces . . . during time of war.” 28 U.S.C. § 2680(j) (2000).

⁴⁶⁸ 5 U.S.C. § 702 (1994).

⁴⁶⁹ See Sloss, *supra* note 155, at 1135 & n.139 (citing cases finding that violation of a treaty right is a cognizable legal wrong under the APA).

⁴⁷⁰ For example, judicial review of agency action is not permitted under the APA if “statutes preclude judicial review,” 5 U.S.C. § 701(a)(1) (1994), or if certain decisions are “committed to agency discretion by law,” 5 U.S.C. § 701(a)(2) (1994).

⁴⁷¹ 321 F.3d 1134 (D.C. Cir. 2003) (affirming *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002)), *rev'd sub nom.* *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686 (2004). In *Rasul*, the district court decided two separate cases brought on behalf of two different groups of Guantanamo detainees that were consolidated at the district court level. In the *Rasul* case, the petitioners explicitly sought release from custody, and labeled their claim as a petition for writ of habeas corpus. *Id.* at 57. In contrast, the *Al Odah* plaintiffs stated explicitly that they did not seek release from custody; rather, they sought injunctive relief related to the conditions of confinement, *id.* at 58, and they invoked the APA as a basis for judicial re-

concurring opinion in *Al Odah*, Judge Randolph presented two distinct arguments against judicial review under the APA. First, he argued that APA review is barred because the APA excludes judicial review of acts by “military authority exercised *in the field* in time of war”⁴⁷² This argument is unpersuasive. Assuming that the Guantanamo detainees are subject to “military authority exercised . . . in time of war,” they are not “in the field” because they are detained in a military prison thousands of miles away from the battlefield where they were captured.⁴⁷³ Thus, Judge Randolph’s interpretation of the statute is flawed because it deprives the phrase “in the field” of any meaning whatsoever.⁴⁷⁴

Second, Judge Randolph argued that APA review is unavailable because the military decisions being challenged are “committed to

view. See *Al Odah*, 321 F.3d at 1149–50 (Randolph, J., concurring). Thus, the hypothetical case here is similar to the *Al Odah* complaint.

⁴⁷² *Al Odah*, 321 F.3d at 1149 (Randolph, J., concurring) (quoting 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G)) (emphasis added).

⁴⁷³ As Justice Kennedy noted in his concurring opinion in *Rasul*, “Guantanamo Bay is in every practical respect a United States territory.” *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686, 2700 (2004) (Kennedy, J., concurring). Thus, even under a very broad interpretation of the statutory phrase “in the field,” Guantanamo Bay does not qualify.

⁴⁷⁴ Judge Randolph cites two cases to support his claim that the Guantanamo detainees are “in the field” within the meaning of the APA. First, he cites *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), which is simply irrelevant, because it had nothing to do with the APA. Second, Judge Randolph cites *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), which actually undermines Judge Randolph’s claim. *Sullivan* involved a challenge to an FDA regulation that authorized the DOD to administer investigational drugs to U.S. military personnel without obtaining informed consent. *Id.* at 1371. The regulation permitted DOD to waive the informed consent requirement only in the context of “a specific military operation involving combat or the immediate threat of combat.” *Id.* at 1374. The government unsuccessfully argued that the FDA regulation was not subject to judicial review under the APA, invoking the statutory exception for “military authority exercised in the field in time of war.” *Id.* at 1380. Despite the fact that the challenged regulation applied only in combat situations, the court concluded that the regulation was subject to judicial review under the APA because the plaintiff challenged “the scope of authority Congress ha[d] entrusted to the FDA.” *Id.* Thus, *Sullivan* supports the conclusion that a claim by Guantanamo detainees challenging DOD’s authority to adopt rules inconsistent with the Geneva Conventions would be subject to judicial review under the APA.

Judge Randolph’s opinion relies heavily on the following sentence from *Sullivan*: “Doe currently does not ask us to review military commands made in combat zones or in preparation for, or in the aftermath of, battle.” See *Al Odah*, 321 F.3d at 1150 (Randolph, J., concurring) (quoting *Sullivan*, 938 F.2d at 1380). Judge Randolph claims that *Al Odah* is distinguishable from *Sullivan*, because decisions regarding the Guantanamo detainees involve “military commands made . . . in the aftermath of battle,” which are exempt from APA review. *Al Odah*, 321 F.3d at 1150. In fact, though, the complaint in *Sullivan* was more closely connected to battlefield activities than the complaint in *Al Odah*. The plaintiff in *Sullivan* filed his complaint in the midst of Operation Desert Shield, seeking to prevent the non-consensual administration of drugs to U.S. military personnel engaged in combat activities. See *Sullivan*, 938 F.2d at 1374. Given that *Sullivan* was subject to APA review—despite the statutory exception for “military authority exercised in the field in time of war”—it is untenable to claim that *Al Odah* is exempt from APA review under the “military authority” exception.

agency discretion by law.”⁴⁷⁵ There may well be some claims related to the Geneva Conventions that are committed to agency discretion.⁴⁷⁶ The executive branch, however, does not have unfettered discretion to decide whether prisoners held at Guantanamo are protected by the Geneva Conventions because the Conventions themselves specify who is protected, and the treaties have the status of supreme federal law, which the executive branch has a duty to apply.⁴⁷⁷ Moreover, decisions concerning the methods of interrogation used at Guantanamo Bay are not committed to agency discretion because the Geneva Conventions limit the range of permissible interrogation methods,⁴⁷⁸ and the President must obtain legislative approval for methods prohibited by the Conventions.⁴⁷⁹ Finally, the military’s own regulations specify that military officers do not have discretion to violate the provisions of the Geneva Conventions that govern treatment of detainees.⁴⁸⁰

