ABOVE THE LAW: UNLAWFUL EXECUTIVE AUTHORIZATIONS REGARDING DETAINEE TREATMENT, SECRET RENDITIONS, DOMESTIC SPYING, AND CLAIMS TO UNCHECKED EXECUTIVE POWER

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I. INTRODUCTION

Whether they constitute "torture" or "violence to life and person," it is quite clear that the tactics portrayed in photos from Abu Ghraib Prison, namely the stripping naked and hooding of persons for interrogation purposes and the use of dogs for interrogation and terroristic purposes, are patently illegal interrogation tactics. Such treatment violates the explicit rights of detainees of any status covered by various treaty-based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment, physical coercion, threats of violence, measures of intimidation, and terrorism during any armed conflict and regardless of purpose or feigned excuses on the basis of reciprocity, reprisals, or alleged necessity.[1]

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[1] *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 814–22, 835, 838–41, 843–46 (2005); *see also* U.N. Comm. Against Torture [CAT], *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America*, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf [hereinafter U.N. CAT Report] ("The [United States] should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction . . . ."); *id.* ¶ 15 ("[P]rovisions of the Convention . . . apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."); *id.* ¶ 19 (stating there exists an "absolute prohibition of torture . . . without any possible derogation"); *id.* ¶ 24 ("The [United States] should rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding,' 'short shackling' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with . . . the Convention."); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Situation of Detainees at Guantánamo Bay*, ¶¶ 9–10, 12–14, 21–22, 24–25, 37, 51–52, 87, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (*prepared by* Leila Zerrougui et al.), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf [hereinafter U.N. Experts' Report]; Eur. Parl. Ass., *Report from the Comm. on Legal Affairs & Human Rights: Lawfulness of Detentions by the United States in*

Did President Bush, various members of his administration, and others within the executive branch authorize or abet these and other violations of international law? Have these and other violations been ruled out by the administration, especially after passage of the 2005 Detainee Treatment Act pressed by Senator McCain? The Bush administration has claimed a radical and seemingly unending commander-in-chief power to violate any inhibiting international law or congressional legislation during an alleged "war" on "terrorism," a war that currently has lasted longer than World War II and that Congress has not declared or formally authorized. Does this alleged unrestrained executive power form a basis for claims that the President and other U.S. officials and government personnel are acting "within the law" when the administration authorizes and condones the use of methods of interrogation and treatment of detained persons patently contrary to international law and domestic legislation, the secret detention and secret rendition to other countries of numerous human beings contrary to international law, the domestic surveillance of our phone calls and email contrary to domestic legislation, and the leaking of classified information contrary to domestic legislation? If so, what constitutionally based restraints are there on the President's commander-in-chief power? Is the President bound by the laws of war? Can Congress rightly limit warfare in terms of its objects, operations, modes, and persons affected?

Guantánamo Bay, Doc. No. 10497, § I, ¶¶ 7(i)–(vi), 8(i)–(iii), (vii) (2005), *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10497.htm [hereinafter P.A. Doc. 10497]; Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 176–77 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 399 (2006); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 55–56 (2006); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1244–45 (2005); Mark Brzezinski, *Torture Reports Tarnish US Image*, BOSTON GLOBE, Nov. 22, 2005, at A11; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1; Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13 ("[T]op lawyers for the Army, Navy and Marine Corps have told Congress that a number of aggressive techniques used by military interrogators . . . were not consistent with the guidelines in the Army field manual on interrogations . . . . 'The [Field Manual] provides that the Geneva Convention provisions . . . be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence . . . . Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.'"); *infra* note 7 and text accompanying notes 5, 7 (describing the use of dogs, etc.).

II. UNLAWFUL EXECUTIVE AUTHORIZATIONS REGARDING DETAINEE TREATMENT AND RENDITION CONTINUE

A. Actors, Authorizations, Abetments, and the Administration's Public Paper Trails

On December 1, 2005, during a speech at the Council on Foreign Relations, Attorney General Alberto Gonzales, who as White House Counsel had previously abetted denials of detainee rights and protections under the laws of war,[2] stated that what happened at Abu Ghraib was "shocking," "horrific," and not allowed.[3] Despite Attorney General Gonzales's denial of authorizations to use certain tactics depicted in the Abu Ghraib photos, by the time of his speech it was well known that Secretary of State Donald Rumsfeld had expressly authorized the stripping of persons naked, use of dogs, and hooding as interrogation tactics, among other unlawful tactics. Furthermore, in an action memo dated December 2, 2002,[4] and a memo dated April 16, 2003,[5] the Secretary added that if additional interrogation

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[2] *See, e.g.*, Paust, *supra* note 1, at 824–26, 830, 834 n.89, 848 n.138; *infra* note 9 and text accompanying notes 18, 28–37; *see also* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086 (2005) (describing "self-conscious creation of the Executive" and "deliberate executive construction" of a process of interrogation as more generally violative of the law); *id.* at 2094 (noting Gonzales's advice to Bush that "'Geneva's strict limitations'" should not be observed); *infra* note 77. As attorney general, it is evident that Gonzales is less than interested in investigating and prosecuting all persons within or who had previously served in the executive branch who are reasonably accused of authorizing or directly perpetrating war crimes, abetting war crimes, being derelict in duty with respect to war crimes, or directly participating in a common plan to deny protections under the laws of war. *See also infra* text accompanying notes 52–58. Nonetheless, as attorney general it is his duty to do so, and in a normal criminal justice system all apparent criminal activity would be investigated. Concerning such forms of criminal liability, nonimmunity (civil and criminal), and two sets of federal legislation that allow prosecution of civilian or military persons for war crimes in federal district courts, see Paust, *supra* note 1, at 824 n.47, 836 n.94, 852–55. Under the circumstances, the need for an independent special prosecutor has rarely been so apparent.

[3] *See* Alberto R. Gonzales, U.S. Att'y Gen., Dep't of Justice, Remarks at the Council on Foreign Relations Meeting (Dec. 1, 2005) (transcript and audio stream available on the Council on Foreign Relations website, http://www.cfr.org/publication/9344/).

[4] Paust, *supra* note 1, at 840–41.

[5] *Id.* at 843–44 & nn.120 & 122; s*ee also* O'Connell, *supra* note 1, at 1245. *See generally* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32 (addressing Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Vice Admiral Albert Church, Inspector Gen., Dep't of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004), *available at* http://msl1.mit.edu/furdlog//docs/new yorker_articles/2006-02-27_newyorker_the_memo.pdf [hereinafter Mora Memo], memos

techniques for a particular detainee were required he might approve them upon written request.[6] There is no public evidence that the 2003 illegal authorization was withdrawn before adoption of a necessarily inconsistent Department of Defense ("DOD") directive in September 2006 and there is no evidence the patently illegal tactics have been completely ruled out by the Bush administration.

In an August 2005 interview, Brigadier General Janis Karpinski confirmed that Major General Geoffrey Miller was sent to Iraq in 2003 to assure that Secretary Rumsfeld's authorized interrogation tactics were used in Iraq. As Karpinski stated, "he said that he was going to use a template from Guantanamo Bay to 'Gitmo-ize' the operations out at Abu Ghraib" and that a Rumsfeld memo was posted on a pole within Abu Ghraib:

> It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food; keeping the lights on, those kinds of things. And then a handwritten message over to the side that appeared to be the same handwriting as the signature, and that signature was Secretary Rumsfeld's. And it said, 'Make sure this happens' with two exclamation points.[7]

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from Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, abuse at Guantanamo, and the failure to foster checks and balances and the flow of the best available information within executive decisional processes that might provide ultimate decision makers with sound information required for rational, policy-serving choice).

[6] Paust, *supra* note 1, at 843–44.

[7] Interview by Marjorie Cohn, Professor, Thomas Jefferson Sch. of Law, with Janis Karpinski, Army Reserve Brigadier Gen. (Aug. 3, 2005), *available at* http://www.truthout.org/docs_2005/082405Z.shtml; s*ee* O'Connell, *supra* note 1, at 1245 (regarding the role of Lt. Gen. Sanchez); Paust, *supra* note 1, at 843 (regarding testimony of DOD officials in 2004 that dogs, "fear up harsh," and humiliating treatment, among other tactics, were approved for use in Iraq); *id.* at 847–48 & nn.135 & 138 (regarding well-publicized authorizations by Lt. Gen. Sanchez and others for the use of "fear up harsh," military working dogs to exploit fear, yelling "to create fear," and similar tactics in Iraq); Bryan Bender, *Prison Rules "Not Humane": Iraq Interrogation Guidelines Possibly Illegal, Officials Concede*, BOSTON GLOBE, May 14, 2004, at A1 (stating tactics of stripping naked, hooding, and the use of dogs were approved); Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. TIMES, May 13, 2004, at A11 (asserting that "[t]op U.S. defense officials," including Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, testified that dogs, "fear up harsh," and humiliating treatment were authorized for use in Iraq); *Rumsfeld Exposed*, AUSTL., Nov. 28, 2006, at 12 (reiterating these points in an interview in Spain). During a court-martial of Sgt. Michael J. Smith, Colonel Thomas M. Pappas (who controlled military intelligence at Abu Ghraib) testified that Gen. Geoffrey D. Miller had authorized the use of dogs to exploit "Arab fear of dogs." *See* Eric Schmitt, *Judge Orders a Top Officer to Attend Abuse Trial*, N.Y. TIMES, Apr. 19, 2006, at A16; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, WASH. POST, Apr. 15, 2006, at A11. *But see* Neil A. Lewis, *Court in Iraq Prisoner Abuse Case Hears*

In another interview, Brigadier General Karpinski expanded on the mission of Major General Miller to "Gitmoize" the operation:

> [A]nd military intelligence, they were all listening and pay[ing] attention and taking notes . . . . "It's going to change . . . we're going to change the nature of interrogation at Abu Ghraib." . . . Every day, there's more people arriving out at Abu Ghraib to be interrogators, and they either had experience in Afghanistan or down at Guantanamo Bay. Many of them were personally selected by Gen. Miller and sent to Iraq . . . . Many of them were contractors.[8]

In November 2005, David Addington, who was Vice President Cheney's top lawyer and is now his chief of staff, openly advised the Bush administration to continue its illegal policy of noncompliance with the minimal and absolute requirements concerning treatment of detainees in common article 3 of the Geneva Conventions, a policy that Addington helped orchestrate in several ways.[9] Colonel

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Testimony of General, N.Y. TIMES, May 25, 2006, at A19 (stating that, during a court-martial of dog handler Sgt. Santos A. Cardona, Gen. Geoffrey D. Miller testified that he did not recommend to Lt. Gen. Sanchez that dogs be used for intimidation during interrogation, but for "custody and control" of detainees instead).

[8] *Frontline: The Torture Question*, Interview with Janis Karpinski (PBS television broadcast Aug. 5, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html; *see also* Paust, *supra* note 1, at 847; *see also* Evan Thomas & Michael Hirsh, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 28 ("Rumsfeld sent . . . Lt. Gen. Geoffrey Miller . . . to 'Gitmoize' the interrogation techniques in Iraq."); Josh White, *General Asserts Right on Self-Incrimination in Iraq Abuse Cases*, WASH. POST, Jan. 12, 2006, at A1.

[9] *See, e.g.*, Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at A1 (adding: "Another official said Mr. Addington and others also argued that Mr. Bush had specifically rejected the Article 3 standard in 2002 . . . when he ordered that military detainees 'be treated humanely and [merely], to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'"); David Ignatius, *Cheney's Cheney*, WASH. POST, Jan. 5, 2006, at A19; *see* Thomas & Hirsh, *supra* note 8, at 35 (stating that Addington "has strongly attacked a draft directive from DOD [Deputy Secretary of Defense Gordon] England that would require detainees to be treated in accordance with language drawn from Article Three of the Geneva Conventions"); *infra* notes 11–12. Concerning the role played by Addington, see also Paust, *supra* note 1, at 816–18, 834 n.89; Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34, 34; and Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006, at 44, 44 ("[Addington] played a central role in shaping the Administration's legal strategy . . . . that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries . . . . Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside."). Addington either drafted or provided advice for the Bybee torture memo

Larry Wilkerson, former chief of staff to former Secretary of State Colin Powell, explained that:

> [T]he Secretary of Defense, under the cover of the vice president's office, began to create an environment—and this started from the very beginning when David Addington . . . was a staunch advocate of allowing the president . . . to deviate from the Geneva Conventions . . . . [T]hey began to authorize procedures within the armed forces that led to . . . what we've seen . . . . [S]ome of the ways that they detailed were not in accordance with the spirit of the Geneva Conventions and the laws of war.[10]

Addington's unlawful policy received continued support from Under-Secretary of Defense Stephen A. Cambone and DOD General Counsel William J. Haynes.[11]

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and another memo that claimed the right to violate "legal prohibitions against the inhumane treatment of foreign prisoners held by the C.I.A." Mayer, *supra*. Addington reportedly berated Matthew Waxman, see *infra* note 11, for seeking compliance with humane treatment requirements under the Geneva Conventions "rather than the President's way." Mayer, *supra*, at 54; *see* Mayer, *supra* note 5, at 41; Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REP., May 29, 2006, at 32 (stating that Addington helped draft the 2002 Gonzales memo abetting denials of Geneva law protections to detainees; helped draft the infamous Bybee torture memo with John Yoo; participated in the Bush decision to engage in domestic surveillance in violation of the Foreign Intelligence Surveillance Act ("FISA") and claimed that the commander-in-chief power allows the President to violate domestic law, *see also infra* note 133; and was in active opposition to the McCain amendment that reiterated the legal ban on cruel, inhuman, and degrading treatment).

[10] *Morning Edition: Ex-Powell Staffer Discusses Cheney's Role in Iraq War*, Interview with Larry Wilkerson, former Chief of Staff for former Sec'y of State Colin Powell (NPR broadcast Nov. 3, 2005), *available at* http://www.npr.org/templates/story/story.php?storyID=4987598; *see* Mayer, *supra* note 5, at 33 ("[T]hose achievements were largely undermined by a small group of lawyers closely aligned with Vice-President Cheney."); *see also* James Gordon Meek, *Torture's No Good, Army Cadets Told*, N.Y. DAILY NEWS, Nov. 13, 2005, at 24 (reporting Wilkerson's remarks regarding the administration's so-called prohibition of torture: "[t]hat is not what I saw in the paperwork coming out of the vice president's office and the office of the secretary of defense"); *Powell Aide: Torture 'Guidance' from VP*, CNN.COM, Nov. 20, 2005, http://www.cnn.com/2005/US/11/20/torture (stating Wilkerson has no doubt that Cheney provided the philosophical guidance and flexibility for the torture of detainees); *supra* note 9.

[11] *See, e.g.*, Golden & Schmitt, *supra* note 9. Regarding Cambone, see Paust, *supra* note 1, at 846, 847 n.135; Mayer, *supra* note 5, at 40 ("Just a few months ago, Mora attended a meeting in Rumsfeld's private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military's detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest-ranking officers of each service, and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat

Moreover, President Bush expressly authorized the denial of absolute rights and protections contained in the Geneva Conventions and therefore authorized violations of the Geneva Conventions in a February 7, 2002, memorandum that apparently has not been withdrawn.[12]

In October 2005, the United States Senate voted ninety to nine to approve an amendment to a defense appropriations bill offered by Senator John McCain (the "McCain amendment") that merely reaffirmed the absolute ban on use of torture and cruel, inhuman, and degrading treatment of any detainee in U.S. custody or control, but Vice President Cheney openly opposed any congressional reiteration of the prohibition.[13] The evident message from Vice President Cheney and several

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detainees in accordance with Common Article Three of the Geneva conventions . . . . England asked for a consensus on whether the Pentagon should support Waxman's proposal . . . . One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was Haynes . . . . Their opposition was enough to scuttle the proposal . . . . Since then, efforts to clarify U.S. detention policy have languished."); and *infra* notes 71, 73. Regarding Haynes, see Paust, *supra* note 1, at 834–35 n.89, 840–41, 847 n.133; Mayer, *supra* note 5, at 40 (quoted above); Mayer, *supra* note 9, at 50 (noting that Addington reportedly "exerted influence" over Haynes and "'runs the whole operation'" at the Pentagon's Office of the General Counsel); and Ragavan, *supra* note 9, at 32.

[12] *See, e.g.*, Paust, *supra* note 1, at 827–28, 854–55 (including related claims of government lawyers in 2005); *see also id.* at 842–43 (discussing 2004 views of Bush, Rumsfeld, and DOD officials); Mayer, *supra* note 5, at 32 (stating that "in April, 2004, Mora warned his superiors at the Pentagon about the consequences of President Bush's decision, in February 2002, to circumvent the Geneva conventions . . . [and] described as 'unlawful,' 'dangerous,' and 'erroneous' novel legal theories" underlying the decision to violate humanitarian law); Editorial, *Rewriting the Geneva Conventions*, N.Y. TIMES, Aug. 14, 2006, at A20 (stating that Bush's plan to violate the Geneva Conventions continues); *supra* note 9 (regarding interpretations in 2005 and earlier by "Addington and others" of the Bush authorization to deny Geneva protections and Addington's role with respect to the 2002 Gonzales memo, which abetted denials of Geneva law protections). Mora affirmed that the Bush administration's "authorizations rested on three beliefs: that no law prohibited the application of cruelty; that no law should be adopted that would do so; and that our government could choose to apply the cruelty—or not—as a matter of policy depending on the dictates of perceived military necessity." Alberto J. Mora, *An Affront to American Values*, WASH. POST, May 27, 2006, at A25; *see also infra* notes 35–36.

[13] *See, e.g.*, Charlie Savage, *McCain Fights Exception to Torture Ban*, BOSTON GLOBE, Oct. 26, 2005, at A2; Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1; *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18; *see also* Walter Pincus, *McCain Will Not Bend on Detainee Treatment; He Pushes White House to Ban Torture*, WASH. POST, Dec. 5, 2005, at A18; *infra* note 14. On December 14, 2005, the House voted 308 to 122 to endorse the McCain amendment. Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at A14. A year earlier, the full Congress had declared that "the Constitution, laws, and treaties of the United States . . . prohibit the torture or cruel,

of his associates in the administration has been that such forms of illegal treatment should continue under the Cheney-Bush-Addington-Gonzales plan and President Bush's earlier illegal authorizations and orders that still have not been withdrawn.[14] In fact, CIA Director Porter Goss admitted that Agency techniques of interrogation would be restricted under the McCain amendment.[15] Moreover, some

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inhuman, or degrading treatment of foreign prisoners held in custody by the United States." National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(a)(6), 118 Stat. 1811 (codified at 10 U.S.C. § 801 note (2006)); *see also* 22 U.S.C. § 262d(a) (2006) (defining gross violations of human rights as including "torture or cruel, inhumane, or degrading treatment"); *id.* § 2304(d)(1) (same); Paust, *supra* note 1, at 823 n.43. In the final legislation, the McCain amendment was restricted. *See infra* text accompanying note 86.

Before the House voted to approve the McCain amendment, former CIA Director Stansfield Turner and thirty-two other retired CIA and other professional intelligence and interrogation experts wrote a letter on December 9, 2005, to Senator McCain expressing their "strong support" for the amendment "reinforcing the ban on cruel, inhuman and degrading treatment by all US personnel around the world." Letter from Stansfield Turner et al. to Sen. John McCain (Dec. 9, 2005), *available at* http://www.humanrightsfirst.info/pdf/051209-etn-cia-mcain.pdf. The letter also declared that "use of torture and other cruelty against those in US custody undermines" U.S. efforts to combat terrorist violence and that "[s]uch tactics fail to produce reliable information, risk corrupting the institutions that employ them, and forfeit the ideals that attract others to our nation's cause." *Id.*

[14] Concerning the unlawful plan, authorizations, and orders, see Paust, *supra* note 1, at 827–29, 836, 848 n.138, 854; *see also* JOHN YOO, WAR BY OTHER MEANS ix (2006) (explaining that denial of Geneva protections and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism"); *id.* at 35, 39–40, 43, 171–72, 177, 187, 190–91, 200, 231; Thomas & Hirsh, *supra* note 8, at 26 ("Cheney, with CIA Director Porter Goss in tow, has been lobbying against McCain . . . . Cheney remains adamantly opposed to any check on executive power."); *supra* notes 9–13; and *infra* note 15 and text accompanying notes 18–22, 28–37, 72–73.

[15] *See, e.g.*, *Goss Says CIA "Does Not Do Torture," but Reiterates Need for Interrogation Flexibility*, FRONTRUNNER, Nov. 21, 2005; *see also* YOO, *supra* note 14, at 171 (stating that under the Bush policy, "methods . . . short of the torture ban . . . could be used"); *id.* at 178 (stating that pursuant to the Bush policy, "[m]ethods that . . . do not cause severe pain or suffering are permitted"); *id.* at 187 (stating that "using 'excruciating pain'" related to "coercive interrogation" was not prohibited by the President); *id.* at 190–91 (noting that "coercive interrogation" was used); *id.* at 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA TODAY, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo exists that is more detailed than the 2002 Bybee torture memo; it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 9 (discussing a memo that allows inhumane treatment of persons held by the CIA); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (stating that secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by the CIA, military, and others, and tactics

CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell'. . . [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' . . . [which produces] a terrifying fear of

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included the use of the cold cell); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (stating that there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees'—prisoners removed from Iraq for secret interrogations" in violation of Geneva law—and that CIA officer and former director of intelligence programs at the National Security Agency, Mary O. McCarthy, has discussed CIA policies that authorized treatment she "considered cruel, inhumane or degrading"). For a discussion on the Bush administration's approval of the secret rendition of persons from Afghanistan, Iraq, and elsewhere to other countries in violation of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, customary prohibitions of forced disappearance, and other customary and treaty-based international law, see U.N. Experts' Report, *supra* note 1, ¶¶ 26–27, 37, 55, 89 ("The practice of rendition of persons to countries where there is a substantial risk of torture . . . amounts to a violation of the principle of non-refoulement and is contrary to article 3 of the Convention against Torture and Article 7 of the [International Covenant on Civil and Political Rights]"); Eur. Parl. Ass., *supra* note 1, § I, ¶ 7(vi) (stating the United States "has engaged in the unlawful practice of secret detention"); *id.* ¶ 7(vii) (finding the United States "has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of *non-refoulement*"); *id.* ¶ 8(vii), (ix); Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Paust, *supra* note 1, at 836–37 & n.96, 850–51 & nn.147–51; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1352–56 (2004) [hereinafter Paust, *Post 9/11*]; Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT'L L. 309, 312 (2006); Christine Spolar, *Ex-spy: CIA, Italians Worked on Abduction; Arrest Warrant Targets 4 Accused Americans*, CHI. TRIB., July 9, 2006, at C10; Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Jan. 31, 2007, at A1; Diane Marie Amann, *The Committee Against Torture Urges an End to Guantanamo Detention*, ASIL INSIGHTS, June 8, 2006, http://www.asil.org/insights/2006/06/insights060608.html; and *infra* notes 19, 44, 88.

drowning,"[16] each of which is manifestly illegal under the laws of war and human rights law and can result in criminal and civil sanctions for war crimes.[17]

With respect to CIA interrogation tactics, it has been reported that Alberto Gonzales "convened his colleagues in his . . . office in the White House," including "top Justice Department and Defense Department lawyers" in July 2002, just before the creation of the infamous Bybee torture memo, to approve illegal interrogation tactics such as "waterboarding."[18] It was also reported that "current and former CIA officers . . . [stated that] there is a presidential finding, signed in 2002, by President Bush, Condoleezza Rice, and then-Attorney General John Ashcroft approving the techniques, including water boarding."[19] It was also

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[16] Editorial, *Director for Torture*, WASH. POST, Nov. 23, 2005, at A18; *see* Paust, *supra* note 1, at 836 n.96, 848 n.138; Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. TIMES, Aug. 28, 2004, at A10 ("[There were] some extreme tactics used at those secret [CIA] centers, including 'waterboarding.'"); Jonathan S. Landay, *Cheney: Water Torture Is OK, Confirms Method Used on al-Qaeda*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 26, 2006, at A4; Press Release, The White House, Interview of the Vice President, WDA at Radio Day at the White House (Oct. 24, 2006); *supra* note 15.

[17] *See, e.g.*, *In re* Estate of Ferdinand E. Marcos Human Rights Lit., 910 F. Supp. 1460, 1463 (D. Haw. 1995) (noting that "forms of torture" include "[t]he 'water cure,' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation," and that "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice," was among other interrogation tactics); *see* Paust, *supra* note 1, at 836 n.96, 846 (describing the use of "cold air to chill" as another interrogation tactic); *see also infra* notes 180–81.

