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# **Executive Power v. International Law**

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## EXECUTIVE POWER V. INTERNATIONAL LAW

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### INTRODUCTION

Presidents have long had an uneasy relationship with international law. If it is true that most states follow most international law most of the time, that probably goes for Presidents, too. Whether Presidents follow international law out of a belief that they, and the United States, must comply with it, or whether they follow international law because much of it simply describes general regularities in state conduct, remains a debated question.<sup>1</sup> Presidents, however, have stretched or violated international law at significant moments in American history where important national security and foreign policy goals were at stake. Recently, international law has served as a political rallying point against the anti-terrorism policies of the Bush administration regarding the use of force, detention, interrogation, and military trial.

Academic critics of the Bush administration make a broad argument: violations of international rules are not only illegal as a matter of international law, but also violate the Constitution.<sup>2</sup> Repeating claims made against the Reagan administration, these scholars assert that the Constitution includes international law in the Laws of the Land under Article VI of the Supremacy Clause.<sup>3</sup> According to this argument, Article II's re-

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1. Compare LOUIS HENKIN, *HOW NATIONS BEHAVE* (1979); with JACK GOLD-SMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

2. See, e.g., 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); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 855-56 (2005); Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 518-19 (2003).

3. Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 363 (1985); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555,

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quirement that the President enforce the law includes the enforcement of international law. "There can be little doubt," Professor Louis Henkin has argued, "that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed."<sup>4</sup> Altogether there are three possible forms of this view.<sup>5</sup> On one account, international law is binding on the President unless he is exercising a statutory authority: he has no independent constitutional authority to violate international law. In the second form, international law is binding on the President unless he is exercising his own constitutional authority: a delegation of power from Congress cannot authorize a violation of constitutional law. Third, some claim that the President cannot violate certain forms of international law *regardless* of his domestic authority.<sup>6</sup> One corollary of assenting that international law constitutes federal law under the Supremacy Clause is that federal courts should be able to enjoin the President from violating it in properly brought cases.

The academic criticism of presidential violations of international law is not descriptive of judicial practice, but instead is normative in design. The leading Supreme Court case on the point, *The Paquete Habana*, states that "[i]nternational law is part of our law," but that "the customs and usages of civilized nations" will be given effect only if "there is no treaty, and no controlling executive or legislative act or judicial decision" to the contrary.<sup>7</sup> While supporters of international law as a restraint on presidential power take comfort from the first part of *The Paquete Habana's* holding, the Court also clearly held that the President could override customary international law.<sup>8</sup> It appears that no federal court of appeals has ever held that customary international law limits presidential decisions.<sup>9</sup> The only district court to reach such a conclusion was affirmed, but the court of appeals did not address the customary international law holding.<sup>10</sup> Much attention has focused on the applicability of customary international law in domestic law through the Alien Tort Statute ("ATS"), but the ATS is not directly relevant here because it represents international law that has

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1566 (1984); see also Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913 (1986); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1179 (1985).

4. Henkin, *supra* note 3, at 1567.

5. See John O. McGinnis & Ilya Somin, *Should International Law Be Part Of Our Law?*, STAN. L. REV. (forthcoming).

6. Lobel, *supra* note 3, at 1075.

7. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

8. See *id.*

9. See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir. 1986).

10. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 800 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

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been incorporated by an explicit congressional act, rather than customary international law which limits the President by its own force.<sup>11</sup> So far, courts have found that sovereign immunity precludes ATS suits against the United States government and, presumably, the President.<sup>12</sup>

Surprisingly, little academic literature critically assesses the contention that the President is bound by customary international law.<sup>13</sup> Sustained academic attention is long overdue, because such a conclusion would have revolutionary implications for the President's exercise of his constitutional powers, and perhaps significant limitations on the war on terrorism. This Article advances the position that the Constitution does not require the President to obey international law. There is no compelling reason in the Constitutional text, structure, or the history of its ratification to read the President's authority as chief executive and commander-in-chief as circumscribed by international law. There are some statements during the early Republic that suggest some Framers believed, after the Constitution's adoption, that federal law included international law, but it appears that the significance of this history has been over-interpreted. Practice, when more completely read, seems to stand for the opposite proposition: that the Constitution does not forbid Presidents from taking action under their constitutional powers that run counter to rules of international law.

We are not arguing that Presidents should ignore international law: compliance, or at least *perceived* compliance, with international law is likely to be an asset in waging modern war.<sup>14</sup> Nor are we addressing whether and how international rules legally bind the United States as a matter of international law.<sup>15</sup> Our inquiry is limited here purely to the status of international rules as domestic law and their relevance to the separa-

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11. See 28 U.S.C. § 1350 (2006). See generally Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 S.Ct. REV. 153 (2005).

12. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) ("The Alien Tort Statute itself is not a waiver of sovereign immunity"); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 272–73 (D.D.C. 2005) (holding that (1) the ATS does not waive sovereign immunity and (2) the Administrative Procedure Act does not waive the sovereign immunity of the President, which is not an agency under the Act).

13. Isolated efforts include Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 671 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988).

14. This point is made forcefully and repeatedly in DAVID KENNEDY, *OF WAR AND LAW* (2006). Equally, however, legal constraints can operate as liabilities in waging war, creating vulnerabilities and asymmetric opportunities for adversaries not so constrained. See ROGER W. BARNETT, *ASYMMETRICAL WARFARE: TODAY'S CHALLENGE TO U.S. MILITARY POWER* (2003).

15. In *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158–61 (1934), Chief Justice (and former Secretary of State) Charles Evans Hughes explained that the United States might remain bound to discharge an international legal obligation even after a validly enacted domestic law precluded discharge of that duty.

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tion of powers. Whether the President should follow international law in the exercise of his constitutional authorities remains a policy question that is context specific.

## I. CONSTITUTIONAL TEXT AND STRUCTURE

Arguments that the President must obey international law, as a matter of domestic law, depend on the Supremacy Clause. The President's Article II obligation to "take Care that the Laws be faithfully executed"<sup>16</sup> applies to international law only if Article VI recognizes international law as constituting federal law. The Supremacy Clause itself only mentions one species of international law: treaties. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States," Article VI declares, "shall be the supreme Law of the Land."<sup>17</sup>

Clearly, Article VI recognizes that treaties are federal law and therefore must be enforced by the President, subject to any powers he has to suspend or terminate treaties. But there are compelling textual reasons to conclude that the Supremacy Clause recognizes only treaties, and not unwritten forms of international law—such as customary international law—as federal law. Notice that after Article VI lists the Constitution first as due supremacy effect, it does not say solely "Laws." Rather, it says "Laws of the United States which shall be made in Pursuance thereof." First, this suggests that it is the "Laws of the United States," and not other sources of law that are supreme. State law is not entitled to supremacy, nor is international law or common law, but only "Laws of the United States." It appears that the only place that the Constitution discusses the making of a "Law of the United States" is in Article I, Section 7's bicameralism and presentment clauses.<sup>18</sup>

Second, the Supremacy Clause suggests that international law is not included because it uses the phrase "which shall be made." This language indicates that the "Laws of the United States" were to be made in the future, that is, after the ratification of the Constitution. "Laws of the United States" did not already exist at the time of the writing or adoption of the Constitution, so they could not have included international law. The Law of Nations, as the Framers called it, pre-existed the Constitution. Another way of seeing this point is to compare the Supremacy Clause's description of statutes with its description of treaties. Article VI gives supremacy to treaties "made, or which shall be made," in other words, both to treaties that the President and the Senate will agree to in the future, and to treaties already in existence before the Constitution,

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16. U.S. CONST. art. II, § 3.

17. *Id.* at art. VI, cl. 2.

18. *See id.* at art. I, § 7, cl. 2–3.

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such as the Treaty of Paris, which recognized the United States' independence from Britain.<sup>19</sup> In Article VI, the Framers were quite specific about which laws and treaties would receive supremacy effect, and it seems clear that they did not intend to incorporate any body of law that existed before the adoption of the Constitution, except for a handful of treaties.

Third, the Supremacy Clause explicitly distinguishes between different forms of international law, and only gives one of them supremacy effect. Article VI elevates treaties to the level of supreme federal law. It does not mention the other form of international law at the time, the "Law of Nations." This shows that the Framers knew how to distinguish between different types of international law (treaties and the Law of Nations) and that they were aware that they could give supremacy to a body of international law that existed before the Constitution. It can be determined that the Framers were well aware of the Law of Nations because in Article I, Section 8, they gave Congress the power to define and punish its violation.<sup>20</sup> It would run counter to standard methods of textual interpretation to read the Supremacy Clause's "Laws of the United States" to include customary international law, when the Constitution specifically mentions the Law of Nations elsewhere. Giving full effect to the Supremacy Clause's explicit mention of treaties would also recommend against importing into it the Law of Nations, which went unmentioned.

Fourth, the Supremacy Clause uses the phrase "made in Pursuance thereof." This language requires that any laws of the United States entitled to supremacy must undergo the procedures set out in the Constitution. This language even suggests that the laws made by Congress must comport with the Constitution, not just as a procedural but as a substantive matter.<sup>21</sup> At a minimum, those who argue over the legitimacy of judicial review agree that "made in Pursuance thereof" requires that all Laws of the United States undergo the procedural requirements of bicameralism and presentment. International law is not made pursuant to the Constitution, but by the practice and agreement of states. It does not undergo the same bicameralism

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19. We think that Justice Holmes missed the point of the reference to treaties in the Supremacy Clause when he said in *Missouri v. Holland*, 252 U.S. 416, 433 (1919):

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

He seemed to overlook the fact that the Framers used the "authority of the United States" language to enable the Constitution to reach back to pre-ratification treaties.

20. See U.S. CONST. art. I, § 8, cl. 10.

21. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 903-09 (2003).

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and presentment that apply to the Laws of the United States.<sup>22</sup> Of course, if Congress were to choose to incorporate international law through a statute, the law would then satisfy bicameralism and presentment and become a Law of the United States entitled to supremacy.

The Supremacy Clause raises an important structural reason why international law could not cabin the President's chief executive and commander-in-chief powers. The Supremacy Clause establishes a hierarchy of law: the Constitution is the highest form of law, followed by statutes, and then treaties. These forms of law are enumerated in descending level of authority. Thus, the Constitution overrides statutes, and statutes override treaties. If the President, therefore, is validly exercising his constitutional authority, that authority could not be restricted by a statute, and it certainly could not be limited by international law, because neither source of law could override the Constitution.

