

2004

# Is the President Bound by the Geneva Conventions?

Derek Jinks

David Sloss

Follow this and additional works at: [https://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

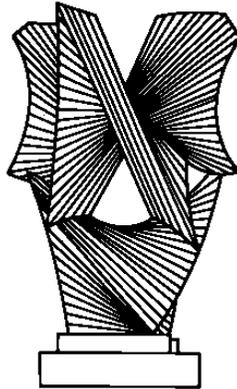
## Recommended Citation

Derek Jinks & David Sloss, "Is the President Bound by the Geneva Conventions?" (University of Chicago Public Law & Legal Theory Working Paper No. 61, 2004).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 61



## IS THE PRESIDENT BOUND BY THE GENEVA CONVENTION?

*Derek Jinks*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

July 2004

This paper can be downloaded without charge at  
<http://www.law.uchicago.edu/academics/publiclaw/index.html>  
and at The Social Science Research Network Electronic Paper Collection:  
[http://ssrn.com/abstract\\_id=517683](http://ssrn.com/abstract_id=517683)

# Is the President Bound by the Geneva Conventions?

Derek Jinks<sup>†</sup> & David Sloss<sup>††</sup>

## *Abstract*

The United States is party to several treaties that regulate the conduct of war, including the 1949 Geneva Conventions on the Protection of War Victims. These treaties require belligerent states, as a matter of international law, to accord fair and humane treatment to enemy nationals subject to their authority in time of war. Moreover, these treaties are, as a matter of domestic law, part of the Supreme Law of the Land. The scope and content of the Conventions have assumed central importance in debates about U.S. policy toward al Qaeda and Taliban detainees held at Guantanamo Bay, Cuba. Indeed, several aspects of U.S. policy toward the detainees arguably violate the Conventions. In response, the Bush Administration maintains in effect that the Conventions, even if they are applicable and even if U.S. policy is inconsistent with them, are not binding on the President as a matter of domestic law because the President has the constitutional authority to choose to violate the Conventions in the interest of protecting national security. This Article evaluates the Bush Administration's claim. The Administration's position has certain non-trivial virtues. Even if the United States has no legal right to violate the treaties as a matter of international law, there are good reasons to recognize an implied power to violate (or supersede) treaties as a matter of domestic law. The central question is who should have this authority: the President or Congress. We consider in detail three variations of the Administration's position - read in its best light. The President's power to violate treaties might stem from (1) the President's law-making authority; (2) the President's law-breaking authority; or (3) the President's unfettered discretion to interpret U.S. treaty obligations. Following detailed consideration of each variation, we conclude that the President has no authority to violate a treaty obligation if Congress has the authority under Article I to enact legislation superseding that treaty obligation. Because the rules embodied in the Geneva Conventions address matters within the scope of Congress' Article I powers, the President lacks the constitutional power (absent congressional authorization) to violate these treaties. Building on this claim, we also argue that the President never has the unilateral authority to violate treaties because the existence of international rules empowers Congress to regulate matters governed by the treaty, even if those matters would otherwise be subject to the President's exclusive power. Finally, we suggest that there is some meaningful role for courts to play in enforcing treaty obligations—irrespective of whether the President's interpretation of any given treaty is entitled to substantial deference. In short, we conclude that the President is bound by the Geneva Conventions—as a formal legal matter and as a practical matter.

---

<sup>†</sup> Associate Professor of Law, Arizona State University College of Law; Visiting Professor of Law, University of Chicago Law School, 2003-2004. J.D., Yale Law School; M.A. M.Phil., Yale University.

<sup>††</sup> Associate Professor of Law, Saint Louis University School of Law. J.D., Stanford Law School; M.P.P., Harvard University. Thanks to Alexander Aleinikoff, José Alvarez, Curtis Bradley, Lori Damrosch, Martin Flaherty, Jack Goldsmith, David Golove, Ryan Goodman, Mattias Kumm, Thomas Lee, Michael Matheson, Gerald Neuman, Eric Posner, Catherine Powell, Michael Ramsey, Beth Stephens, Ed Swaine, Michael Van Alstine, Beth Van Schaack, and Ingrid Wuerth for helpful comments. The project also benefited from comments we received at the 2003 Annual Meeting of the American Society of International Law Interest Group on International Law in Domestic Courts at the University of Maryland School of Law, international law workshops at NYU School of Law and Columbia Law School, an international law workshop sponsored jointly by Washington University School of Law and Saint Louis University School of Law, and the faculty workshop at the University of Cincinnati School of Law.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

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

**INTRODUCTION**

During wartime, the executive branch tends to accrue greater powers at the expense of the legislative and judicial branches. For most of U.S. constitutional history, the powers accrued by the executive branch in wartime reverted to the other branches in peacetime.<sup>2</sup> However, according to one distinguished scholar, this did not happen at the end of World War II. As a result, he concluded, “the situation we are faced with today is that for the first time in our history there is, following a great war, no peace-time Constitution to which we may expect to return in any wholesale way.”<sup>3</sup> Another respected scholar, writing at the end of the Vietnam War, added: “[U]nless the American democracy figures out how to control the Presidency in war and peace . . . then our system of government will face grave troubles.”<sup>4</sup>

Recently, in the context of the so-called “war on terror,” President Bush has attempted to build on precedents established in past wars to support extraordinarily broad claims of executive power. For example, a top legal adviser in the Justice Department told the White House: “[T]he President enjoys complete discretion in the exercise of his Commander-in-Chief authority.”<sup>5</sup> Moreover, he added, Congress lacks authority “to set the terms and conditions under which the President may exercise his authority as Commander in Chief.”<sup>6</sup> In short, when the President invokes his Commander-in-Chief power, he is free to take any action that, in his view, promotes national security, and Congress is powerless to interfere with the exercise of Presidential prerogative.<sup>7</sup>

---

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

<sup>2</sup> *See* EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 168-72 (1947).

<sup>3</sup> *Id.*, at 172.

<sup>4</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at x (1973).

<sup>5</sup> *See Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, August 1, 2002 [hereinafter, “Bybee Memo”], at 33.

<sup>6</sup> *Id.*, at 34.

<sup>7</sup> Several recently declassified memoranda from high-level legal advisors argue that the Congress lacks the authority to condition, in any meaningful way, the exercise of the Commander-in-Chief power. *See, e.g., id.* at 34 (arguing that the Torture Act does not apply to interrogations undertaken pursuant to his Commander-in-Chief authority); *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The Bush Administration's sweeping claims of executive power have not gone unchallenged. In *Hamdi v. Rumsfeld*, the Supreme Court held that a U.S. citizen alleged to be an "enemy combatant" and held captive in a military prison has a right to challenge the factual basis for his detention.<sup>8</sup> In *Rasul v. Bush*, the Court held that aliens designated as "unlawful combatants" who are being imprisoned at Guantanamo Bay, Cuba, have a right of access to U.S. courts.<sup>9</sup> *Hamdi* and *Rasul* impose significant limitations on executive power in wartime, but the Court's decisions also leave unanswered a number of crucial questions.

One such question is whether the President has the constitutional authority to violate treaties that regulate the conduct of warfare. The Geneva Conventions are four treaties concluded in the aftermath of World War II whose central purpose is to provide comprehensive and effective protection for the victims of warfare.<sup>10</sup> The Bush Administration is currently holding approximately six hundred prisoners at Guantanamo Bay, most of whom were captured in the course of armed conflict in Afghanistan.<sup>11</sup> Assuming that the detainees do not qualify as prisoners of war under the POW Convention, as the Bush Administration maintains,<sup>12</sup> they are still entitled to protection under the Civilian Convention,

---

to William J. Haynes II, General Counsel, Department of Defense, January 9, 2002, at 10-11 ("[hereinafter, "Yoo/Delahanty Memo"] (disclaiming the applicability of the War Crimes Act to conduct authorized by the President by reference to the President's "plenary authority" as Commander in Chief); Dep't of Defense, *Working Group Report on Detainee Interrogation in the Global War on Terrorism*, March 6, 2003, at 24, available at [www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html](http://www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html) [hereinafter, *Working Group Report on Detainee Interrogation*] ("In wartime, it is for the President to alone to decide what methods to use to best prevail over the enemy."); *id.* (asserting that President has "complete discretion in exercising the Commander-in-Chief power" and that "[a]ny effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.")).

<sup>8</sup> See *Hamdi v. Rumsfeld*, 542 U.S. \_\_\_\_ (2004).

<sup>9</sup> See *Rasul v. Bush*, 542 U.S. \_\_\_\_ (2004).

<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III, or POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV, or Civilian Convention].

<sup>11</sup> As of September 2003, there were more than 650 detainees at Guantanamo. See Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Sept. 19, 2003, available at [www.whitehouse.gov/news/releases/2003/09](http://www.whitehouse.gov/news/releases/2003/09) (visited Feb. 15, 2004). As of this writing, about ninety of the original detainees have been "transferred for release" or "returned to their home country." See Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Feb. 13, 2004, available at [www.defenselink.mil/transcripts/2004](http://www.defenselink.mil/transcripts/2004) (visited Feb. 15, 2004). It is unclear how many of those may have been transferred or released before September 2003.

<sup>12</sup> See Statement by the Press Secretary on the Geneva Convention, May 7, 2003, available at [www.whitehouse.gov/news/releases/2003/05](http://www.whitehouse.gov/news/releases/2003/05) (visited Feb. 15, 2004) [hereinafter "Press Statement"]. For

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

which applies to all “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict . . . of which they are not nationals.”<sup>13</sup> The Bush Administration claims to be treating the Guantanamo detainees “in a manner consistent with the principles of” the Conventions. However, it reserves the right to deviate from specific requirements of the Conventions “to the extent appropriate and consistent with military necessity.”<sup>14</sup>

Is the President bound, in any meaningful sense, by the Geneva Conventions? Do the treaties, applicable only in time of war, condition the exercise of the President’s Commander-in-Chief power? On the Administration’s view, the answer to both questions is no.<sup>15</sup> As a matter of international law, it is untenable to claim that the United States has a legal right to disregard its

---

analysis of issues related to the classification of detainees as POWs, *see infra* notes 41-47 and accompanying text.

<sup>13</sup> Civilian Convention, *supra* note 10, art. 4. The Bush Administration has suggested that the Civilian Convention does not apply to the al Qaeda detainees because they are unlawful combatants, and the Civilian Convention applies only to “civilian non-combatants.” *See* Fact Sheet: Status of Detainees at Guantanamo, *available at* [www.whitehouse.gov/news/releases/2002/02](http://www.whitehouse.gov/news/releases/2002/02) (Feb. 7, 2002) [hereinafter “Fact Sheet”]. The policy described in the Fact Sheet was formalized in a directive issued by the President on February 7, 2002. *See Humane Treatment of al Qaeda and Taliban Detainees*, Memorandum for the Vice President, et al from the President, February 7, 2002 *available at* <http://news.findlaw.com/hdocs/docs/dod/62204index.html> [hereinafter, “Bush Directive on Treatment of Detainees”]. The Administration’s position is difficult to reconcile with the language of the Convention quoted above. *See infra* notes 479-494 and accompanying text (discussing status of detainees under Civilian Convention).

<sup>14</sup> Fact Sheet, *supra* note 13. The Fact Sheet states explicitly that “the detainees will not receive some of the specific privileges afforded to POWs” under the POW Convention.

<sup>15</sup> *See supra* text accompany notes 5-7. Indeed, the Administration has made clear that its decision to treat detainees in a manner consistent with the Geneva Conventions is not dictated by law. *See* Bush Directive on Treatment of Detainees, *supra* note 13; Fact Sheet, *supra* note 13. And, as part of the claim that the President enjoys complete discretion as Commander in Chief, Administration lawyers argued that the President has the constitutional authority to suspend application of the Geneva Conventions—even if doing so is inconsistent with the Conventions themselves and international law generally. *See* Yoo/Delahanty Memo, *supra* note 7, at 28-34. The President expressly endorsed this view in his directive concerning the treatment of al Qaeda and Taliban detainees. *See* Bush Directive on Treatment of Detainees, *supra* note 13. Moreover, the scope of legal memoranda strongly suggests that the Administration thinks the President is not bound by the Conventions. The legal memoranda are structured around the analysis of criminal statutes; and they discuss international law only insofar as it is relevant to the interpretation of the statutes in question (or simply as a matter of policy). The Office of Legal Counsel’s (OLC) views regarding the application of the treaties to the Guantanamo detainees is structured around an analysis of the War Crimes Act. *See* Yoo/Delahanty Memo, *supra* note 7, at 1-2. As a consequence, the memo is riddled with inexplicable gaps in its analysis. For example, the memo analyzes whether contemplated policies would constitute “grave breaches” of the Conventions—provisions of the treaties covered by the War Crimes Act—but fails to analyze whether specific policy options would violate provisions of the Conventions that do not violate domestic statutes. *Id.* at 2-11. Likewise, the OLC’s analysis of the legality of “counter-resistance” interrogation techniques is structured around an analysis of the Torture Act. *See* Bybee Memo, *supra* note 5. The clear implication is that international law, on the Administration’s view, arguably binds the President only if incorporated directly into statutes (and of course, in the final analysis, not even the statutes bind the President in the Administration’s view).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

obligations under the Conventions. But the constitutional argument advanced by Bush Administration lawyers is a claim about domestic law, not international law.<sup>16</sup> The “Bush position” boils down to this: even assuming that the Geneva Conventions are binding on the United States as a matter of international law, the Conventions are not binding on the President as a matter of domestic law because the President has the constitutional authority to choose to violate specific provisions of the Conventions in the interest of protecting national security.<sup>17</sup> This article evaluates the domestic constitutional arguments for and against the Bush position.

This is the first law review article to offer sustained analysis of the President’s constitutional authority to violate a treaty that is the supreme Law of the Land. There are several scholars who have analyzed the President’s authority to terminate treaties in accordance with international law.<sup>18</sup> However, treaty termination and treaty violation raise distinct constitutional issues. A Presidential decision to terminate a treaty in compliance with international law is generally consistent with his constitutional duty to “take Care that the Laws be faithfully executed.”<sup>19</sup> In contrast, a Presidential decision to breach a treaty, in contravention of international law, may constitute a violation of the President’s constitutional duty under the Take Care Clause.

Scholars have also published numerous articles concerning the President’s authority to violate customary international law (CIL).<sup>20</sup> However, treaties raise different constitutional issues because the Supremacy Clause states expressly that treaties, like statutes, are the “supreme Law of the Land.”<sup>21</sup> Granted, the majority

---

<sup>16</sup> The Bush Administration has also adopted the position, as a matter of international law, that the Guantanamo detainees do not qualify as prisoners of war under the POW Convention. *See, e.g.*, Bush Directive on Treatment of Detainees, *supra* note 13. We discuss that issue below. *See infra* notes 63-70 and accompanying text. However, this article focuses primarily on the domestic constitutional argument, asserted in Justice Department memos, that the President has the constitutional authority to violate treaties governing the treatment of wartime detainees.

<sup>17</sup> The Bybee Memo, *supra* note 5, emphatically endorses the view that we characterize here as the “Bush position.” It is unclear whether the Bush White House has endorsed this position.

<sup>18</sup> *See, e.g.*, DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986); Raoul Berger, *The President’s Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980); Louis Henkin, *Litigating the President’s Power to Terminate Treaties*, 73 AM. J. INT’L L. 647 (1979); David J. Scheffer, Comment, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT’L L. J. 931 (1978).

<sup>19</sup> U.S. Const. art. II, § 3.

<sup>20</sup> *See, e.g.*, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT’L L. 913 (1986) (collection of short essays approaching the question from different perspectives); *Agora: May the President Violate Customary International Law? (Cont’d)*, 81 AM. J. INT’L L. 371 (1987) (same); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988).

<sup>21</sup> U.S. Const. art. VI, cl. 2.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

view is that CIL is also “supreme over the law of the several States.”<sup>22</sup> But that does not mean that CIL and treaties have co-equal status within the hierarchy of federal law. Federal regulations are supreme over state law, but they rank lower than statutes in the federal hierarchy because Congress enacts statutes. Similarly, one could plausibly argue that CIL should rank lower than treaties in the federal hierarchy because the Senate approves treaties.<sup>23</sup> Here, it is not our purpose to defend any particular position regarding the domestic status of CIL. Our claim is simply that questions involving the President’s power to violate treaties raise distinct constitutional issues. Therefore, even assuming that the President has the constitutional authority to violate CIL, it does not necessarily follow that the President has the constitutional authority to violate a treaty that is supreme Law of the Land.

Apart from general issues concerning the President’s authority to violate treaties, the question whether the President is bound by the Geneva Conventions implicates certain unique issues involving the President’s Commander-in-Chief power.<sup>24</sup> The Conventions belong to a fairly small class of treaties that regulate the conduct of warfare. Scholars have written extensively about the relationship between the Commander-in-Chief power and Congress’ power to “declare War.”<sup>25</sup> In addition to the Declare War Clause, though, the Constitution also grants Congress a number of other powers related to the conduct of warfare.<sup>26</sup> There is surprisingly little scholarly commentary on the relationship between

---

<sup>22</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) [hereinafter RESTATEMENT (THIRD)]. The prevailing view is that CIL is the law of the United States because it qualifies as “federal common law.” Criticizing this position, Professors Bradley and Goldsmith have challenged the view that CIL preempts state law. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). For a defense of the view that CIL preempts state law, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). The Supreme Court has now settled at least some aspects of this debate. See *Sosa v. Alvarez-Machain*, 542 U.S. \_\_\_\_ (2004) (Slip op. at 38) (holding that some subset of CIL is federal common law).

<sup>23</sup> Professor Ramsey has advanced a similar argument. See Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT’L L. 555 (2002).

<sup>24</sup> U.S. Const. art. II, § 2, cl. 1 (designating the President as the “Commander in Chief of the Army and Navy of the United States”).

<sup>25</sup> U.S. Const. Art. I, § 8, cl. 11. For recent commentary on this issue, see, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002); John C. Yoo, *War and Constitutional Texts*, 69 U. CHI. L. REV. 1639 (2002).

<sup>26</sup> See, e.g., U.S. Const. Art. I, § 8, cl. 10 (the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); U.S. Const. Art. I, § 8, cl. 11 (the power to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); U.S. Const. Art. I, § 8, cl. 12 (the power “[t]o raise and support Armies”); U.S. Const. Art. I, § 8, cl. 13 (the power “[t]o provide and maintain a Navy”); U.S. Const. Art. I, § 8, cl. 14 (the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

these congressional powers and the President's Commander-in-Chief power.<sup>27</sup> That relationship is important for purposes of this article because law-of-war treaties address some matters that are arguably subject to the President's exclusive constitutional authority as Commander-in-Chief.<sup>28</sup> Matters subject to the President's exclusive authority are, by definition, beyond the scope of Congress' article I powers. It is firmly established that Congress has the power to violate U.S. treaty obligations within the scope of Article I by enacting legislation that supersedes a particular treaty provision as a matter of domestic law. However, if the Geneva Conventions regulate matters beyond the scope of Congress' article I powers, then either the President has the constitutional authority to violate the treaties, or the federal government as a whole lacks the power.

In this Article, we argue that the President never has the unilateral authority to violate a treaty; thus, he must always obtain Congress' approval if he wishes to do so. We also argue that the courts have a meaningful role to play in enforcing treaties. The argument is organized as follows. Part I provides general background information about the Geneva Conventions. It also shows that the Bush Administration has adopted a range of policies and procedures that may be inconsistent with U.S. obligations under the Conventions. Parts II through V each address a different version of the claim that the President is not bound by the Geneva Conventions. One variant of the argument is that the President is not bound by the Conventions because they lack the status of supreme federal law. Part II rebuts that argument. It demonstrates that, prior to September 11, 2001, the Geneva Conventions were the supreme Law of the Land under the Supremacy Clause. Moreover, legislation enacted since 9/11 has not altered the domestic status of the Conventions in any material respect.

Part III analyzes the relationship between treaties and the President's independent lawmaking authority to assess whether the President has the lawmaking authority to supersede the Conventions as matter of domestic law. On November 13, 2001, President Bush issued an executive order related to the

---

<sup>27</sup> *But see* Lt. Col. Bennet N. Hollander, *The President and Congress: Operational Control of the Armed Forces*, 27 MIL. L. REV. 49 (1965). Hollander argues that Congress may not enact legislation regulating the operational control of the armed forces because these matters are the exclusive province of the President as Commander-in-Chief. *See, e.g., id.* at 72. He does not address whether the President may violate treaties (or CIL) regulating the conduct of war. In fact, he seems to suggest at times that the "law of nations" and the "law of war" limit the scope of the Commander-in-Chief power. *See, e.g., id.* at 58 (*quoting* *Brown v. United States*, 12 U.S., (8 Cranch) 110, 147 (1814) (Story, J. dissenting)). Nor does he suggest that the regulation of military operations is beyond the scope of the treaty power. In short, Hollander does not analyze the problem under review here. In Part IV, we offer a sustained analysis of the issues identified by Hollander in so far as they implicate the distribution of constitutional authority to violate treaties. *See infra* Section IV.C.

<sup>28</sup> *See infra* notes 341-359 and accompanying text.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

detention, treatment, and trial of certain enemy aliens.<sup>29</sup> That Military Order authorized the Secretary of Defense to prescribe rules governing conditions of detention (which have never been published), and to issue regulations for trials before military commissions, which have been published.<sup>30</sup> Insofar as regulations adopted pursuant to the Military Order may conflict with certain provisions of the Geneva Conventions, the question arises whether the Military Order supersedes the relevant treaty provisions as a matter of domestic law. Part III contends that, although the President has a limited power to create federal law by issuing unilateral executive orders, any conflict between the Military Order and the Geneva Conventions must be resolved in favor of the treaties.

Part IV confronts directly the central question raised in this article: whether the President has the constitutional authority to violate the Geneva Conventions. The analysis proceeds in three parts. First, we rebut the claim that the President as Commander-in-Chief has the constitutional authority to violate federal statutory and constitutional law in emergency situations for the sake of protecting national security. Second, we demonstrate that the President's duty to "take Care that the Laws be faithfully executed"<sup>31</sup> includes a duty to execute treaties. Therefore, the President must obtain congressional authorization for any policy that contravenes a treaty provision that is Law of the Land. Third, we consider the claim that treaties regulating the conduct of warfare constitute a special case, and that the President must have the constitutional authority to violate such treaties insofar as they regulate conduct beyond the scope of Congress' Article I powers. Part IV rejects this claim for two reasons. First, even if this claim were valid, it would not apply to the Geneva Conventions, for the most part, because most of the Conventions' provisions address matters within the scope of Congress' legislative powers. Second, when the United States ratifies treaties regulating the conduct of warfare, the act of ratification alters the allocation of power between the President and Congress, thus empowering Congress to regulate matters that would otherwise be subject to the exclusive control of the President as Commander in Chief.

Part V addresses the constitutional separation of powers between the President and the courts with respect to treaty interpretation. The Bush Administration has suggested that the President is not bound by the Geneva Conventions -- at least not in any practical sense -- because the President has

---

<sup>29</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (2001) [hereinafter Military Order].

<sup>30</sup> Dep't of Defense, Military Comm'n Order No. 1 (Mar. 21, 2002) [hereinafter DOD Order], <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>

<sup>31</sup> U.S. Const. art. II, § 3.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

unfettered discretion to interpret the treaties as he sees fit.<sup>32</sup> Although the Geneva Conventions do present some treaty interpretation issues that raise nonjusticiable political questions, Part V demonstrates that the Conventions also present some treaty interpretation questions that are well within the scope of judicial competence. Therefore, the President’s power to interpret the Conventions is subject to judicial control.

**I.**  
**BACKGROUND**

Part One is divided into two sections. The first section provides a general introduction to the Geneva Conventions. The second section presents an overview of Bush Administration policies that may be inconsistent with U.S. obligations under the Conventions.

**A. The Geneva Conventions**

The United States is party to several multilateral treaties governing the conduct of war. These treaties constitute the so-called “law of war.” Because our argument directly addresses the legal status of only one (important) aspect of this law, it is important to provide some background on the law of war generally and the Geneva Conventions specifically. The “law of war” encompasses two distinct bodies of rules: the *jus ad bellum*—rules governing when uses of force are lawful; and the *jus in bello*—rules governing the conduct of war. The *jus in bello* itself has two principal subdivisions: “Geneva law” and “Hague law.” Geneva law, embodied principally in the four 1949 Geneva Conventions and the two 1977 Additional Protocols, prescribes an extensive body of detailed rules governing the treatment of the victims of armed conflict.<sup>33</sup> Hague law, embodied principally in the 1899 and 1907 Hague Conventions, govern the means and methods of warfare—i.e., the tactics and general conduct of hostilities.<sup>34</sup> This is not to say that Geneva law includes no rules governing means and methods of warfare; or that Hague law includes no rules governing the treatment of war victims—indeed, each treaty series includes elements of the other. This terminology, although conceptually imprecise, emphasizes the distinction between the two kinds of

---

<sup>32</sup> See *infra* note 463 and accompanying text.

<sup>33</sup> See Geneva Conventions, *supra* note 10; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

<sup>34</sup> See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Regulations are annexed to the Convention) [hereinafter Hague Regulations or Hague Convention].

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

regimes—one governing the treatment of persons subject to the enemy’s authority (Geneva law), the other governing the treatment of persons subject to the enemy’s lethality (Hague law). In contemporary parlance, “international humanitarian law” embraces the whole *jus in bello*, in both its “Geneva” and “Hague” dimensions.<sup>35</sup>

The four Geneva Conventions on the Protection of War Victims form the core of so called “Geneva law.” These treaties were drafted in 1949—in the wake of World War II. The war had revealed several important deficiencies in the law of war: the conditions under which the rules applied were poorly defined; the rules inadequately protected various categories of vulnerable persons subject to the authority of the enemy; the rules did not provide any protection in non-international armed conflict; and the rules were not adequately enforced.<sup>36</sup> The Conventions were designed to address each of these concerns.

First, the Conventions apply in all cases of armed conflict between two or more states—irrespective of whether either of the states has issued a formal declaration of war.<sup>37</sup> That is, the treaties apply whenever there exists a *de facto* state of armed conflict between states. Moreover, these treaties obligate states party to them irrespective of whether the state (or states) against which they fight is party to them.<sup>38</sup>

Second, each of the four Conventions prescribes detailed rules defining the proper treatment of one category of “protected persons”—the sick and wounded on land, the sick, wounded, and shipwrecked at sea, prisoners of war, and civilians. The central idea of these treaties, as alluded to earlier, is to establish minimum rules for the treatment of persons subject to the authority of the enemy (e.g., persons captured and detained by the enemy). For example, under Geneva law, POWs have the following rights: (1) the right to humane treatment while in confinement (including important limitations on coercive interrogation tactics);<sup>39</sup> (2) due process rights if subject to disciplinary or punitive sanctions;<sup>40</sup> (3) the right to release and repatriation upon the cessation of active hostilities;<sup>41</sup> and (4)

---

<sup>35</sup> See generally INGRID DETTER, *THE LAW OF WAR* x-xviii (2000) (surveying these terminological issues).

<sup>36</sup> See generally GEOFFREY BEST, *LAW AND WAR SINCE 1945* (1998) (summarizing the views of governments and the International Committee of the Red Cross).

<sup>37</sup> Geneva Conventions, *supra* note 10, Common Art. 2. The Conventions also apply in all cases of military occupation. *Id.*

<sup>38</sup> *Id.* See also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000) (outlining the significance of this development).

<sup>39</sup> Geneva Convention III, *supra* note 10, art. 13 (humane treatment). See also *id.*, arts. 17-19 (rules concerning interrogation); *id.*, arts. 21-48 (rules governing conditions of confinement).

<sup>40</sup> *Id.*, arts. 99-108.

<sup>41</sup> *Id.*, art. 117-118.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

the right to communication with (and the institutionalized supervision of) protective agencies.<sup>42</sup> The GPW also prohibits reprisals against POWs;<sup>43</sup> and precludes the use of POWs as slave laborers.<sup>44</sup> In addition, the treaties define, with some precision, the categories of persons protected by them.<sup>45</sup>

Third, the Geneva Conventions also specify fundamental humanitarian protections applicable to all persons subject to the authority of a party to a conflict—even if the conflict is not international in character (i.e., a civil war). These protections, first codified in Common Article 3 of the Conventions, govern the treatment of persons no longer taking active part in the hostilities.<sup>46</sup> All such persons are entitled to humane treatment and, in the case of criminal charges, fair trial by “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>47</sup>

Finally, the Conventions established an enforcement and implementation scheme with three important features: (1) states are required to enforce the treaty through the imposition of criminal sanctions; (2) warring parties must designate a neutral state or organization as a “Protecting Power” empowered by the Conventions to monitor compliance with the treaties during armed conflicts; and (3) the Conventions include substantial due process protections designed to ensure some measure of judicial and/or administrative oversight of the treatment accorded war detainees.

In summary, the Geneva Conventions govern the treatment of detainees (and others subjected, in some formal way, to the authority of the enemy) in time of armed conflict. These treaties outline modest, but important humanitarian guarantees with an emphasis on humane treatment, communication rights, due process, fair trial rights, and repatriation. Compliance with the Convention is to be monitored by administrative and/or judicial tribunals in the detaining state as well as a neutral “Protecting Power;” violations of the Convention give rise to individual criminal liability. These features of the Conventions, taken together, provide a viable legal framework that strikes the proper balance between military necessity and humanitarian ideals.

---

<sup>42</sup> *Id.*, arts. 8-11.

<sup>43</sup> *Id.*, art. 13.

<sup>44</sup> *Id.*, arts. 49-57.

<sup>45</sup> *See infra* notes 62-65, 479-494 and accompanying text (describing the “protected persons” definitions in the POW and Civilians Conventions).

<sup>46</sup> *See* Geneva Conventions, *supra* note 10, Common art. 3.

<sup>47</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The Conventions entered into force on October 21, 1950;<sup>48</sup> the United States ratified all four Conventions in 1955. In 1956, the U.S. Army Field Manual on the Laws of War was revised to reflect the numerous important developments codified in the Geneva Conventions.<sup>49</sup> As of January 2004, over 190 states have ratified the Conventions.<sup>50</sup>

In 1977, two Additional Protocols to the Conventions were opened for signature. These Protocols sought to elaborate, clarify and extend the protective schemes of the Geneva Conventions.<sup>51</sup> The First Additional Protocol, governing international armed conflicts, also sought to resolve several important ambiguities in so-called “Hague law” (governing the means and methods of warfare).<sup>52</sup> The Second Additional Protocol sought to elaborate the rules applicable to non-international armed conflicts.<sup>53</sup> Although these treaties also enjoy broad international participation,<sup>54</sup> the United State has not ratified either Protocol.<sup>55</sup>

**B. Possible Treaty Violations Since 9/11**

In this Section, we argue that the Bush Administration, since September 11, 2001, has adopted a range of policies and practices that are arguably inconsistent with U.S. obligations under the Geneva Conventions. Our purpose here is not to offer a comprehensive defense of this position. We intend only to demonstrate that several policies and practices pursued in the “war on terrorism” raise non-trivial concerns under the Geneva Conventions.

Notwithstanding the detainee abuse scandal at Abu Ghraib prison in Iraq,<sup>56</sup> we emphasize U.S. policy with respect to the treatment of detainees at

---

<sup>48</sup> See 75 U.N.T.S. 31; 75 U.N.T.S. 85; 75 U.N.T.S. 135; 75 U.N.T.S. 287.

<sup>49</sup> DEP’T OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE (1956).

<sup>50</sup> See Int’l Comm. of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at [http://www.icrc.org/eng/party\\_gc](http://www.icrc.org/eng/party_gc) (documenting 191 ratifications).

<sup>51</sup> MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 261-63 (1982).

<sup>52</sup> See, e.g., AP I, *supra* note 33, arts. 50-57.

<sup>53</sup> See AP II, *supra* note 33.

<sup>54</sup> See Int’l Comm. of the Red Cross, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions, at [http://www.icrc.org/eng/party\\_ap](http://www.icrc.org/eng/party_ap) (documenting 161 ratifications).