[18] *See* Thomas & Hirsh, *supra* note 8, at 28; *see also* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 75–76 & n.18 (2005); Editorial, *Impunity*, WASH. POST, Apr. 26, 2005, at A14 (stating that the Gonzales meeting approved simulated drowning); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17 (stating that Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in the Bush February 7, 2002, directive and that a congressional ban on cruel and inhumane treatment does not apply to "'aliens overseas'"). Concerning the evident role of Vice President Cheney, see also Paust, *supra* note 1, at 837–38 & n.97; Landay, *supra* note 16; Mayer, *supra* note 9, at 44–54 (regarding Addington's involvement in the creation of the CIA interrogation memo and effective control of the White House counsel's office, one administration lawyer claimed that although Gonzales would call the meetings, Gonzales was weak and "'an empty suit'"); and *supra* note 10. Concerning other relevant conduct by Gonzales, see *supra* note 2 and *infra* note 28. Concerning the infamous Bybee torture memo, see Paust, *supra* note 1, at 834–35.

[19] Brian Ross, *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, http://abcnews.go.com/WNT/Investigation/story?id=1356870; *see also* Paust, *supra* note 1, at 836–37 & n.96 (describing a secret authorization for the CIA to use the water boarding technique); *id.* at 848 n.138; Wendel, *supra* note 18, at 84 & n.60 (revealing that a secret presidential directive exists for CIA transfer of detainees for such forms of interrogation); Landay, *supra* note 16; *supra* note 15.

reported that President Bush authorized the CIA to secretly detain and interrogate persons in a September 17, 2001, directive known as a memorandum of notification and that harsh tactics were devised in late 2001 and early 2002.[20] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized. The CIA also revealed a document that contains a DOJ legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.[21] There is no indication that the presidential finding or directive has been withdrawn. In fact, during a speech in early September 2006, President Bush admitted that a CIA program has been implemented "to move . . . [high-value] individuals to . . . where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue.[22]

Portions of a previously secret December 2002 CIA memo were also disclosed during prosecution of a CIA civilian contractor in August 2006. The

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[20] *See* David Johnson & Douglas Jehl, *At a Secret Interrogation, Dispute Flared over Tactics*, N.Y. TIMES, Sept. 10, 2006, at 1.

[21] *See, e.g.*, Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29; David Johnston, *CIA Tells of Bush Directive on Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14.

As noted in the subsequent Nuremberg proceedings, Hitler's directives:

> had the force and effect of law. . . . [but t]o recognize as a defence to [international crimes] that a defendant acted pursuant to the order of his government or of a superior . . . . would be to recognize an absurdity. . . . International Common Law must . . . take precedence over National Law or directives issued by any governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

United States v. Von Leeb (The High Command Case) (1948), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 50708 (1952) [hereinafter TRIALS].

[22] Pres. George W. Bush, Remarks from the East Room of the White House (Sept. 6, 2006) (transcript available at http://www.npr.org/templates/story/story.php?storyId=5777480); *see* Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOSTON GLOBE, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, ATLANTA J.-CONST., Sept. 7, 2006, at 1A (adding that the CIA secret detention program "had held about 100 detainees"); Anthony Mitchell, *U.S. Seeks Terror Suspects in Secret African Prisons*, VA.-PILOT, Apr. 4, 2007, at A4; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Mark Silva et al., *Bush Confirms Use of CIA Secret Prisons*, CHI. TRIB., Sept. 7, 2006, at A1; *see also* Paust, *supra* note 1, at 836–37 & n.96; Eggen, *supra* note 21; Johnston, *supra* note 21; *infra* text accompanying note 26.

CIA memo notes that the Bush administration allowed three exceptions to prohibited restraints during interrogation of detainees by CIA personnel, although Geneva Convention and human rights prohibitions, for example, of torture and cruel, inhuman, degrading, or humiliating treatment are patently peremptory. The December 2002 memo prohibits:

> any significant physiological aspects (*e.g.*, direct physical contacts, unusual mental duress, unusual physical restraints or deliberate environmental deprivations)—beyond those reasonably required [1] to ensure the safety and security of our officers and [2] to prevent the escape of the detainee—[3] without prior and specific headquarters guidance.[23]

When asked why President Bush would prefer that Geneva law strictures not apply, John Yoo, who had been a deputy assistant attorney general in the Bush administration and primary author of the infamous Yoo-Delahunty 2002 memo, responded:

> Think about what you want to do when you have captured people from the Taliban and Al Qaeda. You want to interrogate them . . . . [T]he most reliable source of information comes from the people in Al Qaeda you captured . . . . [I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].[24]

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[23] Priti Patel, *A Wider Torture Loophole?*, L.A. TIMES, Aug. 18, 2006, at B11 (the numbers in brackets have been added to more easily identify the three exceptions set forth in the CIA memo, the third being prior specific approval by CIA headquarters of apparently any interrogation tactic or form of treatment).

[24] *Frontline: The Torture Question*, Interview with John Yoo (PBS television broadcast July 19, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html; *see* Anne-Marie O'Connor, *In Wartime, This Lawyer Has Got Bush's Back*, L.A. TIMES, Dec. 12, 2005, at E1 (reporting that Yoo was opposed to the McCain amendment and quoting him as stating, "[t]he real effect of the McCain amendment would be to shut down coercive interrogation"); Memorandum from John C. Yoo & Robert J. Delahunty to William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to al-Qaeda and Taliban Detainees 28 (Jan. 9, 2002) (opining in error that "the President has a variety of constitutional powers with respect to treaties, including powers to . . . contravene them" and that "power[s] over treaty matters . . . are within the President's plenary authority"), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek [hereinafter Yoo & Delahunty Memo]; *infra* note 27; *see also* Nat Hentoff, *Don't Ask, Don't Tell*, THE VILLAGE VOICE (New York City, N.Y.), Feb. 7, 2006, at 28 (reporting John Yoo's outrageous if no longer surprising remarks during a debate: Professor Doug Cassel: "If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?" John Yoo: "No treaty." Doug Cassel: "Also, no law by Congress—that is what you wrote in the August

Of course, it is widely known that alleged necessity does not permit violations of relevant Geneva law (such as common article 3), the customary laws of war reflected therein, and nonderogable treaty-based, customary, and peremptory human rights.[25] John Yoo also admitted that "some of the worst possible

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2002 memo . . . ." John Yoo: "I think it depends on why the President thinks he needs to do that."); *infra* note 139. Yoo also stated during the debate in Chicago, "I don't think a treaty can constrain the President as commander in chief." Hentoff, *supra*. *But see* John Yoo, *Terrorists Are Not POWs*, USA TODAY, Nov. 2, 2005, at 12A ("Physical and mental abuse is clearly illegal . . . . The Geneva Conventions—which already prohibit the torture or cruel, inhumane or degrading treatment of prisoners—clearly apply in Iraq."). John Yoo also indicated that among the members of the 2003 DOD Working Group that approved use of various illegal interrogation tactics were JAGS and "general counsels." *Frontline*, *supra*; *see also* YOO, *supra* note 14, at 195 ("[The Office of Legal Counsel] advised the group composed of both military officers and Defense Department civilians."). Nonetheless, several JAG officers did not approve. *See, e.g.*, Paust, *supra* note 1, at 843 & n.119; *see also* Mayer, *supra* note 5, at 32 (stating that Alberto Mora had been a member of the DOD Working Group, but openly disapproved); Mora Memo, *supra* note 5, at 15–19 & n.12. Mora had not seen the final version of the Report and, thus, was one of those who allegedly did not sign it (some reportedly in protest). *See* Paust, *supra* note 1, at 841 n.114.

[25] *See, e.g.*, G.A. Res. 60/148, pmbl., U.N. Doc. A/RES/60/148 (Feb. 21, 2006) ("[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance . . . [and] absolute prohibition of torture . . . is affirmed in relevant international instruments."); *id.* ¶ 1 ("Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified . . . ."); *id.* ¶ 3 ("Condemns any action or attempt by States or public officials to legalize, authorize or acquiesce in . . . [such treatment] under any circumstances, including on grounds of national security or through judicial decisions[.]"); U.N. Experts' Report, *supra* note 1, at 21, ¶¶ 42–43; Bassiouni, *supra* note 1, at 392–93, 395, 406; Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT'L L. 343, 343 (2006); Paust, *supra* note 1, at 815–16, 820–21; *supra* note 1; *see also* United States v. List (The Hostage Case), 11 TRIALS, *supra* note 21, at 1256 (1950) ("[M]ilitary necessity or expediency do not justify a violation of positive rules."); U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAWS OF LAND WARFARE 4, ¶ 3(a) (1956) [hereinafter FM 27-10]; *infra* notes 42, 44, 50. John Yoo still does not understand that "necessity" is not a defense under binding treaty law of the United States of several varieties. *See* YOO, *supra* note 14, at 172 (urging the President to "do what is reasonably necessary"); *id.* at 175 (allowing torture for "good reasons"); *id.* at 200 (allowing torture for "necessity or self-defense"). In response to such claims, Professor Michael Reisman cautioned that such a "practice sits precariously on a slippery—and nasty—slope: torture, by its nature, once sanctioned and however contingent and restrictive . . . metastasizes quickly, infecting the whole process of interrogation." W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L.

interrogation methods we've heard of in the press have been reserved for the leaders of al-Qaeda that we've captured"[26] and, with remarkable candor and abandonment, "I've defended the administration's legal approach to the treatment of al-Qaida [sic] suspects and detainees," including the use of torture.[27] More recently, he provided an honest, remorseless, and revealing set of admissions concerning inner-circle decisions to violate Geneva law. As he recounts, detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[28] Instead of "following the Geneva Conventions," the inner circle decided whether such "would yield any benefits or act as a hindrance."[29] John Yoo further stated that the inner circle knew that following Geneva law would "interfere with our ability to . . . interrogate"[30] since "Geneva bars 'any form of coercion,'"[31] "[t]his became a central issue,"[32] and following "'Geneva's strict limitations on . . . questioning'" "made no sense."[33] The inner circle calculated that "treating the detainees as unlawful combatants would increase flexibility in detention and interrogation."[34] The question became merely "what interrogation methods fell short of the torture ban

852, 855–56 (2006). Moreover, use of cruel and inhuman tactics with impunity encourages contempt for the rule of law.

[26] *Morning Edition: Agreement Reached on McCain Torture Amendment* (NPR radio broadcast Dec. 15, 2005); *see also* YOO, *supra* note 14, at 190–91; Silva, *supra* note 22 (Bush admits that "tough" tactics were used against high-value detainees held in secret detention by the CIA).

[27] John Yoo, *President's Power in Times of War*, TRIB.-REV. (Greensburg, Pa.), Dec. 25, 2005. Concerning the role that Yoo played, see also Paust, *supra* note 1, at 830–33, 834 n.89, 842–43, 856 & n.172, 858, 861–62 & n.198; Klaidman et al., *supra* note 9, at 38 (explaining the infamous 2002 Bybee torture memo was "drafted by Yoo" and a "Yoo memo in March 2003 was even more expansive, authorizing military interrogators . . . to ignore many criminal statutes"); Mayer, *supra* note 5, at 32 (stating that, on February 6, 2003, Alberto Mora asked John Yoo, "'Are you saying the President has the authority to order torture?' 'Yes,' Yoo replied."); Ragavan, *supra* note 9, at 32 (noting Yoo was a drafter, along with Addington and Bybee, of the Bybee torture memo); Mora Memo, *supra* note 5, at 19. *But see* YOO, *supra* note 14, at 196 (stating that Yoo thinks he "would not have said . . . torture" as such to Mora).

[28] YOO, *supra* note 14, at ix; *see also id.* at 30 (noting that, in December 2001 and for months thereafter, Gonzales chaired the meetings "to develop [such] policy"). Concerning the chairing of meetings by Gonzales, see also Paust, *supra* note 1, at 834 n.89, 848 n.138; and *supra* text accompanying note 18.

[29] YOO, *supra* note 14, at 35.

[30] *Id.* at 39.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 39–40.

[34] *Id.* at 43.

and could be used"[35] as "coercive interrogation,"[36] which includes cruel, inhuman, and degrading treatment.[37] In view of the fact that a "common, unifying approach" was devised to use coercive interrogation tactics and President Bush admitted that such tactics and secret detention have been used in other countries, it is obvious that coercive interrogation tactics could migrate also to Iraq and Afghanistan as part of a common plan. It is also clear that several memos and letters (including the Yoo-Delahunty, Gonzales, Ashcroft, Bybee, and Goldsmith memos and letter); presidential and other authorizations, directives and findings; and the 2003 DOD Working Group Report substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that use of coercive interrogation tactics were either known or substantially foreseeable consequences.

B. The "We Do Not 'Torture'" Ploy and Refusals to Prosecute

From October through early December 2005, President Bush, Vice President Cheney, CIA Director Goss, Attorney General Gonzales, Secretary of State Rice, and others within the administration were canting an earlier refrain, "we do not torture,"[38] as if that is all that is proscribed under common article 3 and other

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[35] *Id.* at 171; *see also id.* at ix ("[By focusing] on what constituted 'torture' under the law . . . our agents [supposedly, but erroneously] would know exactly what was prohibited, and what was not."); *id.* at 172 ("[The Office of Legal Counsel] addressed this question: what is the meaning of 'torture?'"). This is an example of manifestly and seriously unprofessional advice, leaving unstated, for example, the ban of cruel, inhuman, and degrading treatment under several treaties of the United States and customary international law.

[36] *See id.* at 172 (allowing "harsh interrogation short of torture"); *id.* at 177 (noting that "Congress banned torture, but not interrogation techniques short of it" and "coercive interrogation" is permitted); *id.* at 178 ("Methods that . . . do not cause severe pain or suffering are permitted."); *id.* at 187 (stating "American law prohibits torture but not coercive interrogation," such as "using 'excruciating pain'"); *id.* at 190–92 (noting that coercive interrogation was used and "should not be ruled out").

[37] *Id.* at 200. Such tactics were authorized for use in Iraq. *See* Paust, *supra* note 1, at 843, 847 & n.135.

[38] *See, e.g.*, Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187, 197–98 (2005); Brian Knowlton, *U.S. Holds Firm as Rice Faces CIA Storm*, INT'L HERALD TRIB., Dec. 5, 2005, at 1; *supra* notes 14–15, 18. *But see* Interview by BBC with Tom Ridge, former Sec'y of Homeland Sec. (Jan. 14, 2005) ("*By and large*, *as a matter of policy* . . . we do not condone the use of torture to extract information . . . ." (emphasis added)), *quoted in* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285, 285 n.1 (2005). President Bush used this tactic earlier. *See* Paust, *supra* note 1, at 837 n.96; *see also* Moore, *supra* note 1, at 47, 49–50 (noting that the Bush administration narrowed its definition of "torture" in order to claim interrogation tactics were not "torture").

provisions of the 1949 Geneva Conventions;[39] article 7 of the International Covenant on Civil and Political Rights;[40] articles I and XXV of the American

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[39] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Geneva Convention]; *see also id.* arts. 5, 27, 31–33, 49 (prohibiting the transfer of non-prisoners-of-war from occupied territory "regardless of . . . motive," but allowing "evacuation of a given area" to occur within the territory "if security of the population or imperative military reasons so demand," unless evacuation within the territory is otherwise impossible); Paust, *supra* note 1, at 816–20, 850–51; Sadat, *supra* note 15, at 325–31 (noting that transfers from occupied territory violate article 49 of the Geneva Convention). Among the absolute rights and duties reflected in article 3 of the Civilian Geneva Convention are the right to be "treated humanely," freedom from "violence to life and person," freedom from "cruel treatment and torture," and freedom from "outrages upon personal dignity, in particular humiliating and degrading treatment." Civilian Geneva Convention, *supra*, art. 3. Article 3 of the Civilian Geneva Convention now reflects minimum and absolute rights and duties under customary laws of war that are directly applicable in any armed conflict whether portions of the Conventions as such are self-executing. *See, e.g.*, Paust, *supra* note 1, at 813 n.8, 814 n.10, 816–18 & nn.17 & 19; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 n.57 (2006) (noting that the rights guaranteed by the "Geneva Conventions were written 'first and foremost to protect individuals'" (quoting 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (1958))). Moreover, the relevant articles in the treaty contain mandatory, self-executing language. *See, e.g.*, Paust, *supra* note 1, at 814 n.10. The rights and duties reflected in article 3 of the Civilian Geneva Convention apply "in all circumstances" to any person who is not taking an active part in hostilities, thus including any person detained and regardless of the person's status (such as a civilian, prisoner of war, unprivileged belligerent, terrorist, or state or nonstate actor). *See, e.g.*, *id.* at 816–18.

Because article 3 applies with respect to any detainee during an armed conflict, there is no gap in the reach of some forms of protection even if the detainee is not a prisoner of war. *Id.* at 817–18 & n.20; *see Hamdan*, 126 S. Ct. at 2796 n.63. Nationals of a "neutral State" who are not prisoners of war have additional rights and protections under Part II of the Civilian Geneva Convention. *See* Civilian Geneva Convention, *supra*, pt. II. A narrow exception for such persons concerning additional protections under Part III of the treaty (containing, for example, articles 27, 31–33, and 49) applies only when they are "in the territory of" the detaining state. Paust, *supra* note 1, at 819 & n.28, 851 n.149. Thus, when the United States detains non-prisoners-of-war outside the United States, they have additional rights and protections under Part III of the Civilian Geneva Convention. *See* Civilian Geneva Convention, *supra*, pt. III.

[40] International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment . . . ."); *see* Paust, *supra* note 1, at 820–23. Article 50 of the ICCPR assures that orders, authorizations, conspiracies, complicitous conduct (including memos that abet violations) and other acts within the United States in violation of the provisions of the treaty are proscribed "without any limitations or exceptions." *See* ICCPR, *supra*, art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."). Concerning the unavoidable and direct domestic effects of

article 50's mandate even in the face of a declaration of partial non-self-execution with respect to other articles, see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 361–78 (2d ed. 2003) [hereinafter PAUST, INTERNATIONAL LAW]. With respect to any relevant, potentially non-self-executing article, the President has a constitutional duty to faithfully execute the laws, including treaties of the United States, and is unavoidably bound by U.S. treaties. *See id.* at 109, 147 n.77, 169–73; Paust, *supra* note 1, at 814 n.10.

Contrary to the Bush administration's view, the ICCPR also applies wherever a person is subject to the jurisdiction or effective control of a party to the treaty. *See, e.g.*, ICCPR, *supra*, art. 2(1); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. [108?], 108–11 (July 9) (the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"), *reprinted in* 43 I.L.M. 1009, 1039–40 (2004); Alejandre v. Cuba, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 24 n.14 (1999); Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 37 n.6 (1993); U.N. Experts' Report, *supra* note 1, at 8–9, ¶ 11; U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Croatia*, ¶ 9, U.N. Doc. CCPR/C/79/Add.15 (Dec. 12, 1992); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶¶ 4, 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994) [hereinafter *General Comment No. 24*] (stating that rights "should be ensured to all those under a State party's jurisdiction"); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[The ICCPR applies] to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of that State Party, even if not situated within the territory of the State . . . . [It applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party . . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained."); *id.* ¶ 11 ("[T]he Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable."); Paust, *supra* note 1, at 822 n.40. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in article 7 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted above are part of subsequent practice and expectation relevant to proper interpretation of the treaty. *See* Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, S. Exec. Doc. L, 92-1 (1971), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Treaties must also be interpreted in light of their object and purpose, *see, e.g.*, *id.* art. 31(1), which in this instance is to assure universal respect for and observance of the human rights set forth in the treaty, *see* ICCPR, *supra*, pmbl. (recognizing "equal and inalienable rights of all" and that "everyone . . . may enjoy" human rights, as well as "[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights"). The preamble to a treaty must also be used for interpretive purposes, *see, e.g.*, Vienna Convention, *supra*, art. 31(2), which in this instance reflects the

Declaration of the Rights and Duties of Man;[41] articles 55(c) and 56 of the United Nations Charter;[42] articles 2, 4, and 16 of the Convention Against Torture and

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object and purpose of the ICCPR to achieve universal respect for and observance of the human rights set forth in the treaty. More generally, in view of the general and preemptive duty of States under the United Nations Charter to achieve universal respect for and observance of human rights, human rights treaties are presumptively universal in reach. *See, e.g.*, U.N. Charter arts. 55(c), 56, 103; Vienna Convention, *supra*, art. 31(3)(c), (stating that "any relevant rules of international law" (such as the preemptive human rights duties under the U.N. Charter) are to be taken into account when interpreting a treaty (such as the ICCPR)); ICCPR, *supra*, pmbl.; *infra* note 42. Further, the Supreme Court recognized that treaties are to be interpreted in a broad manner to protect express and implied rights. *See, e.g.*, Paust, *supra* note 1, at 832 n.76.

Concerning the invalidity of an attempted reservation to ICCPR article 7's reach to all forms of torture and cruel, inhuman, and degrading treatment, see U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995); Paust, *supra* note 1, at 821 n.40, 823 n.42; *infra* note 60. Article 7 is also expressly among the nonderogable articles in the treaty. ICCPR, *supra*, art. 4(2). Moreover, the rights and duties reflected in article 7 are part of customary and *jus cogens* international law of a nonderogable and universal reach regardless of attempted treaty reservations or understandings. *See, e.g.*, U.N. Experts' Report, *supra* note 1, ¶¶ 8, 21, 42–43; Paust, *supra* note 1, at 821–23. Acceptance of an attempted reservation to a treaty that conflicts with *jus cogens* rights or duties is not possible because such acceptance would render that portion of the treaty void. *See, e.g.*, Vienna Convention, *supra* arts. 53, 64. More generally, the United States has not "declared a 'state of emergency' within the meaning of Article 4" and has not attempted a formal "derogation from its commitments under the Covenant." SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 31–32, paras. 89, 91 (2005) (copy on file with author).

[41] Organization of American States [OAS], American Declaration on the Rights and Duties of Man art. I, Apr. 30, 1948 ("Every human being has the right to life, liberty and the security of his person."), *reprinted in* OEA/Ser.L.V/II.71 doc. 6 rev. 1 (1987); *id.* art. XXV ("Every individual who has been deprived of his liberty . . . has the right to humane treatment . . . ."). As a party to the Charter of the Organization of American States, the United States is bound by the American Declaration, which is a legally authoritative indicium of human rights protected through article 3(k) of the Organization of American States Charter. O.A.S. Charter arts. 3(k), 44, 111, Apr. 30, 1948, 2 U.S.T. 2394, 33 I.L.M. 989 (1994); *see, e.g.*, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 45, 47 (July 14, 1989); Roach, Case 9647, Inter-Am. C.H.R., Report No. 147, ¶ 48, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶ 15 (1987); The "Baby Boy" Opinion, Case 2141, Inter-Am. C.H.R., Report No. 25, ¶ 16, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 16 (1981) ("As a consequence of Article 3, 16, 51e, 112 and 150 of [the Charter], the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions of the OAS on human rights were approved with the vote of the U.S. Government [including the American Declaration of the Rights and Duties of Man]."); Inter-Am. C.H.R., *Report on the*

Situation of the Inhabitants of Human Rights in Ecuador, ch. VIII, O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) ("The American Declaration . . . continues to serve as a source of international obligation for all member states."). The American Declaration also affirms several human rights, now protected through the OAS Charter, including the right to "resort to the courts to ensure respect for . . . [one's] legal rights." American Declaration on the Rights and Duties of Man art. XVIII; *see also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 802–04 (3d ed. 1995); MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 198, 316 (1980); DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 598–600 (3d ed. 1996).

Within the Americas, the United States is also bound to take no action that is inconsistent with the object and purpose of the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, which would necessarily include orders, authorizations, complicity, and more direct acts in violation of the human rights protected in the Convention. This obligation arises because the United States has signed the treaty as it awaits ratification. *See, e.g.*, Vienna Convention, *supra* note 40, art. 18, S. Exec. Doc. L, 92-1. Article 5 of the American Convention requires:

> (1) Every person has the right to have his physical, mental, and moral integrity respected.
>
> (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person . . . .

American Convention on Human Rights, *supra*, art. 5. Moreover, the United States is bound by article 15(1) of the Inter-American Convention Against Terrorism to respond to terrorism "with full respect for the rule of law, human rights, and fundamental freedoms." Inter-American Convention Against Terrorism, O.A.S. G.A. Res. 1840, art. 15(1), O.A.S. Doc. XXXII-0/02 (June 3, 2002); *see also* David P. Stewart, Commentary, *Human Rights, Terrorism, and Efforts to Combat Terrorism*, *in* HUMAN RIGHTS & CONFLICT 267–70 (Julie A. Mertus & Jeffrey W. Helsing eds., 2006) ("A government cannot justify . . . torturing its captives, on the grounds of combating terrorism . . . . terrorists themselves have human rights and it is not justifiable to commit human rights violations in pursuit of counterterrorism.").

