

# EXPLORING U.S. TREATY PRACTICE THROUGH A MILITARY LENS<sup>γ</sup>

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<sup>γ</sup> This article is based on a chapter by the authors that will be forthcoming in “*Viewing Treaties through a Military Lens*” in *TREATIES AS LAW OF THE LAND? CHANGE AND UNCERTAINTY IN THE DOMESTIC EFFECTS OF INTERNATIONAL AGREEMENTS*.

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### INTRODUCTION

Treaty practice related to the regulation of armed conflict provides a useful and comprehensive illustration of the interaction between treaties and U.S. law and policy. A body of international law, the law of armed conflict (LOAC),<sup>1</sup> which establishes rules for the conduct of hostilities and treatment of war victims, is central to understanding the constitutional treaty power.<sup>2</sup> LOAC treaties impact perhaps the most vital national security function: employing our military power to protect the nation. Ultimately, like so many other aspects of the relationship between international law and the pursuit of vital national security objectives, LOAC treaty practice reflects a continuous pursuit of balance between two sometimes competing influences on national security policy: achieving the critically important objective of mitigating the suffering associated with armed hostilities, and providing sufficient flexibility and legal authority to engage in decisive military action.<sup>3</sup> Ultimately, because LOAC treaties reflect a quintessential federal function, both their formation and the domestic responses to these core treaties by Congress, the courts, and our constituent States can provide vital insight into U.S. treaty practice.

Striking an effective balance between mitigating suffering in armed conflict and ensuring sufficient legal authority for decisive

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1. U.S. Dep't of Def., Dir. 2311.01E, DOD Law of War Program (May 9, 2006).

2. See U.S. CONST. art. II, § 2, cl. 2.

3. Geoffrey S. Corn et al., *Law of Armed Conflict Principles: The Foundation of Conflict Regulation*, in THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 107, 115 (Vicki Been et al., eds., 2012).

military action has influenced the LOAC treaty development and implementation process. This Article will illustrate how the three branches of the federal government have, over time, leveraged their constitutional roles in the treaty process to affect this balance. The pursuit of equilibrium is an important trend reflected by LOAC treaty practice and has manifested itself both through the checks and balances inherent in our constitution's separation of powers and, to a lesser extent, through the division of power between the national federal government and the constituent states. This should come as no surprise, as our Founders intended that these separation of power and federalism frictions would influence U.S. treaty practice, even when that practice impacts the exercise of the war and foreign affairs powers.

This Article will provide a descriptive overview of LOAC treaty practice and illustrate three themes that appear through this practice. First, the advice and consent and treaty implementation authority vested in Congress have enabled and will continue to enable the legislature to significantly influence whether and to what extent the nation will commit itself to limitations on wartime prerogatives. From the close of World War II to the present, Congress has moved from embracing extensive constraints on national military power to opposing such constraints to preserve U.S. flexibility in the use of such power. These efforts provide important examples of the tools Congress leverages to produce these effects: the Senate's use of understandings, reservations, and conditions within a treaty's resolution of consent to ratification, and the enactment of implementing legislation, or subsequent limiting legislation, designed to control the domestic impact of ratified treaties.

Second, this Article highlights the important role played by the judicial branch in the treaty interpretation process, a role that complements—but may at times contradict—executive interpretation. As will be discussed, the willingness of the judicial branch to exercise interpretive authority over complex issues implicating war powers is an important illustration of the scope and importance of judicial treaty interpretation despite the Constitution's explicit vesting of the war powers in the other two branches.<sup>4</sup>

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4. *But see* *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007) (invoking political question doctrine to avoid adjudicating a case involving foreign relations).

Finally, although federalism constraints on national power have not recently produced any meaningful limits on the treaty power as it relates to wartime authority, the Supreme Court's revival of federalism concerns in Commerce Clause cases may augur some additional restrictions on treaty implementation. As shown in a recent case, *Bond v. United States*,<sup>5</sup> even treaties intended to regulate armed hostilities may implicate core federalism concerns. *Bond* also illustrates that even if federalism considerations have no impact on the power of the United States to bind itself to LOAC obligations, they may affect the implementation of those agreements domestically. Given the Founders' desire to limit the States' interference with the fulfillment of national treaty obligations, it is ironic that federalism may be invoked in the twenty-first century to bolster such interference.

This Article first provides a very general overview of the LOAC and then considers how LOAC treaties provide a powerful indication of why treaties are, and will remain, essential to the development and implementation of international law. It then explores the role of the Senate in the creation and ratification of U.S. treaty obligations, offering insight into how that role has subtly evolved since the end of World War II, and particularly since the 1987 completion of the Third Restatement of the Foreign Relations Law of the United States. The Article then considers constitutional aspects of LOAC treaty implementation: first, the role of implementing legislation in fulfilling—or frustrating—the international obligations encompassed in these LOAC treaties; and second, the impact of federalism on LOAC treaty implementation. Next, this Article attempts to glean what minimal lessons are available from the limited judicial forays into the complex waters of LOAC treaty interpretation. Finally, the Article considers whether there has been a reversal of positions between the political and judicial branches on the proper balance between preserving national freedom to act and commitment to international standards of wartime conduct, the potential normative significance of such a shift, and the potential impact of the recent resurgence of federalism interests seen in *Bond*.

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5. 134 S. Ct. 2077 (2014).

I. TREATY CODIFICATION OF THE  
LAWS AND CUSTOMS OF WAR

A. *The Law of Armed Conflict Generally*

One of the oldest branches of international law, the LOAC (often called international humanitarian law), provides a detailed and surprisingly comprehensive framework to regulate hostilities. This law was historically divided into two branches: the conduct of hostilities and humanitarian protection. While neither of these branches is truly isolated from the other (each branch imposes overlapping obligations), this general dichotomy provides a useful framework to facilitate understanding of the nuances of the law. It is also a dichotomy derived from the treaty codification of customary international law. That codification occurred along two distinct trajectories, generally known as the Hague and Geneva traditions, each indicating a branch of conflict regulation defined by a category of treaties.<sup>6</sup>

The Hague tradition is derived from the Hague Convention IV and Annexed Regulations of 1907.<sup>7</sup> This treaty (a successor to the 1899 Hague Convention<sup>8</sup>) focused on the regulation of armed forces in the field with a primary purpose of regulating the actual conduct of hostilities. The Geneva tradition derives from the Geneva Conventions, a category of treaties with a significantly different focus: protecting victims of war.<sup>9</sup> The first Geneva Convention,<sup>10</sup> adopted in 1864, focused on the protection of the wounded and sick in the field—a humanitarian objective immediately embraced by the international community. This first treaty blossomed into what are today four treaties,

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6. Corn et al., *History and Sources of the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT, *supra* note 3, at 33, 40–46.

7. Convention (IV) Respecting the Laws and Customs of War on Land & Annex, Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]; *see also* CORN, *supra* note 3, at 41.

8. Convention (II) with Respect to the Laws and Customs of War on Land & Annex, Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Corn et al., *History and Sources of the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT, *supra* note 3, at 41.

9. Corn et al., *History and Sources of the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT, *supra* note 3, at 43.

10. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

the Geneva Conventions of 1949. Each of the four Conventions focuses on ameliorating the suffering of a distinct category of war victim: (1) the wounded and sick,<sup>11</sup> (2) the wounded, sick, and shipwrecked at sea,<sup>12</sup> (3) prisoners of war,<sup>13</sup> and (4) civilians in the hands of an enemy belligerent power.<sup>14</sup> In 1977, these two branches of conflict regulation were effectively unified when the two Additional Protocols to the 1949 Geneva Conventions were opened for signature.<sup>15</sup> Today, the regulation of armed hostilities by multilateral treaty—treaties that find their origins in both the Hague and Geneva traditions—is a ubiquitous aspect of planning and executing military operations.<sup>16</sup> Furthermore, because the United States is party to most of these LOAC treaties<sup>17</sup>—international agreements that impose limitations on the nation’s ability to lawfully achieve the most vital strategic objectives—they provide a rich landscape for understanding the role of treaties in U.S. practice.

### B. *Why Treaties Still Matter*

Treaties certainly do not provide the exclusive source of conflict regulation; customary international law, national policy, and other sources of “soft law” all supplement treaty law. However, treaties do and will continue to play a dominant role in this

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11. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362 [hereinafter Geneva I].

12. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. 3363 [hereinafter Geneva II].

13. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3364 [hereinafter Geneva III].

14. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365 [hereinafter Geneva IV].

15. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP II].

16. Corn et al., *Introduction*, in *THE LAW OF ARMED CONFLICT*, *supra* note 3, at xxv, xxvi–xxvii.

17. *ICRC databases on int’l humanitarian law*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/resources/ihl-databases/index.jsp> [<http://perma.cc/L83S-H6P7>] (the various treaties are signed by numerous state parties, but the four Geneva Conventions are the only ones universally ratified).

regulatory mosaic. The reasons for this are manifold, but two considerations are especially significant. First, as “law of the land,” ratified treaties are and will always be considered obligatory by the U.S. armed forces. This recognition is a critically important aspect of U.S. treaty practice. Rarely will military commanders or the legal officers advising them ask whether a treaty is or is not self-executing. While certainly an important consideration in the context of judicial enforcement, in terms of identifying obligations that guide the planning and execution of military operations, it is the fact that the U.S. is bound by treaties that compliance. LOAC treaties are viewed as operational and regulatory in nature by the mere fact they have been ratified. Furthermore, for purposes of military operations, these treaties are often functionally implemented not by statute but by regulations, policies, command directives, or doctrine. For example, if a U.S. commander is establishing a POW camp during an international armed conflict, compliance with the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) will in no way be impacted by a self-execution analysis. Instead, as a treaty ratified by the United States, commanders and the legal officers who advise them will consider the treaty binding as such, unless directed by higher competent authority to deviate from the terms of the treaty. Their actions are also directly governed by joint service regulations, which incorporate and make treaty requirements directly applicable to U.S. military operations.<sup>18</sup> As a result of this codification trend, interpretation

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18. The treatment of prisoners of war (POWs) provides an ideal illustration. Congress has never enacted a statute to implement Geneva III. In fact, Congress, in its ratification of the Geneva Conventions, determined that only four articles of the 1949 Geneva Conventions required implementing legislation: those concerning the criminalization of grave breaches (Geneva I art. 50, Geneva II art. 51, Geneva III art. 130, and Geneva IV art. 147). The Army, as the designated Department of Defense executive agent for POW and detainee issues, has promulgated what is known as a joint services regulation: a regulation applicable to all military services. See U.S. Dep’t of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997). This regulation establishes controlling Department of Defense policy for the treatment of, *inter alia*, POWs. Unsurprisingly, much of this regulation requires compliance with the many provisions of Geneva III. However, of particular significance is that while promulgated as a regulation, and therefore subject to modification at the direction of the Secretary of Defense, the underlying obligation is immutable absent renunciation of Geneva III or a later in time statute enacted to prohibit compliance with the treaty, both of which seem inconceivable. *But see* Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X,

and application of multilateral LOAC treaties are central aspects of planning and executing military operations.<sup>19</sup>

Therefore, LOAC treaties “matter” because unlike Department of Defense policy or even executive orders, they are clearly understood by the armed forces as binding obligations, immune from policy modification.<sup>20</sup> This significance is illustrated by the almost immediate Department of Defense reaction to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, which confirmed that the Geneva Conventions applied to Taliban and al Qaeda prisoners.<sup>21</sup> Based on the Court’s interpretation that Common Article 3 of the Geneva Conventions directly applied to prisoners who up to that point had been characterized as unlawful enemy combatants unprotected by the Conventions, the Under Secretary of Defense instructed the Department to ensure compliance with this obligation within twenty-four hours of the publication of the opinion.<sup>22</sup> This course of

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§ 1002, 119 Stat. 2680 (2005). By making the Interrogation FM (which adopts a Geneva III standard) the law of the land (via Statute), Congress reinforces the application of the treaty even when not required by the terms of the treaty to comply.

19. Corn et al., *Introduction*, in *THE LAW OF ARMED CONFLICT*, *supra* note 3, at xxv, xxvi–xxvii.

20. While certain legal opinions issued at the initiation of the “War on Terror” may have challenged this assumption to a certain degree, the ultimate outcome of the detainee treatment debate actually reconfirmed the binding impact of LOAC treaties. Furthermore, it is arguable that even the now infamous Office of Legal Counsel memoranda addressing the status and treatment of captured and detained al Qaeda and Taliban operatives, and the subsequent findings by President Bush based on these opinions, (see *Text of Order Signed by President Bush on Feb. 7, 2002, outlining treatment of al-Qaida and Taliban detainees*, available at LawofWar.org, [http://www.lawofwar.org/Bush\\_torture\\_memo.htm](http://www.lawofwar.org/Bush_torture_memo.htm) [<http://perma.cc/3LET-ASPL>] [hereinafter *Text of Order*]), recognized this understanding—the primary thrust of these legal opinions was not that the Geneva Conventions could be ignored, but that they were inapplicable to these detainees. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the DoD, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [<http://perma.cc/NHR9-9SVE>].

21. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

22. The Memorandum noted that:

The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.



events—a Supreme Court decision interpreting the scope of a LOAC treaty followed by an immediate enunciation of Department of Defense policy to ensure compliance with that interpretation—is clear evidence that treaties have a profound impact on the planning, execution, and oversight of military operations, impacts which can originate in any of the three branches of government.

Perhaps an even more important LOAC-based illustration of why treaties still “matter” is that treaties have become the almost unquestioned best (and probably only) means of prohibiting the use of weapons considered fundamentally inhumane. The exercise of military force remains a core attribute of sovereignty, and treaties are the mechanism used by nations to impose constraints on its exercise. Specifically, treaties provide what is perhaps the only effective mechanism to restrict or prohibit the development and use of certain weapons.<sup>23</sup> While Arti-

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It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with standards of Common Article 3.

Memorandum from the Deputy Secretary of Defense, to Secretaries of the Military Departments, Subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf> [<http://perma.cc/J5K9-PULX>].

This was, of course, Secretary England’s interpretation of the consistency of then existing DoD policies and practices with the humane treatment mandate of Common Article 3. Many believe that interrogation methods and treatment standards adopted for detainees at Guantanamo Bay, Cuba, were equally inconsistent with Common Article 3. What is clear is that the *Hamdan* decision triggered a top to bottom reconsideration of all treatment standards to ensure compliance with this critically important humanitarian treaty provision.

23. The use of treaties to regulate specific weapons began with the 1868 St. Petersburg Declaration (also known as Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight). One of the very first multilateral law of war treaties, this treaty’s impact was limited to prohibiting the use of one specific means of warfare: bullets designed to explode in the human body. The parties to the treaty reached consensus on this prohibition based on the conclusion that the injuries inflicted by exploding bullets were superfluous as they exceeded the legitimate objective of disabling an enemy opponent. While the treaty itself soon became functionally irrelevant as the result of ammunition developments, the underlying principle became a core tenet of the laws and customs of war: the prohibition against the use of means of warfare (weapons and ammunition) calculated to cause unnecessary suffering or superfluous injury. See Decla-

cle 23 of the Regulations Annexed to the 1907 Hague Convention IV states that “it is especially forbidden . . . [t]o employ arms, projectiles, or material calculated to cause unnecessary suffering . . .”,<sup>24</sup> in practice this general prohibition has not been particularly effective because of the lack of state consensus on what weapons violate this rule.<sup>25</sup> Nonetheless, states still strive

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ration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November/ 11 December 1868.

The current U.S. position is that neither this treaty nor the Expanding Bullets treaty prohibit fragmentation—all bullets fragment at some time. See *Practice Relating to Rule 77. Expanding Bullets*, INT’L COMM. OF THE RED CROSS, available at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule77](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule77) [<http://perma.cc/Y5JE-Y5VW>]; see also Memorandum from W. Hays Parks, Colonel, USMCR, Chief of the Judge Advocate General Int’l Law Branch, to Commander, United States Army Special Operations Command, Subject: Sniper Use of Open-Tip Ammunition (Oct. 12, 1990), available at <http://www.thegunzone.com/opentip-ammo.html> [<http://perma.cc/Y84X-M29D>].

24. Hague IV, art. 23. The full text of Article 23 provides:

In addition to the prohibitions provided by special Conventions, it is especially forbidden

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of [defense], has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.

25. While the binding nature of the prohibition against unnecessary suffering has been long considered axiomatic, the impact of the principle was in fact quite limited. This was because it was virtually impossible to establish widespread consensus on what means of warfare ran afoul of this prohibition. Because neither Article 23 nor AP I provide a list of prohibited weapons and ammunition, the ultimate answer to this question became a matter of state interpretation. This very

to identify those weapons systems considered especially pernicious on the battlefield. To eliminate state discretion inherent in bilateral treaties, states increasingly turn to the multilateral treaty as a mechanism to prohibit entire classes of weapons—a mechanism designed to eliminate the discretion of individual states to pick and choose lawful and unlawful weapons.

The effort to ban chemical weapons provides a prime example. Although widely condemned since their first use in World War I, early attempts to ban the use of chemical weapons through treaty in 1925 were ineffective.<sup>26</sup> These weapons cause

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limited effect is reflected in FM 27-10, which provides as examples of the prohibition glass projectiles (because in the early twentieth century glass fragments could not be detected by x-ray) and barbed spears (because barbs on spears inflicted a wound that was extremely difficult to treat). Considering the fact that this field manual was promulgated in 1956, it is remarkable that the only examples available came from an era of warfare long overtaken by the reality of modern weaponry. What armies still used spears or lances in 1956?

