PRESIDENTIAL POWER AND INTERNATIONAL LAW IN A TIME OF TERROR

*Robert J. Delahunty**

I. INTRODUCTION

The "War on Terror" is not like other wars. It can be argued that the War on Terror is not a *single* global conflict,[1] but instead subsumes at least three different kinds of conflicts, some of which overlap:[2] first, an armed conflict of an international character, pitting the United States and some of its allies, against a transnational terrorist organization—al Qaeda and its affiliates;[3] second, armed conflicts of a purely

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* Associate Professor, University of St. Thomas School of Law. The author wishes to thank the organizers of the symposium at the Regent School of Law for their kindness and hospitality. The author also wishes to thank Professors John O. McGinnis, Mark Movsesian, Antonio F. Perez and John C. Yoo for their illuminating comments.

[1] *See* FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 161 (2005). "Since September 11 a tendency has existed among Western commentators to lump all jihadis together in one category and to overlook important subtleties, nuances, and differences among them. Al Qaeda represents just one violent current in a diverse and complex movement." *Id.* For example, the Iraqi insurgency is highly fragmented, and appears to include over 100 distinct groups, of which only about 59 are claimed by al Qaeda. *See* Dexter Filkins, *Loose Structure of Rebels Helps Them Survive in Iraq: While Al Qaeda Gains Attention, Many Small Groups Attack on Their Own,* NY TIMES, Dec. 2, 2005 at A1.

[2] In a similar three-fold distinction, President Bush pointed out that (1) "[m]any militants are part of a global, borderless terrorist organization like Al Qaida," (2) "[o]ther militants are found in regional groups, often associated with Al Qaida, paramilitary insurgencies and separatist movements in places like Somalia, the Philippines, Pakistan, Chechnya, Kashmir and Algeria," and (3) "[s]till others spring up in local cells, inspired by Islamic radicalism, but not centrally directed." *See* Remarks on the War on Terror in Tobyhanna, Pennsylvania, 41 WEEKLY COMP. PRES. DOC. 1705 (Nov. 11, 2005). The President's classifications go to different kinds of *groups.* The classifications I outline go to different kinds of *conflicts*—some international, some national, some neither. Legal differences in the rights of participants in these conflicts may hinge on the nature of the conflict involved.

[3] Such affiliates appear to include a coalition of jihadists operating in Iraq under the leadership of Abu Musab al-Zarqawi, drawn from such groups as Ansar al-Islam, Jaish Ansar al-Sunnah, and al-Tawhid wa al-Jihad, and operating under the

national character, such as the conflict in the Philippines between government and the Abu Sayyaf Group;[4] and third, a set of conflicts essentially of a local, criminal nature, involving small cells of individuals who are not associated with al Qaeda, but who adopt its ideology and techniques, such as the group responsible for the Madrid bombings.[5]

Each of these forms of conflict has involved, or may yet involve, violence and lethality at levels commensurable with those of undoubted *wars* of the past. Al-Qaeda's attacks of September 11 came close to decapitating the government of the United States, and were surely intended to do so. The threat that al Qaeda posed, and may continue to pose, to the existence of the United States is surely greater

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name al Qaeda in the Land of the Two Rivers. Zarqawi has declared his allegiance to Osama bin Laden, and bin Laden in turn has endorsed Zarqawi as his deputy in Iraq and has appointed him al Qaeda's "emir" in Iraq. *See* GERGES, *supra* note 1, 252, 257-58; *see also* Jean-Charles Brisard & Damien Martinez, *Zarqawi: The New Face of Al-Qaeda* 145-51 (2004). Zarqawi may, however, be seeking to displace Osama bin Laden as leader of al Qaeda. His network reportedly extends to 40 countries from Britain to Afghanistan, and has links to 24 militant groups worldwide; he reportedly controls some 3,000 fighters in Iraq alone. *See* Richard Beeston, *Bin Laden's Ruthless Rival Spreads Tentacles of Jihad Across Region, Iraq,* THE TIMES (U.K.), Nov. 18, 2005, at 44, *available at* WLNR 18639817.

[4] *See* HERFRIED MÜNKLER, THE NEW WARS 10-16 (Patrick Camiller trans. Polity Press 2005) (2002) (discussing the difference between intra-state conflicts that are national and international); *see also* Abu Sayyaf Group (ASG), http://fas.org/irp/world/para/asg.htm (last visited Feb. 24, 2006). Perhaps an even more precise categorization would distinguish here between intra-state conflicts that are primarily irredentist in character, like those in Palestine, Kashmir or Mindinao, and those that pit national jihadist groups against a local Muslim government, as in Egypt or Algeria.

[5] *See* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PUBL'N NO. 11248, COUNTRY REPORTS ON TERRORISM 2004, at 4 (2005) (Madrid bombing in March 2004, may herald "a new phase in the global war on terrorism, one in which local groups inspired by al-Qa'ida organize and carry out attacks with little or no support or direction from al-Qa'ida itself."); DANIEL BENJAMIN & STEVEN SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT 5-16 (2005) (discussing responsibility for Madrid bombings); *see also* GERGES, *supra* note 1, at 217-18:

> The vacuum created by the dismantling of Al Qaeda's command and control structure is being filled by small semiautonomous local affiliates and factions, which . . . are inspired by Al Qaeda and carry out attacks using its ideological label . . . . The 2004 and 2005 bombings in Madrid and London are cases in point.

Id.

than that posed by most, if not all, of the world's armies.[6] Moreover, in the United Nations Security Council's response to the 9/11 attacks, the international community appeared to join the United States in concluding that an "armed attack" within the meaning of Article 51 of the United Nations Charter had occurred, thereby authorizing the United States to act in self-defense.[7] Likewise, the North Atlantic Council, in

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[6] The United States' global military ascendancy, measured in conventional terms, is unassailable. *See* Stephen M. Walt, *Taming American Power: The Global Response to U.S. Primacy* 33-34 (2005). "America's . . . military lead is simply overwhelming . . . . U.S. defense expenditures in 2003 were nearly 40 percent of the global total and almost seven times larger than that of the number-two power (China)." *Id.* "The United States is unchallenged in several realms of military action, including the military use of outer space, air operations above 15,000 feet in altitude, armored engagements at ranges beyond one or two kilometers, and 'blue water' naval battles." *Id.* at 134. *See also* MÜNKLER, *supra* note 4, at 25. "No state on earth, not even a coalition of states, can today challenge the United States on a military level." *Id.*

Yet despite its overwhelming military assets, the United States is highly vulnerable to asymmetric warfare. To put things simply, in face of the asymmetric threat posed by mass terrorism, the largest U.S. Navy air craft carrier, if stationed in New York harbor, would be utterly useless either offensively or defensively in a terrorist attack on that city, except conceivably as a hospital ship. In the face of the asymmetric threat posed by terrorism, "the fielding of vast tank armies and fleets of airplanes is as clumsy as a bear trying to fend off bees." PHILIP BOBBITT, THE SHIELD OF ACHILLES 219 (2002).

[7] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Resolution 1368 recognized in its preamble "the inherent right of individual or collective self-defence in accordance with the [United Nations] Charter" and the resolution regarded the attacks of September 11, "like any act of international terrorism, as a threat to international peace and security." *See also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 165 (2d ed. 2004) (noting that "the Security Council does not commonly make any express reference to the right of self-defence in its resolutions," and more generally observing that "it seems from the international response to 9/11 that there could, under certain conditions, be a right of self-defence against non-state actors for terrorist attacks"); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq,* 4 SAN DIEGO INT'L L.J. 7, 17 (2003)

> The international reaction to the events of September 11, 2001 confirms the commonsense view that the concept of armed attack is not limited to State acts. The U.N. Security Council, in its resolutions 1368 and 1373 (2001), adopted in the immediate aftermath of the attacks, expressly recognized the right of self-defense in terms that could only mean it considered that terrorist attacks constituted armed attacks for the purposes of Article 51 of the Charter, since it was already likely, when these resolutions were adopted, that the attacks were the work of a terrorist organization rather than a state.

Id.

an unprecedented move, invoked Article 5 of the NATO Treaty in its statement on September 12, 2001, affirming that

> if it is determined that this attack [of September 11] was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the [NATO] Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.[8]

Taking account of the ongoing conflicts with al Qaeda forces in Iraq and Afghanistan, the Bush Administration continues to maintain, in its 2006 *National Security Strategy,* that "America is at war."[9]

Although the war between the United States and al Qaeda is an "armed conflict . . . of an international character,"[10] the conflict differs

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But see Antonio Cassesse, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 996 (2001). Some scholars expressed doubt as to whether this language in fact implied that the United States had been subjected to an "armed attack" within the meaning of Article 51 of the Charter. "This resolution is *ambiguous and contradictory* . . . . [I]t recognizes the right of individual and collective self-defence; however, . . . it defines the terrorist acts of 11 September as a 'threat to the peace', hence not as an 'armed attack' legitimizing self-defence under Article 51 of the UN Charter." *Id.* Further, because it was unprecedented for an attack by a non-State actor to have been viewed as an "armed attack" within the meaning of Article 51, it was also argued that Resolution 1368 was a new (or much broadened) conception of self-defense, rather than merely continuing the existing right. *See id.* at 997; *see also* Olivier Corten & François Dubuisson, *Operation "Liberté Immuable"; Une Extension Abusive du Concept de Légitime Défense*, 106 REVUE GENERAL DE DROIT INTERNATIONALE PUBLIC 51 (2002). Moreover, the International Court of Justice subsequently rejected Israel's claim that the construction of a barrier in occupied territory was a valid measure of self-defense against terrorist attacks under Article 51, stating that Article 51 "recognizes the existence of an inherent right of self-defence in the case of an armed attack *by one State against another State.*" *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J ¶ 139 (emphasis added).

[8] Press Release, Statement by the North Atlantic Council on Collective Defense (Sept. 12,2001), *available at* http://usinfo.state.gov/is/international_security/terrorism/sept_11/sept_11archive/statement_by_north.com.

[9] WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (March 2006), *available at* http://www.whitehouse.gov/nsc/nss/2006.

[10] *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3; *see also* Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be or Not To Be, That is the Question": Contemporary Military Operations and The Status of Captured Personnel*, Department of the Army Pamphlet 27-

in important ways from traditional wars. All of these distinguishing features appear to flow from the growing asymmetry of warfare that has marked the post-World War II period.[11]

To begin with, the war with al Qaeda has no definable battlefield or theater of operations: al Qaeda linked attacks on the United States, its allies and their nationals have taken place in New York, northern Virginia, Iraq, Kenya, Saudi Arabia, and most recently Jordan.[12] In this respect, the war against al Qaeda exhibits the characteristics of what Professor Herfried Münkler has called "The New Wars."[13] Fur-

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50-319, 1999-JUN ARMY LAW. 1, 4-6 (explaining the Convention's use of the term "armed conflict").

[11] *See* MÜNKLER, *supra* note 4, at 28.

> The history of war since the middle of the twentieth century may . . . be seen in terms of a rising trend in the asymmetrical pursuit of conflicts. The emergence of global political asymmetries, due to the impossibility of matching the economic, technological, military and culture-industry superiority of the United States, goes together with the asymmetrization of war through the moving of battle zones, the redefinition of combat methods and the mobilization of new resources . . . . In the process, terrorism has gone more and more on the offensive and gradually spread out from its original birthplaces to acquire a global reach. This offensive capacity has grown to the extent that terrorists have managed to increase the asymmetries in the perception and pursuit of conflicts. The latest stage in this change came on 9/11, with the conversion of civilian passenger aircraft into flying bombs and of office skyscrapers into battlefields.

Id.

The Israeli scholar Martin van Creveld captured the emerging significance of asymmetrical warfare in his 1991 study, *On Future War* (1991). With remarkable foresight, van Creveld wrote that

> much present-day military power is simply irrelevant as an instrument for extending or defending political interests over most of the globe; by this criterion, indeed, it scarcely amounts to "military power" at all. When it comes to preventing acts of terrorism closer to home, the military services and their arms – fighter bombs, tanks, armored personnel carriers, etc. – are even less useful. All this is true of developed countries in both West and East, and also on either side of the equator . . . . In the future, war will not be waged by armies but by groups whom we today call terrorists, guerillas, bandits, and robbers, but who will undoubtedly hit on more formal titles to describe themselves. Their organizations are likely to be constructed on charismatic lines rather than institutional ones, and to be motivated less by "professionalism" than by fanatical, ideologically-based, loyalties.

MARTIN VAN CREVELD, ON FUTURE WAR 27, 197.