[42] U.N. Charter arts. 55(c), 56. The universally applicable duty of states under articles 55(c) and 56 is to take joint and separate action to achieve "universal respect for, and observance of, human rights" and, thus, not to authorize their violation or to violate them in any location, in any social context (including actual war), and with respect to any person. *See id.*; *see also* G.A. Res. 59/195, pmbl., U.N. Doc. A/LES/59/195 (Mar. 22, 2005) ("[A]ll States have an obligation to promote and protect all human rights . . . , [r]eaffirming that all measures to counter terrorism must be in strict conformity with international law, including international human rights . . . ."); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 59/191, pmbl., U.N. Doc. A/RES/59/191 (Mar. 10, 2005) ("States are under the obligation to protect all human rights and fundamental freedoms of all persons . . . in the context of the fight against terrorism."); *id.* para. 1 ("States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights . . . and

Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT");[43] and the customary, nonderogable, peremptory, and universally applicable laws of war and human rights reflected therein.[44]

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humanitarian law."); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); S.C. Res. 1566, pmbl., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (quoted *infra* note 50); Paust, *supra* note 1, at 822 n.41. One uses evidences of the content of customary human rights to identify those rights "guaranteed to all by the Charter." *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) ("[T]he guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . . Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.'" (quoting G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8082 (Oct. 24, 1970))). In addition to the prohibition of torture, article 5 of the Universal Declaration prohibits "cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 5, U.N. GAOR, U.N. Doc. A/810 (Dec. 10, 1948). The more general right to human dignity is mirrored in article 1. *Id.* art. 1. Concerning the status of the Universal Declaration and its use as an authoritative interpretive aid, see MCDOUGAL ET AL., *supra* note 41, at 274, 302, 325–27. *See also* G.A. Res. 59/191, *supra* pmbl. ("Stressing that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration . . . ."); Paust, *supra* note 1, at 822 n.40 (noting that the U.S. Executive has recognized that rights and duties reflected in article 5, among others, are customary international law). The same absolute prohibitions are found in the Resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, U.N. Doc. A/RES/59/182 (Mar. 8, 2005), *quoted in* Paust, *supra* note 1, at 821 n.35, and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, pmbl., U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975). Article 2 of the 1975 Declaration affirms that each form of prohibited conduct violates human rights under the U.N. Charter. *Id.* art. 2. The 1975 Declaration was also used in *Filartiga* to identify U.N. Charter-based and customary human rights prohibitions. *See* 630 F.2d at 882–83; *see also* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 499 n.14 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

The 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment also affirms that "[a]ll persons under any form of detention . . . shall be treated in a humane manner and with respect for the inherent dignity of the human person." G.A. Res. 43/173, princ. 1, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988); *see also* Kane v. Winn, 319 F. Supp. 2d 162, 197–99 (D. Mass. 2004) (using the Body of Principles as evidence of customary law).

[43] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter U.N. Convention Against Torture]; *see also id.* pmbl. ("Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant . . . ,

When interpreting article 7 of the International Covenant, the Human Rights Committee created by the Covenant recognized important related responsibilities of states: "Complaints about ill-treatment must be investigated . . . . Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[45]

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both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment" and "[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . throughout the world . . . ."); U.N. CAT Report, *supra* note 1, ¶ 17 ("The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention."); *id.* ¶ 18 ("The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention."); *id.* ¶ 22 ("[D]etaining persons indefinitely without charge, constitutes per se a violation of the Convention . . . ."); *id.* ¶ 24 (quoted *supra* note 1); *id.* ¶ 25 ("The State party should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment by law-enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention."); *id.* ¶ 26 ("The State party should . . . eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction . . . ."); U.N. Experts' Report, *supra* note 1, at 21, ¶ 42 (stating that CAT also encompasses the prohibition of cruel, inhuman or degrading treatment); *id.* ¶ 44 ("[CAT], also encompasses the principle of non-refoulement (art. 3) . . . [and] the prohibition of incommunicado detention . . . ."); *id.* at 24–25, ¶¶ 51, 37, 87 (covering "degrading treatment" and "inhuman treatment"); *id.* ¶ 89 (quoted *supra* note 15); Paust, *supra* note 1, at 823 n.43; *infra* note 88. CAT obligations apply in times of war and relative peace. *See, e.g.*, U.N. Convention Against Torture, *supra*, art. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification . . . ."); U.N. CAT Report, *supra* note 1, ¶ 14.

[44] *See, e.g.*, U.N. Experts' Report, *supra* note 1, at 8, ¶¶ 8, 21, 42–43; O'Connell, *supra* note 1, at 1233, 1235, 1241, 1243–48; Paust, *supra* note 1, at 816–23, 826; *see also* Resolution of the American Society of International Law § 3, Mar. 30, 2006, *available at* http://www.asil.org/events/am06/resolutions.html ("Torture and cruel, inhuman, or degrading treatment of any person . . . are prohibited by international law from which no derogation is permitted.").

[45] Human Rights Commission, *Report of the Human Rights Commission*, 37 U.N. GAOR Supp. (No. 7) at 1, ¶ 1, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982). The same types of obligation were reiterated by the U.N. Committee Against Torture in connection with the CAT. *See, e.g.*, U.N. CAT Report, *supra* note 1, at 4, ¶ 18 (requiring that states "prosecute and punish perpetrators" of "enforced disappearance"); *id.* at 5, ¶ 19 (requiring states to "ensure that perpetrators of acts of torture are prosecuted and punished"; "ensure that . . . no doctrine under domestic law impedes the full criminal responsibility of perpetrators"; and "promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates"); *id.* at 7, ¶ 25 (requiring states to "promptly, thoroughly

In a later admonition, the committee reminded parties to the treaty that "it is not sufficient" merely to make violations "a crime."[46] States should:

> report the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons . . . [and t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible . . . .[47]

States have a duty to afford protection against such acts "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"; "[a]mnesties are generally incompatible with" such duties and "[s]tates may not deprive individuals of the right to an effective remedy . . . ."[48]

More recently, the United Nations Security Council reaffirmed "its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict . . . in particular . . . torture and

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and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment or punishment . . . and bring perpetrators to justice"); *id.* at 7, ¶ 26 (requiring states to "promptly and thoroughly investigate such acts, [and] prosecute all those responsible"); *id.* at 7, ¶ 27 ("The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to habeas corpus petitions, or other claims by or on behalf of Guantanamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defense, have their status determined and reviewed by an administrative process of that department . . . . The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees, as required by article 13 of the Convention."); *id.* at 7, ¶ 28 ("The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials."); *id.* at 8, ¶ 32 (requiring states to "ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation").

[46] Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment No. 20*, 6 ¶ 1, 30 ¶ 8, U.N. Doc. HRI/GEN/1 (Sept. 4, 1992) [hereinafter *General Comment No. 20*].

[47] *Id.* ¶13 2. The same obligations were reflected in a recent U.N. General Assembly resolution. *See* G.A. Res. 60/148, *supra* note 25, ¶ 4 ("[A]ll allegations . . . must be promptly and impartially examined . . . [and] those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished . . . ."); *id.* ¶ 5 ("[A]ll acts of torture must be made offences under domestic criminal law . . . [and] perpetrators . . . must be prosecuted and punished . . . .").

[48] *General Comment No. 20*, *supra* note 46, ¶¶ 2, 15.

other prohibited treatment."[49] The Security Council also demanded that all parties to an armed conflict "comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949"[50] and emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law."[51]

Despite such requirements, for more than five years the Bush administration has furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation,[52] the torture statute,[53] genocide legislation,[54] and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.[55]

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[49] S.C. Res. 1674, ¶ 5, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

[50] *Id.* ¶ 6; *see also* S.C. Res. 1566, pmbl., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (requiring states to "ensure that any measures taken to combat terrorism comply with all their obligations under international law . . . , in particular international human rights, refugee, and humanitarian law"). Decisions of the Security Council are binding on the United States and other members of the United Nations under articles 25 and 48 of the U.N. Charter. As treaty-based obligations, they bind the President. *See infra* note 97.

[51] S.C. Res. 167, ¶ 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006). Concerning the customary international legal responsibility *aut dedere aut judicare* to either initiate prosecution of or to extradite all persons reasonably accused of such crimes and other violations of customary international criminal law, see JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 10, 12, 131–44, 155, 169 (3d ed. 2007). Article 7 of CAT mirrors this customary legal duty. *See* CAT, *supra* note 43, art. 7(1). The same duty is reflected in the Geneva Conventions. *See, e.g.*, Civilian Geneva Convention, *supra* note 39, art. 146.

[52] *See* War Crimes Act, 18 U.S.C. § 2441 (2006). Alternative legislation allowing prosecution of any war crime in federal district courts is based on 10 U.S.C. § 818 used in conjunction with 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47; *see also* Bassiouni, *supra* note 1, at 407, 412.

[53] 18 U.S.C. §§ 2340–2340A.

[54] *Id.* §§ 1091–1093.

[55] The Military Extraterritorial Jurisdiction Act, *id.* § 3261; *see* Bassiouni, *supra* note 1, at 415–16; Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 328 (2006) ("The Coalition Provisional Authority in Iraq declared that 'disciplining contractor personnel is the contractor's responsibility.' This lack of accountability is disturbing . . . ." (quoting Attorney Scott Horton, Barry Yeoman, *Dirty Warriors*, Mother Jones, May/June 2003, at 35)); Robin M. Donnelly, Note, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 GEO. J.L. & PUB. POL'Y 237, 250–54 (2006); David Johnston, *U.S. Inquiry Falters on Civilians Accused of Abusing Detainees*, N.Y. TIMES, Dec. 19, 2006, at A1; *see also* Julian E. Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. TIMES, Aug. 18, 2006, at A18 (adding that the Afghan detainee later died in custody and that human rights organizations have been critical of the lack of other indictments of CIA personnel or "contractors"); *cf.* Patel, *supra*

Furthermore, during the last five years no known criminal investigation was commenced against U.S. military personnel or persons of any other status for authorizing or participating in the manifestly illegal transfer of non-prisoner-of-war detainees from occupied territory in violation of the Geneva Conventions,[56] illegal rendition in violation of the CAT and other international law,[57] or the crime against humanity known as forced disappearance of individuals that President Bush admitted has been and will continue to be used under a CIA program of secret detention and what President Bush cryptically refers to as "tough" interrogation.[58]

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note 23 (stating that a CIA contractor was charged with abusing a detainee in U.S. custody); Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2006, at A1 (discussing the conviction of a CIA civilian contractor, David Passaro, for assault resulting in bodily injury of a detainee on a U.S. military base in Afghanistan under the Patriot Act, which was found to be applicable to the conduct of U.S. nationals on U.S. facilities abroad). By definition, civilian contractors are not members of the armed forces and are not combatants entitled to combatant immunity for lawful acts of warfare or prisoner of war status upon capture.

[56] Concerning the illegal Bush policy and practice of transferring persons from occupied territories and the application of relevant Geneva law, see Alvarez, *supra* note 1, at 199–208; Paust, *supra* note 1, at 850–51 & nn.147–51; Sadat, *supra* note 15, at 325–31.

[57] *See, e.g.*, *supra* notes 15, 43, 45; *infra* note 88.

[58] *See, e.g.*, *supra* notes 19–22. The Bush administration's policy has been to detain numerous individuals in Afghanistan and Iraq, at Guantanamo Bay, Cuba, and in many other places without disclosing the whereabouts or names of all persons detained, or whether secret detention was under the control of the CIA or (until September 7, 2006) military personnel. Such forms of secret detention are violations of the customary prohibition of forced disappearance. *See, e.g.*, Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/133 (Dec. 18, 1992), *reprinted in* 32 I.L.M. 903 (1993); Rome Statute of the International Criminal Court art. 7(2)(i), U.N. Doc. A/CONF.183/9 (July 1, 2002), *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf (stating forced disappearance is a crime against humanity); Inter-American Convention on Forced Disappearance of Persons art. II, June 9, 1994, *reprinted in* 31 I.L.M. 1529 (1994); P.A. Doc. 10497, *supra* note 1, § I, ¶¶ 7(vi), 8(vii)–(viii); *In re* Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); *see also* 22 U.S.C. § 2151n(a); *id.* § 2304(d) ("[C]ausing the disappearance of persons" is among the "flagrant" and "gross violations of internationally recognized human rights"); S. REP. NO. 102-249, at 9 (1991), *quoted in Xuncax*, 886 F. Supp. at 172; U.N. CAT Report, *supra* note 1, ¶¶ 17–18; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) & cmt. n, at 1 (1987); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 340–43, 421, 439 (ICRC ed. 2005); U.S. DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 39–40 (2003) ("[C]ausing the disappearance of individuals is a violation of customary international law."); Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Maureen R. Berman &

During a European trip in early December 2005, Secretary Rice shifted the administration's previous stance when she was pressured to admit that more than torture is proscribed. She announced in guarded language that, "as a matter of U.S. policy, [U.S.] obligations under the CAT, which prohibits cruel, inhumane and

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Roger C. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531, 531 (1982); Paust, *Post 9/11*, *supra* note 15, at 1352–56; Sadat, *supra* note 15, at 322–23; *supra* notes 15, 43, 45. In the context of wars in Afghanistan and Iraq, the policy also creates violations of the Geneva Conventions that can be prosecuted as war crimes. *See* Civilian Geneva Convention, *supra* note 39, arts. 5, 25, 71, 106–07, 143; [International Committee of the Red Cross, IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF AUGUST 12, 1949, at 56–58 (J. Pictet ed., 1958) [hereinafter IV COMMENTARY]; Paust, *supra* note 1, at 836–37 n.96; Paust, *Post 9/11*, *supra* note 15, at 1355 n.84; *see also* United States v. Altstoetter (The Justice Case), *in* 3 TRIALS, *supra* note 21, at 1058 (1951) ("Night and Fog [prisoners] . . . were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment . . . . [T]he victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of . . . [a victim], they were told that the state of the record did not admit of any further inquiry or information."). The U.S. Supreme Court also condemned the totalitarian practice of using "unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical and mental torture." Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

In addition to other customary and treaty-based international law concerning illegal rendition and forced disappearance of persons, European countries have relevant regional obligations. Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Mar. 1, 1992, Europ. T.S. No. 126 (1987), requires signatories to provide the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment full information on all places where persons deprived of their liberty are held. The European Court of Human Rights has held that a state violates article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, if the authorities fail to take reasonable measures to prevent the disappearance of a person with respect to whom there is a particular risk of disappearance. *See* Gongadze v. Ukraine, App. No. 34056/02, ¶¶ 175–80 (2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=gongadze%20%7C%2039056/02&sessionid=10198806&skin=hudoc-en; Mahmut Kaya v. Turkey, App. No. 22729/93, 28 Eur. H.R. Rep. 1, 25–28 (1998) (Commission report). Further, articles 2 and 13 are violated when authorities fail to investigate disappearances. *See* Cyprus v. Turkey, App. No. 25781/94, 35 Eur. Ct. H.R., 30, 821–24, 851–53 (2002); Kurt v. Turkey, App. No. 24276/94, 27 Eur. H.R. Rep. 373, 410–17 (1998) (adding that article 5 requires the authorities to take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations).

degrading treatment . . . extend to U.S. personnel wherever they are."[59] However, U.S. obligations to prohibit cruel, inhuman, and degrading treatment are not limited to those under the CAT; U.S. obligations under that treaty and others are not merely U.S. policy but are also law; and "U.S. obligations under the CAT" are more extensive than the administration admits, especially in view of the fact that an attempted U.S. reservation that sought to avoid the treaty's unyielding prohibition of all forms of cruel, inhuman, and degrading treatment and to cover merely those that are prohibited under domestic U.S. law by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution is necessarily incompatible with the object and purpose of the treaty and, as such, is void *ab initio* as a matter of law.[60]

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[59] Guy Dinmore & Demetri Sevastopulo, *Rice Shifts Stance on Interrogation to Shake Off Claims of Torture Abroad*, FIN. TIMES (London), Dec. 8, 2005, at 1; David Holley & Paul Richter, *Rice Fails to Clarify U.S. View on Torture*, L.A. TIMES, Dec. 8, 2005, at A1.

[60] *See, e.g.*, Vienna Convention, *supra* note 40, art. 19(c), 1155 U.N.T.S. at 338; U.N. Experts' Report, *supra* note 1, at 22 (regarding the U.S. "obligation to fully respect the prohibition of torture and ill-treatment" and attempted U.S. reservations to the CAT and the ICCPR, the Experts "recall the concerns of the relevant treaty bodies, which deplored the failure of the United States to include a crime of torture consistent with the Convention definition in its domestic legislation and the broadness of the reservations made by the United States"); *id.* at 45 n.48 (quoting U.N. Office of the High Comm'r for Human Rights, CAT, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶¶ 179–80, U.N. Doc. A/55/44 (May 15, 2000) ("The Committee expresses its concern about: (a) The failure of the State Party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention . . . ."); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶¶ 266–304, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995) ("[¶] 279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.")); Paust, *supra* note 1, at 823 n.43; *see also*, Office of the United Nations High Commissioner for Human Rights, Declarations and Reservations, http://www.ohchr.org/english/law/cat-reserve.htm (last visited Jan. 23, 2007) (listing objections to the U.S. CAT reservations from Finland, the Netherlands, and Sweden). An additional U.S. "understanding" that the treaty does not preclude all forms of cruel, inhuman, and degrading treatment is simply erroneous and, therefore, of no legal effect. *See* Paust, *supra* note 1, at 823 n.43; *see also* O'Connell, *supra* note 1, at 1250–51 (recognizing that to the extent the United States Constitution prohibition varies from the CAT, it "cannot alter . . . legal obligations under the CAT"). Moreover, as customary international law, peremptory norms, and *jus cogens*, the prohibitions against torture apply universally and without any limitations attempted in treaty reservations and understandings. *See, e.g.*, Paust, *supra* note 1, at 821–22 nn.40–41; *supra* note 40. In *Prosecutor v. Furundzija*, it was recognized that

In early September 2006, President Bush refuted the policy announced by Secretary Rice when he stated that various "tough" CIA interrogation tactics during secret detention had occurred and would continue[61] and the public had been on notice for several years concerning what the "tough" tactics entailed.[62] A week later, Secretary Rice dispelled any notion that the administration's policy was to comply with absolute bans under international law of any form of cruel, inhuman, or degrading treatment. In a letter to the Senate's Armed Services Committee,

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the prohibition of torture

> has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States . . . . [It is] an absolute value from which nobody must deviate. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise [sic] any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing [sic] or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principles and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.

Case No. IT-95-17/1-T, Judgment, ¶¶ 153–55 (Dec. 10, 1998).

The putative reservation had attempted to limit the treaty's reach to types of treatment, not the place of treatment. Given the universal reach of the treaty proscriptions, if the putative reservation had attempted to require application merely within U.S. territory, there would have been an additional reason why it would be incompatible with the object and purpose of the treaty and void *ab initio* as a matter of law. *See, e.g.*, Paust, *supra* note 1, at 823 n.43; *see also supra* note 43; *infra* note 88. In any event, the U.S. Constitution applies abroad to restrain executive authority. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 18–20 (2001) [hereinafter Paust, *Courting Illegality*]. As Justice Black affirmed in *Reid v. Covert*, our government is one of delegated powers, one that is entirely a creature of the Constitution, and one that has no power or authority to act here or abroad inconsistently with the Constitution. *See Reid*, 354 U.S. 1, 5–6, 12, 35 n.62 (1957); *see also* Paust, *Courting Illegality*, *supra*, at 19–20 nn.43 & 47. Concerning a related Supreme Court recognition of limitations on the authority of any member of the executive branch, see *infra* note 214.

[61] *See, e.g.*, *supra* note 22. President Bush might also be relying on the void putative U.S. reservation to the CAT, as if U.S. obligations under the CAT are limited and, mistakenly, that only the CAT applies. Even then, various "tough" tactics noted above would violate amendments to the Constitution. *See also infra* note 180.

[62] *See, e.g.*, *supra* notes 12, 15–19, 26, 35–37 and accompanying text.

Secretary Rice offered her "department's view" that "there is not . . . any inconsistency with respect to the substantive behavior that is prohibited" by the same phrase in common article 3 of the Geneva Conventions "and the behavior that is prohibited . . . as that phrase is defined in the U.S. reservation to the Convention Against Torture" and U.S. compliance with prohibitions reflected in the reservation to the CAT will "fully satisfy the obligations of the United States with respect to the standards" in common article 3 of the Geneva Conventions.[63] However, the legal propriety of this viewpoint is in serious error. First, not all forms of cruel, inhuman, and degrading treatment that are proscribed in the CAT and in the Geneva Conventions would be covered by the reach of what are merely U.S. domestic prohibitions under three constitutional amendments.[64] Second, no reservation has been attempted to common article 3 or any other article of the Geneva Conventions like that attempted with respect to the CAT. It would be outrageous to suggest that a putative reservation to one multilateral treaty can override the reach and meaning of another multilateral treaty that has never had a similar reservation. This is especially the case with respect to a putative reservation to the CAT that has been denounced by the Convention's Committee Against Torture and is void *ab initio* as a matter of law and of no legal effect.

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[63] Letter from Condoleezza Rice, Sec'y of State, to John Warner, Senate Armed Servs. Comm. Chairman (released Sept. 14, 2006), *available at* http://www.uniontribune.net/news/nation/terror/20060914-1513-powell-riceletters.html.

[64] Not only is the content different, *see also supra* note 60; *cf. infra* note 180, but the U.S. Constitution does not reach all private actors even under a domestic notion of "color of law," whereas treaties and the laws of war can be violated by private actors. *See, e.g.*, War Crimes Act, 18 U.S.C. § 2441(a) (2000) (stating that an offense may be committed by "whoever, whether inside or outside the United States"); *In re* Holocaust Victim Assets Litig., 225 F.3d 191, 195–97 (2d Cir. 2000); Kadic v. Karadzic, 70 F.3d 232, 239, 242–43 (2d Cir. 1995) (demonstrating private actor violations of common article 3 of the Geneva Conventions and laws of war), *cert. denied*, 518 U.S. 1005 (1996); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58–59 (E.D.N.Y. 2005); Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1260–62 (N.D. Ala. 2003) (applying common article 3 of the Geneva Conventions); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 310–11 (S.D.N.Y. 2003) (discussing private actor violations of common article 3 and laws of war); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7–8 (D.D.C. 1998) (including common article 3); 11 Op. Att'y Gen. 297, 299–300 (1865) (stating that laws of war can be violated by citizens and every citizen is bound); 1 Op. Att'y Gen. 68, 69 (1797) (providing an example of a private individual violation of the law of nations); 1 Op. Att'y Gen. 57, 58 (1795); FM 27-10, *supra* note 25, at 178, ¶ 498; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 12–15 (1971); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1230–40, 1242 (2004).

Secretary Rice also claimed that:

> [I]t is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. Such practice in the application of a treaty is an accepted reference point in international law . . . . [and] the prohibitions found in the Detainee Treatment Act of 2005 [which limit coverage in a manner like the putative U.S. reservation to the CAT] fully satisfy the obligations of the United States with respect to the standards . . . of Common Article 3.[65]

This claim is also in fundamental error for the reasons noted above. Moreover, domestic law of a single party to a multilateral treaty cannot provide complete, authoritative content or be determinative regarding the meaning of the treaty.[66] As Justice Scalia recognized with respect to the proper interpretation of treaties:

> The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer the question accurately, . . . whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding. Thus, we have declined to give effect . . . even to an explicit condition of ratification adopted by the full Senate, when the President failed to include that in his ratification.[67]

Our courts have recognized more generally that "[t]he subject of treaties . . . is to be determined by the law of nations"[68] and "[w]henever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations."[69] James Wilson remarked during formation of

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[65] Letter from Condoleezza Rice, *supra* note 63. *But see supra* note 60.

[66] There is also a major difference between good-faith use of domestic legal standards as minimum rights or duties protected under a treaty or to further effectuate a treaty, and attempting to use them as maximum obligations and limitations. The latter is unacceptable. *See also supra* note 60. With respect to customary international law, see also *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) ("[M]unicipal law of the country . . . may . . . facilitate or improve the execution of . . . [the law of nations], by any means they shall think best, provided the great universal law remains unaltered."). Further, it is well known with respect to the reach of international criminal law that domestic law is no excuse. *See, e.g.*, *infra* note 90.

[67] United States v. Stuart, 489 U.S. 353, 372–74 (1989) (Scalia, J., concurring).

[68] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796).