One might argue, however, that the President has a duty to enforce laws that go beyond federal law. Professor Ernest Young and Professor Michael Ramsey, for example, have suggested that customary international law enjoys the status of pre-*Erie* general federal common law that could provide a rule of decision in an appropriate case, but would not preempt state law or give rise to federal question jurisdiction.<sup>23</sup> One implication of this, which Professor Ramsey seems to follow, is that international law might be included within the "Laws," in Article II's Faithful Execution Clause, even though it would not be within the Supremacy Clause's enumeration of federal law.<sup>24</sup>

We disagree with this view. This argument usually depends upon the statements of Framers during the early Republic. There do not appear to be any comments during the ratification period itself, however, which support the argument. If this view were correct, the President could enforce customary international law within the United States in the absence of a statute. President Washington, for example, would have been on firm constitutional ground in ordering the prosecution of American citizens who violated his Proclamation of Neutrality in the French Revolutionary Wars,<sup>25</sup> even though Congress had yet to enact any criminal sanctions for its violation.<sup>26</sup> It is true that some Supreme Court Justices, such as Chief Justice John Jay,

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22. Cf. *INS v. Chadha*, 462 U.S. 919, 946–51 (1983) (discussing the Constitution's bicameralism requirement and Presentment Clauses).

23. Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 556–57 (2002); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 392–94 (2002).

24. See Ramsey, *supra* note 23, at 576–84.

25. George Washington, *Proclamation of Neutrality* (1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 430–31 (John C. Fitzpatrick ed., 1939).

26. Congress did not pass a criminal law enforcing neutrality until 1794. Neutrality Act, ch. 50, 1 Stat. 381 (1794).

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gave jury charges on the basis of Washington's Proclamation while sitting as lower court judges.<sup>27</sup> Although Washington and his cabinet believed that the President could unilaterally enforce customary international law, juries acquitted defendants charged under the Proclamation of Neutrality. In response, President Washington asked Congress to enact a criminal law, which it did the next year.<sup>28</sup> In 1812, the Supreme Court resolved any confusion in *Hudson & Goodwin*, which held that no federal common law of crimes existed.<sup>29</sup> At the very least, these events demonstrate that no consensus existed among the Framers in favor of the idea that the President could enforce non-statutory or non-treaty based international law. If anything, the resolution of the Neutrality Proclamation prosecutions suggests the exact opposite.

Other parts of the Constitution also seem to challenge the view that international law limits presidential power. Article I, Section 8 enumerates a variety of congressional powers, such as the authority of Congress "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>30</sup> This provision empowers Congress to incorporate customary international law into federal law, which would be unnecessary if the Law of Nations were already domestic law. If the Law of Nations were already federal law, there would be no need for the Constitution to grant Congress an explicit power to criminalize their violation, because Congress would already have that discretion under the Necessary and Proper Clause (just as Congress can criminalize activity within reach of the Interstate Commerce Clause).

Requiring that Presidents obey customary international law in the exercise of their commander-in-chief or chief executive authority would also distort constitutional structure by raising the authority of international law above that of ordinary statutes. Ordinary statutes cannot infringe on the President's valid constitutional power; a statute, for example, could not forbid the President from exercising his removal authority over an executive branch official. Similarly, Congress could not enact statutes interfering with the President's commander-in-chief authority to make tactical or strategic decisions in wartime. This restriction arises from the same reasoning that forbids Congress from interfering with the Constitution's conferral of the judicial power on the federal courts.<sup>31</sup> The Constitution is the highest form of federal law, and its distribution of authority among the branches cannot be overridden by statute, executive order, or judicial decision. If customary international law

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27. See *Henfield's Case*, 11 F. Cas. 1099, 1100–05 (C.C.D. Pa. 1793) (No. 6,360).

28. See Neutrality Act, ch. 50, 1 Stat. 381 (1794).

29. *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812); accord *United States v. Coolidge*, 14 U.S. 415 (1816).

30. U.S. CONST. art. I, § 8, cl. 10.

31. Cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

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can limit, as a matter of domestic law, what would otherwise be a valid exercise of the commander-in-chief or chief executive power, it would have greater force within our system than an act of Congress or a judicial decision.

Giving customary international law a limiting effect on presidential power would also create a strange deformation in the Constitution's allocation of the foreign affairs power. Under current practice, the Constitution is understood as granting the bulk of the foreign affairs power to the President. According to Supreme Court opinions, the President is the "sole organ"<sup>32</sup> of the nation in its diplomatic relations, and he exercises broad powers to set foreign policy, to protect the national security, and to make or break international agreements. Critics of presidential power would preclude the President in these activities from violating international law. At the same time, however, it is relatively settled that Congress can violate international law by statute—for some reason, supporters of customary international law as a restraint on presidential power are willing to abide by this aspect of *The Paquete Habana*. This legal interpretation would give Congress the authority to violate international law while denying that authority to the President, even though the President is thought to exercise the bulk of the nation's foreign affairs power.

There is no indication that the Framers would have intended such a result. If anything, the basic theory of popular sovereignty underlying the Constitution rejects it. Under this theory, the government exercises power only because it serves as the agent of the people's will. As James Madison wrote in Federalist 46, "[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."<sup>33</sup> Madison reminded critics of the proposed Constitution "that the ultimate authority, wherever the derivative may be found, resides in the people alone."<sup>34</sup> The government can exercise only that power which the people have delegated to it, which is codified in the Constitution. Any law that conflicts with the written Constitution is illegal, because it goes beyond the delegation of power from the people to the government. As Alexander Hamilton stated in Federalist 78, "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."<sup>35</sup> If this understanding did not hold sway, then a written constitution would prove inconsequential because the agents could simply exercise the powers that they

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32. *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting) (quoting 10 ANNALS OF CONG. 613 (1800)).

33. THE FEDERALIST NO. 46, at 239 (James Madison) (Max Beloff ed., 1987).

34. *Id.*

35. THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987).

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saw fit, regardless of the will of the people.<sup>36</sup> Without the basic proposition that the agents could not act beyond the power granted in the Constitution, the government would be sovereign rather than the people. Or, as Hamilton wrote, it “would be to affirm, that the deputy is greater than his principal . . . that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.”<sup>37</sup> To preserve the basic nature of a written constitution of limited, enumerated powers, the Constitution must be “superior, paramount law” to any actions of the government it creates.<sup>38</sup> Therefore, any law or government action that conflicts with the Constitution must be a nullity.

This theory of popular sovereignty has important implications with regard to international law. The Framers were concerned that their agents—the President, Congress, or the federal courts—would make law inconsistent with the people’s fundamental grant of authority in the Constitution. Hence, they decided to rely on a written Constitution to police their agents. They held this concern even though their agents would be chosen through regular election or appointment by constitutional methods, and thus would be accountable to the people. In a structural sense, the written Constitution serves as an ultimate safeguard should the regular political process fail to control government officials from acting against the people’s wishes. The principal-agent problem that worried the Framers would have been compounded if there were a possibility that international law, which is created outside the American political system, automatically was part of the “Law of the Land.”

Other scholars have identified a number of other structural problems that arise if customary international law is considered federal law binding on the President.<sup>39</sup> Giving customary international law the effect of federal law undermines the treaty power and the doctrine of non-self-execution. Even if the United States refused to sign a multilateral treaty, or signed one with the understanding that it was non-self-executing, if enough nations joined the treaty would conceivably assume the status of customary international law, and thus become federal law without the assent of the President or Senate. Raising customary international law to the level of federal law would run counter to *Erie R.R. Co. v. Tompkins*<sup>40</sup> by reintroducing a general common law enforceable by the federal courts. Under *Swift v. Tyson*, customary international law formed part of the general

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36. As stated by the Supreme Court, “[t]he distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

37. THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987).

38. *Marbury*, 5 U.S. (1 Cranch) at 177.

39. See, e.g., Weisburd, *supra* note 13, at 1256–67.

40. 304 U.S. 64 (1938).

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common law applied by federal courts, but was not considered to be law of the United States for federal question jurisdiction.<sup>41</sup> *Erie* replaced the *Swift* framework in favor of specialized federal common law in limited areas which amount to true federal law for jurisdictional purposes. If customary international law was to remain true federal law, binding on the President, it would preempt state law without undergoing the regular law-making process that gives the states an opportunity to influence through Senate participation. Formally considering international law to be federal law could interfere with the separation of powers by preventing the President from conducting foreign relations effectively as the "sole organ" of the United States. A President may wish to violate international law in order to create a new rule of customary international law, as President Reagan did when he unilaterally extended American maritime boundaries.<sup>42</sup> A President, acting on behalf of the United States, may disagree with the majority of other nations that a new rule of customary international law should come into being. Considering customary international law to be federal law would preclude the President from engaging in these courses of action, even though under the Constitution, as interpreted by the Supreme Court, he plays the leading diplomatic role on behalf of the United States.

Perhaps recognizing these problems, defenders of the view that customary international law limits the President, sometimes rely on a definitional argument. They argue that the Commander-in-Chief power, by definition, is limited by customary international law.<sup>43</sup> This argument is usually based on

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41. See *Swift v. Tyson*, 41 U.S. (Pet. 16) 1 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

42. See Douglas W. Kmiec, Office of Legal Counsel, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1, 8–11 (1990) (Op. Off. Legal Counsel), *cited in* *In re Air Crash off Long Island*, 209 F.3d 200, 205 n.9 (2d Cir. 2000).

43. Likewise, it has been argued that Congress's war powers, no less than the President's, are implicitly limited by customary international law (or at least those elements of it that have supposedly acquired "peremptory" status). See Lobel, *supra* note 3, at 1075. But the Supreme Court expressly refused to accept that claim in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871). The plaintiffs contended that:

[A]lthough there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. The power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations.

*Id.* at 285–86. The Court continued:

[I]t is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right.

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the original understanding of materials from the early Republic that are said to show that the Framers believed that the President as commander-in-chief can only exercise those powers permitted to the United States as a belligerent under the laws of war, or the laws of armed conflict as they are known today.<sup>44</sup> These arguments, or at least their claim to support from the original understanding of the Constitution, depend on quotations from Alexander Hamilton and James Madison in their 1793 *Pacificus-Helvidius* debates over the legality of President Washington's Neutrality Proclamation.<sup>45</sup> In *Pacificus* Number 1, Alexander Hamilton argued that "[t]he [Chief] Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws."<sup>46</sup> In *Helvidius* Number 1, Madison responded that when war is declared, normal peacetime laws are suspended and replaced by, "as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy."<sup>47</sup> In a following *Helvidius* paper, Madison seemed to agree that the President "is bound to the faithful execution of these as of all other laws internal and external."<sup>48</sup> Hamilton and Madison's apparent agreement is taken as a sign that the Framers understood the Constitution as limiting the President's commander-in-chief power to the rules of the laws of war.

