INTERNATIONAL LAW AND CONSTITUTIONAL INTERPRETATION: THE COMMANDER IN CHIEF CLAUSE RECONSIDERED

Ingrid Brunk Wuerth[*]

The Commander in Chief Clause is a difficult, underexplored area of constitutional interpretation. It is also a context in which international law is often mentioned, but not fully defended, as a possible method of interpreting the Constitution. This Article analyzes why the Commander in Chief Clause is difficult and argues that international law helps resolve some of the problems that the Clause presents. Because of weaknesses in originalist analysis, changes over time, and lack of judicial competence in military matters, the Court and commentators have relied on second-order interpretive norms like congressional authorization and executive branch practice in interpreting the war and foreign affairs powers of the President. International law can itself function as a second-order interpretive norm, in many ways similar to other forms of congressional authorization or executive branch practice. But because it is mediated in unique ways—by other countries and within our own domestic political system—international law is an especially compelling way to resolve problems with judicial competence and changes over time. International law also makes a powerful contribution to an originalist understanding of the Commander in Chief Clause: the Constitution explicitly vested control over war-related questions of international law with Congress, not the President.

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* Professor of Law, Vanderbilt University Law School. For comments and suggestions, thanks to Curtis Bradley, Chris Bryant, Bill Casto, Sarah Cleveland, Jacob Katz Cogan, Adam Feibelman, Larry Helfer, Donna Nagy, Mary Ellen O'Connell, Michael Ramsey, Peter Spiro, Suja Thomas, Michael Van Alstine, and participants in faculty workshops at Boston College Law School, Notre Dame Law School, the University of Cincinnati College of Law, and the Vanderbilt University Law School. Drew Brinkman and Rebecca Landry provided excellent research assistance. The Harold C. Schott Foundation at the University of Cincinnati generously supported this project.

INTRODUCTION

The Commander in Chief Clause is widely understood as a particularly difficult area of constitutional interpretation.[1] Congress is vested with several powers related to the initiation and prosecution of war, and the relationship between these powers and those of the president as commander in chief remains contested. For decades, debate has centered on the president's independent power to initiate hostilities in light of Congress's power under the Declare War Clause. This issue generated both the War Powers Resolution and a massive corpus of academic writing.[2] Today, however, in the wake of September 11, 2001, the money question is the scope of the president's power to prosecute war.

The Bush administration has relied heavily on the Commander in Chief Clause as the constitutional basis for a host of controversial actions.[3] Indeed,

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1. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring); W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS 1, 7–9 (1981); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 5 (1951); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051 (2005).

2. *See* Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution means by "Declare War"*, 93 CORNELL L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=977244 (collecting important examples of academic work on the Declare War Clause); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1544 nn.1–2 (2002).

3. *See* Brief for Respondents at 18–23, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.aa.pdf (military trials); Brief for the Petitioner at 27–38, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-1027.mer.aa.pdf (military detentions); Opening Brief for the Appellant at 52–57, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05-6396) (military detentions); U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–10 (2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (wiretapping); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President 31–39 (Aug. 1, 2002) [hereinafter

the initial legal response to September 11 was apparently predicated on the president's unilateral wartime authority, which envisioned little role for Congress.[4] Since then, the Supreme Court has reaffirmed a strong role for Congress in setting the scope of the president's powers and analyzed issues related to congressional authorization in great detail.[5] But even where the Court has struck down the president's actions as inconsistent with—or beyond—such authorization, it has largely eschewed general discussions of how the president's war powers are to be distinguished from those of Congress. The June 2006 decision in *Hamdan v. Rumsfeld* is just the most recent example.[6] And in most cases, the Supreme Court does not reach these issues at all, because it upholds the president's actions as consistent with authorization provided by Congress. As a result, it is unclear even what methodological approach the Court would use to demarcate the president's power from that of Congress. Questions about the president's war-prosecution power thus remain unanswered. Current examples include whether the president is bound by the McCain Amendment governing the treatment of detainees,[7] whether Congress could limit the president's use of cluster bombs,[8] and whether the president could convene military commissions in emergency situations without the sanction of Congress.[9]

Somewhat surprisingly, perhaps, given the uncertainty in this area, there seems to be a relatively widespread and longstanding view that international law is relevant to understanding the scope of the president's war powers.[10]

Bybee Interrogation Memorandum], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (interrogations).

4. *See* Bybee Interrogation Memorandum, *supra* note 3, at 39; *see also* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1, 32 (2004); Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 190–93 (2004).

5. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2772–75 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 516–24 (2004) (plurality opinion).

6. *See Hamdan*, 126 S. Ct. 2749; *see also* Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* Endo, 323 U.S. 283 (1944); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

7. *See* President's Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html (last visited May 17, 2007).

8. *See* S. Amend. 4882 to H.R. 5631, 109th Cong. (2d Sess. 2006), 152 CONG. REC. S8975 (daily ed. Sept. 5, 2006).

9. *See* Hamdan, 126 S. Ct. at 2774 (noting this as an open issue).

10. *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 294–95 (5th ed. 1984); J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–78 (rev. ed. 1963); WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 53 (2d ed. 1871); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 298–301 (1922); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 113–14 (2d ed. 1989); Letter from Abraham Lincoln to James C. Conklin (Aug. 26, 1863), *in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 408 (Roy Basler ed., 1953); Jack Goldsmith, *Justice Jackson's Unpublished Opinion in* Ex Parte Quirin, 9 GREEN BAG 2D 223, 227 (2006); David Golove, *Military*

Even government lawyers and scholars otherwise skeptical of international law in constitutional interpretation concede its relevance, at least in passing, in the war powers and foreign affairs contexts.[11] Moreover, many Supreme Court cases that have considered the president's war powers, including the most recent ones,[12] have discussed international law, and the Court has never upheld an exercise of war powers by the president that it concluded violated international law. Finally, lower courts have, without much explanation, explicitly relied on international law in interpreting the president's constitutional power as commander in chief.[13] Despite this, there has been little theoretical attempt to examine international law as a tool of constitutional interpretation for the Commander in Chief Clause, and there has been no attempt to relate international law to other methods of interpretation.

The role of international law becomes more comprehensible once one appreciates the challenges involved in applying conventional interpretive methodologies. Originalism gives at least partially unsatisfactory answers,[14] because both war and the presidency have changed over time, and judges are poorly equipped to make military or strategic judgments.[15] These difficulties have pushed courts toward second-order interpretative norms, such as congressional authorization and past executive branch practice, that mediate direct friction between the president and the courts and help capture changes over time. Second-order interpretative norms thus draw Congress and previous executive branches into constitutional interpretation.

This Article argues that international law is, and has been, attractive to courts, lawyers, and scholars struggling with the Commander in Chief

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Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach, 35 N.Y.U. J. INT'L L. & POL. 363 (2003); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1270 (2002); Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 42, 50–51 (1995).

11. *E.g.*, Brief for Respondents at 20–21, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.aa.pdf; Brief for the Petitioner at 27–30, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-1027.mer.aa.pdf; Brief for the Respondents at 13–18, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-6996.mer.aa.pdf; Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004); Alberto R. Gonzales, Attorney Gen., U.S. Dep't of Justice, Prepared Remarks Chicago Law School (Nov. 9, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511092.html (last visited May 17, 2007).

12. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 19–26 (2006) (describing cases); Golove, *supra* note 10 (same).

13. *See* Hamdi v. Rumsfeld, 337 F.3d 335, 341–45 (4th Cir. 2003) (Wilkinson, J., concurring); *id.* at 351–52, 355 (Traxler, J., concurring); Hamdi v. Rumsfeld, 316 F.3d 450, 468–69, 474 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) (plurality opinion); Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *modified sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd* 542 U.S. 426 (2004).

14. Originalism as used here means the text of the Constitution as it would have been understood when it was enacted. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–130 (2004).

15. *See infra* Sections II.B and II.C.

Clause because it can function as a second-order interpretive norm, thereby aiding in the resolution of many of the difficulties associated with the Clause. International law can partially resolve problems with judicial competence and changes over time by allowing judges to gauge the scope of presidential power based not on their own "idiosyncratic judgments"[16] about military necessity but rather on a form of lawmaking in which tradition and widespread practices, including those of the United States, play a key role. Thus, international law provides strong benchmarks against which courts can evaluate functional[17] claims about presidential power, and it can work to reduce judicial discretion in a difficult area of constitutional interpretation.

International law is a unique and especially valuable second-order interpretive norm for other reasons as well. Customary international law and executive agreements binding on the United States are themselves particularly strong forms of executive branch practice, because they embody norms so significant that the executive branch was willing to commit to them internationally. When he acts consistently with these sources of international law, the president's claim to constitutional authority is strengthened; inconsistency with international law, on the other hand, can cut against the president's claim to authority. Article II treaties require both an external commitment to other nations *and* a robust form of domestic interbranch cooperation, because, unlike statutes, they cannot be concluded over the objection of the president, and they require a supermajority of the Senate for approval.[18] The president's power to act contrary to a treaty should accordingly be narrower than his power to act contrary to a statute. Any functional claims made by the president are deeply undercut by his (or his predecessor's) willingness to bargain away the power in question and by the thick form of interbranch accommodation necessary to enact a treaty.

There is a final reason to use international law to interpret the Commander in Chief Clause: originalism. The contemporary assumption that Congress has little role in war prosecution neglects the significance of the Marque and Reprisal Clause and the Capture Clause of the Constitution.[19] These textual grants of authority, frequently ignored by scholars outside the context of war initiation, are analyzed here in terms of their significance for war prosecution in eighteenth-century international law, particularly during the Revolutionary War. This analysis shows that the Constitution deliberately gave Congress control over the development and interpretation of important

16. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 389 (2006).

17. Functionalism as used here means an approach that focuses on the "core function" of each branch and allows flexibility in how power is allocated among them. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1736–37 (1996); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

18. *See infra* notes 72–80 and accompanying text.

19. *See infra* notes 27–28 and accompanying text and Section III.B (discussing these and other powers of Congress related to war).

war-related questions of international law, even at the expense of the president's power to make strategic decisions about the deployment of force.

Part I of this Article lays out in more detail the interpretive difficulties associated with the Commander in Chief Clause and specifies the features of international law that make it an appealing tool. Part II considers international law's unique advantages as a second-order interpretative norm by analyzing treaties, customary international law, and sole executive agreements. To the extent that these sources of international law are binding on the United States, they are mediated not only by the participation of other nations but also by our own political branches. Relying on these sources can complement and, in some cases, improve upon the Court's current analysis of congressional authorization and executive branch practice. Part III considers congressional and presidential authority over international law and war prosecution as it was understood at the framing and concludes that the Constitution assigned control over these issues to Congress.

Before turning to the argument, the project of this Article should be distinguished from the debate over whether international law is directly enforceable against the president.[20] International law may serve to interpret the Commander in Chief Clause, yet not be directly enforceable by the courts against the president.[21] The converse might also be true, and either use may vary depending on the type of international law in question.[22] This Article also does not directly engage the debate about the justiciability of war-related questions of constitutional law.[23] The argument is not that all violations of international law must somehow be corrected by the courts but instead that when courts do construe the president's war powers, international law will frequently be helpful. Beyond just the judicial branch, this Article's nuanced analysis of the relationship between international law and

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20. *See, e.g.*, Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988). Other general arguments about the respective powers of Congress and the president could also affect some of the analysis in this Article, but they, too, are analytically distinct. For example, some have suggested that Congress can regulate all aspects of presidential power under the Necessary and Proper Clause. *See, e.g.*, Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 226–27, 231–35 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)). The appropriate deference to the executive branch in determining the content of international law is another related, but analytically distinct, issue. *See infra* text accompanying notes 212–216.

21. The two issues overlap, however: direct enforcement of international law against the president may depend on the scope of his independent Article II powers. The scope of the president's constitutional power, this Article argues, may depend itself in part on international law.