[69] Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360).

the Constitution that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance."[70]

C. Mangling Military Manuals

In May 2006, media reports indicated that a nearly-final draft of a new Army Field Manual on interrogation was created that contained major changes from previous manuals and would perpetuate unlawful treatment during interrogation of alleged terrorists and unprivileged belligerents. The new draft was created under the supervision of Stephen Cambone,[71] who opposed use of legally required minimum protections for all detainees under customary international law reflected in common article 3 of the Geneva Conventions.[72] The media also reported that DOD "civilian leaders" had argued "that the Geneva Convention does not apply to terrorists or irregular fighters" and the new draft manual should create two separate sets of interrogation tactics—one for prisoners of war and the other for non-prisoners-of-war, and the latter set "would allow tougher techniques."[73] Despite the DOD civilian leader assertion, it is widely known that there are no gaps in the reach of at least some forms of Geneva law protection during any armed conflict to detainees of any status and that the absolute rights, duties, and responsibilities reflected in common article 3 are among the legal provisions that

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[70] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (M. Farrand ed. 1937).

[71] *See, e.g.*, Eric Schmitt, *Clash Foreseen Between C.I.A. and Pentagon*, N.Y. TIMES, May 10, 2006, at A1 ("[The] Pentagon proposal [is] to have one set of interrogation techniques for enemy prisoners of war and another . . . for the suspected terrorists imprisoned at Guantanamo . . . .").

[72] *See, e.g.*, *supra* note 11. Cambone's opposition to the legal requirements clearly mirrors Addington's. *See supra* note 9.

[73] Julian E. Barnes, *Army Rules Put on Hold*, L.A. TIMES, May 11, 2006, at A1; *see also* Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule*, L.A. TIMES, June 5, 2006, at A1 (reporting that Addington and Cambone oppose the use of common article 3 standards regarding interrogation of non-POWs, and that the draft manual would omit the ban on humiliating and degrading treatment required under international law for all detainees). This would constitute a major change from standards in previous manuals. *See, e.g.*, David E. Graham, *Treatment and Interrogation of Detained Persons*, *in* INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 215 (U.S. Naval War Coll., International Law Studies vol. 81, Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006); White, *supra* note 1, at A13 (addressing the uniform minimum standards required by Geneva law that are contained in the previous manual); *see also* Paust, *supra* note 1, at 840 n.111 (addressing prohibitions in prior manuals). Later reports indicated that congressional and military pressure might lead to the preclusion of two different sets of standards for detainee interrogation. *See, e.g.*, Eric Schmitt, *Pentagon Rethinking Manual with Interrogation Methods*, N.Y. TIMES, June 14, 2006, at A21.

apply to detainees of any status.[74] Moreover, as noted above, human rights law and other customary and treaty-based international laws that are part of the constitutionally based laws of the United States also prohibit the use of torture or cruel, inhuman, or degrading treatment against any human being in any context for any purpose.

Finally, after the Supreme Court's rejection in *Hamdan v. Rumsfeld* of the Bush administration's claim that common article 3 does not apply to detainees captured during armed conflicts in Afghanistan and Iraq being held at Guantanamo,[75] Deputy Defense Secretary Gordon England issued a memo requiring compliance with common article 3 by U.S. military personnel as of July 7, 2006.[76] Behind the scenes, many military lawyers informed civilian officials that if this had not occurred there would have been a firestorm of protests and resignations by JAG officers. However, other members of the administration still oppose application of common article 3 in any other context and President Bush has stated that the CIA program of coercive interrogation will continue.[77]

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[74] *See, e.g.*, *supra* notes 1, 39.

[75] *See* 126 S. Ct. 2749, 2795–96 (2006) ("[T]here is at least one provision of the Geneva Conventions that applies here . . . . Common Article 3, then, is applicable here."); *id.* at 2797 (stating that the phrase "'regularly constituted court'" in common article 3 "must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law"); *id.* at 2799, 2802 (Breyer, J., concurring in part) ("[T]he requirement of the Geneva Conventions [is] a requirement that controls here . . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan . . . . That provision is Common Article 3 . . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law . . . . By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses."). Common article 3 applies as a minimum set of customary rights and prohibitions concerning any detainee during the wars in Afghanistan and Iraq. *See supra* note 39. The Court should have adopted this recognition instead of applying common article 3 to the fight with al-Qaeda as such (and, thus, also outside and unconnected with the armed conflicts in Afghanistan and Iraq). *See infra* note 150.

[76] *See, e.g.*, Stephen J. Hedges, *U.S. Relents on Gitmo Detainees; Geneva Conventions Will Apply to Inmates*, CHI. TRIB., July 12, 2006, at 1; Scott Shane, *Terror and Presidential Power: Bush Takes a Step Back*, N.Y. TIMES, July 12, 2006, at A20. Thus, armed with a Supreme Court ruling that common article 3 applies in the fight against al-Qaeda, England and military lawyers finally prevailed over Addington, Cambone, and Haynes with respect to compliance with the laws of war by military personnel and others subject to DOD control. *See also supra* note 11.

[77] *See, e.g.*, Rosa Brooks, *Orwell Had Nothing on This White House*, L.A. TIMES, July 14, 2006, at B13 (discussing how Justice Department Representative, Steven Bradbury, testified before the Senate Armed Services Committee on July 11, 2006, in serious error, that "[u]nder the law of war . . . the president is always right"); R. Jeffrey Smith & Jonathan Weisman, *Policy Rewrite Reveals Rift in Administration; Top Officials Split on Treatment of Detainees*, WASH. POST, July 14, 2006, at A4 (stating that "the Justice Department and

Deputy Defense Secretary England and professional military lawyers prevailed again on September 5, 2006, when England issued a Department of Defense Directive setting forth a new DOD policy applicable "during all armed conflicts, however such conflicts are characterized, and in all other military operations."[78] The new DOD directive, applicable to military personnel and others subject to DOD control, requires:

- All detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.[79]

- All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 of the Geneva Conventions of 1949 . . . , as construed and applied by U.S. law, . . . in the treatment of all detainees . . . . Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . .[80]

- Detainees and their property shall be accounted for and records maintained according to applicable law . . . .[81]

At the same time, a new *Army Field Manual on Human Intelligence Collector Operations*[82] was presented to the public. The manual states:

> [T]he handling and treatment of sources must be accomplished in accordance with applicable law and policy. Applicable law and policy include U.S. law; the law of war; relevant international law; relevant directives . . . . The principles and techniques of HUMINT [human intelligence] collection are to be used within the constraints established

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the Pentagon have offered starkly different accounts of the administration's" stance after the *Hamdan* ruling); Andrew Zajac, *Gonzales Takes Issue with Justices' Detainees Ruling*, CHI. TRIB., July 14, 2006, at C28 (stating that Gonzales "took issue . . . that al Qaeda combatants were covered by . . . Common Article 3"); *see also supra* note 22 and accompanying text (noting President Bush stated that the CIA program will continue).

[78] U.S. Dep't of Defense, Directive No. 2310.01E, ¶ 2.2 (Sept. 5, 2006), *available at* http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf.

[79] *Id.* ¶ 4.1.

[80] *Id.* ¶ 4.2.

[81] *Id.* ¶ 4.4. "Applicable law," of course, requires that there be no disappearance of detainees. *See supra* notes 15, 43, 45.

[82] U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), *available at* http://www.fas.org/irp/doddir/army/FM2-22.3.pdf [hereinafter FM 2-22.3].

> by U.S. law including the following: . . . [listing, among others, three of the 1949 Geneva Conventions and adding with respect to each: "(including Common Article 3)"] . . . Detainee Treatment Act of 2005 . . . .[83]

The manual also lists several interrogation tactics that are not to be employed, including some previously authorized in administration memos and other documents,[84] such as the stripping of persons naked and hooding for interrogation, the use of dogs for interrogation, use of extreme cold or heat, and waterboarding.[85]

III. THE 2005 DETAINEE TREATMENT ACT AND OTHER BINDING LAWS OF THE UNITED STATES

When the McCain amendment was finally placed in legislation, it was noticeably restricted. The general ban on cruel, inhuman, or degrading treatment or punishment in the amendment was limited in the 2005 Detainee Treatment Act (which is part of a Defense Appropriations Act) to treatment or punishment "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."[86] Moreover, it did not expressly include "torture" and was limited to persons "in the custody or under the physical control of the United States Government,"[87] which presumably includes persons under physical control of U.S. government personnel or others acting on behalf of the U.S. government but does not mirror the more extensive requirements of the CAT,[88] much less

[83] *Id.* at vii (alterations added).

[84] Concerning previous authorizations, see *supra* notes 1, 4–5, 7, 15–19, 22, 26–27, 35–37.

[85] *See, e.g.*, Stephen J. Hedges, *U.S. Revises Rules for Detainees; Treatment Will Follow Geneva Conventions*, CHI. TRIB., Sept. 7, 2006, at C13; Josh White, *New Army Manual Recalls Abuse*, WASH. POST, Sept. 9, 2006, at A8. The manual retained sixteen tactics previously set forth in a 1992 manual and added three: good-cop/bad-cop, interrogator portraying self as someone from another country, and "separation" unless the detainee is a prisoner of war. FM 2-22.3, *supra* note 82, at 71.

[86] Detainee Treatment Act of 2005, § 1003(d), Pub. L. No. 109–48, 119 Stat. 2680 (codified at 42 U.S.C. § 2000dd (2006), 10 U.S.C. § 801, 28 U.S.C. § 2241).

[87] *Id.* § 1003(a) ("In general—No individual in the custody or under the control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

[88] *See* U.N. Convention Against Torture, *supra* note 43, pmbl. (recognizing "the obligation of States under the [U.N.] Charter, in particular, Article 55, to promote *universal* respect for, and *observance* of, human rights"; "[h]aving regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the [ICCPR], both of which

provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; and "[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . *throughout the world*" (emphasis added)); *id.* art. 1 (stating that torture under the treaty is proscribed whenever it is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," for example, whether victims are actually in U.S. custody or control); *id.* art. 2(1) (discussing how state duty exists without limitations to "prevent acts of torture in any territory under its jurisdiction" and, thus, whether victims are in U.S. territory and whether victims within the territory who are subject to U.S. jurisdiction are in U.S. custody or control); *id.* art. 4(1) (covering "an act by any person which constitutes complicity or participation in torture" and, therefore, applies whether or not victims are within territory subject to U.S. jurisdiction or are in U.S. custody or control); *id.* art. 5(1)(a) (applying whenever "the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state"); *id.* art. 5(2) (stating a duty to exercise criminal jurisdiction when any "alleged offender is present in any territory under its jurisdiction" and, thus, regardless of the nationality of the perpetrator or place of the crime); *id.* art. 16 (discussing a duty to "prevent [torture] in any territory under its jurisdiction"); U.N. CAT Report, *supra* note 1, ¶ 14 (requiring states to prevent torture "in any territory under its jurisdiction"); *id.* ¶ 15 (including "'territory under [the State party's] jurisdiction' (arts. 2, 5, 13, 16). . . . [as] all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised," and stating that "the provisions of the Convention expressed as applicable to 'territory under the State party's jurisdiction' apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world" (first alteration in original)); *id.* ¶ 17 (applying to "any secret detention facility under its de facto effective control"); *id.* ¶ 18 (requiring a party state to "prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention"); *id.* ¶ 20 (noting that, contrary to the Bush administration's claim that article 3 of the Convention does not extend to persons detained outside the United States, the United States "should apply the *non-refoulement* guarantee to all detainees in its custody, cease rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention" and the United States "should always ensure that suspects have the possibility to challenge decisions of *refoulement*"); *id.* ¶ 24 (applying "in all places of detention under its de facto effective control"); *id.* ¶ 26 (applying "in any territory under its jurisdiction").

With respect to the prohibition of transfer or extradition of any person to another country where there is a real risk that the person will be subject to torture, cruel, inhuman or degrading treatment, or violations of human rights more generally, see U.N. Experts' Report, *supra* note 1, ¶ 55 ("[T]he United States practice of 'extraordinary rendition' constitutes a violation of article 3 of the Convention against Torture and article 7 of ICCPR."); P.A. Doc. 10497, *supra* note 1, § I, ¶ 7(vii) ("*[T]he United States has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on non-refoulement.*"). *See also* Bader v. Sweden, 2005-II Eur. Ct. H.R. #, ¶ 29 ("[A]n alien must not be sent to a country where there are reasonable grounds for believing that he or

those in other relevant treaties and universally applicable customary international law. Thus, not all cruel, inhuman, or degrading treatment is covered by the 2005 legislation and the legislation does not mirror the legal rights and prohibitions contained in several treaties of the United States and customary laws of war and human rights law or the more extensive obligations of the United States that exist under the CAT despite certain putative U.S. reservations and understandings with respect to the CAT.[89]

Nevertheless, Congress expressed no intent to override either treaty-based or customary international legal rights and duties when it enacted the 2005 Defense Appropriations Act. And because there is a well-recognized requirement that there must be a clear and unequivocal expression of congressional intent to override as part of a five-step process concerning conflicts between treaties and federal statutes, relevant treaty-based rights and duties remain among the operative laws of the United States.[90] Moreover, even if Congress had expressed such an intent clearly and unequivocally, the traditional "rights under" a treaty exception to the last-in-time rule recognized in Supreme Court decisions[91] would assure the

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she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment."); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1832; The Soering Case, 161 Eur. Ct. H.R. (ser. A) at 34–36, 44 (1989); *supra* notes 15, 58.

[89] *See supra* note 60.

[90] S*ee, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("[C]ongressional expression [to override is] necessary."); Cook v. United States, 288 U.S. 102, 120 (1933) (stating the purpose to override or modify must be "clearly expressed"); Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) ("[The] act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude."); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) (stating the "purpose . . . must appear clearly and distinctly from the words used" by Congress); PAUST, INTERNATIONAL LAW, *supra* note 40, at 99, 107, 120, 124–25 nn.2–3; *see also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142–44 (2005) (Ginsburg, J., concurring). In any event, the rights and duties remain at the international level, because inconsistent domestic law is not an excuse. *See, e.g.*, Vienna Convention, *supra* note 40, art. 27, 1155 U.N.T.S. at 1-18232 (stating that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); 9 Op. Att'y Gen. 356, 357 (1859); Int'l Law Comm'n, Principles of the Nuremberg Charter and Judgment, princ. II ("[I]nternal law . . . does not relieve the person . . . from responsibility."), *adopted by* G.A. Res. 177 (II)(a), at 11–14, ¶ 99, 5 U.N. GAOR, 2nd Sess., Supp. No. 12, U.N. Doc. A/1316 (July 1950); PAUST, INTERNATIONAL LAW, *supra* note 40, at 125–27 n.4, 305–08 n.547, 422, 435–38, 445; O'Connell, *supra* note 1, at 1235 n.13. Moreover, the 2006 Security Council resolution noted above, *see supra* notes 49–51, is subsequent in time to the 2005 Appropriations Act, *see* source cited *supra* note 86, and, as part of U.S. treaty law, would prevail in case of an unavoidable clash. *See generally* PAUST, INTERNATIONAL LAW, *supra* note 40, at 460, 480–81 n.62.

[91] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 104–05, 137–39 nn.40–49 (citing Supreme Court cases).

primacy of treaty-based rights to freedom from all forms of cruel, inhuman, and degrading treatment over subsequent legislation. More specifically, with respect to rights and duties under the customary and treaty-based laws of war, precedent requires that they prevail as well.[92]

In any event, other federal statutes that the Executive must faithfully execute, expressly or by incorporating relevant international law by reference, allow criminal and civil sanctions for various forms of torture and cruel, inhuman, degrading, and humiliating treatment.[93] Additionally, with respect to executive implementation of human rights, Executive Order 13107 requires that it:

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[92] *See, e.g.*, 11 Op. Att'y Gen. 297, 299–300 (1865) ("Congress may define those laws, but cannot abrogate them . . . . [T]he laws of war . . . are of binding force upon the departments and citizens of the Government . . . . [War] must . . . be carried on according to the known laws and usages of war . . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war [in violation of the laws of war]."); PAUST, INTERNATIONAL LAW, *supra* note 40, at 106–07, 141–42 nn.53–57 (concerning recognitions of Justices Chase, Field, and Sutherland that the laws of war must prevail over inconsistent congressional legislation); *see also* United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (quoting Albert Gallatin in 1798: "[b]y virtue of [the war] power, . . . Congress could . . . [act], provided it be according to the laws of nations and to treaties"); 9 Op. Att'y Gen. 356, 362–63 (1850) (stating that the law of nations "must be paramount to local law in every question where local laws are in conflict [and] what [the President] will do must of course depend upon the law of our own country, as controlled and modified by the law of nations"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–9, 67–70, 169–73, 175, 488–89, 493–94 (documenting that the Executive is bound by international law, especially the laws of war); Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 839–40 n.53 (2005) [hereinafter Paust, *Before the Supreme Court*] (documenting the unanimous views of the Founders, uniform case law, and judicial recognitions that assure all within the executive branch are bound by the laws of war); *infra* notes 97, 114–15. In view of the singular importance of compliance with the laws of war during an armed conflict (as opposed, for example, to a trade agreement), such a recognized primacy of the laws of war is also logical and policy-serving. Since rights and duties under the customary laws of war prevail, all persons within the executive branch are bound to comply with the laws of war as opposed to subsequent legislation that is even unavoidably inconsistent and based in a clear and unequivocal expression of congressional intent to override. By not violating the laws of war, the executive duty to faithfully execute the laws is fulfilled, but one set of laws has primacy over another.

[93] For example, see 10 U.S.C. § 818 (2006) (incorporating all war crimes by reference as offenses against the laws of the United States), as supplemented to provide federal district court jurisdiction by 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47; *see also* 10 U.S.C. §§ 881, 892–893, 920, 925, 928, 934 (regarding courts-martial jurisdiction over offenses such as assault, dereliction of duty, cruelty and maltreatment, rape, sodomy, indecent acts with another, etc.); War Crimes Act, 18 U.S.C. § 2441 (regarding prosecution of certain war crimes committed by any person, civilian or military); Antiterrorism Act, *id.* §§ 2331–2333 (regarding criminal and civil sanctions for certain acts against U.S. national victims); *id.* §§ 2340–2340A (regarding torture); Military Extraterritorial Jurisdiction Act,

> shall be the policy and practice of the government of the United States . . . fully to implement its obligations under the international human rights treaties to which it is a Party and that all executive departments and agencies . . . shall perform . . . [their] functions so as to respect and implement those obligations fully.[94]

IV. CONSTITUTIONALLY UNACCEPTABLE CLAIMS TO UNCHECKED EXECUTIVE POWER

A. Legal Constraints on the Commander-in-Chief Power

Upon signing the 2005 Defense Appropriations Act, President Bush stated that:

> [t]he executive branch shall construe Title X in Division A, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in . . . protecting the American people from further terrorist attacks.[95]

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id. § 3261 (regarding certain civilians employed by or accompanying U.S. military forces abroad); Alien Tort Claims Act (or Alien Tort Statute), 28 U.S.C. § 1350 (regarding a tort for violation of customary international law or a treaty of the United States); Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350) (regarding civil sanctions against certain persons for torture or extrajudicial killing); Paust, *supra* note 1, at 852–55.

It is also of interest that the President's pardon power is expressly limited to the pardoning of "Offenses against the United States" as such, U.S. CONST. art. II, § 2, cl. 1, as opposed to all offenses against the laws of the United States. Thus, it does not appear to reach violations of the customary law of nations or multilateral treaties as such (which are offenses against the international community) or offenses under the laws of the United States that incorporate international law by reference. *See, e.g.*, Jordan J. Paust, *Contragate and the Invalidity of Pardons for Violations of International Law*, 10 HOUS. J. INT'L L. 51, 51 (1987). Moreover, an attempt to provide immunity for international crimes in new legislation would have no binding legal effect outside the United States. *See, e.g.*, PAUST ET AL., *supra* note 51, at 28, 130, 135–36; *see also* Principles of the Nuremberg Charter and Judgment, *supra* note 90, princ. II.

[94] Exec. Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

[95] President's Statement on Signing H.R. 2863 (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

Whatever implications lurk in the language of such a statement, President Bush has no delegated or inherent authority to suspend, change, or ignore the reach of duties set forth in the 2005 legislation.[96]

First, the President is expressly and unavoidably bound by the Constitution to faithfully execute the laws, including the 2005 Act and relevant international law, especially the laws of war.[97] Second, Supreme Court opinions have recognized since 1800 that Congress has constitutionally based power to place limits on certain commander-in-chief powers during actual war.[98] More generally, the Court

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[96] *See also* Press Release, Senator John W. Warner and Senator John McCain Statement on Presidential Signing Detainee Provisions (Jan. 4, 2006), http://mccain.senate.gov/index.cfm?fuseaction'NewsCenter.ViewPressRelease&Content_id'1634 [hereinafter Press Release, Sens. Warner & McCain Statement] ("Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation."). The President has no general legislative power, *see infra* note 121, and has not been delegated any legislative powers in the 2005 Act. Thus, as Senators Warner and McCain have indicated, there is no delegation of power to suspend, waive, or change restrictions contained in the legislation by executive fiat, interpretation, or elsewise. *See* Press Release, Sens. Warner & McCain Statement, *supra*. With respect to signing statements more generally, clearly the President is not a legislator and presidential signing statements are not law and do not amend or suspend the reach of law.

[97] *See, e.g.*, U.S. CONST. art. II, § 3; PAUST, INTERNATIONAL LAW, *supra* note 40, at 109, 147 n.77, 169–73, 179, 487–90, 492–95 (addressing numerous relevant cases); Paust, *supra* note 1, at 856–61 (documenting the consistent and unyielding judicial recognition that, in particular, the laws of war are binding on the executive branch and limit the lawful exercise of the commander in chief powers); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (regarding Hamdi's objection that Congress did not authorize indefinite detention and stating that "indefinite detention for the purpose of interrogation is not authorized"; "Congress' grant of authority . . . [was] to detain for the duration of the relevant conflict, and our understanding [of the Authorization for Use of Military Force's "grant of authority for the use of 'necessary and appropriate force'"] is based on longstanding law-of-war principles"; and "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities"); Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669, 679 (2005); David M. Golove, *The Commander in Chief and the Laws of War*, 99 AM. SOC'Y INT'L L. PROC. 198, 198–201 (2005) [hereinafter Golove, *Commander in Chief*]; David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364, 374–78 (2003) [hereinafter Golove, *Military Tribunals*]; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 648–49 (2005); Jules Lobel, *International Law Constraints*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 107, 109 (Gary M. Stern & Morton H. Halperin eds., 1994); *supra* note 92. Further, it was well known that the people are bound by international law. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–8, 169, 171–72, 180 n.2, 181 nn.7 & 14. Thus, they could not delegate to the federal executive a supposed power to violate such law that they did not possess.

