Iraq providing for only voluntary repatriation through a program administered by the International Committee of the Red Cross.[88]

F. *Suspension Under International Law*

Although the United States may determine either that Afghanistan was a failed State that could not be considered a party to the Geneva Conventions, or that the Geneva Conventions should otherwise be regarded as suspended under the present circumstances, there remains the distinct question whether such determinations would be valid as a matter of international law.[89] We emphasize that the resolution of that question, however, *has no bearing* on domestic constitutional issues, or on the application of the WCA. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.

International law has long recognized that the material breach of a treaty can be grounds for the party injured by the breach to terminate or withdraw from the treaty.[90] Under customary international law, the general rule is that breach of a multilateral treaty by a State Party justifies the suspension of that treaty with regard to that State. "A material breach of a multilateral treaty by one of the parties entitles . . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."[91] Assuming that Afghanistan could have been found to be in material breach for having violated "a provision essential to the accomplishment of the object or purpose of the [Geneva Conventions]," suspension of the Conventions would have been justified.[92]

We note, however, that these general rules authorizing suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[93] Although the United States is not a party to the Vienna Convention, some

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[88] *See id.* at 931 & n.633.

[89] In general, of course, a decision by a State not to discharge its treaty obligations, even when effective as a matter of domestic law, does not necessarily relieve it of possible international liability for non-performance. *See generally Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

[90] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 47 ¶ 98 (Advisory Opinion June 21, 1971) (holding it to be a "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. . . . The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law[.]").

[91] Vienna Convention on Treaties art. 60(2)(b).

[92] *Id.* art. 60(3).

[93] *Id.* art. 60(5). The Vienna Convention seems to prohibit or restrict the suspension of humanitarian treaties if the sole ground for suspension is material breach. It does not squarely address the case in which suspension is based, not on particular breaches by a party, but by the party's disappearance as a State or on its incapacity to perform its treaty obligations.

lower courts have said that the Convention embodies the customary international law for treaties, and the State Department has at various times taken the same view.[94] The Geneva Conventions must be regarded as "treaties of a humanitarian character," many of whose provisions relate to the protection of the human person."[95] Arguably, therefore, a determination by the United States that the Geneva Conventions were inoperative as to Afghanistan or a decision to regard them as suspended, might put the United States in breach of customary international law.

In addition, the Geneva Conventions could themselves be read to preclude suspension. Common Article 1 pledges the High Contracting Parties "to respect and to ensure respect for the present Convention *in all circumstances*" (emphasis added). Some commentators argue that this provision should be read to bar any State party from refusing to enforce their provisions, no matter the conduct of its adversaries. In other words, the duty of performance is absolute and does not depend upon reciprocal performance by other State parties.[96] Under this approach, the substantive terms of the Geneva Conventions could never be suspended, and thus any violation would always be illegal under international law.

This understanding of the Vienna and Geneva Conventions cannot be correct. There is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension. The drafters included a provision that appears to preclude State parties from agreeing to absolve each other of violations.[97] They also included careful procedures for the termination of the agreements by individual State parties, including a provision that requires delay of a termination of a treaty, if that termination were to occur during a conflict, until the end of the conflict.[98] Yet, at the same time, the drafters of the Conventions did not address suspension at all, even though it has been a possible option since at least the eighteenth century.[99] Applying the canon of interpretation *expressio unius est exclusio alterius*, that the inclusion of one thing implies the exclusion of the other, we should presume that the State parties did not intend to preclude suspension. Indeed, if the drafters and ratifiers of the Geneva Conventions believed the treaties could not be suspended, while allowing for withdrawal and denunciation, they could have said so explicitly and easily in the text.

The text of the Conventions also makes it implausible to claim that *all* obligations imposed by the Geneva Conventions are absolute and that non-performance is *never* excusable. To begin with, the Conventions themselves distinguish "grave" breaches from others. They further provide that "[n]o High Contracting Party shall be allowed to absolve itself . . . of any liability incurred by itself . . . in respect of [grave] breaches."[100] If all of the obligations imposed

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[94] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 122 S. Ct. 206 (2001); Moore, *supra*, at 891-92 (quoting 1971 statement by Secretary of State William P. Rogers and 1986 testimony by Deputy Legal Adviser Mary V. Mochary).

[95] *See* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 191 (2d ed. 1984) (explaining intent and scope of reference to "humanitarian" treaties). Indeed, when the drafters of the Vienna Convention added paragraph 5 to article 60, the Geneva Conventions were specifically mentioned as coming within it. *See* Harris, *supra* n.19, at 797.