22. *See, e.g.*, Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1232–33 (2005) (noting distinctions between self-executing and non-self-executing treaties in determining whether the president is bound by treaties).

23. *See, e.g.*, Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (rejecting a lawsuit by congressmen alleging that President Clinton exceeded his war powers under the Constitution, though disagreeing as to whether the claim was justiciable).

the commander in chief power should be of use to other parties charged with interpreting the Constitution, such as Congress and the executive branch.[24]

I. THE COMMANDER IN CHIEF CLAUSE: INTERPRETIVE DIFFICULTIES

Why is the Commander in Chief Clause such a difficult area of constitutional interpretation? Problems with originalist analysis of the Clause, changes over time in warfare and the office of the president, and the courts' institutional weaknesses in evaluating the conduct of war make it difficult to draw clear lines between presidential and congressional power to wage war. In addition to (and because of) these factors, there is little case law directly addressing the president's own exclusive[25] war powers under the Constitution, particularly as distinct from those of Congress.

A. *Originalism*

The text of Articles I and II of the Constitution do not create a clear picture of where the president's power to prosecute war ends and that of Congress begins.[26] Compared to other foreign affairs issues, the Constitution's textual treatment of war is relatively detailed. It makes the president commander in chief,[27] but at the same time it gives Congress many war-related powers, such as the power to declare war, to raise and support armies, to make rules for the government and regulation of the armed forces, and to grant letters of marque and reprisal.[28] The historical use of the term commander in chief points to a narrow power,[29] but the limited war-related debates at the Constitutional Convention[30] and during ratification[31] focused

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24. *Cf.* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1463–72 (1997) (emphasizing the importance of coordinate constitutional interpretation, particularly by the executive branch, in separation of powers cases); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 530–35 (1999) (discussing executive and legislative interpretation of the Constitution).

25. As used here, an exclusive power is one that the president can exercise even over the objection of Congress. A concurrent power is one that the president can exercise when Congress is otherwise silent, but not over the objection of Congress.

26. H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 20 (2002); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring); Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1842–43 (2003).

27. U.S. CONST. art II.

28. *Id.* art. I, § 8.

29. *See infra* notes 119–126 and accompanying text.

30. *See* POWELL, *supra* note 26; REVELEY, *supra* note 1; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 317–20 (Max Farrand ed., 1937).

31. The ratification debates did question whether the president should be permitted to command in person. *See* Patrick Henry, Statement at the Virginia Ratifying Convention (June 5, 1788), *reprinted in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN

mostly on war initiation and the treaty clause, not the actual conduct of war. They accordingly generated little explicit discussion of war prosecution.

Attempts by courts and scholars to define the president's exclusive power as commander in chief have not been entirely successful. Some, for example, read the Clause as conferring exclusive power on the president to act in the "theater of military operations,"[32] to direct force against the "outside world" but not "inward" or domestically,[33] or to issue "tactical commands tailored to particular battles or campaigns."[34] Phrased in the reverse, Congress cannot "direct the forces it has created"[35] or "interfere with [the president's] day-to-day command of an authorized war."[36] Standing alone, however, these textual statements of the commander in chief power do little to resolve difficult questions, such as whether the president has the exclusive power to detain "enemy combatants" both here and abroad, whether the president may engage in domestic surveillance, and whether he may direct troops or conduct interrogations in ways that violate treaties and federal statutes. Courts have generally put little weight on such formulations, and to the extent they have relied upon them, the results have not been impressive.[37]

It is difficult to divide authority between Articles I and II based on these specific grants of power alone. Originalists have thus relied on two additional, general interpretive strategies. First, some argue that the Vesting Clause in Article II is a substantive grant to the president of all executive

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1787, at 59–60 (Jonathan Elliot ed., 2d ed., Phila., J.B. Lippincott & Co. 1866) (1836); *see also infra* note 185 and accompanying text.

32. *See* CORWIN, *supra* note 10, at 288; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866).

33. *See* Goldsmith, *supra* note 10, at 237; *see also Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

34. Ramsey, *supra* note 22, at 1241–42 n.116; *see also* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850); THE FEDERALIST No. 69, at 460 (Alexander Hamilton) (Paul Leicester Ford ed., N.Y., Henry Holt & Co. 1898) ("It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.").

35. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92 MICH. L. REV. 1364, 1391 (1994).

36. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 903 (1994); *see also* WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 129 (H. Jefferson Powell ed., Carolina Academic Press 2002) (1916); *cf. Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring) ("[Congress] is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions." (quoting U.S. CONST. art. I, § 8, cl. 14)).

37. *See, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866) (reasoning that Indiana was not "on the theatre of active military operations"); *id.* at 140 (Chase, C.J., concurring) (reasoning that Indiana was on "the theatre of military operations"); Hamdi v. Rumsfeld, 337 F.3d 335, 351 (4th Cir. 2003) (Traxler, J., concurring) (arguing, in the denial of rehearing *en banc*, that Hamdi's detention fell within the "[e]xecutive's wartime powers under Article II" because he was captured in a "foreign combat zone"), *vacated*, 542 U.S. 507 (2004) (plurality opinion); *id.* at 358–59 (Luttig, J., dissenting) (criticizing Traxler's argument); *id.* at 372–74 (Motz, J., dissenting) (same). Justice Jackson withdrew his separate opinion in *Ex parte Quirin* and the distinction between inward and outward action from his *Youngstown* concurrence has attracted little attention.

power not specifically allocated to Congress.[38] The Vesting Clause could help clarify the scope of the president's war powers by vesting in the president executive power that includes a broad power to prosecute war.[39] But this approach makes the Commander in Chief Clause redundant.[40] Originalists respond that the substantial grant of war powers to Congress makes the Commander in Chief Clause necessary because otherwise it might be inferred that, despite the Vesting Clause, Congress has the power to direct the conduct of war.[41] But this argument suggests that residual war powers ought to lie with Congress, not the President—the strength of the argument depends, after all, on the strength of the inference that Congress, by virtue of its specific grants of war-related powers, also has *other* war powers. More fundamentally, the Vesting Clause thesis, even if correct, does not itself answer questions about how the president's war powers should be distinguished from those of Congress, nor does it clarify whether the president's commander in chief powers are different from his general executive power to wage war.

Second, some originalists venture further from the text of the Constitution and take what might be called a big tent approach. They rely, for example, on the "structure" of the Constitution, which includes generalizations about the *functional* advantages of a strong executive branch[42] as well as "governmental practice."[43] Another example derives from the Constitution a "law of necessity and self-preservation"[44] that "take[s] priority over

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38. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 18–22 (2005); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) [hereinafter Prakash & Ramsey, *The Executive Power*]. *Contra* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (criticizing the Vesting Clause thesis). For a response to Bradley and Flaherty's criticism, see Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1624–25 n.120 (2005) [hereinafter Prakash & Ramsey, *Foreign Affairs*].

39. *Cf.* John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1200–01 (2004) ("Even if the Constitution's entrustment of the Commander in Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause.").

40. Bradley & Flaherty, *supra* note 38, at 555.

41. Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 28–30; Ramsey & Prakash, *The Executive Power*, *supra* note 38, at 259.

42. For example, Prof. Yoo's discussion about prisoners concludes, based on "structural" arguments, that "[t]he handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by 'a single hand.'" Yoo, *supra* note 39, at 1200 (citing THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1982)). On Yoo as an originalist, see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 172 (1996) (defending originalism in the interpretation of war powers)

43. Yoo, *supra* note 39, at 1204–05.

44. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1276 (2004); *see also id.* at 1267–69.

practically any other constitutional rule set forth in the document,"[45] based on the "somewhat cryptic" presidential oath.[46] In conjunction with the Commander in Chief Clause, this results in a "gigantic" presidential power.[47]

These arguments are not very convincing. In general, they devote little time to the substantial textual grants of wartime authority to Congress, and they eschew any real defense of their approach as originalist despite potential methodological problems with reliance on contemporary practice, broad structural claims, and ahistoric textual observations. Originalist interpretation of the Commander in Chief Clause is further complicated, as the next Section describes, by changes over time.

B. *Changes Over Time*

Changes in the methods and scope of warfare have made the text of the Constitution less accessible to modern readers. Time has partially obscured, for example, the meaning of textual provisions such as "Letters of Marque and Reprisal" and "Captures on Land and Water."[48] Beyond simply making originalist analysis more difficult, fundamental changes in how war is waged may also make formalist interpretive methods less normatively attractive. Since the framing, there has been an increase in the powers that presidents, most famously Lincoln, have actually exercised as commander in chief,[49] as well as an increase in the destructive capacity of weapons, the scope of warfare, and the power of the United States.[50] The expansion of the commander in chief power appears to be in some tension with the original view of the Clause.[51] Even if originalism could successfully wind back the clock and pretend, for example, that the Civil War and World War II had never happened, it is unclear that this would be normatively attractive. The point here is not to revisit general debates about the merits of originalism but instead to suggest that for all of the factors discussed here, the Com-

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45. *Id.* at 1283.

46. *Id.* at 1289.

47. Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 812–13 (2006).

48. U.S. CONST. art. I, § 8, cl. 10.

49. CORWIN, *supra* note 10, at 263–68; REVELEY, *supra* note 1, at 135–70; *see* Brandon, *supra* note 26, at 1847–48; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 68 (2004).

50. CORWIN, *supra* note 10, at 269–70; W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 778–81 (1989); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 888 (1996) (book review); Office of the Legal Adviser, Dep't of State, *The Legality of the United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1101 (1966).

51. *See infra* Sections III.A–B; *see also* Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U. L. REV. 53, 57 (1986) (arguing that the ratifiers of the Constitution had a narrow conception of the president's power as commander in chief).

mander in Chief Clause may be an especially hard area in which to defend some versions of originalism.[52]

For some of the same reasons, foreign affairs issues have generally been particularly difficult for originalists. Formalist arguments, for example, that sole or congressional-executive agreements are unconstitutional,[53] or that Congress must declare war before the president may use force (except in response to an immediate attack),[54] are difficult to maintain in the face of long-term practice to the contrary.[55] In cases raising issues like these, the Supreme Court has explicitly relied on the past practice of the executive branch,[56] and some scholars have emphasized the need for interpretive methodologies that embrace at least some level of constitutional change over time.[57]

C. *Judicial (In)Competence*

Courts and commentators have emphasized the lack of judicial competence in evaluating questions about the conduct of war. As compared to courts, the executive branch has more experience and better access to information about war.[58] It also needs to act at times with dispatch, secrecy, and "unity of plan," all of which may counsel against interference by the courts.[59] Courts have hesitated to rule at all on war powers issues and have rarely ruled against the president, particularly while conflict is ongoing.[60]

The need to accommodate change over time and concerns with judicial competence have pushed courts away from formalism and toward

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52. *See* Sunstein, *supra* note 16, at 400–02 (suggesting that originalism might be an unattractive method of interpretation in war powers and national security cases).

53. *See, e.g.*, Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

54. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

55. *See* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 975–81, 1008–09 (2001); Stromseth, *supra* note 50, at 872–75, 878; Sunstein, *supra* note 16, at 389–91.

56. *See infra* text accompanying notes 94–95.

57. *E.g.*, Spiro, *supra* note 55; Sunstein, *supra* note 16.

58. *See* Ludecke v. Watkins, 335 U.S. 160, 170 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); Thomasson v. Perry, 80 F.3d 915, 926 (4th Cir. 1996); Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2823–26 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507, 582–83 (2004) (Thomas, J., dissenting); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Sunstein, *supra* note 16, at 401.

59. *See Hamdan*, 126 S. Ct. at 2823–26 (Thomas, J., dissenting); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *Curtiss-Wright*, 299 U.S. at 320; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 768 (Ronald D. Rotunda & John E. Nowak eds., 1987); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205 (Vintage Books 2000) (1998).