[12] *See* Timeline: Al-Qaeda, http://news.bbc.co.uk/1/hi/world/3618762.stm (last visited Feb. 17, 2006); *see also* Hassan M. Fattah & Michael Slackman, *3 Hotels Bombed in Jordan*, N.Y. TIMES, Nov. 10, 2005, at A1.

[13] *See* MÜNKLER, *supra* note 4, at 12.

ther, this war, like other *new wars*, has no clearly definable beginning or end.[14] Moreover, the United States' highly developed economy does not bring the substantial advantages in this war that it did in the great wars of the twentieth century; rather, our reliance on densely interwoven information and communication technologies and our dependence on the easy cross-border movement of goods and persons create innumerable vulnerabilities for the enemy to exploit.[15] By contrast, al-Qaeda does not need either large numbers of recruits or costly, sophisticated weaponry in order to fight its war.[16] Although al-Qaeda

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> The course [of new wars] is determined by the dispersion, not the concentration, of forces in space and time, usually in accordance with the principles of guerrilla warfare. The distinction between front, rear and homeland breaks down, so that fighting is not restricted to a small sector but may flare up anywhere. A potentially decisive confrontation with the enemy is avoided at all costs, either because of a perceived unevenness of forces or because one's own troops are not suited to such warfare.

Id.

[14] *See id.* at 13. "[T]he new wars have neither an identifiable beginning nor a clearly definable end. Only very rarely is it possible to set a date on the cessation of violence, or on its flaring up again."

[15] *See id.* at 108. (Noting the more complex the civilian infrastructure "of the country under attack" the easier it is to use "for terrorist objectives"). "The possibilities range from the posting of parcel bombs or anthrax letters, . . . to attacks with computer viruses and other types of intervention in the enemy's systems of information and regulation." *See also* Stephen Flynn, *The Neglected Home Front*, 83 FOREIGN AFFAIRS 20 (Sept./Oct. 2004) (analyzing some of the United States' main vulnerabilities).

[16] *See* MÜNKLER, *supra* note 4, at 109.

> Terrorism requires "only a minimum of funds . . . to create a logistical base, to develop and deploy weapons, and to train and supply guerrilla fighters . . . . This makes the adoption of terrorism and the launching of a terrorist campaign so easy and attractive in comparison with a guerrilla campaign, not to speak of a conventional war."

Id.

According to the 9/11 Commission Report, al Qaeda's pre-September 11 annual operating budget amounted to only $30 million, of which $10-$20 million was paid to Taliban in return for safe haven. *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 171 (2004). The cost of al Qaeda's September 11 attack was only "somewhere between $400,000 and $500,000." *Id.* at 169. The Commission noted that the attack "was carried out by a small group of people, not enough to man a full platoon. Measured on a governmental scale, the resources behind it were trivial." *Id.* at 339-40. In a broadcast to the world shortly before the U.S. Presidential election of 2004, Osama bin Laden boasted that al Qaeda "spent US $500,000 on the Sept[.] 11 attacks, while America, in the incident and its aftermath, lost – according to the lowest estimate – more than US $500 billion." Janadas Devan, *Ends and Means of Jihad, According to Osama; What Do His Strategy and Tactics Tell Us About Where We*

appears to have been badly damaged,[17] as is typical of the *new wars*, the United States' war with al Qaeda may yet prove to be protracted.[18]

Further, the strategic war aims of al Qaeda and other terrorist groups that may, or may not, be linked to it are by no means easy to fathom, leaving it correspondingly hard to see what conditions could lead to the restoration of peace.[19] Indeed, it is open to question whether al Qaeda has intelligible war aims at all, or is instead driven by an irrationally murderous, apocalyptic vision.[20] It may be useful to remember that Osama bin Laden has said that death "is truth and ultimate destiny, and life will end anyway. If I don't fight you, then my

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Are in the War on Terror, and How War is Seen From His Point of View?, STRAITS TIMES (Singapore), Nov. 12, 2005.

[17] *See* GERGES, *supra* note 1, at 40 ("Al Qaeda has become more decentralized . . . and its global reach has diminished considerably."); *see also The 9/11 Commission Report*, at 318-19 n.77 (citing reports that since September 11, 2001, "nearly 65% of Al Qaeda's senior lieutenants have been killed or captured . . . . 3000 Al Qaeda suspects have been arrested . . . . Al Qaeda financial assets are being steadily frozen," and al Qaeda's critical infrastructure—training camps, safe houses, caves, and so on—are now largely gone).

But see, Beeston, *supra* note 3, at 44 (signs of al Qaeda resurgence); Gregg Zaroya, *Afghanistan Insurgents 'Extremely Resolute and Fought to the Last Man,'* USA TODAY, Nov. 17, 2005, at 11A; Daniel Cooney, *Bomb Blast Kills US Soldier on Patrol in East Afghanistan; Explosion Follows a Kabul Attack on NATO Forces*, THE BOSTON GLOBE, Nov. 16, 2005, at A12.

[18] *See* MÜNKLER, *supra* note 4, at 10.

> [A]lmost one in four of these [new] wars has lasted longer than ten years. In Angola the fighting has gone on for thirty years, in Sudan for at least twenty and in Somalia for more than fifteen. The war in Afghanistan, if it is now really over, will have lasted twenty-four years, while those in eastern Anatolia and Sri Lanka are approaching their twentieth year.

Id. See also THOMAS X. HAMMES, THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY, 221 (2004) (noting that "fourth generation warfare" (4GW) has much longer timelines than earlier forms of war). "Fourth-generation wars are lengthy—measured in decades rather than months or years." *Id.* at 2.

[19] *See* ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM 102-123 (2005) (arguing that al Qaeda is not just motivated by bloodlust, but that it has discernible political objectives). In Pape's view, "Al-Qaeda is less a transnational network of like-minded ideologues brought together from across the globe via the Internet than a cross-national military alliance of national liberation movements working together against what they see as an imperial threat." *Id.* at 104; *see also* ANONYMOUS, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR 17-18, 210 (2004) (seeking to identify bin Laden's foreign policy objectives).

[20] *See, e.g.*, Robert J. Delahunty & John C. Yoo, Book Note, *Thinking About Presidents: Presidential Leadership: Rating the Best and the Worst in the White House*, 90 CORNELL L. REV. 1153, 1178 & nn. 161-62 (2005).

mother must be insane."[21] When a terrorist group like al Qaeda communicates, it often prefers to rely on the expressive power of images rather than on a discursive text explaining its actions and setting forth its demands.[22] In consequence, as Münkler points out:

> [W]e can no longer be sure what [its] message is. It could be a number of things, but its "real" content and the "real" aims of the groups behind it are shrouded in mystery. . . . The enemy [has] set a puzzle and left in the dark about the political ideas that fill the attacker's mind. Terrorist attacks that communicate their message purely through images . . . exclude in advance any compromise between the conflicting interests and objectives. Evidently they convey something other than a specific demand, which—whether a state granted it or not—would open the perspective of ending the campaign of terror.[23]

If even the rudiments of a negotiated peace are not visible, it is equally unclear what conditions would represent a decisive victory for the United States. Even the capture of bin Laden himself, for all his unique charisma, might not do so.[24] At the same time, if victory comes at all, it must be a total victory. Any situation in which al Qaeda operations continue, at least if they entailed the risk of mass casualties, would not constitute a lasting return of peace. Finally, at least in the view of our government, this is a war without neutrals. President Bush warned on September 20, 2001 that "[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."[25]

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[21] IAN BURUMA & AVISHAI MARGALIT, OCCIDENTALISM: THE WEST IN THE EYES OF ITS ENEMIES 68 (2004). From the perspective of Buruma and Margalit, Osama bin Laden espouses a form of "religious Occidentalism" that sees the confrontation with the West as "not just a political struggle but a cosmic drama." *Id.* at 107.

[22] *See* MÜNKLER, *supra* note 4, at 113.

[23] *Id.* at 113-14.

[24] *But see* GERGES, *supra* note 1, at 40. "Al Qaeda operatives swore baiya to bin Laden—not to al Qaeda—and developed no institutional links with the organization itself . . . . Al Qaeda did not exist apart from its creator, and it is unlikely to survive his demise." *Id.*

[25] Address to a Joint Session of Congress and the American People, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

Wars of the kind caused by terrorism on a mass scale inevitably pose legal questions that are baffling in their novelty and complexity. Indeed, the question whether the War on Terror is, for legal purposes, truly war at all is still being debated.[26] Even though the Supreme Court's decision in *Hamdi v. Rumsfield*[27] had apparently settled the question that the armed conflict between the United States and al Qaeda was a war, the Court may recently have reopened that issue in *Hamdan v. Rumsfeld*.[28] The Petitioners in *Hamdan* made the argument that the War on Terror is:

> [m]anifestly . . . not a war in any sense of that term against any nation or well-defined enemy, nor is it a war with any definable geographic[al] arena of conflict, nor a war in which one can pinpoint a date when hostilities end, and it most assuredly is not a war ever declared by Congress.[29]

When even the basic legal character of the War on Terror seems to be open, it is not surprising that many other legal questions raised by the existence of mass terrorism also remain unsettled. Some of these legal questions have a domestic focus, such as the breadth of the gov-

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[26] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and The War on Terrorism*, 118 HARV. L. REV. 2047, 2066-72 (2005); *see also* Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power To Wage War Successfully,"* 53 DRAKE L. REV. 851, 853 (2005). "[T]he constitutional assessment of the war on terror depends almost entirely upon whether one—in fact—believes that the United States is at war." *Id.* "The uncertainty over whether we are at war or at peace is the analytical thread running through the Supreme Court's divided opinions, the citizen enemy combatant cases, the Guantánamo alien detainee cases, as well as the related challenges to presidential authority to establish military tribunals." *Id.* at 894. *Compare* Kenneth Roth, *The Law of War and the War on Terror*, FOREIGN AFFAIRS (Jan./Feb. 2004) at 2, *with* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209-15 (2003) (providing an earlier phase of the debate). *See also* Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J. L. & PUB. POL'Y 457, 470 (2002) (providing an overview of the issues and an argument that "the terrorist attacks on the United States, planned from without, cannot definitively be categorized as either war or crime").

[27] 542 U.S. 507 (2004). *Hamdi* held in part that "[t]he capture and detention of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 518.

[28] 126 S. Ct. 22 (2005), *cert. granted*, 74 U.S. 3284 (2005) (No. 05-184).

[29] Petition for Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit, Hamdan v. Rumsfeld, No. 05-184 (Aug. 8, 2005), 2005 WL 1874691 (U.S.).

ernment's national security powers in a time of terror as measured against the civil liberties of citizens. Other questions are addressed to international law, such as the rights of enemy combatants captured by our armed forces under treaties or customary international law, or whether international law forbids or constrains the use of coercive interrogation even in extreme situations. A third area of inquiry concerns the intersection of domestic and international law. This article addresses a question from this third area: Whether the President is bound, as a matter of U.S. constitutional law, to comply with the international laws of war. I shall approach this question by examining in detail the view of one of the ablest proponents of the position that the President is bound by the international laws of war: Professor David Golove of the New York University School of Law—specifically, those views espoused in his article entitled *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach.*[30]

Professor Golove's analysis originated in the context of the President's decision to establish military tribunals in conducting the War on Terror—the central question to be decided in *Hamdan*—but it extends far more broadly than that.[31] Golove's core claim is that:

> [I]n exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law, which means not only faithfully observing the obligations of treaties that the United States has ratified . . . but also complying with customary international law in general and the laws of war (the jus in bello), as modified by the law of human rights, in particular.[32]

Golove presents this claim as a rigid absolute; no wartime situation, however extreme or exigent, provides an exception to this rule.[33] Such a rule does not provide the President with any justification or excuse to suspend or breach an international legal duty or to invade an international legal right.[34] For Golove, the Constitution appears to forbid the President to violate international law as firmly as it forbids him

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30 David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. L. J. INT'L L. & POL. 363 (2003).

31 *Id.* at 363-67.

32 *Id.* at 364.