There is one other potential objection to APA review that merits consideration. The APA authorizes judicial review of “final agency action,” but “[a] preliminary, procedural, or intermediate agency action or ruling” is generally unreviewable.⁴⁸¹ In our hypothetical case, defendants might argue that APA review is unavailable because Secretary Rumsfeld’s April 2003 order approving the use of specific counter-resistance techniques was not “final agency action” within the meaning of the APA. In practice, there is tremendous overlap between the “final agency action” requirement and the requirement for plaintiffs to exhaust administrative remedies.⁴⁸² Agency action is not considered final until a plaintiff has exhausted available administrative remedies.⁴⁸³ Conversely, if an agency does not provide any administrative remedies, agency action that might otherwise be considered “prelimi-

⁴⁷⁵ *Al Odah*, 321 F.3d at 1150 (citing 5 U.S.C. § 701(a)(2) (1994)).

⁴⁷⁶ See *supra* Part V.B.

⁴⁷⁷ The executive branch has some leeway in interpreting the Conventions, provided that its interpretation is reasonable. The Bush Administration’s claim that the Guantanamo detainees are not protected by the Conventions, however, fails to satisfy even a deferential “reasonableness” standard. See *infra* Part V.E.

⁴⁷⁸ See Civilian Convention, *supra* note 15, art. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”); see also POW Convention, *supra* note 13, art. 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”).

⁴⁷⁹ See *supra* Part IV.

⁴⁸⁰ See *supra* notes 141–43 and accompanying text.

⁴⁸¹ 5 U.S.C. § 704 (1994).

⁴⁸² See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.11 (3d ed. 1994).

⁴⁸³ *Id.* at 356 (“If a petitioner has not exhausted available administrative remedies, the agency has usually not yet taken a final action.”).

nary" or "intermediate" will often be deemed final.⁴⁸⁴ This approach is consistent with the principle that there is a "strong presumption that Congress intends judicial review of administrative action."⁴⁸⁵ The "final agency action" requirement is not designed to preclude judicial review altogether, but merely to defer judicial review until after agency action is final.

The administrative mechanisms available for Guantanamo detainees permit periodic review of the *fact* of detention.⁴⁸⁶ There does not appear to be any administrative mechanism, however, that allows detainees to challenge the *conditions* of detention. In particular, there is no evidence that the Bush Administration has established any type of administrative review procedure that would enable detainees to challenge the methods of interrogation utilized at Guantanamo. Given the absence of any viable administrative remedy, courts should hold that Secretary Rumsfeld's April 2003 order constitutes "final agency action" within the meaning of the APA.⁴⁸⁷

D. Privately Enforceable Rights

The government brief in *Rasul v. Bush* asserts that "[t]he Geneva Convention does not create privately enforceable rights."⁴⁸⁸ This assertion conflates three distinct issues: (1) whether the Geneva Conventions create primary individual rights under international law; (2) if so, whether the Conventions create primary individual rights under domestic law; and (3) if so, whether the Conventions create remedial rights for individuals under domestic law.

To determine whether the Geneva Conventions create primary individual rights under international law, it is necessary to consider specific provisions of the Geneva Conventions. For example, Article 137 of the POW Convention states that "[t]he present Convention shall be ratified as soon as possible and the ratifications shall be de-

⁴⁸⁴ *Id.* (stating that *Mathews v. Eldridge*, 424 U.S. 319 (1976), was "a case in which the Court waived the final agency action requirement based on application of one or more exceptions to [the exhaustion] requirement. There is no apparent reason why the two doctrines should differ in scope or be subject to differing exceptions").

⁴⁸⁵ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

⁴⁸⁶ *See, e.g., Lewis, supra* note 80.

⁴⁸⁷ Rumsfeld's order is "final" because it "mark[s] the consummation of the agency's decisionmaking process . . . [in that] it [is not] of a merely tentative or interlocutory nature;" and it is "one by which rights or obligations have been determined, [and] from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 117 (1997) (internal quotation marks omitted). The important point is that the order satisfies the "final agency action" requirement even though the Department of Defense has established the Combatant Status Review Tribunals to review the classification of detainees. *See Lewis, supra* note 80. The establishment of Combatant Status Review Tribunals does not deprive the order of its "finality" because the order itself is not subject to review before these tribunals. *Id.*

⁴⁸⁸ *See* Brief for Respondents at 39, *Rasul v. Bush*, 542 U.S. ___, 124 S. Ct. 2686 (2004) (No. 03-334), available at <http://www.usdoj.gov/osg/briefs>.

posited at Berne.”⁴⁸⁹ Clearly, this provision does not create primary individual rights. In contrast, to return to our previous example, Article 31 of the Civilian Convention states that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”⁴⁹⁰ This provision creates primary rights for individuals under international law. It imposes a specific, mandatory duty (not to exercise coercion) upon a particular class of persons (agents of the detaining power) for the benefit of an identifiable group of individuals (“protected persons”). Nothing more is required to establish a primary individual right under international law.⁴⁹¹

The question of whether Article 31 creates primary rights for individuals under domestic law must be answered affirmatively. As noted above, the vast majority of the provisions of the Geneva Conventions, including Article 31, are law of the land under the Supremacy Clause.⁴⁹² The treaties’ status as law of the land means that the treaties create primary domestic rights and primary domestic duties that correspond to the legal rights and duties that the treaties create under international law. Since Article 31 creates primary rights for individuals under international law, and since Article 31 has the status of supreme federal law under the Supremacy Clause, it follows that Article 31 creates primary rights for individuals under domestic law.