[96] *See, e.g.*, Draper, *The Red Cross Conventions*, *supra*, at 8; *see also Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 76 I.L.R. at 448, ¶ 220.

[97] *See, e.g.*, Geneva Convention III, art. 131.

[98] *See, e.g.*, *id.*, art. 142.

[99] *See* Sinclair, *supra*, at 192.

[100] Geneva Convention IV, art. 148.

by the Conventions were absolute and unqualified, it would serve [illegible] "grave" breaches from others, or to provide explicitly that no party could absolve itself from liability for grave breaches. Furthermore, although specific provisions of the Conventions rule out "reprisals" of particular kinds,[101] they do not rule out reprisals as such. Thus, Article 13 of Geneva Convention III, while defining certain misconduct with respect to prisoners of war as constituting a "serious breach" of the Convention, also states categorically that "[m]easures of reprisal *against prisoners of war* are prohibited." (emphasis added). Similarly, Article 60(5) of the Vienna Convention on Treaties states that the usual rules permitting treaty suspension in some instances "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals *against persons protected by such treaties*" (emphasis added). That provision seems to be an implicit prohibition only of a particular class of reprisals, not of all reprisals. Accordingly, it appears to be permissible, as a matter both of treaty law and of customary international law, to suspend performance of Geneva Convention obligations on a temporary basis. It also appears permissible to engage in reprisals in response to material breaches by an enemy, provided that the reprisals do not give rise to "grave" breaches or to reprisals against protected persons.

Finally, a blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule, international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions. Apart from its unfairness, that result would reward and encourage non-compliance with the Conventions. True, the Conventions appear to contemplate that enforcement will be promoted by voluntary action of the parties.[102] Furthermore, the Conventions provide for intervention by "the International Committee of the Red Cross or any other impartial humanitarian organization . . . subject to the consent of the Parties to the conflict concerned."[103] But the effectiveness of these provisions depends on the good will of the very party assumed to be committing material breaches, or on its sensitivity to international opinion. Likewise, the provision authorizing an impartial investigation of alleged violations also hinges on the willingness of a breaching party to permit the investigation and to abide by its result. Other conceivable remedies, such as the imposition of an embargo by the United Nations on the breaching party, may also be inefficacious in particular circumstances. If, for example, Afghanistan were bound by Geneva Convention III to provide certain treatment to United States prisoners of war but in fact materially breached such duties, a United Nations embargo might have little effect on its behavior. Finally, offenders undoubtedly face a risk of trial and punishment before national or international courts after the conflict is over. Yet that form of relief presupposes that the

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[101] U.S. Army, *The Law of Land Warfare, Field Manual No. 27-10* (July 18, 1956), (the "FM 27-10"), defines "reprisals" as "acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare. For example, the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy." *Id.*, ch. 8, ¶ 497(a). In general, international law disfavors and discourages reprisals. *See id.* ¶ 497(d). ("Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices.") They are permitted, however, in certain specific circumstances.

[102] *See, e.g.*, the Geneva Convention III, art. 8; Geneva Convention IV, art. 9.

[103] Geneva Convention III, art. 9; Geneva Convention IV, art. 10.

offenders will be subject to capture at the end of the conflict – which may well depend on whether or not they have been defeated. Reliance on post-conflict trials, as well as being uncertain, defers relief for the duration of the conflict. Without a power to suspend, therefore, parties to the Geneva Conventions would only be left with these meager tools to remedy widespread violation of the Conventions by others.

Thus, even if one were to believe that international law set out fixed and binding rules concerning the power of suspension, the United States could make convincing arguments under the Geneva Conventions itself, the Vienna Convention on Treaties, and customary international law in favor of suspending the Geneva Conventions as applied to the Taliban militia in the current war in Afghanistan.

IV. *The Customary International Laws of War*

So far, this memorandum has addressed the issue whether the Geneva Conventions, and the WCA, apply to the detention and trial of al Qaeda and Taliban militia members taken prisoner in Afghanistan. Having concluded that these laws do not apply, we turn to your question concerning the effect, if any, of customary international law. Some may take the view that even if the Geneva Conventions, by their terms, do not govern the conflict in Afghanistan, the substance of these agreements has received such universal approval that it has risen to the status of customary international law. Regardless of its substance, however, customary international law cannot bind the executive branch under the Constitution because it is not federal law. This is a view that this Office has expressed before,[104] and is one consistent with the views of the federal courts,[105] and with executive branch arguments in the courts.[106] As a result, any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda and the Taliban.