26. This process began early in the LOAC codification era and gained significant momentum following World War I. The 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare came into force during the inter-war period. *See, e.g.*, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. No. 2138 (1929). The Gas Protocol was, however, fundamentally flawed because, like most treaties, it was subject to reservation. Unsurprisingly, many state parties to these treaties made reservations, especially to preserve the right of retaliatory use of such weapons. *See* (State Parties) Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=280&ps=P> [<http://perma.cc/Z9Q5-LKY3>]. For example, when the United States ratified the Gas Protocol of 1925, it included a reservation permitting retaliatory use, a reservation common among most state parties to this treaty. As the 1989 U.S. Navy Commander's Handbook on the Law of Naval Operations explains:

The United States is a party to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol"). All other NATO nations and all Warsaw Pact nations are also parties. The United States, the USSR, and most other NATO and Warsaw Pact nations conditioned their adherence to the 1925 Gas Protocol on the understanding that the prohibition against use of chemical weapons ceases to be binding with respect to nations whose armed forces, or the armed forces of the allies, fail to respect that prohibition. This, in effect, restricts the prohibition to the "first use" of such munitions, with parties to the Protocol reserving the right to employ chemical weapons for retaliatory purposes.

*See* U.S. Navy, Doc NWP 1-9 (Rev. A), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 10.3.1 (Oct. 1989). Such reservations, in essence, manifested distrust for the efficacy of the prohibitions established by these

especially brutal suffering to the victims (for example, blister agents cause disability and almost certain death by inflicting the equivalent of burn blisters on all exposed parts of the body, including the respiratory system if inhaled). They are also by nature inherently indiscriminate: once released it is impossible to control where and whom they will impact. In a densely populated battlefield like Western Europe, these traits posed immense risk to the civilian population. While general revulsion to this means of warfare remained widespread,<sup>27</sup> it had become obvious that the 1925 treaty prohibiting only their use was ineffective to remove these weapons from the battlefield. This was largely due to State practice of preserving the right to retaliatory use in reservations to the treaty. It was not until the 1997 entry into force of the Chemical Weapons Convention (CWC), which prohibited state reservations, that their production, stockpile, or use was finally banned.<sup>28</sup> Indeed, the CWC not only reflects the continued relevance of treaty law in the regulation of armed hostilities but also a new technique to eliminate especially pernicious weapons from the arsenals of

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“weapon prohibition” treaties. States preserved the capability to employ the prohibited weapon in the event that other state parties violated the prohibition.

This practice seriously undermined the prohibitory objective of these treaties. The most compelling example of this flaw was the prohibition against the use of chemical weapons (the 1925 Gas Protocol). Throughout the Cold War, NATO forces assumed that if conflict with the Soviet Union were to turn hot, a Soviet offensive would involve the almost immediate widespread use of both persistent and nonpersistent chemical weapons. The response to this expectation was not only preparation for countermeasures such as detection, protection, and decontamination capabilities, but also the capability to employ chemical weapons in retaliatory use. Thus, would be belligerent opponents on both sides of the Iron Curtain consistently observed opposing armed forces training to conduct operations in a chemically contaminated battle space, implying a capability to employ chemical munitions.

27. In this regard, it is interesting to note that none of the belligerents involved in World War II used chemical weapons even though most possessed chemical warfare capability, with the exception of Japanese use of poison gas and biological agents in China. Sheldon H. Harris, *Japanese Medical Atrocities in World War II: Unit 731 Was Not an Isolated Aberration*, a paper read at the International Citizens Forum on War Crimes and Redress, Tokyo, Japan (Dec. 11, 1999), available at <http://www.vcn.bc.ca/alpha/speech/Harris.htm> [<http://perma.cc/M6GY-4XBZ>].

28. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-219, 1974 U.N.T.S. 317.

armed forces.<sup>29</sup> These and other multi-lateral LOAC treaties indicate that the treaty process is today recognized as perhaps the most effective mechanism for mitigating the negative humanitarian consequences of armed conflict.

## II. TREATY FORM: ADVICE AND CONSENT

The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>30</sup> As with many other shared constitutional authorities, the treaty-making process was designed to restrain unchecked power in any one branch. Requiring Senate consent was intended “both to protect the rights of the states and to serve as a check against the President’s taking excessive or undesirable actions through treaties.”<sup>31</sup> Involvement of the Senate, representing the legislative branch, was also essential because under the new Constitution treaties automatically became “the supreme law of the land.”<sup>32</sup>

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29. Treaties adopting the same approach to banning weapons negotiated since the CWC include the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211), banning the production, stockpiling, or use of anti-personnel land mines and the Cluster Munitions Convention (Convention on Cluster Munitions, Dec. 2, 2008, 48 I.L.M. 357). Another significant example of the continuing significance of treaties as a mechanism to ban or limit the use of certain weapons is the Convention on Certain Conventional Weapons (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCCW]). Unlike the CWC or the Ottawa Convention, the CCCW is an umbrella agreement that established a mechanism for addressing specific weapons through subsequently negotiated optional protocols. This mechanism has proved remarkably effective, not only as the result of a number of optional protocols addressing specific weapon systems, but perhaps more importantly by creating a forum for an ongoing inter-state dialogue on weapons controls.

30. U.S. CONST. art. II, § 2, cl. 2.

31. CONG. RESEARCH SERV., S. PRT. 106–71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (S. Print 2001) [hereinafter SENATE ON TREATIES].

32. SENATE ON TREATIES, *supra* note 31, at 27–28; *see also* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 995 (2010). The role of the Senate as a representative of State interests, was, at the time of ratification, even stronger than at present. Prior to the passage of the XVII

Because formation of law of war treaties is intertwined with another power shared between the Executive and Legislative branches—the war power—the LOAC treaty ratification process is an especially important manifestation of this constitutionally required inter-branch interaction.

The Senate's advice and consent often reflects the realities of international and domestic politics as well as the Senate's effort to influence United States foreign policy. Thus, the Senate's willingness to consent to treaty obligations will often fluctuate based on the broader national sense of geostrategic necessity. In some cases, as in the ratification of the 1949 Geneva Convention, the views of the Senate and the President merge with little disagreement arising during the advice and consent process.<sup>33</sup> In others, the Executive may set a course quite distinct from the Senate's position, as was the case with the 1977 Additional Protocols to the Geneva Conventions. In that case, Executive concerns over the existing military-political realities resulted in the decision to reject the treaty it had been instrumental in drafting without submitting it to the Senate for advice and consent. In contrast, the Executive did seek advice and consent for Additional Protocol II (drafted at the same time as AP I), but the Senate exerted its power by failing to take any action on the treaty, which remains in limbo to this day. In recent years as geopolitical consensus between the President and the Senate has deteriorated, advice and consent for even seemingly uncontroversial treaties, such as the 1992 Chemical Weapons Convention, has become fraught with controversy and disagreement.

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Amendment, Senators were elected by State legislatures and were thus more responsive to their interests.

33. 132 CONG. REC. 8830 (1986) (in 1953, "the two parties at that time fundamentally viewed the world situation in the same way," and "Eisenhower began his presidency with a broad national consensus on foreign policy and strong bipartisan support in the Congress"). Indeed even prior to the 1950s, the Senate was intimately involved in treaty negotiation. Just after the completion of World War II, two Senators, Connally and Vandenberg, accompanied the U.S. negotiating team at the UN Conference in 1945 and "were recognized as the authorities in the Senate on the Charter; they had been through all the negotiations, they knew the attitude of the Russians and the other delegates there. So there was no real problem getting it through the Senate." 133 CONG. REC. 8937 (1987). This further built on prior Senate practice—Senators Lodge and Underwood were delegates to the 1921 Washington Arms Limitation Conference. The value of Senate participating in negotiations was offset by the effect on Senate business caused by their absence. *See id.*

A. 1949 Geneva Conventions: The United States as Standard Bearer for “Enlightened Practices of Civilized Countries”

Against the background of the devastation of World War II, as signs of the impending Cold War became apparent, the United States negotiated and signed the 1949 Geneva Conventions. These four treaties substantially amplified protections for victims of war. Although transmitted to the Senate in 1951,<sup>34</sup> in 1952 developments in the Korean War led the Department of State to request that consideration of the Conventions by the Senate be deferred.<sup>35</sup>

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34. The Executive signed the Conventions with one reservation made at signing. This reservation concerned the imposition of the death penalty under Article 68. Concurring with the Executive’s action, the Senate accepted the Executive’s assurance that it would object to reservations made by the Soviet bloc nations and concurred in accepting treaty obligations with those nations aside from the reserved areas. *Geneva Conventions for the Protection of War Victims: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 4 (1955) [hereinafter *Senate GC Hearings*], available at [http://www.justice.gov/jmd/lis/legislative\\_histories/pl104-192/hear-060355-1955.pdf](http://www.justice.gov/jmd/lis/legislative_histories/pl104-192/hear-060355-1955.pdf) [<http://perma.cc/9969-L7KX>]. The Senate was concerned that reservations included in ratifications by the Soviet Union and other eastern bloc countries fairly implied that those nations would not provide the protections of the Conventions to POWs who had been convicted of war crimes. *Senate GC Hearings* at 4.

35. *Id.* at 1. During the period the Senate held consideration of the 1949 Geneva Conventions in abeyance at the request of the State Department (from 1952 to its approval in 1955), it also considered the ratification of the North Atlantic Treaty Organization’s Status of Forces Agreement (in June 1953). The NATO Treaty itself had been signed and approved by the Senate within a three month period in 1949, and the NATO SOFA was intended to resolve the legal status of military forces stationed in other countries as this multilateral defense treaty came into effect. See *NATO Chronology of Events*, TRUMAN PRESIDENTIAL LIBRARY, <http://www.trumanlibrary.org/nato/natocron.htm> [<http://perma.cc/6LDQ-6M55>]. Consideration of the NATO SOFA Treaty occurred at a time of increasing domestic controversy over the proper roles of treaties in domestic U.S. law, particularly in light of the ratification of the United Nations Treaty in July 1945, and the newly proposed UN International Covenant on Human Rights, and efforts by Senator Bricker and his supporters to amend the Constitution to radically limit the treaty power. See Dru Brenner-Beck, *Federalism and the Treaty Power: Breaking the “Bond(s)” Between Nations: The Treaty Power and Status of Forces Agreements*, 5 AM. U. NAT’L SEC. L. BRIEF 1 (2014); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1274 (2000) [hereinafter *Treaty-Making and the Nation*]. Senator Bricker’s various attempts to amend the U.S. Constitution, which continued until 1958, included prohibitions on the domestic operation of any U.S. treaty absent specific enabling legislation passed by Congress making its provisions operative domestically, and limits on the subject-matter of such legislation to that already authorized Congress in Article I. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 192 (2nd ed. 1996). President Eisenhower vehemently opposed the various Bricker Amendments, arguing that such an amendment, by overruling *Missouri v. Holland*, would seriously damage U.S.

Foremost among these developments were: (1) the alleged severe maltreatment by North Korea of U.S. and United Nations (U.N.) POWs (including allegations of brainwashing and forced indoctrination); (2) significant difficulty in maintaining order in U.N. POW camps in Korea; and (3) continued international disagreements on the issue of forced repatriation of POWs at the end of hostilities, an issue that arose in the immediate aftermath of World War II and persisted after the Korean armistice. When in 1955 the Senate finally took up ratification, these issues concerning POWs—issues that arose both after World War II and in Korea—were of particular concern.<sup>36</sup>

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foreign policy interests and undermine the country's ability to protect the rights of U.S. citizens abroad.

While deliberating over the Bricker Amendment, the Senate simultaneously considered the NATO SOFA Treaty. The debate over this treaty and the reservation proposed by Senator Bricker—intended to alter one of the treaty's fundamental articles detailing criminal jurisdiction—reflected the underlying domestic political dispute over U.S. foreign policy and the role of treaties in U.S. law generally present in the early 1950s. During the Senate's 1953 consideration of the multi-lateral NATO SOFA Treaty, Senator Bricker opposed its approval, proposing a reservation to retain sole criminal jurisdiction over U.S. military personnel overseas in exchange for granting the same status to foreign soldiers in the US. His opposition to the criminal jurisdiction provisions of the NATO SOFA reflected both a narrow understanding of jurisdiction over military forces generally, and a resistance to the increasing role of the United States as a global power with binding international commitments. The Senate's ultimate rejection of Senator Bricker's reservation and its discussion and comprehension of the effect of these provisions on domestic U.S. law and traditional states' rights, reflected its perception of the ultimate benefit gained from the integrated NATO defense effort—an exercise of national foreign policy, supported by both the Executive and the Senate. Coupled with the Bricker Amendment's narrow defeat, these two Eisenhower victories thus reflected the Senate's ultimate view of the importance of exclusive national power and autonomy in foreign affairs and treaty making. *See* Brenner-Beck, *supra* note 35.

36. At the end of World War II, the United States held over 425,000 prisoners of war in internment camps in the U.S., a figure that would grow to over 4.3 million in U.S. custody worldwide by May 1945. ROBERT H. COLE, *A SURVEY OF UNITED STATES DETAINEE DOCTRINE AND EXPERIENCE SINCE WORLD WAR II 1-2* (2006), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a449746.pdf> [<http://perma.cc/P7B9-MQZJ>]. The Soviet Union held over 3,250,000 German prisoners, and reportedly retained more than 375,000 Japanese POWs in Soviet prisons more than four years after the end of World War II in the Pacific. Following the end of World War II, thousands of German and Japanese prisoners held by the Soviet Union were used as forced labor, tortured, and in many cases executed after "fake criminal procedures." Olivier Barsalou, *Making Humanitarian Law in the Cold: The Cold War, The United States and the Genesis of the Geneva Conventions of 1949* 38 (Institute for International Law and Justice Emerging Scholars Paper 11, 34-35 2008), available at <http://www.iilj.org/publications/documents/Barsalou.ESP11-08.pdf> [<http://perma.cc/3LPC-DWUK>].



The POW repatriation obligation, already problematic following World War II, became even more contentious after the Korean War.<sup>37</sup> Credible and extensive reports of Soviet mistreatment of POWs after World War II led to increased U.S. concern that the Soviets would not adhere to humanitarian norms in any future conflict—conflict that was seen as increasingly likely given the advent of the Cold War. This view was reinforced by the inhumane and brutal treatment of U.S. and U.N. POWs by opposing communist forces in the Korean War.<sup>38</sup>

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37. The United States was responsible for both the repatriation of prisoners from its own POW internment camps, and because of its responsibilities as the Occupying Power of Germany and Japan, for the repatriation of prisoners held by these former enemies. Complicating this situation, the U.S. and other allied powers were faced with eastern bloc POWs who did not wish to be repatriated to their countries of origin. Barsalou, *supra* note 36. Although the U.S.S.R. was not a signatory to the 1929 Geneva POW Convention, at the February 1945 Yalta Conference the U.S. and U.S.S.R. agreed to repatriate all citizens—not just POWs—at the end of the war. Barsalou, *supra* note 36, at 33. In the months immediately following the end of World War II, the U.S. initially agreed with the Soviet view that prisoners of war would be sent back to their country of origin. However, the U.S. was soon faced with the Soviet practice of transferring repatriated soldiers to gulags, and with mass suicides by prisoners after being informed they would be repatriated to the U.S.S.R. During the Korean armistice negotiations the most contested legal issue was whether the parties were obligated to compel prisoners to be repatriated against their will or whether the detaining power could in its discretion grant asylum to any prisoner who desired it. The United Nations Command maintained the position that all prisoners who wished to be repatriated were entitled to repatriation, but that international law did not require force to be used if a POW was unwilling to return. The Communists asserted that forced repatriation was prescribed under the language of article 118 of the 1949 Convention on Prisoners of War. See *Senate GC Hearings*, *supra* note 34, at 22–23; see also *Text of Report to Defense Secretary by Advisory Committee on Prisoners of War*, N. Y. TIMES, Aug. 18, 1955, available at <http://www.nytimes.com/learning/teachers/archival/19550818POW.pdf> [<http://perma.cc/SVX9-N8BH>]. Article 75 of the 1929 Geneva Convention, although requiring that every POW be repatriated at the end of the conflict, was silent on the country of repatriation. See Barsalou, *supra* note 36, at 33. Although not specified, state parties to the 1929 Convention appeared to have “tacitly agreed that the country of repatriation will be the country of origin of the prisoner of war.” *Id.* at 33. Nevertheless state practice following World War II was not uniform.

38. Humane treatment accorded captured North Korean and Chinese prisoners did not result in reciprocal treatment for U.S. POWs, as Communist Armies “seemed to be unconcerned by the fate of their own prisoners beyond their propaganda value,” rendering threats of retaliation for mistreatment of U.S./U.N. prisoners useless. North Korea, Communist China, and the U.S.S.R. had not ratified the Geneva Conventions, and there was significant question as to whether the United Nations was a party to the Conventions. Barsalou, *supra* note 36, at 39; see also S. EXEC. REP. NO. 84-9, at 30 (1955) [hereinafter SENATE GC EXEC. RPT. NO. 9]; *Text of Report to Defense Secretary by Advisory Committee on Prisoners of War*, *supra* note 37.