There is good reason to doubt this contention. As an initial matter, the *Pacificus-Helvidius* debates took place during the second Washington administration, not in 1787 and 1788. If they confirmed evidence from the drafting or ratification debates, they would be more decisive, but standing alone they do not show that the Framers held this understanding. The very fact that Hamilton and Madison were in such sharp disagreement over whether the President had the constitutional authority to declare neutrality in the French Revolutionary Wars dem-

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*Id.* at 305. Later Supreme Court decisions left little doubt that it lay within the war powers of the government to violate customary international law, and that any remedy for such a violation would be political rather than legal in nature. In *Young v. United States*, 97 U.S. 39 (1877), the Court stated:

As war is necessarily a trial of strength between the belligerents, the ultimate object of each, in every movement, must be to lessen the strength of his adversary, or add to his own. As a rule, whatever is necessary to accomplish this end is lawful; and, as between the belligerents, each determines for himself what is necessary. If, in so doing, he offends against the accepted laws of nations, he must answer in his political capacity to other nations for the wrong he does.

*Id.* at 60.

44. Golove, *supra* note 2, at 365.

45. See JOHN YOO, *THE POWERS OF WAR AND PEACE* 198–204 (2005) (discussing the Neutrality Proclamation and *Pacificus-Helvidius* debates).

46. "*Pacificus*" Number 1 (June 1793), reprinted in 15 *THE PAPERS OF ALEXANDER HAMILTON* 40 (Harold C. Syrett ed., Columbia Univ. Press 1969).

47. "*Helvidius*" Number 1 (Aug. 24, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 69 (Thomas A. Mason, Robert A. Rutland, & Jeanne K. Sisson eds., Univ. Press of Va. 1985).

48. "*Helvidius*" Number 2 (Aug. 31, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON*, *supra* note 47, at 86.

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onstrates that the thinking of 1793 does not reflect agreement on what the Framers and ratifiers of the Constitution believed. Reading Hamilton in this way, in particular, does not do full justice to his arguments. Hamilton was defending President Washington's declaration of neutrality, which, in essence, derived from his constitutional authority to interpret the 1778 Franco-American Treaty of Alliance and to establish the nation's foreign policy. Hamilton was arguing that the President's right to enforce international law expanded, not limited, his constitutional power. He was not addressing the converse question whether the President could conduct a foreign policy in violation of international law. The argument that in wartime the President can carry out belligerent acts permitted by the laws of war does not address the different question whether those same laws act as a limit, under the Constitution, on the President's authority. Neither Hamilton nor Madison addressed the latter question because it was not at issue in the Neutrality Proclamation, and their quotes relied upon by the critics of presidential power are tangential to the actual arguments they made at the time.

More important evidence emerges from the framing of the Constitution itself. During this period, no delegate to the Philadelphia or state ratifying conventions stated that the Law of Nations would limit the commander-in-chief power. It is true that there were few discussions of the meaning of the Commander-in-Chief Clause,<sup>49</sup> but this fact does not mean that there is no historical evidence worth examining. First, it is useful to look at precursors to the Constitution's Commander-in-Chief Clause for guidance as to its meaning. State constitutions provide a significant resource for interpreting language in the Constitution, especially those, like New York's and Massachusetts', which served as models for the work in Philadelphia. Although the first revolutionary state constitutions sought to weaken gubernatorial power, later constitutions restored the energy and unity of the executive branch. New Hampshire's constitution defined the commander-in-chief power in this way:

The president of this state for the time being, shall be commander in chief of the army and navy, and all the military forces of the state, by sea and land; and shall have full power by himself . . . to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill slay, destroy, if necessary, and conquer by all fitting

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49. U.S. CONST. art. II, § 2, cl. 1.

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ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist . . . and in fine, the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral . . . .<sup>50</sup>

Although these provisions provided an extensive catalogue of the powers of the commander-in-chief, they nowhere limited, as a matter of constitutional law, his authority only to those actions permitted by international law. As far as we can determine, no state constitution explicitly invoked the Law of Nations as a limit on the powers of the governor in wartime.

For the critics of presidential power to be correct, the concept of the Law of Nations as a restraint on the President must have crept into discussions during the drafting and ratifying conventions. This does not appear to be the case. Again, there does not appear to be any explicit mention of the Law of Nations as a restraint on a wartime President in the Philadelphia or state ratifying conventions. In an environment where one of the chief Anti-Federalist arguments against the Constitution was that it created an overly powerful Chief Executive who might use his military powers to seize dictatorial authority, it would have been in the interests of the Federalists to have responded that the commander-in-chief was limited by the laws of war, among other restraints. The Federalists did not make this response, however, arguing instead that a wayward President would be controlled by Congress' power of the purse, impeachment, and the political process.<sup>51</sup> James Madison, in particular, did not respond to Patrick Henry's attack on the Presidency during the Virginia ratifying convention by falling back on the Law of Nations, but instead stated that the President's military powers would be controlled by Congress' appropriation power. "The sword is in the hands of the British King. The purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist."<sup>52</sup> Rather than invoke a source of law external to the American legal system, the Constitution's defenders declared that the normal workings of the separation of powers would check the Commander-in-Chief.

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50. N.H. CONST. art. LI (1784), reprinted in 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2463-64 (Francis Newton Thorpe ed., William S. Hein & Co. 1909). Massachusetts' constitution, which was widely admired by the Framers, recited nearly identical language. MASS. CONST. art. VII (1780), reprinted in 3 *id.* at 1901.

51. See YOO, *supra* note 45, at 131-41.

52. *Id.* at 139.

## II. CONSTITUTIONAL PRACTICE

The lessons of the constitutional text and the historical materials from the framing find further support in the actual practice of Presidents in the centuries after the ratification. Understanding the policy advantages that often attend compliance with international law, Presidents have usually enforced international law, including the laws of war. Indeed, Presidents have frequently gone beyond mere compliance, both by introducing progressive standards and by affording enemies protections beyond the legal minimum. President George Washington's 1793 Proclamation of Neutrality<sup>53</sup> was a landmark in the development of the international law of neutral rights and obligations.<sup>54</sup> President Abraham Lincoln's General Orders No. 100, issued in 1863 (the so-called "Lieber Code")<sup>55</sup> exerted a massive influence on the later law of land warfare.<sup>56</sup> Unilateral executive decisions have also extended protections to enemy combatants beyond what strict legal duty required. During the Vietnam War, the United States military treated captured Viet Cong guerrillas as if they were entitled to the formal legal status of "prisoners of war" under the Third Geneva Convention—a decision that was "remarkable, considering the variety of ways they might fall below the . . . Convention's definition of a protectable combatant."<sup>57</sup> (By contrast, both North Vietnam and the Viet Cong rejected the Convention as "bourgeois" law and refused to allow the International Committee of the Red Cross (the ICRC)<sup>58</sup> to examine how they treated their pris-

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53. Washington, *supra* note 25.

54. Washington's Proclamation underpinned the Neutrality Act, ch. 50, 1 Stat. 381 (1794). See CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 278–79 (1931). That statute in turn became the "seminal event" for the international law of neutrality. See STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 193 (2005).

55. Instructions for the Government of Armies of the United States in the Field (Lieber Code), reprinted in INTERNATIONAL LAW AND THE USE OF FORCE: DOCUMENTARY SUPPLEMENT 17–36 (Mary Ellen O'Connell ed., Foundation Press 2005).

56. See Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 238–39 (1998); RICHARD SHELLY HARTIGAN, LIEBER'S CODE & THE LAW OF WAR 21–23 (1983); Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (1997); Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 195–96 (2000).

57. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 363 (1994); see also 60 INTERNATIONAL LAW STUDIES: DOCUMENTS ON PRISONERS OF WAR 748–51 (H.S. Levie ed., 1979), reprinted in HOW DOES LAW PROTECT IN WAR 780 (Marco Sassoli & Antoine A. Bouvier eds., 1999); Hans-Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912, 921 (1987).

58. On the rights and duties of the ICRC in international armed conflicts, see David P. Forsythe, *International Humanitarian Assistance: The Role of the Red Cross*, 3 BUFF. J. INT'L L. 235, 236–39 (1996–97). See generally CAROLINE MOORHEAD, DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS (1998).

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oners.)<sup>59</sup> Moreover, it remains Defense Department policy “that US military personnel will comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”<sup>60</sup> Despite the unremitting criticisms of the Bush Administration’s use of military commissions to try certain al Qaeda and Taliban combatants detained at the U.S. Naval Base in Guantánamo, Cuba, the executive has in fact provided those defendants with procedural protections, including representation by an attorney, that “are in most respects like military trials [of U.S. Armed Forces personnel] under the Uniform Code of Military Justice,” and that are “far greater . . . than [those of] any previous military commission, including Nuremberg.”<sup>61</sup>

Nonetheless, the Executive has also, on occasion, unilaterally ordered or authorized actions that have placed the United States in breach of international law, including the law of war. Characteristically, Presidents have taken such actions on the basis of their constitutional authorities to safeguard national security, protect the lives of citizens, interpret and execute treaties, and manage the foreign affairs of the United States and the disposition of its Armed Forces. The President’s power to disregard international law is at its apogee when the survival of the nation is at stake: as former Secretary of State Dean Acheson said with regard to the legality of the United States 1962 naval blockade during the Cuban Missile Crisis, “law simply does not deal with such questions of ultimate power . . . . No law can destroy the state creating the law. The survival of states is not a matter of law.”<sup>62</sup> But even when the stakes are lower, practice attests that the Executive is not constitutionally constrained to follow international law.

Although the historical record amply supports this contention, it is also not without ambiguity. There are two main reasons for this ambiguity.

First, Presidents are understandably reluctant to acknowledge publicly that they are violating international law. Little is gained by such an admission, and elite reaction, both at home and abroad, would surely be hostile. In those circumstances, Presidents or their advisers will instead cast about for arguments of greater or less plausibility in an effort to show that

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59. See BEST, *supra* note 57, at 363–64.

60. W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493, 507 (2003). Thus, the United States treated detainees taken in its 1994 intervention in Haiti as if they were prisoners of war under the Third Geneva Convention, even though, owing to the circumstances of the intervention, the Convention was not “strictly speaking, applicable.” Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 78 (1995).

61. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 288 (2002).

62. Hon. Dean Acheson, Former Secretary of State, Remarks at the American Society of International Law Panel: Cuban Quarantine: Implications for the Future (Apr. 25, 1963), in 1963 PROC. OF THE AM. SOC’Y OF INT’L LAW 13, 14.

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their actions satisfy international legal norms. Given the malleability of much international law, "a most pliant code [that] nations have always bent to their purposes,"<sup>63</sup> such arguments are not hard to find.