60. *See* REHNQUIST, *supra* note 59; ROSSITER, *supra* note 1, at 91 (asserting judges, like the general public, like to "win wars").

second-order interpretive strategies—those that mediate the friction between the judiciary and the executive—including congressional authorization (direct and implied)[61] and the practice of the executive branch.[62] These tools of interpretation avoid directly pitting the judiciary against the president, in part by bringing other actors (Congress and prior executive branches) into the process of constitutional interpretation. Thus, in most war-related cases, the Court has upheld the president's actions on the grounds that Congress authorized them.[63] Where it concludes that authorization is lacking, the Court has generally struck down the action with little or no discussion of the president's exclusive constitutional power.[64]

The reliance on second-order interpretative strategies, especially congressional authorization, has been praised for good reason.[65] There can be problems, however, with this approach to presidential war powers, particularly to the extent that it relies solely on the binary determination of the presence or absence of congressional authorization. The Court's current approach places enormous emphasis on determining whether Congress has authorized the president's action, an endeavor that has drawn criticism,[66] sharply divided the Court in both *Hamdan v. Rumsfeld* and *Hamdi v. Rumsfeld*,[67] and created uncertainty about the legality of other executive

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61. *See* Issacharoff & Pildes, *supra* note 4, at 8–30 (describing this trend in detail). Issacharoff and Pildes use the term "second-order issues" in a similar way to describe judicial decision-making based on "appropriate institutions and processes" rather than "abstract disputes over the meaning of various 'rights.'" *Id.* at 44.

62. *See infra* notes 94–95 and accompanying text; *cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981).

63. *E.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946); *In re* Yamashita, 327 U.S. 1, 11, 25 (1946); Hirabayashi v. United States, 320 U.S. 81, 97–101 (1943); *Ex parte* Quirin, 317 U.S. 1, 35, 48 (1942); *cf.* The Prize Cases, 67 U.S. (2 Black) 635, 670–71 (1862) (reasoning that because Congress had retroactively blessed the forfeitures, the Court did not have to decide whether such act was "necessary under the circumstances").

64. *See supra* note 6 and accompanying text.

65. *See* Issacharoff & Pildes, *supra* note 4; Sunstein, *supra* note 16, at 394–95; Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1832–40 (2004).

66. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 119, 139–40, 148 (1990); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadow*, 19 CONST. COMMENT. 87, 145 (2002).

67. In *Hamdi*, Justices O'Connor, Kennedy, Breyer, and Thomas, and Chief Justice Rehnquist concluded that the detentions were authorized by Congress. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–24 (2004) (O'Connor, J., plurality opinion) (joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.); *id.* at 587 (Thomas, J., dissenting). Four Justices concluded that the detentions were not authorized by Congress. *Id.* at 541–53 (Souter, J., concurring in part, dissenting in part) (joined by Ginsburg, J.); *id.* at 574 (Scalia, J., dissenting) (joined by Stevens, J.). In *Hamdan*, the Court held that the military commissions exceeded the limits that Congress had placed on the president. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796–97 (2006). Four Justices, however, would have gone further and held that the president's actions violated the statute in additional ways. *Id.* at 2775–86, 2796–98 (opinion of Stevens, J., joined by Breyer, Souter, & Ginsburg, J.J.). The three dissenting justices concluded that the commissions were authorized by Congress. *Id.* at 2823–49 (Thomas, J., dissenting) (joined by Scalia, J., and joined in part by Alito, J.). Justice Alito, however, did not join all of this analysis. *Id.* at 2849–50 (Alito, J., dissenting).

branch activities.[68] More fundamentally, reliance on congressional authorization leaves the question of the president's power to act beyond or contrary to the authorization of Congress almost entirely unresolved. Proponents of second-order interpretive strategies may believe that the president's power to act contrary to Congress is extremely limited, but they generally fall short of arguing he has *no* such power as commander in chief.[69] The core interpretive problem regarding the Commander in Chief Clause, therefore, remains unresolved.

D. *International Law*

International law provides an important tool for understanding the president's power as commander in chief by improving both second-order and originalist analysis of the Clause. It is itself a kind of second-order interpretative norm and in some contexts provides additional evidence of executive branch practice and congressional authorization. International law is also superior in some respects to other ways of understanding congressional authorization and executive branch practice. It offers a more fine-grained approach to congressional authorization, as illustrated by the distinction between statutes and treaties developed at length below. In short, one value of focusing on congressional authorization is that it provides norms developed by the political branches working in cooperation with each other. Under Article II of the Constitution, treaties require a unique, heightened form of cooperation between the Senate and the president and thus embody norms of particular significance. Accordingly, the president's power to act contrary to treaties should be narrower than his power to act contrary to statutes. In this context, international law is a particularly valuable second-order interpretive norm.

Similarly, customary international law binding on the United States is in some ways superior to traditional forms of executive branch practice because it embodies especially durable, carefully considered, and transparent forms of practice. By measuring the president's claims of necessity on the one hand against international law on the other hand, courts ease difficulties with judicial competence by relying not on their own expertise but instead on the collective wisdom of many countries working together to fashion appropriate limitations on wartime conduct.

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68. *See* Bellia, *supra* note 66, at 148–54 (detailing problems with analysis of congressional authorization); Curtis A. Bradley et al., *January 9, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Letter of December 22, 2005*, 81 IND. L.J. 1364, 1365–67 (2006) [hereinafter *Letter to Congressional Leadership*] (arguing, contrary to the Department of Justice, that Congress had not authorized electronic surveillance of persons in the United States).

69. *See, e.g.*, Issacharoff & Pildes, *supra* note 4, at 44 (noting that when he acts contrary to Congress, the president's actions are struck down or receive closer scrutiny); Sunstein, *supra* note 49, at 77 ("[A]s a general rule, the executive should not be allowed to proceed on its own.").

By adding to second-order methodologies, international law can also help negotiate changes over time. Although change in international law is frequently understood as undermining its value in constitutional interpretation,[70] change actually enhances that value. One difficulty with interpreting the Commander in Chief Clause is the need to create room for changes over time without making the Clause entirely meaningless. The content of international law changes to reflect developments in the meaning, complexity, and tools of war. This change—and its mediation by other countries and our own political branches—make international law an excellent tool against which to evaluate claims of necessity and functional imperative.[71] Again, the point is not that international law binds the president, or that it serves as the sole method of constitutional interpretation, but instead that it can work alongside other tools of constitutional interpretation.

Finally, international law enhances not only second-order but also originalist analysis of the Commander in Chief Clause. The Constitution's allocation of war powers gave *Congress* control over the critical questions of war-related eighteenth-century international law. A modern interpretive rule that places exclusive presidential power at its lowest point when the president acts contrary to international law is therefore faithful to the way Articles I and II originally divided the war powers. Part III defends this argument. Part II considers the second-order arguments in more detail.

II. INTERNATIONAL LAW AND SECOND-ORDER NORMS

This Part considers international law as a second-order tool of constitutional interpretation in war powers cases. It describes how international law serves as one form of congressional authorization and executive branch practice. It also argues that in some contexts international law offers unique advantages over other ways of analyzing both congressional authorization and executive branch practice. Different forms of international law—treaties,

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70. *See, e.g.*, John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006).

71. Professors Bradley and Goldsmith are "skeptical" that international law can serve as a tool to interpret the Commander in Chief Clause, in part because the laws of war are more restrictive today than they were at the framing: thus, "[i]f the Commander in Chief Clause itself incorporates evolving law-of-war restrictions, the scope of the Commander-in-Chief power would have shrunk significantly during the past two centuries, which is contrary to constitutional history." Bradley & Goldsmith, *supra* note 1, at 2097 n.220. But this argument holds only if international law serves as the *sole* tool of constitutional interpretation. The Department of Justice argues, for example, that as commander in chief, the president has the constitutional authority to conduct surveillance in the United States without a warrant. *See* Letter from William E. Moschella, Assistant Attorney Gen., Dep't of Justice, to Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005), *available at* http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf. For an argument contrary to the position of the Department of Justice, see *Letter to Congressional Leadership*, *supra* note 68. Assuming the position of the Justice Department is correct, the president's power over time may have expanded in an area that is simply unregulated by international law. Moreover, in many areas regulated in detail by international law, such as the trial and detention of prisoners, it is unclear that the president today does enjoy greater constitutional authority than he did at the framing. *See Hamdan*, 126 S. Ct. 2749.

executive agreements, and custom—vary in their interpretive potential. We begin with treaties.

A. *Treaties*

Treaties, as a matter of U.S. constitutional law, involve a unique form of domestic lawmaking. They require a supermajority of the Senate, and they are the only type of formal lawmaking that *requires* the involvement of the president.[72] The president negotiates and presents treaties to the Senate for advice and consent to ratification;[73] statutes, by contrast, are drafted by legislators.[74] Also, unlike statutes, it is impossible for the Senate to conclude a treaty over the objection of the president. After the Senate gives its advice and consent, the president makes the final decision about ratification. That is, Congress cannot override the president and enact a treaty against his wishes, and any reservations or conditions it attaches to the treaty are subject to the president's final decision to ratify.[75] The very formation of a treaty presupposes interbranch cooperation and accommodation in a way that the enactment of a statute does not.[76]

These unique characteristics of treaties in the U.S. constitutional system have several implications for separation of powers analysis. First, treaties to which the United States is a party can themselves serve as a form of congressional authorization. If the president acts within a framework created by a treaty, like the Geneva Conventions, courts should generally infer congressional approval. Second, consistent with the plurality's reasoning in *Hamdi v. Rumsfeld*,[77] actions contrary to treaty obligations are presumptively contrary to the will of Congress. These two points are important because the Court has relied heavily on congressional authorization in resolving foreign affairs and war powers cases,[78] but they help only to gauge congressional authorization and do so by giving equivalent weight to treaties and statutes.

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72. U.S. CONST. art. II, § 2, cl. 2.

73. *Id.*

74. *Id.* art. I, § 7.

75. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 184 (2d ed. 1996).

76. The last-in-time rule does not undermine this conclusion. The rule provides that if a treaty and federal statute conflict, the one later enacted controls. *Id.* at 209. Because the rule puts treaties and statutes on equal footing, it might seem to conflict with the foregoing analysis, which distinguishes between treaties and statutes. The last-in-time rule, however, resolves direct conflicts between statutes and treaties, when courts must pick which to apply. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190 (1888). The point here, by contrast, is that treaties have special significance in separation of powers contexts, where the fundamental question is the scope of the president's constitutional power.

77. 542 U.S. 507, 536–37 (2004) (plurality opinion) (reasoning that the AUMF does not authorize indefinite detention, which would violate the Geneva Conventions).

78. *See supra* notes 61–64 and accompanying text.

Third, the president's power to act contrary to a treaty should be narrower than his power to act contrary to a statute. Here, the president must rely on his own exclusive power, which is generally at its lowest when he acts contrary to a treaty. This is true in part for functional reasons. The president's willingness to make a binding, external commitment that he will not take a particular action is functionally more significant than his failure to veto a statute in which Congress seeks to limit that same power. Courts should be skeptical of arguments based, for example, on wartime necessity when the current or prior president was willing to negotiate away in a treaty the power in question. This is true not only because of the importance of the external commitment[79] but also because of the president's unique role in treaty-making. Statutes—even those not vetoed by the president—may not actually reflect the president's preferences.

The McCain Amendment provides a good example. The Senate passed the final version by a veto-proof majority; the House expressed its support for the language (also with a veto-proof majority); and the president—knowing he had lost—then voiced his support for the bill.[80] Treaties, as noted above, cannot be concluded over the objection of the president. The president's claim that as commander in chief he must enjoy a particular power is deeply undercut when the power is one that he or his predecessor bargained away through an Article II treaty.