As a result, the U.S. began to rethink its views of the repatriation obligations in both the 1929 POW Convention<sup>39</sup> and the proposed Article 118 of the 1949 POW Convention.<sup>40</sup> The Soviet Union viewed these repatriation obligations as mandatory, with no possibility of asylum for POWs who did not wish to return to their countries of origin. For the U.S., the requirement to deal with real world implementation of POW repatriation policies, as well as the advent of the Cold War, led to a reinterpretation of the 1949 Conventions and to a conclusion that POWs had a right to refuse to be repatriated to their country of origin and to seek asylum or repatriation to another country.<sup>41</sup> The U.S. considered this view in accord with the humanitarian object and purposes of the Geneva Conventions,<sup>42</sup> a view concurred in by the United Nations General Assembly.<sup>43</sup>

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39. Stalin's Order 270 stated that every Red Army soldier who allowed himself to be captured alive would be considered as a traitor to the motherland. Barsalou, *supra* note 36, at 38. Olivier Barsalou's article contains an in depth discussion of the evolution of the U.S. view on the repatriation requirements of the 1949 GCs in light of Soviet mistreatment of both its German and Japanese POWs, and its own repatriated soldiers. *Id.* at 32–49.

40. The repatriation requirement of Article 75 of the 1929 Convention, although requiring repatriation at the end of the conflict, was silent on the country of repatriation. *See* Barsalou, *supra* note 36, at 33.

41. The first paragraph of Article 118 reads as follows:

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph. In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

Barsalou, *supra* note 36, at 36 & n.154. This was in contrast to the text and *travaux préparatoires* of the 1949 GC, but “enshrined U.S. conception of freedom and liberty while the Moscow’s conservative interpretation . . . negated these universal truths.” *Id.* at 36–37, 45 (U.S. legal advisors concluded that there was a firmly established principle of international law allowing a detaining state to grant asylum to POWs).

42. *Id.* at 37–38; *see also* SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 23–24 (“The committee unqualifiedly concurs [that article 118 does nothing to change accepted principles of international law under which asylum is applicable to prisoners of war] . . . The interpretation . . . is fully consistent with the great humanitarian purposes which underlie all four of the conventions.”).

43. *See Senate GC Hearings, supra* note 34, at 5. The Senate was referring to a U.N. General Assembly Resolution adopted in 1952 that accepted the U.S. view that forced repatriation was not required by Article 118. *See* Geneva III Commentary, art. 118; *see also* G.A. Res. 610 (VII), U.N. Doc. A/Res/610(VII) (Dec. 3, 1952), *availa-*

The Korean War only exacerbated the existing tensions within the U.S. government between the Department of State, which was developing the U.S. legal position on the POW issue, and the military, which was seeking firm guidance to execute its ongoing duties as an Occupying (and detailing) Power.<sup>44</sup> Only in 1955, after the Korean War ended and the U.S. government was able to evaluate and incorporate its experience in that conflict into its Cold War foreign policy, did the Department of State request that the Senate take up consideration of the 1949 Conventions.<sup>45</sup> A key part of this experience was the North Korean and Chinese brainwashing and mistreatment of U.S. POWs.<sup>46</sup>

Because U.S. ratification of the Geneva Conventions played out against this backdrop of an advancing communist ideology and the impending Cold War, officials within the U.S. government increasingly saw ratification as a means to defend the ideals of western civilization through a universal system of international law.<sup>47</sup> In order to promote this ideological war, the

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ble at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/610\(VII\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/610(VII)) [<http://perma.cc/8Q8S-6XDW>].

44. See Barsalou, *supra* note 36 at 13, 33, 43–46. Additionally, the determination of what international law obligations operated during the Korean War was complicated by the fact that the U.S. had signed but not ratified the 1949 Conventions, and that Communist China, in the midst of the conflict, agreed to abide by the “principles” in the Conventions. *Id.* at 39–40.

45. *Id.* at 38, 43–44; see also SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 3 (“Not long after the treaties were received by the Senate, the Department of State indicated its desire that further action be postponed in view of developments in the Korean conflict. This suggestion seemed a wise course to pursue, since all parties to the Korean conflict had signified in one way or another an acceptance of the principles of the conventions, and there was every reason to believe that more careful and mature consideration could be given to their detailed provisions after, rather than in the midst of, armed conflict. In consequence, no steps were taken in the Senate to consummate ratification of the conventions. With the Korean conflict abated, it became possible to reconsider the matter of ratification.”).

46. *Text of Report to Defense Secretary by Advisory Committee on Prisoners of War*, *supra* note 37; see also SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 29–30.

47. “The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.” SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 32; see also Barsalou, *supra* note 36, at 48–49 (In 1955, the Departments of State and Defense prepared memorandum entitled *Soviet Attitude Toward the Laws of War*, in which the U.S. saw the Soviet Union as “a threat to the peace and security of the world and consequently, for the whole system of humanitarian law developed in the previous decades.”).

Executive and the Senate were willing to accept the legal constraints imposed on the conduct of U.S. foreign policy by the Conventions,<sup>48</sup> “associat[ing] the preservation of the universality and unity of international [law] with the defense of its national interests in the rising world of the Cold War against the Soviet Union’s anti-universalistic philosophy.”<sup>49</sup> Accordingly, in 1955, the Executive in seeking favorable consideration by the Senate considered the Four Geneva Conventions as:

[A]nother long step forward toward mitigating the severities of war on its helpless victims . . . reflect[ing] enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions.<sup>50</sup>

Delaying consideration of the Conventions by the Senate until after the lessons of the Korean War could be assessed was seen as necessary to allow a considered evaluation of their obligations. Furthermore, it proved useful to assess their effect on actual military operations, particularly in the context of a war with a non-party to the Conventions. According to the Senate Report:

The experience of the Korean conflict emphasized the importance of the conventions. Our side, in fact, applied their humanitarian provisions and offered victims the protection these were designed to achieve. The enemy’s ruthless behavior was exposed by their disregard of the Geneva rules. There is reason to believe that the moral acceptance of the conventions as a general norm did have some effect on the enemy. The Communists to some extent improved their treatment and eventually did repatriate a number of sick and wounded as well as numbers of other prisoners after hostilities. With further regard to the Korean conflict, our unified command, in giving effect through the Armistice Agreement to the principle of release and repatriation employed in the prisoners-of-war conventions, successfully confirmed that a detaining power has the right to offer asylum to prisoners of war and is not obligated to repatriate them forcibly. These fundamental

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48. See Barsalou, *supra* note 36, at 41.

49. *Id.* at 50.

50. *Senate GC Hearings*, *supra* note 34, at 5.

points have been upheld by an overwhelming vote in the United Nations General Assembly.<sup>51</sup>

The Department of Defense's conclusion that adherence to the standards embodied in the Conventions would not "prejudice the success of our arms in battle"<sup>52</sup> also reflected lessons of the recent brutal conflict in Korea, and was crucial to favorable Senate action. By urging ratification, the Department of Defense underscored that the Conventions merely require the treatment that the United States already accords<sup>53</sup> and that "fair and just treatment" of protected persons "contribute[s] to success in battle by providing those conditions of order and stability which permit a belligerent to devote its real efforts to the defeat of the enemy armed forces."<sup>54</sup> Pragmatically, the Department of Defense concluded that the "conventions give us the means of dealing with the problems we encountered in Korea and forbid those very acts which so outraged our conscience."<sup>55</sup>

The Senate quickly recommended ratification, echoing the Executive position that the legal constraints imposed by the Conventions were constraints already present in the policies, practices, and values of the United States and its people:

Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. As emphasized in this report, the requirements of the four conventions to a very great degree reflect the actual policies of the United States in World War II. The practices which they bind nations to follow impose no burden upon us that we would

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51. *Senate GC Hearings, supra* note 34, at 10. The Senate was referring to a U.N. General Assembly Resolution adopted in 1952 that accepted the U.S. view that forced repatriation was not required by Article 118. *See* G.A. Res. 610 (VII), *supra* note 43; *see also* Geneva III Commentary, art. 118.

52. *Senate GC Hearings, supra* note 34, at 10 (statement of Wilber M. Brucker, Department of Defense General Counsel).

53. "In the first place, the conventions are largely but a statement of how we would treat, and have already treated the wounded, the sick, the shipwrecked, prisoners of war, and the civilian victims of war. One cannot help being struck by the close parallel which exists between many of the provisions of the conventions and the course of conduct we ourselves have pursued in recent wars." *Id.*

54. *Id.*

55. *Id.*

not voluntarily assume in a future conflict without the injunctions of formal treaty obligations.<sup>56</sup>

And like the Executive, the Senate emphasized the object and purpose of the 1949 Geneva Conventions as representative of the values of the United States, particularly, that:

[T]hese four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.<sup>57</sup>

Ratification of the 1949 Geneva Conventions was thus perceived as contributing to U.S. efforts “[t]o lead the free world and defend the interest of international law.”<sup>58</sup> Faced with the threat posed by the U.S.S.R. and its potential unwillingness to comply with humanitarian requirements in warfare, the U.S. saw ratification of the 1949 Conventions as a critical step in the establishment of universal mandatory legal standards applicable to warfare,<sup>59</sup> standards that could be used in the doctrinal battle with the U.S.S.R. In the face of this overarching foreign policy necessity, and in the midst of the deepening of the Cold War, the relative unanimity of opinion<sup>60</sup> between the Senate and the Executive is unsurprising, representing for the U.S. “an equilibrium [or more properly, an alignment] between its in-

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56. SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 32.

57. *Id.*

58. Barsalou, *supra* note 36, at 43.

59. Reservations by the Soviet Union and other Eastern bloc nations raised concerns in the U.S. State and Defense Departments and the Senate of the possibility of future POWs being subject to tribunals lacking any protections under international law. Moscow did not consider itself bound by the obligation to extend the application of the Convention to POWs convicted of pre-capture war crimes. See Barsalou, *supra* note 36, at 46–50; see also SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 28–29.

60. The Senate imposed one additional reservation in its recommendation of ratification. This involved the continued use of the Red Cross symbol in addition to the reservation made at the signing of Article 68 concerning the imposition of the death penalty in certain circumstances. See *Geneva Conventions of 12 August 1949*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument> [<http://perma.cc/LLW3-KF9E>].

ternational and national imperatives.”<sup>61</sup> Ratification of the Conventions reflected the U.S. view of the mandates of a universal international law of armed conflict and the U.S. leadership role in achieving it:

Through its own conduct in previous wars the United States has been instrumental in encouraging the acceptance of standards of treatment which would preserve the peoples of all races and all nations from the savageries and barbarisms of the past. By adding our name to the long list of nations which have already ratified, we shall contribute still further to the *world-wide endorsement* of those high standards which the draftsmen at Geneva sought to achieve.<sup>62</sup>

B. *The Ratification Process and Unilateral Actions: The 1977 Additional Protocol I and II to the Geneva Conventions and the Military Impact on Advice and Consent*

The Advice and Consent process provides the Senate with the ability to influence the nature of U.S. treaty obligations. However, this power has little meaning if the President never seeks ratification of a previously negotiated treaty. How the Reagan Administration dealt with the 1977 Additional Protocol I to the Geneva Conventions of 1949<sup>63</sup> provides a somewhat unusual reminder that although the Senate can block the ratification of a treaty favored by the President, it has no power to influence the President’s decision *not* to ratify a treaty.

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61. Barsalou, *supra* note 36, at 50.

62. SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 32 (emphasis added); see also *Geneva P.O.W. Code Approved by Senate*, N.Y. TIMES, July 6, 1955 (“Senator William F. Knowland of California, the Republican Leader, said the four international conventions drafted at Geneva in 1949 had established standards that ‘any nation calling itself civilized will comply with.’ . . . Another member of the Foreign Relations Committee, Senator Alben W. Barkley, Democrat of Kentucky, said the conventions made an international standard of the ‘humane practices the United States has followed over a long period of time.’”). Following the Senate’s consent to ratification of the NATO SOFA in 1953, discussed *supra* at note 35, the Senate’s consent to the ratification of the 1949 Geneva Conventions in 1955, interspersed between the defeats of the various Bricker Amendments proposed between 1951 and 1958, reflected a strong Senate commitment to a unified and strong foreign policy and U.S. engagement overseas.

63. Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. TREATY DOC. NO. 100-2, at III-V (1987).

In 1975, the International Committee of the Red Cross convened a conference to update and improve the 1949 Geneva Conventions.<sup>64</sup> Two treaties emerged from this conference: Additional Protocols I and II (AP I and II). AP I supplemented the law applicable to international armed conflicts (inter-state wars), while AP II supplemented the law applicable to non-international armed conflicts (civil wars).<sup>65</sup> Each treaty included codifications of widely accepted customary international law, refinements of existing Geneva Convention obligations, and advancements in the law.<sup>66</sup>

The United States played a central role in the drafting of these treaties, which President Carter signed in 1977.<sup>67</sup> Thereafter, following President Carter's signature, the two treaties were submitted to the Pentagon for a comprehensive review.<sup>68</sup> By the time this process was completed, Ronald Reagan was the President of the United States. The Pentagon's review identified a number of concerns with both Protocols—especially AP I—and the Department of State shared these concerns.<sup>69</sup> Although the Pentagon considered most of the treaty provisions either codifications of existing customary international law or positive developments in the law, several provisions led the Pentagon to conclude that AP I reflected an unacceptable politicization of the LOAC. Most notably, the Protocol included “war[s] of national liberation” occurring solely within the territory of a state within its scope of applicability, thereby transforming them from “internal” to “international”

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64. AP I, *supra* note 15; AP II, *supra* note 15.

65. AP I, *supra* note 15; AP II, *supra* note 15.

66. HOWARD S. LEVIE, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS* (1987); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419, 420 (1987).

67. GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 132–33 (2010).

68. See S. TREATY DOC. NO. 100-2, *supra* note 63, at III-V. President Reagan noted that the scope applicability provision unjustifiably restricted its application to non-international armed conflicts involving opposition forces capable of controlling a portion of national territory. The President also noted that no such condition precedent applied to the applicability of Common Article 3; therefore, consistent with the expansive humanitarian purpose of that original non-international armed conflict regulatory provision, the U.S. would apply AP II to any armed conflict falling within the scope of Common Article 3.

69. *Id.*



armed conflicts.<sup>70</sup> AP I also substantially diluted the Geneva III requirements for POW qualification by allowing insurgents to claim this lawful combatant status so long as they showed their weapons immediately prior to attack<sup>71</sup> (as opposed to the traditional requirement to carry arms openly and wear a fixed distinctive symbol recognizable at a distance).<sup>72</sup> The Joint Chiefs concluded that the combined effect of these provisions incentivized terrorism and diluted key LOAC principles. In contrast, there were no significant concerns raised in relation to AP II.<sup>73</sup>

President Reagan transmitted AP II to the Senate for advice and consent in 1987.<sup>74</sup> The wisdom of President Reagan's decision to reject AP I remains controversial.<sup>75</sup> Most U.S. allies, including almost all NATO allies, reached the opposite conclusion and ratified the treaty.<sup>76</sup> Many of these states shared the same concerns

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70. *Id.*

71. Matheson, *supra* note 66, at 425.

72. Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS, 93, 102-03 (2004).

73. Matheson, *supra* note 66, at 429; S. TREATY DOC. NO. 100-2, *supra* note 63, at IV.

74. S. TREATY DOC. NO. 100-2, *supra* note 63, at III-V. In his transmittal letter, he indicated that the United States considered AP II a positive development in the law. However, in the same transmittal letter, President Reagan informed the Senate that he had decided not to transmit AP I for advice and consent. He explained that his decision resulted from his concurrence with the Joint Chiefs that AP I was "flawed." Specifically, he noted:

I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. . . . These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . . .

S. TREATY DOC. NO. 100-2, *supra* note 63. The Senate, therefore, never had the opportunity to consider whether this conclusion justified the decision to reject this new and inevitably important treaty.

75. George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 20 (1991); see generally Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307 (2007).

76. ICRC *Databases on Int'l Humanitarian Law*, INT'L COMM. OF THE RED CROSS, (last updated May 11, 2012), available at <http://www.icrc.org/eng/resources/ihl-databases/index.jsp> [<http://perma.cc/JL6J-SW9E>].

with specific provisions, but instead of outright rejection addressed these concerns through reservations and understandings,<sup>77</sup> an option that the Senate never had the opportunity to recommend. Today, the U.S. is one of a handful of states not party to this treaty, which often complicates coalition operations because of disparate treaty obligations.<sup>78</sup>

Although President Reagan transmitted AP II to the Senate recommending its ratification, a recommendation repeated by both President Clinton and President Obama, the treaty remains in limbo.<sup>79</sup> The reasons for delay are difficult to assess, but it is clear that, as with any other treaty, even the most determined efforts of the Executive to bind the nation to an international obligation through a treaty are insufficient absent Senate support. The inverse is also obvious: No matter how much the Senate considers a treaty beneficial to the nation, Executive agreement is essential to both the making and ratification of the treaty.

C. *The Chemical Weapons Convention of 1993:  
Bargaining, Horse Trading, or Extortion?*

Reaching consensus between the two political branches on treaty commitments obviously involves political negotiation. Unfortunately, even the fact that a treaty advances an unquestionably important U.S. interest does not guarantee that the Senate will agree to the treaty's goals, terms, or appropriate implementing measures. The four-year battle over the ratification of the CWC—

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77. AP I, *supra* note 15.

78. "Interoperability" refers to the process of armed forces from a number of nations operating effectively within one overall combined command structure. This is a complex issue even without considerations of conflicting legal obligations. However, it is a common practice to integrate what are referred to as "national caveats" into the operational planning and execution process—legal and policy restrictions imposed upon forces by their own national authorities. When the U.S. is involved in such coalition operations—an involvement that will often take the form of coalition command—the impact of divergent positions on AP I can present challenges to mission allocation. See Geoffrey S. Corn, Multi-National Operations, Unity of Effort, and the Law of Armed Conflict 24–25 (Harvard University HPCR Working Paper Series, 2009), available at <http://www.ihl.org/ihl/Documents/multi%20national%20ops.pdf> [<http://perma.cc/TQ4Y-NPZA>].