[98] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene

military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers . . . . The Government does not argue otherwise."); *id.* at 2799 (Kennedy, J., concurring in part) ("It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."); *id.* at 2808 (concluding that the presidential military commission "exceeds the bounds Congress has placed on the President's authority"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) ("He has no monopoly of 'war powers,' whatever they are . . . . [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."); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("[D]etention and trial . . . ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war . . . are not to be set aside by the courts without the clear conviction that they are in conflict with[, for example,] laws of Congress constitutionally enacted."); Herrera v. United States, 222 U.S. 558, 573 (1912) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.'" (quoting Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483, 495 (1873))); *Ex parte* Milligan, 71 U.S. (4 Wall) 2, 119, 121 (1866) (stating that during war, "[t]he President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . [and] not to make the laws"; the *Milligan* Court added: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers"); *id.* at 139 (Chase, C.J., dissenting) ("Congress . . . has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (finding that Congress has the power to "conduct a war"); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330–38 (1818) (noting that a statute controls presidential instructions regarding the seizure of vessels); The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 427–28 (1814) (finding the President's right to seize vessels is limited); Brown v. United States, 12 U.S. (8 Cranch) 110, 152–153 (1814); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177–78 (1804) (Marshall, C.J.) (ruling that, despite presidential power as commander-in-chief to seize vessels during war, a congressional act "limits that authority" and Congress "prescribed . . . the manner in which [law] shall be carried into execution"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.) ("The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–45 (1800); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158–59 (D.D.C. 2004); Dellums v. Bush, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990); 9 Op. Att'y Gen. 517, 518–19 (1860) (stating Congress can limit the use of land and naval forces that are otherwise "under his orders as their commander in chief"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 461–62, 474 n.54, 477 n.58; Paust, *supra* note 1, at 842 n.114; *see also* U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To . . . provide for the Common Defence . . . ."); *id.* § 8, cl. 11 (giving Congress the power to "make Rules concerning Captures on Land and Water"); *id.* § 8, cls. 14–16, 18; *Hamdi*, 542 U.S. at 509–10 (stating "Congress authorized the detention of combatants in the narrow circumstances alleged here" regarding the detention of "a man

whom the Government alleges took up arms with the Taliban during" the war in Afghanistan); *id.* at 536 ("Whatever power the . . . Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *id.* at 521 (quoted *supra* note 97); *id.* at 541 (Souter, J., dissenting in part and concurring in judgment) (noting that a statute controls detention of a citizen during war); *id.* at 574 (Scalia, J., dissenting) (same); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (stressing the importance of "the constraints imposed on the Executive by the rule of law"); United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (emphasizing that "restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation"); Madsen v. Kinsella, 343 U.S. 341, 348 (1952) ("In the absence of attempts by Congress to limit the President's power . . . as Commander in Chief . . . he may, in time of war . . . establish and prescribe the jurisdiction and procedure of military commissions."); Ludecke v. Watkins, 335 U.S. 160, 168 (1948) (stating that war "may be terminated by treaty or legislation"); *id.* at 169 n.13 ("[T]here are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive."); Santiago v. Nogueras, 214 U.S. 260, 266 (1909) (stating Congress can impose limits on the military government during occupation); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (addressed *infra* note 133); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("His duty and his power [as commander in chief] are purely military."); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) ("The president of the United States cannot control the [Neutrality Act], nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount . . . . [It would not] be pretended that the president could rightfully grant a dispensation and license [to avoid the statute]."); Padilla v. Hanft, 389 F. Supp. 2d 678, 690–91 (D.S.C. 2005) ("As Justice Jackson stated, 'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy' . . . [and to allow the President to detain a U.S. citizen pursuant to an alleged "inherent authority" and commander in chief power contrary to congressional legislation] would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."), *rev'd on other grounds*, 423 F.3d 386 (4th Cir. 2005); Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897); *War Powers Resolution: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. 109 (1977) (statement of Abraham D. Sofaer, Professor of Law, Columbia Univ. Sch. of Law) ("[N]one of our early Presidents claimed that their constitutionally granted powers were beyond the legislature's authority to control."); FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government the legislative authority, necessarily predominates."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 103–04 (2d ed. 1996) ("[T]he President's powers as Commander in Chief are subject to ultimate Congressional authority . . . ."); *id.* at 233, 235 (stating that international law is binding on the Executive); THE JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 252 (6th ed. 2000) ("Constitutional language suggests that the president and Congress share the war power, the dominant authority being vested in the legislature . . . . Congress determines the rules of warfare . . ."); NORMAN REDLICH ET

also recognized that the President's foreign relations power can "be regulated by treaty or by act of Congress . . . and [if regulated thusly, must] be executed by the executive" in accordance with the treaty or legislative limitations.[99]

Although there are many relevant judicial opinions concerning the reach of congressional authority, those expressed in two early Supreme Court decisions are especially enlightening. In the celebrated case of *Bas v. Tingy*,[100] Justice Washington affirmed the Court's general recognition that Congress can authorize a war "confined in its . . . extent" and "limited as to places, persons, and things" and in such instances "those who are authorised to commit hostilities, act under special authority, and can go no farther."[101] As Justice Chase explained, "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time," adding that "[i]f a general war is declared, its extent and operations are only restricted and regulated by the *jus belli* [or law of war], forming a part of the law of nations; but if a partial war is waged, its extent and operation depend upon" the grant of authority in congressional laws.[102] Justice Paterson agreed that congressional legislation created "a qualified state of hostility . . . or a war, as to certain objects, and to a certain extent" and "[a]s far as congress tolerated and authorized the war . . . , so far may we proceed in hostile operations," that war may be conducted "in the manner prescribed."[103] To reiterate, the Justices recognized that Congress can limit warfare in terms of its extent, objects, operations, persons and things affected, places, and time.

AL., UNDERSTANDING CONSTITUTIONAL LAW 257 (3d ed. 2005) ("The Constitution, in requiring the President faithfully to execute the laws, does not except laws governing use of the armed forces abroad. The Supreme Court expressed this view in an early pronouncement on presidential power." (citing *Little*, 6 U.S. (2 Cranch) at 177–78)); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 209 (2d ed. 1988) ("[C]ommander in chief is conceived as commanded by law."); Golove, *Commander in Chief*, *supra* note 97, at 199–201; Golove, *Military Tribunals*, *supra* note 97, at 381–94; Koh, *supra* note 97, at 648–50. Furthermore, in this instance the 2005 legislation banning certain types of treatment merely implements part of treaty-based and customary international law that is already binding on the President.

[99] Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); *see also Youngstown*, 343 U.S. at 635 n.2 (Jackson, J., concurring) (noting that dicta in *Curtiss-Wright* concerning presidential foreign affairs power does not suggest that the President "might act contrary to an act of Congress" (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 321–22 (1936))); *Curtiss-Wright*, 299 U.S. at 318 (recognizing that despite broad presidential foreign affairs powers to speak, listen, negotiate, and so forth, executive "operations" in a foreign "territory must be governed by treaties . . . and the principles of international law"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 477 n.58.

[100] 4 U.S. (4 Dall.) 37 (1800).

[101] *Id.* at 40 (Washington, J.).

[102] *Id.* at 43 (Chase, J.).

[103] *Id.* at 45 (Paterson, J.). Justice Paterson added that "this modified warfare is authorized by the constitutional authority of our country," which is Congress. *Id.*

Points of agreement between the majority opinion of Chief Justice Marshall and the dissenting opinion of Justice Story in *Brown v. United States*[104] are also particularly informing concerning the reach of congressional power and are emblematic of the duty of the President to faithfully execute domestic legislation and the laws of war. In *Brown*, Chief Justice Marshall recognized that an 1812 Act containing a declaration of war had the "effect of placing" the United States and Great Britain "in a state of hostility, of producing a state of war, of giving [to the United States] those rights which war confers,"[105] which under the laws of war in that era included the right to confiscate enemy property. Marshall added that the Act also "authorizes the president . . . to use the whole land and naval force . . . to carry the war into effect,"[106] but despite broad language in the Act it did not thereby authorize the confiscation of enemy property as an incident of war since the choice whether to confiscate is a question of "policy . . . for the consideration of the legislature" and Congress had not authorized such a war measure expressly or by implication.[107]

Justice Story agreed that "the sovereignty of the nation as to the right of making war, and declaring its limits and effects" rests with Congress.[108] He added: "[t]he [congressional] power to declare war . . . *includes all the powers incident to war*, and necessary to carry it into effect"[109] and that the congressional power "'to provide and maintain a navy'" includes "the power to *regulate* and *govern* the navy."[110]

His main point in dissent was that although Congress has the power to set limits on the "objects and mode of warfare," it had not done so in the 1812 Act:

> There is no act of the legislature defining the powers, objects or mode of warfare: by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion.[111]

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[104] 12 U.S. (8 Cranch) 110 (1814).
[105] *Id.* at 125–26.
[106] *Id.* at 127.
[107] *Id.* at 128.
[108] *Id.* at 145 (Story, J., dissenting).
[109] *Id.* at 150 (emphasis added).
[110] *Id.* at 151 (emphasis added).
[111] *Id.* at 149.

Justice Story assumed that broad language in the Act "authorizing the president to employ the public forces to carry it into effect" was a sufficient conferral of the power to confiscate "property, wherever, by the law of nations, it may be lawfully seized," "there being no limitation in the act"[112] and no violation of the law of nations. For Justice Story, "[i]f the legislature does not limit the nature of the war, all the regulations and rights of general war attach."[113] "He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare . . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."[114] "[C]ertainly the rights of the 'commander in chief,'" Story affirmed, "must be restrained to such acts as are allowed by the laws."[115]

In view of the broad reach of congressional power evident in several judicial decisions, as well as relevant patterns of legislation agreed to by Congress and the President[116] and the express constitutional power of Congress to "make all Laws

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[112] *Id.* at 145.

[113] *Id.* at 154.

[114] *Id.* at 153. Chief Justice Marshall clearly agreed that the President is bound by international law. *See* PAUST, INTERNATIONAL LAW, *supra* note 40, at 170, 180 n.2, 181 nn.8 & 11. No other Justice disagreed. *See, e.g.*, *id.* at 169–71; *see also id.* at 7–9, 38–39 nn.32–45, 44–47 nn.54–56.

[115] *Brown*, 12 U.S. (8 Cranch) at 153.

[116] *See, e.g.*, War Declared Between Germany and the United States, Pub. L. No. 331-77, 55 Stat. 796 (1941) ("[T]he President is hereby authorized and *directed to employ the entire naval and military forces* . . . ." (emphasis added)); War Declared Between Japan and the United States, Pub. L. No. 328-77, 55 Stat. 795 (1941) ("[T]he President is hereby authorized and *directed to employ the entire naval and military forces* . . . ." (emphasis added)); Act of May 13, 1846, ch. XVI, 9 Stat. 9, 9–10 (stating in section 1 that the President "is hereby, authorized . . . to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services, either as cavalry, artillery, infantry, or riflemen, to serve twelve months"; stating in section 3 that "the said volunteers shall furnish their own clothes, and if cavalry, their own horses and horse equipments"; stating in section 5 that "the said volunteers . . . shall be accepted by the President in companies, battalions, squadrons, and regiments, whose officers shall be appointed in the manner prescribed by law in the several States and Territories"; and stating in section 6 that "the President shall, if necessary, apportion the staff, field, and general officers among the respective States and Territories from which the volunteers" come); S.J. Res. 24, 55th Cong., 30 Stat. 738 (1898) ("[T]he President . . . hereby is, *directed* and empowered *to use the entire land and naval forces* of the United States . . . ." (emphasis added)). Legislation during the limited war with France from 1798 to 1800 limited the conduct of war, including types of vessels that could be seized. *See* Act of Feb. 27, 1800, ch. X, 2 Stat. 7 (adding sections 9 through 12 to Act of Feb. 9, 1799, 1 Stat. 613, *addressed in* Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 171–78 (1804); Act of Mar. 2, 1799, ch. XXIV, 1 Stat. 709, *addressed in* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 37–46 (1800).

Some of the early congressional appropriations allocated monies in significant detail. *See, e.g.*, Act of June 15, 1864, ch. CXXIV, 13 Stat. 126; Act of Aug. 14, 1848, ch.

which shall be necessary and proper for carrying into Execution" its powers "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"[117] there is a compelling basis for the presumptive validity of acts of Congress that set limits concerning the extent of war, its objects, its operations, its mode, persons and things to be affected, places, general effects, and time.

Third, numerous cases throughout our history clearly affirm that the judiciary has constitutionally based power to interpret international law and to review various decisions and actions taken by the Executive during war, including the status and treatment of detainees.[118] More particularly, there is consistent and unyielding judicial recognition that the laws of war are binding on all persons within the executive branch, including the President;[119] and, more generally, it has

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CLXXIII, § 2, 9 Stat. 304, 306 (directing that the President can "increase the number of privates, of not more than five regiments, to such number as he may think discreet, not exceeding one hundred privates to each of the companies of said five regiments"); Act of Mar. 2, 1847, ch. XXXV, 9 Stat. 149.

[117] U.S. CONST. art. I, § 8, cl. 18. Whatever lurks behind the Bush administration's unilateralist claim of power "to supervise the unitary executive branch," *see supra* text accompanying note 97,—a phrase unknown to the Constitution—it is clear that clause 18 provides Congress an express authority to pass laws for carrying into execution the powers of any executive "Department or Officer." U.S. CONST. art. I, § 8, cl. 18.

[118] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (stating that courts can "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" (citing Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."))). The court in *Hamdi* also stated that an executive claim to unreviewable power or to power subject only to "a heavily circumscribed role for the courts" cannot comport with the proper separation of powers since it "serves only to *condense* power into a single branch of government." *Id.* at 536. The Court in *Hamdi* added that "a state of war is not a blank check for the President." *Id.*; *see also* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 39, 43 (2005); Paust, *supra* note 1, at 856 n.169; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 514, 517–24 (2003) [hereinafter Paust, *Judicial Power*].

Even after losing *Hamdi*, in another case the "government . . . argued that the district court [for the District of Columbia] had no authority to issue injunctive relief [for a U.S. citizen detained by U.S. military in Iraq who was to be transferred to Iraqi authorities] because doing so would 'inject [the court] into an exclusive Executive function' and . . . [would raise] 'non-justiciable political questions.'" Omar v. Harvey, 479 F.3d 1, 4 (D.C. Cir. 2007) (quoting Respondents' Opposition to Petitioners' Ex Parte Motion for a TRO at 22, 25, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. Civ. A. 05-2374 RMU)). The Circuit Court panel disagreed: "The Supreme Court's recent decision in *Hamdi* makes abundantly clear that Omar's challenge to his detention is justiciable" and that his "challenge to his transfer is equally justiciable, ... [even though] a decision on the merits might well have *implications* for military and foreign policy." *Id.* at 10.

[119] *See, e.g.*, *supra* notes 92, 97–98 and text accompanying notes 102, 112–15.

been recognized that executive views cannot be determinative of the content of law.[120] If the President disagrees and claims that the commander-in-chief power

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[120] *See, e.g.*, *Hamdi*, 542 U.S. at 535–36 (see quote *supra* note 118); United States v. Nixon, 418 U.S. 683, 703 (1974) ("'[It] is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *id.* at 704 ("Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government."). With respect to ultimate judicial determination of the content of customary and treaty-based international law (contrary to executive views) and its application to executive decisions and military conduct abroad during war, see *The Paquete Habana*, 175 U.S. 677, 683, 691, 700, 708, 711 (1900); PAUST, INTERNATIONAL LAW, *supra* note 40, at 105, 174–75, 184 n.24, 188 n.67, 295–96, 387 n.47, 489–90, 493–95; Paust, *supra* note 1, at 858–59 (discussing *The Paquete Habana*); Paust, *Judicial Power*, *supra* note 118, at 505–25 (addressing numerous cases affirming ultimate judicial authority to interpret and apply treaties and customary international law with respect to decisions and conduct of the Executive during war); Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 981–90 (1994) (addressing the Supreme Court ruling that an executive interpretation of customary laws of war was incorrect and executive conduct abroad during war was a violation of the laws of war); *see also* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) ("[D]etermining the[] meaning [of treaties] as a matter of federal law 'is emphatically the province and duty of the judicial department'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)); Clark v. Allen, 331 U.S. 503, 513 (1947); Perkins v. Elg, 307 U.S. 325, 333 (1939); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (noting an executive interpretation of a treaty is "not conclusive upon courts"); Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (noting the judiciary has ultimate authority to interpret treaties); Jordan v. Tashiro, 278 U.S. 123, 128–29 (1928) (noting the judiciary may interpret treaties broadly); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (noting the judiciary is bound to interpret and apply treaties); Jones v. Meehan, 175 U.S. 1, 32 (1899) (noting "[t]he construction of treaties is the peculiar province of the judiciary" and rights under treaties cannot "be divested by any subsequent action of . . . Congress, or of the Executive"); Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165 (1867) (same); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239–40, 249, 251, 253–54, 283 (1796) (exercising its interpretive power and giving examples of interpreted language in a treaty); THE FEDERALIST NO. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]nterpretation of the laws is the proper and peculiar province of the courts."). *But see* Julian G. Ku, Ali v. Rumsfeld*: Challenging the President's Authority to Interpret Customary International Law*, 37 CASE W. RES. J. INT'L L. 371, 371 (2006) (ignoring numerous directly relevant cases and baldly asserting in significant error that presidential "control over the interpretation of [customary international law (CIL)] . . . is . . . reflected in . . . judicial precedent"); *id.* at 376 n.29 (asserting in outrageous error that "no court has preempted state law using CIL"); *id.* at 376 (asserting in outrageous error that "incorporation of CIL as federal law is unsupported by any judicial precedent prior to the 1980s"); *id.* at 378, 380 (discussing *The Paquete Habana* and asserting in outrageous error that the President can "reject CIL rules" and "make his interpretations binding on federal and state courts") (But see, regarding each error, numerous federal and state cases addressed in PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–11, 38–59, 116, 165–67 nn.134–35, 180–87 nn.2–42, 489–90, 493–95, 499–502 nn.23–31, 507–10 nn.82–103);

allows him to violate the 2005 Act and underlying laws of war and human rights law, he will be conducting war on the Constitution.[121]

Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2404 n.103 (2006) (asserting in error and without citation that "Congress and the President hold the power to recognize rules of customary international law as binding on the U.S. government"); John C. Yoo, *Rejoinder: Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1309 (2002) (preferring a radical change and theorizing that the "treaty power as a whole . . . ought to be regarded as an exclusively executive power"); Yoo & Delahunty Memo, *supra* note 24, at 28.

[121] *See* PAUST, INTERNATIONAL LAW *supra* note 40, at 109, 147 n.77, 169–73, 179, 487–90, 492–95, 497–510. Although some misconstrue an "over-simplified," non-determinative formula once proffered by Justice Jackson, the Justice was emphatic that the President is bound by law. *See, e.g.*, *id.* at 191–92 n.81, 487, 489–90 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646, 649 (1952) (Jackson, J., concurring) (stating that unreviewable "powers *ex necessitate*" were omitted by the Framers, who assured "control of executive powers by law," and that "it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military")); *id.* at 497 nn.1–3, 502 n.31; *supra* note 98 (quoting *Youngstown*, 343 U.S. at 643 (Jackson, J., concurring)); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President . . . ." (citing *Youngstown*, 343 U.S. at 587)); *id.* at 552 (Souter, J., concurring in part and dissenting in part) ("[I]t is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military."); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting); Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (stating the claim of executive power to suspend the Constitution during war is "pernicious" and "the theory of necessity on which it is based is false")); *Ex parte* Merryman, 17 F. Cas. 144, 149−50 (C.C.D. Md. 1861) ("Nor can any argument be drawn from . . . necessity . . . [or] self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution . . . ."). The *Merryman* Court added that the Constitution provides "security against imprisonment by executive authority." 17 F. Cas. at 149−50. *Youngstown* also affirmed that the President's duty "to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587. It follows that the President's constitutional duty of faithful execution also refutes the idea that the President can simply suspend or change the reach of rights and duties based in legislation and it refutes the idea that his views of the content of the law are determinative. *See also* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (quoted *supra* note 98); Neil Kinkopf, *Statutes and Presidential Power: The Case of Domestic Surveillance*, JURIST, Mar. 13, 2006, http://jurist.law.pitt.edu/forumy/2006/03/statutes-and-presidential-power-case.php (stating deference to executive interpretations of statutes conferring powers on the President would be improper); *supra* note 120 (showing executive views cannot determine the content of law). As Richard Nixon learned, presidential authorizations to violate law are, in the words of the House Judiciary Committee, "subversive of constitutional government." HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 93-1305, at 4 (1974).

One of the causes of our Revolution involved a British governor's "defiance of the obligation of treaties."[122] Additional causes involved the King's prosecution of hostilities "without regard to faith or reputation"[123] and use of Indians who acted outside the "known rule of warfare."[124] It is inconceivable that the Founders and Framers would have countenanced a commander-in-chief who claimed a right to violate treaties or, more particularly, the laws of war. Unanimous documented views of the era affirm that they did not.[125] Additionally, the Founders decried the King's efforts "to render the military independent of, and superior to the civil power."[126] Although the President would later be given power as commander-in-

[122] *See* Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 295, 298 (rev. ed. 1972).

[123] *Id.*

[124] THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

[125] *See, e.g.*, PAUST, INTERNATIONAL LAW *supra* note 40, at 7–9, 67–69, 169–71, 180–83 nn.1–22; *supra* note 97; *see also id.* at 195–202, 208–09 (concerning early commitment to human rights); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112–13 (1972) (concerning other early adherence to laws of war and more general laws of nations).

[126] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); Delaware Declaration of Rights § 20 (1776), *reprinted in* Perry, *supra* note 121, at 339 ("[I]n all cases and at all times the military ought to be under strict subordination to and governed by the civil power."); MASS. CONST. OF 1780, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, art. XVII, *reprinted in* Perry, *supra* note 121, at 376 ("[T]he military power shall always be held in an exact subordination to the civil authority, and be governed by it."); MD. CONST. OF 1776, A Declaration of Rights § XXVII, *reprinted in* Perry, *supra* note 121, at 348 ("[I]n all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."); N.C. CONST. OF 1776, A Declaration of Rights § XVII, *reprinted in* Perry, *supra* note 121, at 356 ("[T]he military should be kept under strict subordination to, and governed by, the civil power."); N.H. CONST. OF 1784, art. I § VIII, *reprinted in* Perry, *supra* note 121, at 383 ("[A]ll the magistrates and officers of government are . . . at all times accountable to [the people]."); *id.* § XXVI, *reprinted in* Perry, *supra* note 121, at 385 ("In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power."). Additionally, at the Constitutional Convention, Charles Pinckney of South Carolina warned that giving the President unfettered power over war "would render the Executive a Monarchy of the worst kind." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 69, at 64–65; PA. CONST. of 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth, or State, of Pennsylvania § IV, *reprinted in* Perry, *supra* note 121, at 329 ("[A]ll officers of government, whether legislative or executive, are . . . at all times accountable to [the people]."); *id.* § XIII, *reprinted in* Perry, *supra* note 121, at 330 ("[T]he military should be kept under strict subordination to, and governed by, the civil power."); *see also* VA. CONST. OF 1776, Bill of Rights § 2, *reprinted in* Perry, *supra* note 121, at 311 ("[M]agistrates are . . . at all times amendable to [the people]."); *id.* § 13, *reprinted in* Perry, *supra* note 121, at 312 ("[I]n all cases the military should be under strict subordination to, and governed by, the civil power."); VT. CONST. OF 1777, A Declaration of the Rights of the Inhabitants of the State of Vermont § V, *reprinted in* Perry, *supra* note

chief of the military partly to assure civil control of the military, it is inconceivable that the Founders would have countenanced a commander-in-chief of the military or "first general" who was himself superior to "civil power" and not "governed by it."[127]

121, at 365 ("[A]ll officers of government, whether legislative or executive, are . . . at all times accountable to [the people]."); *id.* § XV, *reprinted in* Perry, *supra* note 121, at 366 ("[T]he military should be kept under strict subordination to, and governed by, the civil power.").

[127] *See supra* note 126 (demonstrating that the quoted language "civil power" and "governed by it" appears in various early state declarations of right and constitutions). Alexander Hamilton declared that the President's commander-in-chief power "in substance [is] much inferior to . . . [the British King's power and] would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral." THE FEDERALIST NO. 69, at 385–86 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In addition, Hamilton stated that the British King's power "extends to the . . . *regulating* of fleets and armies—all of which, by the Constitution . . . , would appertain to the legislature." *Id.* No Founder is known to have claimed that a "first general" should not ultimately be controlled and "governed by" the "civil power." *Cf.* THE FEDERALIST NO. 72, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting "the direction[s] of the operations of war" as such "[are] matters of a like nature . . . [that] seem[] to be most properly understood by the administration of government."). Moreover, the Declaration of Independence decried "usurpations" by the King of England, such as "abolishing the free System of English Laws in a neighbouring Province," "abolishing our most valuable Laws," "suspending our own Legislatures," and other acts "which may define a Tyrant." THE DECLARATION OF INDEPENDENCE paras. 22, 23, 24 (U.S. 1776). Thus, it would have been inconceivable that the Founders would have tolerated a commander-in-chief who violated our laws and claimed a power to ignore them. *See also* 1 Op. Att'y Gen. 492, 493 (1821) ("[I]n a government purely of laws, no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. This . . . is republican orthodoxy . . . ."); Declaration of the Causes and Necessity of Taking Up Arms, *supra* note 122, at 299 (decrying "the tyranny of irritated ministers"). Most assuredly this was "common sense." *See* THOMAS PAINE, COMMON SENSE (Phila., Newbury-Port 1776) ("[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."), *reprinted in* THE ESSENTIAL THOMAS PAINE 49 (Sidney Hook ed., 1969).

Madison had expressed a related distrust of executive power regarding more general decisions concerning war, peace, and their limitation:

> It is in war . . . that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

JAMES MADISON, *"Helvidius" Number 4*, *in* THE WRITINGS OF JAMES MADISON 171, 174 (Gallard Hunt ed., Knickerbocker Press 1906). In a letter to Jefferson, Madison also noted: "The constitution supposed, what the History of all Gov[ernmen]ts demonstrates, that the

B. The Commander-Above-the-Law Theory

These recognitions would be unremarkable if members of the Bush administration had not claimed that the President, as commander-in-chief, can violate international and domestic laws. The commander-above-the-law theory was set forth in various DOJ and DOD memoranda and reports from 2001 to 2003 that the administration has not denounced. A primary proponent of the theory was John Yoo[128] and several others in the administration endorsed the theory or proffered a related claim of necessity to violate international law.[129] For example, a 2003 DOD Working Group Report on Detainee Interrogations adopted John Yoo's commander-above-the-law theory[130] and the Yoo theory was set forth in the infamous 2002 Bybee torture memo.[131] A related claim that "courts may not second-guess" the President also has been reflected in administration briefs.[132]

Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature]." Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.