The benefits of this interpretive norm are also evident from the importance of inter-branch cooperation in separation of powers cases. As Justice Kennedy recently emphasized in *Hamdan v. Rumsfeld*,

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.[81]

Treaties, even more than statutes, are the result of a "deliberative and reflective process" that engages both of the political branches. Not only are they veto proof, they also require approval by a supermajority of the Senate, which means their terms have received particularly close scrutiny by the smaller legislative body whose members enjoy longer tenure and are there-

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79. *See, e.g.*, John B. Bellinger III, Legal Adviser to the Sec'y of State, Remarks at the Duke Law School Center for International and Comparative Law: Reflections on Transatlantic Approaches to International Law (Nov. 15, 2006), *available at* http://www.state.gov/s/l/rls/77279.htm (last visited May 17, 2007) ("[W]e take our international obligations seriously[;] we do not enter into them lightly.").

80. *See* Josh White, *President Relents, Backs Torture Ban; McCain Proposal Had Veto-Proof Support*, WASH. POST, Dec. 16, 2005, at A1.

81. 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

fore best situated to deal with international issues.[82] Treaties, by design, are difficult to conclude[83] and signal especially durable and important international commitments by the United States.[84] When the president acts contrary to the interbranch cooperation created through a treaty regime, his exclusive powers are at their lowest.[85]

This argument does not depend on characterization of the treaty as self-executing, because the question is not whether the treaty is directly applicable as domestic law but instead how the process of treaty formation is related to separation of powers issues. A treaty that is not self-executing because it is too vague for judicial enforcement[86] might also have limited use in separation of powers analysis. But the two contexts are different. A treaty too vague for judicial enforcement when it stands alone may nonetheless be helpful as one separation of powers consideration among several. Similarly, a treaty that is not self-executing because of a declaration or understanding to that effect by the Senate[87] may not be directly enforceable in court but might still be helpful in determining shared Senate-presidential understandings about the appropriate conduct of war.[88] Finally, the most significant treaties governing international humanitarian law are very specific and do not include statements of non-self-execution.[89]

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82. The treaty power was lodged with the Senate, as opposed to the House, because it was viewed as particularly important. The smaller number of senators, their longer tenure, and their method of selection ensured that the power was lodged with those "who best understand our national interests, whether considered in relation to the several States or to foreign nations; who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence." THE FEDERALIST, *supra* note 34, No. 64, at 428 (John Jay).

83. HENKIN, *supra* note 75, at 175 n.2; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 760–63 (2002); John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 5, 7–8 (2002).

84. Setear, *supra* note 83, at 15–16; *see also* Lawson & Seidman, *supra* note 41, at 12 (emphasizing that treaties, but not statutes, can create legally binding obligations with other countries).

85. This analysis would not impact the president's power to withdraw from a treaty when such withdrawal is consistent with the treaty itself and international law. *See* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1589 (2005) (distinguishing between exiting and breaching treaties). This analysis also does not limit the ability of the president and Congress acting together to violate or renounce U.S. obligations under international law. Moreover, in situations requiring an immediate response to an emergency, other functional and/or textual arguments could weigh in favor of the president's power to act, even in ways contrary to a treaty. The extent to which the president is bound by treaties and other forms of international law is contested and beyond the scope of this article. *See* text accompanying notes 21–23.

86. *See, e.g.*, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985).

87. *See* International Covenant on Civil and Political Rights, 138 CONG. REC. S8069–71 (1992).

88. *See* Cleveland, *supra* note 12, at 118–19 (arguing that non-self-executing treaties can serve to interpret the Constitution).

89. *See, e.g.*, 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. 85; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of

The analysis advanced here is fully consistent with, and indeed helps explain, the Court's approach in *Hamdan*, which involved a statute that incorporated the law of war as a limitation on the president's actions. The two levels of interbranch accommodation at work in *Hamdan* left almost no room for claims of independent presidential authority. The Court accordingly focused its analysis almost entirely on the statutory interpretation question, particularly the requirements imposed by the Geneva Conventions. Once that issue was decided against the president, it was clear he also lacked the independent constitutional authority to convene the challenged military commission.

What if we reverse the role of the treaty violation? That is, what if the president acts contrary to a statute but consistent with a treaty obligation? This scenario is unlikely because ambiguous statutes are generally interpreted consistently with international law,[90] particularly where (as is likely in this example) the president would argue in favor of this interpretation. If a later-in-time statute is clear, however, that Congress intends to abrogate the treaty requirement, then the statute will control as a matter of domestic law.[91] This does not resolve the constitutional question, however, because the foregoing analysis attempts to at least partially disaggregate the binding domestic character of international law and its use in interpreting the scope of the Commander in Chief Clause. Suppose, to turn to a concrete example, Congress ordered the president to mistreat prisoners[92] in violation of treaty obligations so as to punish other nations. In this situation, the functional reasoning set out above would favor the president's power as commander in chief over that of Congress.[93]

B. *Executive Agreements and Customary International Law*

Executive agreements and customary international law can also serve as tools of constitutional interpretation. In some respects they are similar to executive branch practice, which is widely viewed as an important tool in separation of powers contexts, including foreign affairs and war powers.[94]

Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; 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, collectively, Geneva Conventions].

90. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 116 (1804); *see also* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 330–31 (2005).

91. *See* Whitney v. Robertson, 124 U.S. 190 (1888); *see also supra* note 76.

92. *Cf.* Act of Mar. 3, 1799, ch. 45, 1 Stat. 743 ("[T]he President . . . is hereby empowered and required to cause the most rigorous retaliation to be executed on any such citizens of the French Republic, as have been or hereafter may be captured in pursuance of any of the laws of the United States.").

93. The historical argument cuts the other way, however. *See infra* text accompanying notes 203–204.

94. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–17 (2003); Dames & Moore v. Regan, 453 U.S. 654, 679, 682–83 (1981). *See generally* KOH, *supra* note 66, at 70–71; Bobbitt, *supra* note

Justice Frankfurter's discussion of executive branch practice in his concurring opinion in *Youngstown* suggests that it has three overlapping roles in constitutional interpretation: to gauge congressional approval, to effectuate the president's own power to interpret the Constitution, and to make functional sense of the Constitution's allocation of powers between Articles I and II.[95]

Many international norms applicable to the United States constitute some form of executive branch practice, so to that extent the use of international law as an interpretive tool should be unproblematic. For example, the general laws and customs of war, which the United States helped develop[96] and to which it has long adhered,[97] can illustrate how our own executive branch has behaved in past conflicts.[98] In this context, the value of international law will depend upon the extent to which it reflects the actual practice of the United States and, obviously, on the extent to which executive branch practice is relevant at all. But customary international law and executive agreements also differ from standard executive branch practice. Unlike other forms of executive branch practice, international law requires both an external commitment by the United States and the agreement of other nations. These differences add interpretive value, at least in some contexts.

Consider first an action taken by the executive branch consistent with commitments made in an executive agreement or with obligations that the executive branch has agreed are binding as customary international law.[99]

35, at 1383–87; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984); Stromseth, *supra* note 50, at 875–82; Yoo, *supra* note 39, at 1204–05.

95. Justice Frankfurter reasons that "[d]eeply embedded traditional ways of conducting government" can "give meaning to the words of a text":

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by [Article II, Section 1].

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

96. Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224, 238–39 (1998); W. Hays Parks, *Means and Methods of Warfare*, 38 GEO. WASH. INT'L L. REV. 511 (2006).

97. *See, e.g.*, INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GEN.'S SCH., OPERATIONAL LAW HANDBOOK 28 (2003); U.S. DEP'T OF DEF., DIRECTIVE NO. 5100.77, DOD LAW OF WAR PROGRAM (1998).

98. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775–86 (2006).

99. A norm of customary international law to which the United States had persistently objected would not be binding on the United States and would not have the interpretative value described here. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 11 (6th ed. 2003). Customary international law to which the United States has not announced its adherence (but to which it has not objected) might have some role in constitutional interpretation. Claims of military necessity are, as we have seen, especially difficult for courts to evaluate. If the president claims that a particular power is essential to the conduct of war, and many countries have renounced that power through international obligations, the president's functional claim may be weakened. The strength of

The external commitment enhances the president's functional claim that the action in question is necessary or essential to his authority, because he was willing to bargain away other powers in order to preserve it. The external commitment also ensures that the action is a considered one and reflects a strong commitment by the president. Relying on executive branch practice in constitutional interpretation must mean more than simply deferring to the president's current litigating position. Looking to customary international law and executive agreements helps courts evaluate claims that a particular practice is consistent and long standing.[100]

Article 75 of Additional Protocol I to the Geneva Conventions serves as an example.[101] Article 75 provides protections that apply to all persons, even those who do not qualify for treatment as prisoners of war.[102] Additional Protocol I was negotiated in Geneva over a four-year period ending in 1977, with the U.S. delegation playing an important role.[103] The negotiations on behalf of the United States were conducted in part by military officers, and the Office of the Secretary of Defense and the Joint Chiefs of Staff reviewed and approved the U.S. position papers.[104] In the end, the United States signed, but did not ratify, Protocol I. President Reagan's decision not to recommend ratification was unrelated to Article 75,[105] which the United States subsequently recognized as customary international law.[106] Article 75 high-

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that conclusion may vary based on the universality of the norm in question. *See* Cleveland, *supra* note 12, at 113–15 (discussing norm universality).

100. *See* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 55–59 (1990); Spiro, *supra* note 55, at 1015–16 (emphasizing the importance of repetition and longevity when relying on past practice); Stromseth, *supra* note 50, at 880 (emphasizing the importance of consistency when relying on past practice).

101. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977, 1125 U.N.T.S. 3.

102. *Id.* This language is much more detailed than Common Article III of the Geneva Conventions. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 412–13 (2004) (discussing the relationship between Common Article 3 and Article 75).

103. *See* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 2–3 (1991); *see also* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 459 (1982) (detailing the U.S. position on aspects of Article 75).

104. *See* Aldrich, *supra* note 103, at 2–3.

105. *See* Michael J. Matheson, *Continuity and Change in the Law of War: 1975–2005: Detainees and POWs*, 38 GEO. WASH. INT'L L. REV. 543, 546 (2006); *see also* Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109 (1985) (providing detailed criticism of parts of Protocol I, but not Article 75); George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the Proposed 1977 Geneva Convention Protocol I*, 26 VA. J. INT'L L. 693, 699 (1986) (describing Article 75 as "warmly welcomed" by the United States in 1977).

106. Matheson, *supra* note 105 at 546; Michael J. Matheson, Deputy Legal Adviser, U.S. Dep't of State, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), *in* 2 AM. U. J. INT'L L. & POL'Y 419, 420–21 (1987). Multinational and "coalition deployments," such as those involving NATO forces, typically use Protocol I rules as the "legal baseline"

lights the involvement of the United States in the development of customary international law, as well as the careful and studied commitments that such law embodies.[107]

An action by the president that violates U.S. obligations under customary international law or an executive agreement, on the other hand, is more likely to be unconstitutional both based on the implied intentions of Congress and for functional reasons. The functional grounds are similar to those for treaties: a power that the executive branch has agreed it does not have under international law is difficult to characterize as essential to the conduct of war. As to congressional intent, if Congress has passed statutory authorization for the president to act, then any preexisting international commitments to which the president has pledged his support should be relevant to construing the scope of that authorization.[108] It is harder, however, to infer from Congress's silence disapproval of the president's violation of an executive agreement or of customary international law. On the other hand, the general presumption that Congress seeks to comply with international law,[109] coupled with the president's assurances that he does and will comply with international law,[110] could be used to conclude that Congress, even when silent, presumptively disapproves of presidential violations of international law.

C. *Conclusion*

The foregoing analysis explains how international law can strengthen the courts' analysis of congressional authorization, one form of second-order interpretation. Treaties can provide direct authorization while, as detailed in other scholarship,[111] additional forms of international law can help interpret the scope of statutory authorizations for the use of force. As described above, where direct congressional authorization is lacking, consistency with international law generally supports the president's claim that he is operating in an area of implicit congressional authorization, while inconsistency with international law weakens claims of implied congressional authorization. Justice Jackson's famous tripartite analysis in

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governing hostilities and status of forces agreements frequently rely on Article 75 to define the protections due those who are arrested or detained. *See* Jinks, *supra* note 102, at 431.