33 *Id.*

34 *Id.*

to draw funds out of the Treasury without a Congressional appropriation.[35] Moreover, as Golove understands international law, it seemingly includes: 1) unexecuted treaties as well as executed or self-executing ones, 2) rules of customary international law that are not implemented by Acts of Congress, and even 3) treaty clauses to which the United States has taken a specific reservation, if those clauses have become customary international law by virtue of state practice.[36]

II. THE THEORY APPLIED TO CONGRESS

Although Golove's central thesis concerns *Presidential* power, the logic of his position arguably would take him to the conclusion that *Congress* is also constitutionally constrained by international law, including but not limited to the laws of war.[37] Golove does not expressly affirm that conclusion, but there are several indications that he is at least disposed to adopt it. Golove cites the post-Civil War case *Miller v. United States*,[38] which put in issue the constitutionality of the Confiscation Acts. Golove states that:

> [T]he Court considered the far more radical question of whether even Congress, in exercising its war powers, was limited by the laws of war . . . . It is striking . . . that while the Court explicitly declined to rule on this question, it was at pains to establish that the Confiscation Acts were fully in accord with the requirements of international law.[39]

Golove also quotes at length Justice Field's powerful dissent in *Miller*, which "explicitly embraced the view that even Congress was limited by international law."[40] More importantly, the logic of Golove's position seems to point to this conclusion: if international law imposes a constitutional check on Article II, § 1's executive power, why does it not impose a similar constitutional check on Arti-

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35 *See* U.S. CONST. art. I, § 9, cl. 7 (stating that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

36 *See generally* Golove, *supra* note 30.

37 *See id.* at 394.

38 78 U.S. (11 Wall.) 483 (1873).

39 Golove, *supra* note 30, at 387-88.

40 *Id.* at 388.

cle I, § 1's legislative powers?[41] Although I have no wish to mischaracterize Golove's views, I think it is relevant to explore the question of congressional power, whether or not Golove personally thinks that international law operates as a constitutional check in that context.

It is a fundamental error to place international law, including the laws of war, on the same plane or a higher plane then the Constitution itself. The very terms of the Supremacy Clause clearly preclude such an idea.[42] The Supremacy Clause[43] rank-orders the "supreme Law of the Land"[44] by telling us that supreme law consists in: first, "[t]his Constitution;" second, "the Laws of the United States which shall be made in Pursuance thereof;" and third, "Treaties."[45] While acts of Congress and treaties have long been held to be on an equal plane, the text of the Supremacy Clause unmistakably places the Constitution in a position of precedence over both. As Alexander Hamilton observed, a treaty "shall not change the Constitution; which results from this fundamental maxim, that a delegated authority cannot alter the constituting act."[46] Any doubts on that score were conclusively settled in *Boos v. Barry*,[47] which held treaties must conform to constitutional

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[41] *See generally id.* As I shall argue in Part IV below, the jurisprudence on which Golove primarily relies to establish international law-based limits on Executive power would impose analogous limits on Congressional power as well.

[42] U.S. CONST. art. VI, cl. 2.

[43] *Id.*

[44] Marybury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[45] Further, the Supremacy Clause makes no reference whatever to *customary* international law, thus inviting the obvious inference that it is not any part of the supreme law of the United States. *See generally* U.S. CONST. art. VI, cl. 2.

[46] Alexander Hamilton, Camillus No. XXXVI *in* 6 WORKS OF ALEXANDER HAMILTON (Henry Cabot Lodge, ed., 1885). The ratification record of the Treaty Clause confirms this interpretation of the Constitution's plain text. U.S. CONST. art. II, § 2, cl. 2. In the debate at the Virginia Ratifying Convention on June 18-19, 1788, Patrick Henry and other Anti-Federalists charged that the Treaty Clause would confer unlimited powers on the President and Senate, including the power to cede the territory of the States and to abridge individual rights. The Debates in the Several State Conventions, on the Adoption by the General Convention at Philadelphia *in* 3 A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774-1875, at 499-515 (Jonathan Elliot, ed., 2d ed. 1836). Edmund Randolph responded by saying, "Will not the President and Senate be restrained? Being creatures of the Constitution, can they destroy it? Can any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it was created?" *Id.* at 504. And James Madison argued, "I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right . . . . The exercise of the power must be consistent with the object of the delegation." *Id.* at 514.

[47] 485 U.S. 312 (1988).

standards. But even before *Boos*, Justice Black's plurality opinion in *Reid v. Covert*[48] had explained that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[49] Similarly, Justice Field, whose dissent in *Miller v. United States*[50] Golove relies on in his argument,[51] said in *Geofroy v. Riggs*[52] "[i]t would not be contended that [the Treaty Power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States."[53] Other constitutional cases, including Justice Harlan's decision in *Banco Naçional de Cuba v. Sabbatino*,[54] also clearly entail the primacy of the Constitution over international law. A view that permits treaties or other forms of international law to expand or contract the constitutional powers of any of the three branches of the federal government, is similar to a view in which individual constitutional liberties are subject to alteration by international agreements—both views are as false as they are dangerous.

The principle of the Constitution's primacy over international law applies to the constitutional powers of the federal branches of government just as it applies to the constitutional rights held by individuals. A treaty may place the United States under an international legal obligation to declare war on behalf of an invaded ally or to expend funds

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48 354 U.S. 1 (1957). Although only three other Justices joined Justice Black, none of the other Justices, concurring or dissenting, disagreed with the view quoted in the text. *See id.* at 16.

49 *Id.*

50 78 U.S. 268 (1870).

51 *Id.* at 314.

52 133 U.S. 258 (1890).

53 *Id.* at 267.

54 376 U.S. 398, 423 (1964). In *Sabbatino,* the Court applied the act of state doctrine to avoid any need to decide the merits of a claim that confiscation of private, foreign-owned property by the Cuban government was illegal under international law. *See generally id.* According to the Court, the act of state doctrine was a choice-of-law rule for cases involving certain foreign sovereign actions that was "compelled neither by international law nor the Constitution," but that could appropriately be adopted as a matter of federal common law because it had "'constitutional' underpinnings" and arose "out of the basic relationships between branches of government in a system of separation of powers." *Id.* at 423, 427. If a federal common law rule that is not itself constitutionally mandated but that merely has "'constitutional' underpinnings" can control a judicial decision in a case that could have been decided instead on the basis of international law, then it follows that a rule that the Constitution directly imposes must prevail over any contrary rule of international law. *Id.*

for a particular purpose, yet Congress retains its full constitutional powers to do neither.[55]

If, as Golove's argument suggests, Congress and the President are constitutionally forbidden to violate international law, then in addition to those issues already considered, a host of startling and implausible consequences emerge. The consequences of such a principle would undermine the validity of the following doctrines.

First, the "last-in-time" rule is mistaken. Under the "last-in-time" rule, an act of Congress may abrogate a prior, inconsistent treaty. Yet the "last-in-time" rule has been a part of American law since the early years of the Republic.[56] The rule is also deeply entrenched in the Supreme Court's case law, extending back at least as far as the Court's 1855 decision in *Taylor v. Morton*.[57] The rule was specifically af-

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[55] U.S. CONST. art. I, § 9, cl. 7 (treasury funds may not be withdrawn except through "Appropriations made by Law."). Justice McLean, sitting as Circuit Justice, said "money cannot be appropriated by the treaty-making power." Turner v. American Baptist Missionary Union, 24 F. Cas. 344, 345 (C.C.D. Mich. 1852) (No. 14,251). *See also* 29 Annals of Cong. 531-32 (1816) (Senator John C. Calhoun stated funds could not be withdrawn on the authority of a treaty alone).

Article I of the Constitution grants Congress the power to "declare War." U.S. CONST. art. I, § 8, cl. 11. Secretary of State Dean Acheson, prior to the ratification of the NATO Treaty, testified that a treaty could not put the United States at war. *See Hearings on the North Atlantic Treaty Before the Senate Comm. on Foreign Relations*, 81st Cong. 11 (1949) (1st Sess., pt. 1).

[56] Congress early assumed it had the power to terminate a treaty by a later statute. *See* An Act to Declare the Treaties Heretofore Concluded With France, No Longer Obligatory on the United States, 1 Stat. 578 (1798). While this statute may be constitutionally void insofar as it attempts to alter the international legal obligations of the United States, it is effective to the extent those treaties were incorporated into municipal law.

[57] 23 F. Cas. 784 (C.C.D. Mass. 1855), *aff'd*, 67 U.S. 481 (1862). Justice Curtis reasoned:

> [I]t is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible. . . .
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> . . . To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence. That the people of

firmed in 1888 by *Whitney v. Robertson*,[58] which stated, when a treaty and an act of Congress "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; *but if the two are inconsistent, the one last in date will control the other.*"[59] One-hundred and seventeen years later, *Whitney v. Robertson* remains good law.

Second, Golove's premise would restrict[60] Congress's express constitutional power to "*define* and punish . . . Offences against the Law of Nations."[61] The Law of Nations Clause enables Congress to enact criminal legislation implementing international legal norms, including the customary laws of war. However, this clause is also understood to enable Congress to *vary* customary international law and practice.[62] Thus, Congress may: *define* crimes under the laws of war in a manner that deviates from customary practice, provide defenses or immunities that do not exist under the general international laws of war, or expressly authorize some acts criminalized by international law.

> the United States have deprived their government of this power in any case, I do not believe.

Id. at 786.

It is true that in *The Federalist No. 64*, John Jay argued treaties are "beyond the lawful reach of legislative acts." THE FEDERALIST No. 64, at 362 (John Jay) (Clinton Rossiter ed., 1961). But for this purpose, the distinction between international and municipal law is critical. Conceivably, what Jay meant was only that the abrogation of a treaty as a matter of municipal law does not, of itself, absolve the abrogating party from liability for non-performance under international law. Even if that is the case, it does not follow that Congress may not supersede an earlier treaty as a matter of the municipal law of the United States. *See* Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934).

> So far as the act of Congress specifically authorized the charging of tolls for the use of the improvements on the Minnesota side of the boundary, it would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty *and the international obligation remained unaffected.*

Id. (emphasis added).

58 124 U.S. 190 (1888).

59 *Whitney*, 124 U.S. at 194 (emphasis added).

60 *See generally* Golove, *supra* note 30.

61 U.S. CONST. art. I, § 8, cl. 10 (emphasis added). For a recent analysis of the clause, *see* Note, *The Offences Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378 (2005).

62 *See* THE FEDERALIST NO. 42, *infra* note 63.

As James Madison wrote in *The Federalist No. 42*, the Framers designed the Law of Nations Clause to enable the United States to define international felonies for itself: "neither the common, nor the statute law of [England], or of any other nation, ought to be a standard for the proceedings of this [nation], unless previously made its own by legislative adoption."[63] Despite this contrary evidence, under Golove's account Congress seems to be constitutionally barred from enacting such legislation if our national standards are contrary to prevailing international norms.[64]

Third, Golove's premise contradicts the Supreme Court's holding in *Murray v. Schooner Charming Betsy*.[65] In *Charming Betsy*, the Court stated "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[66] The *Charming Betsy* illustrates a presumption that acts of Congress are not intended to violate international law.[67] But the presumption is plainly a rebuttable one: as Justice Scalia stated in *Hartford Fire Insurance v. California*,[68] "*[T]hough it clearly has constitutional authority to do so,* Congress is generally presumed not to have exceeded . . . customary international-law limits on jurisdiction to prescribe."[69] Golove's thesis

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[63] THE FEDERALIST No. 42, at 234 (James Madison) (Clinton Rossiter ed., 1961). Madison's notes on the brief debate at the Philadelphia Convention support this interpretation of the Law of Nations Clause. JAMES MADISON, RECORDS OF THE FEDERAL CONVENTION 315 (Aug. 17, 1787), *available at* http://www.yale.edu/lawweb/avalon/debates/817.htm. As originally drafted, the provision would have enabled Congress to "declare the law" of piracies and felonies. *Id.* Edmund Randolph "doubted . . . the efficacy of the word 'declare.'" *Id.* Madison supported Randolph, arguing that the term "felony" at common law was vague, that English statutory law had repaired some of the common law's defects, but that in any case "no foreign law should be a standard farther than is expressly adopted" by our national legislature. *Id.* Gouverneur Morris stated that he would prefer "designate" to "define," but others replied that the term "define" "would be applicable to the creating of offences also," as well as to piracy. *Id.* Madison's and Randolph's motion was then accepted. *See id.* Plainly, the use of the term "define" was intended to permit Congress to create *offenses* that might have different elements, defenses, and so on from those found in other legal systems.

[64] *See generally* Golove, *supra* note 30.

[65] 6 U.S. (2 Cranch) 64 (1804).

[66] *Id.* at 118; *see also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 44 (1801).

[67] *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998).

[68] 509 U.S. 764 (1993).