For example, in the period between the outbreak of the Second World War and the United States' entry into the War after Pearl Harbor, President Franklin Roosevelt concluded that it was essential to the United States' security to provide Great Britain, either directly or through subterfuges, with sufficient material aid to enable it to avert an Axis victory in Europe. Yet as a neutral power rather than a belligerent, the United States was constrained in what it could lawfully do to assist Britain. Article 6 of the 1907 Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII)<sup>64</sup> (to which the United States was a party)<sup>65</sup> provided that "[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."<sup>66</sup> Yet in his address to Congress on September 21, 1939, in which he urged the amendment of the Neutrality Act of 1935, Roosevelt argued that "under the age-old doctrines of international law," the United States would be free to sell to belligerent nations "such goods and products of all kinds as the belligerent nations . . . were able to buy from us or sell to us."<sup>67</sup> Subsequently, Roosevelt decided in August, 1940 to sell several U.S. Navy destroyers to Great Britain directly, in exchange for certain air and naval bases in Britain's colonies. One legal scholar who has examined this transaction carefully has found that even the President's legal advisers believed that it violated both international law and domestic legislation implementing it.<sup>68</sup>

63. JOSEF JOFFE, *ÜBERPOWER: THE IMPERIAL TEMPTATION OF AMERICA* 48 (2006).

64. Laws of War: Rights and Duties of Neutral Powers in Naval War (Hague XIII); October 18, 1907, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague13.htm>.

65. Hague XIII remains the "basic statement" of the rights and obligations of neutrals during maritime war. Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT'L L. REV. 83, 92-93 (1998); see also Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 485, 496-97 (Dieter Fleck ed., 1995).

66. Hague XIII, *supra* note 64, Art. 6.

67. Address recommending revision of the Neutrality Law (September 21, 1939), available at <http://www.ibiblio.org/pha/7-2-188/188-14.html>.

68. See Aaron Xavier Fellmuth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413, 475-76 (1996-97); see also Edwin E. Borchard, *War, Neutrality and Non-Belligerency*, 35 AM. J. INT'L L. 618 (1941); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 576-87 (1940). Roosevelt's policies were not without their legal defenders, however. One defense was that they comprised legitimate measures of self-defense, transcending the duties of neutrality; another argument was that they were lawful forms of reprisal against Germany for its violations of the Kellogg-Briand Pact, August 27, 1928, 46 Stat. 2343, 2 Bevens 732. See Robert H. Jackson, Att'y Gen., Address to the Inter-American Bar Association (April 25, 1941), in 35 AM. J. INT'L L. 348, 349-50 (Apr. 25, 1941). Hans Lauterpacht's seventh edi-

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Second, the law of war itself may have ambiguous or indeterminate standards, or indeed no applicable standards at all. Several explanations may be offered for this. To begin with, before the creation of the Permanent Court of International Justice (PCIJ) (the predecessor to the present International Court of Justice (ICJ)), questions of international law were not adjudicated before standing international judicial bodies, but instead tended to be resolved in an *ad hoc* manner by national courts, international arbitration panels, the agreement of states or, in the case of the law of war, national or international military commissions.<sup>69</sup> Further, because the ICJ lacks compulsory jurisdiction,<sup>70</sup> it is often unavailable to adjudicate questions of the legality of the use of force.<sup>71</sup> Absent binding judicial rulings, the interpretation of the international law lacks definitiveness and certainty. Apart from that, developments in weaponry and military technique (such as submarines, airplanes, and lasers) have often outpaced the ability of States to frame appropriate international regulatory regimes. Finally, given the “sometimes crippling faults” to which it is vulnerable, including the great diversity of State views and practices and the inherently “subjective weighing” of the evidence for them, customary international law in particular is often uncertain and contentious.<sup>72</sup>

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tion of Oppenheim’s treatise on international law acknowledged that the transfer of the destroyers was not “consistent with the relevant specific rules of neutrality as they crystallized in the nineteenth century and in the Hague Conventions,” but it contended that it was “in accordance with the law of neutrality viewed in its entirety and in its true historic perspective” because it was adopted as a “measure[] of discrimination against a belligerent who had resorted to war in violation of International Law” and because it was a valid exercise of the right of self-defense “against the overwhelming danger facing the United States . . . from States bent on world domination and on the denial of the very bases of International Law.” 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 638–40 (H. Lauterpacht ed., 7th ed. 1952).

69. On some early war crimes trials before national military commissions, see DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR, 94–97 (2d ed. 1991).

70. The ICJ’s compulsory jurisdiction depends on the consent of States. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

71. See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 107 (1991). Even when the ICJ opines on an issue, the influence of its decision may be limited. For one thing, where the ICJ *does* have jurisdiction and *does* reach the merits in a case involving the law of war, many years may pass between the initiation of the case and its final resolution. For example, the Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 90 (Nov. 6), reprinted in 42 INT’L LEGAL MATERIALS 1334 (2003), or available at <http://www.icj-cij.org/icjwww/idocket/iop/iop-frame.htm>, was brought in November 1992, but not decided until November 2003. Further, when the issues before the ICJ “are perceived as highly political and the judges seem to reflect the position of the states from which they come,” the ICJ has “diminished authority,” especially if some judges write separate individual opinions or dissents. INTERNATIONAL LAW: CASES AND MATERIALS 135 (Lori Fisler et al. eds., 4th ed. 2001). Finally, states acting individually or in concert may disregard or overrule an international court’s interpretation of the law, as happened with the PCIJ’s decision in *The Lotus Case* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 54 n.56 (4th ed. 2003).

72. JANIS, *supra* note 71, at 53–54.

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Thus, Presidents have often ordered or authorized actions whose legality under the law of war was or remains arguable. We offer four examples of such debatable violations from different periods of the country's history: (1) the policy of the Union Army, sanctioned by President Abraham Lincoln, of deliberately attacking and destroying civilian objectives, for the primary purpose of demoralizing the enemy's civilian population; (2) the policy of attacking enemy civilian targets from the air during the Second World War, especially densely populated civilian centers in Japan; (3) President Dwight D. Eisenhower's program of covert aerial surveillance of the Soviet Union, and (4) the so-called "Cuban quarantine" under President John F. Kennedy.

1. *The Methods of Warfare of the Union Army*

First, General William T. Sherman's 1864 Civil War campaigns in Georgia and the Carolinas provide several examples of military activities that would doubtless now be reckoned to be violations of the law of war, but that were less clearly so at the time.<sup>73</sup> Sherman's mode of warfare, which involved wreaking devastation on the civilian population and cities of the South, grew directly out of the strategic decisions of his commander-in-chief, President Abraham Lincoln.<sup>74</sup> As early as

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73. See Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaigns of the First Commander of the Modern Era Comply with Current Law of War Standards?*, 9 EMORY INT'L L. REV. 459 (1995). For analyses and evaluations of Sherman's methods and objectives, see MICHAEL FELLMAN, *CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN 188-89* (1995) (describing Sherman's view of war as "moral totalism," and characterizing him as an "enormous terrorist"); CHARLES ROYSTER, *THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON, AND THE AMERICANS* (1991) (tracing evolution of Sherman's strategic thought); T. HARRY WILLIAMS, MCCLELLAN, SHERMAN AND GRANT 72-77 (1962) (emphasizing Sherman's objective of altering civilian psychology); J.F.C. FULLER, *THE CONDUCT OF WAR 1789-1961: A STUDY OF THE IMPACT OF THE FRENCH, INDUSTRIAL, AND RUSSIAN REVOLUTIONS ON WAR AND ITS CONDUCT* 107-11 (1961) (condemning Sherman's methods); B.H. LIDDEL HART, *SHERMAN: SOLDIER, REALIST, AMERICAN* 426 (1929) (Sherman "deliberately aimed at the non-combatant foundation of the hostile war spirit" and viewed law and war "as two opposed states" such that "war began when law broke down").

74. Lincoln and two of his most outstanding generals, Grant and Sherman, had begun fairly early in the war to contemplate a strategy of "total war" of the kind that Sherman was eventually to implement in Georgia and the Carolinas in 1864. See ULYSSES M. GRANT, *PERSONAL MEMOIRS* 198-99 (James M. McPherson ed. 1999) (After Shiloh, "I gave up all idea of saving the Union except by complete conquest;" this led him to the conclusion that it was necessary "to consume everything that could be used to support or supply armies," including "the property of the citizens whose territory was invaded"); James M. McPherson, *Lincoln and the Strategy of Unconditional Surrender*, in *LINCOLN: THE WAR PRESIDENT* 45-47 (Gabor S. Borritt ed. 1992) (describing changes in Lincoln's and Grant's strategic thinking, beginning in 1862, about the need for "total" war); EDWARD HAGERMAN, *THE AMERICAN CIVIL WAR AND THE ORIGINS OF MODERN WARFARE: IDEAS, ORGANIZATION, AND FIELD COMMAND* xii-xiv (1988) (discussing novel features of Sherman's method of waging war, and analyzing changed circumstances that appeared to dictate adoption of those methods); *id.* at 207-08 (describing development of Sherman's thinking, beginning in 1862, on the necessity

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1862, Lincoln had rejected Major General George McClellan's plea to carry on a conflict that "should not be at all a war upon population, but against armed forces and political organization."<sup>75</sup> Instead, Lincoln decided on a total war, directed against combatants and civilians alike.<sup>76</sup> Indeed, by July, 1863, the Union Army's conduct towards Confederate non-combatants and their property was so destructive that the Confederacy's President, Jefferson Davis, wrote a personal letter to Lincoln, calling his attention to these apparent violations of the Laws of War and urging Lincoln to remedy them.<sup>77</sup> Significantly, Lincoln never replied. In a letter of October 19, 1864 to his commander, Major General Henry Halleck, Sherman was to describe the objectives of his Georgia and Carolinas campaign as "not purely military or strategic," but also "illustrat[ing] the vulnerability of the South" by wreaking destruction on civilian property.<sup>78</sup> Lincoln, who was "ecstatic" over

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of waging "total" war against civilian population and property). Moreover, as Eliot Cohen has shown in detail, Lincoln was a highly engaged and well-informed Commander in Chief who "exercised a constant oversight of the war effort from beginning to end." ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* 17 (2002).