The government’s assertion that the Geneva Conventions do not create “privately enforceable rights” appears to be consistent with the preceding analysis. Although the government’s position is not entirely clear, it seems to be making the following claim: Even assuming that the Geneva Conventions create primary rights for individuals under domestic law, individuals cannot obtain domestic judicial remedies for violations of those primary rights because the Conventions do not create domestic remedial rights for individuals.⁴⁹³ This claim

⁴⁸⁹ POW Convention, *supra* note 13, art. 137.

⁴⁹⁰ Civilian Convention, *supra* note 15, art. 31.

⁴⁹¹ In the *LaGrand Case*, Germany argued that Article 36(1)(b) of the Vienna Convention on Consular Relations created individual rights. See *LaGrand (Germany v. U.S.)*, 2001 I.C.J. (June 27), ¶ 75, available at www.icj-cij.org. The United States disagreed, contending “that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals” *Id.* ¶ 76. The Court rejected the U.S. argument, concluding “that Article 36, paragraph 1, creates individual rights.” *Id.* ¶ 77. The Court relied principally on the plain meaning of the treaty’s text to support its conclusion that Article 36 creates primary rights for individuals under international law. *Id.* The Court’s analytical methodology in *LaGrand* strongly supports the conclusion that Article 31 of the Civilian Convention creates primary individual rights under international law.

⁴⁹² See *supra* Part II.A.

⁴⁹³ On the distinction between primary and remedial rights, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 122–25 (1994).

makes sense only if one assumes that domestic courts should not provide remedies for individuals who are harmed by violations of their treaty-protected primary rights unless the treaty itself creates a private right of action (a domestic remedial right) in addition to the primary individual right.⁴⁹⁴

This assumption has no merit in a suit for injunctive relief against federal officers. The APA provides a private right of action for injunctive relief against federal officers for all claims within the scope of the APA waiver of sovereign immunity.⁴⁹⁵ In *Norton v. Southern Utah Wilderness Alliance*,⁴⁹⁶ plaintiffs sued the Secretary of the Interior for declaratory and injunctive relief to enforce the Federal Land Policy and Management Act (FLPMA). Plaintiffs asserted a private right of action under the APA,⁴⁹⁷ apparently because the FLPMA does not itself create a private cause of action. Justice Scalia, writing for a unanimous Court, reaffirmed that “[t]he APA authorizes suit” for federal statutory violations “[w]here no other statute provides a private right of action,” if the challenged agency action is a “final agency action.”⁴⁹⁸ Given that the APA grants plaintiffs a private right of action to sue for violations of federal statutes that do not themselves create a private right of action, there is no reason to bar APA claims for injunctive relief against federal officers who violate treaties that do not create a private right of action—at least in cases where the treaty provision at issue, like Article 31 of the Civilian Convention, creates primary rights for individuals under both international and domestic law.

A different conclusion might be warranted if the treaty makers manifested an intent to preclude domestic judicial remedies for violations of individual rights protected by the Geneva Conventions. Judicial review of agency action is not permitted under the APA if “statutes preclude judicial review.”⁴⁹⁹ Accordingly, a court might be justified in

⁴⁹⁴ The government’s position manifests a “remedies first” approach: the idea is that courts should decide first whether the law provides a remedial right. If the law does not provide a remedial right, then courts need not address the issue of primary rights. Hart and Sacks contend that “[l]ots of people have tried to think backwards in this way. It is the essence of clear analysis to see that it is backwards, and instead to think forwards.” *Id.* at 136; see also Sloss, *supra* note 134, at 11 (“To think ‘forwards’ in treaty cases, courts should first ask whether a treaty provision has the status of primary domestic law and then, if the first question is answered affirmatively, consider the availability of judicial remedies for a violation of that treaty provision.”).

⁴⁹⁵ See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (stating that the APA creates a private right of action). The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, may also create a private right of action for declaratory relief against federal officers who are engaged in ongoing treaty violations. Detailed analysis of issues raised by potential claims under the Declaratory Judgment Act is beyond the scope of this article.

⁴⁹⁶ 542 U.S. ___, 124 S. Ct. 2373 (2004).

⁴⁹⁷ *Id.* at 2377.

⁴⁹⁸ *Id.* at 2378 (emphasis added).