[128] *See, e.g.*, YOO, *supra* note 14, at 35 (stating that, instead of faithful execution of Geneva law, the inner circle did a cost-benefit analysis of compliance and decided not to comply); *id.* at 192 ("[C]oercive interrogation . . . should not be ruled out."); *id.* at 202 ("The executive branch should continue . . . deciding when to use coercive interrogation."); *supra* notes 24, 38; *infra* note 139.

[129] *See, e.g.*, Paust, *supra* note 1, at 824 (Gonzales); *id.* at 828 (Bush); *id.* at 831 (Delahunty and others); *id.* at 835 n.90 (Bybee); *id.* at 836–38 nn.96–97; *id.* at 842 n.114 (Mary Walker and others); Brooks, *supra* note 77 (quoting Bradbury's testimony before the Senate Armed Services Committee); Mayer, *supra* note 9, at 44 (discussing Addington's involvement in drafting Bybee's torture memo); Ragavan, *supra* note 9, at 32 (discussing Addington's involvement in drafting the Gonzales memo); *see also* Alvarez, *supra* note 1, at 197–98; Amann, *supra* note 2, at 2100 n.58 (addressing the claim of Gonzales in 2005 that the President "'could theoretically decide that a U.S. law—such as the prohibition against torture—is unconstitutional'" (quoting Dan Eggen & Charles Babington, *Torture by U.S. Personnel Illegal, Gonzales Tells Senate*, WASH. POST, Jan. 19, 2006, at A4)); Lichtblau, *supra* note 18; Press Briefing of Alberto Gonzales, U.S. Att'y Gen. (June 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (the President "has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary"); *infra* note 139.

[130] *See, e.g.*, Paust, *supra* note 1, at 842 n.114; Mora Memo, *supra* note 5, at 17–18.

[131] *See, e.g.*, Paust, *supra* note 1, at 835 & n.89; Koh, *supra* note 97, at 648–50; *supra* note 37. The Bybee memo was later withdrawn, but the commander-above-the-law theory was not denounced.

[132] *See, e.g.*, Amann, *supra* note 2, at 2100; Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. L. REV. 335, 362, 364, 367–68 (2005); Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 87 (2005); Paust, *Judicial Power*, *supra* note 118, at 504 & n.4. The Supreme Court rejected

More recently, a DOJ memorandum on domestic spying claimed a commander-in-chief power to ignore congressional legislation,[133] a claim that was subsequently

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this claim in *Hamdi*. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (quoted *supra* note 118).

[133] *See* Memorandum from the Dep't of Justice on Legal Authorities Supporting the Activities of the National Security Agency Described by the President 3, 35 (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa.whitepaperonnsalegalauthorities.pdf (arguing that an implied executive power termed an "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance" exists and is somehow an exclusive power both here and abroad, and that in the event of a clash with the Foreign Intelligence Surveillance Act, "FISA would be unconstitutional"); *see also* Eric Lichtblau & James Risen, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 19, 2006, at A1; Eric Lichtblau, *Nominee Says N.S.A. Stayed Within Law on Wiretaps*, N.Y. TIMES, May 19, 2006, at A20 (former head of the National Security Agency, General Michael Hayden, testified before the Senate Intelligence Committee: "I talked to the N.S.A. lawyers . . . they were very comfortable with the Article II arguments and the president's inherent authorities . . . . Our discussion anchored itself on Article II"); Mayer, *supra* note 9, at 44 (stating that Addington and Cheney told N.S.A. lawyers "that the President, as Commander-in-Chief, had the authority to override" FISA); Ragavan, *supra* note 9 (noting that Addington used the commander-in-chief-above-the-law claim in support of President Bush's decision to engage in domestic surveillance in violation of FISA); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1 (noting that in signing statements, President Bush has "claimed the authority to disobey more than 750 laws enacted since he took office," including laws regulating domestic spying, the McCain amendment, requirements to report to Congress concerning use of the Patriot Act, laws forbidding use of U.S. troops in combat in Colombia, laws requiring retraining of prison guards on requirements of the Geneva Conventions, and a law creating an inspector general for Iraq); *infra* note 142. *But see* ABA TASK FORCE ON DOMESTIC SURVEILLANCE IN THE FIGHT AGAINST TERRORISM, RESOLUTION 302 AND REPORT 27 (2006), *available at* http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf (Resolution 302 was adopted by the ABA House of Delegates on February 13, 2006); PAUST, INTERNATIONAL LAW *supra* note 40, at 509 n.97; David A. Cole, Remarks, *NSA Wiretapping Controversy*, 37 CASE W. RES. J. INT'L L. 509, 513–14, 529 (2006); Joyce Appleby & Gary Hart, *Wake Up, America, to a Constitutional Crisis: 'Congress Has Been Supine in the Face of the President's Grab for Unconstitutional Power,'* CHI. SUN-TIMES, Apr. 2, 2006, at B2; *Lawyers Group Opposes Warrantless Spying*, L.A. TIMES, Feb. 14, 2006, at A13; Jordan J. Paust, Op-Ed., *Not Authorized by Law: Domestic Spying and Congressional Consent*, JURIST, Dec. 23, 2005, http://jurist.law.pitt.edu/forumy/2005/12/not-authorized-by-law-domestic-spying.php (noting also that Congress set limits on domestic surveillance in the FISA and did not expressly or impliedly authorize their obviation with respect to surveillance either within or outside the United States in any subsequent legislation, including the 2001 Authorization for Use of Military Force ("AUMF")—addressed *infra* Part IV); *see also* Statement on Signing S.1566, Foreign Intelligence Surveillance Act of 1978, into Law, 2 Pub. Papers 1853, 1853 (Oct. 25, 1978), *available at* http://www.cnss.org/Carter.pdf ("[The law] requires . . . a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United

denounced by a federal district court.[134] Revelations of domestic electronic spying

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States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority . . . .").

Similar claims were made in a letter to four congresspersons on December 22, 2005, by Assistant Attorney General Moschella. *See* Letter from William Moschella, Assistant Att'y Gen., to Senators Pat Roberts and Peter Hoekstra, Chairmen, Senate Select Comm. on Intelligence, and John D. Rockefeller, IV, Vice Chairman, and Jane Harman, Ranking Member (Dec. 22, 2005), *available at* http://cryptome.org/doj-nsa-spy.htm. Senator Roberts has openly accepted the commander-above-the-law theory. *See Meet the Press* (NBC television broadcast Feb. 12, 2006) (remarks of Sen. Pat Roberts) (stating that, in regard to FISA limits, "the president has the constitutional authority . . . . [that] rises above any law passed by the Congress"). With respect to the commander-in-chief power, Assistant Attorney General Moschella seriously misread the *Prize Cases* by ignoring the fact that immediately before the language he quoted, the Supreme Court expressly referred to two early federal statutes that "authorized . . . [and] bound" the President to use armed force, demonstrating another instance of congressional power to regulate portions of the commander-in-chief power during actual war. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("*[B]y the Acts of Congress* of February 28th, 1795, and 3d March, 1807, he is *authorized* to . . . use the military and naval forces of the United States in case of invasion by foreign nations . . . . [Thus, i]f a war be made by invasion of a foreign nation, the President is not only *authorized* but *bound* to resist force by force." (emphasis added)); *see also id.* at 691 (Nelson, J., dissenting) (regarding the Acts of 1792 and 1795 and the presidential power to call the militia). The Court also expressly affirmed that the President "has no power to initiate or declare a war," *id.* at 668, "is bound to take care that the laws be faithfully executed," *id.* at 691, and that "[t]he right of . . . capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations," *id.* at 666. Justice Thomas engaged in the same misread of *The Prize Cases* in Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2823, 2826 (2006) (Thomas, J., dissenting) (alleging in error that the *Prize* opinion "observed" that the President has "broad constitutional authority to protect the Nation's security in the manner he deems fit" and "recogniz[ed] that war may be initiated by 'invasion . . . ,' and . . . the President's response, usually precedes congressional action").

It does not follow merely because intelligence-gathering is an accepted and important war measure that (1) Congress cannot set limits on its use during war (*e.g.*, under the FISA), or (2) Congress impliedly authorizes such a measure when it authorizes the use of force, much less a very selective use of appropriate force. *See also* Paust, *supra* (stating no congressional authorization exists in the AUMF to override the requirements of the FISA and such would not be "appropriate"); *supra* note 98 and text accompanying notes 121–22, 124–27; *cf. Hamdi*, 542 U.S. at 518 (stating that the 2001 congressional authorization of certain necessary and appropriate force impliedly authorized the detention of a limited category of individuals from the war in Afghanistan as a "fundamental and accepted . . . incident to war" regarding the "'force' Congress has authorized").

[134] *See* ACLU v. NSA, 438 F. Supp. 2d 754, 775–80 (E.D. Mich. 2006) (ruling that the President's domestic spying program "has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment" and has violated the First Amendment rights of plaintiffs); *id.* at 778 (stating that the President's domestic spying program "undisputedly,

have been followed by revelations of warrantless mail inspections in violation of federal legislation with a claimed right to do so in a 2006 presidential signing statement attached to a postal statute.[135] It was also reported that Vice President Cheney and others in the White House, and perhaps President Bush, had authorized the leaking of two types of highly classified national security information for political purposes despite federal laws prohibiting such conduct.[136]

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has violated the provisions of FISA for a five-year period . . . [and violated] the Separation of Powers ordained by the very Constitution of which this President is a creature"); *id.* at 779 (ruling that the President's domestic spying program is not authorized by the 2001 Authorization for Use of Military Force, especially since the FISA and Title III "have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions," and the FISA's "highly specific . . . requirements" would prevail over the more general AUMF even if it impliedly applied to antiterrorist intelligence surveillance); *id.* at 780 (stating the President's domestic spying program is not permissible because of a claim that the President, as Commander-in-Chief, "has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution").

[135] *See, e.g.*, Mimi Hall & David Jackson, *Bush Administration Defends Warrantless Mail Inspection*, USA TODAY, Jan. 5, 2007, at 4A (addressing a Dec. 20, 2006, signing statement that is not even limited to contexts of war or terrorism).

[136] *See, e.g.*, David Johnston & David E. Sanger, *Cheney's Aide Says President Approved Leak*, N.Y. TIMES, Apr. 7, 2006, at A1; Richard B. Schmitt & Peter Wallsten, *Libby Said Bush OKd Leaks*, L.A. TIMES, Apr. 7, 2006, at A1 (stating leaks of classified information from the National Intelligence Estimate of 2003, which "was [only] officially declassified almost two weeks later," occurred with approval from Cheney and Addington, who stated that Bush authorized the leaking of classified information); Richard B. Schmitt, *Libby Says 'Superiors' Authorized Leaks*, L.A. TIMES, Feb. 10, 2006, at A1; Andrew Zajac, *Libby Said He Had OK to Leak Secrets*, CHI. TRIB., Feb. 10, 2006, at C1; *see also* Mayer, *supra* note 5, at 32–41 ("Documents embarrassing to Addington's opponents were leaked to the press."). Members of the Bush Administration also intentionally leaked highly classified information concerning the identity of high-level covert CIA employee Valerie Plame Wilson for political purposes with clearly foreseeable harm of great significance to CIA operatives, the Agency, and our national security. *See, e.g.*, Bob Deans, *Plame: Leak Felt Like "Hit in the Gut": On Capital Hill, Former CIA Operative Says Covert Identity Exposed, U.S. Intelligence Efforts Undercut for Political Purposes*, ATLANTA J.-CONST., Mar. 17, 2007, at 1A; Trevor Royle, *The Fall Guy*, SUNDAY HERALD, Mar. 11, 2007, at 42; Raymond Whitaker & Andrew Buncombe, *How an Article in the "IOS" Led to the Conviction of Lewis "Scooter" Libby*, INDEP. (London), Mar. 11, 2007, at 50; Zajac, *supra*. This is just one set of detrimental consequences that has followed from an arrogant commander-above-the-law policy that has shifted the war to one against our own institutions. Leaks of such a nature are far different from leaks by lower-level officials to disclose governmental illegality of highest-level officials. The latter sort of leaks can also involve a claimed defense of "justification," especially when disclosures of illegality to those highest-level officials that authorized the illegality would be futile. Concerning the justification defense, see Irina Dmitrieva, Note, *Stealing Information: Application of a*

Even if the Vice President had a power like the President to declassify certain documents, the mere existence of such a power would not be a defense to unlawful leaks that occurred while the documents and information remained classified.[137]

John Yoo's commander-above-the-law preference for the primacy of so-called "self-defense" interrogation tactics over nonderogable international law and his radical and nihilistic theory that the President can lawfully violate the laws of war[138] has its domestic counterpart—a fundamentally anti-democratic and unconstitutional preference for a congressionally unchecked and judicially unreviewable executive commander-in-chief power to override any inhibiting domestic law.[139] Some of John Yoo's DOJ memos addressing presidential power

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Criminal Anti-Theft Statute to Leaks of Confidential Government Information, 55 FLA. L. REV. 1043, 1072 n.170 (2003).

[137] *See* United States v. Nixon, 418 U.S. 683, 695–96 (1974) (stating that "[s]o long as this regulation is extant it has the force of law" and "[s]o long as [an executive] regulation remains in force the Executive branch is bound by it, and indeed . . . [the three branches are] bound to respect and to enforce it" despite the power in the President to amend or terminate it); 10 Op. Att'y Gen. 11, 17 (1861); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 32 (2d ed. 1920).

[138] *See, e.g.*, *supra* notes 24, 27, 120, 130–31.

[139] *See, e.g.*, David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 145 (2005); Paust, *supra* note 1, at 834 n.89 (quoting John Yoo in an interview regarding "'the Commander-in-Chief function'" as compared to congressional power: "'[Congress] can't prevent the President from ordering torture.'" (alteration in original)); Hentoff, *supra* note 24 (quoting John Yoo's response regarding laws created by Congress); O'Connor, *supra* note 24; Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping*, WASH. POST, Dec. 26, 2005, at A3; Andrew Sullivan, *Nixon's Revenge: The Return of the Wiretappers*, SUNDAY TIMES (London), Jan. 1, 2006, at 4; Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21, 24–25; John C. Yoo, *A Crucial Look at Torture Law*, L.A. TIMES, July 6, 2004, at B11 ("[A]s commander in chief, [the President] may have to take measures . . . that might run counter to Congress' wishes."); Memorandum Opinion from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, for the Deputy Counsel to the President (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm ("Neither statute [addressed] . . . can place any limits on the President's determinations as to . . . the method, timing, and nature of the response. These decisions . . . are for the President alone to make . . . . In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable."); *see also* YOO, *supra* note 14, at 120–21 (stating "emergencies . . . cannot be addressed by existing laws" and "presidents [should not be] . . . duty-bound to obey any and all acts of Congress, even those involving the commander-in-chief power"); *id.* at 200–02 (stating that even after the prohibition of coercive interrogation in the 2005 Detainee Treatment Act, "[t]he executive branch should continue . . . deciding when to use coercive interrogation"). *But see supra* Part IV.A. Yoo's co-author of the 2002 Yoo & Delahunty Memo, *see supra* note 24, continues to claim that the President has a commander-in-chief authority "to authorize torture," even "in violation of statutory law and the CAT." *See* Robert J. Delahunty, *The CINC Authority and the Laws of War*, 99 AM. SOC'Y INT'L L.

reflect a jurisprudence of a right-winged flock that is not "conservative" or originalist, but ahistorical, autocratic, and ideologic at base. It is also clearly not strict constructionist.[140] The blueprint for its adherents reflects a willingness to ignore the Founders' and Framers' most relevant majority and uniform views (if any are addressed), the text and structure of the Constitution, and overwhelming judicial opinions for more than 200 years, and pretends that if a few professors with an extremist agenda disagree legal limits somehow disappear and the content of law can be recast merely through anti-contextualist ideologic debate.[141] The

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PROC. 190, 192 (2005). The autocratic Yoo and Delahunty commander-above-the-law theory seems to have a few academic supporters. *See, e.g.*, Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 Yale L.J. Pocket Part 84, 84 (2006), *available at* http://www.thepocketpart.org/images/pdfs/37.pdf (opining that the President has "an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power," with merely imperfect attention to two cases and missing judicial recognition of the significant reach of congressional power documented herein); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2100–02, 2089, 2097 (2005).

[140] *See generally* Golove, *supra* note 139. *See* Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 100 (2006) (stating the theory that "statutes could be set aside" is a "reactionary ideology . . . that has pervaded . . . [the Bush administration's] activity in the past five years"); *id.* at 105 (stating that military commissions are "a reactionary constitutional ideology"); Paust, *supra* note 1, at 856–59, 862 n.198; Wendel, *supra* note 18, at 68 n.2, 70 & n.7, 112–14, 120, 128; Mayer, *supra* note 9, at 44 (quoting attorney Scott Horton, historian Arthur Schlesinger, Jr., conservative attorney Bruce Fein, Professor Richard A. Epstein, and others); *supra* notes 24, 98; *see also* Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1297–98 (2005) ("[The] failure [of "the rule of law"] was predictable in an administration whose legal decision making bespeaks prerogatives of power more than limitations of law. Hand-picked political appointees collaborated secretly on the Torture Memo, driving directly to a desired bottom line . . . . [T]he torture debacle was born in part of ideologically driven myopia."); Louis Fisher, *President's Game? History Refutes Claims of Unlimited Presidential Power over Foreign Affairs*, LEGAL TIMES (Wash., D.C.), Dec. 4, 2006, *available at* http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1164636899541 (stating that Yoo and others misuse dictum in *Curtiss-Wright* and ignore historic trends).

[141] *See also* Delahunty, *supra* note 139, at 192; Ku, *supra* note 120, at 376–80; Paust, *Before the Supreme Court*, *supra* note 92, at 851–52 & n.118; Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451, 1453, 1458–61, 1466, 1470–72 (2006) (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) (criticizing Yoo's theories regarding war and treaty powers as ahistorical, anti-textual, and shockingly ignoring of actual views of the majority of Founders and Framers and actual trends in judicial decision); Yoo & Delahunty Memo, *supra* note 24, at 35 & n.108. In practice, the approach failed to provide the executive branch with sound, realistic, and professional legal advice. *See also* Alvarez, *supra* note 1, at 186, 191 (describing the torture memo as "shoddy and

administration has not abandoned the domestic counterpart to John Yoo's theory[142] despite its lack of any clear support in the text and structure of our Constitution, views of the Founders and Framers, relevant patterns of legislation, and predominant recognitions and trends in judicial opinions.[143]

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incomplete . . . reckless," and "a perversion of . . . law"); *id.* at 215–18, 222–23; Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 693–95 (2004); Koh, *supra* note 97, at 647–50, 652–54; Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 134 (2005) (stating the Bybee Memo "seems irresponsible lawyering at best"); Pillard, *supra* note 140, at 1297–98; Wendel, *supra* note 18, at 68–70 & nn.2 & 7, 112–14, 126–27; Aaron R. Jackson, Comment, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149, 153–56 (2005); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3; Geoffrey R. Stone, *Taking Liberties*, WASH. POST, Nov. 5, 2006, at T6 (book review) (describing Yoo's conclusion that the President is exclusively in charge in wartime as "extreme, reckless and dangerous"); Geoffrey S. Corn, *Pentagon Process Subverted? The Lost Battle of Alberto Mora*, JURIST, Feb. 22, 2006, http://jurist.law.pitt.edu/forumy/2006/02/pentagon-process-subverted-lost-battle.php; Lawyers' Statement on Bush Administration's Torture Memos from Richard L. Abel et al. to President George W. Bush et al. (2004), *available at* http://www.afj.org/spotlight/0804statement.pdf (criticizing the claims to engage in torture); *supra* notes 5, 35.

Westlaw-phobia is an apparent affliction shared by other professors who offer sometime sophistic speculation about important aspects of the reach of law or who, having discovered alleged controversy or uncertainty among themselves, assume that the content of law is no longer extant and discoverable. Lack of attention to actual and directly relevant holdings and expectations of the judiciary set forth in judicial opinions can render even eloquent prattle sterile. The affliction would be of little consequence if left lifeless in law reviews, but it can be dangerous if it migrates to memoranda and briefs under the pretense of providing our government with a statement of "law." Are those in the executive branch bound by the laws of war? Is the commander-in-chief power completely free from legislative limits? Does the judiciary have authority to review the legality of executive decisions and conduct during war? Directly relevant and stable holdings and patterns of juristic expectation regarding each question are discoverable in numerous cases and should not be ignored.

[142] *See also* Mayer, *supra* note 9, at 44 (quoting especially the claims of Addington and Cheney); Wendel, *supra* note 18, at 84; Byron York, *Listening to the Enemy—The Legal Ground on Which the President Stands*, NAT'L REV., Feb. 27, 2006, at 22, 22; Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. TIMES, Feb. 2, 2006, at A1; *Spy Crimes*, NEW REPUBLIC, Jan. 16, 2006, 7, 7; *supra* notes 22, 129, 133–34 (discussing the Bush statement that he will not abandon secret detentions and "tough" interrogation tactics in apparent violation of section 1003(a) of the 2005 Detainee Treatment Act).

[143] Bay, *supra* note 132, at 362, 367, 386; *supra* notes 92, 97–120, 142.

V. MISINTERPRETATIONS OF THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

A few argue that the 2001 congressional Authorization for Use of Military Force ("AUMF")[144] after 9/11 provided an authorization for executive use of any lawful war measure here or abroad during a so-called "war" on "terrorism." However, such a claim is in error. The AUMF is not a declaration of "war," but merely a very limited authorization to use necessary and "appropriate" "force" against certain persons, nations, or organizations that were either directly involved in or aided the 9/11 attacks, or that had "harbored" such organizations or persons before or during the 9/11 attacks.[145] Congressional use of the past tense regarding nations, organizations, or persons that "aided" or "harbored" those who planned, authorized, or committed the 9/11 attacks means that the intentional aiding or harboring must have occurred before or during the 9/11 attacks and with reference to such attacks. The AUMF does not authorize use of force against those persons or organizations who were or are merely general supporters of those responsible for the 9/11 attacks; who were or are merely "affiliated," "associated," or have "links" with al-Qaeda; or who pose any threat of future terrorist attacks.[146]

It most certainly did not authorize a "war" against al-Qaeda (a non-state actor), as opposed to force,[147] or a "war" against a mere tactic of "terrorism."

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[144] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) [hereinafter AUMF].

[145] *Id.* pmbl. ("To authorize [action] . . . against those responsible for the recent attacks . . . ."); *id.* § 2(a) (applying to "those . . . [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . ."); *see* Paust, *Before the Supreme Court*, *supra* note 92, at 838 n.51; Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 189–90 (2005) ("Whatever other targets may be encompassed when the President refers to the global war on terrorism, the entities that Congress has designated to be the subject of military force are limited to those that either played a role in planning or carrying out the 9-11 attacks or sheltered those responsible."); *id.* at 192 ("The class of persons [addressed] under President Bush's executive order [regarding military commissions is] significantly broader than the class of persons fitting within the terms of Congress's Military Force Authorization."); *see also* YOO, *supra* note 14, at 115, 124.

[146] *See, e.g.*, Paust, *Before the Supreme Court*, *supra* note 92, at 838 n.51; Yin, *supra* note 145, at 189–90.

[147] The fact that the United States uses military "force" in a foreign state in legitimate self-defense against a non-state actor engaged in a process of armed attacks against the United States, its military, and/or its nationals here or abroad does not create a "war," "armed conflict," armed "hostilities," or "combat" if the non-state actor is not a belligerent or insurgent and U.S. military forces do not engage in hostilities with the armed forces of the state in whose territory the self-defense measure takes place. *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 535 n.3 (2002) [hereinafter Paust, *Use of Force*]; Paust, *Post 9/11*, *supra*

Congress actually refused to authorize use of force against "acts of terrorism" as such[148] and the Supreme Court recognized earlier that only Congress has the constitutional power to determine whether a war exists.[149] Moreover, the United

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note 15, at 1341 & n.23 (noting remarks of former U.S. Department of State Legal Adviser Abraham D. Sofaer); *see also* Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 821 (2005); *cf.* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 245 (4th ed. 2005) (arguing that such actions create an "armed conflict" with the state, but not a "war"). The fact that Section 2(b)(1) of the AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)), stated that the AUMF was specific statutory authorization within the meaning of Section 8(a)(1) of the War Powers Resolution, 50 U.S.C. §§ 1541–1548, does not mean that Congress contemplated that use of any sort of force in the future would create a state of war. It was contemplated that the U.S. military would be engaged in conflict with al-Qaeda in Afghanistan where the Taliban was engaged in a war with the Northern Alliance. Additionally, the AUMF authorized the use of force against certain nations, which at the time might have been thought to have included the state of Afghanistan—a nation controlled by the Taliban. *See* AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)); *see also infra* note 153. Under the circumstances, it was contemplated that U.S. armed forces would be introduced "into situations where imminent involvement in hostilities" between the Taliban and the Northern Alliance, or against the Taliban, clearly could occur within the meaning of the War Powers Resolution and the international laws of war. Additionally, Congress is presumed to understand that under international law (and apparently under U.S. domestic law) the United States cannot be at "war" with a "person" or "organization" or any entity lacking even insurgent status. *See also infra* note 150.