75. Letter of Major General George McClellan to President Abraham Lincoln (July 7, 1862), in HARRY S. STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE AMERICAN CIVIL WAR* 137 (2006). McClellan had urged Lincoln to conduct the war "upon the highest principles known to Christian civilization. It should not be a war looking to the subjugation of the people of any State in any event. It should not be at all a war upon population, but against armed forces and political organization. Neither confiscation of property, political executions of persons, territorial organizations of States, or forcible abolition of slavery should be contemplated for a moment. In prosecuting the war all private property and unarmed persons should be strictly protected, subject only to the necessity of military operation." *Id.*

76. In response to McClellan's letter, Lincoln designated Major General John Pope as the commander of the new Army of Virginia. "After spending three weeks in Washington, D.C., with Lincoln and [Secretary of War] Stanton, Pope clearly understood the new course his commander wanted him to take." STOUT, *supra* note 75, at 138. With Lincoln's approval, *id.* at 141, Pope issued a series of General Orders that brought the war home to Southern civilians. See Major General John Pope's General Orders No. 5, 7, 11, and 19, available at <http://www.civilwarhome.com/popesorders.htm>. For example, Pope's General Orders No. 7 (July 10[?], 1862), notified the "people of the valley of the Shenandoah and throughout the region of operations . . . living along the lines of railroad and telegraph and along the routes of travel in rear of the United States forces" that "they will be held responsible for any injury done to the track, line, or road, or for any attacks upon trains or straggling soldiers by bands of guerrillas," and ordered that if such attacks occurred, "the citizens living within 5 miles of the spot shall be turned out in mass to repair the damage and shall, beside, pay to the United States in money or property, to be levied by military force, the full amount of the pay and subsistence of the whole force necessary to coerce the performance of the work." General Order No. 7, *id.* para. 1-3. Within four months of receiving McClellan's letter, Lincoln relieved him from the command of the Army of the Potomac. Abraham Lincoln, Executive Order (Nov. 5, 1862), available at [http://www.presidency.ucsb.edu/ws/index.php?pid+69825&st\\_mcclellan&st1](http://www.presidency.ucsb.edu/ws/index.php?pid+69825&st_mcclellan&st1).

77. STOUT, *supra* note 75, at 259.

78. SHERMAN'S CIVIL WAR: SELECTED CORRESPONDENCE OF WILLIAM T. SHERMAN 1860-1865, at 736 (Brooks D. Simpson & Jean V. Berlin eds. 1999) [hereinafter SHERMAN'S CIVIL WAR]. In that letter, Sherman went on to say: "They

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the news of Sherman's capture of Atlanta,<sup>79</sup> and who had "unlimited confidence" in his general,<sup>80</sup> can therefore fairly be said to have authorized Sherman's practices in the Georgia and Carolinas campaigns.<sup>81</sup>

To the extent that the Law of war applied to Sherman's campaigns, it was chiefly in the form of the Lieber Code which, as mentioned above, President Lincoln had issued.<sup>82</sup> The Lieber Code represented an unstable compromise between the demands of the form of warfare emerging from the rise of the modern nation-state, and the more traditional military practices of eighteenth and early-nineteenth century Europe.<sup>83</sup> The Code included several important provisions that maintained the traditional distinction between combatants and civilians—a distinction that the emerging model of total national mobilization threatened to undermine. Among these civilian-protective provisions was one that generally prohibited the unannounced bombardment of cities except when a surprise assault was being prepared.<sup>84</sup> It is this provision that Sherman

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don't know what war means, but when the rich planters of the Oconee and Savannah see their fences and corn and hogs and sheep vanish before their eyes they will have something more than a mean opinion of the 'Yanks.' Even now our poor mules laugh at the fine corn-fields, and our soldiers riot on chestnuts, sweet potatoes, pigs, chickens, &c. " After Savannah fell to Sherman on December 21, 1864, he estimated that his army had caused \$100,000,000 in damage, four-fifths of which he characterized as "simple waste and destruction." PHILIP HOWES, *THE CATALYTIC WARS: A STUDY IN THE DEVELOPMENT OF WARFARE 1860-1870*, at 267 (1998).

79. STOUT, *supra* note 75, at 368. On September 3, 1864, Lincoln gave "national thanks" to General Sherman for his Georgia campaign, which "under Divine favor, has resulted in the capture of Atlanta. The marches, battles, sieges, and other military operations, that have signalized the campaign, must render it famous in the annals of war." MEMOIRS OF GEN. WILLIAM T. SHERMAN 583 (Charles Royster ed. 1990) (1885) [hereinafter SHERMAN'S MEMOIRS]. Sherman also made a "Christmas gift" of the city of Savannah to President Lincoln in 1864. See Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT'L L. 353, 379 (1999). On that occasion, Lincoln wrote a personal letter to Sherman, telling him that his success "brings those who sat in darkness [i.e., the South's civilian population] to see a great light." Letter of President Abraham Lincoln to General William T. Sherman (Dec. 26, 1864), *quoted in* SHERMAN'S MEMOIRS, *supra* at 641. Lincoln personally met Sherman in late March, 1864, and discussed with him "the many incidents of our great march, which had reached him officially and through the newspapers." SHERMAN'S MEMOIRS, *supra* at 810. Another witness, Admiral D.D. Porter, memorialized the meeting, recording that Lincoln "seemed familiar" with "every movement" of "Sherman's campaign through the South." *Id.* at 814.

80. SHERMAN'S CIVIL WAR, *supra* note 78, at 782 (Letter of December 31, 1864).

81. See THOMAS J. DiLORENZO, *THE REAL LINCOLN: A NEW LOOK AT ABRAHAM LINCOLN, HIS AGENDA AND AN UNNECESSARY WAR 173-74, 185-86, 194* (2002).

82. See Waxman, *supra* note 79, at 372-74.

83. *Id.*

84. "Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity." Instructions for Government of Armies of the United States in the Field, *supra* note 55, art. 19. The exception relates to "surprise" assaults.

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arguably violated:<sup>85</sup> leading an army of 60,000 troops, Sherman bombarded the city of Atlanta without warning, then ordered it to be evacuated and burned. Writing in 1911, the English legal scholar J.M. Spaight maintained that Sherman's unannounced bombardment had violated the Lieber Code.<sup>86</sup> Further, Sherman's orders to evacuate and destroy the city even after the defending Confederate Army had left and he was free to enter it without resistance arguably violated not merely the Lieber Code, but also the Law of war as interpreted by General Henry Halleck, the author of an 1861 treatise on the subject<sup>87</sup> and the General-in-Chief of the Union Army at the outbreak of the Civil War.<sup>88</sup> More generally, Sherman's deliberate destruction of privately owned Confederate civilian property arguably violated the law of war, at least as it was understood before the Civil War. For instance, Colonel H.L. Scott, an American military lawyer and high-ranking Army officer affirmed in his *Military Dictionary* of 1861 that it was contrary to the law of war to target civilian objectives.<sup>89</sup> Yet given the unsettled state

85. See Robisch, *supra* note 73, at 477–78; HARTIGAN, *supra* note 56, at 21.

86. See J.M. SPAIGHT, WAR RIGHTS ON LAND 171 (1911) (Sherman's unannounced bombing "cannot be reconciled with the principle laid down in" Article 19 of the Lieber Code).

87. H.W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 466 (1861) ("The general rule by which we should regulate our conduct toward an enemy, is that of moderation, and on no occasion should we unnecessarily destroy his property.").

88. See Waxman, *supra* note 79, at 375, 378.

89. Colonel Scott's *Military Dictionary*, first published in 1861, stated that "[a]ll members of the enemy's state may lawfully be treated as enemies in a public war; but they are not all treated alike. The custom of civilized nations, founded on the general rule derived from natural law, that no use of force is lawful unless it is necessary to accomplish the purposes of war, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women, children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally all public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war. The application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy . . . Private property on land is also exempt from confiscation, excepting such as may become booty in special cases, as when taken from enemies in the field or in besieged towns, and military contributions levied upon the inhabitants of the hostile country. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country." COLONEL H.L. SCOTT, MILITARY DICTIONARY: COMPRISING TECHNICAL DEFINITIONS; ON RAISING AND KEEPING TROOPS; ACTUAL SERVICE, INCLUDING MAKESHIFTS AND IMPROVED MATERIÉL; AND LAW, GOVERNMENT, REGULATION, AND ADMINISTRATION RELATING TO LAND FORCES, Article "War," 657 (1st ed. 1861).

General Halleck and Colonel Scott were following the lead of the eminent American judge and jurist Chancellor Kent, who had written that "[t]he sentiment of the age condemns the employment of such instruments or weapons as will cause a useless shedding of blood. It is now considered a violation of right if weapons of war are turned against non-combatants or unfortified cities or towns, or if a captured city is sacked or demolished; and the bombardment of forts and other fortified places is regarded as a measure of extreme rigor, justifiable only when it is impossible to secure a surrender." I JAMES KENT, COMMENTARIES ON AMERICAN LAW 91 (Jon Roland ed., 1997-2002) (15th ed., 1826). Another impor-

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of the law of war at the time,<sup>90</sup> and the changes that were occurring in it even as the War unfolded,<sup>91</sup> Sherman's bombard-

tant pre-War statement of this position (which derives from the 18th century publicist Emmerich de Vattel) occurred in Justice Woodbury's dissent in *Luther v. Borden*, 48 U.S. 1, 85 (1849) ("The common laws of war, those maxims of humanity, moderation, and honor, which should characterize other wars, Vattel says, 'ought to be observed by both parties in every civil war.' Under modern and Christian civilization, you cannot needlessly arrest or make war on husbandmen or mechanics, or women and children. The rights of war are against enemies, open and armed enemies, while enemies and during war, but no longer. And the force used then is not to exceed the exigency,—not wantonly to injure private property, nor disturb private dwellings and their peaceful inmates. Much will be allowed to discretion, if manifestly exercised with honesty, fairness, and humanity. But the principles of the common law, as opposed to trials without a jury, searches of houses and papers without oath or warrant, and all despotic invasions on private personal liberty,—the customary usages to respect the laws of the land except where a great exigency may furnish sufficient excuse,—should all limit this power, in many respects, in practice (citations omitted).").

90. The Supreme Court's decisions during and after the Civil War attest to the fluid state of the law of war regarding noncombatants and their property. In *Mrs. Alexander's Cotton*, 69 U.S. 404, 419 (1864), the Court posited a general rule that enemy civilians' property in enemy territory "was liable to capture and confiscation by the adverse party." Citing Chancellor Kent, however, the Court then appeared to restrict the purported rule severely: "It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war,' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'" *Id.* (citations omitted). Having made that ostensible concession to traditional law of war, the Court then effectively retracted it: the decision whether a seizure was "dictated by the necessary operation of war" was left to the discretion of the field commander. "The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies" *Id.* Finally, as if to quiet any persisting doubt about the legality of the challenged seizure under the law of war, the Court observed that "[t]he rebels regard [cotton, the property subject to the challenged seizure] as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion." *Id.* at 420; *see also* *United States v. Padelford*, 76 U.S. 531, 540 (1869) ("The court [in *Mrs. Alexander's Cotton*] regarded this particular species of property as excepted, by its peculiar character and by circumstances, from the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region.").