A. *Is Customary International Law Federal Law?*

Under the view promoted by many international law academics, any presidential violation of customary international law is presumptively unconstitutional.[107] These scholars argue that customary international law is federal law, and that the President's Article II duty under the Take Care Clause requires him to execute customary international law as well as statutes lawfully enacted under the Constitution. A President may not violate customary international law, therefore, just as he cannot violate a statute, unless he believes it to be unconstitutional. Relying upon cases such as *The Paquete Habana*, 175 U.S. 677, 700 (1900), in

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[104] *See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (1989),

[105] *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[106] *See, id.* at 669-70; *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935-36 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

[107] See, e.g., Michael J. Glennon, Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 NW. U. L. REV. 321, 325 (1985); Louis Henkin, International Law As Law in the United States, 82 MICH. L. REV. 1555, 1567 (1984); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1179 (1985); see also Jonathan R. Charney, Agora: May the President Violate Customary International Law?, 80 AM. J. INT'L L. 913 (1986).

which the Supreme Court observed that "international law is part of our law." This position often claims that the federal judiciary has the authority to invalidate executive action that runs counter to customary international law.[108]

This view of customary international law is seriously mistaken. The constitutional text nowhere brackets presidential or federal power within the confines of international law. When the Supremacy Clause discusses the sources of federal law, it enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI. International law is nowhere mentioned in the Constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant to Congress the power to "define and punish . . . Offenses against the Law of Nations."[109] It is also clear that the original understanding of the Framers was that "Laws of the United States" did *not* include the law of nations, as international law was called in the late eighteenth century. In explaining the jurisdiction of the Article III courts to cases arising "under the Constitution and the Laws of the United States," for example, Alexander Hamilton did not include the law of nations as a source of jurisdiction.[110] Rather, Hamilton pointed out, claims involving the laws of nations would arise either in diversity cases or maritime cases,[111] which by definition do not involve "the Laws of the United States." Little evidence exists that those who attended the Philadelphia Convention in the summer of 1787 or the state ratifying conventions believed that federal law would have included customary international law, but rather that the law of nations was part of a general common law that was not true federal law.[112]

Indeed, allowing customary international law to rise to the level of federal law would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by

[108] Recently, the status of customary international law within the federal legal system has been the subject of sustained debate with legal academia. The legitimacy of incorporating customary international law as federal law has been subjected in these exchanges to crippling doubts. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law As Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 817 (1997); see also Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 672-673 (1986); Arthur M. Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1269 (1988). These claims have not gone unchallenged. Harold H. Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1827 (1998); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 371 (1997); Beth Stephens, The Law of Our Land: Customary International Law As Federal Law After Erie, 66 Fordham L. Rev. 393, 396-97 (1997). Bradley and Goldsmith have responded to their critics several times. See Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 330 (1997).

[109] U.S. Const. art. I, § 8.

[110] *The Federalist No. 80*, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[111] *Id.* at 444-46.

[112] See, e.g., Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 830-37 (1989); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1306-12 (1996); Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 333-36 (1997).

the Constitution for amending the Constitution or for enacting legislation. [illegible] international law is not approved by two-thirds of Congress and three-quarters of the state legislatures, it has not been passed by both houses of Congress and signed by the President, nor is it made by the President with the advice and consent of two-thirds of the Senate.[113] In other words, customary international law has not undergone the difficult hurdles that stand before enactment of constitutional amendments, statutes, or treaties. As such, it can have no legal effect on the government or on American citizens because it is not law.[114] Even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention self-executing against the executive branch.[115] If even treaties that have undergone presidential signature and senatorial advice and consent can have no binding legal effect in the United States, then it certainly must be the case that a source of rules that never undergoes any process established by our Constitution cannot be law.[116]

It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority. This has been recognized by the Supreme Court since the earliest days of the Republic. In *The Schooner Exchange v. McFaddon*, for example, Chief Justice Marshall applied customary international law to the seizure of a French warship only because the United States government had not chosen a different rule.

> It seems then to the Court, to be a principle of public [international] law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals.[117]

In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall again stated that customary international law "is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[118] In twenty-first century words, overriding customary international law may prove to be a bad idea, or be subject to criticism, but there is no doubt that the government has the power to do it.

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[113] *Cf. INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto for failure to undergo bicameralism and presentment as required by Article I, Section 8 for all legislation).