[69] *Id.* at 815 (Scalia, J., dissenting in part) (emphasis added).

that Congress is constitutionally bound by international law is inconsistent with the canon stated in *Charming Betsy* and its progeny.[70]

Fourth, under Golove's argument, not merely *jus in bello* (international regulations for the *conduct* of war), but also *jus ad bellum* (international regulations respecting the use of armed force), would constitutionally trump acts of Congress. Thus, even a Congressional declaration of war or other authorization for the use of armed force would be unconstitutional if it did not satisfy the restraints international law places on the use of force, including obtaining prior authorization from the U. N. Security Council if the use of force were not undertaken in self-defense.[71] Under Golove's approach, a statute like the Congressional authorization for the use of force in Iraq[72] would have to be considered unconstitutional—assuming that our armed intervention lacked the Security Council's approval[73]—unless, perhaps, such intervention could be validated as anticipatory self-defense.[74] For the same reason, the acts of Congress authorizing the use of force in the War in Vietnam[75] and in NATO's 1999 intervention in Kosovo[76] would apparently have been unconstitutional.

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[70] *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

[71] The Constitution vests Congress with the power to "declare War," in large part so as to ensure that Congress may *alter* international legal relationships, including those established by treaties with the other belligerents. U.S. CONST. art. I, § 8, cl. 11. Thus, the Declare War Clause functions similarly to the Law of Nations Clause: both clauses ensure that Congress, which is essentially a domestic legislature empowered to make local law, has some additional power to incorporate, make, alter, or annul international law as well. *See, e.g.*, John YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 145, 147, 149-52 (2005). *See also* Karnuth v. United States, 279 U.S. 231, 236 (1929) (discussing the legal effect of the War of 1812, a *declared* war, on the Jay Treaty of 1794). However, if Congress is constitutionally disenabled from altering treaties, the central purpose of the Declare War Clause is rendered a nullity.

[72] Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2003).

[73] For the view that the United States' and its Coalition's use of force in Iraq in 2003 was authorized by the Security Council, *see, e.g.*, Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 890-91 (2004). For the contrary view, *see, e.g.*, MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 44-45 (2005).

[74] U.N. Charter art. 51. On the other hand, later Security Council action *ratifying* the United States' intervention in, and occupation of, Iraq would seem on Golove's approach to have the retroactive effect of *redeeming* the Act of Congress from unconstitutionality.

[75] *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 13-16 (1993).

Lastly, under Golove's argument, the President, even when acting pursuant to an express statutory authorization or directive, could not transgress international law—including customary law. Thus, if customary international law prohibited possession of particular weapons systems, Congress could not constitutionally direct those weapons systems to be built, nor could the President constitutionally deploy them. Given the ease and speed with which modern customary international law can be formed, at least in the view of some authorities,[77] this would represent a truly extraordinary limitation on the power of the United States to prepare for or engage in war.[78]

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[76] *See Authorization for Continuing Hostilities in Kosovo*, Pub. L. No. 106-31, 2000 WL 16980 (preliminary print), *available at* http://www.usdoj.gov/olc/final.htm.

[77] A special problem is the existence or non-existence of the category of '*diritto spontaneo*' or 'instant customary international law' which has been brought to the forefront by some authors, such as Robert Ago and Bin Cheng. The result is to deny the significance of state practice and the relevance of the time factor in the formation of customary international law and to rely solely on *opinio juris*, as expressed in non-binding resolutions and declarations, as the constitutive element of custom.

> It is true that the International Court of Justice has clarified in the *North Sea Continental Shelf* cases that customary law may emerge even within a relatively short passage of time. It may also be noted that changes in the international law-making process have modified the concept of modern customary law in several respects, including the tendency that it is made with relative speed, written in textual form, and is more elaborate than traditional custom. The possibility of 'instant' customary international law, or '*droit spontane*', based upon *opinion juris* only and without the requirement of any practice, however, has remained a matter of dispute.

PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 45-46 (7th ed. 1997) (footnotes omitted). *See also* Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 840 (1997). For a penetrating critique of the "new customary international law," *see* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 484-97 (2000).

[78] Indeed, the United States government has on at least one occasion taken the position that mere *opinio juris*, unaccompanied by state practice, can constitute customary international law. On the occasion of signing the United Nations General Assembly's Comprehensive Nuclear Test Ban Treaty, which had not received a sufficient number of ratifications to enter into force, President Bill Clinton declared the signatures of all the declared nuclear powers, together with those of the large majority of other countries, "will immediately create an international norm against nuclear testing even before the treaty formally enters into force." LORI FISLER DAMROSCH, INTERNATIONAL LAW: CASES AND MATERIALS 86 (Louis Henkin et al eds., 4th ed. 2001).

Some legal writers have declared the United States is bound to follow a rule of customary international law even if it has persistently objected to that rule.[79] Coupled with Golove's theory, this contention leads directly to a conclusion where the United States is constitutionally bound to follow a customary rule to which it has persistently objected.

III. THE THEORY'S TWO ARCHITECTONIC PRINCIPLES

Golove rests his claims on principles he purports to derive from James Madison, as interpreted and applied by Golove's teacher, Professor Thomas Franck.[80] The first of these two "Franckian-Madisonian" principles concerns separation of powers,[81] and the second concerns international relations.[82] I will describe and comment on each in turn.

The first Franckian-Madisonian principle consists in the "rejection of simple majoritarianism and . . . adherence to the separation of powers and checks and balances."[83] This principle is said to have "a central aim" of

> [s]ubject[ing] the exercise of power by one branch to the judgment of an independent umpire or jury. This umpiring function is an essential part of a system designed to prevent hasty and improvident exercises of the foreign affairs powers and to check the tendency of ambitious politicians to override, in the name of foreign policy or national security, the rights of individuals.[84]

Although this first principle, as stated, seems uncontroversial, and although it seems to do little work in Golove's overall argument, it does require some examination.

First, undoubtedly the Constitution—and its foreign affairs and war power clauses in particular—were designed in part "to prevent

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79 *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538-42 (1993); *see* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 22, 23-24 (1986); Kelly, *supra* note 77, at 508-16.

80 *See* Golove, *supra* note 30, at 367.

81 *See id.* at 368.

82 *See id.* at 370.

83 Golove, *supra* note 30, at 368.

84 *Id.*

hasty and improvident exercises of the foreign affairs powers" and "to check . . . ambitious politicians."[85] However, a fuller and fairer account of the Constitution's purposes acknowledges the intent was to create a government that is highly effective in protecting its population, its territory and its overall national security.[86] Thus, in *The Federalist No. 43*, Madison flatly declared: "[S]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The requisite powers for attaining it must be effectually confided to the federal councils."[87] And in *The Federalist No. 23*, Alexander Hamilton wrote:

> [T]he moment it is decided ["there ought to be a federal government intrusted with the care of the common defence"], it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust . . . . [T]here can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy . . . .[88]

Second, Golove ascribes to the Framers the purpose of attempting to check "ambitious politicians" from "overrid[ing], in the name of foreign policy or national security, the rights *of individuals*."[89] By indiscriminately referring to *individuals*, Golove ignores any distinction between citizens and non-citizens, or even between friendly aliens and enemy aliens; thus Golove subtly misconstrues the Framers' design.[90]

The Constitution is first and foremost designed to protect the rights of the *American* people and others who form part of our national community, rather than the global class of individuals who are the subjects of contemporary international human rights law. As Chief Justice

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85 *Id.*

86 *See, e.g.*, Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1031-34 (2003); *see also* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 50 (1973). "[T]he sense of national insecurity and of impending danger was a major drive wheel in the movement for constitutional reform which culminated in the Philadelphia Convention of 1787." *Id.*

87 THE FEDERALIST No. 43, at 224 (James Madison) (Clinton Rossiter ed., 1961).

88 THE FEDERALIST No. 23, at 121-22 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

89 Golove, *supra* note 30, at 368 (emphasis added).

90 *See id.*

Rehnquist noted in *United States v. Verdugo-Urquidez*,[91] the Preamble of the Constitution is a declaration that the Constitution "is ordained and established by 'the People of the United States.'"[92] Rehnquist also stated that various provisions of the Bill of Rights (including the First, Second, Fourth, Ninth, and Tenth Amendments) refer to the "rights and powers [of] 'the people,'" and nothing in the ratification history of the Fourth Amendment suggests it was "intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[93]

Third, it is obscure how the doctrine that international law imposes constitutional restrictions on the President's power—let alone on Congress' power—could be derivable from the Constitution's scheme of separated powers. If the President breaches a duty imposed on the United States by international law, he does not undermine or usurp the powers reserved to Congress (although he might arguably be undermining those of the Senate if the duty were embedded in a ratified treaty).[94] For instance, if the President—in violation of both current Executive Branch policy[95] and, arguably, international law[96]—ordered

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91 494 U.S. 259 (1990).

92 *Id.* at 265.

93 *Id.* at 265-66.

94 Golove likely would argue the Executive power, specifically the Commander in Chief power, does not allow the President to authorize or order violations of the laws of war, even if such Executive action would not transgress any statute or treaty. Thus, Golove's *separation of powers* objection is not so much based on the claim that the President would be usurping or undermining the power of another branch, as it is that the President has no affirmative constitutional authority to order or authorize such action. *Cf.* Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 9 (1936) (the executive has no constitutional power to extradite absent statute or treaty). The question then becomes where in the Constitution this significant but implicit limitation on Executive power is found. I address this question in Section IV below.

95 *See* Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981) ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination"). *See generally* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 687-726 (analyzing background of Exec. Order 12333, including U.S. practice before and after enactment of the National Security Act of 1947, which authorized certain targeted killings). According to press reports, however, President George W. Bush signed an intelligence finding in September 2001 instructing the Central Intelligence Agency to engage in "lethal covert operations" to destroy Osama bin Laden and the al Qaeda organization. *See U.S. Policy on Assassinations*, CNN.COM./LAW CENTER, Nov. 4, 2002, http://archives.cnn.com/2002/LAW/11/04/us.assassination.policy/. (last visited Jan. 22, 2006). On November 3, 2002, the United States used an unmanned Predator aircraft to attack a car carrying six men in

the assassination of a foreign head of state or a terrorist chieftain, it would neither usurp nor derogate from the power of Congress, given

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Yemen, including Abu Ali al-Harithi, an al Qaeda member suspected of planning the October, 2000 attack on the *U.S.S. Cole*. *See* Special Rapporteur, *Report of the Special Rapporteur, on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2004/7/Add.1 (March 24, 2004). Further, President Reagan ordered targeted air strikes directed at Libyan leader Moammar Gadhafi in 1986. *See* Ronald Reagan, *Address to the Nation on the United States Air Strike Against Libya April 14, 1986, available at* http://www.reagan.utexas.edu/archives/speeches/1986/41486g.htm *See also*, William Jefferson Clinton, *The Presidential Address Aug. 20, 1998, available at* http://www.pbs.org/newshour/bb/military/july-dec98/clinton2_8-20.html (President Clinton ordered missiles strikes at suspected guerrilla camps in Afghanistan in 1998). .

[96] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 7, at ¶ 105 (quoting Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 958 (July 8)).

> [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.

Id.; *see also* Laws and Customs of War on Land, Hague Convention (IV), annex art. 23, Oct. 18, 1907, *available at* http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm ("especially forbidd[ing] . . . kill[ing] or wound[ing] [of] treacherous[ ] individuals belonging to the hostile nation or army"); DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 17 (1956); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 226 (2004); Comollari v. Ashcroft, 378 F.3d 694, 697 (7th Cir. 2004) (Posner, J.) (raising but not deciding question whether assassination is prohibited by Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984)). Judge Posner states "the Convention Against Torture does not, so far as we have been able to divocer, address" (assassination). *Id.*; Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992); Council on Foreign Relations, *Assassination: Does It Work?*, http://cfrterrorism.org/policy/assassination_print.html (last visited Jan. 22, 2006). As low intensity conflict continues to spread, however, it may be that

> [t]he war convention will change. Over the last three centuries or so attempts to assassinate or otherwise incapacitate leaders were not regarded as part of the game of war. In the future there will be a tendency to regard such leaders as criminals who richly deserve the worst fate that can be inflicted on them. . . .
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> As a matter of . . . fact, leaders *are* increasingly being targeted.

See MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 200-01 (1991); *see also* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 5 (arguing that wartime role of military includes legalized killing of enemy).

the absence of any federal statute addressing that issue.[97] Indeed, rather than *sustaining* separation of powers, the importing of international law into the Constitution threatens to *subvert* it, by obtruding the federal judiciary into areas of foreign policy-making reserved to the political branches. As Justice Harlan rightly pointed out in the *Sabbatino* case, the federal judiciary has traditionally taken a limited role in cases implicating foreign affairs precisely because it understands "the basic relationships between branches of government in a system of separation of powers,"[98] and the Court is particularly concerned with "the competency of dissimilar institutions to make and implement different kinds of decisions in the area of international relations."[99] Likewise, Justice Souter, writing for the Court in *Sosa v. Alvarez-Machain*,[100] rightly reaffirmed that the federal courts should remain "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[101]

Golove places most of the weight of his argument on his second principle—what he calls the "harmonization principle."[102] This too is assertedly Madisonian. This principle holds that "the Constitution, where possible, ought to be interpreted to harmonize the domestic and the international legal systems by facilitating U.S. compliance with international law standards and by enabling it to participate fully in, and uphold, international institutions."[103]

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97 Consider another example of a Presidential breach of international law that would not appear to cause any separation of powers problems. Ordinarily, if the United States or any other belligerent aims a missile at an enemy target, it must not overfly the airspace of a neutral power without its consent. However, in a 1998 air strike aimed at a suspected Al Qaeda camp in Afghanistan, the United States breached that ordinary rule. *See* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 567-68 (1999). If no Act of Congress forbade an attack of that kind, even with the accompanying violation of neutral air space, how would Congress' powers have been unconstitutionally undermined or usurped?