⁴⁹⁹ 5 U.S.C. § 701(a)(1) (1994).

declining APA review of claims invoking a particular treaty if the treaty itself manifested an intent to preclude judicial review. For example, when the United States ratified the International Covenant on Civil and Political Rights (ICCPR), the treaty makers adopted a declaration specifying that the ICCPR is “not self-executing.”⁵⁰⁰ The non-self-executing declaration provides some evidence of a political intent to preclude APA review of claims invoking the ICCPR.⁵⁰¹

In contrast, there is no evidence that the treaty makers, at the time of ratifying the Geneva Conventions, intended to preclude judicial review of claims based on the treaties. One U.S. court has suggested that provisions in the Conventions providing for diplomatic remedies manifest the drafters’ intent to preclude domestic judicial remedies.⁵⁰² The court’s logic is flawed. One could as easily argue that provisions in the Conventions providing for domestic criminal prosecutions⁵⁰³ manifest the drafters’ intent to ensure that domestic courts play a role in enforcing the Conventions. Nonetheless, the treaty text is silent regarding domestic judicial remedies in civil cases. This silence supports judicial review under the APA because there is a “strong presumption that Congress intends judicial review of administrative action.”⁵⁰⁴ Moreover, under international law, there is a presumption in favor of domestic judicial remedies for violations of treaty provisions that create primary individual rights.⁵⁰⁵ Therefore, courts should not dismiss APA claims for treaty violations without compelling evidence that the treaty makers intended to preclude judicial review of such claims. The text of the Geneva Conventions, their negotiating history, and the ratification history in the U.S. Senate are devoid of any such evidence.

E. Deference to the Executive Branch’s Interpretation of Treaties

In a brief submitted to the district court in *Al Odah v. United States*, the Justice Department stated that the government’s position

⁵⁰⁰ See 138 CONG. REC. S4783–84 (1992).

⁵⁰¹ One of the co-authors of this article has argued elsewhere that the non-self-executing declaration attached to the ICCPR was not intended to bar injunctive relief against federal officers for violations of the ICCPR. See Sloss, *supra* note 155, at 1136–37. Even so, this Article concedes that there is at least a plausible argument in support of the view that the declaration was intended to bar APA claims for ICCPR violations.

⁵⁰² See *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated by* 542 U.S. ___, 124 S. Ct. 2633 (2004).

⁵⁰³ See *supra* Part II.A.1.

⁵⁰⁴ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

⁵⁰⁵ See *LaGrand (Germany v. U.S.)*, 2001 I.C.J. (June 27), ¶ 128, *available at* www.icj-cij.org (holding that the Vienna Convention on Consular Relations implicitly obligates the United States to provide individual remedies for violations of the primary individual rights protected by the treaty).

“does not mean that aliens detained by the military abroad are without rights, but rather that the scope of those rights are to be determined by the Executive and the military, not by the courts.”⁵⁰⁶ In short, the Bush Administration has suggested that the President is not bound by the Geneva Conventions, at least not in any practical sense, because the President has unfettered discretion to interpret treaties as he sees fit. This argument is flawed.

It is firmly established that the courts owe deference to executive branch interpretations of treaties—how much deference the courts owe is less clear.⁵⁰⁷ The first subsection below contends that absolute deference is unwarranted because the judiciary has an independent role in treaty interpretation.⁵⁰⁸ The next subsection applies *Chevron* deference to the hypothetical case in which Guantanamo detainees assert that interrogation techniques violate Article 31 of the Civilian Convention.⁵⁰⁹

1. *Absolute Deference*

Professor Yoo contends that the Constitution grants the President exclusive control over treaty interpretation.⁵¹⁰ Specifically, he claims that “the treaty power as a whole . . . ought to be regarded as an exclusively executive power.”⁵¹¹ Professor Yoo notes that Article II expressly grants the President the power to make treaties, subject to Senate consent.⁵¹² Moreover, he adds, “Article II’s Vesting Clause establishes a rule of construction that any unenumerated executive power . . . must be given to the President.”⁵¹³ Given that the power to

⁵⁰⁶ Defendants’ Reply in Support of Motion to Dismiss, *Al Odah v. United States*, Civil Action No. 02-CV-828 (CKK) (D.D.C. 2002) (on file with author).

⁵⁰⁷ See RESTATEMENT (THIRD), *supra* note 20, § 326(2) (“Courts in the United States have final authority to interpret an international agreement . . . but will give great weight to an interpretation made by the Executive Branch.”).

⁵⁰⁸ This statement is not meant to imply that absolute deference is never appropriate. Indeed, there are some treaty interpretation issues that may require absolute deference. See, e.g., *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999) (stating that the question whether Taiwan is bound by China’s adherence to the Warsaw Convention “is a question for the political branches, rather than the judiciary”). It is untenable to claim, however, that the judiciary owes absolute deference to the political branches in every case involving treaty interpretation.

⁵⁰⁹ Under the *Chevron* doctrine, courts will defer to an administrative agency’s interpretation of a statute if the agency is charged with administering the statute and its interpretation is reasonable. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁵¹⁰ See Yoo, *supra* note 422, at 1309; John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001). For a partial response to Professor Yoo, see Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263 (2002).

⁵¹¹ Yoo, *supra* note 442, at 1309.

⁵¹² See U.S. CONST. art. II, § 2, cl. 2.

⁵¹³ Yoo, *supra* note 442, at 1309.

interpret treaties is “an unenumerated executive power,” he concludes that Article II grants the President the power to interpret treaties.