107. A claim by the president that he has constitutional authority to try combatants by military commission absent congressional authorization, for example, would be functionally strengthened if the commission comported with Article 75. The Bush administration may be reconsidering its adherence to Article 75. *See* Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1, 6 (comparing the U.S. Army Judge Advocate General's Legal Center and School Operational Handbooks from 2003 and 2006 and suggesting that the government is rolling back its commitments to Protocol I in general).

108. *See* Wuerth, *supra* note 90, at 330.

109. *See id.*

110. *Id.* at 336–37.

111. *See, e.g.*, Bradley & Goldsmith, *supra* note 1; Wuerth, *supra* note 90.

Youngstown relies on congressional authorization to assign presidential actions into one of three categories,[112] and international law can play a key role in this characterization.

International law, also for the reasons provided above, strengthens constitutional analysis within Justice Jackson's second and third *Youngstown* categories. In category two, the president acts without clear congressional authorization but absent explicit congressional disapproval. Category two analysis depends on the power of the president, the implied will of Congress, and past executive branch practice.[113] In category three, the president acts contrary to Congress, and the constitutionality of his actions will depend on his exclusive power as distinct from that of Congress.[114] The president's claim of exclusive constitutional authority in category three, however, should be extremely weak when he acts contrary to a treaty, both because of the particular kind of interbranch cooperation involved in forming the treaty, and because any claim of necessity is undermined by the prior treaty commitment.[115] In both categories two and three, other forms of international law can buttress or undercut claims to executive power based on past practice and necessity.[116]

III. INTERNATIONAL LAW AND ORIGINALISM

International law also makes a powerful contribution to an originalist understanding of the Commander in Chief Clause. Read in light of the Revolutionary War, the allocation of powers in the Articles of Confederation, and eighteenth-century international law, the text of the Constitution reflects a deliberate decision to give Congress power over international law related to the waging of war. Although originalist analysis, as discussed above, is particularly difficult in this area, this original division of war prosecution powers remains constitutionally significant and is at least partially preserved by a modern interpretive rule holding that the president's power is lowest when he acts contrary to international law.

A. *The Text: Commander in Chief*

Article II of the Constitution makes the president the "Commander in Chief of the Army and Navy of the United States" and of state militias "when called into the actual Service of the United States."[117] It also vests

112. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

113. *Id.* at 637.

114. *Id.*

115. *See supra* Section II.A.

116. *See supra* Section II.B.

117. U.S. CONST. art. II, § 2

"the executive Power" in the president.[118] The term commander in chief was not defined under eighteenth-century international law, but it was used in some state constitutions and colonial charters.[119] In general, the term commander in chief meant merely the highest person in a particular chain of command, such as Esek Hopkins of Rhode Island, who was named "commander-in-chief" of "the fleet" in 1776.[120] The title commander in chief was perfectly consistent with being subordinate to another ultimate decision maker such as the king. Thus, colonial governors and chief admirals of particular ports or stations held the title of "commander in chief."[121] The prominent eighteenth-century international law scholar Emmerich de Vattel noted that although the "commission" of commander in chief could be "simple and unlimited," it was often "limited."[122]

At the Constitutional Convention, the phrase was apparently taken from the South Carolina draft[123] without debate, which suggests that it may have been understood as narrow and uncontroversial in scope.[124] James Madison did record a cryptic and well-known exchange at the Constitutional Convention when the phrase granting Congress the power to "declare war" was substituted for "make war."[125] The change may have been intended in part to clarify the president's power to conduct hostilities during war.[126]

There was, of course, a former commander in chief whose accomplishments were particularly well known to the framers: George Washington. Washington, under title of commander in chief during the Revolutionary War, looked to Congress to manage many aspects of the conduct of war, including the treatment and exchange of prisoners, the disposition of captured property, and strategic decisions such as whether New York should be burned. The use of this same title in the Constitution strongly suggests that if the president was expected to enjoy significantly greater war-prosecution powers than Washington had during the Revolutionary War, then that authority must come from some language other than "Commander in Chief."

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118. *Id.* art II, § 1; *see also supra* notes 38–43 and accompanying text.

119. *E.g.*, DEL. CONST. OF 1776, art. 9; PA. CONST. OF 1776, § 20; N.H. CONST. OF 1784, pt. II; S.C. CONST. OF 1778, art. III; VT. CONST. OF 1786, ch. II, § xi.

120. CHARLES OSCAR PAULLIN, THE NAVY OF THE AMERICAN REVOLUTION 52 (1906).

121. *Id.* at 52–53. For an example of a colonial governor with the commander in chief title, see JOHN FRANKLIN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD 378 (1923).

122. EMMERICH DE VATTEL, THE LAW OF NATIONS 299 (Joseph Chitty, ed., Phila., T & J.W. Johnson & Co. 1863) (1758).

123. The New Jersey Plan referred to the President's power to "direct all military operations." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 244. Hamilton's proposal gave the president the power of "direction" of war "when authorized or begun." *Id.* at 292.

124. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679 (1972).

125. *Id.* at 675–77.

126. ELY, *supra* note 54, at 5; POWELL, *supra* note 26, at 115–17 (describing the discussion about the change at the Constitutional Convention).

B. *The Text: Congress*

Consistent with a narrow understanding of "Commander in Chief," Article I gives Congress the power to "raise and support Armies,"[127] to make rules for "the Government and Regulation of the land and naval Forces,"[128] and to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[129] These last three powers, named together in Article I, Section 8, Clause 11, were well known under international law at the time the Constitution was adopted. Originalist scholars writing about war initiation have offered differing interpretations of Congress's power to declare war, but they agree that the term was defined, at least in part, by international law.[130]

The significance of international law in Clause 11 is underscored by its placement directly after Clause 10, which gives Congress the power to define and punish offenses against the law of nations. This is the Constitution's only direct reference to the law of nations. The powers granted to Congress in Clause 11, therefore, have two things in common: they were an important part of eighteenth-century international law, and they are related to war.

A letter of marque or reprisal in eighteenth-century international law permitted the bearer, frequently a private party, to seize property or people of a foreign nation in order to redress an injury or harm inflicted by that nation.[131] Such letters were widely used during maritime conflicts dating back to the thirteenth century.[132] The term capture under eighteenth-century international law generally referred to the seizure of property, and perhaps people, during war.[133]

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127. U.S. CONST. art. I, § 8.

128. *Id.* Jefferson Powell notes that this power is "associate[d]" with "the power to 'define . . . Offences against the Law of Nations.'" POWELL, *supra* note 26, at 114 (quoting U.S. CONST. art. I, § 8).

129. U.S. CONST. art. 1, § 8.

130. Ramsey, *supra* note 2, at 1569–90 (describing three views of the role of formal declarations of war in international law); Robert F. Turner, Essay, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's* War and Responsibility, 34 VA. J. INT'L L. 903, 907 (1994); Yoo, *supra* note 42, at 242.

131. 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1238 (Richard Tuck ed., Liberty Fund 2005) (1625); Grover Clark, *The English Practice With Regard to Reprisals by Private Persons*, 27 AM. J. INT'L. L. 694 (1933). *See also* G.F. DE MARTENS, AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES 10–12 (Thomas Hartwell Horne trans., Lawbook Exchange 2004) (1801). Martens explains that a letter of reprisal permitted seizure of goods only within the jurisdiction of the sovereign who granted them, while a letter of marque "authorized the seizure of them beyond the confines of his territory." *Id.* at 11. Martens and others conclude, however, that "these two expressions" have been "confounded, and are indiscriminately used now to designate both." *Id.* Some writers distinguished letters of marque on the one hand from letters of marque and reprisal on the other, based on whether they were issued during times of war (marque) or times of peace (marque and reprisal). *See, e.g.*, HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 292 n.151 (George Grafton Wilson ed., Oxford Univ. Press 1936) (1836).

132. *See, e.g.*, GROTIUS, *supra* note 131; MARTENS, *supra* note 131.

133. *See* VATTEL, *supra* note 122, at 385 n.168 (using "capture" to describe both moveable and immoveable property found on both land and water). Vattel lists "captures" under the heading of

With both captures and letters of marque and reprisal, the Constitution gave Congress control over important questions of eighteenth-century international law related to war.[134] During the Revolutionary War, for example, such letters, as well as legislation passed by the Continental Congress governing captures, specifically identified the vessels and cargo subject to capture;[135] the methods of warfare the licensed vessel could use against the enemy;[136] the treatment of persons on board the captured vessel;[137] where the licensed vessel was permitted to "cruize";[138] where the captured property (the "prize") was to be taken;[139] the form and amount of bond posted by those holding such letters;[140] and sometimes even required "written accounts

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"war" in his index. *Id.* at 626, 655. *See* RICHARD LEE, A TREATISE OF CAPTURES IN WAR (photo. reprint 1967) (1759).

134. *See* Yoo, *supra* note 42, at 251–52.

135. *See, e.g.*, 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 373 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1905) (authorizing the seizure of all "ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war against the United Colonies"); 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 230 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1906) (expanding authorized captures to include all ships and other vessels "belonging to any inhabitant or inhabitants" of Great Britain); 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 606 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1906) (expanding authorized captures to include all ships and other vessels "belonging to any subject or subjects of the King of Great Britain, except the inhabitants of the Bermudas, and Providence or Bahama islands"); 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 339 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1907) (expanding authorized captures to include "all ships and other vessels whatsoever, carrying . . . contraband goods" to the British); 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 905 (Gaillard Hunt ed., William S. Hein & Co. 2005) (1910) (requiring that vessels "commanded by the United States" conform to the regulations on neutral vessels passed by Russia); 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 80–81 (Francis Wharton ed., Wash., Gov't Printing Office 1889) [hereinafter RDC].

136. The form of Commission issued by Congress on April 2, 1776, authorized private vessels and their crews "by force of arms, to attack, seize and take the ships and other vessels belonging to the inhabitants of Great Britain." 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 248.

137. *See, e.g., id.* at 254 (prohibiting the threat of persons "contrary to common usage, and the practice of civilized nations in war"); 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 295 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1908) ("[I]f the enemy will not consent to exempt citizens from capture, agreeably to the law of nations, the commissioners be instructed positively to insist on their exchange, without any relation to rank.").

138. 13 JOURNALS OF THE CONTINENTAL CONGRESS 17741789, at 104 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1909).

139. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 374 ("[A]ll prosecutions shall be commenced in the court of that colony in which the captures shall be made . . . ."); 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 340 (authorizing private vessels also to take prizes "into any port or harbour within the dominions of any neutral state willing to admit the same"); 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 137, at 88. For public vessels Congress also determined how prize was to be divided among officers and men. *E.g.*, 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 36.

140. *E.g.*, 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 137, at 88.

of the captures" including "intelligence of what may occur or be discovered concerning the designs of the enemy."[141]

These decisions by Congress set American policy on contested questions of international law and controlled the deployments of American forces most likely to violate international law or otherwise cause diplomatic headaches. As an example of the former, a key issue of international law during the Revolutionary War was the status of enemy cargo on neutral vessels.[142] Neutral nations pushed aggressively to prohibit the seizure of enemy cargo on board their vessels. Benjamin Franklin, a U.S. representative in Paris during the war, had to respond to the complaints of neutrals that American vessels—both public and private—had seized such cargo.[143] As a result, Franklin encouraged Congress to prohibit the capture of such cargo,[144] and in the fall of 1780 Congress did so.[145] Similarly, Congress set U.S. policy on questions of recapture,[146] which items could be seized as contraband,[147] "visits" (that is, searches) of apparently neutral ves-

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141. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 250.

142. *See* Gregg L. Lint, *The American Revolution and the Law of Nations, 1776–1789*, 1 DIPLOMATIC HIST. 20, 24–26 (1977).