98 Banco Naçional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

99 *Id.* Far from indicating that international law is incorporated into the domestic law of the United States, *Sabbatino* demonstrated the Court's unwillingness either to apply international law in a substantive form (with respect to the claim that the confiscation at issue was illegal) or to consider itself bound by international law procedurally (insofar as the Act of State doctrine might have been considered a rule compelled by international law—a proposition the Court expressly rejected). *Id.* at 421-22, 436.

100 542 U.S. 692 (2004).

101 *Id.* at 695.

102 *See* Golove, *supra* note 30, at 370-72, 374-75.

103 Golove, *supra* note 30, at 370.

It is important to understand what Golove means by calling his harmonization principle "Madisonian." He does not mean that Madison himself held the principle, or even that it can be inferred directly from doctrines that Madison did hold. Certainly, he cites no evidence from Madison, or from any of the Framers, which directly supports the principle. Rather, what Golove means is that he can offer an argument on the international level, which he believes, will support his harmonization principle. This argument is "Madisonian" only in the sense Golove supposes it to be broadly analogous to "Madison's famous argument in *The Federalist No. 10*" for an extended republic.[104] In other words, Golove is seeking to provide a Madisonian pedigree for a doctrine of constitutional construction that was not, in fact, James Madison's view at all. Golove's doctrine is to the actual, historical Madison what Brahms' *Variations on a Theme of Haydn* was to Haydn: not Haydn, but Brahms.

> Golove's argument for his "harmonization principle" is as follows: The world as a whole includes a far more diverse set of interests, viewpoints, and sects than are found within the national community. Hence, following Madison [sic], it will be correspondingly more difficult for powerful factions to form that can use the international lawmaking process to infringe upon the rights and interests of minorities. Furthermore, the national representatives who participate in the international lawmaking process are chosen from among the peoples of the entire globe and, hence, are likely to include a high proportion of statesmen and stateswomen who are relatively more capable of rising above factionalism to assume a vision that encompasses the rights and interests of all peoples.[105]

One is left to wonder what this highly idealized description of international lawmaking has to do with the interpretation of the United States Constitution.[106] It seems to reflect the "global governance" ideas of

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[104] *Id.* at 371.

[105] *Id.* at 373.

[106] *See* John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); Kelly, *supra* note 77, at 518-26, 531-35.

The unrealism of Golove's account of how international law is formed is reflected, e.g., by its failure to consider the extent to which other, weaker nations promote particular legal and institutional schemes deliberately so as to constrain American power. International relations theorists have, however, recognized this "binding strategy" as a method by which weaker states now seek to cope with the

the 1990s[107] far more closely than the hard-headed political realism of the late 1780s.[108]

Construing the Constitution to subordinate the United States' national sovereignty to international law and international organizations might have seemed an attractive possibility in the immediate aftermath of the Cold War. That was a world generally at peace, where democratic politics and economic neo-liberalism seemed to be sweeping all before them. It was a period where finding solutions to the emerging collective action problems of international society was seen to require

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United States' concentrated power. *See, e.g.*, G. JOHN IKENBERRY, STRATEGIC REACTIONS TO AMERICAN PREEMINENCE: GREAT POWER POLITICS IN THE AGE OF UNIPOLARITY at 16-17 (July 28, 2003), *available at* http://www.cia.gov/nic/confreports_stratreact.html. The point was well explained by Josef Joffe, the publisher-editor of *Die Zeit*, in his 2003 John Bonython Lecture, *Gulliver Unbound: Can America Rule the World?*, *available at* http://www.cis.org.au/Events/JBL/JBL03htm. Joffe observed that many recent "international law" disputes between the United States and other powers are,

> *[a]u fond*, . . . not about principle, but power. . . . [S]o with the International Criminal Court (ICC). In the end, even the Clinton team correctly understood the underlying thrust of the ICC. Claiming the right to pass judgment on military interventions by prosecuting malfeasants ex post facto, the Court might deter and thus constrain American forays abroad. All the Liliputians would gain a kind of droit de regard over American actions.

Id. at 4.

[107] "No one talked of world government in the 1990s. The vogue term of the new era was 'global governance.' The term was almost unknown at the start of the decade. By the dawn of the new century, it had become a ubiquitous catchphrase." JEREMY RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 19 (2005). "A large body of opinion in the West holds that international politics underwent a fundamental transformation with the end of the Cold War. Cooperation, not security competition and conflict, is now the defining feature of relations among the great powers." JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 360 (2001).

At a deeper level, Golove's ideas reflect the continuing influence of the program for achieving international peace through law that Immanuel Kant outlined in his 1784 and 1795 books. *See generally* IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY (1784); IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS (Ted Humphrey trans., 1983). While acknowledging the impossibility of an international political system, Kant argued international public law could be made to do the work of one—compliance could be achieved without compulsion. *See* F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES 64-69 (1967).

[108] Unlike latter-day proponents of "global governance," James Madison saw clearly that the project of a "universal and perpetual peace" would "never exist but in the imagination of visionary philosophers." RABKIN, *supra* note 107, at 89.

the close coordination of the activities of many national jurisdictions, and where it appeared such coordination could be achieved without compulsion. President Clinton captured the mood of the period when he said "enlightened self-interest, as well as shared values, will compel countries to define their greatness in more constructive ways . . . and will compel us to cooperate in more constructive ways."[109]

From a post-9/11 perspective, however, the relevance and importance of the nation-state as the key organizing element of the international order have again become apparent.[110] As the British historian Michael Howard has remarked:

> It is not clear what alternative creators and guarantors of peaceful order could or would take the place of the state in a wholly globalized world. The state still remains the only effective mechanism through which people can govern themselves. . . . The erosion of state authority is thus likely not to strengthen world order but to weaken it, since states become incapable of fulfilling the international obligations on which that order depends.[111]

My chief complaint against Golove's harmonization principle is not that it is no longer topical; rather, that it is false to the intentions and purposes of the Framers. If we are to adopt a rule of construction for the provisions of the Constitution that concern national security and international relations, such rule should be founded on the language of the Declaration of Independence, which lays claim on behalf of the United States to a place among the sovereign nations of the world:

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[109] MEARSHEIMER, *supra* note 107, at 361.

[110] *See* MEARSHEIMER, supra note 107, at 365; *see also* MICHAEL MANDELBAUM, THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD'S GOVERNMENT IN THE 21ST CENTURY 179 (2005) (Noting that "failed states" offer "particularly hospitable environments for terrorists," thus creating "an incentive to try to create effective structures of governance" in such places); *see also* JOHN MUELLER, THE REMNANTS OF WAR 172 (2004) ("To a very substantial degree, the amount of warfare that persists in the world today—virtually all of it civil war—is a function of the extent to which inadequate [national] governments exist."); Robert J. Delahunty & John Yoo, *Statehood and The Third Geneva Convention*, 46 VA. J. INT'L L. 1, 1-4 (2005).

[111] MICHAEL HOWARD, THE INVENTION OF PEACE 103-04 (2000).

> [T]hese United Colonies are, and of Right ought to be Free and Independent States; . . . and that as Free and Independent States, they have full power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which independent States may of right do.[112]

Having the full powers in world affairs of an independent State, the United States may, of course, do all the "Acts and Things which independent States may of right do,"[113] and the constitutional powers of the United States should be read accordingly.[114] These powers obviously include the powers to engage with other States in the formation of international law and to participate with other States in international organizations. Indeed, the framing generation exploited these possibilities. For example, in 1795, John Jay negotiated a treaty with Great Britain that established the first international claims commissions, thus submitting the claims of British subjects against American expropriations of their property to a multinational panel in Philadelphia; contemporaneously, a parallel commission in London dealt with American merchants' claims against British seizures of their goods on the high seas.[115] However, the Framers warily believed that such cooperation between nations stemmed more from common interests than from common values. As President George Washington said in his celebrated 1796 Farewell Address:

> [T]he great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little *political* connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop. . . .
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> . . . .
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> . . . There can be no greater error than to expect or calculate upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard.[116]

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112 THE DECLARATION OF INDEPENDENCE (U.S. 1776).

113 *Id.*

114 *Id.*

115 RABKIN, *supra* note 107, at 114.

116 *Washington's Farewell Address 1796*, *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 214-15 ((1796), *available at* http://www.yale.edu/lawweb/avalon/washing.htm. (James D. Richardson ed., 1897).

And engagements with the international community were never thought to require compromising American national sovereignty. So when the United States accepted Simón Bolívar's invitation to attend a conference of the newly independent States of South America in 1821, Secretary of State Henry Clay instructed our delegates that they were not even to consider participating in a permanent structure resembling an international legislature.[117]

IV. THE APPLICATION OF GOLOVE'S PRINCIPLES TO PRESIDENTIAL POWER

Golove advances a number of different arguments derived from his two principles for the conclusion that the President is constitutionally bound to follow international law, and in particular the laws of war.[118] For the most part, these arguments are historical. One line of argument concerns early understandings and practices of the United States in the Revolutionary period.[119] Another line focuses on the famous *Helvidius-Pacificus* debate of 1793 between Alexander Hamilton and

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117 RABKIN, *supra note* 107, at 112.

118 *See* Golove, *supra* note 30, at 374.

119 Golove's account of American military doctrine and practice during the Revolutionary War concentrates on the conflict between regular armed forces. A fuller account would also include the related conflicts between American forces and Native American tribes allied with the British. *See* JOHN GRENIER, THE FIRST WAY OF WAR: AMERICAN WAR MAKING ON THE FRONTIER, 1607-1814, at 166-67 (2005). Conflict of that kind often obliterated any distinction between what would now be called combatants and civilians and involved the use of means and methods of warfare that were horrifying. For example, in 1779, the Continental Congress directed that three American armies should take the field against the Seneca Indians. *See id.* at 166. Major General John Sullivan, the commander of one of these armies, stated the goal of the campaign was to "totally extirpate the unfriendly nations of the Indians, to subdue their country, destroy their crops, and drive them to seek habitations where they would be less troublesome to us and our allies." *Id.* at 167. The state of Pennsylvania, which enthusiastically backed the campaign and offered its own rangers to augment Congress' forces, placed a bounty on the scalps of Senecas, regardless of sex. *Id.* As a general matter, although decorum and order made up part of the prevailing military culture in Europe and its possessions, the eighteenth century was also "the age of unchivalrous and chaotic irregular warfare, what the French called *petite guerre*. For most eighteenth-century Western European soldiers, Britons, particularly, *petite guerre* was the antithesis of regular warfare. . . . For the eighteenth-century regular officer, *petite guerre* was not a form of war, but rather a manifestation of criminality." *Id.* at 87. *See also* GEOFFREY PARKER, SUCCESS IS NEVER FINAL: EMPIRE, WAR, AND FAITH IN EARLY MODERN EUROPE 165-67 (2002) (describing common European practices in colonial wars of early modern period).