79. See Col. Michael W. Meier, *A Treaty We Can Live with: The Overlooked Strategic Value of Protocol II*, in U.S. DEP'T OF ARMY, Pam. 27-50-412 (2007), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/09-2007.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/09-2007.pdf) [<http://perma.cc/GCJ3-7XVS>].

a ratification that was expected to be uncontroversial and largely uncontested—provides an especially useful illustration of the impact of inter-branch political friction in the ratification process.<sup>80</sup>

Negotiated by both the Reagan and Bush administrations and signed by Secretary of State Lawrence Eagleburger in January 1993 at the end of the Bush administration, the CWC enjoyed extensive bipartisan Congressional support. Negotiated under the leadership of the United States, the CWC was a direct response to the ongoing fear of the widespread use of chemical weapons should the Cold War turn hot. Although the 1929 Gas Protocol prohibited such use, almost all state parties reserved the right to engage in retaliatory use.<sup>81</sup> As a result, Warsaw Bloc and NATO

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80. John V. Parachini, *U.S. Senate Ratification of the CWC: Lessons for the CTBT*, 5.1 NONPROLIFERATION REV., Fall 1997, 62, 63 [hereinafter Parachini I].

81. The broad definition of “chemical weapon” in the CWC resulted from a long history of attempted treaty regulation of chemical warfare. Modern attempts to ban the use of chemical weapons began with the 1899 Hague Conventions, *supra* note 8, which banned the use of projectiles filled with poison gas, and continued after World War I, with international efforts to prohibit the use of chemical weapons. These efforts resulted in the 1925 Gas Protocol, *supra* note 26, which prohibited their use in war, but not the development, production, or possession of chemical weapons. Many nations signed the Protocol with reservations permitting use against non-signatory nations or in retaliation for first use by other nations. While the U.S. signed the 1925 Gas Protocol, it was not ratified until 1975. See Bureau of International Security and Nonproliferation, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)*, U.S. DEP’T OF STATE, available at <http://www.state.gov/t/isn/4784.htm> [<http://perma.cc/T5QU-YPGU>]. While these weapons were not widely used in World War II, the Cold War prompted many nations to prepare for large scale chemical warfare. Only in the 1980s were efforts to eliminate chemical weapons renewed. In the 1997 CWC, it was recognized that prohibitions on use alone were insufficient to remove these weapons from the battlefield. The Convention therefore banned the development, production, stockpiling and use of chemical weapons, contained an elaborate verification regime covering both military and civilian facilities, and established export controls and reporting requirements for precursor chemicals. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Sept. 3, 1992, 1974 U.N.T.S. 45 [hereinafter CWC]. The extensive verification regime was a new development in arms control treaties and was designed to impede evasions of the CWC at local levels in every nation as chemicals were widely available and could be turned to wartime use with little effort. See Organization for the Prohibition of Chemical Weapons, *Basic Facts on Chemical Disarmament*, available at <http://www.opcw.org/news-publications/publications/history-of-the-chemical-weapons-convention> [<http://perma.cc/H7YF-UT2K>]. Congress was very concerned with the inspection regime’s potential conflict with Fourth Amendment protections, understanding that the ability to inspect civilian facilities and demand challenge inspections for facilities suspected of chemical weapon production had serious ramifications under the Constitution. The CWC Implementation Act was designed to ensure harmony between the Constitution

armed forces possessed massive stockpiles of chemical weapons and trained extensively for such a contingency.

The CWC prohibited not only the use, but also the production and stockpiling of such weapons. The treaty also included an obligation to eliminate existing chemical weapons and established a robust international inspection and verification regime. These aspects of the treaty benefited from widespread support by past and present military leaders, American allies and trading partners, and the U.S. chemical industry.<sup>82</sup> Additionally, the CWC was expected to have little concrete effect on U.S. policy. It merely committed other nations to the same path that the U.S. had adopted unilaterally in 1984 when Congress decided to destroy the U.S. chemical weapons stockpile.<sup>83</sup>

Distracted by domestic economic concerns and international crises, President Clinton not only delayed submitting the CWC to the Senate until November 1993,<sup>84</sup> he also devoted very little political capital to the ratification effort. Struggles within the Republican Party after the end of the Cold War also affected ratification. Tensions between the internationalists “who believe[d] that American leadership in world affairs is vital to the country and entails costs that are worth paying”<sup>85</sup> and the more conservative “unilateralist and isolationist”<sup>86</sup> wing of the party began to play out in the battle over ratification.

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and the treaty and reflects Congress’s balancing of the conflicting interests involved, ultimately weighted against the critical national policy goal of eliminating chemical weapons. See generally Jonathan B. Tucker, *U.S. Ratification of the Chemical Weapons Convention* 15–17 (Center for the Study of Weapons of Mass Destruction, Nat’l Def. Univ., Case Study Series 4, 2011) [hereinafter CWC Case Study], available at <http://www.ndu.edu/press/lib/pdf/CSWMD-CaseStudy/CSWMDCaseStudy-4.pdf> [<http://perma.cc/U368-QLP9>]. Thus, one potential outcome of Bond’s clear statement rule is that its absence may interfere with not only Federal criminal prosecution, but also with the verification regime itself.

82. Amy E. Smithson, *Bungling a No-Brainer: How Washington Barely Ratified the Chemical Weapons Convention*, in Michael Krepon, Amy E. Smithson, & John Parachini, *The Battle to Obtain U.S. Ratification of the Chemical Weapons Convention* 7 (Henry L. Stimson Center, Occasional Paper No. 35, July 1997), [hereinafter Parachini II], <http://www.stimson.org/images/uploads/research-pdfs/op35.pdf> [<http://perma.cc/S5FZ-8EXF>].

83. CWC Case Study, *supra* note 81, at 3.

84. *Id.*

85. Parachini I, *supra* note 80, at 64.

86. *Id.*

This tension echoed that experienced by the U.S. at the end of World War II and highlighted diametrically opposed views of the proper role of the U.S. on the world stage.<sup>87</sup> For the internationalists, the “failure to assume the appropriate leadership role [would] leave the management of world affairs to other states less able or inclined to uphold the political values and economic rights the United States deems important.”<sup>88</sup> In contrast to this view, the unilateralists believed that “the United States should shun international obligations comparable to those assumed by other states when they may restrict U.S. freedom of action. Protection of American interests is best achieved without the encumbrances of working with other states in international bodies.”<sup>89</sup> Senator Jesse Helms, a strong

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87. In 1955, the U.S. had decided by ratifying the 1949 Geneva Conventions that the imperative of U.S. leadership necessitated binding international legal obligations that supported U.S. values. See Barsalou, *supra* note 36, at 48–49; see also Robert Kagan, *Superpowers Don't Get to Retire: What our tired country still owes the world*, NEW REPUBLIC, May 26, 2014, available at <http://www.newrepublic.com/article/117859/allure-normalcy-what-america-still-owes-world> [<http://perma.cc/5EVH-3UCY>] (describing historical disagreements in American foreign policy between “isolationism” and “internationalism” going back to the 1920s and continuing to present).

88. Parachini I, *supra* note 80, at 64.

89. *Id.*; see also CWC Case Study, *supra* note 81, at 7 (“Although the CWC had now been released for a vote on the Senate floor, the political battle over the resolution of ratification had split the Republican Party into two camps, pragmatic ‘Bush Republicans’ versus more ideological ‘Reagan Republicans.’ Tough-minded internationalists within the party, such as Senators Lugar, John McCain (R–AZ), and Charles Hagel (R–NE), agreed with former President Bush that U.S. leadership in world affairs required the willingness to participate in international treaties and to work with other countries in multilateral bodies such as the UN. In contrast, a more conservative group of Republicans, including Senators Helms, Strom Thurmond (R–SC), and Jon Kyl (R–AZ), believed that U.S. interests were best pursued unilaterally, without the burdens and restraints of multilateralism.”); Amy E. Smithson, *Bungling a No-Brainer: How Washington Barely Ratified the Chemical Weapons Convention*, in Michael Krepon, Amy E. Smithson, John Parachini, *The Battle to Obtain U.S. Ratification of the Chemical Weapons Convention* 8 (Henry L. Stimson Center, Occasional Paper No. 35, 1997) (“[T]he CWC fostered something of an ‘identity crisis’ within the Republican party. Although Ronald Reagan and George Bush were the CWC’s principal architects, one wing of the Republican Party repudiated the treaty. Therefore, the CWC was tinder for a confrontation to define the party’s post-Cold War approach to defense and foreign policy, pitting hawkish isolationists against internationalists. One school of Republican thought held that the CWC created a misleading sense of security and that stronger defenses, not easily violated multi-lateral arms control accords, would safeguard America. Pro-engagement Republicans believed that [U.S.] security interests would be best served by activating the CWC, even with its imperfections. According to this second Republican viewpoint, vigilant implementation of the CWC would reduce chemical weapons

proponent of the isolationist wing of the party, opposed the ratification of the CWC.

Unfortunately for the Clinton administration, its year-long delay in seeking the advice and consent of the Senate meant that by the summer of 1994, the Senate Foreign Relations Committee awaited input from both the Senate Intelligence Committee on the treaty's verification procedures and from the Armed Services Committee on the effect of the CWC on military operations. As a result, the Senate took no action on ratification prior to the 1994 midterm elections, which shifted control of both the Senate and the House to the Republicans and resulted in Senator Jesse Helms becoming the Chair of the Senate Foreign Relations Committee.<sup>90</sup> As the new Chair, Senator Helms leveraged his authority to control consideration of the treaty to obtain concessions from the Clinton administration on other foreign policy questions, particularly on his proposed legislation to consolidate three independent agencies into the State Department.<sup>91</sup>

As part of a brokered agreement to break this logjam, Senate Democrats agreed to work with Senator Helms on restructuring the foreign affairs agencies and Senator Helms agreed to report the CWC out of the committee by April 30, 1996, with Majority Leader Robert Dole scheduling a Senate vote on the treaty within a reasonable time. Despite this procedural agreement, Senator Helms opposed the CWC's substance, believing it was "unverifiable, unenforceable, and would lull the Nation into a false sense of security."<sup>92</sup> Senator Helms was personally opposed to the treaty. Although he committed to reporting the CWC out of Committee, his proposed resolution of ratification contained over twenty conditions, most of which were seen as "poison pills" designed to block U.S. ratification or delay it indefinitely.<sup>93</sup> Organizing in response, a bi-partisan group of Senators on the committee defeated Senator Helms's proposed

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arsenals, retard the proliferation of these weapons, and reinforce international standards of civilized behavior.").

90. CWC Case Study, *supra* note 81, at 5–6.

91. *Id.*

92. *Id.* at 6.

93. *Id.* at 7.

resolution and voted to report out of committee an alternative version lacking the poison pill provisions.<sup>94</sup>

A vote was contentiously scheduled for September 14, 1996.<sup>95</sup> Unfortunately, the hardening of positions within the Republican Party made passage of the CWC on the Senate floor a risky proposition—one that became more risky as 1996 wore on. In the months prior to the vote, opponents of the treaty mobilized commentators and columnists in an attempt to influence undecided Senators.<sup>96</sup> Additionally, as the 1996 Presidential election neared, consideration of the CWC in Congress became increasingly politicized. In the face of almost certain defeat, the Clinton administration requested that the CWC be withdrawn from Senate consideration. Senator Lott agreed, and the CWC was re-referred to the Senate Foreign Relations Committee.<sup>97</sup>

On October 31, 1996, immediately prior to the 1996 Presidential election, Hungary became the 65th country to ratify the Convention, triggering a 180-day countdown to its entry into force.<sup>98</sup> Thus, April 29, 1997 became the deadline for ratification if the U.S. wished to become an original party to the Convention. Failure to do so could have significant consequences for the U.S., including forfeiting a seat on the Executive Council overseeing execution of the treaty and drafting its rules, barring U.S. citizens from serving either on the Technical Secretariat (the primary verification body) and the international inspectorate, and the imposition of mandatory economic sanctions

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94. Critics of the treaty focused on the inability of the verification regime to detect violations to a reasonable degree of certainty, the lack of effect of the CWC on pariah nations and terrorist actors, and the burdens and intrusions on the U.S. chemical industry. Proponents of the treaty responded that the CWC would significantly reduce the threat of chemical weapons and increase national security by requiring other nations to reduce their chemical stockpiles, an action already undertaken by the U.S. a decade prior. They saw the no-notice inspection provisions as significantly enhancing the likelihood that violators would be detected, and contended that non-parties would be isolated and punished by the import-export provisions of the CWC. *Id.* at 6–10.

95. *Id.* at 8.

96. *See id.*

97. *Id.* at 8–9.

98. *Id.* at 9.

and embargos costing U.S. chemical companies over \$600 million in business losses.<sup>99</sup>

Having staked its credibility on approval of the CWC and believing that failure to ratify the treaty “would signal an American retreat from the world and undermine U.S. leadership in combating weapons proliferation, terrorism, and other transnational problems,”<sup>100</sup> the Clinton Administration began a major push for advice and consent. This campaign required a sustained effort by Senator Biden and other administration officials to address Senator Helms’s concerns by crafting an acceptable resolution of ratification.<sup>101</sup> Paralleling these negotiations, the Clinton Administration also engaged in substantial negotiations with the Senate leadership, in particular Senator Trent Lott, in an attempt to move the CWC out of committee and on to the Senate floor for a vote.<sup>102</sup>

In addition to the ongoing horse-trading in the Senate, the Administration began a public relations push to influence undecided Senators to vote to ratify the treaty. Secretary of State Madeleine Albright led the effort, forging a personal relationship with Senator Helms to assist in the negotiations.<sup>103</sup> Although faced with an equally vociferous public relations blitz opposing the treaty, Secretary Albright’s testimony before the Senate Foreign Relations Committee articulated the importance attached to the treaty’s ratification, and its view of the leadership role of the United States:

I believe [ratification] very much in the best interest of the United States. . . . America is the world’s leader in building a future

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99. *Id.* at 14; see also *Chemical Weapons Convention: Hearing Before the S. Foreign Relations Comm.*, 105th Cong. 61–64 (1997) (statement of Secretary of State Madeleine K. Albright) [hereinafter *CWC Hearings*], available at [http://www.fas.org/cw/cwc\\_archive/1997\\_SenateFRChearing105-183\\_1.html](http://www.fas.org/cw/cwc_archive/1997_SenateFRChearing105-183_1.html) [<http://perma.cc/X3A8-5VCU>] (“Moreover, if we fail to ratify the agreement by the end of April, we would forfeit our seat on the treaty’s Executive Council for at least 1 year, thereby losing the right to help draft the rules by which the Convention will be enforced; we would lose the right to help administer and conduct inspections; and because of the trade restrictions imposed on nonmember states, our chemical manufacturers are concerned that they would risk serious economic loss.”).

100. CWC Case Study, *supra* note 81, at 9.

101. *Id.* at 13–14.

102. *Id.* at 10–12.

103. Parachini II, *supra* note 82, at 18–19.



of greater security and safety for us and for all who share our commitment to democracy and peace. The path to that future is through the maintenance of American readiness and the expansion of the rule of law. We are the center around which international consensus forms. We are the builder of coalitions, the designer of safeguards, the leader in separating acceptable international behavior from that which cannot be tolerated. . . . This leadership role for America may be viewed as a burden by some, but I think, to most of our citizens, it is a source of great pride. It is also a source of continuing strength, for our influence is essential to protect our interests, which are global and increasing. If we turn our backs on the CWC after so much effort by leaders from both parties, we will scar America with a grievous and self-inflicted wound. We will shed the cloak of leadership and leave it on the ground for others to pick it up. . . . By ratifying the CWC, we will assume the lead in shaping a new and effective legal regime. We will be in a position to challenge those who refuse to give up those poisonous weapons. We will provide an added measure of security for the men and women of our armed forces. We will protect American industry and American jobs. We will make our citizens safer than they would be in a world where chemical arms remain legal. This treaty is about other people's weapons, not our own. It reflects existing American practices and advances enduring American interests. It is right and smart for America.<sup>104</sup>

In early 1997, the White House and Senator Helms continued to work out understandings and conditions to be included within the resolution of ratification.<sup>105</sup> Of particular concern were wheth-

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104. *CWC Hearings*, *supra* note 99, at 63–64.