143. Letter from Franklin to Vergennes (June 18, 1780), *in* 3 RDC, *supra* note 135, at 801, 801–02 (responding to Dutch complaints about the American privateer *Black Prince* and explaining why the American captors were entitled to the enemy property on board); Letter from B. Franklin to the President of Congress (Aug. 9, 1780), *in* 4 RDC, *supra* note 135, at 21, 24 ("As it is likely to become the law of nations *that free ships make free goods*, I wish the Congress to consider whether it may not be proper to give orders to their cruisers not to molest foreign ships, but conform to the spirit of that treaty of neutrality.").

144. Letter from B. Franklin to the President of Congress (Aug. 9, 1780), *supra* note 143, at 24.

145. 18 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 135 at 864–867. This decision followed the Declaration of Armed Neutrality of 1780. *Id.* For details of the changes in U.S. policy during the Revolutionary War on the question of "free ships make free goods," see Lint, *supra* note 142, at 24–26.

146. This issue arose when an American privateer recaptured a French vessel, the *Isabella*, which had been captured by a Guernsey (English) privateer. Among the questions that the diplomats negotiated were the share of a prize due to the party that recaptures it (the French and English rules varied) as well as whether the Guernsey privateer was actually a pirate when it captured the French vessel, since it only had a commission to prey on American ships. Letter from Sartine to the Commissioners at Paris (Sept. 16, 1778), *in* 2 RDC, *supra* note 135, at 719, 719–20; Letter from B. Franklin, Arthur Lee, & John Adams to Sartine (Sept. 17, 1778), *in* 2 RDC, *supra* note 135, at 720, 720–22; Letter from Sartine to the Commissioners at Paris (Sept. 21, 1778), *in* 2 RDC, *supra* note 135, at 730, 730 (noting that final disposition of the issue is for the courts); Letter from B. Franklin, Arthur Lee, & John Adams to Sartine (Sept. 27, 1778), *in* 2 RDC, *supra* note 135, at 747, 747. For a resolution regarding recaptures, see 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 407. For an excerpt from French and Dutch Convention Concerning Recaptures, see Letter from John Adams to the President to Congress (May 25, 1781), *in* 4 RDC, *supra* note 135, at 435, 435–36.

147. In 1781, the King of Prussia issued an ordinance explaining its views on armed neutrality, prohibiting all Prussian subjects from carrying "merchandizes generally acknowledged to be prohibited and contraband" such as "cannons, mortars, bombs, grenades, fusils, pistols, bullets, flints, matches, powder, saltpetre, sulphur, pikes, swords, and saddles" and requesting that the belligerent powers not "permit their armed vessels to molest or take the Prussian vessels loaded with masts, timber, pitch, corn, and other materials, which, without being warlike stores, may, nevertheles [*sic*], in the sequel be converted into such stores." Letter from John Adams to the President of Con-

sels,[148] and how captured prisoners should be treated.[149] Leading treatises on international law emphasized both the complexity and importance of the international legal rules governing the seizure of private property during war, particularly on the high seas.[150]

Congress also controlled the deployment of American forces where they were most likely to violate international law or irritate possible allies. For example, neutral powers, including France, Spain, and Sweden, complained frequently that their ships and cargo had been unlawfully captured by American vessels,[151] that American vessels had improperly brought prizes into their ports,[152] and that American prize vessels were being outfitted in

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gress (May 21, 1781), *in* 4 RDC, *supra* note 135, at 424, 426. For congressional action on the question of contraband, see 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1151, 1153–58 (Gaillard Hunt, ed., William S. Hein & Co. 2005) (1912) (discussing an ordinance ascertaining what captures on water shall be legal). *See also* Lint, *supra* note 142, at 25–26 (discussing the importance of the definition of "contraband" during the Revolution).

148. MARTENS, *supra* note 131, at 51, 55–61.

149. *See supra* note 137.

150. MARTENS, *supra* note 131.

151. Letter from Benjamin Franklin, Silas Deane, & Arthur Lee to Captains of American Armed Vessels (Nov. 21, 1777), *in* 2 RDC, *supra* note 135, at 425, 425; Letter from Arthur Lee to Committee of Foreign Affairs (Nov. 27, 1777), *in* 2 RDC, *supra* note 135, at 429, 429; Letter from B. Franklin, Silas Deane, & Arthur Lee to the Committee of Foreign Affairs (Nov. 30, 1777), *in* 2 RDC, *supra* note 135, at 433, 433–36; Letter from James Gardoqui to A. Lee (Sept. 28, 1778), *in* 2 RDC, *supra* note 135, at 750, 750–51; Letter From B. Franklin to Ferdinand Grand (Oct. 14, 1778), *in* 2 RDC, *supra* note 135, at 784, 784–85.

152. In the summer of 1777, France complained, for example, that by outfitting vessels of war and by permitting them to bring English prizes into French ports, the Americans put France in violation of its treaty obligations to the British. *See* Letter from Vergennes to the Commissioners at Paris (July 16, 1777), *in* 2 RDC, *supra* note 135, at 364, 364–65 (complaining that the American vessels the *Reprisal*, the *Lexington*, and the *Dolphin* brought English prizes into French ports). The situation was a tricky one for the American diplomats in France. To the English, the French emphasized their efforts to comply with their treaty obligations and to prevent American vessels of war from using their ports. To the Americans, however, the French made clear that the disposal of American prizes in their ports would be overlooked (in part because of their commercial benefits to France) as much as possible. *See* Letter from Silas Deane to Robert Morris (Aug. 23, 1777), *in* 2 RDC, *supra* note 135, at 378, 378–82; Letter from B. Franklin, Silas Deane, & Arthur Lee to the Committee of Foreign Affairs (Sept. 8, 1777), *in* 2 RDC, *supra* note 135, at 388, 388–91. In 1780, Franklin wrote to Congress requesting it to again give orders to the American cruisers not to meddle with neutral vessels for the practice was apt to produce "ill blood." Letter from B. Franklin to the President of Congress (May 31, 1780), *in* 3 RDC, *supra* note 135, at 742, 745; *see also* Letter from Franklin to Vergennes (June 18, 1780), *supra* note 143, at 801–03. The disposition of French privateers in American ports as well as American privateers in French ports was the subject of negotiation and agreement between the French government and American Commissioners in France. *See* Letter from B. Franklin, Arthur Lee, & John Adams to Sartine (July 16, 1778), *in* 2 RDC, *supra* note 135, at 647, 647; Letter from Sartine to Commissioners (July 29, 1778), *in* 2 RDC, *supra* note 135, at 673, 673; Letter from Arthur Lee & John Adams to Sartine (Aug. 13, 1778), *in* 2 RDC, *supra* note 135, at 682, 682–83; Letter from Sartine to Commissioners at Paris (Aug. 16, 1778), *in* 2 RDC, *supra* note 135, at 684, 684–87; Letter from B. Franklin, Arthur Lee, & John Adams to Sartine (Aug. 18, 1778), *in* 2 RDC, *supra* note 135, at 688, 688–89; Letter from J. Adams to the President of Congress (Oct. 6, 1780), *in* 4 RDC, *supra* note 135, at 83, 83–84 (enclosing a Dutch ordinance prohibiting privateers from bringing prizes into Dutch ports).

their ports.[153] Through the allocation of authority over captures and letters of marque and reprisal, the Constitution vested Congress with full control over the U.S. response to these difficulties.

The Constitution also granted Congress the means to deal with the problem of American vessels, especially privateers, violating international law. The commissions issued by Congress during the Revolutionary War only authorized captures "according to the laws and usages of Nations,"[154] but privateers were notoriously difficult to control.[155] Initially, Congress warned that violations resulted in forfeiture of the bond and damages actions.[156] On May 9, 1778, after pressure from abroad, Congress issued a proclamation making clear its concern that "American armed vessels" had violated the law of nations by seizing ships belonging to subjects of neutral nations and making captures of enemy vessels in neutral waters.[157] Congress supplemented the potential punishments by emphasizing that American violators would be "condignly punished therefore" and that willful violators caught by foreign nations would have no right to claim the protection of the United States.[158] Of course, if diplomatic pressure from foreign countries became too intense, the commissions themselves could be recalled.[159] Under this system, preserved and enhanced by the text of the Constitution, Congress controlled the level of appropriate deterrence against violations of international law during war.

With the power to grant letters of marque and reprisal and to make rules concerning captures, Congress controlled the power of private and, most likely, public vessels to seize enemy vessels or property and claim them as prize. The term "capture" referred unequivocally to both private and public

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153. In December 1776, for example, the Continental Congress agreed to pay for armed vessels to be outfitted by the commissioners in Paris—assuming that France would not disapprove—but at the same time refused to permit the commissioners to authorize private ships of war because it would be too difficult to control their conduct. 1 GARDNER W. ALLEN, A NAVAL HISTORY OF THE AMERICAN REVOLUTION 279 (1913). By the following May, Congress had changed its mind and sent Franklin commissions for outfitting privateers in France. *Id.* at 279–80; *see also* Letter from Franklin to Vergennes (June 18, 1780), *supra* note 143, at 801–03 (discussing commissions for privateers in France).

154. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 230; *see also* 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 340 (prohibiting captures "contrary to, or inconsistent with the usage and customs of nations"); 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 137, at 196 (instructing privateers "not to infringe or violate the laws of nations, or the laws of neutrality").

155. 1 ALLEN, *supra* note 153, at 48–50; C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 976 (1997).

156. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 254.

157. 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 486 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1908).

158. *Id.*

159. *See* MARTENS, *supra* note 131, at 104–06; Letter from Franklin to Vergennes (June 18, 1780), *supra* note 143, at 803; Letter from Franklin to Vergennes (Aug. 15, 1780), 4 RDC, *supra* note 135, at 33.

seizures of enemy property.[160] Whether the power to grant letters of marque and reprisal applied to public vessels is a more difficult question.[161] Under the Articles of Confederation, states could not grant "commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled."[162] This language suggests a distinction between "commissions" granted to public vessels ("ships or vessels of war") and "letters of marque and reprisal" issued to private vessels. The Constitution, by contrast, uses the language "Letters of Marque and Reprisal," but leaves out entirely the phrase "commissions to any ships or vessels of war."[163] This omission might suggest that the power to issue "commissions to ships or vessels of war" was not conveyed to Congress along with the power to issue letters of marque and reprisal.

The difficulty, however, is that "ships or vessels of war" meant either private or public vessels.[164] Similarly, the term commission was used in a wide variety of ways and sometimes interchangeably with letters of marque and reprisal. All three terms were used with a great deal of imprecision.[165] The terms marque and reprisal, for example, were employed to distinguish among various ways of using force, not based solely on whether private—as opposed to public—vessels were making the seizures. Sir Mathew Hale discusses "general" wars of "marque or reprisal," which were different from a

160. *See, e.g.*, 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 371–75 (providing very specifically which vessels and cargo could be captured both by privately-armed vessels and those fitted out at the expense of any of the Colonies); *see also* MARTENS, *supra* note 131, at 23–24.

161. *See* Ramsey, *supra* note 2, at 1617–18 (noting that eighteenth-century authors do not specifically address this issue, but that early presidential practice suggests that the term applied to public as well as private vessels); J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 474 (2005) (both public and private vessels engaged in reprisal activity); Yoo, *supra* note 42, at 251 ("Letters of marque and reprisal do not clearly refer to the use of the state's own military against another state.").

162. THE ARTICLES OF CONFEDERATION art. VI (U.S. 1781).

163. U.S. CONST. art. I, § 8.

164. *See* 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 253 ("Instructions to the commanders of private ships or vessels of war, which shall have commissions or letters of marque and reprisal . . . .").