Yoo is correct that the President has a limited power over treaty interpretation. Yoo’s argument is flawed, however, because it assumes that the power to interpret treaties, in its entirety, is an “unenumerated executive power.”⁵¹⁴ In fact, the power to interpret treaties, like other constitutional powers, is divided among the various branches. The Constitution states expressly that “all Treaties made . . . under the Authority of the United States” have the status of law.⁵¹⁵ The power to interpret the law is granted primarily, but not exclusively, to the judiciary. In particular, Article III grants federal courts the power to adjudicate cases arising under treaties,⁵¹⁶ and Article VI requires state courts to enforce treaties.⁵¹⁷ If, as Yoo claims, the Constitution granted the President exclusive control over treaty interpretation, the references to treaties in Articles III and VI of the Constitution would be superfluous.

In some of its earliest reported decisions, the Supreme Court affirmed the principle that treaty interpretation is, at least in part, a judicial function.⁵¹⁸ Likewise, modern Supreme Court decisions have reaffirmed the principle that, although courts owe deference to executive branch views on treaty interpretation, “courts interpret treaties for themselves.”⁵¹⁹ Indeed, there are numerous cases in which U.S. courts adopted interpretations of treaties that were contrary to the construction espoused by the executive branch.⁵²⁰ Thus, despite Professor Yoo’s assertion, constitutional text and judicial precedent confirm that treaty interpretation is not an exclusively executive power.

2. Chevron Deference

According to the Restatement, “[c]ourts in the United States have final authority to interpret an international agreement . . . but will give great weight to an interpretation made by the Executive

⁵¹⁴ *Id.*

⁵¹⁵ U.S. CONST. art. VI, cl. 2.

⁵¹⁶ *Id.* art. III, § 2, cl. 1.

⁵¹⁷ *Id.* art. VI, cl. 2 (declaring that “the Judges in every State shall be bound” by treaties).

⁵¹⁸ *See, e.g.,* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109–110 (1801) (stating that treaty implementation is usually “superintended by, the executive of each nation,” but if a treaty “affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress”); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239 (1796) (“In all these cases, it seems . . . that the courts, in which the cases arose, were the only proper authority to decide, whether the case was within the article of the treaty, and the operation and effect of it”).

⁵¹⁹ Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

⁵²⁰ *See generally* Bederinan, *supra* note 455, at 962.

Branch.”⁵²¹ Professor Bradley has suggested that this “treaty interpretation deference” is best understood as a form of *Chevron* deference.⁵²² Under the *Chevron* doctrine, courts are deferential to the executive branch, but they “do not defer if they find that the plain language of the treaty clearly resolves the issue, or if the executive branch’s interpretation is unreasonable.”⁵²³ This section contends that courts applying a *Chevron* approach to a claim under Article 31 of the Civilian Convention would likely hold that some of the Guantanamo detainees are protected under the Civilian Convention, if not the POW Convention, and that at least some of the interrogation techniques approved by Secretary Rumsfeld violate Article 31.

The Administration’s claim that none of the detainees are protected by the Civilian Convention constitutes an unreasonable interpretation of the treaty. As previously mentioned, the Bush Administration’s official position is that the Geneva Conventions “apply to the Taliban detainees, but not to the al Qaeda international terrorists.”⁵²⁴ The government’s rationale is that al Qaeda members are not covered by the Conventions, because al Qaeda “is an international terrorist group and cannot be considered a state party to the Geneva Convention.”⁵²⁵ Thus, from the government’s standpoint, the al Qaeda detainees are not legally entitled to protection under either common Article 3 or the Civilian Convention.⁵²⁶

This position is inconsistent with the Geneva Conventions. The Civilian Convention explicitly provides that it applies to all persons “who, at a given moment and in any manner whatsoever, find them-

⁵²¹ RESTATEMENT (THIRD), *supra* note 20, § 326(2).

⁵²² Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 702 (2000).

⁵²³ *Id.* at 703. This Article does not attempt to defend a *Chevron* approach to treaty interpretation as a normative matter. As a descriptive matter, however, the *Chevron* doctrine does a reasonably good job of describing the courts’ approach to treaty interpretation. Accordingly, the Article assumes that courts would adopt this approach in cases where plaintiffs raise claims under the Geneva Conventions.

⁵²⁴ Press Statement, *supra* note 14.

⁵²⁵ *Id.*

⁵²⁶ It is unclear whether the Bush Administration thinks that the Taliban detainees qualify as protected persons under either common Article 3 or the Civilian Convention. On the one hand, the government has said that the Conventions “apply to the Taliban detainees.” *Id.* This seems to imply that they are legally entitled to some protection under the Conventions. On the other hand, Secretary of Defense Donald Rumsfeld stated that the United States would, as a matter of policy, treat the detainees humanely, but he suggested that the United States was under no legal obligation to do so. See U.S. Dep’t of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), available at <http://www.defenselink.mil/news/Jan2002>. Moreover, there is no question that the Taliban detainees are being denied some of the protections to which they would be legally entitled as protected persons under the Civilian Convention. See *supra* notes 86–88 and accompanying text. This suggests that the Bush Administration does not believe that they are legally entitled to such protections.

selves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."⁵²⁷ There are only three exceptions to this broad coverage. First, the Civilian Convention does not apply to persons protected by one of the other three Conventions. Second, "[n]ationals of a State which is not bound by the Convention are not protected by it."⁵²⁸ Third, "[n]ationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."⁵²⁹

The Administration cannot rely on the first exception because the United States claims that none of the Geneva Conventions protect the al Qaeda detainees. The second exception has very little practical application because almost every state in the world is bound by the Conventions.⁵³⁰ Under the third exception, the Administration might legitimately deny protection to some al Qaeda detainees depending upon their nationalities.⁵³¹ The Administration claims, however, that the Conventions do not apply to the al Qaeda detainees, *regardless of their nationality*. The plain meaning of the Civilian Convention contradicts this claim.