[114] In fact, allowing customary international law to bear the force of federal law would create significant problems under the Appointments Clause and the non-delegation doctrine, as it would be law made completely outside the American legal system through a process of international practice, rather than either the legislature or officers of the United States authorized to do so.

[115] *See, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

[116] See John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999) (non-self-execution of treaties justified by the original understanding); John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 Colum. L. Rev. 2218 (1999) (demonstrating that constitutional text and structure require implementation of treaty obligations by federal statute).

[117] 11 U.S. (7 Cranch) 116, 145-46 (1812) (emphasis added).

[118] *Id.* at 128.

Indeed, proponents of the notion that customary international law [illegible] little support in either history or Supreme Court case law. It is true that in some contexts, mostly involving maritime, insurance, and commercial law, the federal courts in the nineteenth century looked to customary international law as a guide.[119] Upon closer examination of these cases, however, it is clear that customary international law had the status only of the general federal common law that was applied in federal diversity cases under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). As such, it was not considered true federal law under the Supremacy Clause; it did not support Article III "arising under" jurisdiction; it did not pre-empt inconsistent state law; and it did not bind the executive branch. Indeed, even during this period, the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore serve as the basis for federal subject matter jurisdiction. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, for example, the Supreme Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the constitution, laws, treaties, or executive proclamations of the United States.[120] The spurious nature of this type of law led the Supreme Court in the famous case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), to eliminate general federal common law.

Even the case most relied upon by proponents of customary international law's status as federal law, *The Paquete Habana*, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana* involved the question whether U.S. armed vessels in wartime could capture certain fishing vessels belonging to enemy nationals and sell them as prize. In that case, the Court applied an international law rule, and did indeed say that "international law is part of our law."[121] But Justice Gray then continued, "*where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations." In other words, while it was willing to apply customary international law as general federal common law (this was the era of *Swift v. Tyson*), the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time. No Supreme Court decision in modern times has challenged that view.[122] Thus, under clear Supreme Court precedent, any

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[119] See, e.g., Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892); New York Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87 (1875).
[120] 92 U.S. 286, 286-87.
[121] *Id.* at 700.
[122] Two lines of cases are often cited for the proposition that the Supreme Court has found customary international law to be federal law. The first, which derives from Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). The "Charming Betsy" rule, as it is sometimes known, is a rule of construction that a statute should be construed when possible so as not to conflict with international law. This rule, however, does not apply international law of its own force, but instead can be seen as measure of judicial restraint: that violating international law is a decision for the political branches to make, and that if they wish to do so, they should state clearly their intentions. The second, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, applied the "act of state" doctrine, which generally precludes courts from examining the validity of the decisions of foreign governments taken on their own soil, as federal common law to a suit over expropriations by the Cuban government. As with Charming Betsy, however, the Court developed this rule as one of judicial self-restraint to preserve the flexibility of the political branches to decide how to conduct foreign policy.
Some supporters of customary international law as federal law rely on a third line of cases, beginning with Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). In Filártiga, the Second Circuit read the federal Alien Tort Statute, 28 U.S.C. §1350 (1994), to allow a tort suit in federal court against the former official of a foreign government for violating norms of international human rights law, namely torture. Incorporation of customary international law via the Alien Tort Statute, while accepted by several circuit courts, has never received the blessings of the Supreme

presidential decision in the current conflict concerning the detention [illegible] Taliban militia prisoners would constitute a "controlling" executive act that would immediately and completely override any customary international law norms.

Constitutional text and Supreme Court decisions aside, allowing the [illegible] upon international law to restrict the President's discretion to conduct war would raise deep structural problems. First, if customary international law is indeed federal law, then it must receive all of the benefits of the Supremacy Clause. Therefore, customary international law would not only bind the President, but it also would pre-empt state law and even supersede inconsistent federal statutes and treaties that were enacted before the rule of customary international law came into being. This has never happened. Indeed, giving customary international law this power not only runs counter to the Supreme Court cases described above, but would have the effect of importing a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process. If customary international law does not have these effects, as the constitutional text, practice and most sensible readings of the Constitution indicate, then it cannot be true federal law under the Supremacy Clause. As non-federal law, then, customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan.