By 1870, the Court had become far less equivocal about affirming the legality of the seizure of enemy civilian property, even dispensing, on occasion, with the requirement of military necessity. Even if the law of war was violated (a question on which the Court implied different answers in different opinions), the validity of the seizure was a political question. *See* *Miller v. United States*, 78 U.S. 268, 305 (1870) (holding that "the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor . . . is and always has been an undoubted belligerent right"); *Lamar v. Browne*, 92 U.S. 187, 195 (1875) ("What shall be the subject of capture, as against his enemy, is always within the control of every belligerent. Whatever he orders is a justification to his followers. He must answer in his political capacity for all his violations of the settled usages of civilized warfare.")

91. For example, the 1863 revisions to the United States Army's 1861 regulations included a novel provision stating that "the laws of the United States and the

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ment and subsequent treatment of Atlanta might arguably have been defended as a “military necessity” in the emerging circumstances of “total war.”<sup>92</sup>

2. *The United States Air Campaign Against Japanese Cities*

Second, during the Second World War, American military policy called for indiscriminate area bombing of Japanese targets.<sup>93</sup> For example, on the night of March 9–10, 1945, American pilots dropped 1,667 tons of incendiary bombs on a target consisting of some 15 square miles in a densely populated district of Tokyo, causing a ferocious firestorm that killed more than 85,000 people.<sup>94</sup> For five months thereafter, the United States conducted an unremitting area bombing campaign against (often undefended) Japanese cities. According to the U.S. Strategic Bombing Survey for the Pacific theater, nearly half of the built-up areas of sixty-six Japanese cities was destroyed.<sup>95</sup> The climax of the area bombing campaign was, of course, the destruction of Hiroshima and Nagasaki by atomic weapons. Including the casualties in those two cities, the American air campaign caused 330,000 deaths and 400,000 injuries, principally from burns.<sup>96</sup>

Pre-World War II law of war regarding the aerial bombardment of civilian targets was unsettled. There is some evidence that the practice was condemned under customary international law. In a speech to the House of Commons on June 21, 1938, the British Prime Minister, Neville Chamberlain, stated that “it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.

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*general laws of war* authorize, in certain cases, the seizure and conversion of private property for the subsistence, transportation, and other use of the army.” UNITED STATES WAR DEPARTMENT, REVISED UNITED STATES ARMY REGULATIONS OF 1861, WITH AN APPENDIX CONTAINING THE CHANGES AND LAWS AFFECTING ARMY REGULATIONS AND ARTICLES OF WAR TO JUNE 25, at 512 (1863) (emphasis added).

92. See Waxman, *supra* note 79, at 378–81; see also LIDDELL, *supra* note 73, at 308 (arguing that Sherman’s depopulation of Atlanta was a military necessity). Sherman himself defended his conduct on grounds of military necessity to the Mayor and City Council of Atlanta. See SHERMAN’S CIVIL WAR, *supra* note 78, at 707–09 (Letter of September 12, 1864). We use “military necessity” here in the sense in which it means “the necessity which a belligerent commander claims to justify him in violating the law and usage of nations or the national treaty obligations.” SIR THOMAS BARCLAY, LAW AND USAGE OF WAR: A PRACTICAL HANDBOOK OF THE LAW AND USAGE OF LAND AND NAVAL WARFARE AND PRIZE 79 (1914).

93. See A.C. GRAYLING, AMONG THE DEAD CITIES: THE HISTORY AND MORAL LEGACY OF THE WWII BOMBING OF CIVILIANS IN GERMANY AND JAPAN 76–78 (2006).

94. *Id.* at 77.

95. *Id.*

96. *Id.* at 78.

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In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed."<sup>97</sup> As the war in Europe was about to break out, President Franklin D. Roosevelt, in a radio address of September 1, 1939, called on the European powers not to bomb civilians, asking them "to affirm [a] determination that [their] armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities."<sup>98</sup> Also in existence were the Hague Air Rules of 1923, an unratified treaty substantially codifying these norms.<sup>99</sup>

On the other hand, it would have been reasonable to argue that the aerial bombardment of civilian targets had been left unregulated.<sup>100</sup> The British publicist J.M. Spaight, writing in 1944, contended that at the start of the War, the air weapon

was not regulated. There are rules, internationally agreed, for war on land and sea. There were none for air warfare. An attempt was made, indeed, and rules were drafted by a Commission of Jurists at The Hague in 1922-23, but they were never embodied in a convention. When the war began in 1939, the air arm, alone among the arms of war, went into action without a stitch of regulations to its back.<sup>101</sup>

To his credit, Spaight had taken the same position in his pre-War work, warning unsuccessfully of the imperative need to regulate air warfare.<sup>102</sup>

The legality of using atomic weapons against civilian population centers must also be considered unsettled at the time of the attacks on Hiroshima and Nagasaki. President Truman, who ordered the atomic attacks, considered them to be fully legal.<sup>103</sup> On the other hand, a post-War Japanese court, in a suit

97. *Id.* at 243.

98. *Id.* at 149.

99. See The Hague Air Rules, The Hague, December 1922-February 1923, reprinted in, INTERNATIONAL LAW AND THE USE OF FORCE: DOCUMENTARY SUPPLEMENT 230 (Mary Ellen O'Connell ed., 2005).

100. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* at ¶ 43 (2000) (reviewing Allied bombing practices in Second World War and finding question of their legality at the time to be open), <http://www.un.org/icty/pressreal/nato061300.htm>; Peter R. Faber, Lt. Col., United States Air Force, The Ethical-Legal Dimensions of Strategic Bombing During WWII: An Admonition to Current Ethicists (1996), <http://www.duke.edu/jscope/papfab.htm>.

101. J.M. SPAIGHT, BOMBING VINDICATED 18 (1944).

102. See J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 18-19, 239-41 (1933). British government officials throughout the 1930s had divided opinions about the advisability of a convention to regulate air warfare and became convinced that it would be impossible to attain one. See Uri Bialer, "Humanization" of Air Warfare in British Foreign Policy on the Eve of the Second World War, 13 J. CONTEMP. HIST. 79 (1978).

103. See 1945 PUB. PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN 212-13 (1961); see also Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 178-79 (1995).

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brought by the survivors of the atomic blasts, held that the use of atomic weapons against Hiroshima and Nagasaki violated positive international law at the time.<sup>104</sup> Some later legal writers have agreed with that decision.<sup>105</sup>

Whatever the correct judgment may be about the legality of the United States air war against Japan as a matter of international law, we are aware of no serious argument that these actions—including President Truman's decision to use the atomic bomb—were unconstitutional. Internationally lawful or not, they stand as valid exercises of the commander-in-chief authority.

3. *The U-2 Incident in the Cold War*

Third, during the Cold War, President Eisenhower ordered the covert aerial surveillance of the Soviet Union for intelligence gathering purposes (the U-2 program). The program became public when the Soviets shot down a U-2 spy plane and captured its pilot, Gary Francis Powers. The Soviets argued that an American military plane's invasion of their airspace was illegal and, less plausibly, that it constituted an act of aggression.<sup>106</sup> Eisenhower and his Secretary of State, Christian Herter, defended the program on national security grounds.<sup>107</sup> The legality of such peacetime espionage under international law "remains ambiguous, not specifically permitted or prohibited."<sup>108</sup>

4. *The Cuban "Quarantine"*

Faced with the alarming disclosure that Soviet missiles were being introduced into Communist Cuba, President John Kennedy's Administration grappled with the question of how to

104. *Shimoda v. State*, 355 HANREI JIHO 17 (Tokyo D. Ct., Dec. 7, 1963), available at <http://www.icrc.org/ihl-nat.nsf/0/aa559087dbcflaf5c1256a1c0029f14d?OpenDocument> ("an aerial bombardment with an atomic bomb on both cities of Hiroshima and Nagasaki was an illegal act of hostility as the indiscriminate aerial bombardment on undefended cities . . . Besides, the atomic bombing on both cities . . . is regarded as contrary to the principle of international law that the means which give unnecessary pain in war and inhumane means are prohibited as means of injuring the enemy.").

105. See Richard Falk, *Strategic Deterrence and Nuclear War*, 76 AM. SOC'Y INT'L L. PROC. 23, 24 (1982); Leonard B. Boudin, *War Crimes in Vietnam: The Mote in Whose Eye?*, 84 HARV. L. REV. 1940, 1942 (1971).

106. See Chicago Convention on International Civil Aviation art. 3(c), Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 ("No state aircraft of a contracting party shall fly over the territory of another State . . . without authorization by special agreement or otherwise"); Quincy Wright, *Legal Aspects of the U-2 Incidents*, 54 AM. J. INT'L L. 836, 845–46, 853 (1960).

107. See Commander Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 225 (1999).

108. *Id.* at 223; see also Myers S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 394 (1973) (finding in state practice "a deep but reluctant admission of the lawfulness of such intelligence gathering, when conducted within customary normative limits").

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respond. Although the Cold War had already lasted for well over a decade, the United States was not in a state of war with either the Soviet Union or Cuba. Moreover, although the introduction of the Soviet missiles to a location within close range of the United States' major East Coast cities undoubtedly constituted a grave threat to the nation's security, it could not in itself have reasonably been considered an "armed attack" within the meaning of Article 51 of the United Nations Charter—a condition that was widely understood to be necessary before the right to take lawful armed countermeasures in self-defense was triggered.<sup>109</sup> Hence, a unilateral American naval blockade of Cuba, even though defensively intended, could well be regarded as an unlawful act of aggression, in violation of Article 2(4) of the Charter. The Kennedy Administration was greatly concerned with international law—or to be more accurate, with likely perceptions of that law—when considering whether to institute a naval blockade. To minimize legal objections, it decided to characterize the action as a "quarantine" rather than as a "blockade," and it limited the action in the first instance to interdicting the flow of offensive military equipment into Cuba.<sup>110</sup> Further, instead of obtaining United Nations Security Council authorization for its action (which the Soviet veto obviously made impossible), the Kennedy Administration sought authorization for the use of force from the Organization of American States.<sup>111</sup> While these maneuvers succeeded in altering international perceptions of the American action, they hardly silenced objections made on grounds of international law.<sup>112</sup>

Again, the arguable ambiguity in international law does nothing to cloud the President's *constitutional* authority to act as Kennedy did. That President Kennedy had the constitutional authority to order the "quarantine" of Cuba is, we think, incon-

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109. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 258-61 (1963). In the event, the State Department advised, and the Kennedy Administration agreed, not to defend the naval intervention as an act of self-defense. See ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 65 (1974); see also Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 515 (1991) ("Although President Kennedy spoke of the United States action as one of self-defense, his State Department, in presenting the case to the Security Council, the OAS, and the public, sought to justify the American use of force in Cuba primarily under the Rio Treaty and the action of the Organization of American States pursuant to that Treaty. This argument is untenable . . . . The only possible legal basis for the action taken by the United States in the Cuban missile crisis was therefore its 'inherent' right of self-defense, reaffirmed by Article 51 of the Charter.").