[148] *See, e.g.*, David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 72–74 & n.5 (2002) (stating that the AUMF is not a declaration of war); Bradley & Goldsmith, *supra* note 139, at 2079 & nn.133–35.

[149] *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (stating the President "has no power to initiate or declare a war"); *id.* at 693 (Nelson, J., dissenting) ("Congress alone can determine whether war exists or should be declared . . . .); *id.* at 698 ("[T]his power belongs exclusively to the Congress of the United States . . . ."); *see* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) ("[P]ower of making war . . . is exclusively vested in congress . . . ."); Nat'l Savings & Trust Co. v. Brownell, 222 F.2d 395, 397 (D.C. Cir. 1955) ("[A] state of war, constitutionally speaking . . . is a matter of congressional declaration . . . ."); ALEXANDER HAMILTON, *Pacificus No. 1* (June 29, 1793), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (Harold Syrett ed., 1969) ("[T]he Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War."); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 24, 28, 30–31 (Univ. of Ill. Press 1989) (1986) (quoting James Madison, who said that "'power to declare war . . . is *fully* and *exclusively* vested in the legislature . . . [and] the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war'"); *id.* at 66, 76 (quoting Thomas Jefferson, who said that "'Congress alone is constitutionally invested with the power of changing our conditions from peace to war'"); *id.* at 84, 179 n.4 (quoting James Wilson, who discussed how the war power is "vested" in Congress); Letter from James Monroe to former President James Madison (1824), *in* THE RECORD OF AMERICAN

States cannot be at "war" with al-Qaeda since it is not a state, nation, belligerent, or insurgent.[150]

DIPLOMACY 185 (Ruhl J. Bartlett ed., 1947) ("The Executive has no right to compromit the nation in any question of war."); *see also* PAUST, INTERNATIONAL LAW, *supra* note 40, at 470 n.25; *cf. The Prize Cases*, 67 U.S. (2 Black) at 667 (regarding merely that "a civil war['s] . . . actual existence is a fact . . . which the Court is bound to notice and to know"). *But see id.* at 670 (stating that the "Court must be governed by the decisions" of the President, whether a civil war as such with "belligerents" exists).

[150] *See, e.g.*, Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003) [hereinafter Paust, *Enemy Status*]. *But cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2778 n.31 (2006) ("[W]e do not question the Government's position that the war commenced with the events of September 11, 2001."); *supra* note 75. Most text writers agree that we cannot be at "war," or in "armed conflict" or "combat" with al-Qaeda as such, or a mere tactic of "terrorism." *See, e.g.*, Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1872–73 (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"* 87 INT'L REV. RED CROSS 39, 45 (2005); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002); Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2003); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 348–49 (2002); McCormack, *supra* note 141, at 70 & n.6; Moore, *supra* note 1, at 36; Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349–57 (2004); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQUALITY 195, 197–98 (2004); Warren Richey, *Tribunals on Trial*, CHRISTIAN SCI. MONITOR, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat, who stated that "[t]he actions of September 11 aren't war crimes, they are civilian crimes, they are crimes against humanity"); Detlev F. Vagts, *"War" in the American Legal System*, 12 ILSA J. INT'L & COMP. L. 541, 543–45 (2006); Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants,"* FOREIGN AFF., Jan./Feb. 2004, at 2, 2; *see also DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before Congress*, 107th Cong. (2001) (statement of Scott Silliman, Executive Director, Center of Law, Ethics, and National Security, Duke University School of Law), *available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=70 (contending that the United States is not at war with al-Qaeda and the 9/11 attacks could not be violations of the laws of war); U.N. Experts' Report, *supra* note 1, at 36, ¶ 83 ("The war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law."); Mark A. Drumbl, *Guantánamo,* Rasul*, and the Twilight of Law*, 53 DRAKE L. REV. 897, 908 (2005) (stating the Bush policy has the unwanted consequence of "absurdly glorifying terrorism as armed conflict and terrorists as 'warriors'"); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2500 (2006) (stating that "'[t]errorist violence, serious as it is,'" is not a "'war or other public emergency threatening the life of the nation'" (quoting A (FC) & Others (FC) v. Sec'y of State for the Home Dep't [2004] UKHL 56, 96 (U.K.) (Lord Hoffman))); *CNN Late Edition with Wolf Blitzer*, Interview with Zbigniew Brzezinski, former Nat'l Sec. Adviser (CNN television broadcast May 14, 2006) ("I don't buy the proposition we are at

It follows that the AUMF provides no support for what rhetorically is claimed to be a "war on terrorism"[151] and if the AUMF authorized any "war" measures it did so only with respect to the war in Afghanistan against the Taliban (as the government of the nation of Afghanistan) "for the duration" of "active hostilities" during that war[152] if the Taliban had actually "harbored" al-Qaeda prior to or during the 9/11 attacks.[153] Moreover, it is clear that Congress only authorized the use of "appropriate" force, and the word "appropriate" contains a statutory limitation that necessarily limits executive discretion and requires executive

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war . . . . [T]his is really a distortion of reality. We have a serious security problem with terrorism . . . . But to create an atmosphere of fear, almost of paranoia, claiming that we're a nation at war, opens the door to a lot of legal shenanigans . . . . [Without compliance with FISA, we] slide into a pattern of illegality . . . ."); *cf.* Bay, *supra* note 132, at 337 n.6 (citing sources standing both for and against the proposition that the "war on terror" is not a "true war"); Yin, *supra* note 145, at 189–90 ("[I]t is important to distinguish the rhetoric of the 'war on terrorism' from the congressional authorization . . . [and t]he current war on terrorism."). *But see* YOO, *supra* note 14, at 12–13 (recognizing that we cannot be at war with terrorism, but claiming that we are "in an international armed conflict with al Qaeda"); Jane Gilliland Dalton, *What Is War? Terrorism as War After 9/11*, 12 ILSA J. INT'L & COMP. L. 523, 533 (2006); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209–15 (2003).

[151] There are several reasons why the rhetoric of "war on terror" is not preferable. One is that it can mask and sanitize choices based on underlying nationalistic, racist, or religious-based aggression and violence against other human beings, not that all responses to acts of human beings who use the tactic of terrorism are based on any such circumstance. During what is claimed to be a "war on terror," it may be that certain members of the general public choose not to know what forms of violence are actually practiced against a dehumanized "them" as long as it is done "over there." In this sense, some of the Abu Ghraib photos might have been disturbing, not so much because of the cruel, inhuman, and degrading treatment portrayed, but because it was "brought home." *Cf.* Scheppele, *supra* note 38, at 292 n.17 (addressing results of a USA Today/CNN/Gallup poll in 2005).

[152] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004). The "active hostilities" in Afghanistan have lasted longer than World War II.

[153] There is no convincing proof that the Taliban knew of the pending 9/11 attacks or helped to plan, authorize, commit, or aid the 9/11 attacks. Thus, by its terms, the AUMF would not authorize use of force against the Taliban unless they had "harbored" al-Qaeda before or during the 9/11 attacks, which in the context of its use in the AUMF seems to mean "harbored" with knowledge of the pending 9/11 attacks as such. *See* AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)); *supra* note 145; *see also* Paust, *Use of Force*, *supra* note 147, at 542–43, 554–55. The same points pertain with respect to Saddam Hussein's regime in Iraq, except that there is no known factual basis to even suggest that Iraq had "harbored" al-Qaeda before the 9/11 attacks and with reference to such attacks. There were other reasons for use of force in Iraq. *See, e.g.*, Paust, *Use of Force*, *supra* note 147, at 549–50, 555–56. Nonetheless, rightly or wrongly, we have been at war in Afghanistan and Iraq, and both armed conflicts have been international armed conflicts to which all of the customary laws of war and relevant treaties apply. *See also* Paust, *supra* note 1, at 813–14, 816; *supra* note 39.

compliance with relevant constitutional, customary, and treaty-based international and other federal laws. This is especially true since (1) the Executive has a constitutional duty to faithfully execute the laws and, thus, all are on notice that it would be clearly inappropriate to violate them,[154] and (2) Supreme Court opinions have long recognized that relevant international law is a necessary background for interpretation of federal statutes[155] and, in this instance, for interpretation of the

[154] *See supra* notes 97–99, 101–03, 108–12, 114–16 and accompanying text. Legislative history documents the recognition that only "appropriate" force was authorized and that, therefore, force must comply with "international laws." *See, e.g.*, 147 CONG. REC. H5673 (daily ed. Sept. 14, 2001) (statement of Rep. Clayton); *see also Hamdi*, 542 U.S. at 520–21; Bradley & Goldsmith, *supra* note 139, at 2078 (stating the AUMF authorization to use necessary and appropriate force specifies "both the resources that the President can use and the methods that he can employ"). *But see* Bradley & Goldsmith, *supra* note 139, at 2066 (claiming, inconsistently and illogically, that the AUMF somehow authorized the President to "fully" prosecute a "war"); *id.* at 2081 (regarding their inconsistent statement and unproven assumption that legislative debates "suggest that Congress did not view the 'necessary and appropriate' phrase as a limitation on presidential action"—with footnoted quotations referring merely to a "wide" or "broad delegation of authority" and to an express recognition that the word "'appropriate'" encompasses international legal requirements); *id.* at 2089, 2097 (preferring that the "AUMF should not be read as prohibiting the President from violating the laws of war"—a power he clearly does not possess, *see supra* notes 97, 111, 114–15 and accompanying text).

Even if the limiting word "appropriate" had not been used, it is certain that there was no clear and unequivocal expression of congressional intent to override international law, which is a requirement based in Supreme Court decisions and part of the five-step process regarding potential conflicts between statutes and international law. *See* cases cited *supra* note 90 and accompanying text. Precedent also exists affirming that Congress has no authority to authorize a violation of the laws of war. *See supra* note 92. In view of the above, it would be quite illogical to claim that a congressional requirement to use "appropriate" force should not be read as prohibiting the President from violating relevant international law, especially given the President's constitutionally based duty to faithfully execute the laws and an unswerving judicial recognition of executive duties to comply with the laws of war. *See also supra* notes 92, 97, 114–26.

[155] *See, e.g.*, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); United States v. Flores, 289 U.S. 137, 159 (1933); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); MacLeod v. United States, 229 U.S. 416, 434 (1913); Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Pizarro, 15 U.S. (2 Wheat.) 227, 245–46 (1817); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); PAUST, INTERNATIONAL LAW, *supra* note 40, at 12–13, 43 n.53, 47 n.57, 59 n.73, 70, 99, 101, 120, 124 n.2, 134 n.18, 137 n.41, 143–44 n.73; *see also Hamdi*, 542 U.S. at 521 ("[O]ur understanding [of the AUMF] is based on longstanding law-of-war principles."); *id.* at 551 (Souter, J., dissenting in part and concurring in judgment) (using the law of war and stating "there is reason to question whether the United States is acting in accordance with the laws

statutory limitations incorporated through use of the word "appropriate." More particularly, given that there is unswerving judicial recognition that all members of the executive branch are bound by the laws of war,[156] it is presumed that Congress required executive conduct to comply with the laws of war, it being most inappropriate under the Constitution and in view of consistent judicial decisions and recognitions not to do so. The compelling nature of this presumption is enhanced by federal criminal statutes for prosecution of war crimes as offenses against the laws of the United States that apply, without limitation, to "[w]hoever" [157] might commit such crimes.[158]

VI. THE MALIGNANT MILITARY COMMISSIONS ACT OF 2006

Just before Congress passed the Military Commissions Act of 2006 ("MCA"),[159] Senator McCain was widely quoted as stating "[t]here is no doubt that the integrity and letter and spirit of the Geneva Conventions have been preserved."[160] On the Senate floor he also assured:

> The President and his subordinates are . . . bound to comply with Geneva. That is clear to me and to all who have negotiated this legislation in good faith . . . . [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions. We expect the CIA to conduct interrogations in a manner that is fully consistent . . . with all of our obligations under Common Article 3 . . . [and Congress is not] amending, modifying or redefining the Geneva Conventions.[161]

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of war . . . I conclude accordingly that the Government has failed to support the position that the [AUMF] authorizes the described detention."). This well-recognized interpretive criterion would apply whether or not Congress uses the word "appropriate."

[156] *See supra* note 97 and text accompanying notes 112–14, 119.

[157] *See* 10 U.S.C. § 818 (incorporating all of the laws of war by reference); War Crimes Act, 18 U.S.C. § 2441 (incorporating many of the laws of war by reference for prosecution of "[w]hoever" might be reasonably accused); *supra* note 93.

[158] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (finding there was no intent to limit requirements concerning the structure and procedures in military commissions contained in 10 U.S.C. §§ 821, 823, 836); *supra* notes 133–34 and accompanying text (discussing the fact that there was no congressional intent to limit the requirements of the FISA concerning domestic spying).

[159] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C., 28 U.S.C. § 2241, and 42 U.S.C.)

[160] *See, e.g.*, R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules*, WASH. POST, Sept. 22, 2006, at A1 (quoting Sen. John McCain).

[161] 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement of Sen. McCain). Upon signing the Act, President Bush stated that it "complies with both the spirit and the letter of our international obligations." *President Signs 'Military Commissions Act of 2006*,' U.S. FED. NEWS, Oct. 17, 2006.

The statements were not fully accurate, but they reaffirm that when passing the legislation there was no clear and unequivocal expression of a congressional intent to override the Geneva Conventions as treaty law of the United States. For this reason, the Geneva Conventions necessarily have primacy as law of the United States in case of a potential clash.[162]

This significant recognition is also evident in language of the legislation. For example, section 6 is entitled "Implementation of Treaty Obligations," thereby evincing an intent of Congress to comply with U.S. treaty obligations. Section 6(a)(1) adds various acts enumerated in subsections (b) and (c) to 18 U.S.C. § 2441 and states that the added acts "constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law" that are implemented in the new legislation, not that they constitute an exclusive set of violations of common article 3 or that Congress intends to obviate the reach of other proscriptions. Section 6(a)(2) states that the provisions of § 2441, "as amended by" section 6 of the new legislation, "fully satisfy the obligation under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3." The legislative statement is incorrect, but it demonstrates the clear intent of Congress to "fully satisfy" U.S. treaty obligations reflected in article 129 and to not inhibit or obviate them in any way. Section 6(a)(3)(A) recognizes a presidential authority to interpret the Geneva Conventions—an authority the President already has in connection with the duty to faithfully execute the laws and, thus, to make an initial choice concerning the interpretation and application of a treaty, a choice and application that numerous cases affirm are subject to judicial review.[163] Section 6(a)(3)(A) also states that the President has authority "to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches," not

[162] *See, e.g.*, *supra* note 90. One does not apply the last-in-time rule unless there is a clear and unequivocal expression of congressional intent to override a prior treaty. *See id.* Even if the last-in-time rule were applicable, the traditional "rights under" treaties exception to the last-in-time rule documented in Supreme Court decisions, *see* cases cited *supra* note 91, and the law of war exception recognized by Supreme Court Justices and Attorneys General, *see* sources cited *supra* note 92, would assure the primacy of "rights under" the Geneva Conventions and primacy of the Geneva Conventions more generally as laws of war.

[163] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 105, 174–75, 184 n.24, 188 n.67, 295 n.503, 387 n.47; Paust, *Judicial Power*, *supra* note 118, at 514–25. Section 6(a)(3)(c) adds that a relevant executive order "shall be authoritative (except as to grave breaches of common article 3) as a matter of United States law, in the same manner as other administrative regulations," Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(C), 120 Stat. 2600, 2632 (codified at 18 U.S.C. § 2241 note). However, such an authoritative provisional characterization by the Executive concerning the meaning of common article 3 of treaty law of the United States must still be subject to ultimate review by the judiciary in view of the constitutionally based judicial power and authority at stake.

lower standards or violations of the Conventions. Section 6(c) addresses an "Additional Prohibition of Cruel, Inhuman, or Degrading Treatment or Punishment," not an exclusive prohibition of such forms of treatment or one that is intended to override other inconsistent federal statutes or the many treaties of the United States that set forth related rights and prohibitions. Finally, each recognition in section 6 is overlaid by subsection (a)(3)(D), which assures that "[n]othing" in section 6 "shall be construed to affect the constitutional functions and responsibilities of . . . the judicial branch." Necessarily then, the judicial functions and responsibilities that are not to be affected include the constitutionally based and time-honored authority and responsibility of the judiciary to identify, clarify, and apply treaties of the United States as law of the United States and to assure the primacy of international law when there is not a clear and unequivocal expression of congressional intent to override international law.[164]

Nevertheless, there are provisions in the legislation that are inconsistent with rights and duties contained in common article 3. Common article 3 requires that all detainees "shall in all circumstances be treated humanely,"[165] not merely whenever domestic U.S. constitutional amendments or federal criminal laws against "torture" happen to coincide with some of the common article 3 standards. Common article 3 also prohibits "torture," "mutilation," "cruel treatment," "outrages upon personal dignity," "humiliating" treatment, and "degrading" treatment "at any time and in any place whatsoever."[166] A core of generally shared meaning and definitional factors operates in various judicial fora for imposition of criminal and civil responsibility with respect to each term or phrase despite the possibility of a lack of generally agreed meaning at the extreme outer edges of theoretically possible meanings[167]—a circumstance well-known to lawyers and judges who interpret words such as "cruel," "due process," "free speech," "good faith," and the like in constitutions, statutes, private contracts, and other instruments.

Addressing article 4 of the Statute of the International Criminal Tribunal for Rwanda,[168] which incorporates all violations of common article 3 and lists several of its proscriptions (including torture, mutilation, outrages upon personal dignity, humiliating treatment, degrading treatment, rape, and any form of indecent

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[164] *See, e.g.*, Paust, *Judicial Power*, *supra* note 118, at 514–25; *infra* note 202.

[165] Civilian Geneva Convention, *supra* note 39, art. 3(I), 6 U.S.T. at 3518, 75 U.N.T.S. at 289–90.

[166] *Id.*

[167] *See generally* Vienna Convention, *supra* note 40, art. 31(1), 1155 U.N.T.S. at 340 (requiring treaties to be interpreted in good faith in accordance with ordinary meaning and given the treaty's purpose); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 69–70, 255, 365, 390, 413, 417, 419 (2d ed. 2005).

[168] Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 4, U.N. Doc. S/RES/955 (Nov. 8, 1994).

assault[169]), the Trial Chamber in *The Prosecutor v. Musema* (2000)[170] ruled that the list "is taken from Common Article 3 of the Geneva Conventions and of Additional Protocol II" and "comprises *serious* violations of the fundamental humanitarian guarantees which . . . are recognised as customary international law."[171] Thus, all of the proscriptions listed in common article 3 are among "serious" violations of the laws of war.

More particularly, the Trial Chamber ruled that *humiliating* and *degrading* treatment includes "[s]ubjecting victims to treatment designed to subvert their self-regard,"[172] adding: "motives required for torture would not be required."[173] "Indecent assault," the tribunal affirmed, involved "the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual."[174] Other international courts and tribunals have provided guidance concerning the meaning and definitional factors with respect to cruel, inhuman, and degrading treatment[175] and so have several U.S. courts.[176] For example, while addressing five British interrogation tactics used in the 1970s (wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink), the European Court of Human Rights affirmed that *inhuman* treatment occurred with respect to a combination of some of the tactics that "caused, if not bodily injury, at least intense physical and mental suffering."[177] The five "techniques were also *degrading*, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[178] In 1999, other European decisions expressly reaffirmed the recognition that treatment is degrading if it is "such as to arouse in its victims

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[169] *Id.*

[170] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement [sic] and Sentence (Jan. 27, 2000).

[171] *Id.* ¶ 287 (emphasis added). In a related manner, the United States Congress has determined that "cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, [and] causing the disappearance of persons by the abduction and clandestine detention of those persons" are among "flagrant" and "gross violations of internationally recognized human rights." 22 U.S.C. § 2304(d) (2006).

[172] *Musema*, Case No. ICTR-96-13-A, ¶ 285.

[173] *Id.*

[174] *Id.*; *see also* 22 U.S.C. § 2152 note (stating "rape and other forms of sexual violence" constitute torture); Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) (stating that rape and sexual assault "can constitute torture"); Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that torture in Iraq included "rape, breaking of limbs, denial of food and water, and threats to rape or otherwise harm relatives").

[175] *See* Paust, *supra* note 1, at 845–46.

[176] *Id.* at 821 n.40.

[177] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (emphasis added).

[178] *Id.* (emphasis added).

feelings of fear, anguish and inferiority capable of humiliating and debasing them."[179]

A U.S. court also recognized that "*cruel*, *inhuman*, or *degrading* treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement" and that being "forced to observe the suffering of friends and neighbors . . . [is] another form of inhumane and degrading treatment."[180] The

[179] T & V v. United Kingdom, App. No. 24888/94, 30 Eur. H.R. Rep. 121, 175 (2000); Selmouni v. France, 1999-V Eur. Ct. H.R. 149, 182 (1999).

[180] Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1348–49 (N.D. Ga. 2002) (emphasis added). More generally, the Supreme Court has recognized the impermissibility of "coercive cruelty." Weems v. United States, 217 U.S. 349, 373 (1910). U.S. cases have also provided informing recognition of what types of conduct can amount to cruel treatment under the Eighth Amendment. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 14, 17 (1992) (Blackmun, J., concurring) (recognizing "shocking [prisoners] with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold" and infliction of "psychological pain" as cruel and unusual punishment); Wilson v. Seiter, 501 U.S. 294, 305 (1991) (recognizing a combination of deprivation of food and warmth, "for example a low cell temperature at night combined with a failure to issue blankets," as cruel and unusual punishment); Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain[]' . . . ." (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))); Brooks v. Florida, 389 U.S. 413, 414–15 (1967) (per curiam) (finding the deprivation of adequate food and detention while naked in a small cell was in context "a shocking display of barbarism"); Beecher v. Alabama, 389 U.S. 35, 36, 38 (1967) (per curiam) (finding "gross coercion" existed when an officer pressed a gun to an escaped convict's face and stated, "'If you don't tell the truth I am going to kill you,'" and thereafter another officer fired a rifle nearby); United States v. Rojas-Tapia, 446 F.3d 1, 4–5 (1st Cir. 2006) (finding "physically coercive punishment, such as an unreasonable deprivation of food or sleep" obviates the voluntariness of a confession); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967) (finding that solitary confinement conditions in a "'strip cell,'" where the prisoner was nude and exposed to bitter cold, "serve to destroy completely the spirit and undermine the sanity of the prisoner" and violate the Eighth Amendment); Scarver v. Litscher, 371 F. Supp. 2d 986, 993, 1000–02 (W.D. Wis. 2005) (finding that stripping a prisoner naked and placing him in a cold cell without a mattress, blankets, etc. and subjecting him to high temperatures in the summer and long periods of confinement would be sufficiently serious to constitute an Eighth Amendment violation); Littlewind v. Rayl, 839 F. Supp. 1369, 1372 (D.N.D. 1993) (holding, as a matter or law, that the Eight Amendment was violated where prisoner was restrained naked for seven hours, denied clothing for six days, denied a blanket for two days, restrained seven days in leg irons and handcuffs, and tied to a bed for eight hours), *remanded by* Littlewind v. Rayl, 33 F.3d 985, 986 (8th Cir. 1994); Ferola v. Moran, 622 F. Supp. 814, 822–23 (D.R.I. 1985) (finding it cruel and unusual to restrain a prisoner so as to deny him access to a bathroom for fourteen hours); Hancock v. Avery, 301 F. Supp. 786, 791–92 (M.D. Tenn. 1969) (stating that forcing persons to strip nude and sleep on cement floors with no means to maintain personal cleanliness is cruel and unusual punishment in violation of the Eighth Amendment); Al Ghashiyah v. McCaughtry, 602

Committee Against Torture affirmed that seven interrogation tactics are either torture or cruel, inhuman, or degrading treatment criminally proscribed by the Convention: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.[181]

Language in the 2006 legislation fails to reflect the international legal standards recognized by international and U.S. courts and tribunals. First, several definitions are limited to others that are found in prior U.S. legislation,[182] even though the Committee Against Torture noted that prior U.S. legislation is inadequate.[183] Second, in contrast to some of the standards noted above, some of the definitions in the 2006 legislation are too limiting and, thus, do not adequately warn U.S. interrogators regarding what the actual legal standards are under customary international and treaty law of the United States. Third, the legislation abets this problem by attempting to require that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts . . . in interpreting the prohibitions enumerated."[184] However, the attempt to exclude time-honored judicial use of "international sources of law" to interpret a statute or treaty of the United States violates the separation of powers, since it is the

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N.W.2d 307, 316 (Wis. Ct. App. 1999) (finding strip searches employed for the purpose of intimidating a person or humiliating or harassing violate the Eighth Amendment).