105. Opponents of the treaty, including Majority Leader Trent Lott, were also concerned about whether articles X and XI of the CWC required the U.S. to “share chemical defense equipment and dual-use chemicals and production technology with ‘rogue states,’ such as Cuba and Iran.” *CWC Case Study*, *supra* note 81, at 21. In response, President Clinton not only assured Senator Lott that existing export controls were compatible with the CWC, but also sent a letter stating that “if, despite these precautions, certain CWC member states managed to exploit Articles X and XI to acquire chemical weapons or to defeat U.S. chemical defenses, the President would ‘regard such actions as extraordinary events that have jeopardized the supreme interests of the United States and therefore, in consultation with the Congress, be prepared to withdraw from the treaty.’” *Id.* This was portrayed as an “‘ironclad commitment’ to withdraw from the treaty if it harmed U.S. security,” *id.*, and conditions (numbers 7 and 13) were included to address these concerns. For a full list of the conditions, see *Summary of the Senate Resolution of Ratification*, ARMS CONTROL ASS'N, (Apr. 1, 1997), [http://www.armscontrol.org/act/1997\\_04/cwcanal](http://www.armscontrol.org/act/1997_04/cwcanal) [<http://perma.cc/DU99-32C7>].

er search warrants would be required for challenge inspections of U.S. chemical plants (what would become condition 28), concern over possible trade-secret compromises (condition 18), and, finally, military use of riot control agents (RCA) (condition 26).<sup>106</sup>

The CWC prohibited the use of RCAs as a “‘method of warfare’ because it was hard to distinguish between nonlethal and lethal chemicals on the battlefield, creating the risk of inadvertent escalation.”<sup>107</sup> The CWC allowed RCA use for normal peacekeeping, humanitarian and disaster relief operations, and counter-terrorism and hostage-rescue situations outside a war zone.<sup>108</sup> Existing U.S. policy allowed the use of RCAs, such as tear gas, in accordance with a 1975 Executive Order, “in ‘defensive military modes to save lives.’”<sup>109</sup> In early ratification discussions in 1994, the Joint Chiefs of Staff had reluctantly acceded to the Clinton Administration’s more “narrow legal interpretation of the CWC as banning any use of tear gas in situations where enemy combatants were present.”<sup>110</sup> By 1997, in the face of Senator McCain’s threat to vote against the treaty unless the option to use tear gas to rescue downed American pilots was retained (even if it violated the text of the treaty), the administration’s representative agreed that the 1975 Executive Order would remain in effect, allowing RCA use “in defensive military modes to save lives.”<sup>111</sup> Presented to the State Department as a *fait accompli* required to obtain Senate ratification of

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106. CWC Case Study, *supra* note 81, at 14–16. The Senate drafted conditions requiring that administrative search warrants would be required for challenge inspections should the owner of the facility not consent to the inspection. It also drafted a condition prohibiting the removal of samples to international laboratories, raising a concern that if other nations followed the U.S. lead on this issue, the verification regime would be substantially weakened. *Id.*

107. *Id.* at 4.

108. *Id.*

109. *Id.*

110. *Id.* (“On June 23, 1994, the White House issued a statement from President Clinton to the Senate stating: ‘according to the current international understanding, the CWC’s prohibition on the use of RCAs as a “method of warfare” also precludes the use of RCAs even for humanitarian purposes in situations where combatants and non-combatants are intermingled, such as the rescue of downed air crews, passengers, and escaping prisoners, and situations where civilians are being used to mask or screen attacks.’ In these situations, the administration argued, nonlethal weapons other than chemical agents could be employed that were fully consistent with the CWC.”).

111. *Id.* at 16.

the treaty, this condition (number 26) generated concern that a future President would be able to use RCAs in a manner prohibited by the CWC, undermining its object and purpose.<sup>112</sup>

As the deadline approached, Senator Biden suggested to the White House that some support of Senator Helms's bill to reorganize the foreign affairs agencies might be an acceptable step to move the CWC out of committee.<sup>113</sup> The Administration's actions consolidating foreign affairs agencies contributed toward an agreement to report the treaty out of committee and to schedule a Senate vote on April 24, five days before the CWC's entry into force.<sup>114</sup> This move ultimately led to successful agreement on twenty-eight of the conditions for ratification, leaving five conditions still in dispute. Unfortunately, these five were largely considered as barriers to ratification.<sup>115</sup> The proposed resolution of ratification contained thirty-three conditions, twenty-eight of which would by agreement not be subject to changes. The other

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112. *Id.* Recall the CWC prohibited state reservations in hopes that the Convention would accomplish the goal of eliminating chemical weapons. Allowing reservations had resulted in the failure of the 1925 Gas Protocol to accomplish that goal. For the CWC, the White House also agreed to conditions prohibiting international inspectors from removing samples from U.S. industrial sites to overseas laboratories, heightening the risk that other parties to the Convention would impose similar restrictions and thereby weaken the international verification regime.

113. *Id.* at 13, 16–19.

114. *Id.* at 18.

115. CWC Case Study, *supra* note 81, at 16–17 (These killer conditions were: “1. A condition preventing the United States from becoming a party to the CWC until China, Iraq, Iran, Libya, North Korea, Syria, and all countries designated by the State Department as state sponsors of international terrorism had ratified the treaty. (This condition would prevent Washington from joining the treaty for an indefinite period of time.) 2. A condition preventing U.S. ratification of the CWC from taking effect until Russia ratified. (This condition would prevent the United States from becoming an original party to the treaty.) 3. A condition requiring the United States to renegotiate Articles X and XI of the CWC to prevent their misuse by proliferators. (Because the multilateral negotiations had been concluded and the treaty opened for signature, it was impossible to renegotiate the two articles, so this condition would effectively preclude U.S. participation.) 4. A condition barring U.S. ratification of the CWC until the President certified the ability of the intelligence community to detect, with a high degree of confidence, any ‘militarily significant’ violation, defined as involving as little as 1 ton of chemical agent. (The Director of Central Intelligence made clear that this standard of verification was unrealistic and that the United States would never be able to meet it.) 5. A condition unilaterally authorizing the United States to reject all international inspectors from countries designated as state sponsors of terrorism. (This condition was unnecessary because the CWC allows member states to reject individual inspectors on a case-by-case basis.)”).

five conditions remained subject to amendment by majority vote.<sup>116</sup> The White House continued to publicly push for ratification, inviting former Senator Dole as a surprise speaker at the White House in support of its approval on the day prior to the scheduled vote. After eighteen hours of floor debate, the five separate motions to remove each of the five killer amendments passed—leaving the agreed upon resolution of ratification with twenty-eight conditions to be voted upon by the Senate.<sup>117</sup> In a dramatic floor vote, the Senate voted seventy-four to twenty-six to ratify the Convention with the twenty-eight consensus conditions. It then took Congress another year to pass legislation implementing this Convention.<sup>118</sup>

The international negotiation of the CWC was seen as a major success of American foreign policy, creating a multi-lateral international regime to eliminate a heinous weapon of war through the first LOAC treaty to address an inhumane weapon

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116. *Id.* at 18.

117. *Id.* The CWC prohibited reservations by State Parties. As a result, the Senate's approved resolution of advice and consent to ratification contained 28 "conditions" for Senate approval of the Treaty. The resolution of ratification required several Presidential certifications prior to deposit of the instrument of ratification with the UN Secretary General. For a summary of these conditions, see ARMS CONTROL ASS'N, *supra* note 105.

118. *Id.* at 21. During its consideration of the CWC, the Senate also considered the CWC Implementation Act, currently before Congress to implement the CWC, if ratified. The Deputy Assistant Attorney General testified that both the CWC and the CWC Implementation Act:

were painstakingly drafted to put in place an effective, verifiable ban on the development, acquisition, and use of chemical weapons, but none of their provisions in any way contemplates or permits conduct in contravention of the Fourth Amendment. Indeed, the inspection provisions were drafted to be fully consonant with the dictates of search and seizure law.

*See Constitutional Implications of the Chemical Weapons Convention: Hearings Before Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee, 104th Cong. 80 (1996)* [hereinafter *Senate CWC Constitutional Implications Hearing*] (statement of Richard I. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice). Some contentious issues resurfaced during the final consideration of the CWC after ratification of the CWC itself. This led to another round of negotiations between the President and Republican members of both houses of Congress, resulting in the insertion of a provision in the CWC Implementation Act, "authorizing a future President to block, on grounds of national security, an involuntary 'challenge' inspection of any facility on U.S. territory, declared or undeclared, that another member state believed was engaged in prohibited activities." This provision was seen as undermining another key element in the treaty's verification regime. CWC Case Study, *supra* note 81, at 23.

by prohibiting not only its use, but also its production and stockpiling.<sup>119</sup> However, in the four years after the U.S. signed the treaty, the bipartisan view of the wisdom of binding multilateral international legal obligations fell victim to the realities of politics and interbranch frictions, thus its ratification became dependent on significant compromises to its object and purpose. The Senate's ratification of the CWC with twenty-eight conditions—most significantly, the assertion of authority to continue RCA use—compromised worldwide perception of U.S. commitment to the treaty. Perhaps more importantly, it raised significant questions as to the present and future willingness of the U.S. to commit to other weapon prohibition treaties.

### III. SELF-EXECUTION: *HAMDAN* AND *NORIEGA SQUARED*

Domestic implementation of the 1949 Geneva Conventions provides useful insight into the doctrine of self-execution.<sup>120</sup> Like all treaties ratified by the United States, these four treaties are, pursuant to Article VI, Section 2 of the Constitution, the "supreme law of the land." But, like all other treaties, the domestic force and effect of these treaties turns on application of the self-execution doctrine. Adopted as a method of judicial treaty interpretation early in our history, this doctrine draws a distinction between treaties that by their terms create discernible standards for judicial enforcement (those that operate of themselves) and treaties that commit the nation to perform some future legislative act.<sup>121</sup> Key to this determination is whether any given treaty

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119. CWC, *supra* note 81.

120. The legislative history of the ratification of the Geneva Conventions show that the Senate carefully considered what further legislation, if any, was deemed "required to give effect to the provisions contained in the four conventions," and found that "very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 30. See also *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 164 (D.D.C. 2004) ("[I]t is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed 'required to give effect to the provisions contained in the four conventions,' S. REP. NO. 84-9, at 30 (1955), and found that only four provisions required implementing legislation.").

121. See HENKIN, *supra* note 35, at 199, (discussing *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829)); see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J. INT'L L. 695, 700-01 (1995).

provision can be enforced without additional legislative action. Courts have characterized this distinction as “one of the most confounding in treaty law.”<sup>122</sup>

As this doctrine developed, courts looked beyond the text of the treaty to the treaty’s object and purpose as well as the intent of the parties to determine whether the treaty had immediate domestic effect. As a result, the Senate’s advice and consent often significantly impacts subsequent interpretation of the domestic effect of a treaty.<sup>123</sup> Further complicating this already complex assessment is the common conflation of two distinct questions: first, whether the treaty operates domestically without further Congressional enactment; and second, whether the treaty confers a private right of action on an individual to enforce provisions of the treaty.<sup>124</sup>

A small number of judicial opinions have grappled with the self-execution question as it relates to the 1949 Geneva Conventions. In these cases, individuals sought to challenge presidential directives by invoking the protection provisions of these treaties. Like other cases that may arise under the Conventions, such challenges required our courts to resolve the twin issues of whether particular articles of the 1949 Geneva Conventions are directly enforceable, and even if not, whether Congress has effectively implemented them through statutes enacted to address wartime exercises of national power. Two cases, *Hamdan v. Rumsfeld* and *United States v. Noriega*, highlight the complexi-

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122. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979).

123. See *Al-Bihani v. Obama*, 619 F.3d 1, 13 (D.C. Cir. 2010) (Judge Kavanaugh, in his statement to the denial of a rehearing en banc) (citing *Medellín v. Texas*, 552 U.S. 491, 504–06 (2008); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). According to the court in *Al-Bihani*:

[s]tatutes and self-executing treaties are domestic U.S. law and thus enforceable in U.S. courts. By contrast, non-self-executing treaties and customary international law are not domestic U.S. law. Only when international-law principles are incorporated into a statute or a self-executing treaty do they become domestic U.S. law enforceable in U.S. courts.

619 F.3d at 13.

124. See *Renkel v. United States*, 456 F.3d 640, 643 n.3 (6th Cir. 2006) (citing *Medellín v. Dretke*, 544 U.S. 660 (2005)) (O’Connor, J., dissenting) (“Although related, ‘the questions of whether a treaty is self-executing and whether it creates private rights and remedies are analytically distinct.’ While a treaty must be self-executing for it to create a private right of action enforceable in court without implementing domestic legislation, all self-executing treaties do not necessarily provide for the availability of such private actions.”); see also *Hamdan*, 344 F. Supp. 2d. at 164–65.

ty of self-execution.<sup>125</sup> Furthermore, *Noriega* also exposed the significance of Congress's prohibiting individuals from invoking these treaty protections as a source of domestic right.<sup>126</sup>

In *Hamdan v. Rumsfeld*, Common Article 3 of the Conventions provided a treaty based authority for the Supreme Court to rule that Hamdan's trial by military commission was unlawful. However, the Court did not resolve the question of whether the Geneva Conventions *writ large* were self-executing. Instead, the Court concluded that because Congress had incorporated the law of war into the Uniform Code of Military Justice provision authorizing trial by military commission, the President was obligated to comply with this provision of the treaty, thus sidestepping the self-execution question. According to the Court, the Geneva Conventions were:

an independent source of law binding the Government's actions and furnishing [Hamdan] with any enforceable right, [because] regardless of the nature of the rights conferred on Hamdan, they are . . . part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.<sup>127</sup>

This interpretation of the relationship between the UCMJ and the Geneva Conventions avoided the need to either directly tackle the lower appellate court's conclusion that the Conventions were not self-executing or affirm the district court's conclusion that they were. And, by applying Common Article 3 through the conduit of a federal statute (the UCMJ), the Court built its opinion on a solid constitutional foundation, as Article 21 of the UCMJ is an exercise of Congress's vested Article I authority.<sup>128</sup>

Nonetheless, no matter how the legal obligations of the Geneva Conventions became applicable in *Hamdan*, the Supreme Court interpreted Common Article 3 with sufficient breadth to achieve the Conventions' humanitarian object and purpose. This provided the basis for the Court to conclude that invoking the authority derived from the law of war through Article 21

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125. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992).

126. *Noriega*, 808 F. Supp. 791.

127. *Hamdan*, 548 U.S. at 627–28 (internal citations omitted).

128. *Id.* at 594–613.

triggered an obligation to comply with Common Article 3's minimum humanitarian protections. Consequently, once Common Article 3 of the Geneva Conventions was "incorporated" through Article 21, the Convention furnished the basis for a determination that the procedures adopted for Hamdan's military commission trial violated the requirements of that article.<sup>129</sup> Self-execution aside, *Hamdan* was therefore entitled to the protection of Common Article 3.

The prosecution, conviction, and decades later, extradition of General Manuel Noriega, whose antagonism of the United States culminated in the invasion of Panama in 1989, also involved self-execution of the Geneva Conventions. The case also involved a statute enacted long after his capture which restricted invocation of Convention protections.

The 1992 district court opinion granting Noriega POW status was premised on the conclusion that the Third Geneva Convention was both self-executing and a source of enforceable individual rights.<sup>130</sup> The court asserted that only through judicial action could Noriega be assured the protections provided to POWs by Geneva III.<sup>131</sup> The court emphasized that allowing Noriega to invoke the protections of the Convention in a U.S. court was necessary to fulfill the object and purpose of the treaty, once the court determined he did in fact qualify as a POW. Accordingly, recourse to the courts of the Detaining Power was an "appropriate measure" where available:<sup>132</sup>

In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions

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129. *Id.* at 628.

130. *Noriega*, 808 F. Supp. at 794.

131. *Id.* at 796–97.

132. *Id.* at 797.



have been drawn up first and foremost to protect individuals, and not to serve State interests.<sup>133</sup>

Unfortunately for Noriega, none of the enforceable rights in the Third Convention prevented his prosecution, conviction, or incarceration for pre-conflict crimes against the United States (although he did receive certain Convention-based conditions of confinement during his federal incarceration).<sup>134</sup> Seventeen years later, upon completing his sentence, Noriega would, however, seek a different benefit from the treaty: a bar to his extradition to France.

In 2007, France sought Noriega's extradition in order to try him for money laundering offenses that arose from his years of using France as a location to preserve his ill-gotten gains while he was head of the Panamanian Defense Forces. Noriega invoked the Third Convention to block his extradition, asserting that because France would not treat him as a POW, the U.S., as Detaining Power, was barred from transferring him. This effort failed when the Eleventh Circuit concluded that section 5 of the 2006 Military Commissions Act barred Noriega from invoking the Geneva Conventions as an individually enforceable right in U.S. courts.<sup>135</sup> This section of the MCA provides that:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or . . . 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.<sup>136</sup>

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133. *Id.* at 799 (citing 3 International Committee of the Red Cross, *Commentary on the Geneva Conventions*, (J. Pictet ed., 1960)).

134. *United States v. Noriega*, 746 F. Supp. 1506, 1525–26 (S.D. Fla. 1990) (because members of the U.S. armed forces could have been tried in federal court for the same offenses alleged against General Noriega, his immunity as a POW did not shield him from criminal jurisdiction.) Under Article 84:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

*Id.* at 1525.

135. *See Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009).

136. Military Commissions Act, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (2006) [hereinafter 2006 MCA].

The issue of self-execution was once again easily sidestepped, as the circuit court held that even if the Conventions were self-executing, Congress could eliminate the domestic applicability of such a self-executing treaty by enacting a subsequent statute contradicting the terms of the self-executing treaty.<sup>137</sup>

As discussed below, while the United States' international obligations under the Geneva Conventions are not altered by the enactment of § 5 of the MCA, Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this."<sup>138</sup>

Noriega sought Supreme Court review of this decision, creating the possibility that his case might have significance beyond the mere final disposition of a long-forgotten U.S. enemy. This hope was short lived, as the Supreme Court denied his petition for certiorari.<sup>139</sup> Justices Thomas and Scalia, however, dissented from the denial. In their view, the case offered an ideal opportunity to consider whether Congress is authorized to prohibit the courts from considering the provisions of a ratified treaty as it relates to an individual litigant seeking a remedy under that provision. For them, resolution of this issue "would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since we decided *Boumediene*;" namely, whether the Geneva Conventions are self-executing and judicially enforceable and "the extent, if any, to which provisions like Section 5 affect 28 U.S.C. § 2241 [the federal habeas statute] in a manner that implicates the constitutional guarantee of habeas corpus."<sup>140</sup> They lamented the lost opportunity to "say what the law is" in a case unencumbered by classified information or issues relating to extraterritorial detention or the ongoing hostilities against al Qaeda.<sup>141</sup>

Nonetheless, as the result of section 5 of the MCA, the issue of self-execution of the Geneva Conventions will not likely be tack-

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137. See *Noriega*, 564 F.3d at 1295–96 (The court found it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty.).