<sup>55</sup> The United States has, however, signed Additional Protocol II. President Reagan transmitted the treaty to the Senate for its advice and consent, but the Senate has not consented to the treaty. See Letter of Transmittal of Protocol II to the Senate by President Reagan, S. TREATY DOC. NO. 2, 100th Cong. at III (1987), *reprinted in* 81 AM. J. INT’L L. 910 (1987).

<sup>56</sup> See DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800<sup>TH</sup> MILITARY POLICE BRIGADE, Prepared by Major Gen. Antonio M. Taguba (The “Taguba Report”), available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> [hereinafter TAGUBA REPORT]; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, April 30, 2004.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Guantanamo Bay. We do so for two reasons. First, the precise contours of formal U.S. policy in Iraq are unclear. It is important to note that the Administration concedes that the conduct at Abu Ghraib violated the Geneva Conventions;<sup>57</sup> and it maintains that this conduct was contrary to U.S. policy.<sup>58</sup> Moreover, the military has initiated criminal proceedings against several soldiers deemed directly responsible for the abuse.<sup>59</sup> And although some evidence strongly suggests that U.S. *policy* concerning interrogation methods and conditions of detention was inconsistent with the Geneva Conventions,<sup>60</sup> there is insufficient information at the time of this writing to draw definitive conclusions. In addition, there is good reason to think that any improprieties at the policy level resulted from an ill-conceived strategy to transplant Guantanamo detainee policies into Iraq.<sup>61</sup> In other words, sustained reflection on the legality of U.S. practices in Guantanamo is, in an important sense, also an analysis of U.S. policy in Iraq. Second, the details of U.S. policy in Guantanamo are publicly available; and several aspects of this policy are, we submit, flatly inconsistent with U.S. treaty obligations.<sup>62</sup>

Consider four examples. First, the *procedures* utilized by the administration to classify war detainees under Geneva law are arguably deficient under that law. Second, the *merits* of these classification decisions are themselves also questionable under the terms of the treaties. Third, the treatment accorded the detainees in Guantanamo Bay, including the so-called “interrogation rules of engagement,” is arguably inconsistent with the Geneva Conventions—irrespective of whether the detainees are entitled to POW status. And, fourth, the contemplated trials by special military commission are arguably inconsistent with the fair trial and due process guarantees recognized in the Conventions (again,

---

<sup>57</sup> See, e.g., AP Newswire, *Pentagon Officials: Interrogation Techniques Lawful*, May 13, 2004 (quoting Marine General Peter Pace, Vice Chairman of the Joint Chiefs of Staff, and Deputy Defense Secretary Paul Wolfowitz—both acknowledging that the abuse constituted violations of the Geneva Conventions).

<sup>58</sup> See, e.g., Dep’t of Defense, *Defense Department Background Briefing*, May 14, 2004, available at <http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html> (transcript of Senior Military official insisting that U.S. policy was to apply the Geneva Conventions in Iraq); Richard W. Stevenson, *White House Says Prisoner Policy Set Humane Tone*, NEW YORK TIMES, June 23, 2004 at A1.

<sup>59</sup> See, e.g., *US Marines Plead Guilty to Prisoner Abuse*, GUARDIAN, June 3, 2004; see also Thom Shanker, *At Iraqi Prison, Rumsfeld Vows to Punish Abuse*, NEW YORK TIMES, May 14, 2004, at A1.

<sup>60</sup> See, e.g., John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004; Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004; Seymour M. Hersh, *Chain of Command*, NEW YORKER, May 9, 2004.

<sup>61</sup> See, e.g., Douglas Jehl & Eric Schmitt, *Afghan Policies on Questioning Prisoners Landed in Iraq*, NEW YORK TIMES, May 21, 2004, at A1.

<sup>62</sup> See, e.g., Fact Sheet, *supra* note 13 (outlining Administration policy with respect to detainees on Guantanamo); White House, *Press Briefing by White House Counsel Judge Alberto Gonzalez, et al.*, June 22, 2004, available at [www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html](http://www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html) (describing in great detail the evolution of U.S. policy regarding treatment of Guantanamo detainees and announcing the release of many Administration orders and memoranda defining and debating the contours of this policy). These orders and memoranda are available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html>.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

irrespective of the “status” of the detainee). These four examples divide into two types of potential violations. The first two examples illustrate possible treaty violations issuing from the U.S. decision to deny the Guantanamo detainees POW status. The second two examples illustrate possible violations issuing from the treatment accorded these detainees—however classified under Geneva law. In the balance of this Section, we consider each type of example in more detail.

The U.S. government has arguably denied the Guantanamo detainees POW status improperly. The official U.S. government position is that neither Taliban nor al Qaeda fighters qualify as POWs because they failed to satisfy international standards defining “lawful combatants.”<sup>63</sup> This position is arguably deficient under Geneva law in at least two respects: (1) the U.S. determination that the detainees are not POWs is flawed because it relies on a misreading of the POW Convention; and (2) the U.S. must, irrespective of the merits of their classification, treat the detainees as POWs until a “competent tribunal” has determined that they do not qualify for POW status. The first criticism questions the U.S. interpretation of Article 4 of the POW Convention—identifying persons entitled to POW status (the “Article 4 issue”).<sup>64</sup> The second, on the other hand, questions the U.S. interpretation of Article 5 of the treaty—establishing presumptive POW status in all cases of “doubt” and prescribing the procedure for determining the legal status of captured fighters (the “Article 5 issue”).<sup>65</sup> On both

---

<sup>63</sup> See Press Conference, Department of Defense, Secretary Rumsfeld and General Myers, Feb. 8, 2002, available at <http://www.defenselink.mil/news/Feb2002>; Fact Sheet, *supra* note 13. For a summary of the government’s position, see Sean Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 475 (2002); Mike Allen and John Mintz, *Bush Makes Decision on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

<sup>64</sup> See, e.g., Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 2-6 (2001) [hereinafter Paust, *Courting Illegality*]. Article 4 of the POW Convention identifies several categories of persons protected by the Convention. See POW Convention, *supra* note 10, art. 4. With respect to Article 4, one important question is whether the four criteria expressly applied to “militia and other volunteer corps” in paragraph (A)(2) also limit the scope of paragraph (A)(1) concerning members of the armed forces. That is, there is some question whether members of the regular armed forces must have a command structure, wear uniforms, carry arms openly, and generally comply with laws of war to qualify for POW status. On the other hand, the text of (A)(1) does not make reference to “regular” armed forces. Indeed, it extends coverage to “members of militia and other volunteer corps forming part of” the armed forces—and, inexplicably, this reference to “militia and other volunteer corps,” unlike the reference in (A)(2), is not qualified by the four criteria. This textual anomaly strongly suggests that the four criteria apply only to “militia and other volunteer corps” not part of the “armed forces” of the state; and that captured fighters covered by (A)(1) are POWs irrespective of whether they satisfy the four criteria. See, e.g., George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 768-69 (1981) (arguing that Article 4(A)(2) criteria apply only to certain “irregular” armed forces and that “[m]embers of regular, uniformed armed forces do not lose their PW [prisoner of war] entitlements no matter what violations of the law their units may commit, but the guerrilla unit is held to a tougher standard ....”).

<sup>65</sup> See, e.g., Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571 (2002); Inter-American Commission on Human Rights, Request for Precautionary Measures, Detainees in Guantanamo Bay, Cuba (IACHR March 12, 2002) (on file with authors) (granting, in part, petitioners’ request for precautionary measures; and urging the U.S. “to take urgent measures necessary to have the legal

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

fronts, U.S. policy is arguably inconsistent with the minimum requirements of the Convention.

The United States has maintained that these detainees do not qualify for POW status; and that the assignment of POW status in this case would be bad policy. Specifically, the U.S. argues that neither the Taliban nor the al Qaeda detainees satisfy the express requirements of the POW Convention, and that POW protections would impede the investigation and prosecution of suspected terrorists.<sup>66</sup> Of particular concern on the policy front are (1) restrictions on the interrogation of POWs;<sup>67</sup> (2) the criminal procedure rights of POWs (which might preclude trial by special “military commission”);<sup>68</sup> and (3) the right of POWs to

---

status of the detainees at Guantanamo Bay determined by a competent tribunal” in accordance with Article 5 of the POW Convention). It is difficult, in many cases, to discern easily whether a captured combatant satisfies the requirements of Article 4—a point well understood by the drafters of the Convention. To address this problem directly, the Convention establishes that captured combatants, when their status is unclear, are presumptively entitled to POW status. Article 5 of the Convention provides that, “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” POW Convention, *supra* note 1, art. 4. In response, the United States maintains that the status of Taliban and al Qaeda detainees was not in “doubt.” *See, e.g.,* Katharine Q. Seelye, *Detainees Are Not P.O.W.’s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (quoting Secretary of Defense Rumsfeld that “[t]here is no ambiguity in this case”). However, long-standing U.S. policy provides for Article 5 tribunals whenever the detainee asserts POW status or asserts facts that would entitle him or her to POW status. *See* U.S. Army, Army Reg. 190-8. In addition, substantial evidence suggests that, as an objective matter, there was some doubt as to the status of these detainees. Recall that several dozens of the detainees have been released over the course of the last two years, and reports indicate that many more may be released in the wake of the Supreme Court rulings in *Rasul* and *Hamdi*. In fact, the Defense Department has now established “Combatant Status Review Tribunals” to determine the legal status of the detainees. *See* Neil A. Lewis, *U.S. is Readying Review Panels for Cuba Base*, NEW YORK TIMES, July 17, 2004, at A1.

<sup>66</sup> *See, e.g.,* Yoo/Delahanty Memo, *supra* note 7.

<sup>67</sup> Under the POW Convention, the detaining authority may not subject POWs to coercive questioning, and POWs are required only to provide name, rank, and serial number to interrogators. *See* Geneva Convention III, *supra* note 10, arts. 17-18; Jeremy Rabkin, *After Guantanamo: The War over the Geneva Conventions*, NAT’L INTEREST 15 (Summer 2002) (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328 (2002) (same); Ruth Wedgwood, *The Rules of War Can’t Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001 (same).

<sup>68</sup> *See* MILITARY ORDER, *supra* note 20. It is a fair reading of the POW Convention that POWs facing criminal charges are entitled to trial by court-martial or regular civil court. *See* POW Convention, *supra* note 1, arts. 99, 102; Neal Kumar Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1263-66 (2002) (concluding, in view of rights recognized in the POW Convention, that the Military Order must cover only unlawful belligerents); Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1423-24 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 324-26 (2002); Diane F. Orenlichter & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL’Y 653, 659-63 (2002); Paust, *Courting Illegality*, *supra* note 64. Under this view, denying POW status would appear to leave open the possibility of trying detainees before military commissions for

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

release and repatriation following the cessation of hostilities.<sup>69</sup> In short, the United States has denied the detainees POW status in part because POW rights were deemed inconsistent with U.S. policy objectives.<sup>70</sup> The important point here is that, irrespective of the merits of these concerns, U.S. policy is manifestly inconsistent with Geneva law if the procedures utilized to classify these detainees were insufficient; or if the classification determinations were inaccurate in fact or erroneous in law.

In addition, the treatment of these detainees is arguably deficient under the Geneva Conventions—even if they were lawfully denied POW status. Assuming that the detainees are not POWs, they are still “protected persons” under Common Article 3 and many of them are protected under the Civilians Convention. The Civilians Convention and Common Article 3 grant rights to “unlawful combatants” that are nearly identical to the rights granted POWs under the POW Convention.<sup>71</sup> Thus, by denying the Guantanamo detainees the protections of the POW Convention, the United States is violating many of the rights to which they are legally entitled under Common Article 3<sup>72</sup> and the Civilians Convention.<sup>73</sup>

---

violations of the law of war. For evaluation of this claim, in view of the arguments developed herein, *see infra* notes 68-84 and accompanying text.

<sup>69</sup> See Geneva Convention III, *supra* note 10, arts. 117-118 (recognizing the right to repatriation); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 353 (2002) (suggesting that this right is one procedural consequence of denying POW status); Rabkin, *supra* note 45 (defending denial of POW status to Taliban and Al Qaeda detainees, in part, on this ground); Wedgwood, *supra* note 45 (same).

<sup>70</sup> The internal memoranda traffic on the issue indicates that there was some support for assigning the detainees POW status. See, e.g., *Comments on Your Paper on the Geneva Conventions*, Memorandum to White House Counsel Alberto Gonzalez from William H. Taft, IV, Legal Advisor, Department of State, February 2, 2002 [hereinafter, “Taft Memo”] (arguing that U.S. classify detainees as POWs irrespective of whether they satisfy the formal requirements of the POW Convention).

<sup>71</sup> See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. (forthcoming 2004); *see also infra* text accompanying notes 479-494 (assessing the Administration’s claim that “unlawful combatants” are not protected by the Civilian Convention).

<sup>72</sup> For example, Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva Conventions, *supra* note 1. Thus, many of the arguments against trial of POWs by military commission apply with equal force to persons protected under Common Article 3. See *infra* notes 87-99 and accompanying text. It must be noted that the President expressly determined that Common Article 3 does not apply to the war on terrorism because the conflict is “international in scope.” See Bush Directive on Treatment of Detainees, *supra* note 13; *see also* Yoo/Delahanty Memo, *supra* note 7. Although an extended analysis of this claim is beyond the scope of this Article, suffice it to say that it is plainly incorrect as a matter of law. By its terms, Common Article 3 applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” On the Administration’s view, this language makes clear that the provision governs only armed conflicts confined to the territory of one state. The text, structure, and history of the provision, however, demonstrate that it applies to all armed conflicts not involving two or more opposing states. See generally Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (2003). Common Article 3 was revolutionary (and controversial in some quarters) because it regulates wholly internal matters as a matter of international humanitarian law. If the provision governs wholly internal conflicts, as the “one state”

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The claim that the detainees are not protected by Geneva law has provided the foundation for U.S. detention policy at Guantanamo. The clearest—and perhaps most controversial—aspect of this policy are the “interrogation rules of engagement.” Unencumbered by international legal obligation, the Administration crafted an interrogation policy motivated solely by U.S. policy preferences—narrowly conceived. In Part V, we analyze in some detail the legality of the interrogation techniques authorized for use in Guantanamo.<sup>74</sup> It is sufficient here to point out only that these “counter resistance” techniques clearly violate the Geneva Conventions—if the Conventions do indeed protect the detainees—in that they involve various forms of coercion and intimidation including implied threats of violence and other forms of gross mistreatment.<sup>75</sup> The POW Convention obligates the detaining power to protect POWs “against [all] acts of violence or intimidation and against insults and public curiosity.”<sup>76</sup> It also provides that

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.<sup>77</sup>

---

interpretation recognizes, then the provision applies a fortiori to armed conflicts with international or transnational dimensions. The language of the provision limiting its application to the “territory of one of the High Contracting Parties” simply makes clear that application of the provision requires a nexus to the jurisdiction of a state party to the treaty. *Id.* at 41. In addition, the Administration’s interpretation produces several inexplicable regulatory asymmetries. On the Administration’s view, the Conventions would cover international armed conflicts proper (in virtue of Common Article 2) and wholly internal armed conflicts (in virtue of Common Article 3), but would not cover armed conflicts between a state and an armed group with a transnational presence. The Conventions also would not cover internal armed conflicts that spill over an international border into the territory of another state. The only reasonable reading of the provision is that it applies to all “armed conflicts” not covered by Common Article 2—the provision defining international armed conflict within the meaning of the Geneva Conventions. *Id.* at 38-41.

<sup>73</sup> See, e.g., Civilian Convention, *supra* note 10, art. 31 (restricting interrogation of protected persons); *id.*, arts. 65-76 (specifying criminal procedure rights of protected persons); *id.*, arts. 132-35 (providing for release and repatriation of protected persons). The Civilian Convention guarantees the detainees a right of access to a canteen to purchase “foodstuffs and articles of everyday use, including soap and tobacco.” Civilian Convention, *supra* note 10, art. 87. However, the Administration has stated explicitly that the detainees will not receive “access to a canteen to purchase food, soap, and tobacco.” Fact Sheet, *supra* note 13.

<sup>74</sup> See *infra* Part V (analyzing interrogation policy as an illustration of the kind of Convention-based claims that might succeed in court).

<sup>75</sup> See *infra* text accompanying notes 495-501 (describing and analyzing interrogation specific techniques).

<sup>76</sup> POW Convention, *supra* note 10, art. 13.

<sup>77</sup> *Id.* art. 17.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Likewise, the Civilians Convention provides that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”<sup>78</sup> This Convention also provides that: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>79</sup> Simply put, the techniques authorized by the Defense Department are plainly inconsistent with these obligations.<sup>80</sup> Indeed, the Secretary of Defense acknowledged, in his April 2003 Order authorizing these tactics, that several of the techniques are inconsistent with provisions of the POW Convention.<sup>81</sup>

Finally, the contemplated criminal trials by *ad hoc* military commission arguably violate the fair trial rights recognized in the Geneva Conventions.<sup>82</sup> As discussed above, the military commission procedures clearly fail to satisfy the requirements of the POW Convention.<sup>83</sup> On this point, there is little room for meaningful disagreement because the POW Convention flatly requires the detaining state to “assimilate” POWs into the legal regime governing their own armed forces.<sup>84</sup> The relevant aspect of this regime for present purposes is the rule requiring that POWs be tried before the same courts, and according to the same procedures, as members of the armed forces of the detaining state.<sup>85</sup> Therefore, POWs detained and tried by the United States must be tried by regular courts-

---

<sup>78</sup> Civilians Convention, *supra* note 10, art. 27. This provision makes clear that the protection against violence and threats of violence is part of the right to “humane treatment.” This is important for two reasons: (1) Article 5 of the Civilians Convention requires that all civilians, even “unlawful combatants” be treated humanely, *id.* art. 5; and (2) Common Article 3 requires that all enemy combatants be treated humanely in all circumstances. *Id.* art. 3.

<sup>79</sup> Civilians Convention, *supra* note 10, art. 31. *See also* POW Convention, *supra* note 10, art. 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”)

<sup>80</sup> *See infra* text accompanying notes 495-501 (assessing these interrogation techniques under Article 31 of the Civilians Convention).

<sup>81</sup> *See* Dep’t of Defense, *Counter-Resistance Techniques in the War on Terrorism*, Memorandum for the Commander, US Southern Command from Secretary of Defense Donald Rumsfeld, April 16, 2003, available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html> [hereinafter *Rumsfeld April 2003 Memo*].

<sup>82</sup> Fifteen detainees have been designated for trial by military commission. *See* Dep’t of Defense, Press Release, *Presidential Military Order Applied to Nine More Combatants*, July 7, 2004, available at <http://www.defenselink.mil/releases/2004/nr20040707-0987.html>. And charges have been referred in several cases. *See, e.g.*, Dep’t of Defense, Armed Forces Information Service, *Yemeni Detainee to Face Military Commission*, available at [http://www.defenselink.mil/news/Jul2004/n07142004\\_2004071406.html](http://www.defenselink.mil/news/Jul2004/n07142004_2004071406.html); Dep’t of Defense, Armed Forces Information Service, *Guantanamo Detainees Charged with Conspiracy to Commit War Crimes*, Feb. 24, 2004, available at [http://www.defenselink.mil/news/Feb2004/n02242004\\_200402246.html](http://www.defenselink.mil/news/Feb2004/n02242004_200402246.html).

<sup>83</sup> *See supra* note 68 (summarizing this point and collecting citations).

<sup>84</sup> *See* POW Convention, *supra* note 10, arts. 82-106.

<sup>85</sup> *Id.*, art. 102.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

martial.<sup>86</sup> In other words, the POW Convention prohibits trial by the contemplated *ad hoc* military commissions irrespective of whether the procedures utilized therein satisfy basic due process requirements—simply put, the right to assimilation precludes the use of special procedures.

In addition, the procedures prescribed by the Department of Defense for trials by military commission arguably fall short of the minimum guarantees recognized in the Geneva Conventions.<sup>87</sup> Note first that all detainees are entitled to substantial fair trial guarantees under the Conventions. The Civilians Convention provides due process rights that, in most respects, mirror those provided by the POW Convention.<sup>88</sup> Moreover, the Conventions establish minimum procedural rights for any person charged with serious violations of its substantive rules *irrespective of the person's status under the Conventions*.<sup>89</sup> Any person prosecuted for violations of the Geneva Conventions, irrespective of their status as “protected persons,” must be provided with “safeguards of proper trial and defence, which shall not be less favorable than” those outlined in Articles 105 and following of the Third Geneva Convention (concerning POWs).<sup>90</sup> Article 105 specifically provides for basic fair trial rights including: the right to counsel of the defendant's choice, the right to confer privately with counsel, the right to call witnesses, and the right to an interpreter.<sup>91</sup> These provisions also require, for example, that accused persons be granted the same right of appeal as that open to members of the armed forces of the Detaining Power.<sup>92</sup> In addition, Common Article 3, applicable to all war detainees, prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>93</sup> This rule, even though somewhat abstract, clearly prohibits punishment without a “previous judgment” suggesting that a formal adjudication is required. The body pronouncing this judgment must be “regularly constituted” suggesting that it must be established in

---

<sup>86</sup> See, e.g., Paust, *Courting Illegality*, *supra* note 64, at 17 n.39.

<sup>87</sup> See DOD Order, *supra* note 30 (outlining the trial procedure).

<sup>88</sup> The Civilian Convention does not include so-called “assimilation” rights but the specific fair trial rights recognized in the Convention are identical to those found in the POW Convention. See Civilian Convention, *supra* note 10, arts. 64-76, 126, 146-47; see also Jinks, *supra* note 71.

<sup>89</sup> See, e.g., Civilian Convention, *supra* note 10, art. 146. This is an important source of fair trial rights in this context because the Administration asserts the authority to try by military commission only persons accused of violations of the laws of war. See, e.g., Alberto Gonzales, *Martial Justice, Full and Fair*, NEW YORK TIMES, Nov. 30, 2001, at A27 (maintaining that persons subject to trial by military commission “must be chargeable with offenses against the international law of war.”).

<sup>90</sup> Geneva Convention I, *supra* note 10, art. 49; Geneva Convention II, *supra* note 10, art. 50; POW Convention, *supra* note 10, art. 129; Civilian Convention, *supra* note 10, art. 146.

<sup>91</sup> POW Convention, *supra* note 10, art. 105.

<sup>92</sup> *Id.*, art. 106.

<sup>93</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

law; and that it must not be convened especially for the punishment of the adversary. And this body must be a “regularly constituted *court*” suggesting that there must be adequate safeguards in place to ensure the impartiality, independence, and fairness of the institution issuing the judgment. Moreover, the text of Common Article 3—specifically the reference to the opinions of “judicial guarantees which are recognized as indispensable by civilized peoples”—also establishes an evolving standard that, by design, tracks customary international law in this area.<sup>94</sup>

The military commission procedures arguably fail to satisfy these requirements in several respects. For example, the commissions themselves arguably do not constitute impartial, independent tribunals.<sup>95</sup> The commissions arguably do not qualify as “tribunals established by law,” and they clearly are not “regularly constituted courts.”<sup>96</sup> In addition, the Department of Defense procedures arguably deprive defendants of any meaningful right to counsel.<sup>97</sup> They also limit the defendant’s ability to mount an effective defense by sharply qualifying the right to confront witnesses and compel process.<sup>98</sup> Finally, the procedures do not recognize a right to appeal to a higher tribunal.<sup>99</sup>

---

<sup>94</sup> See, e.g., LINSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 86-88 (2002). Therefore, Common Article 3 arguably requires that all war detainees be accorded the basic fair trial rights recognized in major human rights treaties. *Id.* See also International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171 [hereinafter ICCPR]; The African Charter on Human and Peoples’ Rights, June 27, 1981, arts. 3, 6, & 7, 21 I.L.M. 59; American Convention on Human Rights, Nov. 22, 1969, arts. 7, 8, & 9 I.L.M. 673; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5, 6, & 7, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118; Universal Declaration of Human Rights, arts. 9-11, G.A. Res. 217, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948).

<sup>95</sup> See, e.g., LAWYER’S COMMITTEE FOR HUMAN RIGHTS, *TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR THE MILITARY COMMISSIONS* 5 (2003) [hereinafter LCHR, *TRIALS UNDER MILITARY ORDER*] (arguing that the military commission scheme is “particularly susceptible to abuse because the entire process is limited to one branch of government (the executive) with no meaningful independent oversight or review by either the judiciary or the legislature, and none of the participants has both standing and an interest to challenge possible abuses.”).

<sup>96</sup> See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 687-90 (2002) [hereinafter Paust, *Ad Hoc DoD Rules*].

<sup>97</sup> One problematic aspect of the rules is that civilian counsel (the counsel chosen by the accused) can be excluded from “closed Commission proceedings” and denied “access to any information protected under [the procedure’s security exclusion].” DoD Order, *supra* note 30, §§ 4(C)(3), 6(B)(3), 6(D)(5); see also Paust, *Ad Hoc DoD Rules*, *supra* note 96, at 690.

<sup>98</sup> The procedures drastically curtail the right of confrontation. Cross-examination of witnesses against the accused is authorized only with respect to witnesses “who appear before the Commission.” DoD Order, *supra* note 21, § 5(I). Witnesses can also provide testimony “by telephone, audiovisual means, or other means,” by “introduction of prepared declassified summaries of evidence,” “testimony from prior trials and proceedings,” “sworn [and even] unsworn written statements,” and “reports.” *Id.* § 6(D). See also Paust, *Ad Hoc DoD Rules*, *supra* note 96, at 685-87.

<sup>99</sup> Verdicts issued by the military commissions may be appealed to specially established “Review Panels.” See DoD Order, *supra* note 30, § 6(H)(4); see also LCHR, *TRIALS UNDER MILITARY ORDER*, *supra* note 95, at 5-6 (criticizing the absence of a right to appeal guilty verdicts to a civilian court).

**II.**  
**The Domestic Status of the Geneva Conventions**

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

**A. The Domestic Status of the Conventions Before 9/11**

President Truman transmitted the Geneva Conventions to the Senate on April 25, 1951.<sup>100</sup> The Senate gave its consent to ratification on July 6, 1955.<sup>101</sup> The United States ratified the treaties on July 14, 1955. This section demonstrates that the Conventions had the status of supreme federal law within the domestic legal system prior to 9/11. The first sub-section addresses those portions of the Conventions for which implementing legislation is constitutionally required. The second sub-section addresses the provisions for which implementing legislation is not constitutionally required.

1. *Provisions for Which Implementing Legislation Is Constitutionally Required:* There are some provisions of the Conventions for which implementing legislation is constitutionally required. For example, it is generally agreed that a treaty provision “requiring states parties to punish certain actions . . . could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense.”<sup>102</sup> Certain provisions of the Geneva Conventions obligate the United States to impose criminal sanctions for specified conduct that constitutes a “grave breach” of the Conventions.<sup>103</sup> Implementing legislation is

---

<sup>100</sup> Senate Comm. on Foreign Relations, *Geneva Conventions for the Protection of War Victims*, S. Exec. Rep. No. 84-9 (1955), reprinted at 84 Cong. Rec. 9962, 9963 (1955) [hereinafter, Senate Report].

<sup>101</sup> 84 Cong. Rec. 9958, 9972-73 (1955).

<sup>102</sup> RESTATEMENT (THIRD), *supra* note 22, § 111, cmt. i. A minority view holds that implementing legislation is not constitutionally required to give domestic legal effect to treaty provisions requiring criminal sanctions. See JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 59-62 (1996).

<sup>103</sup> See Geneva Convention I, *supra* note 10, art. 49 (obligating States Parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of” Convention I, which are defined in article 50); Geneva Convention II, *supra* note 10,

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

probably constitutionally required to give domestic legal effect to the “grave breaches” provisions.

When the United States ratified the Geneva Conventions, the Executive Branch expressed the view that it was unnecessary to enact new implementing legislation for the grave breaches provisions because “it would be difficult to find any of these [grave breaches] which, if committed in the United States, are not already violations of the domestic [criminal] law of the United States.”<sup>104</sup> The Senate Foreign Relations Committee agreed with that assessment.<sup>105</sup> Thus, at the time of ratification, the political branches agreed that the constitutional requirement for implementing legislation was satisfied by pre-existing criminal legislation. Forty years later, though, the political branches decided that existing legislation was inadequate. Congress enacted the War Crimes Act of 1996 to impose federal criminal sanctions for grave breaches of the Geneva Conventions.<sup>106</sup> Since 1996, the U.S. treaty obligation to impose criminal sanctions for specified violations of the Conventions has been fully incorporated into domestic law by virtue of a combination of federal statutes that implement various aspects of the U.S. treaty obligations.<sup>107</sup>

Aside from the grave breaches provisions, there is one other aspect of the Geneva Conventions for which implementing legislation may be constitutionally required. Article 74 of the POW Convention and article 110 of the Civilian Convention provide that relief shipments for prisoners of war and civilian internees shall be exempt from import duties.<sup>108</sup> The Constitution provides that

---

art. 50 (imposing a similar obligation with respect to grave breaches of Convention II, which are defined in article 51); POW Convention, *supra* note 10, art. 129 (imposing a similar obligation with respect to grave breaches of Convention III, which are defined in article 130); Civilians Convention, *supra* note 10, art. 146 (imposing a similar obligation with respect to grave breaches of Convention IV, which are defined in article 147).

<sup>104</sup> *Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G Before the Senate Comm. on Foreign Relations*, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess. 24 (1955) [hereinafter, Senate Hearing] (statement of Richard R. Baxter, Office of the General Counsel, Department of Defense).

<sup>105</sup> See Senate Report, *supra* note 100, at 9970 (“The committee is satisfied that the obligations imposed upon the United States by the “grave breaches” provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions . . .”).

<sup>106</sup> Pub. L. No. 104-192, 110 Stat. 2104 (1996) (“Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”) One year later, Congress amended the statute to expand criminal liability to include other war crimes, in addition to grave breaches of the Geneva Conventions. See Pub. L. No. 105-118, title V, § 583, 111 Stat. 2436 (1997). The statute is now codified at 18 U.S.C. § 2441.

<sup>107</sup> See generally War Crimes Act of 1996, H. Rep. No. 104-698, pgs. 3-7 (1996).

<sup>108</sup> See POW Convention, *supra* note 10, art. 74; Civilian Convention, *supra* note 10, art. 110.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

“[a]ll Bills for raising Revenue shall originate in the House of Representatives.”<sup>109</sup> There is some authority to suggest that this provision may preclude the treaty makers from utilizing the treaty power to amend pre-existing laws that impose duties on imports.<sup>110</sup> Thus, implementing legislation may be constitutionally required to give domestic effect to the Geneva Convention articles that exempt relief shipments from import duties. Regardless, legislation enacted prior to U.S. ratification of the Conventions gave the President the requisite statutory authority to implement these provisions.<sup>111</sup> In sum, there are a few articles of the Geneva Conventions for which implementing legislation may be constitutionally required. Those articles have the status of supreme federal law within the domestic legal system because Congress has enacted appropriate legislation to incorporate the relevant provisions into domestic law.

2. *Provisions for Which Implementing Legislation Is Not Required:* Under the Supremacy Clause: “[A]ll Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land.”<sup>112</sup> This means that all treaties ratified by the United States have the status of supreme federal law, unless a particular treaty provision exceeds the scope of the treaty makers’ domestic lawmaking powers, or it is superseded by a subsequent inconsistent treaty or statute.<sup>113</sup> Most provisions of the Conventions are well within the scope of the treaty makers’ domestic lawmaking powers.<sup>114</sup> For such provisions,

---

<sup>109</sup> U.S. Const. art. I § 7, cl. 1.

<sup>110</sup> See SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 183-99 (2d ed. 1916) (documenting the fact that, by the middle of the 19<sup>th</sup> century, the political branches had developed a tacit understanding that treaties involving concessions in tariff duties would not have domestic effect in the absence of implementing legislation).