[181] U.N. Office of the High Comm'r for Human Rights, CAT, *Concluding Observations of the Committee Against Torture: Israel*, ¶¶ 256–57, U.N. Doc. A/52/44 (Sept. 5, 1997). With respect to the use of cold air to chill, a U.S. case decided that among acts of "torture" is that of "[f]orcing a detainee while wet and naked to sit before an air conditioner." *In re* Estate of Marcos, 910 F. Supp. 1460, 1463 (D. Haw. 1995); *see also* U.N. Experts' Report, *supra* note 1, at 25, ¶ 51 ("[S]tripping [persons] naked . . . can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering."); *id.* ¶ 52 ("[U]se of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering."). CAT has also recognized that "incommunicado detention" is a form of cruel, inhuman, and degrading treatment and that, if prolonged, it can even rise to the level of torture. *See* U.N. Office of the High Comm'r for Human Rights, *Fact Sheet No. 4: Methods of Combating Torture*, at 32 (1st rev. 2002), *available at* http://www.unhchr.ch/html/menu6/2/fs4rev1.pdf; *see also* Aschraft v. Tennessee, 322 U.S. 143, 153–54 (1944) (finding incommunicado detention is coercion violative of the Fifth Amendment).

[182] *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633–35 (codified at 18 U.S.C. § 2441(d)(1)(B)). The Act adds section 6(b)(1), which references other statutes in subsections (A) through (C) and (E), to 18 U.S.C. § 2441.

[183] *See supra* note 60.

[184] Military Commissions Act § 6(a)(2), 120 Stat. at 2632 (codified at 18 U.S.C. § 2441 note).

judiciary that has the ultimate, traditional, and essential authority to interpret law in cases before the courts and to use international law to interpret a federal statute[185] as well as treaty law of the United States.[186]

Examples of incomplete coverage of international proscriptions are found in limiting words in the legislation used to define "cruel or inhuman" treatment such as "intended to inflict," "severe," and "serious."[187] Moreover, "cruel" treatment is more egregious than "inhuman" treatment and it is improper to lump their definitions together. Instead of prohibiting "mutilation" outright, the legislation seeks to limit mutilation to that which is "permanently disabling."[188] The legislation also limits coverage of "serious physical pain or suffering" by excluding "cuts, abrasions, or bruises" not amounting to "a burn or physical disfigurement"[189] and excluding serious pain or suffering not involving "significant loss or impairment of the function of a bodily member, organ, or mental faculty," or "extreme" physical pain, or "a substantial risk of death."[190] Thus, the legislation does not cover all forms of serious injury to body or health, mutilation, cruel treatment, and inhuman treatment.

There is no attention to Geneva prohibitions of "humiliating" treatment and there is only one portion that addresses "degrading" treatment[191]—and it does so in a manner that fails to provide adequate legal guidance to U.S. interrogators, because it attempts to limit additional coverage of "cruel, inhuman, or degrading treatment" to merely the "cruel, unusual, and inhumane" treatment prohibited by three domestic U.S. constitutional amendments.[192] On their face, the terms "cruel, unusual, and inhumane" do not reflect "degrading" treatment. Moreover, as noted, the Committee Against Torture rejected such an attempt to limit the reach of the CAT in a putative U.S. reservation.[193] Additionally, there has never been such an attempted reservation to the Geneva Conventions and, if there had been, such a putative reservation would also have been void *ab initio* as a matter of law. Constitutional amendments simply do not cover all cruel, inhuman, degrading, and humiliating treatment proscribed under the laws of war and human rights law.[194]

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[185] *See, e.g.*, *supra* notes 118, 120, 155 (addressing judicial authority to interpret statutes, treaties, and customary international law).

[186] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 12, 61 n.103, 73, 388 n.64, 437 n.69 (describing application of international law to interpret treaties, and citing relevant cases); *see also* Vienna Convention, *supra* note 40, art. 31(3)(c), 1155 U.N.T.S. at 340 (stating treaties are to be interpreted in light of other relevant international law).

[187] *See* Military Commissions Act § 6(b)(1), 120 Stat. at 2633–35 (codified at 18 U.S.C. § 2441).

[188] *Id.* (codified at 18 U.S.C. § 2441(d)(1)(E)).

[189] *Id.* (codified at 18 U.S.C. § 2441(d)(2)(D)(iii)).

[190] *Id.* (codified at 18 U.S.C. § 2441(d)(2)(D)(i)–(ii), (iv)).

[191] *See id.* § 6(c) (codified at 42 U.S.C. § 2000dd-0).

[192] *Id.*

[193] *See supra* note 60 and accompanying text.

[194] *See also supra* note 60.

Moreover, constitutional amendments do not reach all private perpetrators, whereas U.S. cases have rightly recognized that the laws of war and human rights law can reach private perpetrators.[195]

Among the most egregious portions of the legislation are attempts to deny any person (i.e., any U.S. citizen or alien), here or abroad, in time of peace or war, now and in the future, the right to invoke his or her rights under the Geneva Conventions

> in any habeas or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[196]

Furthermore, these provisions attempt to deny any so-called "unlawful enemy combatant"[197] the right to "invoke the Geneva Conventions as a source of rights"

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[195] *See supra* note 64.

[196] Military Commissions Act § 5(a), 120 Stat. at 2631–32 (codified at 28 U.S.C. § 2241 note). The attempt in section 5(a) to deny habeas corpus to any person with respect to their treaty-based Geneva rights and claims is an attempted suspension of habeas corpus unlimited as to time, place, nationality, necessity, and the circumstances of rebellion or invasion; it is patently beyond the lawful authority of Congress and unconstitutional. *See infra* note 208. Moreover, the attempt was to preclude the right to "invoke the Geneva Conventions," not customary international law. *See* Military Commissions Act § 5(a), 120 Stat. at 2631–32. Since the rights reflected in the Geneva Conventions are now customary international law, *see, e.g.*, Paust, *supra* note 1, at 813 & n.8, one can still invoke such rights as customary international law. There is no ambiguity in that regard and, if there had been, the Supreme Court has long recognized that a federal statute "can never be construed to violate . . . rights [under the customary law of nations] . . . further than is warranted by the law of nations." Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804).

[197] The Act defines "unlawful enemy combatant" to include within one such category "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant." Military Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(1)(A)(i)). The Act defines three types of "lawful enemy combatant" in a way that only partly mirrors article 4(A)(1)–(3) of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Geneva Convention], and does not expressly include certain persons under article 4(A)(1) and (3) and three other types of persons who are entitled to prisoner of war status under article 4(A)(4)–(6). *Compare* Military Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(2)), *with* POW Geneva Convention, *supra*, art. 4(A)(1)–(6). Thus, some persons who are prisoners of war and lawful combatants under Geneva law might be "unlawful enemy combatants" under the Act unless the Act is construed in a manner consistent with U.S. treaty law, which is required by Supreme Court decisions. *See supra* notes 118, 120, 155. Moreover, the Act may attempt to deny combatant and prisoner-of-war rights under Geneva law to "a person who is part of the Taliban . . . ." *See* Military

at his or her trial by military commission.[198] These provisions necessarily violate the Geneva Conventions, which contemplate the invocation and enforcement of individual rights in domestic courts and tribunals.[199] The provisions also attempt to

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Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(1)(a)(i)). But such a broad denial would violate Geneva law, especially for members of the regular armed forces of the Taliban who are protected under article 4(A)(1) and (3) of the POW Geneva Convention. Thus, this portion of the legislation should also be construed to be consistent with U.S. treaty law, especially since there was no intent to violate the Geneva Conventions. *See supra* text accompanying notes 160–62. Concerning combatant and prisoner of war status under Geneva law, see Paust, *Enemy Status*, *supra* note 150, at 328–34. Under the MCA, anyone else of any nationality, including a civilian or prisoner of war of any sort, might be classified by the Executive as an unlawful enemy combatant. *See* Military Commissions Act 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a (1)(A)(i)).

It must be recalled, however, that outside the context of actual wars in Afghanistan and Iraq mere members of al-Qaeda cannot be engaged in "hostilities" or "combat" against the United States. *See supra* notes 147–50. They are not "combatants" and, having no combatant immunity, they can be prosecuted for criminal acts of violence. *See* Paust, *Enemy Status*, *supra* note 150, at 327–28, 332. However, they can be prosecuted for war crimes only with respect to acts occurring during an actual war to which the laws of war apply, like the wars in Afghanistan and Iraq.

[198] *See* Military Commissions Act § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(g)). Here, the attempt was merely to deny a right to "invoke the Geneva Conventions" and not customary international law. *See id.* Since rights reflected in the Geneva Conventions are also customary international law, such rights can be invoked as customary international legal rights. *See supra* note 196.

[199] *See, e.g.*, Civilian Geneva Convention, *supra* note 39, arts. 3(1)(d), 29 (regarding state and individual liability); *id.* at 43 (stating propriety of detention must be reconsidered "by an appropriate court or administrative board"); *id.* at 78 (regarding "right of appeal" of detention); *id.* at 148 (regarding "liability" and nonimmunity); POW Geneva Convention, *supra* note 197, arts. 3(1)(d), 84, 99, 102, 105–06; IV COMMENTARY, *supra* note 58, at 209–11, 260–61, 368–69, 595–96, 602–03 ("liable to pay compensation"); 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 84 (Jean S. Pictet ed., 1952) ("'It should be possible . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation.'"); Paust, *supra* note 1, at 852 n.154 (citing relevant cases and addressing nonimmunity); Paust, *Judicial Power*, *supra* note 118, at 514–16 & nn.43–45; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 n.57 (2006) (quoted *supra* note 39).

Although the provisions are violative of the Geneva Conventions, there was no clear and unequivocal expression of a congressional intent to override the Conventions. *See supra* notes 160–64 and accompanying text. Thus, the last-in-time rule does not apply and Geneva law must have primacy. *See supra* note 90. Even if the last-in-time rule could apply, the "rights under" treaties and law of war exceptions to the last-in-time rule would assure the primacy of Geneva law. *See supra* notes 91–92.

Article 23(h) of the Annex to the 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, sets forth another relevant law of war prohibition: "it is

deny the Supreme Court's ruling in *Hamdan* that common article 3 of the Geneva Conventions is directly relevant treaty law that must be followed.[200]

Congress has no power to obviate original jurisdiction of the Supreme Court.[201] Thus, the attempt to deny treaty-based rights "in any court" is facially unconstitutional. Moreover, Congress has no power to violate the separation of powers by such a blatant denial of a constitutionally mandated, traditional, and essential judicial power to implement treaty law of the United States that, as the Constitution expressly requires, "shall extend to all cases . . . arising under . . . treaties."[202]

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especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party." Hague Convention No. IV, Annex, art. 23(h), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *see also* Rome Statute of the International Criminal Court art. 8(2)(a)(vi), *adopted by* the U.N. Diplomatic Conference, July 17, 1998, U.N. Doc. A/64F.15319, *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 268, 272–73 (2007) (stating that "[w]ilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" is a "grave breach" of the Geneva Conventions); *id.* art. 8(2)(b)(xiv) (stating that "[d]eclaring abolished, suspended or inadmissible in a court of law the rights . . . of the nationals of the hostile party" is a serious war crime). Denial of the use of rights under the Geneva Conventions in a court of law would violate the law of war and constitute a war crime. Every violation of the law of war is a war crime. *See, e.g.*, FM 27-10, *supra* note 25, at 178, ¶ 499; Paust, *supra* note 1, at 812 n.2. In view of such war crime responsibility, there is an additional reason to recognize the primacy of Geneva law—one that is in the interest of congresspersons and judges alike.

[200] *See supra* note 75; *see also supra* note 39.

[201] *See, e.g.*, U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."); *id.* § 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction . . . ."); *see also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.) (stating the "appellate powers of this court" are not created by statute but are "given by the constitution"), *quoted in Hamdan*, 126 S. Ct. at 2764.

[202] U.S. CONST. art. III, § 2; *see* PAUST ET AL., *supra* note 167, at 123–29; PAUST, INTERNATIONAL LAW, *supra* note 40, at 67–70, 105, 189, 295, 387 n.47; Paust, *Judicial Power*, *supra* note 118, at 518–24. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties, "[t]he reason for inserting that clause was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty . . . it is to be protected" by the judiciary. Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809). The next year, he also confirmed a fundamental expectation of the Framers concerning an essential reach of judicial power when he affirmed that our judicial tribunals "are established . . . to decide on human rights." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). Concerning the rich history of Founder, Framer, and judicial attention to human rights and their use in thousands of federal and state cases, see PAUST, INTERNATIONAL LAW, *supra* note 40, at 193–223.

The violation of the separation of powers in this instance is especially evident where federal courts have continuing jurisdiction in all cases arising under treaties and Congress attempts to substantially inhibit judicial independence by controlling the results in certain cases. Congress is attempting precisely that by prescribing rules for decision in a particular way or, in this instance, rights and rules of law contained in the Geneva Conventions that cannot be used for decision.[203] This congressional effort to deny use of particular law and to control judicial decision of cases in a particular way is all the more blatant where Congress has attempted to deny judicial use of common article 3 as a rule for decision in detainee cases after the Supreme Court clearly decided that common article 3 is a primary rule for decision.[204] Additionally, Congress has no power to deny to the States of the United States their shared constitutionally based duty and authority to implement treaty law of the United States as supreme law of the land.[205]

The attempt in another section of the Act to deny any habeas corpus relief at any time and under any circumstances to any alien in U.S. custody here or abroad[206] who has been properly determined to be an "enemy combatant" (either

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[203] *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 145–47 (1871) (stating that a violation of the separation of powers exists where Congress withholds appellate jurisdiction "as a means to an end," "to deny . . . the effect which this court had adjudged" acts "to have" and when the Court had "decided . . . to consider them and give them effect," "to prescribe a rule for the decision of a cause in a particular way . . . [or to] prescribe rules of decision . . . in cases pending before" the judiciary); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 36–39 (6th ed., Westgroup 2000) (1978); BERNARD SCHWARTZ, CONSTITUTIONAL LAW 20 (2d ed., MacMillan Publ'g Co., Inc. 1979) (1972); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–28 (1995); Walker v. U.S. Dep't of Hous. & Urban Dev., 912 F.2d 819, 829 (5th Cir. 1990) ("Congress cannot prescribe a rule of decision in a case pending before the courts so as to decide a matter as Congress would like to see." (citing United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980))); Hyundi Merch. Marine Co. Ltd. v. United States, 888 F. Supp. 543, 548 (S.D.N.Y. 1995) ("[A] violation of the separation of powers doctrine occurs when Congress enacts legislation that prescribes a rule of decision to the judicial branch in cases pending before it . . . ." (citing *Sioux Nation of Indians*, 448 U.S. at 404; Brown v. Hutton Group, 795 F. Supp. 1307, 1313 (S.D.N.Y. 1992))). The Act attempts to deny habeas relief and various other actions in "all cases, without exception, pending on or after the date of" enactment. Military Commissions Act, §7(b), 120 Stat. at, 2635.

[204] *See supra* notes 75, 203.

[205] *See, e.g.*, U.S. CONST. art. VI, cl. 2 (stating "all Treaties" are "supreme Law of the Land; and the Judges in every State shall be bound thereby," whereas congressional legislation merely has that effect if it is "made in Pursuance" of the Constitution and not if it is made inconsistently with the Constitution to deny traditional judicial independence, authority, and responsibility regarding "all" treaties of the United States); *id.* amend. X; PAUST ET AL., *supra* note 167, at 506–08.

[206] Concerning application of the Fifth and Sixth Amendments of the U.S. Constitution abroad as textual and structural restraints on executive authority, see Paust, *Courting Illegality*, *supra* note 60, at 18–20; Elizabeth Sepper, Note, *The Ties that Bind: How the*

"lawful" or "unlawful") or who "is awaiting such determination"[207] is decidedly contrary to constitutional textual strictures and is therefore beyond the lawful power of Congress.[208] The draconian attempt to also deny such alien persons here

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Constitution Limits the CIA's Actions in the War on Terror, 81 N.Y.U. L. REV. 1805, 1833–39 (2006). Additionally, resident aliens within the United States have rights under the Fifth and Sixth Amendments whether or not they have the same rights abroad. *See* Wong Wing v. U.S., 163 U.S. 228, 238 (1896).

[207] *See* Military Commissions Act § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)). The word "awaiting" might mean that denial of habeas could last for years if the provision was not otherwise unconstitutional, *see infra* note 208, and trumped by treaty law, *see supra* notes 162, 202.

[208] The Constitution expressly mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2; *see also* PERRY, *supra* note 122, at 195 (addressing the proposal by Charles Pinckney that suspension shall not occur "except upon the *most urgent and pressing* occasions" (emphasis added)). The phrase—"except upon the most urgent and pressing occasions"—was relevant to the restrictive meaning of the word "require" that was finally adopted by the Framers even though the "occasions" were expressly limited to two (i.e., rebellion and invasion). In this instance, there had been no rebellion or invasion at the time of the MCA's enactment in 2006, and suspension of habeas corpus had not been required for five years after 9/11 and for two years after the decision of the Supreme Court in *Rasul*. Rasul v. Bush, 542 U.S. 466 (2004). Moreover, the attempted suspension is without limits concerning time, place, necessity, or invasion. Thus, the attempt in section 7(a) of the MCA to suspend the writ is contrary to constitutional textual strictures and structural limitations on governmental power and is, therefore, *ultra vires*. The attempt in section 5(a) to suspend habeas for any person (citizen or alien), here or abroad, in time of peace or war, regardless of any alleged necessity due to invasion, and at all times in the future with respect to claims under the Geneva Conventions, *see supra* note 196 and accompanying text, suffers from the same constitutional impropriety.

In *Hamdan v. Rumsfeld*, the district court correctly found that "[t]he MCA is not a constitutionally valid suspension of the writ of habeas corpus" since neither "rebellion nor invasion" existed as required by the Constitution. 464 F. Supp. 2d 9, 12 (D.D.C. 2006). It noted that Congress had previously suspended habeas only four times and that each suspension was "accompanied by clear statements expressing congressional intent to suspend the writ and limiting suspension to periods during which the predicate conditions (rebellion or invasion) existed." *Id.* at 14. However, the district court thought that "Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus," but a "removal" without limits, and merely a "jurisdiction-stripping" denial of Hamdan's "statutory access to the writ." *Id.* at 19. This appears to be plain sophistry and ignores the fact that Congress simply has no constitutional authority to suspend or indefinitely remove habeas corpus in this instance. More particularly, the Framers did not allow Congress to terminate habeas and a claim that "termination," which can be operative only until the next Congress (or the present Congress) changes the legislation, is not "suspension" is patently silly. Similarly it is nonsensical to claim that legislation does not suspend habeas when it suspends (or terminates) the jurisdiction of federal courts to hear habeas claims. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) ("[The parties a]ll agree that, absent suspension, the writ of habeas corpus remains available . . . . At all other

or abroad, at any time, and under any circumstances, "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement"[209] is a flagrant "denial of justice" under customary international law[210] and an outrageous denial of peremptory rights of access to courts, rights to a remedy, and/or equality of treatment under numerous multilateral and bilateral treaties of the United States and customary international law.[211] Such a sweeping denial of treaty-based requirements is also a

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times, it has remained a critical check on the Executive . . . .").

In *Boumediene v. Bush*, the circuit panel decision focused on rights as opposed to the fact that our government is one of limited powers and that some governmental acts are *ultra vires*, and decided that aliens abroad did not have rights to complain about the constitutionality of the MCA's suspension of habeas corpus. 476 F.3d 981, 990–94 (D.C. Cir. 2007). The dissenting judge stated that the focus on rights was inapt, "the Suspension Clause is a limitation on the powers of Congress . . . [and] limits the removal of habeas"; it "offends the constitutional constraint on suspension . . . [and] is therefore void and does not deprive this court or the district courts of jurisdiction." *Id.* at 995 (Rogers, J., dissenting). With respect to suspension, the dissent stated that the constitutional "proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *Id.* at 1000 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871)).

It is of historic interest that despite an authorization in an 1863 Act of Congress to suspend habeas corpus "in any case throughout the United States, or any part thereof," Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, the Supreme Court refused to recognize suspension in the state of Indiana, which was outside the area of the Civil War rebellion, *see ex parte* Milligan, 71 U.S. (4 Wall) 2, 126 (1866).

[209] Military Commissions Act § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(2)). The word "action" indicates an intent to cover a civil action, not a criminal prosecution. The only limit is found in the phrase "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)." *Id*. Section 8(b) of the MCA revises the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions where, under section 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person . . . did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful"; however, it does not "provide immunity from prosecution for any criminal offense by the proper authorities." 42 U.S.C. § 2000dd-1. The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. *See, e.g.*, PAUST ET AL., *supra* note 51, at 51–78, 100–14.

[210] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 199, 259–61 nn.250–75, 287 n.481, 290 n.483; RESTATEMENT, *supra* note 58, § 711 & cmts. a–c, h.

[211] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 43, pmbl., arts. 13–15; ICCPR, *supra* note 40, pmbl., art. 2(1); *id.* art. 2(3) (affirming nonimmunity as well by assuring the right to "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"); *id.* arts. 9(4), 14(1), (5), 26; Civilian Geneva Convention, *supra* note 39, arts. 29, 148; American Declaration of the Rights and Duties of Man, *supra* note 41, arts. II, XVIII, XXV–VI (operative through the Organization of American States

violation of the separation of powers, since it attempts to control judicial decision and to deny the judiciary its time-honored and essential role of applying fundamental and peremptory rights and requirements contained in treaty law of the United States.[212] More generally, it is an attempt to deny the rule of law.

VII. CONCLUSION

There are short- and long-term consequences of illegality. For example, war crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They threaten law and order more generally, violate our common dignity, degrade our military,[213] place our soldiers and CIA personnel in harm's way, thwart our mission, and deflate our authority and influence abroad. They can embolden an enemy, serve as a terrorist recruitment tool, lengthen social violence, and fulfill other terrorist ambitions.

The claim that the President has authority to violate international laws of war, human rights law, and domestic legislation is patently unconstitutional and unacceptable. Its nihilistic essence is remarkably close to the unlimited psychotic justifications of many terrorists and is far removed from the essential characteristics of modern human civilization. At least one sharply contrasting and

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Charter, arts. 3(k), 44, 111); Universal Declaration of Human Rights, *supra* note 42, pmbl., arts. 1–2, 7–8, 10–11; Hague Convention No. IV, *supra* note 199, Annex, art. 23(h); U.N. CAT Report, *supra* note 1, ¶¶ 27–28, 32; *General Comment No. 20*, *supra* note 46, ¶ 15; *General Comment No. 24*, *supra* note 40, ¶¶ 8, 11–12; PAUST ET AL., *supra* note 167, at 340–42 (quoting Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000)); PAUST, INTERNATIONAL LAW, *supra* note 40, at 224–29; Paust, *Courting Illegality*, *supra* note 60, at 10–15, 17 n.38 (noting the requirements of access to courts and equality of treatment contained in bilateral friendship, commerce, and navigation treaties with numerous states that would necessarily be violated if the treaties did not have primacy); Paust, *supra* note 1, at 852 n.154 (addressing nonimmunity for violations of the ICCPR, the CAT, and war crimes as well); Paust, *Judicial Power*, *supra* note 118, at 507–10, 514; *supra* notes 199, 210; *see also* United States v. Altstoetter (The Justice Case), *in* 3 TRIALS, *supra* note 58, Indictment ¶ 16, at 22 (stating "discriminatory measures against Jews, Poles, 'gypsies,' and other designated 'asocials' resulted in . . . deprivations of rights to file private suits and rights of appeal" and were war crimes). Even if the last-in-time rule could apply (it cannot because there is no clear and unequivocal expression of congressional intent to override *any* of these treaties, *see supra* note 90), the "rights under" treaties exception would apply to guarantee the primacy of such rights, *see supra* note 91.

[212] *See supra* notes 202–03.

[213] Degradation can include moral and psychologic degradation and detrimental impacts upon military morale, retention, and recruitment. *See* Corn, *supra* note 141. Ultimately, a strong and effective military that serves the national interest in a constitutional democracy is one that operates within the law. The same point pertains more generally with respect to the presidency.

venerable aspect of the meaning of America is worth conserving—the constitutionally based precept that no one is above the law.[214]

[214] An especially apt affirmation appears in *United States v. Lee*:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

106 U.S. 196, 220 (1882); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006) ("[T]he Executive is bound to comply with the Rule of Law.").