The Administration also argues that the Civilian Convention protects only "non-combatant" civilians and therefore does not apply to "unlawful combatants."⁵³² It is difficult to reconcile this position with the plain meaning of the Civilian Convention. Article 4 of the Convention broadly defines the category of persons protected.⁵³³ The

⁵²⁷ Civilian Convention, *supra* note 15, art. 4.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ As of this writing, there are 191 states that are party to the Geneva Conventions. See *supra* note 70.

⁵³¹ To invoke the third exception as a basis for denying treaty rights to the Guantanamo detainees, the Administration would either have to show that they are "nationals of a co-belligerent state," or that they are "nationals of a neutral state who find themselves in the territory of a belligerent State." Civilian Convention, *supra* note 15, art. 4. Thus, for example, British nationals could legitimately be denied protection on the grounds that the United Kingdom is a co-belligerent state. The vast majority of the detainees, however, are not nationals of co-belligerent states.

Saudi nationals, for example, would be considered nationals of a neutral state. The Bush Administration cannot plausibly argue, though, that the Saudi nationals detained at Guantanamo are "in the territory of a belligerent state," because the Administration has consistently maintained that Guantanamo is not U.S. territory. If Guantanamo is not U.S. territory, then any detainees who are not POWs are protected as civilian internees, unless they are nationals of a co-belligerent state. If Guantanamo is U.S. territory, then the detainees are entitled to federal constitutional and statutory protections that might legitimately be denied to aliens outside U.S. territory.

⁵³² See WORKING GROUP REPORT ON DETAINEE INTERROGATION, *supra* note 9, at 4.

⁵³³ Civilian Convention, *supra* note 15, art. 4.

provision does not expressly limit the Convention's application to non-combatants.⁵³⁴ In fact, the Convention prescribes, in some detail, rules governing the treatment of civilians "suspected of or engaged in activities hostile to the State."⁵³⁵ The definitions of "protected persons" in the other Geneva Conventions are also quite detailed.⁵³⁶ Thus, when read in light of the other Conventions, the Civilian Convention should not be interpreted as implicitly excluding from its protection a broad category of individuals otherwise satisfying its definition of "protected persons." Moreover, a consensus of commentators,⁵³⁷ contemporary international war crimes jurisprudence,⁵³⁸ and national military manuals⁵³⁹ directly contradict the Administration's position.

Given that some of the Guantanamo detainees are protected under the Civilian Convention, no reasonable construction of Article 31 would permit the interrogation techniques authorized by the Administration. Recall that Article 31 states that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."⁵⁴⁰ By design, the interrogation techniques authorized for use in Guantanamo involve the systematic application of physical and moral coercion. Although the President's Order depriving the detainees of all protection

⁵³⁴ *Id.*

⁵³⁵ *Id.* art. 5.

⁵³⁶ See Geneva I, *supra* note 44, art. 4; Geneva II, *supra* note 44, art. 4; POW Convention, *supra* note 13, art. 4.

⁵³⁷ See, e.g., BOTHE ET AL., *supra* note 71, at 261-63; HILLARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 137 (2d ed. 1998); George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 893, 893 n.12 (2002); Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L REV. RED CROSS 849 (2003); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, BRITISH Y.B. INT'L L. 197, 197 (1971); Jinks, *supra* note 47, at 380; Frits Kalshoven, *The Position of Guerrilla Fighters Under the Law of War*, 11 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 55, 71 (1972); Esbjörn Rosenblad, *Guerrilla Warfare and International Law*, 12 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 91, 98 (1973).

⁵³⁸ See, e.g., Prosecutor v. Delalic et al., ICTY (Judgment), IT-96-21-T, 16 November 1998, para. 271 ("If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.")

⁵³⁹ See, e.g., DEP'T OF THE ARMY, FM 27-10, *supra* note 68, at 31 ("If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the categories listed in Article 4 [GC III], he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' within the meaning of Article 4 [GC IV]."); THE WAR OFFICE, MANUAL OF MILITARY LAW PART III: THE LAW OF WAR ON LAND 34 (1958) (United Kingdom) ("Should *regular* combatants fail to comply with [the four conditions required for POW status], they may in certain cases become unprivileged belligerents . . . [and] they would appear to be entitled, at a minimum, to the limited privileges conferred . . . by the Civilian Convention . . .").

⁵⁴⁰ Civilian Convention, *supra* note 15, art. 31; see also POW Convention, *supra* note 13, art. 17.

under the Geneva Conventions also directed the military to treat all detainees “humanely,”⁵⁴¹ several techniques authorized and utilized by the DOD violate many of the most fundamental precepts of the Conventions, including those enshrined in Article 31 of the Civilian Convention. Indeed, the Administration acknowledges—in the very order issued in April 2003 by Secretary of Defense Rumsfeld in which the Administration’s “mature” interrogation policy is established⁵⁴²—that several of the techniques are inconsistent with the Geneva Conventions, including the “Incentive/Removal of Incentive” technique involving the withdrawal of privileges accorded to detainees as a mat-

⁵⁴¹ See Bush Directive on Treatment of Detainees, *supra* note 16.