<sup>111</sup> See Senate Hearing, *supra* note 104, at 59 (Letter from Assistant Attorney General to Chairman of Senate Foreign Relations Committee) (noting that 19 U.S.C. § 1318 “provides that during a war or national emergency the President may authorize the Secretary of the Treasury to permit the duty-free importation of food, clothing, and other supplies for use in emergency relief work”). The letter adds that “it may be appropriate to revive” a World War II statute that specifically authorized duty-free importation of “articles addressed to prisoners of war and civilian internees in the United States.” *Id.* However, Congress apparently decided that it was not necessary to revive that statute, because Congress never enacted any such legislation.

<sup>112</sup> U.S. CONST. art. VI, cl. 2

<sup>113</sup> For a detailed exposition of this interpretation of the Supremacy Clause, see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 46-55 (2002). A competing interpretation of the Supremacy Clause holds that a treaty provision has the status of supreme federal law unless the treaty makers intended to prevent a particular provision from having domestic legal effect. See, e.g., Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 700-710 (1995). Even under that interpretation of the Clause, most provisions of the Geneva Conventions are supreme federal law because there is no evidence that the treaty makers intended to prevent them from having domestic effect. See *infra* notes 118-128 and accompanying text for further discussion of this point.

<sup>114</sup> This statement is based on two assumptions: 1) most provisions of the Conventions address matters that are within the scope of Congress’ Article I powers; and 2) the treaty makers generally have the power to create domestic law within the scope of Article I, because most of Congress’ Article I powers are concurrent powers, not exclusive powers. We provide a detailed defense of the first assumption below. See *infra* [cross-ref]. Most scholars agree with the second assumption, but Professor Yoo has argued that the treaty makers

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

implementing legislation is not constitutionally required. For most such provisions, Congress has not enacted implementing legislation.<sup>115</sup> Even so, the various articles of the Geneva Conventions for which there is no implementing legislation have the status of supreme federal law because the Supremacy Clause grants them that status.

One might object that a treaty has the status of supreme federal law only if the treaty makers intended it to have that status.<sup>116</sup> As a matter of constitutional law, we contend that this objection is misguided because a treaty's status as supreme federal law is governed by the Constitution, and the treaty makers lack the power to alter the relevant constitutional rules by manifesting their intent to deprive a treaty of its status as Law of the Land under the Supremacy Clause.<sup>117</sup> For present purposes, though, we will assume that the treaty makers' intentions do have some relevance to the question whether the Geneva Conventions are the Law of the Land. Given this assumption, analysis of the domestic legal status of treaty provisions for which there is no implementing legislation requires discussion of whether the Conventions were intended to be self-executing.

The Senate record associated with ratification of the Geneva Conventions does not contain any general statement by either the Senate or the executive branch suggesting that the Conventions, as a whole, are either self-executing or non-self-executing. There are a few statements indicating that particular provisions of the Conventions are non-self-executing.<sup>118</sup> One might infer from

---

cannot utilize the Article II treaty process to create domestic law within the scope of Congress' Article I powers. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Rejoinder, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) [hereinafter Yoo, *Rejoinder*]. For detailed criticism of Yoo's thesis, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos M. Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

<sup>115</sup> When the Senate consented to ratification of the Conventions, the Senate Report stated explicitly "that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." Senate Report, *supra* note 100, at 9971. The report then recommended a few minor changes in federal statutes. *Id.* at 9971. Apart from these few items, and the war crimes legislation noted above, see *supra* notes 106-107 and accompanying text, there has not been any legislation to implement the Conventions.

<sup>116</sup> See, e.g., RESTATEMENT (THIRD), *supra* note 22, § 111(4)(a) (stating that a treaty is non-self-executing, and will not be given effect as law in the absence of implementing legislation, "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

<sup>117</sup> For a detailed defense of this position, see Sloss, *supra* note 113.

<sup>118</sup> See, e.g., Senate Report, *supra* note 100, at 9970 ("It should be emphasized, in any event, that the grave breaches provisions cannot be regarded as self-executing"); *id.* at 9969-70 (discussing articles 53 and 54 of Geneva Convention I, which concern the use of the "Red Cross" symbol by private parties, and noting

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

these statements that the treaty makers thought that the vast majority of Convention provisions – those not specifically said to be non-self-executing – would be self-executing. This inference is reinforced by the fact that the Senate and the executive branch both stated that most of the Conventions’ provisions could be implemented without enacting new legislation.<sup>119</sup> Even so, aside from the few provisions explicitly said to be non-self-executing, the Senate record as a whole provides at best weak evidence of the treaty makers’ intentions regarding the self-executing or non-self-executing character of the Conventions.

In contrast, the subsequent practice of the U.S. military provides fairly strong evidence that the executive branch has understood the Conventions to have the status of supreme federal law. On October 1, 1997, the government published Army Regulation 190-8, which establishes policies and procedures “for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of the U.S. Armed Forces.”<sup>120</sup> The regulation states explicitly that it is “a multi-service regulation,” which “applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components.”<sup>121</sup> The regulation does not cite any federal statute as a basis of authority for its adoption. Rather, it cites the Geneva Conventions as the basis for the military’s legal authority to promulgate the regulations.<sup>122</sup> Moreover, the regulation states: “In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.”<sup>123</sup> In short, the U.S. military has taken the position that the Geneva Conventions are directly binding on all U.S. military forces as a matter of domestic law, even where the Conventions conflict with the military’s own regulations.

Some courts have argued that language in the Conventions calling for implementing legislation demonstrates that the treaty drafters intended the Conventions to be non-self-executing.<sup>124</sup> This argument is mistaken for two

---

that “[i]t is the position of the executive branch that the prohibition of articles 53 and 54 is not intended to be self-executing.”)

<sup>119</sup> See, e.g., Senate Hearing, *supra* note 104, at 59 (letter from Assistant Attorney General to Senator George stating that, upon ratification of the Conventions, “the United States will be required to enact only relatively minor legislation” to implement the Conventions); Senate Report, *supra* note 100, at 9971 (“From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.”).

<sup>120</sup> Army Regulation 190-8, § 1.1(a).

<sup>121</sup> *Id.*, cover page.

<sup>122</sup> *Id.*, § 1.1(b).

<sup>123</sup> *Id.*, § 1.1(b).

<sup>124</sup> See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the POW Convention and the Civilians Convention “expressly call for implementing legislation,” and that “[a] treaty that provides that party states will take measures through their own laws to

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

reasons. First, the treaty language at issue merely calls for legislation “to provide effective penal sanctions for persons committing” grave breaches.<sup>125</sup> Thus, at most this language suggests that the treaty drafters intended the grave breaches provisions to be non-self-executing;<sup>126</sup> it does not manifest an intention that the Conventions as a whole would be non-self-executing. Moreover, the Conventions obligate parties “to enact any legislation necessary.”<sup>127</sup> The phrase “any legislation necessary” is designed to accommodate the differences between domestic legal systems that *always* require implementing legislation for treaties (dualist systems), and domestic legal systems that *never* require implementing legislation for treaties (monist systems).<sup>128</sup> Thus, the language does not actually manifest an intention for the grave breaches provisions to be non-self-executing. Rather, it manifests the treaty makers’ recognition that broad-based multilateral treaties must be formulated in a manner that takes account of the variety of domestic legal systems in the countries where the treaty is to be implemented.

Judicial opinion is divided on the question of whether the Geneva Conventions are self-executing. Two district courts have held explicitly that at least some provisions of the Geneva Conventions are self-executing.<sup>129</sup> The majority of courts that have explicitly addressed the question have held that the

---

enforce its proscriptions evidences its intent not to be self-executing.”); *Linder v. Portocarrero*, 747 F.Supp. 1452, 1463 (S.D. Fla. 1990) (“The Geneva Conventions expressly call for implementing legislation, and therefore . . . are not self-executing.”).

<sup>125</sup> See Geneva Convention I, *supra* note 10, art. 49; Geneva Convention II, *supra* note 10, art. 50; POW Convention, *supra* note 10, art. 129; Civilian Convention, *supra* note 10, art. 146. There are a few other articles of the Conventions that call for legislation dealing with specific aspects of the Conventions. See, e.g., Geneva Convention I, *supra* note 10, art. 54 (“The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.”). But there is no general provision that calls for implementing legislation for the Conventions as a whole.

<sup>126</sup> As noted above, under U.S. constitutional law the grave breaches provisions would be non-self-executing in any event, because implementing legislation is constitutionally required for a treaty provision obligating the United States to impose criminal sanctions for designated conduct. See *supra* notes 87-92 and accompanying text.

<sup>127</sup> See Geneva Convention I, *supra* note 10, art. 49; Geneva Convention II, *supra* note 10, art. 50; POW Convention, *supra* note 10, art. 129; Civilian Convention, *supra* note 10, art. 146.

<sup>128</sup> The Netherlands, for example, has a monist legal system; treaties never require implementing legislation. See Pieter van Dijk & Bahiyih G. Tahzib, *Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 CHI.-KENT L. REV. 413, 418 (1991). In contrast, the United Kingdom has a dualist system, where treaties always require implementing legislation. See Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 467-69 (1991).

<sup>129</sup> See *United States v. Lindh*, 212 F.Supp.2d 541, 553 (E.D. Va. 2002) (holding that the Prisoner of War Convention, “insofar as it is pertinent here, is a self-executing treaty”); *United States v. Noriega*, 808 F.Supp. 791, 797 (S.D. Fla. 1992) (“[G]iven the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Conventions are not self-executing.<sup>130</sup> However, a simplistic division into majority and minority views obscures more than it clarifies.

The cases supporting non-self-execution generally say that the Conventions are non-self-executing because they do not create a private right of action.<sup>131</sup> The conclusion that the Conventions do not create a private right of action is entirely consistent with the proposition that the Conventions have the status of supreme federal law. In *American Insurance Assoc. v. Garamendi*,<sup>132</sup> the Supreme Court enjoined enforcement of a California statute that required insurance companies to disclose information about “insurance policies issued to persons in Europe, which were in effect between 1920 and 1945.”<sup>133</sup> The Court held that the California law was preempted by certain bilateral agreements between the United States and European governments.<sup>134</sup> Despite the fact that

---

<sup>130</sup> See *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (stating that the “Geneva Convention of 1949” is not self-executing, without specifying which Convention he is addressing); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4<sup>th</sup> Cir. 2003) (POW Convention is not self-executing); *United States v. Fort*, 921 F.Supp. 523, 526 (N.D. Ill. 1996) (POW Convention is not self-executing); *Linder v. Portocarrero*, 747 F.Supp. 1452, 1462-63 (S.D. Fla. 1990) (rejecting claim based on Common Article 3, and stating that “the Geneva Conventions are not self-executing”); *Handel v. Artukovic*, 601 F.Supp. 1421, 1424-26 (C.D. Cal. 1985) (rejecting claim based on the 1929 Geneva Convention, in part because the 1949 POW Convention is not self-executing); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (neither the POW Convention nor the Civilian Convention is self-executing); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6<sup>th</sup> Cir. 1978) (rejecting child custody claim based on Articles 24 and 49 of the Civilian Convention because “there is no evidence that any of the general language relied upon by plaintiffs was intended to be self-executing”).

<sup>131</sup> See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4<sup>th</sup> Cir. 2003) (POW Convention is not self-executing because “the document, as a whole, [does not] evidence an intent to provide a private right of action”) (quoting *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4<sup>th</sup> Cir. 1992)); *Handel v. Artukovic*, 601 F.Supp. 1421, 1425 (C.D. Cal. 1985) (“In the absence of authorizing legislation, an individual may enforce a treaty’s provisions only when it is self-executing, i.e., when it expressly or impliedly provides a private right of action”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that neither the POW Convention nor the Civilian Convention is self-executing because neither treaty “provides a private right of action”); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6<sup>th</sup> Cir. 1978) (stating that there is no evidence that the Civilian Convention “was intended to be self-executing or to create private rights of action in the domestic courts of the signatory countries”).

<sup>132</sup> 123 S. Ct. 2374 (2003).

<sup>133</sup> *Id.* at 2383.

<sup>134</sup> *Id.* at 2390-93. The Court’s preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” United States-Germany, July 17, 2000, 39 I.L.M. 1298; Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” October 24, 2000, 40 I.L.M. 523; Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, January 18, 2001, 2001 WL 416465. All three agreements acknowledge the creation of certain “funds” or “foundations” by European governments that are designed to compensate victims for harms they suffered during World War II. All three agreements provide that the designated funds or foundations are intended to provide the exclusive remedy for such victims. See, e.g., U.S.-Germany Agreement, *supra*, art. 1, para. 1 (“The parties agree that . . . it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

none of the bilateral agreements created a private right of action,<sup>135</sup> the Court granted relief to private plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause.<sup>136</sup> Thus, *Garamendi* supports the proposition that international agreements of the United States have the status of supreme federal law under the Supremacy Clause, regardless of whether they create a private right of action.<sup>137</sup>

Only three published judicial opinions have explicitly addressed the question whether the Geneva Conventions have the status of supreme federal law under the Supremacy Clause; all three agree that the Conventions are the Law of the Land.<sup>138</sup> In contrast, none of the cases holding that the Conventions are non-self-executing explicitly address the status of the Conventions under the Supremacy Clause. Thus, unanimous judicial precedent supports the proposition that the Geneva Conventions – at least in substantial part – have the status of supreme federal law.

In sum, with respect to the vast majority of Convention provisions for which implementing legislation is not constitutionally required, judicial precedent supports two conclusions. First, the Conventions are non-self-executing in the

---

<sup>135</sup> The bilateral agreements manifest the drafters' expectations that the agreements may be invoked defensively in U.S. courts. *See id.*, art. 2, para. 1 ("The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest."). In *Garamendi*, though, the insurance companies did not invoke the bilateral agreements defensively. Rather, they sued the Insurance Commissioner of the State of California to enjoin enforcement of the California law. *See Garamendi*, 123 S. Ct. at 2385. There is nothing in the language of any of the agreements to suggest that the drafters anticipated, or intended to authorize, this type of private lawsuit. Thus, the plaintiffs in *Garamendi* implicitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that themselves did not create a private right of action. *See* David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1193-97 (2000) (contending that the Supremacy Clause creates an implied private right of action for some treaty-based preemption claims against state officers).

<sup>136</sup> *Garamendi*, 123 S.Ct. 2374.

<sup>137</sup> One could make a persuasive argument that *Garamendi* was wrongly decided insofar as it equated sole executive agreements with treaties. *See, e.g.*, David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003). Regardless, the central point here is that a treaty that does not create private rights of action, like a statute that does not create private rights of action, might still have the status of supreme federal law under the Supremacy Clause.

<sup>138</sup> *Padilla v. Bush*, 233 F.Supp.2d 564, 590 (S.D.N.Y. 2002) (stating that the POW Convention "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F.Supp.2d 541, 553-54 (E.D. Va. 2002) (stating that provisions of the POW Convention "in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause"); *United States v. Noriega*, 808 F.Supp. 791, 794 (S.D. Fla. 1992) (stating that the POW Convention "is undoubtedly a valid international agreement and 'the law of the land' in the United States").

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

sense that they do not create a private right of action.<sup>139</sup> Second, and most importantly for the purposes of this paper, the Conventions are self-executing in the sense that they have the status of supreme federal law under the Supremacy Clause.

**B. Legislation Since 9/11**

Some may argue that Congress, in the wake of September 11, 2001, has authorized violations of the Geneva Conventions. This section refutes that argument. At the outset, it is important to emphasize that Congress has not expressly authorized the President to violate the Geneva Conventions. Nevertheless, it might be argued that two congressional acts impliedly authorize violations of the Conventions: the congressional resolution authorizing the use of force against those responsible for the September 11 attacks; and the USA PATRIOT Act of 2001. This Section demonstrates that: (1) the authorization to use force does not implicate U.S. obligations under the Geneva Conventions; and (2) the PATRIOT Act, at the most, enacts a few modest qualifications of U.S. obligations under the Civilians Convention.

1. *Congressional Resolution Authorizing the Use of Force*: The Joint Congressional Resolution authorizing the use of force does not authorize the President to violate the Geneva Conventions. By its terms, the resolution authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>140</sup> The Joint Resolution also characterizes the attacks as “armed attacks” against the United States in order to justify the use of force in self-defense. Indeed, the Resolution arguably characterizes the attacks as inherently unlawful acts of war, or “war crimes.”<sup>141</sup> The language of the Resolution, therefore, clearly contemplates executive action aimed at attacking and killing those responsible for the September 11 attacks, or in the alternative, capturing, detaining, and punishing any such persons. In this sense, it is clear that Congress contemplated the direct, severe application of U.S. power against a foe formally characterized as the

---

<sup>139</sup> We express no view as to whether this conclusion is correct. We simply note that judicial precedent supports this conclusion.

<sup>140</sup> Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

<sup>141</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

“enemy.” The question is whether the Resolution directly or impliedly authorizes the President to engage in conduct contrary to the Geneva Conventions.

Although the Joint Resolution does not on its face mention the Geneva Conventions, it may nevertheless impliedly authorize violations of these treaties. There are two versions of this argument—one plausible and the other not. It is therefore important to distinguish these two competing conceptions of this implied authorization: (1) the resolution authorizes the use of *any* tactics deemed essential in that it authorizes the President to use “all necessary and appropriate force” to prevent further attacks; and (2) the resolution triggers the application of a network of laws—statutes, treaties, common law, and regulations—governing the use of force that in turn authorize the President to violate the Geneva Conventions.

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

To read the Resolution more broadly is inconsistent with several important interpretive considerations. First, U.S. law criminalizes many violations of the Geneva Conventions.<sup>142</sup> It is difficult to sustain the claim that Congress impliedly repealed various provisions of the U.S. penal code and the Uniform Code of Military Justice.<sup>143</sup> Second, all evidence suggests that Congress would have presumed that military operations would be conducted in accordance with the laws of war. No evidence suggests that the executive sought, or suggested the necessity of, the discretion to conduct military operations in any way inconsistent with U.S. treaty obligations. Indeed, substantial evidence suggests that the U.S. military thought (or thinks) that it is in the strategic interest of the United States to comply with the laws of war.<sup>144</sup> It is important to note in this regard that the President did not seek a formal declaration of war in part because he considered

---

<sup>142</sup> See 18 U.S.C. § 2441.

<sup>143</sup> 10 U.S.C. § 801 *et seq.*

<sup>144</sup> See, e.g., DEP’T OF ARMY, JUDGE ADVOCATE GENERAL, OPERATIONAL LAW HANDBOOK 10 (2003); Department of Defense Law of War Program, DoD Directive 5100.77 (Dec 9, 1998) (establishing that, as a matter of U.S. policy, U.S. forces are to observe the law of war).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

the extraordinary powers triggered by such a declaration unnecessary. Third, long-standing U.S. military regulations require all operations to be conducted in accordance with the Geneva Conventions.<sup>145</sup> This dense network of regulations (tightly coupled to the statutory provisions of the UCMJ) constituted an important part of the backdrop against which Congress issued the Resolution.

The second variant of this claim, though more plausible, is nevertheless flawed. Recall that, on this view, the resolution *in conjunction with some other source or sources of authority* empowers the President to take action inconsistent with U.S. treaty obligations. This variant acknowledges that the Joint Resolution could not of its own force authorize the President to suspend statutes and treaties that might otherwise condition the exercise of the war-making power. The resolution might, nevertheless, constitute sufficient congressional authorization to activate other presidential powers arising out of other specific statutes or the Constitution itself—powers that might allow the President to derogate from specific treaty obligations. The most salient example is the claim that Congress has, in time of war, authorized the use of military commissions—and insofar as the use of these special tribunals violates the Geneva Conventions, Congress has authorized these violations.<sup>146</sup>

On this application of the view, the resolution arguably empowers the President to invoke the “Articles of War,” including the provisions authorizing the

---

<sup>145</sup> See, e.g., DEP’T OF ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE (1956); Army Regulation 190-8, § 1.1(b) (“In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.”).

<sup>146</sup> To be clear, the argument is not that *further* congressional authorization is unnecessary. Rather, the argument identified here is that the Joint Resolution constitutes *wholly sufficient* authorization for the use of military commissions. There are two variants of this claim. The argument is that Congress, by authorizing the use of force, implicitly sanctioned the establishment of military commissions—even absent any other constitutional or statutory source of authority—because: (1) the resolution necessarily authorizes any action short of armed force in dealing with the September 11 attackers in that the greater power includes the lesser; or (2) the use of military commissions itself constitutes the “use of force” within the meaning of the resolution. These are obviously strained readings of the resolution. After all, the resolution triggers a narrower range of emergency powers than would a formal declaration of war. In addition, the Constitution as well as some treaties and statutes govern the exercise of the President’s war-making power; and might prohibit or authorize the use of specific institutions such as military commissions. It is also important to note that the Supreme Court in *Quirin* did not sanction the use of commissions based solely on the fact that the Congress had declared war on Germany. See *Ex parte Quirin*, 317 U.S. 1, 26-29 (1942) (identifying two potential sources of authority to establish commissions: statute and the Commander-in-Chief power). Of course, some commentators argue that the Court’s reasoning in *Quirin* suggests that a formal declaration of war is a condition precedent for the invocation of either basis. See, e.g., Katyal & Tribe, *supra* note 68. The rather clumsy arguments outlined above must, therefore, be distinguished from the more plausible claim that the resolution read in conjunction with another power (the commander-in-chief power, for example) establishes the president’s authority to convene military commissions. See *infra* notes 147-156 and accompanying text.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

use of military commissions.<sup>147</sup> The central question driving the vigorous, on-going debates concerning the President’s power to issue the Military Order is whether the Joint Resolution is sufficient to trigger these other powers or whether a formal declaration of war is necessary.<sup>148</sup> For the purposes of this analysis, the important point is that the Joint Resolution arguably authorizes the use of military commissions only insofar as it activates other sources of authority cited in the Military Order—namely, 10 U.S.C. §§ 821 and 836.<sup>149</sup>

Section 821 provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute *or by the law of war* may be tried by military commissions, provost courts, or other military tribunals.<sup>150</sup>

By its terms, this provision does not appear to *authorize* the establishment of military commissions.<sup>151</sup> Nevertheless, the Supreme Court in *Quirin* held that “Congress [in what is now § 821] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases,” and held that “Congress [in what is now § 821] has authorized trial of offenses against the law of war before such commissions.”<sup>152</sup> Many commentators argue that the Court’s

---

<sup>147</sup> 10 U.S.C. §§ 901 et seq.

<sup>148</sup> Compare Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002); with Katyal & Tribe, *supra* note 46.

<sup>149</sup> See MILITARY ORDER, *supra* note 20, prml.

<sup>150</sup> 10 U.S.C. § 821 (1994) (emphasis added).

<sup>151</sup> See, e.g., Katyal & Tribe, *supra* note 68, at 1285-87; Bradley & Goldsmith, *supra* note 148, at \* 7 (suggesting that the terms of the statute appear to “recognize[ ] a pre-existing non-statutory authority in the President”); David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825, 834 (1993) (“Although federal statute recognizes military commissions, it is clear that Congress considers them established . . . under the laws of war.”).

<sup>152</sup> Ex parte *Quirin*, 317 U.S. 1, 28-29 (1942). See also RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 408-15 (5th ed. 2003); DEP’T OF ARMY, JUDGE ADVOCATE GENERAL, *LAW OF WAR DESKBOOK* 206 (2000) (stating that UCMJ “authorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war”) (emphasis added); Bradley & Goldsmith, *supra* note 148, at \* 7-8; *id.* at \* 7 (“Although by its terms this provision recognizes a pre-existing non-statutory authority in the President, the Supreme Court in *Quirin* held that this provision also constitutes congressional *authorization* for the President to create military commissions.”). In fact, many critics of the result in *Quirin* acknowledge that the Court interpreted Article 15 of the Articles of War as congressional authorization for military commissions. See, e.g., Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 82 (1980); David J. Danelski, *The Saboteurs’ Case*, 1 J. S. CT. HIST. 61 (1996). It is important to note that in *Quirin* the government also charged the German saboteurs under Article

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

reasoning in *Quirin* is closely tethered to the facts of the case and should not apply outside these unique circumstances.<sup>153</sup> Some also maintain that the Court’s interpretation of the predecessor of § 821 is implausible,<sup>154</sup> implying that perhaps the Supreme Court should revisit the issue.<sup>155</sup> Irrespective of the merits of these contentions, the applicability of § 821 to the present circumstances will turn, in substantial part, on *whether individuals subject to the Military Order may, under the laws of war, be tried by special military tribunal*. That is, the statute authorizes the use of military commissions, even under the *Quirin* court’s reasoning, only insofar as the laws of war permit it. Therefore, insofar as such tribunals violate the Geneva Conventions, which are an integral part of the laws of war, this statutory provision does not authorize their use.<sup>156</sup>

---

82 of the Articles of War—a provision that clearly authorized military commissions to try the offense of spying. The Court, however, examined only the “laws of war” charges, and had “no occasion to pass on” the other charges. See *Quirin*, 317 U.S. at 46. In *Yamashita*, the Supreme Court, relying in part on *Quirin*, again read the predecessor of § 821 as explicit congressional authorization for military commissions to try offenses against the laws of war. In *Re Yamashita*, 327 U.S. 1, 46 (1946). See also Bederman, *supra* note 151, at 835-36 n.55.

<sup>153</sup> These circumstances include: the case was decided in the context of a formally declared, “total” war; the charges were levied against only eight identified defendants; the charges were supported by irrefutable evidence; the list of charges included alleged violations of statutes clearly assigning jurisdiction to military commission. See, e.g., Katyal & Tribe, *supra* note 68; Oversight of the Dep’t of Justice: Preserving our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (statement of Scott L. Silliman).

<sup>154</sup> See, e.g., Katyal & Tribe, *supra* note 68, at 1281-1284; Belknap, *supra* note 152; Danelski, *supra* note 152.

<sup>155</sup> See, e.g., Katyal & Tribe, *supra* note 68 (advocating an overruling of *Quirin*). One difficulty with this view is that courts, for obvious reasons, do not lightly abandon *stare decisis* in the context of statutory interpretation. See, e.g., *Hohn v. United States*, 524 U.S. 236, 251 (1998) (stating that “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation” (citation omitted)); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting) (outlining why heightened rules of *stare decisis* apply in statutory settings); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 1-16, 3-3, at 84 & n.42, 251-54 (3d ed. 2000). Specifically, it appears that Congress ratified the holding in *Quirin* when reenacting § 821. See SEN. RPT. 486, *Establishing a Uniform Code of Military Justice*, 81st Cong., 1st Sess., at 13 (June 10, 1949) (“The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court. (*Ex Parte Quirin*, 317 U.S. 1 (1942)).”); H. REPT. 491, *Uniform Code of Military Justice*, 81st Cong., 1st Sess., at 17 (April 28, 1949) (same). See also Bradley & Goldsmith, *supra* note 148, at \* 8.

<sup>156</sup> The statute does suggest, however, that other statutes might authorize trial by military commission—irrespective of whether the laws of war would authorize them in any such circumstances. This is an important point because the Uniform Code of Military Justice does authorize the use of military commissions in some specific circumstances. See, e.g., 10 U.S.C. § 904 (2002) (stating that military commissions may impose the death penalty for the crime of “aiding the enemy”); 10 U.S.C. § 906 (2002) (stating that military commissions may try the crime of spying during wartime); Military Tribunal Authorization Bill of 2002, S. 1941, 107th Cong. § 3(b) (introduced Feb. 13, 2002) (establishing military tribunal jurisdiction over “crimes against humanity targeting against United States persons”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

2. *USA Patriot Act of 2001*: In general, the USA Patriot Act does not authorize the President to violate the Geneva Conventions.<sup>157</sup> Clearly, the Act does not expressly authorize the President to do so. Some of its provisions may nevertheless have this effect in that they are inconsistent with some U.S. obligations under these treaties—at least when these provisions target certain persons at certain times. Even so, the Act implicates only a very narrow swath of Geneva law. This Section contends that the Act, at most, derogates from a few rules established in the Civilians Convention concerning the treatment of enemy aliens on U.S. territory in time of armed conflict.

For the most part, the Patriot Act does not concern matters governed by the Geneva Conventions. This is not to say that the Act has little impact on the civil rights of persons subject to the jurisdiction of the United States. Indeed, without question, it does. Our point is only that the law enforcement powers augmented by the Act, by and large, do not concern matters regulated by the law of war. For example, the Act substantially expands the information-gathering and surveillance capacity of federal law enforcement. The Act also broadens the definition of terrorism (and terrorism-related offenses) with the effect of increasing the available penalties for many federal crimes. In addition, it formalizes several modes of cooperation between law enforcement agencies. Although there may be other grounds for objecting to these provisions, they do not violate U.S. treaty obligations under the laws of war.

One cluster of reforms in the Act, however, is potentially problematic. The “enhanced immigration” provisions dramatically expand the power of federal law enforcement to detain non-citizens. Section 412 of the Act grants the Attorney General the authority to detain any alien he has “reasonable grounds to believe” to have engaged in activity that endangers the national security of the United States.<sup>158</sup> The provision requires that the Attorney General either begin removal proceedings against such aliens or bring criminal charges within seven days (or release them from custody).<sup>159</sup> Nevertheless, any alien found to be removable, but whose removal is unlikely in the reasonably foreseeable future, may be detained indefinitely if the Attorney General “certifies” that release of the alien will “adversely affect national security or the safety of the community or any person.”<sup>160</sup> The provision also sharply limits the scope of judicial review accorded any alien detained under the provision.<sup>161</sup>

---

<sup>157</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>158</sup> *Id.*, § 412.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* §§ 412-413.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

When applied to nationals of a state with which the United States is at war, this provision arguably violates the Geneva Conventions. The detention of any such individuals is arguably an unlawful deprivation of liberty under the Civilians Convention. The Civilians Convention authorizes states to detain enemy aliens present on their territory only if (1) the alien has directly participated in the hostilities; or (2) detention is otherwise necessary to preserve the national security of the detaining state.<sup>162</sup> In addition, enemy aliens present on the territory of a party to a conflict are to be given the right to depart the enemy territory voluntarily.<sup>163</sup> The details of these claims are, for the moment, less important than the more general point: even if some provisions of the Patriot Act are inconsistent with the Geneva Conventions, the Act does not, in general, constitute congressional authorization to violate these treaties.

---

<sup>162</sup> Civilian Convention, *supra* note 10, art. 42.

<sup>163</sup> *Id.*, art. 35.

**III**  
**The President as Law Maker**

As noted above, certain Defense Department regulations and policies adopted to implement President Bush's Military Order may conflict with some provisions of the Geneva Conventions.<sup>164</sup> In light of these apparent conflicts, the question arises whether the Military Order supersedes conflicting provisions of the Geneva Conventions as a matter of domestic law. Although the Military Order relies in part on statutory authorization, the statutes invoked by the Order do not grant the President the authority to supersede the Geneva Conventions.<sup>165</sup> Even so, one could argue that the Military Order supersedes the Geneva Conventions because the President has the independent constitutional authority to adopt a unilateral executive order<sup>166</sup> that supersedes a prior inconsistent treaty that is the supreme Law of the Land. Part Three evaluates the merits of this argument.

It bears emphasis that this is not a question about the power of the *federal government* to supersede a previously ratified treaty. It is well established that Congress has the power to enact legislation that supersedes a previously ratified treaty as a matter of domestic law.<sup>167</sup> Thus, the precise issue under consideration is a question of the distribution of power between the legislative and executive branches. Given that Congress has an undisputed power to enact legislation to supersede a previously ratified treaty, does the President also have an independent power – acting without congressional authorization – to adopt a unilateral executive order that supersedes a previously ratified treaty as a matter of domestic law? The first section presents the argument in favor of a Presidential power to promulgate orders that supersede prior inconsistent treaties. The next section explains why that argument is ultimately unpersuasive.

**A. The Case for A Presidential Power to Supersede Treaties**

In his famous concurring opinion in the *Steel Seizure* case, Justice Jackson identified three categories of Presidential action.<sup>168</sup> Category One includes

---

<sup>164</sup> See *supra* Section I.B.

<sup>165</sup> See *supra* Section II.B.

<sup>166</sup> The term “unilateral” executive order refers to an executive order issued by the President on the basis of his independent constitutional authority. It does not include executive orders that rely on an express or implied statutory authorization by Congress. Since Congress has not authorized the President to violate the Geneva Conventions, the Military Order is unilateral insofar as it appears to authorize policies inconsistent with U.S. obligations under the Conventions.