James Madison.[120] A third line starts from early Supreme Court cases and traces the case law, together with other leading authorities,

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[120] It appears to me that Golove has drawn the wrong conclusions from this debate. The legal and policy controversy of which the *Helvidius-Pacificus* exchange formed a part, was triggered by the French Revolution and the uncertainty that event caused concerning the United States' relationship with the new French Republic. The United States had been bound to monarchical France by the Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., Treaty Ser. 82, an instrument that had been essential to the success of the American Revolution. Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, T.S. 82, *available at* http://www.yale.edu/lawweb/avalon/diplomacy/france/fr1788-2.htm. When revolutionary France declared war on Great Britain and Holland in February, 1793, American leaders, anxious not to be drawn into a general European conflict, began to question our legal obligations under that treaty. Of particular concern was Article 11, the "guarantee" clause, which appeared to require the United States to guarantee French possessions, including the French West Indies, that were vulnerable to a British attack. *See id.* Other articles of the treaty gave French warships and privateers the right to bring prizes into American ports (a privilege denied to other belligerents), and forbade France's enemies from fitting out privateers in U.S. ports or selling prizes there. *See id.*

In a Cabinet meeting on April 19, 1793, Alexander Hamilton, then Secretary of the Treasury, took the position (as reported by Secretary of State Thomas Jefferson) that the occurrence of a régime change in France gave the United States "a right of election to renounce the treaty altogether, or to declare it suspended till their government shall be settled in the form it is ultimately to take." Thomas Jefferson, *Opinion on the French Treaties*, *in* THOMAS JEFFERSON: POLITICAL WRITINGS 553-54 (Joyce Appleby & Terence Ball eds., 1999). Hamilton stressed the danger to the United States' national security that would ensue if the treaty were not renounced or suspended. *See id.* Jefferson's reply to Hamilton, delivered in response to a request by President George Washington for the opinions of his Cabinet members, took issue with Hamilton's assumptions about the risks that the United States would be drawn into war, but did not deny that if the dangers proved real, the United States would have the right under the Law of Nations to suspend performance of the treaty, or at least of some of its clauses. *See id.* at 556. "Obligation is not suspended, till the danger is become real, & the moment it is so imminent, that we can no longer avoid decision without forever losing the opportunity to do it." *Id.* at 556. For Jefferson, under the Law of Nations "the exception of *danger*" to treaty performance "exists in all cases." *Id.* at 562. Accordingly, both Hamilton and Jefferson believed that in cases in which performance of treaty obligations would present a sufficient danger to national security, the Law of Nations permitted the United States to suspend performance. *See generally id.* at 553-62. Hamilton, in an opinion for Washington on May 2, 1793, further maintained that existing circumstances justified temporary suspension of the treaty, and that the Law of Nations would also justify terminating the treaty because of the dangers. *See* Letter from Alexander Hamilton & Henry Knox to President George Washington (May 2, 1793), http://www.pbs.org/georgewashington/collection/pres_1793may2.html (last visited Jan. 22, 2006).

Relying on the advice of his subordinates, President Washington announced the Neutrality Proclamation on April 22, 1793. *See* 1 MESSAGES AND PAPERS OF THE

PRESIDENTS: 1789-1897, at 148-49 (James D. Richardson ed., 1900). The Proclamation was widely attacked by American sympathizers with France, including James Madison and Thomas Jefferson (despite his original support of proclaiming a state of neutrality). Hamilton rallied to the President's defense in *Pacificus* No. 1 (June 29, 1793). *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 112-13 (1976) (emphasis added). Jefferson sent Madison a copy of the first *Pacificus* article on June 30, urging Madison to reply to Hamilton's "heresies," including his views that the President could "declare that we are *not bound to execute the guarantee*" clause and that the President could suspend the treaty. *Id.* Thus began the *Pacificus-Helvidius* debate.

Of chief relevance here is the fact that Hamilton consistently maintained the President's constitutional authority to suspend performance of a concededly binding treaty obligation. In *Pacificus* No. 1, he expressly stated that "it is conceded that an execution of the clause of Guarantee contained in the 11th article of our Treaty of Alliance with France would be contrary to the sense and spirit of the [Neutrality] Proclamation." Alexander Hamilton, Pacificus, No. 1, http://www.hamiltonsociety.org/Hamilton%20Writings/Pacificus.mht (last visited Feb. 17, 2006). Having assumed that this was "a just view of the true force and import of the Proclamation," Hamilton then turned to the question whether "the President in issuing it acted within his proper sphere, or stepped beyond the bounds of his constitutional authority and duty." *Id.* He concluded that "the step, which has been taken by [the President], is liable to no just exception on the score of authority." *Id.* Further, Hamilton ascribed to the President "the right . . . to decide the obligations of the Nation with regard to foreign Nations," and maintained that "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone." *Id.* And in *Pacificus* No. 3, Hamilton affirmed that "[s]elf-preservation is the first duty of a nation; and though in the performance of stipulations relating to war, good faith requires that its ordinary hazards should be fairly met, . . . yet it does not required that extraordinary and extreme hazards should be run." Further, citing Emmerich de Vattel, whom he called "one of the best writers on the law of nations," Hamilton wrote that "'the case of [an imminent danger threatening the safety of the state] is tacitly and necessarily reserved in every treaty.'" Alexander Hamilton, Pacificus, No. 3.

To be sure, Hamilton also argued that in suspending the treaty, the President would also be acting *in accordance with* the Law of Nations. *Id.* But it does not follow that Hamilton believed that the President lacked the constitutional authority to suspend or renounce a treaty *in contravention of* international law. In fact, that precise issue does not seem to have been reached in the debates surrounding the French treaty. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L. J. 231, 327 (2001). "Whether, as a matter of domestic law, the President could terminate a treaty in violation of international law is a question the [Washington] administration did not appear to contemplate." *Id.* It is therefore mistaken to infer that the debate reflected a common assumption that the President is constitutionally bound by international law. In any event, the putative international law exception for *danger* would appear to cover substantially all the cases in which the President might legitimately claim the authority to suspend or renounce a treaty of alliance.

through the Mexican War, the Civil War, the Reconstruction Era, the Spanish-American War, and even later.[121]

I will not attempt to summarize, review and challenge Golove's entire case here. I will however attempt to rebut what appears to me to be his strongest line of argument—the argument based on case law, above all early Supreme Court case law. Before turning to that, however, I must make two brief prefatory remarks.

A. Although the United States Generally Follows International Law, the Executive Has Constitutional Power to Contravene It.

First, the United States has a long and honorable tradition of compliance with international law, including the laws of war. Indeed some of the most fundamental and progressive innovations in that body of law, such as President Lincoln's General Orders No. 100 of 1863 (the "Lieber Code") were the work of the United States military and its legal advisers.[122] Further, the United States has long followed the policy of extending the essential protections of the Third Geneva Convention to classes of prisoners, such as the Viet Cong, who in the opinion of the government had no legal entitlement to "prisoner of war" status.[123]

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[121] *See generally* Golove, *supra* note 30, at 384-94.

[122] General Order 100 (1863). The Lieber Code exerted an enormous influence on the subsequent development of the Law of War. *See generally* Theodor Meron, *Francis Lieber's Code and Principles of Humanity,* 36 COLUM. J. TRANSNAT'L L. 269 (1997); Grant R. Doty, *The United States and the Development of the Laws of Land Warfare,* 156 MIL. L. REV. 224, 238-39 (1998); 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).

[123] Hans-Peter Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: An Appeal for Ratification by the United States,* 81 AM. J. INT'L L. 912, 921 (1987):

> During the war in Vietnam, members of Vietcong guerrilla units who were captured while actually engaged in combat ('carrying arms openly') were treated by the U.S. Military Assistance Command as prisoners of war (but not granted formal POW status), whereas a Vietcong who had committed an act of terrorism did not receive that treatment.

Id.; *see also* H.S. Levie, *United States Military Assistance Command, Vietnam: Directives No. 381-46, Military Intelligence: Combined Screening of Detainees* (Dec. 27, 1967), *in* HOW DOES LAW PROTECT IN WAR? 780 (Marco Sassòli & Antoine A. Bouvier eds., 1999).

In general, Department of Defense "policy is 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

However, the question here is not what kinds of policies are most worthy of us as a great and humane nation. The question is the extent of the President's constitutional power, as he may be called upon to exercise it in an extreme situation. Even international law itself may recognize in certain extreme situations that a State is not forbidden to take actions otherwise impermissible under international law.[124] Thus the International Court of Justice, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, found itself unable to "reach a definite conclusion as to the legality or illegality of use of nuclear weapons by a State in an extreme circumstance . . . in which [the State's] very survival would be at stake."[125] If international law (at least in its present state) cannot be understood to forbid measures like the use of devastating nuclear weapons in order to protect a State's survival,[126] it is hard to believe the Constitution is as, or more, restric-

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operations." W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 507 (2003); *see also* Corn & Smidt, *supra* note 10, at 9.

[124] During the Second World War, the French Forces of the Interior (the organization of Free French resistance fighters against Nazi Germany's forces in occupied France) captured a large number of withdrawing German military and executed eighty of them. Kenneth Anderson, *Reprisal Killings*, http://www.crimesofwar.org/thebook/reprisal-killing.html (last visited Jan. 26, 2006). This action was taken in reprisal against the previous execution by the Germans of eighty French prisoners of war, and was also intended to counter the German threat of further execution of French prisoners. *Id.* Under the Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, 27 July 1929, measures of reprisal against prisoners of war "are forbidden." Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 2, *available at* http://www.icrc.org/ihl.nsf/FULL/305?OpenDocument. If that clause applied to the conflict between the Free French and German forces, the French reprisal against their German prisoners was clearly a violation. Commenting on the episode, however, one scholar observed that "[t]he [French] resort to reprisals in this case showed the difficulty of absolutely prohibiting reprisals against prisoners of war." LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 142 n.104 (1988).

[125] Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. 226 § 97 (July 8). Likewise, addressing the question of the legality of the United States' 1962 naval blockade of Cuba under international law, former Secretary of State Dean Acheson observed: "[L]aw 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." *The Cuban Quarantine: Remarks by the Honorable Dean Acheson*, 57 AM. SOC'Y INT'L L. Proc. 9, 14 (1963).

[126] The scope of "survival of a State" in the Court's opinion is unclear. *See* Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 418 (1997).

tive. The Constitution, after all, was specifically designed to secure the safety and survival of the American nation.

Second, it can hardly be denied that Presidents, often under claim of constitutional power, have ordered or authorized actions at variance with international law, including the laws of war, as generally understood. Prominent examples involving conflicts between Presidential power and the rules of international law respecting war would arguably include at least four modern instances:[127] President Franklin Roosevelt's course of conduct towards the Axis powers in the period before the United States declared war on them;[128] the U.S. Navy's practice of unrestricted submarine warfare against Japan throughout the entire Pacific, beginning on December 7, 1941;[129] President Truman's decision to drop the atomic bomb on Japan;[130] and President Clinton's

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[127] There are arguably other important instances as well. For example, the Allied occupation and reconstruction of Germany after the Second World War, with its policy of fundamental régime change, was arguably controlled by, but irreconcilable with, Hague Convention IV Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, which requires the occupying Power to respect, "unless absolutely prevented, the laws in force in the [occupied] country." *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 48 (1990); James C. Ho, *International Law and the Liberation of Iraq*, 8 TEX. REV. L. & POL. 79, 84-86 (2003).

[128] *See, e.g.*, Delahunty & Yoo, *supra* note 20, at 1175-77. I note that at least some of President Roosevelt's violations of neutrality might be regarded as acts of anticipatory self-defense (assuming that Nazi Germany intended to attack the United States eventually) and therefore, consistent with international law. *Id.* It is beyond the scope of this paper to examine that possibility, which would appear to involve an understanding of the anticipatory self-defense doctrine broader than the traditional one.

[129] During the trial at Nuremberg of German Admiral Karl Doenitz on the charge, *inter alia*, of waging unrestricted submarine warfare in contravention of the London Naval Protocol of 1930, as reaffirmed by the Naval Protocol of 1936, 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 that the U.S. Navy had instituted a policy of unrestricted submarine warfare against Japan throughout the entire Pacific, beginning on December 7, 1941. 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." TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 409 (1992). *See generally* Sienho Yee, *The Tu Quoque Argument as a Defence to International Crimes, Prosecution, or Punishment*, 3 CHINESE J. INT'L L. 87, 104-10 (2004) (providing account of events of Doenitz trial).

[130] There is an impressive argument that President Truman's decision to drop atomic bombs on Hiroshima and Nagasaki was in violation of both conventional and customary international law. President Truman himself, to be sure, considered his

armed intervention in Kosovo.[131] Even if longstanding governmental practice does not control the interpretation of the Constitution, it should surely inform it.

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actions fully legal. *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). But in the 1963 *Shimoda* case, the Tokyo District Court, in a suit brought by plaintiff survivors of the Hiroshima and Nagasaki bombings, held the use of the atomic bomb against those cities violated the positive international law existing at that time. Shimoda v. State, 355 HANREI JIHŌ 17 (Tokyo D. Ct., Dec. 7, 1963), translated in 8 JAPANESE ANN. INT'L L. 231 (1964), *available at* http://www.icrc.org/ihlnat.nsf/0/aa559087dbcflaf5c1256a1c0029f14d?OpenDocument. The court concluded: "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." *Id.*

Later writers have agreed. Addressing the American Society of International Law in 1982, Richard Falk stated that "[n]uclear weapons are clearly in violation of the laws of war as understood from the Hague Conventions on up to the Geneva Conventions and their Protocols . . . . The *Shimoda* case and numerous resolutions of the U.N. General Assembly show that the international legal system . . . has found them to be illegal." Richard A. Falk et al., *Strategic Deterrence and Nuclear War*, 76 AM. SOC'Y INT'L L. PROC. 23, 24 (1982). Professor Falk was, of course, writing well before the International Court of Justice's advisory opinion Legality of the Threat or Use of Nuclear Weapons. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 § 97 (July 8). And in 1971, Leonard Boudin wrote, "it is difficult to challenge [the *Shimoda*] court's evaluation of Hiroshima as a war crime." Leonard B. Boudin, *War Crimes and Vietnam: The Mote in Whose Eye?*, 84 HARV. L. REV. 1940, 1942 (1971).