110. See LAWRENCE FREEDMAN, *KENNEDY'S WARS: BERLIN, CUBA, LAOS, AND VIETNAM* 183, 187-88, 191 (2000).

111. See *id.* at 203. See generally High Seas: Freedom of the Seas, 1965 DIGEST § 2, at 523-24.

112. See Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 553-65 (1963) (arguing quarantine was unlawful). But see Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963) (defending legality of quarantine as self-defense).

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testable, whatever the legality of that action under international law.

We hope to have shown by these four cases that the key factors we identified earlier—the understandable reluctance of Presidents to admit that they are breaching the law of war, and the unsettled, and sometimes incomplete, character of the law of war itself—complicate the analysis of historical practice. Other scholars reviewing the very same four incidents might claim, with more or less reason, that *none* of the incidents strictly shows that the President has the constitutional authority to act in contravention of the laws of war. Nonetheless, in each of these cases, we believe that the measures or policies ordered or sanctioned by the President were inconsistent with international law at the time. In order to escape the force of the examples, critics of the claim that the President has the constitutional power to violate international law seem compelled to retreat to the position that in cases of doubt, the President's determination that a particular measure was consistent with international law should be accepted.

Furthermore, it is by no means difficult to find other and clearer examples of presidentially-ordered or -authorized violations of the law of war based on the President's constitutional authorities.<sup>113</sup> These include violations both of *jus ad bellum* (rules regulating the decision to wage war) and of *jus in bello* (rules regulating the conduct of hostilities).

### III. PRESIDENTIAL VIOLATIONS OF *JUS AD BELLUM*

The Kosovo Air War launched by NATO against Serbia in 1999 provides, we think, the clearest recent case of a violation of contemporary *jus ad bellum* based on the President's claim of constitutional authority.<sup>114</sup> Article 2(4) of the United Na-

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113. Although we would not necessarily agree with his evaluations, Louis Henkin considers the United States' 1983 invasion of Grenada, its 1986 bombardment of Libya, and its support of the Nicaraguan *contras*, to have been violations of international law respecting the use of force. He also questions the legality of its activities in supporting the invasion at the Bay of Pigs (1961), in sending troops to the Dominican Republic (1965), in purportedly bringing down governments in Guatemala (1957) and Chile (1973), and in intervening in Vietnam. See Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 53–54 (Louis Henkin et al., eds. 1989); see also Louis Henkin, *International Law as Law in the United States*, 82 *MICH. L. REV.* 1555, 1567 (1984) (“[F]rom Vietnam to Grenada, and in Cuba, the Dominican Republic, El Salvador, and Nicaragua, there have been charges—including some that are plausible, some compelling—that the United States was acting in violation of International law.”). If Henkin is right, he has furnished a truly formidable list of cases in which Presidents in several administrations over the course of half a century have subordinated international law respecting the use of force to their conceptions of the nation's security needs.

114. We note that the constitutional defense of this violation is considerably less powerful than it would be in other cases, insofar as President Clinton's decision to wage war in Kosovo was not based on any plausible threat to the national security of the United States. The nexus to national security concerns is more substantial, however, if the United States' true purpose in leading the Kosovo intervention

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tions Charter unequivocally prohibits the use or the threat of force in international relations. The ICJ, in its 1986 *Nicaragua* “merits” decision, affirmed that this prohibition also forms part of customary international law, and indeed characterized it as “having the character of jus cogens.”<sup>115</sup> Only two exceptions from this uncompromising legal norm are recognized in the Charter: self-defense in response to an armed attack (Art. 51) and military action taken or authorized by the Security Council pursuant to its powers under Chapter VII of the Charter (Arts. 39-41).<sup>116</sup> NATO’s Air War against Serbia did not come within either of those two exceptions: “it failed to obtain the authorization of the Security Council” and “the circumstances would not sustain claims of self-defense.”<sup>117</sup> It follows directly that it was in breach of the Charter.<sup>118</sup>

True, some legal scholars have sought to defend the legality of the NATO Air War, usually on the ground that a novel customary international law norm permitting “humanitarian intervention” is in the process of supplanting the Charter’s restric-

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was to demonstrate the continuing relevance of NATO in the post-Cold War world, and if NATO can now rightly be seen “mainly as a means of maintaining and lengthening America’s grip on the foreign and military policies of European states.” Kenneth N. Waltz, *Structural Realism after the Cold War*, 25 INT’L SEC. 5, 20 (2000).

115. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99–100 (June 27).

116. “The UN Charter’s primary purpose was to save succeeding generations from the scourge of war by maintaining international peace and security. Apart from a limited right of self-defense against armed intervention, the one exception to the ban on military force, outlined in Chapter VII of the Charter, is explicitly for the purpose of countering a threat to international peace and security, under UN Security Council authorisation. The status of the UN Charter clearly places peace as central to the UN system.” DAVID CHANDLER, *FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* 160 (2nd ed. 2006) (quotation marks and citations omitted). Accordingly, under the Charter scheme, “[n]either human rights, democracy [n]or self-determination are acceptable grounds for waging war.” SCHACHTER, *supra* note 71, at 128. *See also* LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 113 (1995) (observing that the UN Charter “declares peace as the supreme value, to secure not merely state autonomy, but fundamental order for all. It declares peace to be more compelling even than human rights or other human values.”).

117. Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL’Y 877, 881 (2004). Many other scholars concur that NATO’s campaign was an unlawful breach of the Charter. *See, e.g.*, JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 156–61 (2004); MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 25–28 (2001); John C. Yoo, *Using Force*, 71 U. CHI. L. REV. 729 n.22, 736, 797 (2004); Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT’L L. 19, 36 (2000); Mary Ellen O’Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 80–83 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 1 (1999); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 23 (1999); Jonathan Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT’L L. 1231, 1232 (1999).

118. *See, e.g.*, John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1725–29 (2000).

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tions.<sup>119</sup> Apart from other substantial flaws,<sup>120</sup> this argument suffers from the debilitating difficulty that the United States, the central actor in NATO's Kosovo campaign, steadfastly refused to defend the intervention on that basis.<sup>121</sup> Indeed, even after Serbia sought to sue NATO's members in the International Court of Justice over the legality of NATO's bombing,<sup>122</sup> "the respondent states were reluctant to offer a legal justification of the bombing. Rather, the focus of the responses has been on challenging the jurisdiction of the Court."<sup>123</sup> Thus, even assuming (controversially) that a customary norm could supplant the Charter's explicit provisions on the use of force,<sup>124</sup> a necessary element in the formation of such custom—the requirement of *opinio juris*, or a sense that the practice at issue conforms to a "legal obligation"<sup>125</sup>—is lacking.

IV. PRESIDENTIAL VIOLATIONS OF *JUS IN BELLO*

Presidents have also authorized violations of *jus in bello*. Here we may reference the United States' decision, taken within hours of the Japanese attack on Pearl Harbor, to disregard the London Protocol of 1936<sup>126</sup> and to engage in unrestricted submarine warfare throughout the Pacific Ocean.<sup>127</sup>

119. Ironically, proponents of a legal doctrine of "humanitarian intervention" seem generally unreceptive to the argument that the United States-led intervention in Iraq in 2003 could be defended on that basis, despite the force of that defense. See Eric A. Heinze, *Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice*, PARAMETERS (U.S. ARMY WAR COLLEGE Q.) Spring 2006, at 20 (2006), available at <http://www.carlisle.army.mil/usawc/Parameters/06spring/heinze.html>.

120. For analysis of some of these difficulties, see Michael Byers & Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177, 181–84 (J.L. Holzgrefe & Robert O. Keohane eds., 2003). See generally Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1694–95 (2003).

121. See Dinstein, *supra* note 117, at 881; see also SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 210–13 (2001). To be precise, the United States "has never expressly endorsed a right of humanitarian intervention under the UN Charter, although various US officials have from time to time cited humanitarian concerns as a *policy* justification for the use of force." MURPHY, *supra* note 117, at 152.

122. *Legality of Use of Force (Serb. & Mont. v. Belg.)*, 2004 I.C.J. (Dec. 15), available at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>.

123. MURPHY, *supra* note 117, at 159.

124. "Charter law may very well not be subject to change by new general international law. By [the] terms [of Article 103] the UN Charter overrides all inconsistent treaties, regardless of the date of their entry into force. One would expect the same rule to apply to developments in general international law, especially since treaties supersede all but *jus cogens* norms." Charney, *supra* note 3, at 1239–40.

125. See *North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.)*, 1969 I.C.J. 3, 44; see also MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 92–93 (2005).

126. Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, 173 L.N.T.S. 353, entered into force Nov. 6, 1936. See Bryan Ranft, *Restraints on War at Sea Before 1945*, in RESTRAINTS

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The legality of this kind of warfare was at issue in the post-War Nuremberg Trial of German Admiral Karl Doenitz. Doenitz' counsel raised a "tu quoque" defense, introducing into evidence a set of answers to interrogatories directed to U.S. Admiral Chester Nimitz. In his answers, Admiral Nimitz admitted the existence of the U.S. Navy's policy of unrestricted submarine warfare against Japan. As one of the leading U.S. prosecutors at Nuremberg acknowledged, once this evidence came in, "it was as clear as clear could be that if Doenitz . . . deserved to hang for sinking ships without warning, so did Nimitz."<sup>128</sup>

## V. OTHER RECENT CASES OF PRESIDENTIAL REFUSAL TO COMPLY WITH INTERNATIONAL LAW

Two final instances of Presidential decisions to disregard international law regarding the use of force are provided by the United States' firm refusal to acquiesce in the adverse rulings of the ICJ in the *Oil Platforms Case*<sup>129</sup> (to which the United States was a party) and the *Nicaragua Case*<sup>130</sup> (in which the United States had disavowed the ICJ's compulsory jurisdiction).

*Oil Platforms* arose out of two military actions by the United States in what was called the "Tanker War," which formed part of the Iran-Iraq War of 1980–88. During that war, both Iran and Iraq attacked neutral military and commercial shipping in the Persian Gulf. Kuwait, a small and neutral Gulf nation, sought protection from the United States and other neu-

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ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT 39, 53–54 (Michael Howard ed., 1979).

127. See THOMAS PARRISH, *THE SUBMARINE: A HISTORY* 319, 320 (2004) (recounting that Chief of Naval Operations Admiral Harold R. Stark's headquarters issued an order saying "Execute Unrestricted Air and Submarine Warfare Against Japan," with the result that "[t]he London Submarine Agreement . . . ceased to exist, except perhaps for the Japanese"); Richard Dean Burns, *Regulating Submarine Warfare, 1921–1941: A Case Study in Arms Control and Limited War*, 35 MIL. AFF. 56, 60 (1971) ("For the United States, the decision to toss overboard 'treaty and doctrine' came on the first day of the war . . . [O]nly hours after the attack on Pearl Harbor, the Chief of Naval Operations ordered his remaining units to 'execute unrestricted submarine and air warfare against Japan' and, at the same time, classified the entire Pacific Ocean as an operation area."). Although there is no documentation demonstrating civilian or political involvement in that day's decision, we think that in view of its significance, scope, duration, and endorsement by the highest commanders in the U.S. Navy, it can reasonably be described and defended as an exercise of Presidential authority.

128. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 409 (1992). See generally Sienho Yee, *The Tu Quoque Argument as a Defense to International Crimes, Prosecution, or Punishment*, 3 CHINESE J. INT'L L. 87, 104–10 (2004) (providing account of events of Doenitz's trial).

129. *Oil Platforms (Iran v. U. S.)*, 2003 I.C.J. (Nov. 6), available at <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>.

130. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26).

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trals for its shipping. The United States agreed to re-flag several Kuwaiti vessels under its own flag, and to provide U.S.-flagged vessels in the Gulf with naval escorts. This, however, did not stop the attacks. In October 1987, a Kuwaiti oil tanker flying the U.S. flag was hit in Kuwaiti waters by a missile, causing deaths and damages. The United States determined that Iran was responsible for the missile attack and, after giving the facilities notice and their personnel time to evacuate, attacked two Iranian oil platforms that it had found were being used for offensive military purposes. In a later incident in April 1988, a U.S. naval vessel was struck by a mine in international waters near Bahrein, again causing deaths and damages. The United States concluded that Iran was responsible for the mine attack. On this occasion, again after giving notice and time to evacuate, the United States struck two Iranian oil platforms. The United States cited self-defense in both instances.

Iran sued the United States in the ICJ, which reviewed and rejected the United States' claim of self-defense. As the United States State Department Legal Adviser read the ICJ's opinion, however, it implied several unfounded and erroneous propositions of international law, including the view that "an attack involving the use of deadly force by a State's regular armed forces on civilian or military targets is not an 'armed attack' [within the meaning of U.N. Charter art. 51] triggering the right of self-defense unless the attack reaches some unspecified level of gravity."<sup>131</sup> The Legal Adviser sharply criticized this view, arguing that it was "inconsistent with well-settled principles of international law," that it would "make the use of force more rather than less likely, because it would encourage States to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses," and that it had "no support in international law or practice."<sup>132</sup> Speaking for the government, the Legal Adviser stated that "[f]or its part, if the United States is attacked with deadly force by the military personnel of another State, it reserves its inherent right preserved by the U.N. Charter to defend itself and its citizens."<sup>133</sup>

The Legal Adviser's position would be untenable as a matter of domestic law unless the President had the constitutional authority to reject the ICJ's (assumedly definitive) interpretation of international law regarding the use of force. We believe

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131. William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 299 (2004).

132. *Id.* at 300-02.

133. *Id.* at 302. The Legal Adviser's position here was completely consistent with prior views of the United States government. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 (2000) ("The United States has officially rejected the prohibition of reprisals on the theory that taking such measures, or at least threatening them, continues to be necessary to deter violations of international humanitarian law, especially against POWs and civilians.").

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that the President was well within his constitutional rights, however, in refusing to accede to the ICJ's interpretation.<sup>134</sup>

Even before *Oil Platforms*, the United States had emphatically rejected the ICJ's understanding of the law of war in the *Nicaragua Case*. This was an action brought by Nicaragua charging violations of customary and treaty law by the United States in its military and paramilitary activities against Nicaragua. The alleged violations included attacks on Nicaraguan facilities and naval vessels, the mining of Nicaraguan ports, the invasion of Nicaraguan air space, and the training, arming, equipping, financing and supplying of forces (the "Contras") seeking to overthrow Nicaragua's Sandinista government. Importantly, that case had two phases: "jurisdictional" and "merits." After the Court concluded (by rather strained reasoning) that the United States, despite its objections, was subject to the Court's jurisdiction,<sup>135</sup> the United States announced that it had "decided not to participate in further proceedings in this case."<sup>136</sup> Accordingly, the United States made no appearance before the ICJ in the "merits" phase of the case. About a year after the Court's jurisdictional decision, moreover, the United States took the further, radical step of withdrawing its consent to the Court's compulsory jurisdiction.<sup>137</sup> In remarks to the Senate Foreign Relations Committee, the State Department's Legal Adviser, Judge Abraham Sofaer, explained and defended the

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134. We agree with the Legal Adviser's criticisms of *Oil Platforms*' failings as a statement of the rules of international law. In *Oil Platforms*, the ICJ was attempting to extend one of its rulings in the *Nicaragua Case* which, as Michael Reisman noted, had "purported to limit the right of self-defense . . . to an armed attack of significant scale, thereby prohibiting unilateral acts of self-defense in response to what has come to be called 'low-level warfare.' . . . [T]he Court set the legal bar for the initiation of actions in self-defense at a rather high notch and, in effect, asked targeted populations simply to endure the consequences of low-level protracted conflict." W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 83, 89 (2003). See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (June 27). We see no reason whatsoever to think that the Article 51 right of self-defense embodies any such restriction, and we consider the ICJ's position as more of a (misguided) policy preference than as a construction of the law. For further criticisms of the merits of this aspect of the ICJ's *Nicaragua* decision, see John L. Hargrave, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 (1987).

135. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 392 (Nov. 26).

136. United States: Statement on US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 INT'L LEGAL MATERIALS 246 (1985).

137. See United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, Oct. 7, 1985, reprinted in 24 INT'L LEGAL MATERIALS 1742 (1985). The United States is not the only nation to have withdrawn its declaration of consent to the ICJ's compulsory jurisdiction. France did the same in response to ICJ decisions in the 1970s in cases challenging the legality of French nuclear testing in the Pacific. See 1974 U.N.T.S. 129; *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, 28 I.C.J. Yearbook 1973-1974, at 49; Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57, 65 & n. 51 (1987).

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United States' withdrawal of consent.<sup>138</sup> Judge Sofaer asserted that the President had the power to withdraw from the Court's compulsory jurisdiction because "the Constitution allows the President unilaterally to terminate treaties consistent with their terms; and his authority is even clearer with respect to lesser instruments," such as the United States' 1946 declaration accepting the Court's compulsory jurisdiction.<sup>139</sup> Judge Sofaer also laid significant emphasis on the fact that the Court had asserted jurisdiction in a case involving the *ongoing* use of force. This fact, he contended,

made acceptance of the Court's compulsory jurisdiction an issue of strategic significance . . . . For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense . . . is effectively to surrender to that body the power to pass on our efforts to guarantee the safety and security of this nation and of its allies.<sup>140</sup>

The ICJ ultimately ruled on the merits of the *Nicaragua Case* in 1986, deciding (over dissents from the American, British and Japanese judges) that the United States had violated its obligations under customary international law not to use force against another State or to intervene in its affairs.<sup>141</sup> The ICJ further rejected the argument that the United States' military and paramilitary activities were justifiable acts of collective self-defense undertaken in conjunction with the government of El Salvador.<sup>142</sup>

The United States (through both the President and Congress) again pointedly rebuffed the ICJ. The United States government "announced that it would not abide by the judgment, vetoed subsequent proposed Security Council resolutions seeking to enforce the judgment, and appropriated additional funds for the actions in question it had taken against Nicaragua."<sup>143</sup>

As with the Executive's reaction to the *Oil Platforms Case*, there can be no domestic legal basis for the Executive's various responses to *The Nicaragua Case* unless the President has the constitutional authority to supersede a purportedly definitive interpretation of the law of war.

Finally, a word of caution. Although we contend that the President has no constitutional obligation to follow customary international law *per se*, we should not be understood as saying

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138. See Statement of Abraham D. Sofaer, Legal Adviser of State Department, to Senate Foreign Relations Committee, Dec. 4, 1985, 86 STATE DEPT BULL. 67 (1986).

139. *Id.* at 68. Judge Sofaer further argued that the United States' 1946 declaration, 1 U.N.T.S. 9, was in any case not a treaty. *Id.*

140. *Id.* at 70.

141. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 14 (June 27).

142. *Id.* at 118–19, 121–22, 146.

143. MURPHY, *supra* note 117, at 263.

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that whenever the President claims to be acting on his commander-in-chief or other constitutional powers, he may disregard the laws of war. For one thing, the measure that the President orders must truly be within the scope of his constitutional authority: however broad the limits of the commander-in-chief power may be, there are *some* limits to it (even if those limits are not defined by international law). Moreover, insofar as Congress may have incorporated the laws of war into domestic law, the President would be bound to observe them, unless the relevant statutes were unconstitutional as applied in that situation. Thus, to take an obvious example, if a President ordered U.S. military forces to massacre hundreds of prisoners of war in their hands for reasons wholly unrelated to national security, that order would plainly be invalid, and indeed criminal. As we see it, however, the dangers of absolutism are not on the side of those *defending* the claim that the President may constitutionally countermand the law of war, but on the side of those *attacking* that claim. To say that the President may *never* deviate from the international law of war is to argue not only against constitutional text and structure, but also against the overwhelming weight of constitutional history and practice.

## CONCLUSION

Critics of the Bush administration's conduct of the war on terrorism and the wars in Afghanistan and Iraq have made the claim that the President cannot order conduct that is inconsistent with international law. Not only is the argument undertheorized, it runs counter to the best reading of the constitutional text, structure, and the history of American practice. A careful examination of the constitutional text, for example, shows that international law that does not take the form of a treaty or other authoritative adoption by the political branches will not enjoy supremacy effect. If international law cannot claim the status of federal law, like the Constitution, statutes, or treaties, it has no binding effect on the President through the Take Care Clause. Allowing international law to limit the President's exercise of his constitutional powers also runs counter to the constitutional structure, primarily by undermining the traditional understanding of the allocation of the foreign affairs power between the President and Congress. Raising customary international law to the status of law binding on the President would transfer lawmaking authority to a vague, indeterminate process that is not subject to popular sovereignty.

Examining important moments in American military and diplomatic history illustrates the precedence of the President's constitutional authority over international law. The Civil War, the World War II bombings of Japan, the Cuban Missile Crisis, and the Kosovo War, for example, show that even if American wartime conduct may have been inconsistent with, or at least stretched international law, no one has plausibly argued that these presidential decisions violated the Constitution. Indeed,

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these moments suggest the serious harm to American national security which might result if we were to read the Constitution to impose international law as a constraint on legitimate exercises of the President's Chief Executive and Commander-in-Chief powers. The better reading of the Constitution is that it gives the political branches the discretion to make decisions which protect vital American national security and foreign policy interests, and that compliance with international law is one, but only one, policy consideration to be taken into account by Presidents constitutionally charged with safeguarding the nation.