<sup>167</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 600-602 (1889); *Whitney v. Robertson*, 124 U.S. 190, 193-95 (1888); *Edye v. Robertson*, 112 U.S. 580, 597-99 (1884).

<sup>168</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Presidential “acts pursuant to an express or implied authorization of Congress.”<sup>169</sup> Category Two includes Presidential actions undertaken without “either a congressional grant or denial of authority.”<sup>170</sup> Category Three includes Presidential actions that are “incompatible with the expressed or implied will of Congress.”<sup>171</sup>

Even before the rise of administrative agencies associated with the New Deal, it had become routine for the President and his subordinates to create law pursuant to express congressional authorization.<sup>172</sup> Nowadays, the Code of Federal Regulations contains thousands of pages of regulations promulgated by the executive branch on the basis of congressional authorization. Such regulations have the status of supreme federal law,<sup>173</sup> at least insofar as the regulators are acting within the scope of legislative authorization. In short, Category One Presidential lawmaking has become so firmly entrenched in our legal system that its constitutionality cannot seriously be challenged.

Whereas the products of Category One lawmaking are often called “regulations,” Category Two Presidential lawmaking yields “unilateral executive orders.”<sup>174</sup> Such executive orders are properly termed “unilateral” because they are adopted by the President without legislative authorization. Category Two lawmaking, like Category One, has deep historical roots,<sup>175</sup> but its constitutional validity is less firmly established.<sup>176</sup> Justice Jackson concluded that the constitutionality of Category Two lawmaking “is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>177</sup>

---

<sup>169</sup> *Id.* at 635.

<sup>170</sup> *Id.* at 637.

<sup>171</sup> *Id.*

<sup>172</sup> See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (3<sup>rd</sup> ed. 1994) (describing the historical development of administrative law prior to World War II).

<sup>173</sup> See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that FCC regulations preempt Oklahoma law prohibiting advertising of alcoholic beverages on cable television).

<sup>174</sup> An executive order that relies on congressional authorization would be considered Category One. In contrast, an executive order promulgated by the President on the basis of his independent constitutional authority (i.e., a unilateral executive order) is Category Two.

<sup>175</sup> For a detailed account of Category Two lawmaking by President Roosevelt before and during World War II, see EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION (1947), at 47-50 (discussing seizure of private companies to ensure continued production of war material in the face of actual or threatened labor strikes); and at 50-55 (discussing Presidential orders establishing administrative agencies that lacked legislative authorization); and at 55-62 (describing the Roosevelt Administration’s use of “administrative sanctions,” which according to Professor Corwin “were in fact nothing short of blackmail.”). In light of the Supreme Court’s subsequent decision in *Youngstown*, some of Roosevelt’s unilateral Presidential orders were probably unconstitutional.

<sup>176</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) (describing Category Two as a “zone of twilight”).

<sup>177</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

There is a longstanding practice of Category Two Presidential lawmaking by means of sole executive agreements. A “sole executive agreement” is an international agreement concluded by the President on the basis of his independent constitutional authority, without any legislative authorization.<sup>178</sup> Between 1789 and 1989, the United States concluded more than 12,000 nontreaty international agreements, including 1,182 such agreements concluded before 1939.<sup>179</sup> The Supreme Court has consistently held that sole executive agreements have the status of domestic law, and that they supersede inconsistent state law.<sup>180</sup> Thus, notwithstanding the original constitutional design,<sup>181</sup> it is now firmly established that the President has some independent authority to create domestic law by means of sole executive agreements.

Advocates of broad Presidential powers might cite Supreme Court precedents involving sole executive agreements in support of a unilateral Presidential power to supersede treaties domestically. In *United States v. Belmont* the Supreme Court suggested that “all international compacts and agreements,” including sole executive agreements, have the status of supreme federal law.<sup>182</sup> Five years later, in *United States v. Pink*, the Court reiterated that “[a] treaty is a Law of the Land under the supremacy clause . . . Such international compacts and agreements as the Litvinov Assignment [a sole executive agreement] have a similar dignity.”<sup>183</sup> Since sole executive agreements “have a similar dignity” as

---

<sup>178</sup> Terminology related to executive agreements is not entirely uniform. Commentators generally distinguish between “congressional-executive agreements,” which are international agreements authorized by Congress in some fashion, and “sole executive agreements,” which are international agreements concluded by the President on the basis of his independent constitutional authority. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 215-224 (2d ed. 1996). Some commentators distinguish a third category of executive agreements that derive their authority from an earlier treaty. See PHILLIP R. TRIMBLE, *UNITED STATES FOREIGN RELATIONS LAW* 113-15 (2002).

<sup>179</sup> CONG. RESEARCH SERV., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 14 (1993) [hereinafter CRS Study]. Due in part to definitional problems in distinguishing between sole executive agreements and congressional executive agreements, it is unclear how many of these were sole executive agreements. However, it is fair to assume that a substantial number were sole executive agreements.

<sup>180</sup> See *American Insurance Assoc. v. Garamendi*, 123 S. Ct. 2374 (2003) (holding that sole executive agreements with Germany, France and Austria preempt California statute); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that sole executive agreement with Iran preempts state law breach of contract claims); *United States v. Pink*, 315 U.S. 203 (1942) (holding that sole executive agreement with Russia preempts New York common law rules governing relative priority of competing creditors); *United States v. Belmont*, 301 U.S. 324 (1937) (same).

<sup>181</sup> Professor Ramsey has made a persuasive argument that the Framers did not intend to grant the President independent authority to create domestic law by means of sole executive agreements. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

<sup>182</sup> 301 U.S. 324, 331 (1937).

<sup>183</sup> *United States v. Pink*, 315 U.S. 203, 230 (1942). See also RESTATEMENT (THIRD), *supra* note 22, § 115 n.5 (“A sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

treaties, a later sole executive agreement arguably supersedes an earlier treaty under the later-in-time rule. Moreover, one could argue, there is no reason to distinguish between unilateral executive orders and sole executive agreements in this respect because both are unilateral Presidential acts.

Even in a purely domestic context, the Court has periodically upheld the validity of Category Two Presidential lawmaking. For example, in *United States v. Midwest Oil Co.*,<sup>184</sup> Congress had enacted a statute declaring that public lands containing petroleum would be “free and open to occupation, exploration, and purchase by citizens of the United States.”<sup>185</sup> The President subsequently issued an executive order that made certain public lands temporarily unavailable for exploration and purchase in order to ensure “the conservation of a proper supply of petroleum for the government’s own use.”<sup>186</sup> The Supreme Court upheld the validity of the executive order, despite the fact that it was issued without statutory authorization. The Court relied heavily on the practice of the political branches as a guide to constitutional interpretation. The majority opinion stated: “[I]n determining the . . . existence of a [constitutional] power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation.”<sup>187</sup> The Court noted that, prior to 1910, various Presidents had issued “at least 252 executive orders making reservations [of public lands] for useful, though nonstatutory, purposes.”<sup>188</sup> The Court concluded that Congress had acquiesced in this practice, and that its acquiescence “operated as an implied grant of power.”<sup>189</sup> Thus, *Midwest Oil* stands for the proposition that the President has a limited power to create law in Category Two: i.e., without express congressional authorization.<sup>190</sup>

In sum, Supreme Court precedents involving both sole executive agreements and unilateral executive orders support the claim that the President has independent constitutional authority to create supreme federal law by means of unilateral executive action. In *The Federalist*, John Jay stated: “All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from

---

<sup>184</sup> 236 U.S. 459 (1915).

<sup>185</sup> *Id.* at 466 (citing Act of February 11, 1897).

<sup>186</sup> *Id.* at 467.

<sup>187</sup> *Id.* at 473.

<sup>188</sup> *Id.* at 471.

<sup>189</sup> *Id.* at 475.

<sup>190</sup> Some may object that *Midwest Oil* does not support a Presidential lawmaking power because the Presidential order in that case was “executive,” not “legislative.” Granted, the executive order was “executive” in a formal sense because it emanated from the President. However, it was “legislative” in a functional sense because it had precisely the same effect as a statute limiting occupation and exploration of public lands. Therefore, *Midwest Oil* supports Presidential lawmaking in a functional sense.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

the legislature.”<sup>191</sup> If, as Jay suggests, a unilateral executive order has as much legal validity as a statute, then one could argue that a unilateral executive order should supersede a prior inconsistent treaty, just as a federal statute supersedes a prior inconsistent treaty under the later-in-time rule. The following section explains why this argument is flawed.

**B. The Limits on Presidential Lawmaking Powers**

A careful reading of the constitutional text suggests that the Framers did not intend to grant the President the authority to create law by means of unilateral executive action: that is, without the participation of the legislative branch. The text grants the President “[t]he executive power.”<sup>192</sup> Additionally, the President is the “Commander in Chief of the Army and Navy,”<sup>193</sup> he has the “Power to grant Reprieves and Pardons for Offences against the United States,”<sup>194</sup> and the power to “receive Ambassadors and other public Ministers.”<sup>195</sup> However, these textual provisions, construed in accordance with their ordinary meaning, do not appear to grant the President any lawmaking authority. Of course, the President does have the power to make treaties, which have the status of supreme federal law, but a treaty does not obtain that status unless it is approved by a two-thirds Senate majority.<sup>196</sup> Thus, the Treaty Power grants the President the authority to create law, but not by means of unilateral executive action.

Article I states explicitly that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>197</sup> The Framers decision to use the word “all” to modify the phrase “legislative Powers” reinforces the conclusion that they did not intend to grant the President an independent lawmaking power. Contemporary scholars of U.S. foreign relations law hold sharply differing views about the scope of the President’s constitutional foreign affairs powers, but they generally agree that the Framers did not intend to grant the President an independent lawmaking power in the realm of foreign affairs.<sup>198</sup>

---

<sup>191</sup> THE FEDERALIST No. 64, at 378 (John Jay) (Isaac Kramnick ed. 1987).

<sup>192</sup> U.S. Const. art. II, § 1, cl. 1.

<sup>193</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>194</sup> *Id.*

<sup>195</sup> U.S. Const. art. II, § 3.

<sup>196</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>197</sup> U.S. Const. art. I, § 1.

<sup>198</sup> See, e.g., Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10-11 (1993) (claiming that the President has “a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm,” but “the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting.”); Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L. J. 231, 234-35 (2001) (contending that the constitutional grant of “executive power” gives the President a “residual foreign affairs power,” but “the President is not a lawmaker, even in foreign affairs.”). But see H. Jefferson Powell, *The*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Even so, all but the most rigid formalists must acknowledge that there is a thin line, at best, that separates execution of existing law from creation of new law. Indeed, the difficulty of drawing bright lines to separate legislative and executive functions provides a partial explanation for the Supreme Court decisions approving Presidential lawmaking by means of unilateral executive action. Despite the Court's approval of Presidential lawmaking, though, the analysis in this section shows that Supreme Court precedent is generally consistent with the following proposition: although valid federal law created by means of unilateral executive action is supreme over state law, unilateral executive action that conflicts with a federal statute or treaty is invalid, unless the President is acting within the scope of his exclusive constitutional authority.<sup>199</sup>

This proposition is consistent with the overall structure of the Constitution, which purposefully divides power among the three branches of the federal government in order to limit the power of any one branch.<sup>200</sup> The President has a constitutional duty to “take Care that the Laws be faithfully executed.”<sup>201</sup> That duty applies not only to statutes enacted by Congress, but also to ratified treaties.<sup>202</sup> If the President had the power to adopt a unilateral executive order that could supersede federal statutes or treaties, his duty to “take Care that the Laws be faithfully executed” would be illusory.<sup>203</sup> Whenever the President did not want to execute a particular statute or treaty, he could simply adopt a unilateral executive order to supersede the particular statute or treaty that he did not want to implement. The balance between the legislative and executive branches that the Framers wove into the constitutional structure would be destroyed.

---

*President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 543-44 (1999) (distinguishing between “autonomous presidential powers,” which Congress cannot lawfully regulate, and “independent presidential powers,” which are subject to legislative regulation).

<sup>199</sup> If the President is acting pursuant to his *exclusive* constitutional authority, then any conflicting federal statute would be invalid because Congress lacks the power under Article I to legislate in areas that are constitutionally committed to the President's exclusive control. In contrast, there is no authority to suggest that the treaty makers, acting pursuant to Article II, lack the power to create domestic law in areas within the scope of the President's exclusive constitutional authority. Below, we consider whether the President has the constitutional authority to violate treaty provisions addressing matters within the scope of his exclusive authority as Commander in Chief. *See infra* text accompanying notes 341-383.

<sup>200</sup> *See See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725,1763-64 (discussing excessive concentration of power in state legislatures during pre-Constitutional period), and at 1766-67 (concluding that Framers “understood that governmental power needed to be separated sufficiently to ensure that no one branch would ever again become as powerful as the state legislatures had”).

<sup>201</sup> U.S. Const. art. II, § 3.

<sup>202</sup> *See infra* notes 286-302 and accompanying text.

<sup>203</sup> *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

1. *Limits on Sole Executive Agreements:* The Supreme Court has never held that sole executive agreements have the same rank as statutes and treaties within the domestic constitutional order. Supreme Court decisions involving sole executive agreements have all involved conflicts with state law, not federal law.<sup>204</sup> Both *Belmont* and *Pink* involved conflicts between the Litvinov Agreement, a sole executive agreement with Russia, and New York common law rules governing the relative priority of competing creditors.<sup>205</sup> *Dames & Moore* involved a sole executive agreement with Iran that effectively terminated the petitioner's state law breach of contract action against the Atomic Energy Organization of Iran, and transferred venue to a specially constituted arbitration tribunal.<sup>206</sup> *Garamendi* involved a conflict between a California statute and sole executive agreements with Germany, France and Austria.<sup>207</sup> In none of these cases did the Supreme Court decide the relationship between sole executive agreements, on the one hand, and federal statutes or treaties, on the other.<sup>208</sup>

Granted, both *Belmont* and *Pink* contain dicta suggesting that sole executive agreements have the same status as statutes and treaties.<sup>209</sup> Equal status implies that a subsequent executive agreement would supersede an earlier statute or treaty under the later-in-time rule. However, such dicta are noticeably absent from both *Dames & Moore* and *Garamendi*.<sup>210</sup> Moreover, most lower courts that

---

<sup>204</sup> Franklin Roosevelt concluded an executive agreement with Great Britain in 1940 -- involving the delivery of fifty overage destroyers to Britain in exchange for the lease of sites for naval bases -- that "was directly violative of at least two [federal] statutes." See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* (5<sup>th</sup> ed. 1984) at 273. Attorney General Jackson (later Justice Jackson) defended the agreement on the basis of the President's Commander-in-Chief power. *Id.* However, the constitutionality of the agreement was never tested in court.

<sup>205</sup> See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>206</sup> See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>207</sup> See *American Insurance Assoc. v. Garamendi*, 123 S. Ct. 2374 (2003).

<sup>208</sup> Professor Trimble contends that, in *Dames & Moore*, the Supreme Court authorized the use of a sole executive agreement to supersede the Foreign Sovereign Immunities Act (FSIA), a federal statute. TRIMBLE, *supra* note 178, at 138-39. However, this is an excessively broad reading of *Dames & Moore*. The *Dames & Moore* Court never stated explicitly that the executive agreement at issue superseded the FSIA. Moreover, Trimble's interpretation is inconsistent with the Court's stated intention "to rest decision on the narrowest possible ground capable of deciding the case." *Dames & Moore*, 453 U.S. at 660.

<sup>209</sup> See, e.g., *Pink*, 315 U.S. at 230 (stating that a treaty is "a Law of the Land under the supremacy clause," and that sole executive agreements "have a similar dignity"); *Belmont*, 301 U.S. at 331 (stating that the Supremacy Clause establishes the supremacy of treaties over state law, and "the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government").

<sup>210</sup> See *American Insurance Assoc. v. Garamendi*, 123 S. Ct. 2374 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

have explicitly addressed the issue have concluded that sole executive agreements do not supersede a prior inconsistent statute.<sup>211</sup>

There are numerous cases in which the Supreme Court has held that an administrative regulation that conflicts with a previously enacted statute is invalid.<sup>212</sup> These cases are instructive because the Court has also held that valid federal regulations, like valid executive agreements, preempt conflicting state law.<sup>213</sup> In effect, the Court treats administrative regulations as equivalent to federal statutes for the purpose of resolving conflicts between federal and state law, but it views such regulations as being subordinate to statutes for the purpose of resolving conflicts between federal statutes and regulations. Statutes have a higher status than regulations within the system of federal law because statutes require the joint action of the legislative and executive branches, whereas a regulation that conflicts with a statute is the product of unilateral executive action.<sup>214</sup>

Treaties, like statutes, require the joint action of the legislative and executive branches.<sup>215</sup> In contrast, sole executive agreements, like regulations, involve unilateral executive action. Therefore, even though sole executive agreements preempt conflicting state law, such agreements should be subordinated to treaties for the purpose of resolving conflicts between two international agreements.<sup>216</sup> Moreover, if a sole executive agreement does not

---

<sup>211</sup> See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4<sup>th</sup> Cir. 1953) (holding that an “executive agreement was void because it was not authorized by Congress and contravened provisions of a statute”); *Swearingen v. United States*, 565 F. Supp. 1019, 1021 (D. Colo. 1983) (stating that “executive agreements do not supersede prior inconsistent acts of Congress because, unlike treaties, they are not the ‘supreme Law of the Land’”); *Seery v. United States*, 127 F. Supp. 601, 606-07 (Ct. Cl. 1955) (rejecting Government’s contention that an executive agreement is equivalent to a treaty under the Supremacy Clause). *But see Etlimar S.A. of Casablanca v. United States*, 106 F. Supp. 191 (Ct. Cl. 1952) (suggesting that an executive agreement might supersede an earlier act of Congress).

<sup>212</sup> See, e.g., *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (invalidating FDA regulations that conflicted with Food, Drug and Cosmetic Act); *MCI Telecommunications v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994) (invalidating FCC rule that conflicted with Federal Communications Act); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994) (invalidating EPA rule that conflicted with Resource Conservation and Recovery Act).

<sup>213</sup> See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that FCC regulations preempt Oklahoma law prohibiting advertising of alcoholic beverages on cable television).

<sup>214</sup> A valid regulation typically involves the participation of both legislative and executive branches: Congress enacts a statute to authorize Presidential rulemaking. But the existence of a conflict between a statute and regulation necessarily implies that the regulation was not authorized by Congress, which means that the President was acting unilaterally with respect to the invalid portion of the regulation.

<sup>215</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>216</sup> From the standpoint of international law, there is no difference between a treaty and a sole executive agreement: both are considered “treaties.” Thus, a sole executive agreement could supersede a prior inconsistent treaty for purposes of international law. See *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331, art. 30, para. 3 (“When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

supersede a prior inconsistent treaty, it follows that a unilateral executive order cannot supersede a prior inconsistent treaty.

2. *Limits on Unilateral Executive Orders:* Even if one assumes that sole executive agreements have the same status as statutes and treaties, it does not necessarily follow that unilateral executive orders have equivalent status. Sole executive agreements arguably deserve a higher status than unilateral executive orders because sole executive agreements implicate the international legal obligations of the United States.<sup>217</sup> In contrast, unilateral executive orders are entirely creatures of domestic law.<sup>218</sup>

Despite the fact that a valid executive order is supreme over state law,<sup>219</sup> a unilateral executive order can never supersede a prior inconsistent statute because a unilateral executive order that conflicts with a valid federal statute is *per se* invalid.<sup>220</sup> *Little v. Barreme*<sup>221</sup> illustrates this point. In 1799, in the context of ongoing hostilities with France, Congress enacted a statute to suspend commercial intercourse between the United States and France. The statute authorized the President to seize “any ship or vessel of the United States on the high sea . . . bound or sailing to any place within the territory of the French republic or her dependencies.”<sup>222</sup> Although the statute covered only vessels sailing *to* France, the President subsequently issued an executive order authorizing seizures of vessels “bound *to or from* French ports.”<sup>223</sup> Acting pursuant to the executive order, Captain Little seized a ship sailing *from* a French port. Chief Justice Marshall, writing for the Court, held that the seizure was unlawful, even though it was

---

of the later treaty.”). However, in terms of domestic law, the better view is that a sole executive agreement cannot supersede a prior inconsistent treaty, for the reasons explained above.

<sup>217</sup> Professor Henkin makes a similar argument. See HENKIN, *supra* note 178, at 504 n.198.

<sup>218</sup> At times, Presidents have adopted a unilateral executive order for the purpose of implementing a sole executive agreement. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981) (the “dispute involves various Executive Orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States . . . to comply with an Executive Agreement between the United States and Iran”).

<sup>219</sup> See CORWIN, *THE PRESIDENT*, *supra* note 204, at 440, n.10 (stating that “executive laws” are “endowed as against state authority with the supremacy of national law.”).

<sup>220</sup> *Id.* at 439, n.10 (“Such regulations may not, of course, transgress the constitutional acts of Congress.”).

<sup>221</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>222</sup> *Id.* at 177.

<sup>223</sup> *Id.* at 178.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

consistent with the executive order,<sup>224</sup> because the executive order could not authorize action contrary to the statute.<sup>225</sup>

The Court's conclusion is especially noteworthy because Marshall suggested that the President, as Commander-in-Chief, might well have had the constitutional power to authorize the seizure if Congress had not enacted legislation.<sup>226</sup> Hence, by enacting legislation to authorize seizure of vessels sailing *to* France (which the President as Commander-in-Chief had the power to seize without legislative authorization), Congress effectively precluded the President from exercising his Commander-in-Chief power to seize vessels sailing *from* France. In short, an executive order that would have been constitutional under Category Two (if undertaken without "either a congressional grant or denial of authority"<sup>227</sup>) was invalid under Category Three because it was "incompatible with the . . . implied will of Congress."<sup>228</sup>

The conclusion that a unilateral executive order can never supersede a prior inconsistent statute implies that conflicts between an earlier-in-time treaty and a later-in-time executive order must also be resolved in favor of the treaty, at least insofar as the treaty is the Law of the Land. The Supreme Court has consistently held that treaties and statutes have equal rank within our constitutional system; in the event of a conflict between a statute and a treaty, the later in time prevails.<sup>229</sup> Since treaties are equivalent to statutes, and statutes rank higher than unilateral executive orders, it follows that treaties also rank higher than unilateral executive orders. Therefore, a unilateral executive order can never supersede a prior inconsistent treaty that is the Law of the Land.

Core principles of democratic theory reinforce the soundness of this conclusion. In our democratic system, political power ultimately belongs to the people. Lawmaking by statute or treaty requires the participation of both the legislative and executive branches. The participation of both branches helps

---

<sup>224</sup> The Court assumed, for the purpose of its analysis, that the seizure was consistent with the executive order. *See id.* at 178.

<sup>225</sup> *See id.* at 177-79. As a matter of statutory interpretation, one could have made a plausible argument that the executive order was supplementary to the statute, not contrary to the statute. However, that was not how the Court construed the statute.

<sup>226</sup> *See id.* at 177 ("It is by no means clear that the president . . . who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.")

<sup>227</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring)

<sup>228</sup> *Id.*

<sup>229</sup> *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581, 600-602 (1889); *Whitney v. Robertson*, 124 U.S. 190, 193-95 (1888); *Edye v. Robertson*, 112 U.S. 580, 597-99 (1884).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

ensure that treaties and statutes do not become law without a certain degree of popular support. In contrast, when the President creates law by means of unilateral executive orders, the safeguard of a legislative check on Presidential authority is absent. Accordingly, there is a greater danger of creating law at odds with the will of the people. Inasmuch as unilateral executive orders have less democratic legitimacy than federal statutes or treaties, it is entirely appropriate that such executive orders have a lower rank within the hierarchy of federal law.

**IV.**  
**The President as Law Breaker**

Part Three showed that, although the President has a limited power to create new law, any law created by unilateral executive action necessarily has a lower status within the hierarchy of federal law than treaties or statutes, both of which involve legislative participation. Even so, Presidents and their subordinates have often claimed that the President is free to disregard (i.e., violate) statutes and treaties, and even the Constitution itself, in certain emergency situations.<sup>230</sup> Most recently, executive branch lawyers have claimed that President Bush has unlimited discretion to determine the appropriate means for interrogation of enemy combatants detained in the war on terrorism.<sup>231</sup> Indeed, a Justice Department memorandum contends that treaties and statutes prohibiting torture -- if applied to interrogation of enemy combatants -- would be an unconstitutional infringement of the President's Commander-in-Chief power.<sup>232</sup>

Part Four addresses the claim that the President has the constitutional authority to violate the law for the sake of protecting national security. The first section rebuts the argument that the President has the legal authority to violate constitutional and/or statutory law in emergency situations. The second section contends that the President's constitutional duty to "take Care that the Laws be faithfully executed"<sup>233</sup> includes a duty to execute treaties that have the status of supreme federal law. Therefore, the President lacks the unilateral authority to violate treaties, and he must obtain congressional authorization to violate a treaty that is Law of the Land.

---

<sup>230</sup> See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24-32 (1993) (discussing claims advanced by various Presidents in support of a Presidential power to violate the law in an emergency).

<sup>231</sup> See Bybee Memo, *supra* note 5, at 39 ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.").

<sup>232</sup> *Id.* at 31-39. It bears emphasis that the Geneva Conventions expressly prohibit torture of both POWs and civilians. See POW Convention, *supra* note 10, art. 130; Civilian Convention, *supra* note 10, art. 147. Common Article 3 also prohibits torture. *Id.* art. 3

<sup>233</sup> U.S. Const. art. II, sec. 3.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

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

**A. Presidential Emergency Power**

1. *Historical Support for an Emergency Power:* Before any person can become President, he is required to take an oath to “preserve, protect and defend the Constitution of the United States.”<sup>234</sup> Relying in part on this oath, several Presidents have claimed a power to violate the law in situations where national survival is at stake. For example, Thomas Jefferson once wrote:

The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of *saving our country when in danger*, are of higher obligation.<sup>235</sup>

Jefferson added: “To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, and property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.”<sup>236</sup> Thus, even Thomas Jefferson, who was more wary than most Presidents of the dangers of unchecked executive power, seemingly recognized a Presidential power to violate the law in order to protect and defend the nation.

---

<sup>234</sup> U.S. Const. art. II, sec. 1, cl. 8.

<sup>235</sup> Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *reprinted in IX THE WRITINGS OF THOMAS JEFFERSON* 279-82 (Paul Ford, ed. 1898).

<sup>236</sup> *Id.*, at 279.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

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

[President Lincoln] added 23,000 men to the Regular Army and 18,000 to the Navy, paid out two millions from unappropriated funds in the Treasury to persons unauthorized to receive it . . . suspended the writ of habeas corpus in various places, caused the arrest and military detention of persons who were represented to him as being engaged in or contemplating treasonable practices -- and all this for the most part without the least statutory authorization.<sup>237</sup>

Lincoln defended his actions in a speech to a special session of Congress on July 4, 1861.<sup>238</sup> During that speech, Lincoln posed the famous rhetorical question: “[A]re all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>239</sup> As Professor Corwin has noted, this question “logically implies that the President may, in an emergency thought by him to require it, partially suspend the Constitution.”<sup>240</sup> Lincoln himself made a similar point: “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it.”<sup>241</sup> Thus, faced with a choice between his duty to execute the law and his duty to maintain national integrity, President Lincoln asserted that his duty to preserve national unity was paramount.

Similarly, in the period before and during World War II, President Roosevelt advanced broad claims of Presidential power. In September 1942, Roosevelt urged Congress to repeal an offending provision of the Emergency Price Control Act (EPCA).<sup>242</sup> In addition to urging, though, he also threatened to violate EPCA: “In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.”<sup>243</sup> Professor Corwin analyzed Roosevelt’s message to Congress as follows:

---

<sup>237</sup> CORWIN, *TOTAL WAR*, *supra* note 2, at 16-17.

<sup>238</sup> See Message to Congress in Special Session, July 4, 1861, *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS (Roy P. Basler, ed.) (1946) at 594-609.

<sup>239</sup> *Id.* at 601.

<sup>240</sup> CORWIN, *TOTAL WAR*, *supra* note 2, at 17.

<sup>241</sup> Alexander J. Groth, *Lincoln and the Standards of Presidential Conduct*, XXII *PRESIDENTIAL STUD. Q.* 765, 766 (1992) (quoting President Lincoln).

<sup>242</sup> See CORWIN, *TOTAL WAR*, *supra* note 2, at 62-65.

<sup>243</sup> 88 Cong. Rec. 7044 (1942). Roosevelt did not make the threat idly; the Dean of the Oregon Law School had previously told him that “if you decide that a certain course of action is essential as a war measure, it supersedes congressional action.” Monaghan, *supra* note 230, at 29.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The Message of September 7 can only be interpreted as a claim of power on the part of the President to suspend the Constitution in a situation deemed by him to make such a step necessary. The claim was not a totally unprecedented one . . . [referring to Lincoln]. But Mr. Roosevelt was proposing to set aside, not a particular clause of the Constitution, but its most fundamental characteristic, its division of power between Congress and President, and thereby gathering into his own hands the combined power of both. He was suggesting, if not threatening, a virtually complete suspension of the Constitution.<sup>244</sup>

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

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

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

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

FROST: By definition.

NIXON: Exactly. Exactly. If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise, they're in an impossible position.<sup>245</sup>

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

In sum, lawyers within the Bush Administration can cite substantial executive branch precedent in support of their claim that the President has the constitutional authority to violate federal statutes and treaties prohibiting torture of detainees held in the war on terrorism. On the other hand, if the Constitution

---

<sup>244</sup> CORWIN, *TOTAL WAR*, *supra* note 2, at 64-65.

<sup>245</sup> *Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16 (quoted in Monaghan, *supra* note 230, at 7).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

really does grant the President the authority to approve torture of detainees, it becomes difficult to identify the line that separates constitutional democracy from despotism. Thus, the next section subjects the claim of a broad Presidential emergency power to critical scrutiny.

2. *Critical Evaluation of an Asserted Emergency Power:* The central claim of those who advocate a Presidential power to violate the law in emergency situations is that the President's duty to protect and defend the nation sometimes takes precedence over his duty to execute the laws. It is helpful to distinguish between a weaker and stronger version of this thesis. The strong version asserts that the President has the sole constitutional authority to decide what specific actions are necessary to defend the nation, and that any action the President deems necessary is *ipso facto* lawful, regardless of any constitutional or statutory provision to the contrary.<sup>246</sup> Under the strong version, neither the legislative nor the judicial branch has the constitutional authority to second-guess the President's judgment that a particular course of action is required for national security, and impeachment is the only remedy for abuse of Presidential power.

Whereas the strong version provides a constitutional defense of broad Presidential emergency powers, the weak version offers a legal realist account of inter-branch behavior in emergency situations. According to this account, Presidents tend to adopt an expansive view of executive power during perceived emergencies, and the legislative and judicial branches tend to defer to executive judgments about how best to handle the situation. Under the weak version, Presidential action that contravenes the federal constitution or statutes is illegal, and the existence of an emergency does not make it legal.<sup>247</sup> However, as a practical matter, executive officers are unlikely to be subjected to civil or criminal sanctions for violating the law if: 1) they were acting within the scope of a Presidential order; 2) the legislative and judicial branches agree there was a genuine emergency; and 3) the relevant Presidential order did not constitute a gross abuse of executive power.

The weak version of the emergency power thesis, understood as a descriptive theory of inter-branch collaboration in times of crisis, has much to

---

<sup>246</sup> See *supra* text at note 245 (quoting President Nixon). See also *Hamdi v. Rumsfeld*, Brief for the Respondents (submitted to the U.S. Supreme Court), at 25 (stating that “[a] commander’s wartime determination that an individual is an enemy combatant is a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority”), and at 41 (stating that “the Fifth Amendment does not restrict the Commander in Chief’s constitutional authority to detain captured enemy combatants during ongoing hostilities.”)