[131] 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, 736, 797 n.22 (2004); Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 36 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999), *available at* http://www.ejil.org/journal/vol0/No1/ab1.html; Dinstein, *supra* note 74, at 881. Despite flawlessly setting out the legal case against intervention altogether, Richard Falk attempts, unconvincingly in my view, to defend the legality of NATO's actions under international law. *See generally* Richard Falk, *Humanitarian Intervention After Kosovo*, *in* LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 31-52 (Aleksandar Jokic ed., 2003). *See also* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 828 (1999) (attempting to justify—even if retrospectively—for the Kosovo intervention under international law).

B. The Early Supreme Court Cases Cited by Golove Reflect an Eighteenth Century Natural Law Jurisprudence

I turn now to Professor Golove's argument that a long train of Supreme Court decisions, accompanied by the opinions of leading legal authorities and scholars, establishes that the Laws of War create a constitutional check on the President's authority to wage war.[132] Of these various cases and authorities, the most weighty and important are those handed down in the early Republic.[133]

Fortunately, there is no need for me to examine Golove's cases one-by-one, because the essential work has already been done. In a recent article in the Harvard Law Review, Professors Curtis Bradley and Jack Goldsmith reviewed the relevant precedents and characterized them as follows:

> The Supreme Court has never invalidated presidential action on the ground that the action violated the laws of war. Many of the precedents cited in support of the claim that the laws of war limit the President's Article II Commander-in-Chief power are not framed in terms of limitation, but rather simply state that the President may do everything permitted by the laws of war. Some decisions do talk (in dissents or dicta) about international law as a limitation, but these statements appear to refer to international law as a limitation on the United States, not the President, even though it is settled that the United States has the domestic authority to violate international law . . . . Moreover, the laws of war are along most dimensions much more restrictive now than they were in the late 1700s when the Constitution was drafted and ratified. If the Commander in Chief Clause itself incorporates evolving law-of-war restrictions, the scope of the Commander-in-Chief power would have shrunk significantly during the past two centuries, which is contrary to constitutional history.[134]

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132 Golove, *supra* note 30, at 380-391.

133 *See generally id.*

134 Bradley and Goldsmith, *supra* note 26, at 2097 n. 220. One might also note that case law is not as seamless as Golove assumes. For example, in *Matthews v. McStea*, the Supreme Court stated the President, "and even, to a limited extent . . . a military commander" could order a "partial suspension[ ] of the law[ ] of war" prohibiting commercial intercourse with the enemy. Matthews v. McStea, 91 U.S. 7, 10 (1875). And in his dissenting opinion in *New York Life Ins. v. Hendren*, Justice Bradley observed that "international law . . . may be modified as the government

Although the early cases that Golove cites do not have the force he ascribes to them, I willingly acknowledge that he has seized on an important and illuminating point. For there is indeed powerful evidence that legal thinkers in the framing period of America and the early Republic did indeed believe that simply by entering into the society of nations, the United States at once acquired rights and assumed obligations under the Law of Nations.[135] In this view, submission to that body of law is intrinsic to the very idea of nationhood.

Chancellor James Kent, one leading legal theorist of the early Republic, explained this conception in his 1826-30 *Commentaries on American Law* as follows:

> When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law. During the war of the American revolution, Congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, "according to the general usages of Europe." By this law we are to understand that code of public instruction, which de-

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sees fit . . . . [I]n many things that *prima facie* belong to international law, the government will adopt its own regulations: such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband, &c." New York Life Ins. v. Hendren, 92 U.S. 286, 287-88 (1875). Moreover, as a general matter, the early Court held the view that the Laws of War could, in appropriate cases, be varied by agreement between or among nations.

> The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged . . . . [But] [m]any nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it.

The Nereide, Bennet, Master, 13 U.S. (1 Cranch) 388, 418-19 (1815). Likewise, in *The Atlanta*, the Court said, "The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be changed, or so impaired as to leave no object to which it is applicable." The Atlanta, 16 U.S. (3 Wheat.) 409, 415 (1818).

[135] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793). Chief Justice John Jay stated that the United States "had, by taking a place among the nations of the earth, become amenable to the law of nations." *Id. See generally* RABKIN, *supra* note 107, ch. 4; *see also* John Yoo & Robert Delahunty, *Against Foreign Law*, 29 HARV. J. L. & PUB. POL'Y 291 (2005).

> fines the rights and prescribes the duties of nations, in their intercourse with each other. The faithful observance of this law is essential to national character . . . . [I]t is founded on the principle, that different nations ought to do each other as much good in peace, and as little harm in war, as possible, without injury to their true interests.[136]

As Kent indicates here, the Law of Nations was understood to include laws relating to war.[137] In this connection, he notes approvingly that since Hugo Grotius first attempted in the seventeenth century to systematize it,[138]

> [t]he code of war has been vastly enlarged and improved, and its rights better defined, and its severities mitigated. The rights of maritime capture, the principles of the law of prize, and the duties and privileges of neutrals, have grown into very important titles in the system of national law.[139]

He also notes that American practice and tradition, from the very beginning of our national existence, established the United States' willingness to subject itself to the laws of war: "[T]he Congress of the United States, during the time of the American [Revolutionary] war, discovered great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions of it punished."[140]

The question therefore arises: does it not follow from Chancellor Kent's (very representative) views, that the United States, and in particular the President, are constitutionally bound to observe the laws of war, since such observance is a necessary condition of nationhood? The answer to this question depends on situating jurisprudential views like Kent's within a larger tradition of legal thinking: the tradition of

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136 JAMES KENT, COMMENTARIES 1 (1826), *excerpts reprinted in* 3 THE FOUNDERS' CONSTITUTION, at 85 (Philip B. Kurland & Ralph Lerner eds., 1987).

137 *See also* New York Life Ins. Co. v. Hendren, 92 U.S. at 286 (referring to "the general laws of war, as recognized by the law of nations applicable to this case"); Sanderson v. Morgan, 39 N.Y. 231, 232 (1868) (the "obligation of observing the common laws of war" is "the same which the law of nature obliges all nations to observe in the prosecution of war against each other").

138 *See generally* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS (A.C. Campell trans., M. Walter Dunne ed. 1901) (1625).

139 KENT, *supra* note 136, at 87.

140 *Id.*

natural law.[141] Following Max Weber, we may understand "Natural Law" to be "the sum total of all those norms which are valid independently of, and superior to, any positive law and which owe their dignity not to arbitrary enactment but, on the contrary, provide the very legitimation for the binding force of positive law."[142]

The early Supreme Court's jurisprudence abounds in references to Natural Law, which was at least sometimes considered to be a source of law equal to, or perhaps even more fundamental than, the written Constitution.[143] For example, in *Johnson & Graham's Lessee v. M'Intosh*,[144] Chief Justice John Marshall consulted the "principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations." Marshall went on to rest

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[141] There is also a more particularized answer. The Law of Nations, as understood in the framing period and early Republic, was primarily a law *between* nations. It did not necessarily apply in full force to conflicts between nations and non-state actors, such as pirates. As Chancellor Kent specifically noted:

> Pirates have been regarded by all civilized nations as the enemies of the human race, and the most atrocious violators of the universal law of society. They are every where pursued and punished with death; and the severity with which the law has animadverted upon this crime, arises from its enormity and danger, the cruelty that accompanies it, the necessity of checking it, the difficulty of detection, and the facility with which robberies may be committed upon pacific traders, in the solitude of the ocean. Every nation has a right to attack and exterminate them without any declaration of war; for though pirates may form a loose and temporary association among themselves, and re-establish in some degree those laws of justice which they have violated with the rest of the world, yet they are not considered as a national body, *or entitled to the laws of war as one of the community of nations.*

Id. (emphasis added). If, as an original matter, it was not constitutionally incumbent on the President to apply the laws of war to conflicts with pirates, it is hard to see why it is constitutionally required for him to apply them in the war with al Qaeda.

[142] 2 Max Weber, *Economy and Society* 867 (Guenther Roth and Claus Wittich (eds.) 1978). Weber further observed that "[n]atural law has thus been the collective term for those norms that owe their legitimacy not to their origin from a legitimate lawgiver, but to their immanent and teleological qualities. It is the specific and only type of legitimacy of a legal order which can remain once religious revelation and the authoritarian sacredness of a trafition and its bearers have lost their force." *Id.*

[143] *See* Benjamin Fletcher Wright, *American Interprerations of Natural Law: A Study in the History of Political Thought* 280-300 (1931). As Wright points out, although the Justices and judges did not always speak, in terms, of "natural law," they often used other language to describe a body of higher law that was not a human construct.

[144] 8 Wheat. 543, 572 (1823).

his decision in the case largely on the right of discovery, which he conceived of as a "principle of universal law."[145]

When legal writers of the framing period spoke of "the Law of Nations," they often assumed such law to be founded upon natural law.[146] Sir William Blackstone, who exerted an enormous influence on the Framers' legal thinking, put the matter as follows:

> The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.[147]

Blackstone identified two sources of the Law of Nations. That body of law, he said, depended

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[145] *Id.* at 595.

[146] "The English and American writers who shaped American law prior to the Civil War . . . generally credited natural law. Among these writers were Locke, Blackstone, Jefferson, Wilson, Madison, Tucker, Marshall, Kent, Story, Lieber, Lincoln, and Pomeroy." ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 9 (2000). Alschuler finds that American legal opinion began departing from its Natural Law origins beginning about 1870. *See id.*; *see also* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 at 678 (abridged ed. 1991) (finding that "[e]arly nineteenth-century commentators pointed to the close connection between the law of nature and the law of nations," but adding that "[s]ome juristic contemporaries . . . were far less confident about the 'fundamental' status of natural law, let alone its intelligibility as a set of unwritten principles."); STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS, A GENERAL HISTORY 95-96 (2005) (finding the Just War tradition of the Middle Ages to have been "the dominant framework for legal analyses of war throughout the seventeenth and eighteenth centuries," but noting the rise of "the new law of nations, or 'voluntary' law, alongside the old law of nature," giving this period "its distinctive dualistic stamp"); Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 550-52 (1909) (describing influence of Continental publicists upon early American legal thinkers).

[147] WILLIAM BLACKSTONE, 4 COMMENTARIES *66.

> [e]ntirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts, we have no other rule to resort to, but the law of nature; being the only one to which both communities are equally subject.[148]

Insofar as the Law of Nations was natural law rather than man-made conventional law (in the form of treaties and the like), Blackstone considered it binding on all human governments:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[149]

Chancellor Kent, likewise, distinguished between the Law of Nations "considered . . . as a mere system of positive institutions, founded upon consent and usage," and considered as "essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons."[150] Although Kent agreed the "most useful and practical part of the law of nations" was positive or conventional, he insisted

> [i]t would be improper to separate [the Law of Nations] entirely from natural law jurisprudence, and not to consider it as deriving much of its force, and dignity, and sanction, from the same principles of right reason, and the same view of the nature and constitution of man, from which the science of morality is deduced.[151]

Considered as a species of natural law, Kent maintains that the Law of Nations may be called a necessary law "because nations are bound by the law of nature to observe it," or an "internal" law, because "it is obligatory upon [nations] in [terms] of conscience."[152]

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148 WILLIAM BLACKSTONE, 1 COMMENTARIES *38, *43.

149 *Id.* at *41.