138. *Noriega*, 564 F.3d at 1296.

139. *Noriega v. Pastrana*, 559 U.S. 917 (2010) (Thomas, J., dissenting from denial of certiorari).

140. *Id.* at 918.

141. *Id.*

led by U.S. courts, as future litigants are likely to run into the same obstacle that prevented Noriega from invoking the treaty to bar his extradition. Section 948b(e) of the 2009 MCA, however, appears to have significantly narrowed this bar, applying it only to alien unprivileged enemy belligerents subject to trial by military commission.<sup>142</sup> Perhaps most importantly, these cases demonstrate the powerful influence Congress may assert on the enforceability of what facially appear, absent such action, self-executing treaty provisions.

This should not, however, be seen as suggesting that these treaties are in some way insignificant. To the contrary, they remain central to the formulation of U.S. national security policies and to the protection of individuals under U.S. control. Thus, while the statutory prohibition against individual invocation of the Geneva Conventions in U.S. courts has in large measure superseded questions of self-execution, how these protections, as well as other principles and rules of both treaty and customary law of war impact U.S. action remain complex and important issues. Finally, even where treaty provisions are considered to apply to U.S. litigation as the result of statutory incorporation, the meaning, scope, and effect of these treaty rights continues to be a source of uncertainty and debate.<sup>143</sup>

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142. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 984(b)(3), 123 Stat. 2190, 2574 (2009) [hereinafter 2009 MCA] (“GENEVA CONVENTIONS NOT ESTABLISHING PRIVATE RIGHT OF ACTION.—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.”).

143. Illustrative of the intense difference of opinion over the appropriate impact of international law on domestic U.S. law, the denial of a rehearing en banc in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), provided the opportunity for several judges to extensively explain their views on the issue in the context of a habeas challenge arising after *Hamdan* and *Hamdi*. In that case, the law of war was again arguably relevant in interpreting the powers granted by Congress to the President in the 2001 Authorization for the Use of Military Force (AUMF). Although the majority of the Circuit’s judges felt that determination of the role of international law of war principles in interpreting the AUMF had not been relevant to its disposition on the merits and was therefore not appropriate for en banc consideration, several judges nevertheless expounded extensively on the inapplicability of international law norms to limit the President’s war powers absent incorporation of those standards into domestic law via statute, regulations, or self-executing treaties incorporating those limits. Rejecting the position that consulting international law sources as a method of statutory construction was valid, two judges, Judges Brown and Kavanaugh, would limit the sources relevant to determine the powers granted by the AUMF solely to the significant body of legislation passed by Con-

IV. INTERPRETATION: *YAMASHITA & HAMDAN*

Because LOAC treaties are multilateral commitments between large numbers of states,<sup>144</sup> treaty meaning will inevitably be susceptible to varying interpretations. As a result, conflicting interpretations of treaty obligations are almost as inevitable as war itself, with potentially profound consequences to U.S. national security. *In re Yamashita*<sup>145</sup> and *Hamdan v. Rumsfeld*<sup>146</sup> provide interesting insight into the impact of domestic treaty interpretation. Both of these cases turned on interpreting a treaty provision, and both illustrate how such interpretation may produce operational and strategic consequences extending far beyond the litigant's judicial remedy. These cases are unsur-

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gress to prohibit certain wartime actions by the Executive and military. *Al Bihani*, 619 F.3d at 24. Judge Williams, however, disagreed, reiterating his view that international law could properly serve as a source of information in interpreting Congressional statutes governing international matters. In his view, international law operated both prior to, and after the *Erie* decision as a "source of interpretive guidance regarding statutes passed by Congress." *Id.* at 54. Pointing out that the plurality in *Hamdi* had used international law in this manner, *id.* at 55, 111, Judge Williams concluded "if the international laws of war 'can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.'" *Id.* at 54–55 (quoting Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2094 (2005)). As Judge Williams summarized,

Courts use a wide range of information outside the words of a statute to find those words' meaning. This reflects the simple truth that the question of a word's meaning is an empirical one: what have persons in the relevant community actually meant when using the words that appear in a statute? Among the most obvious outside sources to resolve that question are legislative history, usage in other laws and in judicial decisions, and dictionaries . . . Because military conflict is commonly an international phenomenon, words relating to such conflict are used in international discourse, of which international law is a subset . . . . To dispute that commonsensical understanding, after all, requires defending the unlikely view that international law—unlike other known binding laws—offered no useful information whatsoever regarding the meaning of new laws on similar subjects.

*Id.* at 53–54.

144. ICRC *Databases on Int'l Humanitarian Law*, INT'L COMM. OF THE RED CROSS (last updated May 11, 2012), <http://www.icrc.org/eng/resources/ihl-databases/index.jsp>. [<http://perma.cc/9389-PRXB>]; see, e.g., Geneva III Commentary, art. 85 (demonstrating difference between French and American interpretations).

145. 327 U.S. 1 (1948).

146. 548 U.S. 557 (2006).

prisingly rare because the Executive, and more specifically subordinate military officers, play the dominant role in LOAC treaty interpretation. Although few in number, judicial LOAC interpretations provide important clarity for the military and have significantly affected the evolution of international law.<sup>147</sup>

The case of *In re Yamashita*<sup>148</sup> provides an interesting example of the relationship between Executive and judicial treaty interpretation. Yamashita, who qualified as a POW pursuant to the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (1929 Geneva III)<sup>149</sup> (a treaty ratified by the United States in 1932),<sup>150</sup> faced charges based on the widespread war crimes committed by his subordinates in the final days of the Japanese occupation of the Philippines. Although Yamashita took command only shortly before allied forces invaded the islands, and as a result had very little opportunity to assert his authority over his subordinates, the charges against him alleged that he was personally responsible for the widespread abuses of those forces.<sup>151</sup>

The Supreme Court reviewed Yamashita's trial and conviction by military commission pursuant to a writ of habeas corpus challenging a range of issues related to the trial. The Court's endorsement of a charge and conviction on a theory of vicarious command responsibility—even in the face of evidence that Yamashita lacked the capacity to communicate with or to control most of his subordinates—is the most widely known aspect of the decision. However, Yamashita also chal-

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147. Int'l Comm. of the Red Cross, *Commentary on the Geneva Convention III Relative to the Treatment of Prisoners of War* 85 (Jean S. Pictet ed., 1960) [hereinafter *Geneva III Commentary*], available at <http://www.icrc.org/ihl.nsf/COM/375-590104?OpenDocument> [<http://perma.cc/W9JT-FHN5>]; see Matthew C. Kirkham, *Hamdan v. Rumsfeld: A Check on Executive Authority in the War on Terror*, 15 *TUL. J. INT'L & COMP. L.* 707, 728–29 (2007); see also Samuel Estreicher & Diarmuid O'Scannlain, *Hamdan's Limits and the Military Commissions Act*, 23 *Const. Comment.* 403, 418–20 (2006); Sylvain Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91, no.873 *INT'L REV. OF THE RED CROSS*, 69, 70, 93 (2009).

148. *In re Yamashita*, 327 U.S. 1.

149. *Id.* at 20–21.

150. *Convention Relative to the Treatment of Prisoners of War Ratification Dates*, INT'L COMM. OF THE RED CROSS (last updated May 11, 2012), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=305&ps=P> [<http://perma.cc/GYE2-2LBH>].

151. *In re Yamashita*, 327 U.S. at 13–14.

lenged the legality of trial by military commission itself, arguing that use of a military commission, and not a General Court-Martial, violated the 1929 Geneva III.<sup>152</sup>

Like the 1949 successor version of Geneva III, the 1929 Prisoner of War Convention included provisions to ensure POWs subjected to criminal prosecution received a fair trial process. Instead of detailing with precision the procedural and evidentiary rules applicable to such trials, the treaty imposed upon the detaining power an obligation to use the same tribunal that would be used for its own personnel. Article 63 of the 1929 Convention provided that “[s]entences may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.”<sup>153</sup> The assumption seemed clear (although perhaps not completely valid): States will afford their own service members fundamentally fair military trials. Therefore, an obligation to use the same tribunals for POWs effectively ensures fair process for the enemy. Yamashita invoked this provision to challenge trial by military commission, arguing that because the Articles of War prohibited the use of prosecution depositions and hearsay in trials by courts-martial for U.S. military personnel, use of this evidence at his military commission trial violated Geneva III.<sup>154</sup>

The Supreme Court rejected Yamashita’s argument, concluding that Article 63 was inapplicable to his case.<sup>155</sup> The Court based this conclusion on the nature of Yamashita’s alleged misconduct. According to the Court, Article 63 applied only after the initiation of detention, *not* for pre-capture violations of the laws and customs of war subject to trial by military commission.<sup>156</sup> Thus, had Yamashita been tried for misconduct *as* a POW, his argument would have had merit. Because this was not the case, the Court concluded that use of evidentiary rules different from those used for trial by court-martial did not violate Geneva III:

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152. *Id.* at 6.

153. *Id.* at 20–21.

154. *Id.* at 6.

155. *Id.* at 21–23

156. *Id.* at 22

[N]either Article 25 [prohibiting the use of prosecution depositions] nor Article 38 [prohibiting the use of hearsay] is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. . . . [E]xamination of Article 63 in its setting in the Convention plainly shows that it refers to sentence “pronounced against a prisoner of war” for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.<sup>157</sup>

This interpretation was consistent with that of several other state parties,<sup>158</sup> although inconsistent with that of the International Committee of the Red Cross.<sup>159</sup> This interpretation, however, also produced a bifurcated approach to allocating the Convention’s fair process protections that seemed inconsistent with the treaty’s apparent objective: ensuring adequate process is used to ascertain whether the captive did in fact engage in the alleged misconduct. Indeed, this inconsistency between the

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157. *Id.* at 19–21.

158. Geneva III Commentary, art. 85, *supra* note 147.

159. *Id.*

The 1929 Convention contained no provision concerning the punishment of crimes or offenses committed by prisoners of war prior to their capture. Although Articles 45 to 67 of that Convention do not specifically exclude such acts, the drafter probably had in mind only acts committed during captivity. At the end of the Second World War, this gap in the text of the 1929 Convention gave rise to much discussion until sentences were passed in most of the Allied countries. Among the prisoners of war who were nationals of the vanquished Powers were many persons who were accused of war crimes, and crimes against peace and humanity. During the ensuing trials, a number of the accused asked to be afforded the guarantees provided by the 1929 Convention in regard to judicial proceedings. The International Committee of the Red Cross . . . requested that the guarantees afforded by Articles 45 to 67 should be applied to them . . . In almost every case the courts of the Allied countries rejected the requests of the accused. Thus, the United States Supreme Court rejected a request by General Yamashita of Japan on this point . . . .

*Id.*

Although the 1949 Geneva III rejected the earlier *Yamashita* and *Eisentrager* interpretation of article 63 of the 1929 Geneva Conventions, recognition of the substantive change in article 102 of the 1949 GCs did not provide any bar to the prosecution of General Noriega despite his recognition as a POW. As discussed above, Noriega was subject to prosecution for pre-capture federal drug offenses because, under article 102, a U.S. soldier would have been subject to prosecution in federal district court for such offenses as well. Fourteen years later in 2006, the Supreme Court would consider the applicability of the 1949 Geneva Conventions to an entirely different kind of war captive.

ostensible objective of the Convention and the majority's interpretation generated a strong dissent.<sup>160</sup>

In the 1950 case of *Johnson v. Eisentrager*,<sup>161</sup> the Supreme Court adopted an almost identical interpretation of the 1929 Geneva III. Eisentrager and his fellow petitioners<sup>162</sup> challenged trial by a U.S. military commission for allegations of pre-capture war crimes committed in China by asserting, *inter alia*, that as POWs they could only be tried by the type of tribunal used for the trial of U.S. forces.<sup>163</sup> As in *Yamashita*, the Supreme Court rejected this invocation of Article 63, concluding it did not apply to POWs tried for pre-capture offenses such as war crimes.<sup>164</sup> According to the Court, "this Article also refers to those, and only to those, proceedings for disciplinary offenses during captivity. Neither applies to a trial for war crimes."<sup>165</sup>

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160. *In re Yamashita*, 327 U.S. 1, 26–27 (Murphy, J., dissenting) (Justice Murphy argued that strategic decisions to eliminate communication should not impute liability through the theory of command responsibility). Justice Murphy's dissent also highlighted his view of the applicability of the Constitution and its fundamental rights even to a trial of an enemy belligerent:

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

*Id.* at 26–27 (Murphy, J., dissenting).

161. 339 U.S. 763 (1950).

162. The case actually involved a consolidated challenge by twenty-one German nationals captured by U.S. forces in China after Germany's unconditional surrender. *Id.* at 765–66.

163. *Id.* at 790.

164. *Id.*

165. *Id.*



As with *Yamashita*, this interpretation was consistent with how some other treaty states interpreted this same provision at the time. Nonetheless, it also deprived individuals qualified for POW status of an important protection: the prohibition on use of tribunals utilizing different rules of evidence and procedure than those considered necessary for the fair trial of the detaining power's own armed forces. Indeed, as Justice Murphy noted in his vociferous *Yamashita* dissent, this interpretation could not be reconciled with the humanitarian objective of the treaty.<sup>166</sup> If these interpretations did nullify the objective of the treaty, it was a potential outcome inherent in any judicial treaty interpretation.

The interpretation of Article 63 that led to both these decisions and divided the *Yamashita* Court was addressed directly in the 1949 revision of Geneva III. Article 102 is successor to Article 29, and provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."<sup>167</sup> Article 85 of the 1949 Geneva III eliminated all doubt as to the applicability of this provision to trials for pre-capture (pre-POW) misconduct, providing that "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."<sup>168</sup> The associated commen-

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166. *In re Yamashita*, 327 U.S. at 35 (Murphy, J., dissenting); see also *id.* at 41–80 (Rutledge, J., dissenting) ("More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late. This long-held attachment marks the great divide between our enemies and ourselves. There was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.").

167. Geneva III, art. 102.

168. Geneva III, art. 85. The associated ICRC Commentary to this article explains:

tary explains that this provision was included to ensure Article 102 applied to all POW trials, including those for pre-capture war crimes or even pre-capture crimes with no connection to the armed conflict.<sup>169</sup>

In *Hamdan v. Rumsfeld*, the Court considered the President's authority—acting in his capacity as Commander in Chief—to convene a military commission to try a captured al Qaeda operative for alleged violations of the laws and customs of war.<sup>170</sup> The Court would again interpret an important provision of the Geneva Conventions, a provision of the Conventions that did not even exist when *Yamashita* and *Eisentrager* were decided: Common Article 3.<sup>171</sup>

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When the International Committee of the Red Cross undertook the revision of the 1929 Convention, it therefore gave immediate attention to introducing provisions which would afford certain guarantees to prisoners of war, even when accused of war crimes, and remove all ambiguity which had resulted from the earlier text.

Geneva III Commentary, art. 85.

169. *Id.* The Soviet Union included a reservation to Article 85 stating:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

See *Geneva Conventions of 12 August 1949*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/NORM/48D358FE7D15CA77C1256402003F9795?OpenDocument> [<http://perma.cc/FB86-BEPW>]. This change to Geneva III was noted by Justice Stevens in his *Hamdan* majority opinion addressing an analogous issue. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 619–20 (2006).

170. *Hamdan*, 548 U.S. at 613–35.

171. Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned

Common Article 3—a treaty article included in all four of the 1949 Geneva Conventions—was perhaps the most significant addition to the Conventions when they were revised following World War II. It represented the first inclusion of an article extending international legal regulation to non-international armed conflicts.<sup>172</sup> This new category of conflict regulation was, at that time, focused on hostilities between state authorities and internal opposition groups (i.e. civil wars). Although the state parties were unwilling to extend the full corpus of the Conventions to these internal conflicts, they did ultimately agree that even in these primarily domestic affairs, international law required the humane treatment of any person not actively participating in hostilities.<sup>173</sup>

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persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva I, *supra* note 11, art. 3.

172. Geneva I, *supra* note 11, art. 3; Geneva II, *supra* note 12, art. 3; Geneva III, *supra* note 13, art. 3; Geneva IV, *supra* note 14, art. 3.