<sup>247</sup> See, e.g., *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934) (stating that an “[e]mergency does not create power . . . or diminish the restrictions imposed upon power granted”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

recommend it. However, courts have generally rejected the strong version because it would concentrate too much power in the executive branch. For example, in *Hamdi v. Rumsfeld*,<sup>248</sup> the Supreme Court entertained a habeas petition brought on behalf of Yaser Hamdi, an American citizen captured in Afghanistan during armed conflict between the United States and the Taliban. The Bush Administration claimed the authority to detain him indefinitely, “without formal charges or proceedings – unless and until it [the executive branch] makes the determination that access to counsel or further process is warranted.”<sup>249</sup> The Supreme Court decisively rejected this claim of executive prerogative: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>250</sup>

The *Hamdi* Court’s insistence that the judiciary plays a vital role in restraining executive power, even in wartime, is generally consistent with the original understanding of separation of powers. For example, Madison stated: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>251</sup> To guard against the excessive accumulation of power in a single branch, the Framers designed a system “in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.”<sup>252</sup> If the President could simply disregard the law in times of crisis, the Framers’ careful effort to incorporate checks and balances into the constitutional design would be defeated.

One could argue that it makes no sense to interpret the Constitution in a manner that requires the President to obey the law in a situation where rigid adherence to law endangers national security. This objection misses its mark. As

---

<sup>248</sup> 542 U.S. \_\_ (2004).

<sup>249</sup> *Id.*, slip op at 2-3.

<sup>250</sup> *Id.* at 29 (O’Connor, J.) (plurality opinion). There was no majority opinion in *Hamdi*. Justice O’Connor, writing for a plurality of four Justices, held that the President had statutory authorization to detain Hamdi, but only as long as “active combat operations” are ongoing in Afghanistan. *Id.* at 13-14. Moreover, to justify his continued detention, the government must prove that Hamdi is an “enemy combatant,” and he is entitled to present his own evidence to rebut the government’s allegations. *Id.* at 17-32. Justice Souter, writing for himself and Justice Ginsburg, argued that Hamdi’s continued detention violates the federal Non-Detention Act, 18 U.S.C. §4001(a). Justice Scalia, writing for himself and Justice Stevens, argued that Hamdi’s continued detention is unconstitutional. Justice Thomas was the only Justice who supported the Bush Administration’s claim that it had the legal authority to detain Hamdi indefinitely.

<sup>251</sup> THE FEDERALIST NO. 47, at 303 (Madison) (Isaac Kramnick ed. 1987).

<sup>252</sup> *Id.* at 311 (Madison).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

a matter of constitutional fact, there are undoubtedly times when the President can and will violate the law to defend the nation. In terms of constitutional law, though, the critical question is whether the legislative and judicial branches have the constitutional authority to second-guess the President's judgment. We suggest that the Constitution is best interpreted to grant the other branches the requisite authority to review Presidential decisions after the fact. If the legislature agrees, after an opportunity for considered reflection, that the President acted wisely in responding to the perceived emergency, then the legislature can enact laws to immunize executive officials from any civil or criminal liability that might otherwise ensue from the legal infractions they committed.<sup>253</sup> On the other hand, if the legislature decides not to immunize executive officials, then those officials should be accountable for their conduct in a court of law.<sup>254</sup>

The case of *Ex parte Merryman* provides a useful illustration of these principles.<sup>255</sup> John Merryman, a citizen of Maryland, was a leading secessionist agitator during the Civil War. After he was arrested and detained by the military at Fort McHenry, he petitioned for a writ of habeas corpus.<sup>256</sup> Chief Justice Taney personally issued the writ, ordering General Cadwalader to bring Merryman before him, despite the fact that President Lincoln had suspended habeas corpus. The general "politely but flatly refused to produce the prisoner, citing as authority the President's order" suspending the writ.<sup>257</sup> Taney published an opinion declaring that the President's order suspending the writ and the subsequent detention of Merryman was illegal.<sup>258</sup> As a matter of constitutional law, Taney's analysis was unassailable. However, "Lincoln went right on exercising the power that the Chief Justice had branded palpably

---

<sup>253</sup> See, e.g., *The Apollon*, 22 U.S. 362, 366-67 (1824) ("It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity.")

<sup>254</sup> As a practical matter, an executive officer who violates federal law in the course of implementing a Presidential order is unlikely to face criminal charges during the tenure of the President who issued the order, because the President would not want to authorize criminal prosecution of a subordinate who obeyed him. However, the executive officer might face criminal prosecution after a change of administration. Moreover, the officer could potentially be exposed to civil liability. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding a Navy Captain liable for damages for unlawful seizure of a ship, despite the fact that the President had authorized the seizure, because the seizure violated a federal statute).

<sup>255</sup> 17 Fed. Cas. 144 (1861).

<sup>256</sup> See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 18-25 (2d ed. 1976).

<sup>257</sup> *Id.* at 22.

<sup>258</sup> See 17 Fed. Cas. at 148-49.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

unconstitutional.”<sup>259</sup> And Taney was forced to concede that he had no power to force the President to comply with the law.<sup>260</sup>

Three points emerge from this analysis. First, as a matter of constitutional fact, the President undoubtedly has some power to violate the law to protect national security. Second, as a matter of constitutional law, a Presidential decision that a particular action is essential for national security does not render an illegal action lawful. Third, “[s]o long as public opinion sustains the President, as a sufficient amount of it sustained Lincoln in his shadowy tilt with Taney and throughout the rest of the war, he has nothing to fear from the displeasure of the courts.”<sup>261</sup>

Some will object to a concept of “legality” that makes it unlawful for the President to do what is expedient to protect national security. Under this view, the law should be interpreted so that any Presidential action that promotes national security is, by definition, legal. The central problem with this concept of legality, though, is that it fails to account for the inevitable tension between national security and individual liberty. A Presidential action that is fully justified on national security grounds may nevertheless impose significant constraints on individual liberty. Thus, the critical constitutional question is whether the President’s judgment about the proper tradeoff between liberty and security is subject to legislative and judicial oversight. The Supreme Court, quite rightly, has answered this question affirmatively. In the words of Justice Souter: “For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory . . . . A reasonable balance is more likely to be reached on the judgment of a different branch.”<sup>262</sup>

**B. The President’s Duty to Execute Treaties**

Given that the President has a constitutional duty to “take Care that the Laws be faithfully executed,”<sup>263</sup> the question arises whether that duty also applies to treaties. Professor Henkin contends that the President has a general authority to

---

<sup>259</sup> ROSSITER, *supra* note 256, at 23-24.

<sup>260</sup> 17 Fed. Cas. at 153 (“I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.”).

<sup>261</sup> ROSSITER, *supra* note 256, at 25.

<sup>262</sup> *Hamdi*, Souter slip op. at 7.

<sup>263</sup> U.S. Const. art. II, § 3.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

violate treaties.<sup>264</sup> However, this section contends that the Constitution is best interpreted to require the President to obtain congressional approval, in the form of legislation, if he wants to violate a treaty provision that is Law of the Land.

1. *Treaty Termination and Treaty Violation:* Before discussing the President's duty to execute treaties, it is important to highlight the distinction between treaty termination and treaty violation. Under generally accepted principles of international law, there are a variety of legitimate reasons for terminating or withdrawing from a treaty.<sup>265</sup> The parties to a treaty may jointly terminate a treaty by consent of all the parties,<sup>266</sup> or by concluding a later treaty.<sup>267</sup> A state may unilaterally terminate or suspend the operation of a treaty in response to a material breach by another party.<sup>268</sup> A state may also invoke "the impossibility of performing a treaty,"<sup>269</sup> or "[a] fundamental change of circumstances"<sup>270</sup> as a ground for terminating, withdrawing from, or suspending the operation of a treaty. In addition, a single party may unilaterally withdraw from a treaty in accordance with the withdrawal clause contained in the treaty.<sup>271</sup> Most modern international treaties contain a withdrawal clause,<sup>272</sup> the Geneva Conventions are no exception.<sup>273</sup>

---

<sup>264</sup> See HENKIN, *supra* note 178, at 214 ("The President can terminate a treaty or may decide to breach it."). Interestingly, this is one area where the Restatement does not adopt the views of its chief reporter. The Restatement says that "the President has the power, *when acting within his constitutional authority*, to disregard . . . an agreement of the United States." RESTATEMENT (THIRD), *supra* note 22, § 115 n.3 (emphasis added). The Restatement does not purport to define the constitutional limits on the President's authority to "disregard" treaties.

<sup>265</sup> See Vienna Convention on the Law of Treaties, *supra* note 216, arts. 54-64.

<sup>266</sup> *Id.*, art. 54(b).

<sup>267</sup> *Id.*, art. 59.

<sup>268</sup> *Id.*, art. 60. The rules for bilateral and multilateral treaties are different. For bilateral treaties, a material breach by one party is grounds for termination by the other. *Id.*, art. 60, para. 1. For multilateral treaties, a material breach by one party may be grounds for another party to unilaterally suspend the operation of the treaty, but a single party cannot unilaterally terminate the treaty. *Id.*, art. 60, para. 2. These rules "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character." *Id.*, art. 60, para. 5.

<sup>269</sup> *Id.*, art. 61.

<sup>270</sup> *Id.*, art. 62. Under the Vienna Convention, the changed circumstance justification is quite narrow. A party may not invoke changed circumstances "as a ground for terminating or withdrawing from a treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty." *Id.*, art. 62, para. 1.

<sup>271</sup> *Id.*, art. 54(a).

<sup>272</sup> RESTATEMENT (THIRD), *supra* note 22, § 332, cmt. a ("Modern agreements generally specify either a term for the agreement, or procedures whereby a party may withdraw; therefore, there will rarely be occasion to decide whether a right of withdrawal is implied . . .").

<sup>273</sup> See Geneva Convention I, *supra* note 10, art. 63; Geneva Convention II, *supra* note 10, art. 62; POW Convention, *supra* note 10, art. 142; Civilians Convention, *supra* note 10, art. 158.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The Restatement asserts that the President has the constitutional authority “to suspend or terminate [a treaty] in accordance with” a termination clause in the treaty.<sup>274</sup> This position makes sense from both a formal and functional standpoint. As a formal matter, the President’s power to execute the law<sup>275</sup> clearly includes the power to execute a treaty termination or withdrawal clause that is the Law of the Land. From a functional standpoint, there are often prudential factors that favor a Presidential choice to work with Congress in executing a termination or withdrawal clause.<sup>276</sup> However, when President Carter terminated a mutual defense treaty with Taiwan in accordance with the treaty’s termination clause,<sup>277</sup> a majority of the Supreme Court agreed that there is no judicially enforceable constitutional constraint that precludes the President from exercising a treaty termination clause unilaterally (i.e., without a congressional vote) on the basis of his Article II powers.<sup>278</sup> The Court correctly refrained from drawing a constitutional line that would impose unnecessary constraints upon the President’s exercise of his foreign policy powers. The Court’s decision reflects a tacit judgment that Congress, by political means, exercises sufficient control over the President’s treaty termination power that additional constitutional restraints are unwarranted.<sup>279</sup>

The Restatement also asserts that the President has the constitutional authority, even in the absence of a treaty termination clause, “to make the determination that would justify the United States in terminating or suspending [a treaty] because of its violation by another party or because of supervening

---

<sup>274</sup> RESTATEMENT (THIRD), *supra* note 22, § 339(a).

<sup>275</sup> U.S. Const. art. II, sec. 1 (“The executive Power shall be vested in a President of the United States.”).

<sup>276</sup> Congress has sometimes played an active role in treaty termination. See HENKIN, *supra* note 178, pg. 490-91, n.143.

<sup>277</sup> The termination clause permitted termination by either party on one year’s notice. See *Goldwater v. Carter*, 617 F.2d 697, 708 (D.C. Cir. 1979).

<sup>278</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979). In *Goldwater*, nine Senators and sixteen members of the House of Representatives sued to block the President’s unilateral termination of the Mutual Defense Treaty with Taiwan. See 617 F.2d at 709 (Wright, C.J., concurring). The Supreme Court vacated the D.C. Circuit opinion and remanded with instructions to dismiss the complaint. 444 U.S. at 996. The Court produced four widely divergent opinions. Justice Rehnquist, writing for a plurality of four Justices, thought that the case presented a non-justiciable political question. *Id.* at 1002-1006. Justice Powell, writing only for himself, thought that the case was not ripe, because neither the Senate nor the House of Representatives had taken a formal vote on the issue. *Id.* at 997-98. Justice Brennan, writing for himself, would have affirmed the President’s unilateral authority to terminate a treaty. *Id.* at 1006-1007. Justices Blackmun and White would have set the case for oral argument to give the matter plenary consideration. *Id.* at 1006. Justice Marshall concurred in the result without expressing any view on the issues.

<sup>279</sup> See *Goldwater*, 617 F.2d at 708-09 (“Treaty termination is a political act, but political acts are not customarily taken without political support. Even if formal advice and consent is not constitutionally required as a prerequisite to termination, it might be sought. If the Congress is completely ignored, it has its arsenal of weapons, as previous Chief Executives have on occasion been sharply reminded.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

events.”<sup>280</sup> Clearly, the question whether the United States should terminate or suspend a treaty in response to a violation by another party, or in response to changed circumstances, is not an appropriate question for judicial determination.<sup>281</sup> As between the President and Congress, both formal and functional considerations support a finding of executive power. As a formal matter, a decision that actions by a treaty partner constitute “material breach” of a treaty is of an executive, not a legislative nature. The same applies with respect to a decision that recent developments render continued performance by the United States impossible. From a functional standpoint, the President is better able than Congress to make these types of determinations.<sup>282</sup> For these reasons, the Supreme Court has held explicitly that the President has the constitutional authority to decide to implement a treaty despite an apparent violation by the other party.<sup>283</sup> The constitutional power to choose not to terminate a treaty in response to a breach by the other party presumably also includes the power to terminate if the breach is sufficiently serious.

The preceding discussion deals only with the President’s constitutional authority to suspend, terminate, or withdraw from a treaty in compliance with international law. As long as a Presidential decision to suspend, terminate, or withdraw from a treaty complies with international law, the President’s action is consistent with his constitutional duty to “take Care that the Laws be faithfully executed.”<sup>284</sup> The question of the President’s authority to breach a treaty, in violation of international law,<sup>285</sup> raises very different constitutional issues because a Presidential breach of a treaty that is Law of the Land is also potentially a violation of the President’s constitutional duty under the Take Care Clause.

---

<sup>280</sup> RESTATEMENT (THIRD), *supra* note 22, § 339(b).

<sup>281</sup> *See, e.g.,* Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (“[W]hether a treaty with a foreign sovereign had been violated by him, whether the consideration of a particular stipulation of a treaty had been voluntarily withdrawn by one party so as to no longer be obligatory upon the other, and whether the views and acts of a foreign sovereign, manifested through his representative, had given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty . . . were not judicial questions”).

<sup>282</sup> Under the Vienna Convention, a breach is “material” only if it violates “a provision essential to the accomplishment of the object or purpose of the treaty.” Vienna Convention, *supra* note 216, art. 60, para. 3(b). Impossibility is a legitimate ground for termination or withdrawal only “if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.” *Id.*, art. 61, para. 1. Application of these standards in concrete fact situations requires the expertise of the executive branch.

<sup>283</sup> *See* Charlton v. Kelly, 229 U.S. 447, 469-76 (1913) (affirming executive branch decision to extradite U.S. national to Italy under bilateral extradition treaty, despite Italy’s refusal to extradite Italian nationals to U.S.).

<sup>284</sup> U.S. Const. art. II, § 3. Courts have held that the President’s duty under the Take Care Clause includes a duty to execute international obligations of the United States. *See infra* note 302.

<sup>285</sup> Whereas international law sometimes authorizes suspension, withdrawal or termination of a treaty, international law never authorizes a treaty violation. *See* Vienna Convention, *supra* note 216, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

2. *Treaty Violation and the Take Care Clause:* Under the Constitution, treaties are declared to be “the supreme Law of the Land,”<sup>286</sup> and the President is obligated to “take Care that the Laws be faithfully executed.”<sup>287</sup> As a textual matter, there are two possible interpretations of the word “Laws” in the Take Care Clause. The first interpretation holds that the word “Laws” includes treaties. The fact that the Supremacy Clause declares treaties to be “the supreme Law of the Land” lends support to this interpretation. Under this interpretation, it would seem that the President does not have the constitutional power to violate treaties, because his duty to execute the Laws includes a duty faithfully to execute treaties.

The second interpretation holds that the word “Laws” in the Take Care Clause excludes treaties. The fact that the Supremacy Clause distinguishes between “Laws of the United States” on the one hand, and “Treaties” on the other hand,<sup>288</sup> lends support to this interpretation. Under this interpretation, the President arguably does have the constitutional power to violate treaties, because he does not have a constitutional duty to “take Care” that treaties are “faithfully executed.” Although this textual argument initially appears plausible, it is ultimately untenable: under this interpretation, the President would also have the power to violate the Constitution, because the Constitution, like treaties, is mentioned separately from “Laws” in the Supremacy Clause, but not in the Take Care Clause.<sup>289</sup>

Historical materials support the view that the President’s duty under the Take Care Clause includes a duty to execute treaties that are Law of the Land. Some early drafts of the Take Care Clause would have limited the Clause so that it applied only to federal statutes.<sup>290</sup> A later draft would have obligated the President to “take care that the laws of the United States be duly and faithfully executed.”<sup>291</sup> At the end of the Convention, though, the Committee of Style deleted the words “of the United States.”<sup>292</sup> According to one commentator,

---

<sup>286</sup> U.S. Const. art. VI, cl. 2.

<sup>287</sup> U.S. Const. art. II, § 3.

<sup>288</sup> See U.S. Const. art. VI, cl. 2 (stating that “the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land”).

<sup>289</sup> Compare U.S. Const. art. II, § 3 (President “shall take Care that the Laws be faithfully executed”) with U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land”).

<sup>290</sup> See 1 The Records of the Federal Convention of 1787 (Max Farrand ed., 1966), at 244 (New Jersey Plan) (granting the Executive authority “to execute the federal acts”); and at 292 (Hamilton Plan) (granting the Executive authority “to have a negative on all laws about to be passed, and the execution of all laws passed”).

<sup>291</sup> 2 The Records of the Federal Convention of 1787 (Max Farrand ed., 1966), at 185 (draft Constitution submitted by Committee of Detail).

<sup>292</sup> See *id.*, at 600 (report of Committee of Style).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

“[t]he deletion of this qualifying language . . . was probably intended to make clear that the Take Care Clause encompassed not only federal legislation, but also the other two forms of supreme federal law – the Constitution and treaties.”<sup>293</sup>

One of the earliest foreign relations controversies in the United States involved President George Washington’s Proclamation of Neutrality,<sup>294</sup> which declared the neutrality of the United States in a war between France and other European powers. Opponents of the Proclamation argued, among other things, that the President’s declared policy of neutrality was inconsistent with U.S. obligations under Article XI of the Treaty of Alliance with France.<sup>295</sup> Alexander Hamilton, writing in defense of the Proclamation, did not claim that the President had a constitutional power to violate the treaty. In fact, he claimed that the President’s power to issue the Proclamation derived in part from his constitutional duty to execute “the Laws, of which Treaties form a part.”<sup>296</sup> James Madison disagreed with Hamilton’s conclusion that the Proclamation was valid,<sup>297</sup> but he agreed with Hamilton’s claim that the President’s duty to execute “the Laws” included a duty to execute treaties.<sup>298</sup> Thus, it was common ground on both sides of the debate that the President had a duty under the Take Care Clause to execute faithfully the treaty with France.

A few years later, another foreign relations controversy arose when President John Adams sought to extradite Jonathan Robbins to Great Britain, in accordance with the Jay Treaty.<sup>299</sup> Members of Congress challenged the President’s authority to extradite Robbins on the grounds that there was no statute to authorize extradition. John Marshall, the illustrious Chief Justice, who was then a member of the House of Representatives, defended the President’s authority on the grounds that the President had a duty to take care that the Jay Treaty was faithfully executed. Marshall said:

---

<sup>293</sup> Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 602 n.65 (2002).

<sup>294</sup> See Proclamation of Neutrality, April 22, 1793, reprinted in CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2003), at 13-14.

<sup>295</sup> See Prakash & Ramsey, *supra* note 195, at 324-25.

<sup>296</sup> Pacificus Essay No. 1, reprinted in *THE PAPERS OF ALEXANDER HAMILTON*, Vol. XV (Harold C. Syrett ed.) (1969) at 33, 38 (stating that the President’s power to issue the Proclamation is “connected with” his responsibilities “as the organ of intercourse between the Nation and foreign Nations – as the interpreter of the National Treaties in those cases in which the Judiciary is not competent . . . as that Power, which is charged with the Execution of the Laws, of which Treaties form a part”).

<sup>297</sup> See Helvidius Essay No. 1 reprinted in *THE PAPERS OF JAMES MADISON*, Vol. 15 (Thomas Mason et al. eds.) (1985) at 66-74.

<sup>298</sup> *Id.* at 69 (“A treaty is not an execution of laws: it does not pre-suppose the existence of laws. It is, on the contrary, to have itself the force of a law, and to be carried into execution, like all other laws, by the executive magistrate.”).

<sup>299</sup> See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L. J. 229 (1990).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract [i.e., the treaty] by any means it possesses.<sup>300</sup>

Nineteenth century commentators generally agreed that the President's duty under the Take Care Clause includes a duty to execute treaties.<sup>301</sup> There is very little case law that addresses the relationship between treaties and the Take Care Clause. However, Supreme Court opinions that address the topic are unanimous in support of the view that the President's duty faithfully to execute "the Laws" includes a duty to execute treaties.<sup>302</sup>

3. *Structural and Policy Considerations:* Suppose that the President did have a general power to violate treaties. If that were true, then either: 1) treaties are not law; or 2) the President has the power to violate the law. The latter proposition is at odds with the principle that ours is "a government of laws, and

---

<sup>300</sup> 10 Annals of Congress 596, 613-14 (1800).

<sup>301</sup> See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 136 (1825) (quoting the Take Care Clause, stating that the Clause "declares what is his [the President's] duty," and concluding as follows: "The constitution, treaties, and acts of congress are declared to be the supreme law of the land. He [the President] is bound to enforce them.").

<sup>302</sup> See *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) (President's duty under the Take Care Clause "is not limited to the enforcement of acts of Congress according to their express terms. It includes the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (the power to exclude or expel aliens "is to be regulated by treaty or by act of congress," and such regulations are "to be executed by the executive authority," regardless of whether the rules are derived from treaties or statutes); *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890) (President's duty to take care that the laws be faithfully executed is not "limited to the enforcement of acts of congress or of treaties of the United States according to their express terms." It encompasses "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution"); *The Amistad*, 40 U.S. 518, 571 (1841) (argument of Attorney General on behalf of the United States) ("The executive government was bound to take the proper steps for having the treaty executed . . . A treaty is the supreme law; the executive duty is especially to take care that the laws be faithfully executed.").

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

not of men.”<sup>303</sup> As to the former proposition, it is true that some treaty provisions lack the status of law within our domestic legal system. But this article has already demonstrated that most provisions of the Geneva Conventions are Law of the Land.<sup>304</sup> Therefore, a general Presidential power to violate the Geneva Conventions would effectively mean that the President is above the law.

Advocates of a Presidential power to violate treaties might seek to avert this consequence by distinguishing among different types of law. The federal constitution and statutes are binding on the President. In contrast, a President is free to disregard an executive order issued by his predecessor, even though such an executive order has the status of “law.”<sup>305</sup> Treaties, one could argue, are like executive orders, because both derive from the President’s Article II powers. Thus, the claim that Presidents have a general power to violate treaties does not imply that the President is above the law. Rather, the President’s power to violate the law applies only to laws that are promulgated on the basis of the President’s Article II powers.

This argument is unpersuasive. Granted, treaties differ from statutes in that the Treaty Power is an Article II power, whereas Congress’ legislative powers are derived from Article I. However, treaties are like statutes in that they require the joint action of the executive and legislative branches.<sup>306</sup> In contrast, an executive order can become “law” without any legislative participation.<sup>307</sup> Thus, from a structural standpoint, the President should not be required to obtain congressional approval to violate an executive order because the President does not need such approval to adopt an executive order.<sup>308</sup> In contrast, the President must obtain legislative approval to violate a treaty provision that has the status of law because treaties require Senate approval in order to become law.<sup>309</sup>

---

<sup>303</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>304</sup> See *supra* Part II.

<sup>305</sup> See *supra* note \_\_.

<sup>306</sup> See Helvidius Essay No. 1, *supra* note 297, at 70 (“The power of treaties is vested jointly in the President and in the Senate, which is a branch of the legislature. . . . [T]here are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character.”).

<sup>307</sup> See *supra* notes 174-191 and accompanying text.

<sup>308</sup> See Taylor v. Morton, 23 F.Cas. 784, 785-86 (D. Mass. 1855) (“Ordinarily, it is certainly true, that the powers of enacting and repealing laws reside in the same persons.”)

<sup>309</sup> The President might obtain legislative approval to violate a treaty by means of ordinary legislation that supersedes an earlier treaty for purposes of domestic law. See *infra* Section IV.C.1. Or, the President might obtain legislative approval to abrogate a treaty by negotiating a new treaty with a foreign country that supersedes a prior treaty for purposes of international law. By granting its consent to ratify the new treaty, the Senate would effectively authorize abrogation of the prior conflicting treaty. Either mechanism provides a legislative check on the President’s power to violate a treaty without some form of legislative authorization.

The question arises: “Absent a new agreement with a foreign country, could a two-thirds Senate vote grant the President legal authority to violate a treaty if he otherwise lacked such authority?” The

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Policy considerations support the preceding constitutional analysis. The United States has a long-term interest in promoting the development of an international system that is governed increasingly by agreed legal rules, and less by sheer power politics.<sup>310</sup> On the other hand, the United States, more than any other nation in the world today, has the power to thwart the development of an effective international legal order by shunning the agreed rules when it is convenient to do so. Moreover, there are many situations where short-term interests provide incentives for the United States to violate international law. From a constitutional standpoint, the best way to promote our long-term interest in fostering the development of the rule of law in the international sphere is to have constitutional arrangements that make it harder, not easier, for the United States to renege on its international commitments. A constitutional rule that grants the President a general power to violate treaties would make it too easy for the United States to breach its treaty obligations. In contrast, a constitutional rule that requires the President to obtain legislative approval to violate a treaty makes it harder for the United States to violate treaties, and helps promote our long-term national interest in strengthening the rule of law internationally.

In addition, such a rule would increase the prospects of meaningful international cooperation. Substantial empirical evidence suggests that institutionalized legislative participation in the treaty process increases the credibility of U.S. commitments—thereby improving the prospects of meaningful international cooperation.<sup>311</sup> Although this empirical work documents the importance of *ex ante* legislative influence (at the bargaining and ratification stages of international agreements), the advantages of legislative involvement would be substantially diminished if *ex post* the President could unilaterally alter

---

question must be answered in the negative. The Constitution grants the President plus two-thirds of the Senate the power to create domestic law by means of an agreement with a foreign country, but the President plus two-thirds of the Senate do not have any power to make law in the absence of an international agreement. Since they do not have the power to make law without an international agreement, it is untenable to claim that they have the power to “un-make” (or violate) law without an international agreement. *See, e.g., Taylor v. Morton*, 23 F.Cas. 784, 786 (C.C. Mass. 1855) (If the power to modify a treaty was vested exclusively in the President and Senate, then “the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign.”). *See also* THE FEDERALIST No. 64, at 379 (John Jay) (Isaac Kramnick ed. 1987) (“They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.”)

<sup>310</sup> This has been a central theme in the work of Harold Koh. *See, e.g.,* Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L. J. 23, 23-24 (2002).

<sup>311</sup> *See, e.g.,* LISA MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* (2000); Kenneth A. Schultz, *Domestic Opposition and Signaling in International Crises*, 92 AMER. POL. SCI. REV. 829 (1997).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

the domestic law status of treaties. Critics might point out that legislative involvement at the bargaining and ratification stages conveys important information to other states about U.S. preferences; and, therefore, some useful signaling function is served by *ex ante* legislative involvement even if the President may violate treaties without congressional authorization *ex post*. This point, we concede, is important and almost certainly correct. Nevertheless, many of the most important signaling benefits of legislative participation are sacrificed if Presidents may violate treaties unilaterally.<sup>312</sup> Indeed, the signaling effect improves the prospects for international cooperation precisely because it suggests an increased probability of implementation and compliance.<sup>313</sup> Legislative involvement in treaty negotiation and ratification constitutes an important constraint on the exercise of executive power—suggesting that the legislature will not hinder the implementation of the agreement and that the executive is a reliable (because constrained) treaty partner.<sup>314</sup>

The main policy argument in favor of a Presidential power to violate treaties relates to the President's demand for flexibility in handling the unpredictable contingencies of foreign affairs. Although we recognize the need for flexibility, we contend that the President has ample flexibility even without a general power to violate treaties. There are three factors that support this conclusion. First, if the political branches decide that a treaty imposes unacceptable limits on Presidential flexibility, they can choose not to ratify the treaty,<sup>315</sup> or to ratify with conditions that are specifically designed to preserve flexibility.<sup>316</sup> Second, if the President decides after ratification that a treaty imposes unacceptable constraints, he can suspend or terminate the treaty in

---

<sup>312</sup> MARTIN, *supra* note 311.

<sup>313</sup> *Id.*

<sup>314</sup> See, e.g., *id.* at 5 (“Unconstrained executive-branch actors can indeed bargain more flexibly. But such apparently powerful negotiators can find it difficult to put into effect the agreements they reach with such ease at the international table. Their lack of *ex-ante* domestic constraints also gives them the capacity to act arbitrarily, making them unreliable partners in international cooperation in spite of their apparently enviable freedom of maneuver.”).

<sup>315</sup> Every treaty limits Presidential flexibility by imposing international legal constraints on the exercise of national sovereignty. Even if one adopts the view that the President has a constitutional power to violate treaties, a Presidential decision to violate a solemn treaty commitment of the United States will almost invariably incur political costs; those political costs limit Presidential flexibility by providing a disincentive to treaty violations in the first place. Therefore, the decision to ratify a treaty amounts to a decision that the costs resulting from legal constraints on national sovereignty – which necessarily limit Presidential flexibility – are outweighed by the benefits that the treaty offers.

<sup>316</sup> For example, when the United States ratified the Geneva Conventions, it adopted a reservation to preserve the right to impose the death penalty in circumstances that would otherwise be prohibited under Article 68 of the Civilians Convention. See 84 Cong. Rec. 9972 (1955) (resolution of ratification for Civilians Convention).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

accordance with its terms, or in accordance with generally recognized principles of international law.<sup>317</sup>

Third, if the President decides after ratification that the treaty imposes unacceptable constraints, he can ask Congress to enact legislation to authorize executive action inconsistent with the treaty. In the nineteenth century, the logistical difficulties involved in convening a special session of Congress made it difficult for the President to obtain prompt congressional action to deal with national emergencies.<sup>318</sup> In contrast, in the twenty-first century, it is easier than ever for the President to obtain prompt congressional action because Congressmen can travel to Washington in a matter of hours, if necessary, to respond to a national crisis. Additionally, Congress takes much shorter recesses now than it did in the nineteenth century.<sup>319</sup> It took only one week after the terrorist attacks of September 11, 2001, for Congress to enact a joint resolution authorizing the President “to use all necessary and appropriate force” to respond to the attacks.<sup>320</sup> Thus, a constitutional rule requiring the President to obtain legislative approval to violate a treaty imposes fewer constraints on Presidential flexibility today than it would have one hundred years ago.

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

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

Assuming that, as a general rule, the President must obtain legislative approval to violate treaties, the question arises whether there should be an exception to that rule for law-of-war treaties. The argument in favor of such an exception can be summarized as follows. Certain provisions of law-of-war

---

<sup>317</sup> See *supra* Section IV.B.1.

<sup>318</sup> The difficulty of securing prompt legislative action was one of the main factors that led President Lincoln to act unilaterally to suspend the writ of habeas corpus during the Civil War. See Message to Congress in Special Session, July 4, 1861, *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS (Roy P. Basler, ed.) at 594, 601 (noting that constitutional provision for suspending habeas corpus “was plainly made for a dangerous emergency,” and claiming: “[I]t cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”).