150 KENT, *supra* note 136, at 85.

151 *Id.*

152 *Id.*

We are now much better positioned to understand the implications of Golove's argument. The early Supreme Court cases on which he relies, including *Bas v. Tingy*,[153] *Talbot v. Seeman*,[154] and *Brown v. United States*,[155] are best understood against the backdrop of this eighteenth century conception of natural law, rather than in terms of a timeless "international law," as Golove incorrectly assumes.[156] The language in those cases to the effect that the United States is constrained by the Law of War is fully intelligible insofar as the Law of War (or some elements of it), as part of the Law of Nations, is (or are) considered to be a species of natural law with a divine origin and a universal scope.[157]

By contrast, it would have been strange for the Court to have maintained that the political branches were *constitutionally* constrained by the Law of War if that body of law had been thought to be purely conventional—a wholly man-made artifact, alterable at will by political sovereigns. As a general matter, the early Court took it to be unproblematic that a sovereign could unilaterally overturn international law, at least with respect to activity on its own territory.[158] Likewise, early American statesmen like Franklin and Jefferson recognized that where provisions of the Law of War had arisen from state practice, they could legitimately be refashioned at the will of governments.[159] Furthermore, Blackstone, who considered the law of war to

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153 4 U.S. (4 Dall.) 37 (1800).

154 5 U.S. (1 Cranch) 1 (1801).

155 12 U.S. (8 Cranch) 110 (1814).

156 The very term "international law" was not invented until 1789, after the ratification of the Constitution. It was introduced by Jeremy Bentham precisely to *avoid* what he considered the unwelcome connotations of the term "Law of Nations." *See* RABKIN, *supra* note 107, at 25; *see also* M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405, 408-09 (1984).

157 Other early cases are to similar effect. *See, e.g.*, Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (unwritten Law of Nations determined by "resort to the great principles of reason and justice"); The Venus, Rae, Master, 12 U.S. (8 Cranch) 253, 297 (1814) ("The law of nations is a law founded on the great and immutable principles of equity and natural justice"). *See also* G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 728 (1989) (the "Law of Nations" in the Marshall Court "was intended to signify . . . a set of bedrock beliefs and values . . . . The 'law of nations' and 'the law of nature' were closely allied concepts for Marshall and his contemporaries.").

158 *See* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 145-46 (1812).

159 In instructions to the agent for American cruisers on May 30, 1780, Benjamin Franklin, as Minister to France, pointed out that the neutral States of Europe were disposed to change the rule of maritime captures "that an enemy's property

be at least partly conventional, indicated it would be binding on nations only insofar as it was "without prejudice to their own real interests."[160] Kent, likewise, considered the principle of causing as little harm as possible to other nations in wartime to be binding only if it could be followed without prejudice to a nation's "true interests."[161]

A natural law-based conception of the Law of Nations can be seen in other early cases, notably including Justice Story's opinion in *United States v. La Jeune Eugenie*.[162] Not unlike Blackstone and Kent, Justice Story found the Law of Nations derived in part from what he called "the general principles of right and justice, applied . . . to the relations and duties of nations," and in part from other sources he called "the customary observances and recognitions of civilized nations" and "the conventional or positive law, that regulates the intercourse between states."[163] In *La Jeune Eugenie*, Justice Story ruled the African slave trade illegal because it contravened "the first principles,

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may be taken wherever found, and to establish a rule that free ships shall make free goods." *The Minister in France (Franklin) to the Agent for American Cruisers (Torris)* (May 30, 1780), *reprinted* in 1 CARLTON SAVAGE, POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR 145 (1934). Franklin considered the emerging rule sound, thought that the Continental Congress would agree to it, and instructed American cruisers to bring in no more Dutch vessels carrying enemy (English) goods unless the goods were contraband. In the particular case before him, Franklin confiscated the entire English cargo of the interdicted Dutch ship, not merely what was contraband; but he reported his action to Congress and requested its authorization for his prospective change in policy. *See* SAVAGE, *supra*, at 146.

President Thomas Jefferson took a similar view of the maritime captures in informal instructions to Robert Livingston upon his appointment as Minister to France. In a letter of September 9, 1801, Jefferson advised Livingston that "[i]f . . . we are to consider the practice of nations as the sole and sufficient evidence of the law of nature among nations," then it was undoubtedly lawful for a belligerent to seize the goods of an enemy being carried by a neutral ship. But Jefferson found that the established rule caused serious "inconveniences" to neutrals, among them that of tending to draw them into the conflict. Attributing the emergence of the established rule to "accident, and the the particular convenience of the States which first figured on the water," Jefferson expressed his personal preference for "the genuine principle dictated by national morality," *viz.*, the rule that "'free ships should make free goods.'" While declaring that the new principle was not "worth a war," Jefferson looked forward to cooperating in peacetime with the European nations disposed to institute it. *President Jefferson to the Appointed Minister to France (R. Livingston)*, Sept. 9, 1801, *reprinted* in SAVAGE, *supra*, at 233, 234-37.

160 BLACKSTONE, *supra* note 97.

161 *See generally* KENT, *supra* note 136.

162 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

163 *Id.* at 846.

which ought to govern nations,"[164] it violated the Law of Nations *qua* natural law, not conventional law.[165]

If the Law of Nature (or at least the part of it that comprised the Law of Nations) was, from the perspective of some of these early cases, a limitation on executive power, the Law of Nature was even more obviously a constraint on *legislative* power. Hence if Golove is right in thinking that the early cases established a constitutional limit to executive power, he must logically concede that Congress' power is analogously circumscribed. In particular, Golove should, in consistency, acknowledge Natural Law-based limits to legislative power to interfere with private property or contracts. Consider, e.g., Justice Chase's opinion in *Calder v. Bull*[166]:

> I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state . . . . The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments . . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection of which government was established.

We can now pinpoint the critical problem for Golove's theory. This is that the natural law jurisprudence, which informed the early cases on which he relies,[167] has for decades been disfavored in American law. True, as recently as the post-World War II Tokyo War Crimes Trial, the United States prosecutor based his case squarely on a

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164 *Id.*

165 As G. Edward White has noted, however, Story's opinion is not without some equivocation. "Pressed to its logical conclusion, Story's position would appear to have elevated natural law to a status of jurisprudential primacy, a set of first principles that antedated and superseded positivistic law. But he was not prepared to press his logic that far in his *Eugénie* opinion." WHITE, *supra* note 146, at 678.

166 3 Dall. 386, 388 (1798).

167 *See generally* Golove, *supra* note 30, at 386-94.

natural law theory of international law.[168] However, Justice Robert Jackson, the United States Chief Counsel at the Nuremberg Trial, was far more representative of current American jurisprudence in assuming a thoroughly positivistic account of international law.[169] There is no indication whatever in Golove's article, however, that he would accept the pre-positivist basis of the Supreme Court cases that he uses to under-gird his argument.

The "watershed" event in American constitutional jurisprudence occurred, of course, in *Erie R.R. Co. v. Tompkins*.[170] As the Framers had understood it, the Law of Nations, when situated in a natural law framework, formed part of "the so-called general common law."[171]

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[168] JOSEPH BERRY KEENAN & BRENDAN FRANCIS BROWN, CRIMES AGAINST INTERNATIONAL LAW 71-72 (1950).

> [T]he Prosecution contended for a moral notion of law, the Defense for an amoral conception. From the moral point of view, law is essentially integrated with philosophy, ethics and sociology. . . . It may or may not be the command of a State. . . . The Prosecution postulated an objectively existing moral order as the final medium of international social control. A common morality applies to the individual person, to the nation, and to the community or family of nations—a morality rooted in the spiritual dignity, worth, and value of all men, who constitute a universal brotherhood under the fatherhood of God.

Id. The position held by Mr. Keenan, who was the Chief Counsel of the United States at the Tokyo Trial, reflected a revival of interest in this country in Natural Law which had accompanied the rise and ascendancy of Nazism during the 1930s. *See* Richard Primus, *Note: A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L. J. 425, 429-31 (1996). Proponents of this revival (often Roman Catholics) frequently argued legal positivism and legal realism offered no bulwark against—or indeed contributed to—totalitarianism. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 159-78 (1973).

[169] *See generally* JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 179-86 (1964).

[170] 304 U.S. 64 (1938). As Justice Scalia (quoting the majority) recently observed in *Sosa v. Alvarez-Machain*, *Erie* "was a 'watershed' decision heralding an avulsive change, wrought by 'conceptual development in understanding common law.'" Sosa v. Alvarez-Machain, 54 U.S. 692, 744 (2004) (Scalia, J., concurring in part and concurring in judgment).

[171] *Sosa*, 54 U.S. at 739 (Scalia, J., concurring in part and concurring in the judgment). *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat) 153, 161 (1820) ("[the] law of nations . . . is part of the common law"); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 161 (1795) ("the common law, of which the law of nations is a part"); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,766) (the law of Nations is part of "the common law of the United States"). The English position at the time, as explained by Blackstone, was that "the law of nations (wherever any question arises which is properly the object of it's [sic] jurisdiction) is here

But this pre-positivist conception of general common law as, in Justice Holmes' famous words, "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,"[172] does not figure significantly in federal jurisprudence after *Erie*.

> *Erie*, following Holmes's earlier dissents, adopted an unexceptional Austinian version of legal positivism. Law, according to Austin, is the coercive order of a sovereign. In his dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, Holmes added the realist gloss that state court decisions count as law. Brandeis's opinion in *Erie*, by quoting approvingly the pertinent part of Holmes's dissent, adopts both an Austinian version of legal positivism and Holmes's realist gloss on it.[173]

Abstracted from the pre-positivist historical context in which it made sense to see governments as bound by natural law, therefore, the early materials on which Professor Golove relies do not have the contemporary constitutional significance that he imputes to them. *Erie* broke the thread that Golove thinks binds the early cases to the present.

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adopted in it's [sic] full extent by the common law." BLACKSTONE, *supra* note 147, at *67. *See also* Triquet v. Bath, 3 Burr. 1478, 1480 (1764); Mark Weston Janis, *International Law as Fundamental Justice: James Scott Brown, Harold Hongju Koh, and the American Universalist Tradition of International Law*, 46 ST. LOUIS U. L.J. 345, 350 (2002). *See generally* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 374, 511 n.43 (2002); Bradley, *supra* note 26, at 822-24; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-28 (1989); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263-67 (1985); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1798: The Example of Maritime Insurance*, 97 HARV. L. REV. 1513, 1515, 1517-21 (1984); J. Edward Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 39 (1955).

[172] Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

[173] Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 678 (1998).

V. CONCLUSION

The President has a clear constitutional duty to "take Care that the Laws be faithfully executed,"[174] and because duly ratified treaties are part of the law of the land, the President has the constitutional duty to execute them faithfully. He has no constitutional duty to execute unratified treaties, however, nor is he constitutionally obliged to conform the United States' practices to the customs and practices of other nations, although it may well be prudent and advisable as a general matter for him to do so.[175] The President also has a constitutional obligation, by virtue of his Oath of Office, "to preserve, protect and defend the Constitution of the United States."[176] In some circumstances, especially during wartime, the President's constitutional duty to protect national security may require him to breach or suspend our treaty obligations. It may also require him to violate customary international law. Nothing in Golove's argument should persuade us otherwise.

The way forward for the United States is treacherous. On the one hand, it must use international law as an instrument against terrorism. The community of nations must understand and accept that it cannot permit its members to sustain or harbor terrorist groups whose aim is to destroy the lives of other members' citizens. On the other hand, in attempting to create and maintain an international legal system from which it and other nations will undoubtedly benefit, the United States may in some circumstances be compelled to take measures that the

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174 U.S. CONST. art. II, § 3.

175 As Joseph Nye has argued, the United States' position in the world depends to a great extent on its possession of "soft power," and that source of power is undercut by what is widely (if often tendentiously) perceived as illegal activity or human rights abuse on the part of our government. *See* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 59-60 (2004); *see also* Walt, *supra* note 7, at 98-9; 167-69. In particular, "[m]edia-generated world opinion" has become "a resource of war, behind which and in which the combatants on the weaker side seek cover and protection." MÜNKLER, *supra* note 4, at 90. A vulnerable *Goliath* like the United States needs, as a practical necessity of warfare, to be attentive to perceptions of international legality when engaged in asymmetrical conflict with a group that seeks to portray itself as a *David*.

Military manuals, including those of the American, British and Australian armed forces, have long identified the importance of domestic and foreign public opinion. *See* Theodore Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 85 (2000). But the effect of such opinion on the conduct of war, especially in democratic societies, can hardly be understated, particularly in "small wars" of the kind in which our country is now engaged. *See* GIL MEROM, HOW DEMOCRACIES LOSE SMALL WARS 22-23 (2003).

176 U.S. CONST. art. II, § 8.

system condemns as illegal. As Walter Russell Mead has wisely pointed out, the paradox is inescapable: "[t]he Parties of Heaven and Hell may combine against us, but we must nevertheless do our best both to uphold the concept of international law and defend the basic order that alone makes concepts like international law meaningful."[177]

[177] WALTER RUSSELL MEAD, POWER, TERROR, PEACE AND WAR: AMERICA'S GRAND STRATEGY IN A WORLD AT RISK 175 (2004).