165. It is clear that the term commission applies to the licensing of both private and public armed ships, not just public. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 371–75; 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 230, 251–52; 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 584; 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 223–24, 226. In practice, the term commission was widely employed to refer generally to authorizations (for a variety of purposes) by the sovereign to individuals. *See, e.g.*, Commission of a Vice-Admiralty Judge (June 16, 1753), *in* JAMESON, *supra* note 121, at 519–23 (empowering James Michie to hold a vice-admiralty court in South Carolina).

"regular war" because they involved only seizures.[166] The term reprisal itself referred to public or private seizures of property. Hugo Grotius, in his discussion of reprisals, cites indiscriminately to captures made by public and private forces.[167] The change in language in the Constitution, which occasioned no recorded comment, was therefore most likely a matter of style and was not intended to limit congressional ability to regulate public vessels.

Practice during the Revolutionary War suggests that letters of marque and reprisal referred to the licensing of public as well as private vessels. For example, a public vessel outfitted by the Massachusetts State Navy petitioned to "be furnished with a Commission for a Letter of Marque."[168] Similarly, public vessels such as "packets, dispatch boats, and cargo carriers" would petition the Commonwealth for "letters of marque"; Continental vessels observed "the same procedure."[169] Even if "letters of marque and reprisal" referred only to the licensing of private vessels, it still gave Congress the power to control the tactical and strategic use of privateers. Coupled with the power to make rules concerning captures (which indisputably included prizes taken by public vessels), Congress had control over those uses of force most likely to result in violations of international law.

Article I, Section 8, Clause 11, in summary, provides three direct limitations on the powers of the president as commander in chief, all three of which were well-known terms in international law. Contrary to many general formulations of the commander in chief power, the text of the Constitution did not leave to the president all decisions of tactics, military strategy, or deployment of force. Precisely where such decisions were most likely to violate international law and have significant diplomatic ramifications, the Constitution vested them in Congress. This allocation of authority is entirely consistent with the overall structural design of Articles I and II, which also gave Congress the power both to "define and punish offenses against the law of nations" and to create lower federal courts with the power to hear prize—that is, wartime—cases that involved questions of international law.

C. *Congress, the Commander in Chief, and International Law*

This Section takes up two sets of potential problems. First, in what sense was the division of power described above deliberate? While Article I, Section 8, Clause 11 lists specific powers, it does not explicitly refer to

166. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 162 (Sollom Emlyn ed., London, E. & R. Nutt, & R. Gosling 1736); *cf.* Ramsey, *supra* note 2, at 1574 (describing Hale as a "leading English treatise writer well known in America").

167. GROTIUS, *supra* note 131, at 1234 n.4, 1240 n.3 (citing to reprisals made by King Herod and Emperor Julian).

168. GARDNER WELD ALLEN, MASSACHUSETTS PRIVATEERS OF THE REVOLUTION 255 (1927).

169. *Id.* at 43.

compliance with or the interpretation of international law during war.[170] Moreover, letters of marque and reprisal are usually understood as relating to war initiation, so perhaps this allocation of authority to Congress has little to do with war prosecution. There is, however, strong evidence that the division of power between Congress and the president was indeed deliberate and clearly related both to war prosecution and to international law.

Second, international law has changed over time in ways that may make the original division of authority between Congress and the executive irrelevant, or at least difficult as a basis for contemporary interpretation. Although they should not be overstated, both of these points are true and both make international law a less-than-perfect tool of interpretation. These issues are explored in more depth below.

1. *War Prosecution and Separation of Powers*

Of what separation of powers significance is the Constitution's grant to Congress of power over letters of marque and reprisal and captures? Modern scholarship views letters of marque and reprisal almost exclusively in terms of presidential power over war *initiation*.[171] To some extent this focus is accurate: letters of marque and reprisal served as a form of limited warfare. But, as described below, letters of marque and reprisal also gave Congress a constitutionally significant strategic role in fighting full-scale wars. Eighteenth-century practice tended to lodge the power over both captures and letters of marque and reprisal with the executive. The framers, however, departed from this practice, thereby reducing the president's control over questions of international law. Granting this power to Congress thus limited not only the president's power to initiate hostilities but also to *prosecute* a war once it was underway.

The framers would have been familiar with the importance of letters of marque and reprisal in the prosecution of full-scale warfare, because they were frequently issued during the American Revolution by the Continental Congress as well as the colonies.[172] Vessels licensed by such letters caused significant damage to British trade and commerce, substantially contributing to the American victory.[173] They also played an important role in earlier

170. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 644–45 (1999) (discussing level of generality problems).

171. *See, e.g.*, REVELEY *supra* note 1, at 63–64; David Gray Adler, *The Constitution and Presidential Warmaking*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 183, 184–90 (David Gray Adler & Larry N. George eds., 1996); Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1042–45 (1986); Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 66–72 (1995) [hereinafter Lobel, *Little Wars*]; Stromseth, *supra* note 50, at 854–56, 859–60. I use the term war initiation to include uses of force that do not lead to war itself.

172. ALLEN, *supra* note 153, at 45–48.

173. Letter from B. Franklin, Silas Deane, & Arthur Lee to Committee of Secret Correspondence (Feb. 6, 1777), *in* 2 RDC, *supra* note 135, at 261–62; Letter from B. Franklin, Silas Deane, & Arthur Lee to the Committee of Foreign Affairs (Sept. 8, 1777), *supra* note 152, at 390; Letter from

full-scale conflicts involving the colonies.[174] The Articles of Confederation confirm that the wartime use of letters of marque and reprisal was well understood. Indeed, Articles VI and IX distinguished carefully between letters issued after a declaration of war, which states were permitted to grant, and those issued in "times of peace," which were prohibited to the states.[175] The framers of the Constitution, had they wanted to avoid encroachments on the president's power to wage war, could have given the president the power to issue letters *after* a declaration of war. Instead, contrary to the Articles of Confederation, both powers were lodged exclusively in one place: Congress.

The Marque and Reprisals Clause was inserted into the language of the Constitution immediately after the "Declare War" substitution. There was no debate about the inserted language, although Elbridge Gerry did say that he thought letters of marque were "not included in the power of war."[176] Perhaps, as some argue, Gerry wanted to ensure that Congress had power over the deployment of force in times of peace.[177] Had the Continental Congress been concerned just with war initiation and peacetime letters of marque and reprisal, however, they could have preserved the distinction from the Articles of Confederation and given the peacetime power to Congress and the wartime power to the president. More likely, the framers thought that the

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Franklin to the President of Congress (Aug. 10, 1780), *in* 4 RDC, *supra* note 135, at 25, 26; Letter from John Adams to the President of Congress (Sept. 16, 1780), *in* 4 RDC, *supra* note 135, at 57, 58.

174. *See* Commission of Capt. Benjamin Norton as a Privateer (June 2, 1741), *in* JAMESON, *supra* note 121, at 378–81 (explaining that Great Britain had already declared war on Spain in 1739, and subsequently authorized the seizure and taking of vessels belonging to Spain or to Spanish subjects); *see also* CARL J. KULSRUD, MARITIME NEUTRALITY TO 1780, at 38–39 (1936) (noting that general reprisals were "employed in every maritime war in the days of the sailing vessel"); *cf.* MARTENS, *supra* note 131, at 20–21, 25–27, 26 n.b (distinguishing between wartime and peacetime letters).

175. Article VI states as follows:

> [N]or shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the [U]nited [S]tates in [C]ongress assembled, and then only against the kingdom or state and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the [U]nited [S]tates in [C]ongress assembled . . . .

THE ARTICLES OF CONFEDERATION art. VI (U.S. 1781).

Article IX states as follows:

> The [U]nited [S]tates, in [C]ongress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; [and] . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the [U]nited [S]tates shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of [C]ongress shall be appointed a judge of any of the said courts.

Id. art. IX.

176. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 326.

177. Lobel, *Little Wars*, *supra* note 171, at 69; STORY, *supra* note 59, at 63.

phrase "make war" included the power to issue letters of marque and reprisal in both war- and peacetime but that the power to declare war did not. This is consistent with Rufus King's observation that the term "make war" could be understood as "conduct war," which was an executive function.[178] Marque and reprisals could be understood as part of the power to conduct war, because this is how the power was used during the Revolution. The change to "Declare War," therefore, made necessary the specific allocation of marque and reprisals power to Congress.

The significance of assigning these powers to Congress, not the president, is confirmed by the context in which the Constitution was drafted, as well as eighteenth-century practice in England and France. Issues of war, national security, and possible violations of the law of nations were foremost in the minds of the framing generation.[179] Modern commentators appear to agree that in Britain the power to issue letters of marque and reprisal was an executive prerogative.[180] To the extent this is accurate, the U.S. Constitution departed from this historical allocation of authority by vesting this power with Congress.

Legislative and executive control over letters of marque and reprisal was, however, contested. Several eighteenth-century acts of Parliament controlled the issuance of letters of marque and reprisal as well as some aspects of the conduct of privateers.[181] This legislation, coupled with the independence of the British prize courts, resulted in diplomatic difficulties for English ministers,[182] as well as uncertainty about the extent of executive control over privateering, prizes, and even public armed vessels.[183] By contrast, in other European countries, particularly France, the executive exercised greater control over captures and letters of marque and reprisal.[184] Thus, eighteenth-century English practice undermines the view that letters of marque and reprisal were solely an executive prerogative, but this practice also demonstrates that the balance of executive and legislative authority was already in question well before the U.S. Constitution was drafted.

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178. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 319.

179. YOO, *supra* note 38, at 25–26.

180. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1201–02 (2006); Ramsey, *supra* note 2, at 1599; *cf.* WILLIAM BLACKSTONE, 1 COMMENTARIES *249–51; VATTEL, *supra* note 122, at 285.

181. *See* BLACKSTONE, *supra* note 180, at *250; RICHARD PARES, COLONIAL BLOCKADE AND NEUTRAL RIGHTS 1739–1763, at 42–76 (1938).

182. PARES, *supra* note 181, at 68–71, 226.

183. *Id.* at 45–53; *see also* REPORT OF LAW OFFICERS AND CIVILIANS AS TO THE LEGALITY OF A PROPOSED INSTRUCTION TO PRIVATEERS NOT TO SEIZE SHIPS AND GOODS OF ENEMIES OTHER THAN THE FRENCH, HAVING REGARD TO THE PRIZE ACT (1757), *reprinted in* 2 DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA 381–382 (Thomson Gale 2007) (1916).

184. KULSRUD, *supra* note 174, at 31–36 (1936); FRENCH PRIZE REGULATIONS (1744), *reprinted in* 2 DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA, *supra* note 183, at 312–316.

This history may help explain why letters of marque and reprisal were not mentioned during the ratification period as imposing significant limitations on the president's power. When Hamilton, for example, used *Federalist No. 69* to address the fear that the president's power would equal that of the king, he pointed to Congress's spending power, its power to make rules for the government and regulation of the armed forces, and its power to declare war as significant limitations on the commander in chief power.[185] That he did not mention other powers in Article I or international law generally as limiting the president's power is hardly surprising, because, as we have seen, executive control over both letters of marque and reprisal, as well as captures, was a complicated, contested topic in England; these issues simply did not make for the straightforward, clear distinctions that could be used to sway delegates. Moreover, when letters of marque and reprisal were mentioned, the focus was on the appropriate scope of federal authority. In *Federalist No. 44*, for example, James Madison discussed the change in letters of marque and reprisal from the Articles of Confederation, arguing that the power should belong solely to the federal government, not the states, because of the "advantage of uniformity in all points which relate to foreign powers."[186]

The president could have been vested with substantially greater control over captures as well. It was unusual under eighteenth-century practice to divest the executive of control over questions of capture and prize. As Vattel explained it, only the sovereign had jurisdiction over these issues. In Great Britain, the king usually delegated that power to the Admiralty Court,[187] but appeal went to the Privy Council[188] or the Court of Prize Appeals (which was primarily composed of privy councillors).[189] The extent to which the king or his ministers actually controlled the resolution of prize appeals is a complicated question.[190] It is clear, however, that the framers were well aware of executive power over issues of capture. In *Federalist No. 83*, again in a discussion of state-federal power (this time in the context of juries), Hamilton acknowledged the value of juries in most civil cases but emphasized that sometimes they were inappropriate in cases related to the law of nations, including in prize cases:

> [T]he method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain, in the last

185. *See* THE FEDERALIST, *supra* note 34, at 465.