<sup>319</sup> At the beginning of the twentieth century, the 56<sup>th</sup> Congress ended on March 3, 1901, and the 57<sup>th</sup> Congress did not convene until December 2, 1901. See [http://clerk.house.gov/histHigh/Congressional\\_History/Session\\_Dates](http://clerk.house.gov/histHigh/Congressional_History/Session_Dates). Thus, there was a continuous nine-month period when Congress was not in session. At the beginning of the twenty-first century, the 106<sup>th</sup> Congress ended on December 15, 2000, and the 107<sup>th</sup> Congress began on January 3, 2001. See *id.* Granted, the House of Representatives took ten different recesses in 2001, for a total of about 130 days in recess. *Id.* Even so, the House could easily have convened on short notice to respond to an emergency.

<sup>320</sup> See Pub. L. 107-40 (Sept. 18, 2001).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

treaties regulate conduct that is constitutionally committed to the Commander-in-Chief, and that is therefore beyond the scope of Congress' legislative powers. If the President was required to await congressional legislation to authorize violations of such treaty provisions, the federal government as a whole would lack the power to violate the treaty because Congress cannot enact legislation beyond the scope of its Article I powers. Since the federal government must have the power to violate treaties, including law-of-war treaties, the President must have the independent authority to violate treaty provisions that regulate conduct within the exclusive purview of the Commander-in-Chief.

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

Part four shows that the creation of new international legal rules regulating battlefield operations alters the constitutional balance between Congress and the President. In particular, we argue that the creation of international rules governing the conduct of warfare activates Congress' power under the Define and Punish Clause<sup>321</sup> to regulate battlefield operations in ways that it could not in the absence of such international rules. Finally, we argue that U.S. ratification of law-of-war treaties activates Congress' power under the Necessary and Proper Clause<sup>322</sup> to regulate treaty-related conduct that, in the absence of such treaties, would be beyond the scope of Congress' legislative powers. Therefore, the claim that the President has the independent authority to violate law-of-war treaty provisions beyond the scope of Congress' legislative powers ultimately fails,

---

<sup>321</sup> U.S. Const. art. I, sec. 8, cl. 10 (granting Congress the power “[t]o define and punish . . . Offences against the Law of Nations”).

<sup>322</sup> U.S. Const. art. I, sec. 8, cl. 18 (granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

because Congress has the power to enact legislation to supersede domestically any law-of-war treaty provision.

1. *The Federal Power to Violate Law-of-War Treaties:* The argument in favor of a Presidential power to violate law-of-war treaties rests on two premises: 1) the federal government must have the power to violate such treaties; and 2) Congress lacks the power to do so, in some cases, because certain provisions of law-of-war treaties address matters within the exclusive purview of the Commander-in-Chief. This section defends the first premise. The following sections demonstrate that the second premise is incorrect.

There are distinct two lines of authority supporting the claim that the federal government has the power to violate law-of-war treaties. The first relates to the war powers of the federal government. The Supreme Court has affirmed that “the war power of the federal government . . . is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation.”<sup>323</sup> Additionally, the Court has said: “Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of means for resisting it.”<sup>324</sup>

In light of these and similar precedents, Professor Henkin has remarked that “[t]he Supreme Court has never declared any limit to the war powers of Congress . . . or even intimated where such limits might lie.”<sup>325</sup> Similarly, another commentator suggests that “the only limitation of the war power is necessity itself. It is as extensive in scope as circumstances require. It is complete, total and adequate when both Congress and the President act in cooperation.”<sup>326</sup> These authorities support the proposition that the federal government as a whole has the constitutional authority to violate law-of-war treaties in situations where such treaties would inhibit the power to wage war successfully.<sup>327</sup>

---

<sup>323</sup> Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 426 (1934). See also *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (“The war power of the national government is the power to wage war successfully.”).

<sup>324</sup> *Hirabayashi*, 320 U.S. at 93.

<sup>325</sup> HENKIN, *supra* note 178, at 67.

<sup>326</sup> Hollander, *supra* note 27, at 55.

<sup>327</sup> We are not claiming, as a factual matter, that law-of-war treaties do inhibit the federal government’s power to wage war successfully. Rather, we are claiming, as a constitutional matter, that the federal political branches, when acting in unison, have the constitutional authority to violate specific

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The second line of authority supporting the claim that the federal government has the power to violate law-of-war treaties relates to the later-in-time rule, which holds that a later-in-time statute that conflicts with a previously ratified treaty trumps the earlier treaty for purposes of domestic law.<sup>328</sup> *Taylor v. Morton*<sup>329</sup> is the earliest reported judicial decision that provides a coherent justification for the later-in-time rule. Justice Curtis wrote the opinion in his capacity as a circuit justice. In his view, the case turned on the issue of whether Congress had the power “to refuse to execute” (i.e., to violate) a treaty.<sup>330</sup> He concluded that Congress must have the power to violate a treaty, because that power is an essential attribute of national sovereignty.

To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; *but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence.* That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere, and be applicable to all cases, I am convinced. I feel no doubt that it belongs to congress. That, insasmuch as treaties must continue to operate as part of our municipal law, . . . and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects, which the constitution has placed under that legislative power.<sup>331</sup>

Justice Curtis wrote his opinion in *Taylor v. Morton* in 1855. The Supreme Court first endorsed the later-in-time rule in 1871 in *The Cherokee Tobacco*.<sup>332</sup> Over the next two decades, the Supreme Court reaffirmed the later-in-time rule in at least three different cases. All three cases effectively restated the rationale for the later-in-time rule that Justice Curtis first articulated in

---

provisions of law-of-war treaties if they decide that such violations are necessary for successful prosecution of the war effort.

<sup>328</sup> See RESTATEMENT (THIRD), *supra* note 22, § 115(1)(a) (“An act of Congress supersedes an earlier . . . [treaty provision] as law of the United States if the purpose of the act to supersede the earlier . . . provision is clear or if the act and the earlier . . . provision cannot be fairly reconciled.”). Under the later-in-time rule, a subsequent treaty also supersedes a prior inconsistent statute. See *id.*, § 115(2).

<sup>329</sup> 23 F.Cas. 784 (C.C. Mass. 1855).

<sup>330</sup> *Id.* at 786.

<sup>331</sup> *Id.* at 786 (emphasis added).

<sup>332</sup> 78 U.S. 616, 621 (1871). In that case, the Court did not provide any rationale for the later-in-time rule. It merely stated that “an act of Congress may supersede a prior treaty,” *id.* at 621, citing *Taylor v. Morton* as authority for the proposition.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

*Taylor*.<sup>333</sup> Indeed, all three cases cited *Taylor* and endorsed Justice Curtis' opinion.<sup>334</sup> Thus, by the end of the nineteenth century, the later-in-time rule was firmly entrenched in Supreme Court jurisprudence on the strength of Justice Curtis' analysis in *Taylor*. And his entire analysis was based on the assumption that the power to violate treaties is an essential attribute of national sovereignty. Thus, the rationale underlying the later-in-time rule supports the proposition that the federal government has the constitutional authority to violate law-of-war treaties.<sup>335</sup>

As noted above, there is an important distinction between treaty termination and treaty violation, and there are several ways in which a treaty can legitimately be terminated in accordance with international law.<sup>336</sup> Moreover, the President has the constitutional authority to terminate treaties in accordance with international law.<sup>337</sup> The Geneva Conventions, in particular, permit parties to denounce the treaties for any reason, or for no reason, subject to a one-year prior notification requirement.<sup>338</sup> Therefore, one could argue, the power to violate treaties is not an essential attribute of national sovereignty because international rules governing treaty termination adequately protect the sovereignty of all nations.

The preceding argument has some persuasive force. However, a constitutional rule denying the federal government the authority to violate a treaty might actually undermine the development of international law because it could

---

<sup>333</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 600-602 (1889); *Whitney v. Robertson*, 124 U.S. 190, 193-95 (1888); *Edye v. Robertson*, 112 U.S. 580, 597-99 (1884).

<sup>334</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (stating that the issue of conflicts between treaties and statutes "was fully considered by Mr. Justice Curtis, while sitting at the circuit, in *Taylor v. Morton*"); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888) (stating that the "subject was very elaborately considered at the circuit by Mr. Justice Curtis"); *Edye v. Robertson*, 112 U.S. 580, 597-98 (1884) (stating that Justice Curtis "in a very learned opinion exhausted the sources of argument on the subject" of conflicts between statutes and treaties).

<sup>335</sup> This conclusion is entirely consistent with the thesis, advanced by Professor Golove, that "in exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law, [including] . . . the laws of war." David Golove, *Military Tribunals, International Law, and the Constitution: A Frankian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364 (2003). While defending the claim that the laws of war constrain the President's authority as Commander in Chief, Professor Golove concedes that "the view that Congress is so limited raises large theoretical questions and is in tension with the so-called 'last in time' rule." *Id.* at 387.

<sup>336</sup> See *supra* Section IV.B.1.

<sup>337</sup> See *supra* notes 274-285 and accompanying text.

<sup>338</sup> See Geneva Convention I, *supra* note 10, art. 63; Geneva Convention II, *supra* note 10, art. 62; POW Convention, *supra* note 10, art. 142; Civilians Convention, *supra* note 10, art. 158. Insofar as the Geneva Conventions codify customary international law, the United States would have an international legal obligation to comply with those customary norms, even if it denounced the Conventions. However, it is debatable whether the President would have a domestic constitutional duty to comply with those customary norms. See *supra* note 22.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

inhibit the United States from entering into treaties that would otherwise be acceptable. Moreover, it is difficult to imagine that a modern U.S. court would embrace a constitutional rule denying the federal government the constitutional authority to violate a treaty provision if the political branches decided that provision inhibited the nation's ability successfully to wage war. A court can justify a constitutional rule requiring the President to obtain legislative approval to violate a treaty on the grounds that courts have historically played an important role in policing the constitutional division of powers between the President and Congress.<sup>339</sup> But there is virtually no judicial precedent supporting a constitutional rule that invokes international law as a limit on the constitutional power of the federal government,<sup>340</sup> thereby denying to the national government as a whole the constitutional power to violate international law. There may come a time when the world is politically integrated to such a degree that an "international supremacy clause" becomes a viable option, but that time has not yet arrived.

2. *The Commander-in-Chief Power as a Limitation on Congress' War Powers:* The preceding section demonstrated that the federal government, as a whole, has the power to violate law-of-war treaties. The remaining question is: "How is that power divided between the President and Congress?" We contend that international laws of war shape the constitutional division of war powers between the legislative and executive branches. Subsequent sections address the impact of international laws of war on the allocation of war powers between the branches. This section addresses the constitutional division of war powers in the absence of international legal rules. Specifically, this section demonstrates that, in the absence of international legal rules, the President as Commander-in-Chief would have the exclusive power to control battlefield operations in wartime. Insofar as the President's power is exclusive, Congress lacks the power to interfere with the President's conduct of military operations.<sup>341</sup>

The Constitution grants Congress a wide array of war powers. Under Article I, Congress has the authority to "provide for the common Defence;"<sup>342</sup>

---

<sup>339</sup> See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (holding that Line Item Veto Act is unconstitutional); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that one-House veto is unconstitutional); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that President lacked constitutional authority to seize steel mills).

<sup>340</sup> But see *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315-16 (1870) (Field, J., dissenting) (contending that Congress lacks the constitutional authority to violate the laws of war).

<sup>341</sup> We distinguish here between "concurrent" and "exclusive" powers. In areas where the President and Congress share "concurrent" powers, the President has independent freedom of action in the absence of congressional legislation, but he must conform his conduct to the requirements of any legislation that Congress enacts. In areas where the President has "exclusive" power, congressional attempts to legislate are invalid insofar as they interfere with the President's exercise of his exclusive powers.

<sup>342</sup> U.S. CONST. Art. I, § 8, cl. 1.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

“raise and support Armies” and “provide and maintain a Navy;”<sup>343</sup> “make rules for the Government and Regulation of the land and naval forces”;<sup>344</sup> “define and punish . . . offenses against the law of nations”;<sup>345</sup> and “declare war, grant Letters of Marque and reprisal, and make rules concerning captures on land and water.”<sup>346</sup> In addition, Congress is empowered to “make all laws which shall be necessary and proper for carrying into execution” any power vested in the federal government.<sup>347</sup>

Despite this impressive array of congressional war powers, the President’s Commander-in-Chief Power constitutes an important constraint on the scope of congressional power. The Commander-in-Chief Power grants the President “the supreme command and direction of the military and naval forces.”<sup>348</sup> The reason for vesting this power in the President is obvious: “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>349</sup>

Recognizing the need for the Commander-in-Chief to exercise unified control over the armed forces, the Supreme Court has affirmed the principle that there are constitutional limits on Congress’ authority to interfere with the President’s operational control of the military in wartime. For example, Chief Justice Chase stated that Congress’ war “power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief.”<sup>350</sup> He continued: “[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.”<sup>351</sup>

Congress has rarely attempted to interfere with the President’s operational control of the military in wartime. There was a notable exception during the Civil War, when President Lincoln was “subjected to unrelenting scrutiny by the

---

<sup>343</sup> *Id.*, art. I, § 8, cl. 12, 13.

<sup>344</sup> *Id.*, art. I, § 8, cl. 14.

<sup>345</sup> *Id.*, art. I, § 8, cl. 10.

<sup>346</sup> *Id.*, art. I, § 8, cl. 11.

<sup>347</sup> *Id.*, art. I, § 8, cl. 18.

<sup>348</sup> THE FEDERALIST No. 69, at 398 (Hamilton) (Isaac Kramnick ed. 1987).

<sup>349</sup> *Id.*, No. 74, at 422 (Hamilton).

<sup>350</sup> *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring) (emphasis added). *See also* *Fleming v. Page*, 50 U.S. 603, 615 (1850) (“As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”)

<sup>351</sup> *Ex parte Milligan*, 71 U.S. at 139 (Chase, C.J., concurring).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

powerful Joint Committee on the Conduct of War, which . . . insisted even on a say in the choice of field commanders and battle strategy.”<sup>352</sup> Not surprisingly, congressional meddling in the details of military operations frustrated the President’s war effort. Indeed, “Robert E. Lee once remarked that the committee was worth two divisions to him.”<sup>353</sup> Apart from this single episode of congressional overreaching, Congress has generally contented itself with issuing non-binding resolutions that do not intrude upon the Commander-in-Chief’s authority to exercise control over battlefield operations in wartime.<sup>354</sup>

Commentators generally agree that the President has exclusive authority over battlefield operations, and that Congress’ war powers are constrained by the need to avoid interference with the President’s Commander-in-Chief power in wartime.<sup>355</sup> As one leading commentator has stated: “Congress declares war and provides the means for carrying it on, but the President decides how the war is to be conducted and directs the campaigns. . . . [I]n the field of military operations there are no limitations prescribed by the Constitution and the President’s power is therefore exclusive.”<sup>356</sup> The President’s exclusive power includes “control of the movements of the army and navy” in time of war,<sup>357</sup> as well as the power to decide “how the forces shall be used, for what purposes, the manner and extent of

---

<sup>352</sup> DAVID McCULLOUGH, *TRUMAN* 258 (1992); *see also* GEOFFREY PERRET, *LINCOLN’S WAR: THE UNTOLD STORY OF AMERICA’S GREATEST COMMANDER-IN-CHIEF* (2004); BRUCE TAP, *OVER LINCOLN’S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* (1998).

<sup>353</sup> McCULLOUGH, *supra* note 352, at 258. It should be noted, however, that Lee references only the strategic value of the information made public in the Committee’s hearings. *See* PERRET, *supra* note 352. The contemporary Congress, now broadly experienced in “closed hearings” and other forms of confidential oversight of the executive, would arguably do much better.

<sup>354</sup> Even in situations where individual Members of Congress objected to Presidential policy, Congress has been reluctant to enact binding legislation that would restrict the President’s operational control over the military in wartime. *See, e.g.*, CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 123-25 (1920) (discussing congressional opposition to the deployment of U.S. troops in Siberia after World War I, which resulted in legislation that “was merely a request for information as to the general policy respecting Siberia and the maintenance of troops there”). *See also* ROSSITER, *supra* note 256, at xvii (Preface to 2<sup>nd</sup> edition written by Richard P. Longaker) (discussing congressional opposition to the deployment of U.S. troops to Europe in 1951, resulting in a resolution in which “Congress seemed to accept the President’s power to dispatch troops independently”).

<sup>355</sup> *See, e.g.*, HENKIN, *supra* note 178, at 103-04 (“It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President’s authority is effectively supreme.”); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* 84 (1990) (concluding that the President has exclusive authority over “operational battlefield decisions concerning the means to be employed to achieve ends chosen by Congress”); HOLLANDER, *supra* note 27, at 64 (“Once the nation is at war . . . the whole power of conducting it, as to manner, method, and means is for Presidential determination. He is the sole judge of the nature and extent of the exigencies, necessities, and duties demanded by the occasion.”).

<sup>356</sup> BERDAHL, *supra* note 354, at 118. Professor Berdahl continues: “Neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives [Congress] the command of the army. Here the constitutional power of the President as commander-in-chief is exclusive.” *Id.* (quoting Lieber, *Remarks on Army Regulations*, 18).

<sup>357</sup> *Id.*, at 121.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

their participation in campaigns, and the time of their withdrawal.”<sup>358</sup> Any congressional effort to regulate these types of operational and tactical decisions in wartime would constitute impermissible interference with the President’s exercise of his Commander-in-Chief power.

Although Congress lacks the power -- in the absence of international legal rules -- to regulate the President’s conduct of battlefield operations in wartime, the United States is a party to certain law-of-war treaties that do regulate the means and methods of warfare.<sup>359</sup> In light of the conclusion of the previous section (that the federal government has the power to violate law-of-war treaties), and the conclusion of this section (that Congress lacks the power to regulate battlefield operations in wartime), one might assert that the federal power to violate law-of-war treaties is vested in the President as Commander-in-Chief, at least insofar as law-of-war treaties regulate conduct that is beyond the scope of Congress’ Article I powers. We address this claim in sections 4 and 5 below. First, though, we consider whether Congress has the power, in the absence of international legal rules, to regulate the treatment of wartime detainees.

3. *Congress’ Concurrent Authority to Regulate Treatment of Detainees:* The previous section demonstrated that, in the absence of international legal rules, the Constitution would grant the President exclusive power over battlefield operations in wartime, and Congress would lack the power to regulate such matters. However, there are also substantial areas where the President and Congress exercise concurrent authority. In this section, we contend that the power to regulate the treatment of wartime detainees is shared between the legislative and executive branches. Therefore, a constitutional rule requiring the President to obtain legislative approval to violate treaties would not deprive the federal government of the power to violate treaty provisions concerning wartime

---

<sup>358</sup> *Id.*, at 122. Professor Berdahl wrote these words in 1920. For the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the Commander-in-Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority. Given the tremendous changes in the technology of modern warfare, as well as the evolution of the international laws of war, some refinement of Professor Berdahl’s formulation may be appropriate. It is beyond the scope of this article to address this issue in a comprehensive fashion. Below, we suggest that: 1) rules governing the treatment of detainees fall on the concurrent side of the line, *see infra* Section IV.C.3; and 2) the development of the international laws of war expands the scope of Congress’ concurrent powers, while diminishing the scope of the President’s exclusive powers. *See infra* Section IV.C.4.

<sup>359</sup> *See infra* Section IV.C.4 (discussing treaties that regulate means and methods of warfare). The United States has the power to enter into treaties that regulate matters beyond the scope of Congress’ Article I powers because limits on Article I do not necessarily apply in the same way to the treaty power. *Missouri v. Holland*, 252 U.S. 416 (1920).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

detainees because the Government and Regulation Clause<sup>360</sup> grants Congress the power to prescribe rules governing the treatment of wartime detainees.

Congress has the power under Article I “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>361</sup> On its face, this provision is clearly broad enough to empower Congress to prescribe rules for the treatment of persons detained by the military. Moreover, the Government and Regulation Clause must be construed in light of the principle articulated by Chief Justice Marshall in *McCulloch*: “Let the end be legitimate, let it be within the scope of the constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”<sup>362</sup> This principle supports a broad interpretation of Congress’ powers under the Government and Regulation Clause. Courts have often adopted narrower interpretations of enumerated Article I powers in order to protect individual rights, or to protect state sovereignty. But the Supreme Court has rarely, if ever, adopted a narrow construction of an enumerated Article I power in order to protect the President’s prerogatives as Commander-in-Chief.

The practice of the political branches is consistent with the view that Congress has the power to regulate the treatment of wartime detainees. Indeed, long before the drafting of the 1949 Geneva Conventions, Congress prescribed rules for the government of the armed forces that directly regulated the treatment of wartime detainees.<sup>363</sup> These statutory schemes established detailed rules governing many aspects of military government, including the treatment of captured enemy combatants.<sup>364</sup> Moreover, many Supreme Court cases assume, expressly or implicitly, that Congress has the power to make rules for the treatment of the enemy in time of war.<sup>365</sup>

In a recently declassified memorandum drafted by the Bush Administration Justice Department, the Assistant Attorney General asserted:

---

<sup>360</sup> U.S. Const. art. I, § 8, cl. 14 (granting Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).

<sup>361</sup> U.S. Const. art. I, § 8, cl. 14.

<sup>362</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>363</sup> See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 45, 931 (2d ed. 1920) (documenting long history of congressional regulation of the conduct of war through various iterations of the “Articles of War”); American Articles of War of 1775, 2 J. Cont. Cong. 111-23 (1775), reprinted in WINTHROP, *supra*, at 953; American Articles of War of 1786, 30 J. Cont. Cong. 316 (1786), reprinted in WINTHROP, *supra*, at 972.

<sup>364</sup> See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that the Articles of War authorized the President to try by military commission captured enemy combatants in a manner consistent with the law of war).

<sup>365</sup> See, e.g., *Quirin*, 317 U.S. 1; *In Re Yamashita*, 327 U.S. 1 (1946).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

“Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”<sup>366</sup> Not surprisingly, the Justice Department failed to cite any authority for this unprecedented claim of executive prerogative. Moreover, in its most recent decision on the detention of enemy combatants, the Supreme Court rejected the Bush Administration’s claim. The Court distinguished between the procedures governing “initial captures on the battlefield” and the procedures that apply “when the determination is made to continue to hold those who have been seized.”<sup>367</sup> The Court tacitly conceded that the rules governing initial captures may not be subject to judicial review. But the Court insisted on the need for judicial review of the policies and procedures governing the continued detention of captured enemy combatants. “While we accord the greatest respect and consideration to the judgments of military authorities *in matters relating to the actual prosecution of a war* . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving” claims involving the continued detention of those who have been seized.<sup>368</sup> Clearly, if the courts can review the claims of detainees without infringing on the core role of the military, then Congress can regulate the treatment of detainees without infringing on the core role of the military.

As a practical matter, it is eminently sensible to vest the President with responsibility for the “actual prosecution of a war,” while entrusting the legislature with shared responsibility for prescribing rules governing continued detention of enemy combatants. Alexander Hamilton defended the unitary executive on the grounds that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man.”<sup>369</sup> He contended that these are the qualities needed to ensure an energetic executive and, one might add, to ensure successful prosecution of a war. In contrast, he argued, a numerous legislature is “best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.”<sup>370</sup> Whereas “activity, secrecy and dispatch” are needed to ensure successful prosecution of a war, “deliberation and wisdom” are needed to regulate the treatment of wartime detainees held in long-term captivity. Therefore, it

---

<sup>366</sup> Bybee Memo, *supra* note 5 at 35. *See also id.*, at 39 (“Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. . . . Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”).

<sup>367</sup> Hamdi v. Rumsfeld, 542 U.S. \_\_\_ (2004) (O’Connor, J., plurality opinion) (slip op. at 27-28).

<sup>368</sup> *Id.* at 28 (emphasis added).

<sup>369</sup> THE FEDERALIST No. 70, at 403 (Hamilton) (Isaac Kramnick ed. 1987).

<sup>370</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

makes sense to construe the Government and Regulation Clause to grant Congress the power to prescribe rules for the treatment of wartime detainees, but not to interfere with the President's control over battlefield operations.

Recall that the Geneva Conventions prescribe rules that govern the treatment of persons captured (and detained) by enemy forces.<sup>371</sup> The Civilians Convention, for example, protects “those who, at any given moment and in any manner whatsoever, find themselves . . . *in the hands of a Party* . . . of which they are not nationals.”<sup>372</sup> In addition, the POW Convention (as its name implies) governs only those circumstances in which combatants are captured and detained by the enemy—that is, the treaty governs the treatment of *prisoners* in time of war. The upshot is that the Conventions, for the most part, purport to govern only the treatment of persons no longer taking active part in the hostilities.<sup>373</sup> Thus, the vast majority of the provisions embodied in the Geneva Conventions address matters that are well within the scope of Congress' Government and Regulation Power.<sup>374</sup>

In sum, the argument in favor of a Presidential power to violate law-of-war treaties boils down to this: the President must have the power to violate law-of-war treaties because the federal government has the power to violate treaties, and law-of-war treaties regulate conduct that is beyond the scope of Congress' Article I powers. This section has demonstrated: 1) the majority of the provisions embodied in the Geneva Conventions concern the treatment of wartime detainees; and 2) even in the absence of international rules, the Government and Regulation Clause empowers Congress to regulate the treatment of wartime detainees. Therefore, even if the President did have the constitutional authority to violate

---

<sup>371</sup> See *supra* Part I.A.

<sup>372</sup> Geneva Convention IV, *supra* note 10 art. 4 (emphasis added).

<sup>373</sup> For example, the POW Convention has a total of 143 articles, including 92 articles that address “Captivity,” and an additional 13 articles that address “Termination of Captivity.” Moreover, the Convention specifically obligates parties to evacuate POWs “as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.” Geneva Convention III, *supra* note 10 art. 19. Thus, the Convention's primary focus concerns the treatment of individuals who have been removed from active combat zones.

<sup>374</sup> Some protections established by the Geneva Conventions regulate operational choices more directly, and thereby arguably impinge on the Commander-in-Chief power. Indeed, it is well understood that the law of war governs not only the treatment of captives but also the very “means and methods” of warfare. These rules are, for the most part, codified in the Hague Convention, *supra* note 34, and the Additional Protocols to the Geneva Conventions, *supra* note 33 (The United States has not ratified the Additional Protocols.) However, some provisions of the Geneva Conventions govern war tactics. For example, the Civilians Convention prohibits attacking civilian hospitals. Geneva Convention IV, *supra* note 10 arts. 18-19. It also requires belligerents to allow free passage of medical supplies, objects necessary for religious worship, and foodstuffs so long as the belligerent is satisfied that these consignments are for civilian use. *Id.*, art. 23. Below, we consider whether the President has the constitutional authority to violate treaty provisions that regulate the conduct of battlefield operations. See *infra* Section IV.C.4

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

treaties beyond the scope of Congress' Article I powers, the President would still be bound by most portions of the Geneva Conventions, because the Conventions primarily address matters within the scope of Congress' legislative powers.

*4. International Laws of War and the Separation of Powers:* Up to this point, we have established only that, in the absence of international law rules: (1) the President, as Commander-in-Chief, possess some quantum of exclusive authority to conduct military operations; and (2) Congress possesses some quantum of concurrent authority to regulate the treatment of enemy forces no longer directly participating in the hostilities. Two important questions remain unanswered by the analysis so far: (1) is the President bound by those aspects of the Geneva Conventions that govern (or might govern, in some circumstances) the conduct of hostilities proper; and (2) is the President bound by Hague Law which expressly purports to regulate the conduct of battlefield operations. In this Section, we argue that the creation of new international legal rules regulating battlefield operations alters the constitutional balance between Congress and the President. We reject the claim that the President has the independent authority to violate law-of-war treaty provisions beyond the scope of Congress' legislative powers because Congress has the power to enact legislation to supersede, as a matter of domestic law, any law-of-war treaty provision. The main idea here is this. Assume that—in the absence of controlling international legal rules—any congressional attempt to regulate “the general direction of military and naval operations” would be an unconstitutional infringement of the President's Commander-in-Chief power. Even so, once the U.S. ratifies a treaty that constrains the President's operational discretion, that treaty ratification has the effect of empowering Congress to regulate in areas where it could not otherwise regulate.

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

In defending these two claims, we will make reference to a specific example of the kind of rule we have in mind: the prohibition on the bombing of “undefended towns” embodied in the Hague Conventions of 1907.<sup>375</sup> This is, we suggest, the kind of rule that presents the greatest difficulty for our broad claim

---

<sup>375</sup> Hague Convention IV, *supra* note 34, art. 25 (“The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

that the President has no unilateral authority to violate treaties. The rule purports to restrict the strategic options of states in time of war. In the absence of international rules, Congress arguably would not have the power to promulgate such a rule because it infringes on the President’s exclusive Commander-in-Chief powers. Again, the question is whether the emergence of an international rule reallocates law-making (and thus, law-breaking) authority as between the political branches.

*a. The Define and Punish Clause and the Division of War Powers:* First consider that the existence of international rules activates Congress’ authority to “define and punish . . . offenses against the law of nations.”<sup>376</sup> The Define and Punish Clause expressly empowers Congress to incorporate the law of nations—including treaties—into domestic law. If there were no international legal rule prohibiting, for example, the bombing of undefended towns, then Congress could not create such a rule – it would be beyond the scope of Art. I. But once the United States ratifies a treaty that prohibits the bombing of undefended towns, Congress has the power under the Define and Punish Clause to enact legislation establishing civil and/or criminal liability for a violation.<sup>377</sup>

Moreover, Congress’ power to punish individuals who violate international norms necessarily includes the power to immunize individuals who violate those same norms in cases where Congress decides that the infraction was justified.<sup>378</sup> Thus, if the President orders the air force to bomb an undefended town in violation of the Hague Convention, and Congress agrees that the President made a wise choice, Congress could enact a law on the basis of its Define and Punish power to immunize the military officers who executed the Presidential order from any civil or criminal liability that might otherwise ensue.

This point, however, provides only modest support for our broad claim in this Section. The problem is this: Congress’ Define and Punish power provides only limited authority to enact legislation that would, in effect, *authorize* violations of the Conventions. There is an important difference between legislation “authorizing” certain conduct (e.g., the bombing of undefended towns) and legislation creating immunity for those who engage in unauthorized conduct.

---

<sup>376</sup> U.S. CONST. Art. I, Sec. 8, Cl. 10.

<sup>377</sup> Indeed, this is exactly what Congress has done. Article 25 of the Hague Regulations Respecting the Laws and Customs of War on Land is now part of the U.S. criminal code. See War Crimes Act, 18 U.S.C. § 2441. The House Report on the War Crimes Act specifically cites the Define and Punish clause as the source of congressional authority to pass the bill. See H.R. Rep. No. 104-698, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

<sup>378</sup> See, e.g., HENKIN, *supra* note 178, at 68-70. This power also authorizes Congress to establish (or modify or qualify) civil remedies for the violation of the law of nations. See *id.* at 69-70.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Even if Congress accorded U.S. officials an unqualified immunity for the bombardment of undefended towns, this military tactic would be illegal (because it violates a treaty, which has the status of law). Any such enactment arguably would not supersede law-of-war treaties (including the Geneva Conventions) as a matter of domestic law. The question is whether Article I accords Congress such authority.

*b. The Necessary and Proper Clause:* The question then is whether Congress has the authority, given the existence of international rules, to enact legislation *superseding any* such rules. We submit that it does, pursuant to the Necessary and Proper Clause. The idea is this: if the Geneva Conventions impose operational constraints that unacceptably compromise the ability of the Commander-in-Chief to wage war successfully, Congress has the authority to enact legislation superseding these problematic constraints because such legislation is “necessary and proper” for the execution of the President’s power.<sup>379</sup> As Chief Justice Marshall noted in *McCulloch v. Maryland*:

Let the end be legitimate, let it be within the scope of the constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.<sup>380</sup>

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

The claim advanced here is obviously analogous to the Supreme Court’s holding in *Missouri v. Holland*.<sup>381</sup> In that case, the Court assumed that Congress lacked the power to regulate migratory birds in the absence of a treaty, but held that a treaty on migratory birds effectively gave Congress the power, under the

---

<sup>379</sup> See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 300-305 (2<sup>nd</sup> ed. 1988) (describing the contours of Congress’ power under the “necessary and proper” clause); see also *id.* at 301 (“The exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, as long as the ancillary power does not conflict with external limitations such as those of the Bill of Rights and federalism”).