173. *Id.* Over time, the importance of Common Article 3 in the mosaic of humanitarian protections evolved substantially. In 1986, the International Court of Justice characterized this article as the “minimum yardstick” of protection in armed conflicts. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. United States), 1986 I.C.J. 14, 104 (June 27). Then, in 1996 in response to the brutal conflict in the Balkans following the collapse of Yugoslavia, Common Article 3 emerged as a critical source of international criminal responsibility in non-international armed conflicts. *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at par. 70, *reprinted in* 35 I.L.M. 32 (1996). The United States also continuously emphasized the importance of respect for this critical humanitarian shield of protection, including it within the jurisdiction of the federal War Crimes Act (War Crimes Act of 1996, 18 U.S.C. § 2441 (1996)), and insisting that the scope of application of the 1977 Additional Protocol II (a treaty developed to supplement the law applicable to non-international armed conflicts)

Accordingly, Common Article 3 requires the humane treatment of any person not actively participating in the hostilities and especially opposition 'fighters' who are *hors de combat* (out of the fight) as the result of wounds, sickness, or capture.<sup>174</sup> Common Article 3 also enumerated a non-exclusive list of treatment that was especially prohibited, including murder, torture, cruel, inhuman, or degrading treatment, collective punishment, and failing to collect and care for the wounded and sick.<sup>175</sup> Also included on this list of enumerated prohibitions was "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>176</sup>

Based on Common Article 3's initial humanitarian focus, it was widely assumed that the term "non-international armed conflict" was a synonym for internal armed conflict. As a result, a binary test of Geneva Convention applicability evolved: The full corpus of the four Conventions applied only during international (inter-state) armed conflicts, and the much more limited humane treatment rule applied during internal armed conflicts.<sup>177</sup> While the meaning of armed conflict was the subject of considerable debate prior to 9/11, this internal/international typology was not.

When the United States initiated its military response to the terrorist attacks of September 11, 2001, this binary paradigm became a source of major policy and legal controversy. What triggered this controversy was the widely condemned U.S. decision to invoke the expansive legal authorities of armed conflict<sup>178</sup> (most notably the authority to kill as a measure of first resort and to detain without trial) while disavowing any inter-

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apply as broadly as Common Article 3 applies (rejecting a more restrictive scope of application provision included in the Protocol).

174. Geneva IV, *supra* note 14, art. 3.

175. *Id.*

176. *Id.*

177. Vité, *supra* note 147, at 69; see also Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 VAND. J. TRANSNAT'L L. 295 (2007).

178. Military operations conducted against al Qaeda involved the use of powers clearly derived from the law of armed conflict: attack with deadly force as a measure of first resort, preventive detention of captured "enemy belligerents," and trial by military tribunal for violations of the laws and customs of war.

national humanitarian limits on that power. Thus the applicability of Common Article 3 became the focus of this storm.<sup>179</sup> This resulted from a two-part U.S. interpretation of the conflict and applicable law. First, because al Qaeda was not a state, the armed conflict was not “international” within the meaning of the Geneva Conventions, and the full corpus of the Geneva Conventions was not triggered. Second, because the armed conflict was not “internal”, it failed to trigger Common Article 3.<sup>180</sup> Thus, prior to the Supreme Court’s *Hamdan* decision, the articulated U.S. policy resulted in a critical protective gap for captured enemy belligerents who could not claim even the minimum protections of the Geneva Conventions encompassed in Common Article 3.<sup>181</sup>

Salim Hamdan challenged the legality of his trial by military commission by asserting, *inter alia*, that the procedures adopted for the military commission violated Common Article 3’s humane treatment obligation.<sup>182</sup> The government responded by asserting that Common Article 3 did not apply to the armed conflict in which Hamdan was captured, and that even if it did, the procedures did not violate the prohibition against use of tribunals that fail to provide minimally acceptable process.<sup>183</sup> Each of these issues necessitated interpretation of Common Article 3: first, to resolve its field of application and, second, its substantive meaning.

The Supreme Court rejected the government’s arguments and ruled in Hamdan’s favor.<sup>184</sup> First, the Court held that Common Article 3 applied in “contradistinction” to Common Article 2, the Convention provision dictating applicability of the full corpus of each Convention to international armed con-

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179. Memorandum from President George W. Bush on the Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), available at [http://www.lawofwar.org/Bush\\_torture\\_memo.htm](http://www.lawofwar.org/Bush_torture_memo.htm) [<http://perma.cc/7GSA-UKE9>].

180. Memorandum from Jay S. Bybee to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the DoD, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [<http://perma.cc/88RK-V55H>].

181. *Text of Order*, *supra* note 20.

182. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

183. *Id.* at 568–69.

184. *Id.* at 567.

flicts.<sup>185</sup> By interpreting Common Article 3 to apply to any armed conflict that did not qualify as international within the meaning of Common Article 2, the Court closed the conflict regulation gap created by the Bush administration interpretation of these two articles. This “contradistinction” interpretation meant the struggle against al Qaeda, because it was treated by the government as an armed conflict, had to fall within the scope of Common Article 3 as “non-international.”<sup>186</sup> The Hamdan Court then held that the procedures adopted for trial by military commission did not comply with Common Article 3’s prohibition against “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>187</sup> This was because the process at issue—excluding Hamdan from his trial on request of the government—was not permitted in a court-martial, the standard the Court used as the touchstone for process that complies with Common Article 3.<sup>188</sup>

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185. *Id.* at 630–31. It is true that the Court held that the law of war was statutorily “incorporated” to trials by military commission by operation of Article 21 of the U.C.M.J., the provision pursuant to which the military commission was convened (The Court concluded that Article 21 represented a congressional delegation of authority for the President to convene military commissions in accordance with the law of war. It is questionable whether this interpretation is accurate.). Article 21 does not indicate a delegation of authority, but instead recognition of what the President asserted was a pre-existing authority inherent in the function of commander-in-chief. However, because the Court did treat Article 21 as a delegation of commission convening authority, it provided a statutory basis for application of the law of war to Hamdan’s commission.

This did not, however, resolve the Common Article 3 applicability issue. Instead, it merely framed that issue as one of both statutory and treaty interpretation. The Article 21 interpretation established the obligation to comply with applicable law of war rules related to trial by military commission. However, whether Common Article 3’s fair process rules were included within that obligation required a second level of analysis, namely whether Common Article 3 applied to non-international armed conflicts of international (as opposed to internal) scope. It was this issue that produced the most significant treaty interpretation aspect of the holding, which was equally significant as a rebuke to the President’s interpretation of the same.

186. *Id.*

187. *Id.* at 630.

188. *Id.* at 624–25. Congress responded to the decision by enacting the Military Commission Act of 2006, which substantially enhanced the process for trial by military commission, with further enhancements in the 2009 MCA. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190,

Some observers considered this outcome consistent with the true meaning of Common Article 3 while others viewed it as an exercise in unjustified judicial activism.<sup>189</sup> One thing does seem clear: both of these reactions have some merit. Both the text of Common Article 3 and its drafting context suggest it was understood, at least in 1949, to impose an obligation between States and opposition forces operating within a state's territory, not between a State and a transnational non-state group.<sup>190</sup> Indeed, this was the foundation for the D.C. Circuit's rejection of Hamdan's Common Article 3 argument. However, many have also argued (including the authors of this Article) that Common Article 3 has evolved substantially since its adoption, and that as a matter of customary international law, it must apply to any armed conflict, including one between a state and a transnational non-state group.<sup>191</sup> But the Court did not rely on customary international law to reach its holding. Instead, the result was based exclusively on treaty interpretation. Thus, even if the outcome is considered by many to have been a positive development in the regulation of hostilities, it remains susceptible to criticism.<sup>192</sup>

The conclusion that the process created by the President for trial by military commission violated Common Article 3 is equally susceptible to criticism. There is no question that the Court correctly noted the divergence between military commission process and court-martial process (a divergence that provided an alternate statutory basis for ruling in Hamdan's favor through Article 21's incorporation of the UCMJ).<sup>193</sup> However, it is questionable whether these deviations indicate a violation of the humane treatment mandate, at least as it was un-

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2574 (2009) [hereinafter 2009 MCA]. In fact, with few (albeit significant) exceptions, that process today is virtually analogous to the court-martial trial process.

189. Marko Milanovic, *Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case*, 89 INT'L REV. OF THE RED CROSS, 373, 375–81 (2007); Brian M. Christensen, Comment, *Extending Hamdan v. Rumsfeld to Combatant Status Review Tribunals*, 2007 BYU L. REV. 1365 (2007).

190. Milanovic, *supra* note 189, at 375–81.

191. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities*, *supra* note 177, at 347, 349; see also MICHAEL LEWIS ET. AL., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* (2009); Rogier Bartels, *Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts*, 91 INT'L REV. OF THE RED CROSS 35 (2009).

192. See generally LEWIS, *supra* note 191.

193. *Hamdan*, 548 U.S. at 619–25.

derstood in 1955 when the U.S. ratified the 1949 Geneva Conventions. Indeed, as Justice Thomas noted in his dissent, for trial process to be so defective that it violates this aspect of Common Article 3, something much more akin to summary execution is required.<sup>194</sup>

Nonetheless, the Court's interpretation of Common Article 3 produced a profound consequence that extended well beyond military commissions: As a matter of treaty obligation the United States was required to ensure the humane treatment of captured al Qaeda operatives.<sup>195</sup> This was a genuine "beginning of the end" to the debate over the permissibility of utilizing harsh interrogation techniques on captured unprivileged belligerents. These detainees were, following the Court's interpretation of Common Article 3, protected by this baseline humanitarian shield against abusive treatment, protection that foreclosed any treatment that came even close to torture.<sup>196</sup>

Taken collectively, although limited in number, these three cases illustrate the significant impact that judicial treaty interpretation may have on the execution of military operations.

#### V. IMPLEMENTING LEGISLATION

Few treaties ratified by the United States are completely self-executing. Instead, it is much more common that treaties, or provisions thereof, are non-self-executing, requiring imple-

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194. *Hamdan*, 548 U.S. at 716–18 (Thomas, J., dissenting). It is almost certain that at the time of ratification, Common Article 3's fair trial mandate aligned more closely with Justice Thomas's view than that of the majority. Part of the motivation for including the fair trial provision in Article 3 was the then-recent experience of summary justice in brutal civil wars like the one in Spain. Furthermore, the process adopted for trial by military commission, while inconsistent with contemporary court-martial process, was much more similar to the version of that process provided for in the 1950 Uniform Code of Military Justice. Thus, in 1955 when the United States ratified the Conventions, it is unlikely that the post-2001 commission process would have been viewed as inherently "inhumane" in violation of Common Article 3.

195. Donna Miles, *England Memo Underscores Policy on Humane Treatment of Detainees*, AMERICAN FORCES PRESS SERVICE (July 11, 2006), available at <http://www.globalsecurity.org/security/library/news/2006/07/sec-060711-afps01.htm> [<http://perma.cc/52LZ-U5R5>].

196. See Major James A. Barkei, *Legislating Military Doctrine: Congressional Usurping of Executive Authority through Detainee Interrogations*, 193 MIL. L. REV. 97 (2007); see also Exec. Order No. 13,491, 3 C.F.R. 13491 (2009).



menting legislation to give the treaty obligation the full force and effect of law in the United States.<sup>197</sup> The process of treaty implementation in turn implicates the U.S. dualist theory of international law.<sup>198</sup> Ultimately, because the Supremacy Clause assigns higher priority to a later in time statute over a previously ratified treaty,<sup>199</sup> subsequently enacted implementing legislation takes priority over the prior ratified treaty. As a result, such legislation controls judicial resolution of any issues arising under the treaty and implementing statute in U.S. courts, even if the statute-based resolution is perceived externally as inconsistent with the terms of the treaty. Accordingly, while implementing legislation in no way alters the international obligation of the nation imposed by a treaty, it may, in a very practical sense, modify the *domestic* effect of the treaty obligations.

Statutory implementation of the war crimes repression provision of the four 1949 Geneva Conventions provides an iconic example of this domestic modification of a treaty obligation. In the wake of World War II, individual responsibility for the violation of the laws and customs of war emerged as perhaps the single most important development in the law.<sup>200</sup> Although there had been previous efforts to hold individuals accountable for violations of this law, these had been largely ineffective.<sup>201</sup> During the revision of the 1929 Geneva Conventions, the absence of any individual accountability provisions in these or other LOAC treaties was recognized as a contributing factor to this ineffectiveness.<sup>202</sup>

In response, the drafters of the 1949 Conventions included penal provisions within each of the four treaties.<sup>203</sup> These provisions imposed an obligation on state parties to hold individ-

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197. SENATE ON TREATIES, *supra* note 31, at 76.

198. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

199. SENATE ON TREATIES, *supra* note 31, at 75.

200. See William George Eckhardt, *Nuremberg—Fifty Years: Accountability and Responsibility*, 65 UMKC L. REV. 1, 1 (1996); see generally N.F. Christiakov, *The Question of War Crimes at the Nuremberg Trial*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 155, 155–66 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

201. SOLIS, *supra* note 67, at 75–76.

202. Geneva III Commentary, art. 129–131; see also Marko Divac Öberg, *The absorption of grave breaches into war crimes law*, 91 INT'L REV. OF THE RED CROSS 163 (2009).

203. Geneva I, *supra* note 11, art. 49; Geneva II, *supra* note 12, art. 50; Geneva III, *supra* note 13, art. 129; Geneva IV, *supra* note 14, art. 146.

uals criminally accountable for violating certain treaty obligations. More significantly, the Conventions imposed a mandatory obligation on all state parties to prosecute “grave breaches,” even for violators with no nationality or territorial connection to the state.<sup>204</sup>

The Convention drafters clearly recognized that effective implementation of a penal sanction provision would require prosecution at the national rather than international level. Indeed, contrary to popular misconception, the vast majority of post-World War II war crimes prosecutions were conducted by states, and although most prominent, the international military tribunals at Nuremberg and Tokyo comprised only a small fraction of these prosecutions.<sup>205</sup> Accordingly, the drafters also required that state parties “enact legislation” to implement the mandatory penal response triggered by grave breaches. Article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), for example, specifies:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article [Article 130 lists violations qualifying as grave breaches].

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the

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204. See, e.g., Geneva IV, *supra* note 14, art. 146 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”).

This obligation did not extend to all Convention articles. Instead, the drafters identified a limited number of articles imposing the most fundamental obligations related to the protection of war victims. Only violation of these articles—the most egregious violations—triggered the penal obligation. Such violations were designated as “grave breaches.” Geneva I, *supra* note 11, art. 50; Geneva II, *supra* note 12, art. 50; Geneva III, *supra* note 13, art. 129; Geneva IV, *supra* note 14, art. 146. Other violations could provide the basis for penal sanction, but unlike grave breaches, state parties did not accept an *obligation* to enforce penal sanctions to repress such violations.

205. SOLIS, *supra* note 67, at 301–31.

provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie case*.<sup>206</sup>

Other violations of the Conventions trigger a repression obligation, which differs from the mandatory “prosecute or extradite” obligation for “grave breaches”: “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”<sup>207</sup>

In requiring enabling legislation, Article 129 and its analogs in the other three Geneva Conventions represent perhaps as clear an example of a non-self-executing treaty provision imaginable. When the United States ratified the Conventions in 1955, the nation assumed the obligation to “implement this contract” by enacting the legislation called for by the treaty. Failure to do so would result in an unfulfilled treaty obligation.<sup>208</sup>

Article 129 establishes the expectation that states would enact domestic penal legislation criminalizing grave breaches of the Conventions. Article 129, however, also permits a state party to meet its treaty obligation by extraditing an individual suspected of a grave breach to another state willing to prosecute.<sup>209</sup> Known accordingly as the “prosecute or extradite” rule,<sup>210</sup> the extradition option might have offered the United States a case-by-case opportunity to avoid the perception that it failed to properly implement its Article 129 obligation. Howev-

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206. Geneva III, *supra* note 13, art. 129.

207. *Id.*

208. In fact, this requirement was recognized by the Senate in its consideration of the Geneva Convention, although the Senate concluded both that “the obligations imposed upon the United States by the ‘grave breaches’ provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers” and that a “review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedures for those violations of the conventions.” Administration witnesses also stated that there was not “intended that there be any enlargement of existing Federal power, which it was felt was already adequate for that purpose . . . [and] that the acts enumerated in [the grave breach provision] were already condemned by Federal and State criminal law.” SENATE GC EXEC. RPT. NO. 9, *supra* note 38, at 27.

209. *Id.*

210. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, THE LAW OF WAR DESKBOOK 186 (2011).

er, relying on the Senate's initial 1955 conclusion that acts condemned in the grave breach provisions were "already condemned by Federal and State criminal law,"<sup>211</sup> it was not until 1996 that Congress decided that full implementation required enactment of domestic laws criminalizing these war crimes and giving courts appropriate jurisdiction over them.<sup>212</sup>

Thus, four decades after the U.S. ratified the Geneva Conventions, Congress acted to fulfill its treaty obligation by enacting

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211. SENATE GC EXEC. RPT. NO. 9, *supra* note 38.

212. Universal jurisdiction for grave breaches may have been viable pursuant to a somewhat obscure provision of the UCMJ. Article 18 of the UCMJ provides jurisdiction both to persons subject to the code and to "any person who by the law of war is subject to trial by a military tribunal"—an apparent extension of General Court-Martial jurisdiction to any person who commits a triable war crime. 10 U.S.C. § 818 (2012) (emphasis added). However, this provision was neither enacted to implement the Geneva Convention penal provisions, nor was it understood as providing universal jurisdiction. Indeed, the false assumption that the UCMJ *did not* provide for such expansive jurisdiction was a major factor that finally led Congress to enact the War Crimes Act. *See generally* Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 91–101 (2001). Furthermore, at the time the War Crimes Act was adopted, Article 18 had never been invoked to try anyone for war crimes not connected to an armed conflict with the United States, and whether such an individual could be subject to trial by a military court would itself raise complex constitutional questions. *See Reid v. Covert*, 354 U.S. 1, 33–35 (1957). One thing is clear: Even considering the U.C.M.J., there was no U.S. law that explicitly implemented the universal jurisdiction obligation imposed by the Conventions. *See War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 14–15 (1996) (statement of John H. McNeill, Senior General Deputy Counsel (International Affairs and Intelligence), Office of General Counsel, Department of Defense).