Second, relying upon customary international law here would undermine the President's control over foreign relations and his Commander in Chief authority. As we have noted, the President under the Constitution is given plenary authority over the conduct of the Nation's foreign relations and over the use of the military. Importing customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field.[123] It is difficult to see what legal authority under our constitutional system would permit customary international law to restrict the exercise of the President's plenary power in this area, which is granted to him directly by the Constitution. Further, reading customary international law to be federal law would improperly inhibit the President's role as the representative of the Nation in its foreign affairs.[124] Customary law is not static; it evolves through a dynamic process of State custom and practice. "States necessarily must have the authority to contravene international norms, however, for it is

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Court and has been sharply criticized by some circuits, see, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-10 (D.C. Cir.1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985), as well as by academics, see Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 330 (1997).

[123] *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) (reviewing authorities).

[124] "When articulating principles of international law in its relations with other states, the Executive branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." Sabbatino, 376 U.S. at 432-33. See also Rappenecker v. United States, 509 F.Supp. 1024, 1029 (N.D. Cal. 1980) ("Under the doctrine of separation of powers, the making of those determinations [under international law] is entrusted to the President."); International Load line Convention, 40 Op. Att'y Gen. at 123-24 (President "speak[s] for the nation" in making determination under international law).

the process of changing state practice that allows customary international law to evolve. As we observed in 1989, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[126] The power to override or ignore customary international law, even the law applying to armed conflict, is "an integral part of the President's foreign affairs power."[127]

Third, if customary international law is truly federal law, it presumably must be enforceable by the federal courts. Allowing international law to interfere with the President's war power in this way, however, would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches. Indeed, treating customary international law as federal law would require the judiciary to intervene into the most deeply of political questions, those concerning war. This the federal courts have said they will not do, most notably during the Kosovo conflict.[128] Again, the practice of the branches demonstrates that they do not consider customary international law to be federal law. This position makes sense even at the level of democratic theory, because conceiving of international law as a restraint on warmaking would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives.

Based on these considerations of constitutional text, structure, and history, we conclude that any customary rules of international law that apply to armed conflicts do not bind the President or the U.S. Armed Forces in their conduct of the war in Afghanistan.

B. *Do the Customary Laws of War Apply to al Qaeda or the Taliban Militia?*

Although customary international law does not bind the President, the President may still use his constitutional warmaking authority to subject members of al Qaeda or the Taliban militia to the laws of war. While this result may seem at first glance to be counter-intuitive, it is a product of the President's Commander in Chief and Chief Executive powers to prosecute the war effectively.

The President has the legal and constitutional authority to subject both al Qaeda and Taliban to the laws of war, and to try their members before military courts or commissions instituted under Title 10 of the United States Code, if he so chooses. Section 818 of title 10 provides in part that "[g]eneral courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (except for capital punishment in certain cases). Section 821 allows for the trial "offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." We have described the jurisdiction and usage of military tribunals for you in a separate memorandum. We do not believe that these courts would lose jurisdiction to try members of al Qaeda or the Taliban militia for violations of the laws of

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[125] 13 Op. O.L.C. at 170.

[126] *Id.*

[127] *Id.* at 171.

[128] *See, e.g., Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

war, even though we have concluded that the laws of war have no binding effect – as law – on the President.

This is so because the extension of the common laws of war to the present conflict is, in essence, a *military* measure that the President can order as Commander-in-Chief. As the Supreme Court has recognized, "an important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[129] In another case, the Court observed that "in the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States."[130] Thus, pursuant to his Commander in Chief authority, the President could impose the laws of war on members of al Qaeda and the Taliban militia as part of the measures necessary to prosecute the war successfully.

Moreover, the President's general authority over the conduct of foreign relations entails the specific power to express the views of the United States both on the content of international law generally and on the application of international law to specific facts. "When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."[131] Thus, the President can properly find the unprecedented conflict between the United States and transnational terrorist organizations a "war" for the purposes of the customary or common laws of war. Certainly, given the extent of hostilities both in the United States and Afghanistan since the September 11 attacks on the World Trade Center and the Pentagon, the scale of the military, diplomatic and financial commitments by the United States and its allies to counter the terrorist threats, and the expected duration of the conflict, it would be entirely reasonable for the President to find that a condition of "war" existed for purposes of triggering application of the common laws of war. He could also reasonably find that al Qaeda, the Taliban militia, and other related entities that are engaged in conflict with the United States were subject to the duties imposed by those laws. Even if members of these groups and organizations were considered to be merely "private" actors, they could nonetheless be held subject to the laws of war.[132]

In addition, Congress has delegated to the President sweeping authority with respect to the present conflict, and especially with regard to those organizations and individuals implicated

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[129] *See Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); *cf. Hirota v. Mac Arthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (Agreement with Allies to establish international tribunals to try accused war criminals who were enemy officials or armed service members was "a part of the prosecution of the war. It is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done.").