⁵⁴² See Rumsfeld April 2003 Memo, *supra* note 97. This Memo, signed by Secretary Rumsfeld, details the Administration’s considered view on which interrogation techniques—beyond those authorized in then existing military law and policy—are pre-authorized in Guantanamo. See DEP’T OF ARMY, FM 34-52, INTELLIGENCE INTERROGATION (1987) (summarizing U.S. policy regarding interrogation of war detainees). The Memo is the endpoint in the Administration’s evolving interrogation policy for Guantanamo. In January 2002, Secretary Rumsfeld issued a memorandum to the Joint Chiefs of Staff reporting that the Department had determined that the detainees were not entitled to POW status and directing combatant commanders to treat the detainees humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with the Geneva Conventions of 1949.” Memorandum from Donald Rumsfeld, Secretary of Defense, to the Joint Chiefs of Staff, Status of Taliban and Al Qaida (Jan. 19, 2002), *available at* <http://news.findlaw.com/hdocs/docs/dod/62204index.html>. Of course, the White House adopted this policy as a formal matter in February 2002—formally established in President Bush’s February 7 Directive, and publicly announced in the White House Fact Sheet. See Bush Directive on Treatment of Detainees, *supra* note 16; Fact Sheet, *supra* note 16. By the summer of 2002, combatant commanders had concluded that (1) many of the detainees had been trained in counter-interrogation techniques; and (2) some of the detainees had information that could prove quite useful in the War on Terrorism. See Press Briefing, *supra* note 22. These conclusions ultimately generated a formal request to utilize so called “counter-resistance” interrogation techniques on detainees in Guantanamo. The request made its way up to the Commander of the Southern Command and then to the Pentagon. See *id.* On December 2, 2002, Secretary Rumsfeld pre-authorized combatant commanders to utilize several harsh counter-resistance techniques in Guantanamo including 20-hour interrogations, hooding, removal of clothing, forced shaving, use of stress-induced phobias like fear of dogs, and telling detainee that he or his family are in imminent danger of death. See Memorandum from William J. Haynes, II, General Counsel, to Donald Rumsfeld, Secretary of Defense, Counter Resistance Techniques (Nov. 27, 2002) [hereinafter Rumsfeld December 2002 Order] (approved by Secretary Rumsfeld on December 2, 2002); Memorandum from LTC Jerald Phifer, Director, J2, to Commander, Joint Task Force 170 (Oct. 11, 2002) (cataloguing the techniques referenced in Rumsfeld’s December 2002 Order), *available at* <http://news.findlaw.com/hdocs/docs/dod/62204index.html>. Secretary Rumsfeld, in turn, rescinded this pre-authorization on January 15, 2003, pending a study to be undertaken by a special Working Group led by the DOD’s General Counsel. See Memorandum from Donald Rumsfeld, Secretary of Defense to Commander, Southern Command, Counter-Resistance Techniques (Jan. 15, 2003), *available at* www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html. This Order did not preclude the use of the controversial techniques, rather it simply directed the Commander of the Southern Command to request in writing the use of these techniques if the Commander determines that the use of any such technique is warranted in an individual case. See *id.* Following the final report of the Working Group, Secretary Rumsfeld issued the April 2003 Order. See WORKING GROUP REPORT ON DETAINEE INTERROGATION, *supra* note 9.

ter of right by the Conventions;⁵⁴³ the “Pride and Ego Down” technique involving attacks or insults against the ego of the detainee;⁵⁴⁴ the “Mutt and Jeff” technique involving harsh intimidation tactics;⁵⁴⁵ and the “Isolation” technique involving the solitary confinement of detainees for thirty days or more.⁵⁴⁶ In addition, several other expressly authorized techniques may well violate the Conventions, depending on the manner in which they are utilized.⁵⁴⁷

The legal memoranda justifying the use of these techniques only offer sustained analysis of whether the techniques constitute “torture” within the meaning of U.S. criminal law.⁵⁴⁸ They do not engage the question of whether the techniques violate Article 31 of the Civilian Convention. These techniques are plainly inconsistent with the Civilian Convention (as well as the POW Convention and arguably common Article 3) irrespective of whether they constitute “torture” within the meaning of either international or U.S. law.

This analysis of potential treaty-based APA claims is provisional. This Article explores the implications of potential treaty-based APA claims to illustrate that courts have a meaningful role to play in enforcing the Geneva Conventions. As a consequence, the President is bound by the Conventions not simply as a formal matter, but also as a practical matter.

CONCLUSION

The central issue presented in this Article is whether the President is bound by the Geneva Conventions. The preceding analysis suggests several reasons why the President is bound. First, the Geneva Conventions are the “Law of the Land” under the Supremacy Clause. Second, Congress has not authorized the President to violate the Geneva Conventions or to promulgate rules inconsistent with the Conventions. Third, any conflict between a presidential order and a treaty

⁵⁴³ Rumsfeld April 2003 Memo, *supra* note 97, at Tab A, Interrogation Technique B.

⁵⁴⁴ *Id.* at Tab A, Interrogation Technique I.

⁵⁴⁵ *Id.* at Tab A, Interrogation Technique O.

⁵⁴⁶ *Id.* at Tab A, Interrogation Technique X.