<sup>380</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>381</sup> 252 U.S. 416 (1920).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Necessary and Proper Clause, to regulate in areas where it could not regulate in the absence of a treaty.<sup>382</sup>

Critics might suggest that the *Missouri v. Holland* analogy fails for the following reason. The Necessary and Proper Clause refers to laws “for carrying into Execution” the powers vested in the federal government. In *Missouri*, the law at issue was designed to “carry into Execution” a treaty. Here, the issue is whether Congress has the authority to prevent or inhibit the execution of a treaty. Such laws, critics might argue, are not necessary or proper for carrying into execution the treaty power. Our claim, however, is that legislation superseding the Conventions is necessary and proper for carrying into execution the Commander-in-Chief power, not the Treaty power. Nevertheless, the logic of *Missouri* applies to any legislation essential to the effective exercise of any power enumerated in the Constitution—including the Commander-in-Chief power. The analytical structure of our argument tracks closely the Court’s reasoning in *Missouri*. We start with the premise that – in the absence of international rules – Congress could not regulate the means and methods of warfare. For example, the President has exclusive authority—again, in the absence of international rules—to decide whether to bomb “undefended towns.” We then posit formal international rules prohibiting specific means and methods of warfare—including the bombing of “undefended towns.” We then conclude: Since the international rule is binding on the President, legislation to remove the constraint is “Necessary and Proper” to execute the Commander-in-Chief power.<sup>383</sup>

Indeed, we can take the analogy a step further. Because the treaty power is a federal power, when the U.S. ratifies a treaty, the act of ratification “nationalizes” the issue (per *Missouri*) and shifts the locus of decision-making from the state governments to the federal government. Similarly, because treaties have the status of law, the act of ratification “legalizes” the issue (as in the bombing of undefended towns) and thereby shifts the locus of decision-making from the President to Congress. Absent a treaty, the question whether to bomb undefended towns is a question of policy for the President to decide. But when the U.S. ratifies the treaty, that creates a legal rule, and the President must comply with the legal rule unless Congress changes the law.

\*\*\*\*\*

---

<sup>382</sup> *Id.*

<sup>383</sup> As previously discussed, the international rule is binding on the President as a matter of constitutional law because the rule is embodied in a treaty that has the status of law, and the President has a duty to take care that the laws are faithfully executed. See *supra* Section IV.B.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

In short, our argument is this. Absent international laws of war, the President as Commander in Chief would have exclusive control over “battlefield operations,” and Congress would lack the power under Article I to interfere with the President’s control over “battlefield operations.” However, by ratifying law of war treaties, the U.S. shifts the constitutional balance between Congress and the President. The act of ratification empowers Congress to regulate—under the Define and Punish and Necessary and Proper Clauses—matters governed by the treaty, even if those matters would otherwise be subject to the President’s exclusive power.

**V.**  
**The President, The Courts, and The Geneva Conventions**

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

Part Five addresses the role of the courts in ensuring that U.S. military officers and contractors comply with the Geneva Conventions. There is no question that the federal courts would adjudicate criminal prosecutions initiated by the federal government against individuals who allegedly breached the Conventions.<sup>384</sup> However, in cases where private plaintiffs initiate suits against the federal government, government employees, or military contractors, the role of the courts may vary substantially depending upon the identity of the plaintiffs, the identity of the defendants, the nature of the relief sought, and/or the nature of the substantive claim. For example, Guantanamo detainees may have greater access to U.S. courts than prisoners held in Iraq or Afghanistan.<sup>385</sup> Plaintiffs might evade the bar of sovereign immunity by suing military contractors, rather than government employees.<sup>386</sup> There are many possible permutations and combinations of plaintiffs, defendants, substantive claims, and remedial mechanisms. It is beyond the scope of this article to explore all of them. Even so, some discussion of the role of courts is essential to counter the view that the President is bound only in a formal sense, not in a practical sense.

---

<sup>384</sup> The War Crimes Act, 18 U.S.C. § 2441, makes it a federal criminal offense to commit a grave breach of the Geneva Conventions, or to commit a violation of Common Article 3.

<sup>385</sup> In *Rasul v. Bush*, 542 U.S. \_\_\_\_ (2004), the Court relied heavily on the fact that the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base to justify its holding that the federal district court had jurisdiction over a habeas petition presented by Guantanamo detainees. *See* Stevens slip op. at 12-15. It is unclear whether the Court would have reached the same result if the petitioners had been detained in Iraq or Afghanistan.

<sup>386</sup> In a recent case, plaintiffs sued private contractors and their employees for abuses committed at Abu Ghraib prison in Iraq. *See* Saleh v. Titan Corp., Amended Complaint, *available at* [www.ccr-ny.org/v2/reports/](http://www.ccr-ny.org/v2/reports/). Notably, the complaint does not name any government entities or employees as defendants. This may be because claims for money damages against government employees would likely fail. *See infra* note 423.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

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

**A. Jurisdiction**

In *Rasul v. Bush*, aliens detained at Guantanamo Bay sought to challenge the legality of their detention by means of habeas corpus petitions.<sup>387</sup> In addition, they raised nonhabeas statutory claims challenging the conditions of confinement at Guantanamo.<sup>388</sup> The government's brief asserted that *Johnson v. Eisentrager*<sup>389</sup> barred federal district court jurisdiction both over petitioners' habeas claims and over their nonhabeas statutory claims.<sup>390</sup> The Supreme Court ruled in favor of petitioners on both counts.

First, the Supreme Court held explicitly that the federal habeas statute "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."<sup>391</sup> Second, although the Supreme Court did not decide whether the District Court had jurisdiction over the nonhabeas claims, it did state that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."<sup>392</sup> The Court identified two potential grounds for federal jurisdiction

---

<sup>387</sup> 542 U.S. \_\_\_\_ (2004).

<sup>388</sup> *Id.* at 16-17 (slip. op.).

<sup>389</sup> 339 U.S. 763 (1950).

<sup>390</sup> See *Rasul v. Bush*, Brief for the Respondents, available at <http://www.usdoj.gov/osg/briefs>.

<sup>391</sup> *Rasul v. Bush*, 542 U.S. \_\_\_\_ (2004) (slip. op. at 15-16).

<sup>392</sup> *Id.* at 16.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

over petitioners' nonhabeas claims: the federal question statute<sup>393</sup> and the Alien Tort Statute.<sup>394</sup>

In light of the Supreme Court's decision in *Rasul*, and its decision the next day in *Alvarez-Machain*,<sup>395</sup> it is uncertain whether the Alien Tort Statute grants the federal district courts jurisdiction to entertain a claim by Guantanamo detainees against U.S. government officers to enjoin the future use of interrogation techniques that violate the Geneva Conventions.<sup>396</sup> However, one thing is clear in light of *Rasul*: if there is a federal statute that creates a private cause of action authorizing suit by the Guantanamo detainees to challenge the interrogation techniques being employed, then the federal question statute grants federal district courts jurisdiction to entertain such a claim.<sup>397</sup> Below, we suggest that the Administrative Procedure Act creates a private right of action, thereby giving rise to federal question jurisdiction.<sup>398</sup>

### **B. The Political Question Doctrine**

Professor Yoo contends that the political question doctrine generally precludes judicial enforcement of treaties.<sup>399</sup> Although there is a grain of truth to Yoo's argument, he takes the argument too far. There are some treaty interpretation issues that raise nonjusticiable political questions. For example, Article 51 of Additional Protocol I prohibits any "attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>400</sup> If the United States eventually ratifies Protocol I,<sup>401</sup> some individual or group might file a lawsuit alleging a U.S. violation of Article 51. Such a claim would clearly raise a nonjusticiable political question. The application of Article 51 in any particular case requires a decision maker to weigh the potential loss of human life against the anticipated military advantage. That type of cost-benefit analysis is a political question because there is "a textually demonstrable constitutional commitment of

---

<sup>393</sup> 28 U.S.C. § 1331.

<sup>394</sup> 28 U.S.C. § 1350.

<sup>395</sup> *Sosa v. Alvarez-Machain*, 542 U.S. \_\_\_\_ (2004).

<sup>396</sup> Add a long footnote to highlight the issues that a court would have to address in resolving a claim under the Alien Tort Statute.

<sup>397</sup> The federal question statute confers jurisdiction on federal district courts to hear cases "arising under" federal law. 28 U.S.C. § 1331. This means, *inter alia*, that federal courts have jurisdiction to entertain any claim in which a federal statute creates a private right of action that entitles a private plaintiff to assert his or her claim. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 279-80 (3<sup>rd</sup> ed. 1999).

<sup>398</sup> *See infra* Section V.D.

<sup>399</sup> *See* John Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1325-28 (2002) [hereinafter Yoo, *False Sirens*].

<sup>400</sup> AP I, *supra* note 33, art. 51, para. 5(b).

<sup>401</sup> The United States signed Protocol I on December 12, 1977, but has never ratified it.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

the issue to a coordinate political department,”<sup>402</sup> and “a lack of judicially discoverable and manageable standards for resolving it.”<sup>403</sup>

However, the fact that *some* treaty interpretation issues raise nonjusticiable political questions does not mean that *all* treaty interpretation issues raise nonjusticiable political questions. For example, on April 16, 2003, Secretary of Defense Rumsfeld approved a set of twenty-four “counter-resistance techniques” to be used for “interrogations of unlawful combatants held at Guantanamo Bay, Cuba.”<sup>404</sup> Suppose that a group of Guantanamo detainees filed suit to enjoin the future use of some of these techniques on the grounds that specific techniques violate Article 31 of the Civilian Convention. Article 31 states: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>405</sup> Application of the six factors identified in *Baker v. Carr*<sup>406</sup> demonstrates that such a claim is justiciable:

- There is no “textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>407</sup> Indeed, a determination as to whether a particular interrogation technique involves physical or moral coercion involves a straightforward application of law to fact, something that U.S. courts do on a daily basis in a wide variety of circumstances.

---

<sup>402</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962). Specific targeting decisions, which require someone to weigh the expected military benefit against the potential loss of civilian life, are arguably constitutionally committed to the President as the “Commander in Chief of the Army and Navy.” U.S. Const. art. II, § 2, cl. 1. *See supra* Section IV.C.2.

<sup>403</sup> *Baker v. Carr*, 369 U.S. at 217. A different situation would be presented if the government decided to prosecute a military officer who directed an attack that caused excessive loss of civilian life. 18 U.S.C. § 2441 makes it a federal criminal offense to commit a war crime. The term “war crime” includes, *inter alia*, conduct prohibited by Article 23 of “the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907.” 18 U.S.C. § 2441(c)(2). Under Article 23, it is forbidden “[t]o employ arms, projectiles, or material calculated to cause unnecessary suffering.” Annex to Hague Convention, *supra*, art. 23(e).

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

<sup>404</sup> Memorandum for the Commander, US Southern Command (Apr. 16, 2003), *available at* [www.washingtonpost.com](http://www.washingtonpost.com): “Bush Administration Documents on Interrogation.”

<sup>405</sup> Civilian Convention, *supra* note 10, art. 31. *See also* POW Convention, *supra* note 10, art. 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”)

<sup>406</sup> 369 U.S. 186 (1962).

<sup>407</sup> *Id.*, at 217.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

- There is not “a lack of judicially discoverable and manageable standards for resolving” the question.<sup>408</sup> To the contrary, the Geneva Conventions specify in detail precisely who are “protected persons.”<sup>409</sup> Moreover courts, no less than executive officials, are capable of determining what constitutes “physical or moral coercion.”
- These questions can be decided “without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>410</sup> The political branches already made the initial policy determination to refrain from using physical or moral coercion against protected persons when they decided to ratify the Geneva Conventions.
- A court could resolve these questions “without expressing lack of respect due coordinate branches of government.”<sup>411</sup> Although courts frequently defer to the executive branch’s interpretation of a treaty, there are many cases in which courts have adopted interpretations that conflict directly with views espoused by the executive branch.<sup>412</sup> In such cases, courts are not manifesting a lack of respect for the executive. Rather, they are exercising their constitutional power to decide cases in accordance with the “Constitution, the Laws of the United States, and Treaties made . . . under their Authority.”<sup>413</sup>
- The Bush Administration may well claim that the war on terrorism creates “an unusual need for unquestioning adherence to a political decision already made,”<sup>414</sup> and that there is a “potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>415</sup> But the treatment of prisoners at Guantanamo Bay has already generated substantial embarrassment by subjecting the United States to widespread criticism for its alleged failure to comply with international humanitarian and human rights law.<sup>416</sup> A judicial decision on the issue could potentially help ameliorate this problem, either by providing a reasoned opinion substantiating U.S. compliance with international law, or by remedying any previous non-compliance.

---

<sup>408</sup> *Id.*

<sup>409</sup> See *supra* notes 63-70 and accompanying text. See also *infra* notes 479-494 and accompanying text.

<sup>410</sup> Baker v. Carr, 369 U.S. at 217.

<sup>411</sup> *Id.*

<sup>412</sup> See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 962 (1994) (citing cases).

<sup>413</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>414</sup> Baker v. Carr, 369 U.S. at 217.

<sup>415</sup> *Id.* at 217.

<sup>416</sup> See JENNIFER ELSEA, TREATMENT OF BATTLEFIELD DETAINEES IN THE WAR ON TERRORISM 1-5 (2003) (documenting the storm of controversy surrounding the POW issue); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 10 n.24 (2002) (same).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

In sum, the Geneva Conventions present some treaty interpretation issues that raise nonjusticiable political questions, which are constitutionally committed to the executive branch. But the Geneva Conventions also present some treaty interpretation questions that are well within the scope of judicial competence. Specific cases will inevitably involve difficult line-drawing problems that will require a judgment about whether a particular treaty interpretation issue is within the scope of judicial competence. In such cases, the critical question is: who decides? Does the judiciary have the constitutional power to decide which treaty interpretation issues are justiciable? Or, is the judiciary required to defer to the President's determination that a particular treaty interpretation issue is nonjusticiable (in which case the President would not be bound by the Geneva Conventions)?

In several court cases, the executive branch has espoused the view that the President, not the judicial branch, gets the final say as to whether a particular treaty interpretation issue is nonjusticiable.<sup>417</sup> To the best of our knowledge, no court has ever conceded this point. Nor could any court concede this point without doing serious damage to the separation of powers principles that are embedded in our constitutional structure. The Framers drafted a constitution that divides power in order to promote certain policy objectives, one of which is to maintain a balance among the branches.<sup>418</sup> Judicial recognition of an executive power to decide, by Presidential fiat, that certain treaty interpretation issues are nonjusticiable would destroy the balance between the executive and judicial branches to the detriment of the People in whose name the President governs. The Constitution grants the judicial branch the power to determine which issues are justiciable, and which issues are nonjusticiable, so that the judiciary can perform its constitutional function of protecting individuals from executive overreaching. Therefore, the President is bound by the Geneva Conventions because his interpretation of at least some treaty provisions is subject to judicial review, and the power to determine which treaty provisions are justiciable belongs to the judicial branch, not the President.

### **C. Sovereign Immunity**

---

<sup>417</sup> See David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1483 (1999) (summarizing U.S. amicus brief submitted to the Fourth Circuit as follows: "The United States's argument appeared to reduce to the proposition that any case implicating a treaty right is, upon the election of the executive branch, capable of being characterized as a political question and thus rendered nonjusticiable.").

<sup>418</sup> See Flaherty, *The Most Dangerous Branch*, *supra* note 200, at 1729-30 (1996) ("The Founders embraced separation of powers to further several widely agreed-upon goals . . . including balance among the branches, responsibility or accountability to the electorate, and energetic, efficient government.")

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

In his concurring opinion in *Al Odah v. United States*, Judge Randolph asserted that the Guantanamo “detainees’ treaty and international law claims are barred by sovereign immunity.”<sup>419</sup> Like the political question doctrine, the doctrine of sovereign immunity undoubtedly bars some claims against federal officers and/or agencies under the Geneva Conventions. However, sovereign immunity does not bar all possible claims and defenses under the treaties.

For example, there are some cases in which criminal defendants have invoked the Conventions as the basis for a defense to a federal criminal prosecution.<sup>420</sup> In such cases, the doctrine of sovereign immunity is inapplicable because the doctrine applies only to offensive claims against the federal government and/or its agents. Similarly, the federal habeas statute entitles an individual to a remedy if “[h]e is in custody in violation of the Constitution or laws *or treaties* of the United States.”<sup>421</sup> Sovereign immunity has never barred habeas corpus actions against federal officers.<sup>422</sup> Thus, habeas petitioners who satisfy the jurisdictional and other requirements of the habeas statute, and who prove a violation of the Geneva Conventions, are entitled to relief under the statute without regard to sovereign immunity.

The Administrative Procedure Act (APA) provides a waiver of sovereign immunity for plaintiffs who seek relief other than money damages against federal officers.<sup>423</sup> The waiver applies, with some exceptions, to any “person suffering

---

<sup>419</sup> *Al Odah v. United States*, 321 F.3d 1134, 1149-50 (D.C. Cir. 2003) (Randolph, J., concurring).

<sup>420</sup> *See, e.g., United States v. Lindh*, 212 F.Supp.2d 541, 552-58 (E.D. Va. 2002) (U.S. citizen charged with violations of federal anti-terrorism statutes invoked defense based on POW Convention); *United States v. Noriega*, 746 F.Supp. 1506, 1525-28 (S.D. Fla. 1990) (Commander-in-Chief of Panamanian Defense Forces charged with various narcotics offenses raised defense based on POW Convention).

<sup>421</sup> 28 U.S.C. § 2241(c)(3) (1994) (emphasis added).

<sup>422</sup> Petitions for writs addressed to individual officers do not implicate sovereign immunity. *See, e.g., LARRY W. YACKLE, FEDERAL COURTS* (2<sup>nd</sup> ed. 2003) (“Actions for common law writs are prototypical officer suits, neatly avoiding the government’s sovereign immunity.”).

<sup>423</sup> 5 U.S.C. § 702 (1994) (“An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed . . . on the ground that it is against the United States.”). *See also* H. Rep. No. 94-1656 (1976), *reprinted in* 1976 U.S.S.C.A.N. 6121, 6121 (stating that the purpose of the proposed amendment to the APA was “to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.”).

Whereas the APA provides a waiver of sovereign immunity for at least some plaintiffs who seek declaratory and/or injunctive relief for violations of the Geneva Conventions, sovereign immunity poses a larger hurdle for plaintiffs who seek money damages. The Federal Tort Claims Act (FTCA) does provide a waiver of sovereign immunity in some cases where plaintiffs seek money damages from the United States for torts committed by federal employees. *See* 28 U.S.C. § 2674 (providing that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances”). However, substantive liability is determined “in accordance with the law of the place where the act or omission occurred,” 28 U.S.C. § 1346(b)(1), and the remedy provided by the FTCA “is exclusive of any other civil

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

legal wrong because of agency action, or adversely affected or aggrieved by agency action.”<sup>424</sup> A violation of individual rights protected by a treaty is a “legal wrong” within the meaning of the APA.<sup>425</sup> Therefore, an individual who seeks declaratory and/or injunctive relief against a federal officer for an alleged violation of his or her rights under the Geneva Conventions could potentially bring a claim under the APA. Of course, the APA includes various limitations on its waiver of sovereign immunity.<sup>426</sup> Accordingly, some claims for declaratory and/or injunctive relief for alleged violations of the Conventions may be barred by sovereign immunity. However, there is no *a priori* reason to think that the various limitations on the APA will bar all possible claims under the Geneva Conventions. To the contrary, case-by-case decisions will be necessary to determine the applicability of the APA in particular circumstances.

Recall the previous hypothetical: a group of Guantanamo detainees filed suit to enjoin the future use of certain interrogation techniques approved by Secretary Rumsfeld on the grounds that specific techniques violate Article 31 of the Civilian Convention. This is similar to one of the claims raised by the plaintiffs in *Al Odah v. United States*.<sup>427</sup> In his concurring opinion in *Al Odah*, Judge Randolph presented two distinct arguments against judicial review under the APA. First, he argued that APA review is barred because the APA excludes judicial review of acts by “military authority exercised *in the field* in time of war.”<sup>428</sup> This argument is unpersuasive. Assuming that the Guantanamo detainees are subject to “military authority exercised . . . in time of war,” they are clearly not “in the field,” because

---

action or proceeding for money damages by reason of the same subject matter.” 28 U.S.C. § 2679(b)(1). Thus, the statutory scheme appears to preclude a damages remedy for a violation of the Geneva Conventions, unless that violation would give rise to a state tort law claim. Even assuming that the violation constitutes a tort under state law, the waiver does not apply to “any claim arising in a foreign country,” 28 U.S.C. § 2680(k), or to “any claim arising out of the combatant activities of the military or naval forces . . . during time of war.” 28 U.S.C. § 2680(j).

<sup>424</sup> 5 U.S.C. § 702 (1994).

<sup>425</sup> See Sloss, *supra* note 135, at 1135 (citing cases).

<sup>426</sup> For example, judicial review of agency action is not permitted under the APA if “statutes preclude judicial review,” 5 U.S.C. § 701(a)(1) (1994), or if certain decisions are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (1994). We address both limitations below. See *infra* notes 431-436 and accompanying text (in V.C, discussing the “agency discretion” provision) and notes 451-462 and accompanying text (in V.D, addressing the argument that “statutes preclude judicial review”).

<sup>427</sup> 321 F.3d 1134 (D.C. Cir. 2003) (*affirming Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.C. 2002)). In *Rasul*, the district court decided two separate cases, brought on behalf of two different groups of Guantanamo detainees, that were consolidated at the district court level. In the *Rasul* case, the petitioners explicitly sought release from custody, and labeled their claim as a petition for writ of habeas corpus. *Id.* at 57. In contrast, the *Al Odah* plaintiffs stated explicitly that they did not seek release from custody; rather, they sought injunctive relief related to the conditions of confinement, *id.* at 58, and they invoked the APA as a basis for judicial review. See 321 F.3d, at 1149-50 (Randolph, J., concurring). Thus, the hypothetical case here is similar to the *Al Odah* complaint.

<sup>428</sup> *Al Odah*, 321 F.3d at 1149 (citing 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G)) (Randolph, J., concurring) (emphasis added).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

they are detained in a military prison thousands of miles away from the battlefield where they were captured.<sup>429</sup> Judge Randolph's interpretation of the statute is flawed because it deprives the phrase "in the field" of any meaning whatsoever.<sup>430</sup>

Second, Judge Randolph argued that APA review is unavailable because the military decisions being challenged are "committed to agency discretion by law."<sup>431</sup> There may well be some claims related to the Geneva Conventions that are committed to agency discretion.<sup>432</sup> However, the executive branch does not have unfettered discretion to decide whether prisoners held at Guantanamo are protected by the Geneva Conventions because the Conventions themselves specify who is protected, the Conventions have the status of supreme federal law, and the executive branch must apply the law.<sup>433</sup> Moreover, decisions about the methods of interrogation used at Guantanamo Bay are not committed to agency discretion because the Geneva Conventions limit the range of permissible

---

<sup>429</sup> As Justice Kennedy noted in his concurring opinion in *Rasul*, "Guantanamo Bay is in every practical respect a United States territory." *Rasul v. Bush*, 542 U.S. \_\_\_\_ (2004) (Kennedy slip op. at 3). Thus, even under a very broad interpretation of the statutory phrase "in the field," Guantanamo Bay does not qualify.

<sup>430</sup> Judge Randolph cites two cases in support of his claim that the Guantanamo detainees are "in the field" within the meaning of the APA. First, he cites *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). That case is simply irrelevant because it had nothing to do with the APA. Second, he cites *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991). That case actually undermines Judge Randolph's claim. *Sullivan* involved a challenge to an FDA regulation that authorized the Department of Defense (DOD) to administer investigational drugs to U.S. military personnel without obtaining informed consent. The regulation permitted DOD to waive the informed consent requirement only in the context of "a specific military operation involving combat or the immediate threat of combat." *Id.* at 1374. The government argued that the FDA regulation was not subject to judicial review under the APA; it invoked the statutory exception for "military authority exercised in the field in time of war." *Id.* at 1380. Despite the fact that the challenged regulation applied only in combat situations, the court concluded that the regulation was subject to judicial review under the APA because the plaintiff challenged "the scope of authority Congress has entrusted to the FDA." *Id.* at 1380. Thus, *Sullivan* supports the conclusion that a claim by Guantanamo detainees challenging DOD's authority to adopt rules inconsistent with the Geneva Conventions would also be subject to judicial review under the APA.

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

<sup>431</sup> *Al Odah*, 321 F.3d, at 1150 (citing 5 U.S.C. § 701(a)(2) (1994)).

<sup>432</sup> See *supra* Section V.B.

<sup>433</sup> The executive branch has some leeway in interpreting the Conventions, provided that its interpretation is reasonable. However, the Bush Administration's claim that the Guantanamo detainees are not protected by the Conventions fails to satisfy even a deferential "reasonableness" standard. See *infra* Section V.E.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

interrogation methods,<sup>434</sup> and the President must obtain legislative approval if he wants to utilize methods prohibited by the Conventions.<sup>435</sup> Finally, the military's own regulations specify that military officers do not have discretion to violate the provisions of the Geneva Conventions that govern the treatment of detainees.<sup>436</sup>

There is one other potential objection to APA review that merits consideration. The APA authorizes judicial review of "final agency action," but "[a] preliminary, procedural, or intermediate agency action or ruling" is generally not reviewable.<sup>437</sup> Defendants in our hypothetical case might argue that APA review is not available because Secretary Rumsfeld's April 2003 order approving the use of specific interrogation techniques was not "final agency action" within the meaning of the APA. In practice, there is tremendous overlap between the "final agency action" requirement and the requirement for plaintiffs to exhaust administrative remedies.<sup>438</sup> If a plaintiff has failed to exhaust available administrative remedies, then agency action is not considered final.<sup>439</sup> Conversely, if an agency does not provide any administrative remedies, agency action that might otherwise be considered "preliminary" or "intermediate" will often be deemed final.<sup>440</sup> This approach is consistent with the principle that there is a "strong presumption that Congress intends judicial review of administrative action."<sup>441</sup> The "final agency action" requirement is not designed to preclude judicial review altogether; it is merely intended to defer judicial review until after agency action is final.

Based on publicly available information, it appears that the administrative mechanisms available for Guantanamo detainees permit periodic review of the

---

<sup>434</sup> See Civilian Convention, *supra* note 10, art. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."). See also POW Convention, *supra* note 10, art. 17 ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.")

<sup>435</sup> See *supra* Part IV.

<sup>436</sup> See Army Regulation 190-8, § 1.1(b) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.")

<sup>437</sup> 5 U.S.C. § 704 (1994).

<sup>438</sup> See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.11 (3<sup>rd</sup> ed. 1994).

<sup>439</sup> *Id.*, at 356 ("If a petitioner has not exhausted available administrative remedies, the agency has usually not yet taken a final action.")

<sup>440</sup> *Id.* (stating that *Mathews v. Eldridge*, 424 U.S. 319 (1976), was "a case in which the Court waived the final agency action requirement based on application of one or more exceptions to [the exhaustion] requirement. There is no apparent reason why the two doctrines should differ in scope or be subject to differing exceptions.")

<sup>441</sup> *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

fact of detention.<sup>442</sup> However, there does not appear to be any administrative mechanism that allows detainees to challenge the conditions of detention. In particular, there is no evidence that the Bush Administration has established any type of administrative review procedure that would enable detainees to challenge the methods of interrogation being used. Given the absence of any viable administrative remedy, courts should hold that Secretary Rumsfeld's April 2003 order constitutes "final agency action" within the meaning of the APA.<sup>443</sup>

In sum, the defense of sovereign immunity should not bar a suit by Guantanamo detainees to enjoin the future use of interrogation techniques that violate the Geneva Conventions because the APA provides a waiver of sovereign immunity.

#### **D. Privately Enforceable Rights**

The government brief in *Rasul v. Bush* asserts that "[t]he Geneva Convention does not create privately enforceable rights."<sup>444</sup> This assertion conflates three distinct issues: 1) do the Geneva Conventions create primary individual rights under international law?; 2) if so, do the Conventions create primary individual rights under domestic law?; and 3) if so, do the Conventions create remedial rights for individuals under domestic law?

To answer the first question, it is necessary to consider specific provisions of the Geneva Conventions. For example, article 137 of the POW Convention states: "The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne."<sup>445</sup> Clearly, this provision does not create primary individual rights. In contrast, to return to our previous example, article 31 of the Civilian Convention states: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."<sup>446</sup> This provision creates primary rights for individuals under international law. It imposes a specific, mandatory duty (not to exercise coercion) upon a particular class of persons (agents of the Detaining Power) for the benefit of an identifiable group of individuals ("protected persons"). Nothing more is required to establish a primary individual right under international law.<sup>447</sup>

---

<sup>442</sup> See, e.g., Lewis, *supra* note 65, at A1.

<sup>443</sup> [Add long footnote explaining the "final agency action" requirement]

<sup>444</sup> See *Rasul v. Bush*, Brief for the Respondents, at 39, available at <http://www.usdoj.gov/osg/briefs>.

<sup>445</sup> POW Convention, *supra* note 10, art. 137.

<sup>446</sup> Civilian Convention, *supra* note 10, art. 31.

<sup>447</sup> In the *LaGrand Case*, Germany argued that article 36, paragraph 1(b), of the Vienna Convention on Consular Relations created individual rights. See *LaGrand Case (Germany v. United States of America)*,

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

The next question is whether article 31 creates primary rights for individuals under domestic law. This question must be answered affirmatively. As noted above, the vast majority of the provisions of the Geneva Conventions, including article 31, are Law of the Land under the Supremacy Clause.<sup>448</sup> The treaties' status as Law of the Land means that the treaties create primary domestic rights and primary domestic duties that correspond to the legal rights and duties that the treaties create under international law. Since article 31 creates primary rights for individuals under international law, and since article 31 has the status of supreme federal law under the Supremacy Clause, it follows that article 31 creates primary rights for individuals under domestic law.

The government's assertion that the Geneva Conventions do not create "privately enforceable rights" appears to be consistent with the preceding analysis. Although the government's position is not entirely clear, it seems to be making the following claim: even assuming that the Geneva Conventions create primary rights for individuals under domestic law, individuals cannot obtain domestic judicial remedies for violations of those primary rights because the Conventions themselves do not create domestic remedial rights for individuals.<sup>449</sup> This claim makes sense only if one assumes that domestic courts should not provide remedies for individuals who are harmed by violations of their treaty-protected primary rights unless the *treaty itself* creates a private right of action (a domestic remedial right) in addition to the primary individual right.<sup>450</sup>

---

I.C.J. 2001, ¶ 75, *available at* [www.icj-cij.org](http://www.icj-cij.org). The United States disagreed, contending "that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals . . ." *Id.*, ¶ 76. The Court rejected the U.S. argument, concluding "that Article 36, paragraph 1, creates individual rights." *Id.*, ¶ 77. The Court relied principally on the plain meaning of the treaty's text to support its conclusion that article 36 creates primary rights for individuals under international law. The Court's analytical methodology in *LaGrand* strongly supports the conclusion here that article 31 of the Civilian Convention creates primary individual rights under international law.

<sup>448</sup> See *supra* Section II.A.

<sup>449</sup> On the distinction between primary and remedial rights, see generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 122-25 (1994).

<sup>450</sup> The government's position manifests a "remedies first" approach: the idea is that courts should decide first whether the law provides a remedial right. If the answer to that question is "no," then courts need not address the issue of primary rights. Hart and Sacks contend: "Lots of people have tried to think backwards in this way. It is the essence of clear analysis to see that it is backwards, and instead to think frontwards." *Id.* at 136. See also Sloss, *supra* note 113, at 11 ("To think 'frontwards' in treaty cases, courts should first ask whether a treaty provision has the status of primary domestic law and then, if the first question is answered affirmatively, consider the availability of judicial remedies for a violation of that treaty provision.").