[130] *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

[131] *Sabbatino*, 376 U.S. at 432-33.

[132] *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir.) ("The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law."), *cert. denied*, 518 U.S. 1005 (1996).

in the terrorist attacks of September 11, 2001. In the wake of those incidents, Congress [illegible] Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress found that "on September [illegible] treacherous violence were committed against the United States and its [illegible] render it both necessary and appropriate that the United States exercise its [illegible] and to protect United States citizens both at home and abroad," and that "such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." Section 2 of the statute authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Read together with the President's constitutional authorities as Commander in Chief and as interpreter of international law, this authorization allows the President to subject members of al Qaeda, the Taliban militia, and other affiliated groups to trial and punishment for violations of the common laws of war, if the President determines that it would further the conduct of military operations or contribute to the defense and security of the United States and its citizens.

<u>*C. May a U.S. Servicemember be Tried for Violations of the Laws of War?*</u>

You have also asked whether the laws of war, as incorporated by reference in title 10, also apply to United States military personnel engaged in armed conflict with al Qaeda or with the Taliban militia. Even though the customary laws of war do not bind the President as federal law, the President may wish to extend some or all of such laws to the conduct of United States military operations in this conflict, or to the treatment of members of al Qaeda or the Taliban captured in the conflict. It is within his constitutional authority as Commander in Chief to do so. The common laws of war can be viewed as rules governing the conduct of military personnel in time of combat, and the President has undoubted authority to promulgate such rules and to provide for their enforcement.[133] The Army's Manual on the Law of Land Warfare, which represents the Army's interpretation of the customary international law governing armed conflict, can be expanded, altered, or overridden at any time by presidential act, as the Manual itself recognizes.[134] This makes clear that the source of authority for the application of the customary

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[133] The President has broad authority under the Commander in Chief Clause to take action to superintend the military that overlaps with Congress's power to create the armed forces and to make rules for their regulation. (See Loving v. United States, 517 U.S. 748, 772 (1996) ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including courts-martial."); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted."). The executive branch has long asserted that the President has "the unquestioned power to establish rules for the government of the army" in the absence of legislation, Power of the President to Create a Militia Bureau in the War Department, 10 Op. Att'y Gen. 11, 14 (1861). Indeed, at an early date, Attorney General Wirt concluded that regulations issued by the President on his independent authority remained in force even after Congress repealed the statute giving them legislative sanction "in all cases where they do not conflict with positive legislation." Brevet Pay of General Macomb, 1 Op. Att'y Gen. 547, 549 (1822). These independent powers of the President as commander in chief have frequently been exercised in administering justice in cases involving members of the Armed Forces: "[i]ndeed, until 1830, courts-martial were convened solely on [the President's] authority as Commander-in-Chief." Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 479 (1987).

[134] FM 27-10, ch. 1, ¶ 7(c).

laws of war to the armed forces arises directly from the President's [illegible] Commander in Chief power.

Moreover, the President has authority to limit or qualify the application of such rules. He could exempt, for example, certain operations from their coverage, or apply some but not all of the common laws of war to this conflict. This, too, is an aspect of the President's Commander in Chief authority. In narrowing the scope of the substantive prohibitions that apply in a particular conflict, the President may effectively determine the jurisdiction of military courts and commissions. He could thus preclude the trials of United States military personnel on specific charges of violations of the common laws of war.

Finally, a presidential determination concerning the application of the substantive prohibitions of the laws of war to the Afghanistan conflict would not preclude the normal system of military justice from applying to members of the U.S. Armed Services. Members of the Armed Services would still be subject to trial by courts martial for any violations of the Uniform Code of Military Justice (the "UCMJ"). Indeed, if the President were to issue an order, listing certain common laws of war for the military to follow, failure to obey that order would constitute an offense under the UCMJ.[135] Thus, although the President is not constitutionally bound by the customary laws of war, he can still choose to require the U.S. Armed Forces to obey them through the UCMJ.

Thus, our view that the customary international laws of armed conflict do not bind the President does not, in any way, compel the conclusion that members of the U.S. Armed Forces who commit acts that might be considered war crimes would be free from military justice.

Conclusion

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution. Nonetheless, we also believe that the President, as Commander in Chief, has the constitutional authority to impose the customary laws of war on both the al Qaeda and Taliban groups and the U.S. Armed Forces.

Please let us know if we can provide further assistance.

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[135] 10 U.S.C. § 892 (2000).