⁵⁴⁷ These include: the “Dietary Manipulation” technique that may involve the use of hunger or thirst as an inducement to cooperate, *see* Rumsfeld April 2003 Memo, *supra* note 97, at Tab A, Interrogation Technique T; the “Environmental Manipulation” technique that may involve adjustment of the temperature or the introduction of unpleasant smells, *id.* at Tab A, Interrogation Technique U; the “Sleep Adjustment” technique, *id.* at Tab A, Interrogation Technique V; and the “False Flag” technique whereby the interrogator sets out to convince the detainee that the interrogator is a national of a country known for the harsh treatment of detainees, *id.* at Tab A, Interrogation Technique W. Each of these strategies utilize implied threats of abuse (via the further deterioration of living conditions or the harsh treatment of a “false flag” interrogator) if the detainee fails to cooperate. As such, each is arguably inconsistent with the Conventions.

⁵⁴⁸ *See, e.g.*, Bybee Memo, *supra* note 7; WORKING GROUP REPORT ON DETAINEE INTERROGATION, *supra* note 9.

that is law of the land must be resolved in favor of the treaty, unless Congress has authorized executive action inconsistent with the treaty, or the President is acting within the scope of his exclusive constitutional authority. Fourth, the rules embodied in the Geneva Conventions address matters within the scope of Congress's Article I powers, and the President lacks the constitutional power—absent congressional authorization—to violate treaty provisions within the scope of Article I. Finally, U.S. courts have both the power and the duty, in some circumstances, to restrain federal executive action that violates the Conventions.

When a crisis presents itself, there is a strong tendency to concentrate power in the executive branch. The events following September 11, 2001 exemplify this trend. In response to that crisis, the Bush Administration adopted a variety of measures to augment executive power. It is not surprising that executive branch officials responsible for conducting the War on Terror advocate an approach to constitutional interpretation that maximizes presidential power and minimizes treaty-based constraints on the exercise of that power. It is both dangerous and counterproductive, however, to permit the President to utilize the War on Terror as an opportunity to augment the powers of the executive branch at the expense of the other two branches.

The U.S. Constitution was designed, in part, to limit executive power. The Founders were aware of the dangers inherent in a system that concentrates power in the hands of a supreme monarch. To avert those dangers, they created a governmental structure in which there is no supreme ruler; the law itself is supreme. Specifically, the Constitution accords supremacy to three types of law: the Constitution, statutes, and treaties.⁵⁴⁹ To ensure that the President is not above the law, the Constitution gives the President a duty to "take Care that the Laws be faithfully executed."⁵⁵⁰ This duty applies not only to constitutional and statutory law, but also to treaty law. Therefore, the President is bound by the Geneva Conventions because they have the status of supreme federal law, and the President has a constitutional duty to execute treaties.

Some government officials responsible for national security policy may scoff at this conclusion. Constitutional analysis, they say, must be faithful not only to the text and structure of the Constitution, but also to the practical realities of life in an age of global terrorism. Terrorists armed with the destructive capacity of modern technology pose a unique threat to the United States. Moreover, the President has a duty to "preserve, protect and defend the Constitution of the United

⁵⁴⁹ U.S. CONST. art. VI, cl. 2.

⁵⁵⁰ *Id.* art. II, § 3.

States,"⁵⁵¹ which necessarily implies a duty to protect and defend the people of the United States. If faithful execution of the law would endanger the security of U.S. citizens, then the President's duty to protect and defend the people must take precedence over rigid adherence to the letter of the law. As the U.S. Supreme Court has stated, "[the Constitution] is not a suicide pact."⁵⁵²

In the authors' view, the alleged dilemma that forces the President to choose between protecting national security and upholding the rule of law is a false dichotomy, at least insofar as the Geneva Conventions are concerned. U.S. compliance with the Geneva Conventions does not endanger national security. To the contrary, failure to comply with the Conventions endangers the welfare of U.S. troops overseas, because other nations are unlikely to afford captured U.S. soldiers better treatment than the United States affords to the enemy troops it captures.⁵⁵³ In addition, substantial evidence suggests that mistreatment of the enemy directly undermines the war effort, and thus national security, by discouraging surrender by the enemy, encouraging reprisals, decreasing the morale of home forces, and decreasing political support for the war effort.⁵⁵⁴ Moreover, U.S. failure to adhere strictly to the Conventions undermines respect for the rule of law within the international community.⁵⁵⁵ This, in turn, weakens our security, because U.S. national security depends upon the willingness of other nations and subnational actors to conform their conduct to the requirements of international law.⁵⁵⁶ Thus, it is a sad irony that presidential policies derogating from the Geneva Conventions for the sake of protecting national security may ultimately thwart accomplishment of that very objective.

⁵⁵¹ *Id.* art. II, § 1.

⁵⁵² *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (alteration in original).

⁵⁵³ *See, e.g.*, Taft Memo, *supra* note 85; Memorandum from Colin Powell, Secretary of State, to Alberto Gonzales, White House Counsel, Draft Decision on the Applicability of the Geneva Conventions to the Conflict in Afghanistan (Jan. 26, 2002), available at <http://msnbc.com/id/4999363/site/newsweek>.

⁵⁵⁴ *See, e.g.*, Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493 (2004).

⁵⁵⁵ *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487 (2003) ("[B]y opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves.").

⁵⁵⁶ *Id.* at 1500-01.