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Whatever merit this assumption might have in other contexts, it has no merit whatsoever in the context of a suit for injunctive relief against federal officers. The Administrative Procedure Act (APA) provides a private right of action for injunctive relief against federal officers for all claims within the scope of the APA waiver of sovereign immunity.<sup>451</sup> In *Norton v. Southern Utah Wilderness Alliance*,<sup>452</sup> plaintiffs sued the Secretary of Interior for declaratory and injunctive relief to enforce the Federal Land Policy and Management Act (FLPMA). Plaintiffs asserted a private right of action under the APA,<sup>453</sup> apparently because the FLPMA does not itself create a private cause of action. Justice Scalia, writing for a unanimous court, reaffirmed that “[t]he APA authorizes suit” for federal statutory violations “[w]here no other statute provides a private right of action” if the challenged agency action is “final agency action.”<sup>454</sup> Given that the APA grants plaintiffs a private right of action to sue for violations of federal statutes that do not themselves create a private right of action, there is no reason to bar APA claims for injunctive relief against federal officers who violate a treaty that does not create a private right of action<sup>455</sup> – at least in cases where the treaty provision at issue, like article 31 of the Civilian Convention, creates primary rights for individuals under both international and domestic law.

A different conclusion might be warranted if the treaty makers had manifested an intention to preclude domestic judicial remedies for violations of individual rights protected by the Geneva Conventions. Judicial review of agency action is not permitted under the APA if “statutes preclude judicial review.”<sup>456</sup> Accordingly, a court might be justified in declining APA review of claims invoking a particular treaty if the treaty itself manifested an intention to preclude judicial review. For example, when the United States ratified the International Covenant on Civil and Political Rights (ICCPR), the treaty makers adopted a declaration specifying that the ICCPR is “not self-executing.”<sup>457</sup> That non-self-executing declaration provides at least some evidence of a political intent to preclude APA review of claims invoking the ICCPR.<sup>458</sup>

---

<sup>451</sup> See *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (stating that APA creates private right of action). The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, may also create a private right of action for declaratory relief against federal officers who are engaged in ongoing treaty violations. Detailed analysis of issues raised by potential claims under the Declaratory Judgment Act is beyond the scope of this article.

<sup>452</sup> 542 U.S. \_\_\_\_ (2004).

<sup>453</sup> *Id.* (slip op. at 4).

<sup>454</sup> *Id.* (slip op. at 5) (emphasis added).

<sup>455</sup> Add a note about the Alien Tort Statute and implied rights of action for treaty violations.

<sup>456</sup> 5 U.S.C. § 701(a)(1) (1994).

<sup>457</sup> See 138 Cong. Rec. S4783-84 (1992).

<sup>458</sup> One of the co-authors of this article has argued elsewhere that the non-self-executing declaration attached to the ICCPR was not intended to bar injunctive relief against federal officers for violations of the

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

In contrast, there is no evidence that the treaty makers, at the time of ratifying the Geneva Conventions, intended to preclude judicial review of claims based on the treaties. One U.S. court has suggested that provisions in the Conventions providing for diplomatic remedies manifest the drafters' intent to preclude domestic judicial remedies.<sup>459</sup> The court's logic is flawed. One could just as easily argue that provisions in the Conventions providing for domestic criminal prosecutions<sup>460</sup> manifest the drafter's intent to ensure that domestic courts play a role in enforcing the Conventions. The fact is that the treaty text is silent with respect to domestic judicial remedies in civil cases. That silence supports judicial review under the APA because there is a "strong presumption that Congress intends judicial review of administrative action."<sup>461</sup> Moreover, under international law, there is a presumption in favor of domestic judicial remedies for violations of treaty provisions that create primary individual rights.<sup>462</sup> Therefore, courts should not dismiss APA claims for treaty violations without compelling evidence that the treaty makers intended to preclude judicial review of such claims. The text of the Geneva Conventions themselves, their negotiating history, and the ratification history in the U.S. Senate are devoid of any such evidence.

**E. Deference to the Executive Branch's Interpretation of Treaties**

In a brief submitted to the district court in *Al Odah v. United States*, the Justice Department stated that the government's position "does not mean that aliens detained by the military abroad are without rights, but rather that the scope of those rights are to be determined by the Executive and the military, not by the courts."<sup>463</sup> In short, the Bush Administration has suggested that the President has unfettered discretion to interpret the Geneva Conventions as he sees fit. This section rebuts that claim.

It is firmly established that the courts owe deference to executive branch interpretations of treaties. The question is: "how much deference?" The first sub-

---

ICCPR. See Sloss, *supra* note 135, at 1136-37. Even so, we concede that there is at least a plausible argument in support of the view that the declaration was intended to bar APA claims for ICCPR violations.

<sup>459</sup> See Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4<sup>th</sup> Cir. 2003).

<sup>460</sup> See *supra* Section II.A.1.

<sup>461</sup> Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

<sup>462</sup> See LaGrand Case (Germany v. United States of America), I.C.J. 2001, available at [www.icj-cij.org](http://www.icj-cij.org) (holding -- despite the fact that the Vienna Convention on Consular Relations is silent with respect to domestic remedies -- that the treaty implicitly obligates the United States to provide individual remedies for violations of the primary individual rights protected by the treaty).

<sup>463</sup> Defendants' Reply in Support of Motion to Dismiss, *Al Odah v. United States*, Civil Action No. 02-CV-828 (CKK) (D.D.C. 2002) (on file with author).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

section below contends that absolute deference is unwarranted because the judiciary has an independent role in treaty interpretation.<sup>464</sup> The next sub-section assumes that something like *Chevron* deference is appropriate.<sup>465</sup> Applying *Chevron* deference to the hypothetical case in which Guantanamo detainees assert that interrogation techniques violate article 31, we show that: a) despite the Bush Administration's claim to the contrary, at least some of the detainees at Guantanamo are protected under the Civilian Convention, if not the POW Convention; and b) at least some of the interrogation techniques approved by Secretary Rumsfeld violate article 31 of the Civilian Convention.

1. *Absolute Deference*: Professor Yoo contends that the Constitution grants the President exclusive control over treaty interpretation.<sup>466</sup> He claims that “the treaty power as a whole . . . ought to be regarded as an exclusively executive power.”<sup>467</sup> He correctly notes that Article II expressly grants the President the power to make treaties, subject to Senate consent.<sup>468</sup> Moreover, he adds, “Article II’s Vesting Clause establishes a rule of construction that any unenumerated executive power . . . must be given to the President.”<sup>469</sup> Given that the power to interpret treaties is “an unenumerated executive power,” he concludes that Article II grants the President the power to interpret treaties.

Yoo is clearly right to suggest that the President has a limited power over treaty interpretation. However, Yoo’s argument is flawed because it assumes that the power to interpret treaties, *in its entirety*, is an “unenumerated executive power.” In fact, the power to interpret treaties, like other constitutional powers, is divided among the various branches. The Constitution states expressly that “all Treaties made . . . under the Authority of the United States” have the status of law.<sup>470</sup> The power to interpret the law is granted primarily (but not exclusively) to the judiciary. In particular, Article III grants federal courts the power to

---

<sup>464</sup> This statement is not meant to imply that absolute deference is never appropriate. Indeed, there are some treaty interpretation issues where absolute deference may be warranted. *See, e.g.,* *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, \_\_\_ (9<sup>th</sup> Cir. 1999) (stating that the question whether Taiwan is bound by China’s adherence to the Warsaw Convention “is a question for the political branches, rather than the judiciary”). However, it is untenable to claim that the judiciary owes absolute deference to the political branches in every case involving treaty interpretation.

<sup>465</sup> Under the *Chevron* doctrine, courts will defer to an administrative agency’s interpretation of a statute if the agency is charged with administering the statute and its interpretation is reasonable. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

<sup>466</sup> *See* Yoo, *Politics as Law*, *supra* note 114; Yoo, *False Sirens*, *supra* note 399. For a partial response to Professor Yoo, *see* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263 (2002).

<sup>467</sup> Yoo, *False Sirens*, *supra* note 399, at 1309.

<sup>468</sup> *See* U.S. Const. art. II, § 2, cl. 2.

<sup>469</sup> Yoo, *False Sirens*, *supra* note 399, at 1309.

<sup>470</sup> U.S. Const. art. VI, cl. 2.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

adjudicate cases arising under treaties,<sup>471</sup> and Article VI gives state courts the duty to enforce treaties.<sup>472</sup> If, as Yoo claims, the Constitution granted the President exclusive control over treaty interpretation, then the references to treaties in Articles III and VI of the Constitution would be superfluous.

In some of its earliest reported decisions, the Supreme Court affirmed the principle that treaty interpretation is, at least in part, a judicial function.<sup>473</sup> Modern Supreme Court decisions have reaffirmed the principle that, although courts owe deference to executive branch views on treaty interpretation, “courts interpret treaties for themselves.”<sup>474</sup> Indeed, there are numerous cases in which U.S. courts have adopted interpretations of treaties that were at odds with the construction espoused by the executive branch.<sup>475</sup> Thus, despite Professor Yoo’s contrary assertion, constitutional text and judicial precedent show that treaty interpretation is not an exclusively executive power.

2. *Chevron Deference*: According to the Restatement: “Courts in the United States have final authority to interpret an international agreement . . . but will give great weight to an interpretation made by the Executive Branch.”<sup>476</sup> Professor Bradley has suggested that this “treaty interpretation deference” is best understood as a form of *Chevron* deference.<sup>477</sup> Under the *Chevron* doctrine, although courts are deferential to the executive branch, they “do not defer if they find that the plain language of the treaty clearly resolves the issue, or if the executive branch’s interpretation is unreasonable.”<sup>478</sup> In this section, we contend that courts applying a *Chevron* approach to a claim under article 31 of the Civilian Convention would likely hold that: a) at least some of the Guantanamo detainees are protected under the Civilian Convention, if not the POW Convention; and b) at least some of the interrogation techniques approved by Secretary Rumsfeld violate article 31.

---

<sup>471</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>472</sup> U.S. Const. art. VI, cl. 2 (“the Judges in every State shall be bound” by treaties).

<sup>473</sup> See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109-110 (1801) (stating that treaty implementation is usually “superintended by, the executive of each nation,” but if a treaty “affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) (“In all these cases, it seems to me, that the courts, in which the cases arose, were the only proper authority to decide, whether the case was within the article of the treaty, and the operation and effect of it”).

<sup>474</sup> *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

<sup>475</sup> See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953, 962 (1994) (citing cases).

<sup>476</sup> Restatement (Third), *supra* note 22, § 326(2).

<sup>477</sup> Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 702 (2000).

<sup>478</sup> *Id.*, at 703. Here, we do not attempt to defend a *Chevron* approach to treaty interpretation as a normative matter. As a descriptive matter, though, the *Chevron* doctrine does a reasonably good job of describing the courts’ approach to treaty interpretation. Accordingly, we assume that courts would adopt this approach in cases where plaintiffs raise claims under the Geneva Conventions.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

First, the Administration’s claim that none of the detainees are protected by the Civilian Convention constitutes an unreasonable interpretation of that treaty. The government’s official position is that the Geneva Conventions “apply to the Taliban detainees, but not to the al Qaeda international terrorists.”<sup>479</sup> The government’s rationale is that al Qaeda members are not covered by the Conventions because al Qaeda “is an international terrorist group and cannot be considered a state party to the Geneva Convention.”<sup>480</sup> Thus, from the government’s standpoint, the al Qaeda detainees are not legally entitled to protection under the POW Convention or the Civilian Convention.<sup>481</sup> This position is flatly inconsistent with the Geneva Conventions—indeed, it verges on the absurd. The Civilian Convention provides explicitly that it applies to all persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>482</sup> There are only three exceptions to this broad coverage. First, persons protected by one of the other three Conventions are not protected by the Civilian Convention. Second, “[n]ationals of a State which is not bound by the Convention are not protected by it.”<sup>483</sup> Third, “[n]ationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”<sup>484</sup>

The Administration cannot rely on the first exception, because it claims that the al Qaeda detainees are not protected by any of the Geneva Conventions. The second exception has very little practical application because almost every

---

<sup>479</sup> White House Press Statement, *supra* note 12.

<sup>480</sup> *Id.*

<sup>481</sup> As discussed in Part I, the Bush Administration concluded that Common Article 3 does not apply to the conflict because it is international in character. *See supra* note 72. And as demonstrated above, this position is flatly inconsistent with the text, structure, and history of the Conventions. *See supra* note 72. On the other hand, it is unclear whether the Bush Administration thinks that the Taliban detainees qualify as protected persons under the Civilian Convention. On the one hand, the government has said that the Conventions “apply to the Taliban detainees.” *Id.*; Fact Sheet, *supra* note 13. This seems to imply that they are legally entitled to some protection under the Conventions. On the other hand, Secretary of Defense Donald Rumsfeld stated that the U.S. would, as a matter of *policy*, treat the detainees humanely, but he suggested that the U.S. was under no legal obligation to do so. *See* U.S. Dep’t of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), *available at* <http://www.defenselink.mil/news/Jan2002>. Moreover, there is no question that the Taliban detainees are being denied some of the protections to which they would be legally entitled as protected persons under the Civilian Convention. *See infra* notes 479-494 and accompanying text. This suggests that the Bush Administration does not believe that they are legally entitled to such protections.

<sup>482</sup> Civilian Convention, *supra* note 10, art. 4.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

state in the world is bound by the Convention.<sup>485</sup> Some of the al Qaeda detainees might legitimately be denied protection under the third exception, depending upon their nationality.<sup>486</sup> But the Administration claims that the Conventions do not apply to the Al Qaeda detainees, *regardless of their nationality*. That claim is contradicted by the plain meaning of the Civilians Convention.

The Administration also argues that the Civilians Convention protects only “non-combatant” civilians; and, as such, it does not apply to “unlawful” combatants.<sup>487</sup> This position is also difficult to square with the plain meaning of the Civilians Convention. As just discussed, Article 4 of the Convention defines the category of persons protected by the Convention broadly.<sup>488</sup> The provision does not expressly limit the application of the Convention to persons taking no part in the hostilities.<sup>489</sup> Indeed, the Convention prescribes, in some detail, rules governing the treatment of civilians “suspected of or engaged in activities hostile to the State.”<sup>490</sup> It is also important to note that the definitions of “protected persons” in the other Geneva Conventions are, without exception, quite detailed.<sup>491</sup> When read in light of the other Conventions, the Civilians Convention should not be interpreted as *implicitly* excluding from its protection a broad category of individuals otherwise satisfying its definition of “protected persons.” Moreover, the Administration’s position is expressly rejected by a consensus of commentators,<sup>492</sup> contemporary international war crimes jurisprudence,<sup>493</sup> and national military manuals.<sup>494</sup>

---

<sup>485</sup> As of this writing, there are 191 states parties to the Geneva Conventions. *See supra* note 50.

<sup>486</sup> To invoke the third exception as a basis for denying treaty rights to the Guantanamo detainees, the Administration would either have to show that they are “nationals of a co-belligerent state,” or that they are “in the territory of a belligerent State.” Civilians Convention, *supra* note 10, art. 4. Although it is not entirely clear which states qualify as “co-belligerents” in these circumstances, there may be a few detainees from such states. However, the Administration has consistently maintained that Guantanamo is not U.S. territory. The Bush Administration cannot have it both ways. If Guantanamo is not U.S. territory, then any detainees who are not POWs are protected as civilian internees, unless they are nationals of a co-belligerent state. If Guantanamo is U.S. territory, then the detainees are entitled to federal constitutional and statutory protections that might legitimately be denied to aliens outside U.S. territory.

<sup>487</sup> *See* White House Fact Sheet, *supra* note 13.

<sup>488</sup> Civilians Convention, *supra* note 10, art. 4.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*, art. 5.

<sup>491</sup> *See* Geneva Convention I, *supra* note 10, art. 4; Geneva Convention II, *supra* note 10, art. 4; POW Convention, *supra* note 10, art. 4.

<sup>492</sup> *See, e.g.*, HILLARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE, 137 (2nd ed. 1998); MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 261-63 (1982); Jinks, *supra* note 48; George Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 893 (2002); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, BRITISH Y.B. INT’L L. 197 (1971); Frits Kalshoven, *The Position of Guerrilla Fighters under the Law of War*, 11 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 55, 71 (1972); Esbjorn Rosenblad, *Guerrilla Warfare and International Law*, 12 REVUE DE DROIT

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

Second, no reasonable construction of Article 31 of the Civilian Convention would permit the interrogation techniques authorized by the Administration. Recall that Article 31 states: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>495</sup> By design, the interrogation techniques authorized for use in Guantanamo involve the systematic application of physical and moral coercion. And although the President’s Order depriving the detainees of all protection under the Geneva Conventions also directed the military to treat all detainees “humanely,” several techniques authorized (and no doubt utilized) by the Department of Defense violate many of the most fundamental precepts of the Conventions, including Article 31 of the Civilian Convention. Indeed, the Administration acknowledges—in the very order issued in April 2003 by Secretary of Defense Rumsfeld in which the Administration’s “mature” interrogation policy is established<sup>496</sup>—that several of the techniques are

---

PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 91, 98 (1973); Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 849 (2003).

<sup>493</sup> See, e.g., *Prosecutor v. Delalic et al.*, ICTY (Judgment), IT-96-21-T, 16 November 1998, para. 271 (“If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.”).

<sup>494</sup> See, e.g., DEP’T OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE 31 (1956) (United States) (“If a person is determined by a competent tribunal, acting in conformity with Article 5 [GC III] not to fall within any of the categories listed in Article 4 [GC III], he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 [GC IV].”); BRITISH MILITARY MANUAL, PART III: LAW OF LAND WARFARE 96 (1958) (United Kingdom).

<sup>495</sup> Civilian Convention, *supra* note 10, art. 31. See also POW Convention, *supra* note 10, art. 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”)

<sup>496</sup> See Dep’t of Defense, *Counter-Resistance Techniques in the War on Terrorism*, Memorandum for the Commander, US Southern Command from Secretary of Defense Donald Rumsfeld, April 16, 2003, available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html> [hereinafter *Rumsfeld April 2003 Memo*]. This Memo, signed by Secretary Rumsfeld, details the Administration’s considered view on which interrogation techniques—beyond those authorized in then existing military law and policy—are pre-authorized in Guantanamo. See DEP’T OF ARMY, FM 34-52, INTELLIGENCE INTERROGATION (1987) (summarizing U.S. policy regarding interrogation of war detainees). The Memo is the endpoint in the Administration’s evolving interrogation policy for Guantanamo. In January 2002, Secretary Rumsfeld issued a memorandum to the Joint Chiefs of Staff reporting that the Department had determined that the detainees were not entitled to POW status; and directing combatant commanders to treat the detainees humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with the Geneva Conventions of 1949.” Dep’t of Defense, *Status of Taliban and Al Qaida*, Memorandum to the Joint Chiefs of Staff from Secretary of Defense Donald Rumsfeld, January 19, 2002, available online at <http://news.findlaw.com/hdocs/docs/dod/62204index.html>. Of course, the White House adopted this policy as a formal matter in February 2002—formally established in President Bush’s February 7 Directive and publicly announced in the White House Fact Sheet. See Bush Directive on Treatment of Detainees, *supra* note 13. By the summer of 2002, combatant commanders had concluded that (1) many of the detainees had been trained in counter-interrogation techniques; and (2) some of the detainees had information that could prove quite useful in the War on Terrorism. See White House, *Press Briefing by White House Counsel Judge Alberto Gonzalez, et al.*, June 22, 2004 (opening statement of Daniel J. Dell’Orto, Principle Deputy General

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

inconsistent with the Geneva Conventions (if indeed the Conventions apply) including: the “Incentive/Removal of Incentive” techniques that involves the withdrawal of privileges accorded to detainees as a matter of right by the Conventions;<sup>497</sup> the “Pride and Ego Down” technique involving attacks or insults against the ego of the detainee;<sup>498</sup> the “Mutt and Jeff” technique involving harsh intimidation tactics;<sup>499</sup> and the “Isolation” technique involving the solitary confinement of detainees for thirty days or more.<sup>500</sup> In addition, several other techniques expressly pre-authorized may well violate the Conventions depending on the manner in which they are utilized including several strategies relying on the implied threat of gross mistreatment.<sup>501</sup>

It is also important to note that the legal memoranda ostensibly justifying the use of these techniques only offer sustained analysis of whether the techniques

---

Counsel of the Department of Defense), available at [www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html](http://www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html). These conclusions ultimately generated a formal request to utilize so called “counter-resistance” interrogation techniques on detainees in Guantanamo. The request makes its way up to the Commander of the Southern Command and then on to the Pentagon. *See id.* On December 2, 2002, Secretary Rumsfeld pre-authorizes combatant commanders to utilize several harsh counter-resistance techniques in Guantanamo including 20-hour interrogations, hooding, removal of clothing, forced shaving, use of stress-induced phobias like fear of dogs, and telling detainee that he or his family are in imminent danger of death. *See* Dep’t of Defense, *Counter Resistance Techniques*, Action Memorandum for Secretary of Defense Donald Rumsfeld from General Counsel William J. Haynes, II, November 27, 2002 (approved by Secretary Rumsfeld on December 2, 2002) [hereinafter *Rumsfeld December 2002 Order*]; Dep’t of Defense, *Request for Approval of Counter-Resistance Strategies*, Memorandum for Commander, Joint Task Force 170 from LTC Jerald Phifer, Director, J2, October 11, 2002 (cataloguing the techniques referenced in Rumsfeld’s December 2002 Order), available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html>. Secretary Rumsfeld, in turn, rescinded this pre-authorization on January 15, 2003 pending a study to be undertaken by a special Working Group led by the DoD’s General Counsel. *See* Dep’t of Defense, *Counter-Resistance Techniques*, Memorandum to Commander, Southern Command from Secretary of Defense Donald Rumsfeld, January 15, 2003, available at [www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html](http://www.whitehouse.gov/news/releases/2004/06/print/20040622-14.html). This Order did not preclude the use of the controversial techniques, rather it simply directed the Commander of the Southern Command to request in writing the use of these techniques if the Commander determines that the use of any such technique was warranted in an individual case. *See id.* Following the final report of the Working Group, Secretary Rumsfeld issued the April 2003 Order. *See Working Group Report on Detainee Interrogation, supra* note 7.

<sup>497</sup> *Rumsfeld April 2003 Memo, supra* note 496 at Tab A, Interrogation Technique B.

<sup>498</sup> *Id.* at Tab A, Interrogation Technique I.

<sup>499</sup> *Id.* at Tab A, Interrogation Technique O.

<sup>500</sup> *Id.* at Tab A, Interrogation Technique X.

<sup>501</sup> These include: the “Dietary Manipulation” technique that may involve the use of hunger or thirst as an inducement to cooperate, *Rumsfeld April 2003 Memo, supra* note 496 at Tab A, Interrogation Technique T; the “Environmental Manipulation” technique that may involve adjustment of the temperature or the introduction of unpleasant smells, *id.* at Tab A, Interrogation Technique U; the “Sleep Adjustment” technique, *id.* at Tab A, Interrogation Technique V; and the “False Flag” technique whereby the interrogator sets out to convince the detainee that the interrogator is a national of a country known for the harsh treatment of detainees, *id.* at Tab A, Interrogation Technique W. Each of these strategies utilize implied threats of abuse (via the further deterioration of living conditions or the harsh treatment of a “false flag” interrogator) if the detainee fails to cooperate. As such, each is arguably inconsistent with the Conventions.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

constitute “torture” within the meaning of U.S. criminal law.<sup>502</sup> The important point here is that these techniques are plainly inconsistent with the Civilian Convention (as well as the POW Convention and arguably Common Article 3) irrespective of whether they constitute “torture” within the meaning of either international or U.S. law.

\*\*\*\*\*

This analysis of potential treaty-based APA claims is, of course, provisional and we offer it here to illustrate a more fundamental point: the courts have a meaningful role to play in enforcing the Geneva Conventions. As a consequence, the President is bound by the Conventions not simply as a formal matter, but also as a practical matter.

### CONCLUSION

The central issue presented in this Article is the question whether the President is bound by the Geneva Conventions. The preceding analysis suggests several reasons why the President is bound. First, the Geneva Conventions are the Law of the Land under the Supremacy Clause. Second, Congress has not authorized the President to violate the Geneva Conventions, or to promulgate rules inconsistent with the Conventions. Third, any conflict between a Presidential order and a treaty that is Law of the Land must be resolved in favor of the treaty, unless Congress has authorized executive action inconsistent with the treaty, or the President is acting within the scope of his exclusive constitutional authority. Fourth, the rules embodied in the Geneva Conventions address matters within the scope of Congress’ Article I powers, and the President lacks the constitutional power (absent congressional authorization) to violate treaty provisions within the scope of Article I. Finally, U.S. courts have both the power and the duty, at least in some circumstances, to restrain federal executive action that violates the Conventions.

When a crisis presents itself, there is a strong tendency to concentrate power in the executive branch. The events following September 11, 2001 exemplify this trend. In response to that crisis, the Bush Administration has adopted a variety of measures to augment executive power. It is not surprising that executive branch officials responsible for conducting the war on terrorism advocate an approach to constitutional interpretation that maximizes Presidential power, and minimizes treaty-based constraints on the exercise of that power.

---

<sup>502</sup> See, e.g., Bybee Memo, *supra* note 5; Working Group Report on Detainee Interrogation, *supra* note 7.

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

However, in the final analysis, it is both dangerous and counterproductive to permit the President to utilize the war on terror as an opportunity to augment the powers of the executive branch at the expense of the other two branches.

The U.S. Constitution was designed, in part, to limit executive power. The Founding generation was acutely aware of the dangers inherent in a system that concentrated power in the hands of a supreme monarch. To avert those dangers, they created a governmental structure in which there is no supreme ruler, because the law itself is supreme. Specifically, the Constitution accords supremacy to three types of law: the Constitution, statutes, and treaties.<sup>503</sup> To ensure that the President is not above the law, the Constitution gives the President a duty to “take Care that the Laws be faithfully executed.”<sup>504</sup> That duty applies not only to constitutional and statutory law, but also to treaty law. Therefore, the President is bound by the Geneva Conventions because the Geneva Conventions have the status of supreme federal law, and the President has a constitutional duty faithfully to execute the treaties.

Some government officials responsible for national security policy may well scoff at this conclusion. Constitutional analysis, they might say, must be faithful not only to the text and structure of the Constitution, but also to the practical realities of life in an age of global terrorism. Terrorists armed with the destructive capacity of modern technology pose a unique threat to the United States. Moreover, the President has a duty to “preserve, protect and defend the Constitution of the United States,”<sup>505</sup> which necessarily implies a duty to protect and defend the people of the United States. If faithful execution of the law would endanger the security of U.S. citizens, then the President’s duty to protect and defend the people must take precedence over rigid adherence to the letter of the law. The U.S. Supreme Court, the guardian of the rule of law within our domestic constitutional system, has stated: “the Constitution is not a suicide pact.”<sup>506</sup>

In our view, the alleged dilemma that forces the President to choose between protecting national security and upholding the rule of law is a false dichotomy, at least insofar as the Geneva Conventions are concerned. United States compliance with the Geneva Conventions does not endanger national security. To the contrary, failure to comply with the Conventions endangers the welfare of U.S. troops overseas, because other nations are unlikely to accord captured U.S. soldiers better treatment than the United States provides to the

---

<sup>503</sup> U.S. Const. art. VI, cl. 2.

<sup>504</sup> U.S. Const. art. II, § 3.

<sup>505</sup> U.S. Const. art. II, § 1.

<sup>506</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

**Is the President Bound by the Geneva Conventions?**  
**Draft – July 17, 2004**

enemy troops it captures.<sup>507</sup> In addition, substantial evidence suggests that mistreatment of the enemy directly undermines the war effort—by discouraging surrender by the enemy, encouraging reprisals, decreasing morale of home forces, and decreasing political support for the war effort.<sup>508</sup> Moreover, U.S. failure to adhere strictly to the Conventions undermines respect for the rule of law among the international community.<sup>509</sup> That, in turn, weakens our security, because U.S. national security depends in part upon the willingness of other nations and sub-national actors to conform their conduct to the requirements of international law.<sup>510</sup> Thus, it is a sad irony that Presidential policies that derogate from the Geneva Conventions for the sake of protecting national security may ultimately thwart accomplishment of that very objective.

---

<sup>507</sup> See, e.g., Taft Memo, *supra* note 70; *Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan*, Memorandum to Alberto Gonzales, White House Counsel, from Colin Powell, Secretary of State, January 26, 2002.

<sup>508</sup> See, e.g., Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. (forthcoming 2004).

<sup>509</sup> See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

<sup>510</sup> *Id.*

## University of Chicago Law School

### Public Law and Legal Theory Working Paper Series

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v. 110, no. 1).
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).

21. Geoffrey R. Stone, *Above the Law: Research Methods, Ethics, and the Law of Privilege* (March 2002; forthcoming *J. Sociological Methodology* 2002).
22. Cass R. Sunstein, *Is There a Constitutional Right to Clone?* (March 2002).
23. Emily Buss, *Parental Rights* (May 2002, forthcoming *Virginia Law Review*).
24. David A. Strauss, *Must Like Cases Be Treated Alike?* (May 2002).
25. David A. Strauss, *The Common Law Genius of the Warren Court* (May 2002).
26. Jack Goldsmith and Ryan Goodman, *U.S. Civil Litigation and International Terrorism* (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes* (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions* (July 2002).
29. Elizabeth Garrett, *Is the Party Over? The Court and the Political Process* (August 2002).
30. Cass R. Sunstein, *The Rights of Animals: A Very Short Primer* (August 2002).
31. Joseph Isenbergh, *Activists Vote Twice* (November 2002).
32. Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget* (November 2002).
33. Cass R. Sunstein, *Hazardous Heuristics* (November 2002).
34. Cass R. Sunstein, *Conformity and Dissent* (November 2002).
35. Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education* (December 2002).
36. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (January 2003).
37. Adrian Vermeule, *Mead in the Trenches* (January 2003).
38. Cass R. Sunstein, *Beyond the Precautionary Principle* (January 2003).
39. Adrian Vermeule, *The Constitutional Law of Congressional Procedure* (February 2003).
40. Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice* (March 2003).
41. Emily Buss, *Children's Associational Rights? Why Less Is More* (March 2003)
42. Emily Buss, *The Speech Enhancing Effect of Internet Regulation* (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron* (May 2003)
44. Elizabeth Garrett, *Legislating Chevron* (April 2003)
45. Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis* (April 2003)
46. Mary Ann Case, *Developing a Taste for Not Being Discriminated Against* (May 2003)
47. Saul Levmore and Kyle Logue, *Insuring against Terrorism – and Crime* (June 2003)
48. Eric Posner and Adrian Vermeule, *Accommodating Emergencies* (September 2003)

49. Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory* (September 2003)
50. Cass R. Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (September 2003)
51. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally* (November 2003)
52. Jenia Iontcheva, *Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court* (January 2004)
53. Lior Jacob Strahilevitz, *The Right to Destroy* (January 2004)
54. Adrian Vermeule, *Submajority Rules (in Legislatures and Elsewhere)* (January 2004)
55. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism* (January 2004)
56. Catharine A. MacKinnon, *Directions in Sexual Harrassment Law: Afterword* (January 2004)
57. Cass R. Sunstein, *Black on Brown* (February 2004)
58. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence* (February 2004)
59. Bernard E. Harcourt, *You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers* (February 2004)
60. Adrian Vermeule, *Selection Effects in Constitutional Law* (March 2004)
61. Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?* (July 2004)
62. Derek Jinks and Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law* (March 2004)
63. Eric A. Posner and Alan O. Sykes, *Optimal War and *Jus Ad Bellum** (April 2004)
64. Derek Jinks, *Protective Parity and the Law of War* (April 2004)
65. Derek Jinks, *The Declining Significance of POW Status* (April 2004)
66. Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility* (June 2004)
67. Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians}* (June 2004)
68. Jide Nzelibe, *The Uniqueness of Foreign Affairs* (July 2004)