186. *Id.* No. 44, at 295 (James Madison).

187. VATTEL, *supra* note 122, at 391–93 n.172.

188. *Id.*

189. PARES, *supra* note 181, at 101..

190. *See id.* at 84–108.

> resort, before the king himself in his privy council, where the fact, as well as the law, undergoes a re-examination.[191]

In the end, therefore, it is significant that the Constitution vests Congress, not the president, with the power to create rules governing captures and to create lower courts that could hear prize cases.

2. *Gaps and Changes*

Other issues of international law also arose during the Revolutionary War, such as the treatment and exchange of prisoners.[192] But these, too, were resolved by the Continental Congress.[193] They remained with Congress after the adoption of the Constitution through its power to regulate "Captures on Land and Water"[194] and to make rules for the government and regulation of the armed forces. Thus, during the quasi war with France and the War of 1812, Congress made clear its power to control the treatment of prisoners.[195] In any event, the point here is not that Congress controlled every possible violation of international law related to the waging of war but instead that the Constitution repeatedly vested important and well-known war-related questions of eighteenth-century international law with Congress, not the president. The modern interpretive claim explored here is that international law should serve as one—but not the only—tool of constitutional interpretation.

The shift from natural law to positivism as the basis of international law has been debated at length elsewhere.[196] Some of the contemporary literature on this issue has been driven by two modern questions: the scope of the term "law of nations" as used in the Alien Tort Statute[197] and the direct applicability

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191. *See* THE FEDERALIST, *supra* note 34, No. 83, at 564 (Alexander Hamilton).

192. *See supra* note 137.

193. *See, e.g.*, 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 400; 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 175–76, 263–64; 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 135, at 630; 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 449–50 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1907); 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 137, at 79–81, 293–97; 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 138, at 272–80 (empowering Washington to negotiate the exchange of prisoners); 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 147, at 972–74, 1029–30; 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 93–95 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1914).

194. U.S. CONST. art. I, § 8, cl. 11.

195. Act of Mar. 3, 1799, ch. 45, 1 Stat. 743; Act of Feb. 28, 1799, ch. 18, 1 Stat. 624; Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580; Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575; Act of July 6, 1812, ch. 128, 2 Stat. 777, *repealed by* Act of Mar. 3, 1817, ch. 34, 3 Stat. 358.

196. *See generally* Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547 (1909).

197. *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986);

of international law in federal courts.[198] The key question here, though, is different: has international law changed so much over time that it is not helpful in preserving the structural balance between Articles I and II? For instance, the eighteenth-century laws of war and neutrality regulated the treatment of enemy and neutral property in more detail than modern laws of war,[199] but the treatment of detainees and methods of waging war are more comprehensively addressed today.[200] And in the eighteenth century, prize courts applied a set of nuanced rules governing captures for which there is no precise modern equivalent.[201]

It is unclear, however, why these changes in the content of international law undermine its value in understanding the structural allocation of authority between the branches. International law, whatever its grounding in natural law, imposed obligations based on both custom and treaty, and it was well understood that those obligations would evolve and change over time. During the Revolutionary War, Congress ordered that "in cases of capture on water," the rules of decision would be as follows: "Resolutions and ordinances of the United States in Congress assembled, public treaties when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials."[202] Nothing about the natural law basis of eighteenth-century international law prevented the Continental Congress from understanding various sources of international commitments, ranking their importance, and guarding against violations.

D. *Synthesis of Parts II and III*

Putting together the second-order and originalist arguments, consider the following example: a treaty limits the use of certain kinds of weapons, say cluster bombs.[203] During war, the president violates the treaty, but argues that he was acting within the scope of the Commander in Chief Clause. As

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William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 232 (1996).

198. *See generally* Curtis Bradley & Jack Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815 (1997); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

199. *See generally* VATTEL, *supra* note 122.

200. *See, e.g.*, Geneva Conventions, *supra* note 89.

201. David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 36–41 (1995) (book review).

202. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 147, at 1153–58.

203. The use of cluster munitions is not explicitly prohibited by current treaties on international humanitarian law, but the International Committee of the Red Cross has called for their prohibition in all populated areas. Press Release, Int'l Comm. of the Red Cross, Cluster munitions: ICRC calls for urgent international action (June 11, 2006), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-weapon-news-061106?opendocument (last visited May 17, 2007).

an initial matter, the president is acting contrary to the intentions of the Senate and must rely on his own Article II authority. The text of the Constitution vests most questions of war-related international law with Congress, not the president. As a matter of constitutional structure, the fact that this was an international commitment (as opposed to a statute) cuts against the president's claim of exclusive authority. Moreover, the treaty itself serves as a particularly thick form of interbranch accommodation, because it requires the president to negotiate and approve it, and it requires a supermajority of the Senate. Arguments about necessity and dictates of war are deeply undercut by the conclusion of a treaty that gives away the very powers that the president now claims as essential. Similarly, if the president acts contrary to customary international law binding on the United States, this will inform the analysis of congressional authorization and undermine any necessity-based arguments that the president might advance.

What if the president's conduct is consistent with (or compelled by) international law, but Congress has prohibited it? This returns to the example from Part II in which Congress orders the president to take an action that is prohibited by a treaty. For reasons described there, such a scenario is unlikely to occur.[204] But if it does, the second-order and originalist analysis may point in opposite directions. The originalist analysis shows that Congress controls compliance with international law of war, while the arguments advanced in Part II favor the president. In this situation, a fine-grained analysis of the specific powers listed in Article I may prove helpful, but resolution of remaining tensions between originalist and other analysis may depend on more general arguments about constitutional interpretation that are beyond the scope of this Article.

CONCLUSION

As described above, there are both second-order and originalist arguments in favor of using international law as a tool to interpret the scope of the Commander in Chief Clause and its relationship to Congress's war-prosecution power. The analysis of international law in this area of constitutional interpretation, however, has broader implications, both methodological and doctrinal.

Methodologically, originalism faces some difficult hurdles in the war-prosecution context. Much of the best war-powers-related originalist work has been in the area of war initiation,[205] which raises issues unlikely to be resolved by the courts. Current originalist scholarship tends to disavow any attempt to explain how contemporary courts should solve contemporary problems.[206] Where originalists have turned to modern problems of war

204. *See supra* notes 90–92 and accompanying text.

205. *See supra* note 2.

206. *See, e.g.*, Prakash, *supra* note 2, at 4 n.10 ("The Article never argues that the original Constitution (and its meanings) ought to apply today. Instead, this Article makes claims about the

prosecution, their analysis has lacked methodological rigor. Perhaps one answer lies in accepting past practice and structure under some form of "faint-hearted originalism."[207] Such sources may become appropriate as part of constitutional "construction" rather than interpretation,[208] although the role that courts should play in performing such construction is debatable.[209] Perhaps, instead, we should define a set of originalist sources, determine the "best available original meaning" that those sources provide, and venture no further.[210] International law—for the reasons described above—is a plausible tool under any of these approaches. The point here, however, is that much originalism-implementing work remains to be done.

A second methodological contribution relates to the general debate about international law in constitutional interpretation, which is often framed in broad terms, sometimes almost akin to good versus evil.[211] This Article approached the issue differently by considering international law in one specific, but very difficult, interpretive context: the Commander in Chief Clause. Viewing international law upward from constitutional text, history, and structure rather than downwards from abstract debates about democracy and cosmopolitanism pays a number of dividends, including a far better picture of how and why international law might be used in conjunction with other tools of constitutional interpretation. The value of international law as an interpretive norm depends in part on the nature and quality of these other tools.

Doctrinally, mapping the relationship between the president and Congress with respect to war-related international law has significant implications for the debate about the appropriate level of deference courts should grant the president concerning the content of international law.[212] This Article gives two reasons to reject strong deference, at least in the war powers context. First, as Part III described, it was Congress, not the president, that controlled the U.S. response to most war-related questions of international law at the framing. To the extent the deference argument trades

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late eighteenth century meaning of 'declare war' and merely assumes that this meaning should continue to apply today."); Ramsey, *supra* note 2, at 1544.

207. Sunstein, *supra* note 16, at 391.

208. BARNETT, *supra* note 14, at 118–30.

209. *Compare* Barnett, *supra* note 170, at 645–46 (suggesting that courts may engage in construction), *with* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 211–12 (1999) (suggesting that the political branches, not the courts, should engage in constitutional construction).

210. Prakash & Ramsey, *Foreign Affairs*, *supra* note 38 at 1597–98.

211. *See, e.g.*, Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 43–45 (2004); McGinnis, *supra* note 70, at 303–09.

212. *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

on constitutional text or original history,[213] therefore, it is wrong. Second, those who favor deference to the president point to his superior knowledge and expertise and to the need to vest important security questions with him, not the courts.[214] Comparing the expertise of the courts to that of the president, though, overlooks the effect of deference on the relationship between the president and Congress.

With respect to statutes, deference may push Congress to make authorizations of wartime authority to the president in normatively unattractive ways. It may, for example (as others have predicted), discourage legislative authorization altogether.[215] Others have not explained, though, how this shift in legislative authorization could affect constitutional analysis by taking more cases out of *Youngstown* category one (where separation of powers issues are generally straightforward) and putting them in *Youngstown* category two (where separation of powers issues are notoriously difficult[216]). Even if deference does not discourage legislative authorization overall, it would still make constitutional interpretation more difficult within *Youngstown* categories two and three. Where courts might have relied on international law either to bolster or undercut functional claims about presidential power, that reliance would become nothing more than deference to the president's current litigating position on the scope of his own constitutional power. Stated succinctly, courts are better at interpreting international law than they are at making unmediated decisions about the appropriate scope of presidential war powers.

The Supreme Court has consistently relied upon second-order, mediated norms when called upon to interpret the president's war and emergency powers. It should come as no surprise, then, that international law turns out to be a particularly valuable interpretive norm in cases raising these issues. International law is, after all, deeply—even profoundly—mediated. Its formation requires the agreement of at least two countries with different interests, histories, and domestic political arrangements and, in the case of international humanitarian law, usually represents the agreement of a large number of countries.[217] Moreover, international law binding on the United

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213. *See, e.g.*, Ku & Yoo, *supra* note 212, at 215–16.

214. Ku & Yoo, *supra* note 212, at 201–02; Posner & Sunstein, *supra* note 212, at 1202.

215. Jinks & Katyal, *supra* note 212, 1275–79.

216. *See* Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 870 (1983).

217. For example, there are 194 state parties to the Geneva Conventions of 1949 and 167 and 163 state parties to Protocols I and II, respectively. Int'l Comm. of the Red Cross, 1949 Conventions & Additional Protocols, http://www.icrc.org/ihl.nsf/CONVPRES?OpenView (last visited May 17, 2007); *see also supra* text accompanying notes 103–107 (describing Protocol I). There are 182 state parties (including the United States) to the 1993 Chemical Weapon Convention. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317, *available at* http://www.icrc.org/ihl.nsf/INTRO/553?OpenDocument (last visited May 17, 2007). There are 102 state parties (including the United States) to a similar convention. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have

States is mediated by the political branches of our own government. Indeed, the framers carved out one form of international law—the treaty—and required for its conclusion a special form of interbranch accommodation. For perhaps similar reasons, the framers separated out those war powers related to international law and vested them with Congress rather than the president. Today, international law can provide new and important guideposts for a contemporary understanding of the Commander in Chief Clause.

Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, *available at* http://www.icrc.org/ihl.nsf/INTRO/500?OpenDocument (last visited May 17, 2007).