Congress did, however, correctly conclude that there was simply no basis to prosecute individuals suspected of committing grave breaches in Federal Court. The forum-enabling effect of the WCA was highlighted by Senator Helms, who perhaps came closest to accurately stating the real need for the War Crimes Act of 1996 when he said:

Many have not realized that the U.S. cannot prosecute, in Federal Court, the perpetrators of some war crimes against American servicemen and nationals. Currently, if the United States were to find a war criminal within our borders—for example, one who had murdered an American POW—the only option would be to deport or extradite the criminal or to try him or her before an international war crimes tribunal or military commission. Alone, these options are not enough to insure that justice is done.

142 CONG. REC. 21684 (1996).

The War Crimes Act of 1996.<sup>213</sup> However, in doing so, Congress chose not to enact a universal jurisdiction statute that fully implemented the grave breach provision. Instead, the War Crimes Act<sup>214</sup> provides federal criminal jurisdiction only when the grave breaches fall within the objective or subjective nationality principles of international jurisdiction: those circumstances where “the person committing such war crime [as defined in section (c)] or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . . .”<sup>215</sup> Thus, the act did not extend to foreign nationals committing grave breaches against non-nationals of the United States as the treaties required. This nationality requirement was inconsistent with the recommendations of both the State Department<sup>216</sup> and Department of Defense,<sup>217</sup> which sought legislation that would fully implement U.S. treaty obligations by establishing a near-universal jurisdiction for grave breaches.<sup>218</sup>

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213. 18 U.S.C. § 2441 (2012).

214. *Id.* (amended in 1997 to replace the term “grave breaches” with “war crimes” and to include violations of Common Article 3 within the definition of war crimes).

215. *Id.* § 2441(b).

216. H.R. REP. NO. 104-698, at 7–8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172.

217. H.R. REP. NO. 104-698, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2177–2178.

We believe . . . that the jurisdictional provisions should be broadened from the current focus on the nationality of the victims of war crimes. Specifically, we suggest adding two additional jurisdictional bases: (1) where the perpetrator of a war crimes is a United States national (including a member of the Armed Forces); and (2) where the perpetrator is found in the United States, without regard to the nationality of the perpetrator or victim.

*Id.* at 13 (statement by Judith Miller, General Counsel of the U.S. Department Defense, May 17, 1996, reference H.R. 2587, the precursor to H.R. 3680 (The War Crimes Act of 1996)). The Department of Defense was focusing on broader jurisdiction than was proposed in H.R. 2587 or than was eventually passed in H.R. 3680. Additionally, the current version of the War Crimes Act of 1996, as amended in 1997, falls short of the expansive jurisdiction recommended by the Department of Defense.

218. The House Judiciary Committee, in addressing universal jurisdiction, stated:

[E]xpansion of H.R. 3680 to include universal jurisdiction would be an unwise at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight.

H. R. REP. NO. 104-698, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2173.

These jurisdictional limitations indicate that Congress chose not to *fully* implement the penal obligations accepted by the United States when it ratified the 1949 Geneva Conventions. The statute does not provide jurisdiction enabling the United States to bring “persons alleged to have committed, or to have ordered to be committed, such grave breaches . . . regardless of their nationality, before its own courts,”<sup>219</sup> as the Geneva Conventions required. This decision may have been motivated by congressional concern that implementing the universal jurisdiction obligation might encourage other states to assert criminal jurisdiction over U.S. military personnel when the state lacked any nationality or territorial link to the alleged grave breach.

Regardless of the motivation, the War Crimes Act is a quintessential illustration of two important aspects of treaty practice in U.S. law: first, that accepting a treaty obligation by ratification is no guarantee that the obligation will be promptly executed; and second, that even when Congress executes treaty obligations by statute, it remains congressional prerogative to qualify the legal impact of those treaties within the United States via domestic law.<sup>220</sup>

#### VI. FEDERALISM AND THE TREATY POWER: TESTING THE LIMITS

The Constitution reposes the treaty power in the two political branches<sup>221</sup> and makes treaties the “supreme law of the land.”<sup>222</sup> What limits exist to cabin this power have been the subject of debate since the drafting of our Constitution. The treaty power is generally recognized as limited by the same

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219. See Geneva I, *supra* note 11, art. 50; Geneva II, *supra* note 12, art. 50; Geneva III, *supra* note 13, art. 129; Geneva IV, *supra* note 14, art. 146.

220. The Military Commission Act of 2006 again amended the War Crimes Act. Congress, in an apparent effort to align WCA jurisdiction with that of the military commission, established a distinction between those violations of Common Article 3 considered minor and those it considered serious. Accordingly, the WCA now criminalizes only what the amendment characterized as “grave” breaches of Common Article 3 (an odd word choice, as grave breaches are not, as a matter of law, internationally cognizable in the context of a non-international armed conflict). See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

221. U.S. CONST. art. II, § 2.

222. U.S. CONST. art. VI, cl. 2.

constitutional provisions—especially in the Bill of Rights—that limit all federal power.<sup>223</sup> But it remains unclear whether, and if so to what extent, the treaty power is restrained by a subject-matter limitation or the federalist structure of our government by the Tenth Amendment.

Debates over the subject matter limitations of the treaty power have existed since our founding and continue to this day.<sup>224</sup> At its inception, the treaty power was generally understood as a means to regulate the United States' intercourse with foreign nations, with its exercise to be consistent with those external aims. In *Federalist No. 45*, Madison writes that the federal powers were to be exercised "principally on external objects, as

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223. HENKIN, *supra* note 35, at 185 ("It is now settled, however that treaties are subject to the constitutional limitations that apply to all exercise of federal power, principally the prohibitions of the Bill of Rights."). For example, a treaty could not combine two states without their consent, *see* U.S. CONST. art. IV, § 3, cl. 1 or give a state a non-republican form of government, *see* U.S. CONST. art. IV, § 4. *See also* SENATE ON TREATIES, *supra* note 31, at 66 ("It seems clear from the Court's pronouncement in *Geofroy v. Riggs* that the treaty power is indeed a broad one, extending to 'any matter which is properly the subject of negotiation with a foreign country.' However, it is equally apparent that treaties, like Federal statutes, are subject to the overriding requirements of the Constitution.").

224. In his later years, Thomas Jefferson construed the treaty power narrowly, believing it was limited to those subjects traditionally regulated by treaties between sovereign states and excluding those rights normally reserved to the states and further excluding those subjects normally requiring participation by the House of Representatives. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 13–14 (2006). This narrow view, apart from rendering the treaty power a functional nullity, is not supported by the drafting history of the Constitution's treaty provisions during the 1787 Constitutional Convention, nor by historical practice following its ratification. *See* SENATE ON TREATIES, *supra* note 31, at 27–29 (2001) (discussing the treaty provision: "[b]y September 4 delegates had agreed that the President 'by and with the advice and consent of the Senate, shall have power to make treaties,' and that no treaty shall be made without the consent of two-thirds of the Senators present. This portion of the report was brought up for discussion on September 7. James Wilson of Pennsylvania moved to add the words 'and House of Representatives' after the word Senate because, he said, since treaties 'are to have the operation of laws, they ought to have the sanction of laws also.' As to the objection that secrecy was needed for treaty making, he said that factor was outweighed by the necessity for the sanction of both chambers. Roger Sherman of Connecticut argued that the requirement of secrecy for treaties 'forbade a reference of them to the whole Legislature.' Wilson's motion was defeated.") (internal footnotes omitted). *See also* United States v. Bond, 681 F.3d 149, 157–58 (3rd Cir. 2012) [hereinafter *Bond II*] (discussing Congressional treaty authority and state sovereignty under the Tenth Amendment); HENKIN, *supra* note 35, at 191. *Contra* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395 (1998); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1875 (2005).

war, peace, negotiation, and foreign commerce[.]”<sup>225</sup> Yet, Madison also emphasized that precise definition of the treaty power was undesirable because it was intended to be flexible to address future contingencies unknown to the drafters.<sup>226</sup> Regardless, a primary purpose of the new Constitution was to eliminate the problems of the Confederation where federal treaty obligations were frustrated by the States.<sup>227</sup>

Despite the treaty power being entrusted solely to the federal government by the Constitution, its potentially unlimited scope made it a focus for concern over federal intrusion into matters traditionally entrusted to the States. Neither the Convention nor state ratifying conventions provided any guidance on how the national government was expected to enforce the nation’s treaty obligations, primarily because treaties were envisioned to be self-executing.<sup>228</sup> The operation of the Supremacy Clause was seen as the primary mechanism to implement the treaty power, making treaties the supreme law of the land by binding “the Judges in every State . . . any Thing in the Constitution or Laws or any State to the Contrary notwithstanding.”<sup>229</sup> Because of the assumption that treaties automatically became the supreme law of the land, the extent of Congress’s ability to legis-

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225. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961); see also *Bond II*, 681 F.3d at 159 n.11.

226. *Bond II*, 681 F.3d at 160.

227. See *Medellín v. Texas*, 552 U.S. 491, 543 (Breyer, J., dissenting) (citing THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961)) (Supremacy Clause “disembarrassed” the Convention of the problem presented by the Articles of Confederation where “treaties might be substantially frustrated by regulations of the States”).

228. *Medellín*, 552 U.S. at 533 (Stevens, J., concurring in the judgment) (“[T]he text and history of the Supremacy Clause, as well as this Court’s treaty-related cases, do not support a presumption against self-execution.”); HENKIN, *supra* note 35, at 201 (“What seems clear, from the language of the Constitution and of John Marshall, is that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional”); Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 250–51 (2013) (“Evidence that Founding-Era treaties were largely meant to self-execute includes the placement of treaties in the Supremacy Clause, an overt endorsement of self-execution at the North Carolina ratifying convention, and statements like Jefferson’s in his Manual of Parliamentary Practice that “[t]reaties are legislative acts. A treaty is a law of the land.”). See Golove & Huelsebosch, *supra* note 32.

229. U.S. CONST. art. VI, cl. 2.



late to implement a treaty, particularly if outside of other federally enumerated powers, was not discussed at the Convention. As the doctrine of non-self-execution developed,<sup>230</sup> it gave proponents another avenue to use the historical record to support their respective views. Nevertheless, no court has declared a congressional act implementing a treaty void because of its impact on states' rights.<sup>231</sup>

Many believe that the uncertainty about the scope of the treaty power was resolved by *Missouri v. Holland*,<sup>232</sup> which seemed to foreclose arguments trying to limit Congressional implementation of a valid treaty. In that case, the Supreme Court rejected a Tenth Amendment challenge to legislation implementing the 1916 U.S.-Canadian Migratory Bird Treaty. Prior to the treaty, the Court had struck down similar legislation regarding migratory birds as violating the Tenth Amendment.<sup>233</sup> The state of Missouri argued that the Treaty and its implementing legislation were similarly invalid as "an interference with the rights reserved to the States."<sup>234</sup> Echoing Madison's prescient description of the necessity of flexibility in the treaty power, Justice Holmes stated, "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we

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230. Justice Marshall in *Foster v. Nielson* stated:

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

27 U.S. 253, 314 (1829).

231. See *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) ("The Government replies that this Court has never held a statute implementing a valid treaty to exceed Congress's enumerated powers.").

232. *Missouri v. Holland*, 252 U.S. 416, 432 (1920). Tellingly, Congress itself saw *Missouri v. Holland* as dispositive of the issue of whether they have authority to legislate in support of a ratified treaty. See SENATE ON TREATIES, *supra* note 31, at 66–67.

233. *Missouri*, 252 U.S. at 432.

234. *Id.*

must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”<sup>235</sup>

Evaluating the treaty power, the Court observed, “[I]t is obvious that there may be matters of the sharpest exigency for the national wellbeing that an act of Congress could not deal with but that a treaty followed by such an act could.”<sup>236</sup> Recognizing that restrictions of the treaty-making power “must be ascertained in a different way” from those governing ordinary legislation,<sup>237</sup> the Court determined first that the provision did not contravene any prohibitory language in the Constitution. The Court then queried further, “[T]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”<sup>238</sup> For Justice Holmes, that question could only be answered by considering what “this country has become in deciding what that Amendment has reserved.”<sup>239</sup> In upholding the Act, Holmes concluded, “[N]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”<sup>240</sup> What “invisible radiations” exist to circumscribe the federal treaty power remains an open question.

Although federalism constraints on national power have not recently produced any meaningful limits on the treaty power as it relates to wartime authority, the Supreme Court’s revival of federalism concerns in Commerce Clause and other cases may augur future federalism-based restrictions on treaty implementation.<sup>241</sup> The recent case of *Bond v. United States* indicates that even treaties intended to regulate armed hostilities may implicate core federalism concerns.<sup>242</sup> *Bond* also indicates

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235. *Id.* at 433–34.

236. *Id.* at 433.

237. *Id.*; see also Robert Anderson IV, “Ascertained in a Different Way”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. L. REV. 189, 201–03 (2001) (arguing that treaty power, as independent federal power, requires bona fide agreement between states, and that requirements to effect contractual obligations are a better test for when treaty power may intrude on state prerogatives).

238. *Missouri*, 252 U.S. at 434.

239. *Id.*

240. *Id.*

241. See *Bond II*, 681 F.3d at 158–59 nn.10 & 11.

242. See *Bond*, 134 S. Ct. 2077, 2088 (2014).

that even if federalism considerations have no impact on the power of the nation to bind itself to LOAC obligations, they may affect the implementation of those agreements domestically.<sup>243</sup> What is certainly clear from the Court's *Bond* decision is that any such federalism concern will arise only if Congress clearly indicates its intent to intrude upon areas normally reserved to state power through a statute implementing a treaty. Absent such a clear statement, the Court will presume no such intrusion was intended, a presumption seemingly logical in relation to LOAC treaty implementation, as these treaties rarely address issues implicating state authority.<sup>244</sup>

A. *The "Curious Case" of Ms. Bond and the Chemical Weapons Convention*

The two forays of Ms. Bond's appeal of her conviction to the Supreme Court resulted in two significant holdings. First, resolving a circuit split on the issue, the Supreme Court held that Ms. Bond had standing to raise her Tenth Amendment challenge to the treaty implementing legislation under which she was prosecuted.<sup>245</sup> In so doing, the Supreme Court explained:

The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. [Because] federalism secures to citizens the liberties that derive from the diffusion of sovereign pow-

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243. *Id.* at 2084.

244. In *United States v. Bond*, Carol Anne Bond contested her prosecution in federal district court for the use and possession of a chemical weapon in violation of the Chemical Weapons Convention Implementation Act of 1998 and its associated criminal provisions. The permissible reach of this LOAC treaty was the central issue in this case, and it highlights the issues with which a court must grapple when faced with a federalism challenge to the Constitution's Treaty powers. The facts of Bond's case certainly exemplify the concern over the federal criminalization of conduct, which would otherwise have been considered local and left to the ministrations of the State of Pennsylvania, involving a campaign of harassment using toxic chemicals by Ms. Bond against her romantic rival. Bond contested her ultimate federal prosecution for use of a chemical weapon, claiming it violated the principles of federalism embodied in the Tenth Amendment. See *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009) [hereinafter *Bond I*], *rev'd*, *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011).

245. *Bond*, 131 S. Ct. at 2366 (holding that Ms. Bond had standing to raise a federalism challenge to the legislation, even absent the involvement of a state or state official).

er . . . [f]ederalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . Federalism protects the liberty of the individual.<sup>246</sup>

Thus, after the first *Bond* decision by the Supreme Court, persons injured by the application of treaty provisions or treaty-implementing legislation would have the standing to “challenge a law as enacted in contravention of constitutional principles of federalism.”<sup>247</sup>

On remand from the Supreme Court, the Third Circuit determined that under *Missouri v. Holland*’s ‘valid treaty equals valid implementing legislation’ holding, the Tenth Amendment posed no barrier to Ms. Bond’s prosecution.<sup>248</sup> Although acknowledging the various views on the appropriate scope of the subject matter of the Treaty power,<sup>249</sup> the Third Circuit held both that the CWC “falls comfortably within the treaty power’s traditional subject matter limitation” and that its Implementation Act was rationally related to the treaty.<sup>250</sup> Nevertheless, once again the Supreme Court granted certiorari to determine the merits of Ms. Bond’s federalism challenge to legislation based on the CWC.

Despite anticipation (and extensive briefing from amici) that the *Bond* case would finally address the substance of Justice Holmes’ invisible radiations from the Tenth Amendment, provide guidance on any subject matter limitations to the

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246. *Id.* at 2364 (internal quotations omitted).

247. *Id.* at 2365.

248. *Bond II*, 681 F.3d at 164 n.18.

249. *Bond II*, 681 F.3d at 156–59 (discussing scholars conflicting work on the origin, scope, and historical practice of the Treaty Clause). The Third Circuit also rejected, as foreclosed by *Holland*, arguments that the Necessary and Proper Clause in connection to the Treaty Clause only authorized Congress to enact laws to enable the President to make treaties, not to implement that provisions of those completed treaties. See *id.* at 157 n.9. Justice Scalia, in his concurrence in *Bond v. United States*, adopted this argument, but in so doing, neglected the historical experience of the use of the Necessary and Proper Clause to enact legislation implementing treaty provisions. Compare *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring), with Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014). See also Brief for Professors David M. Golove, Martin S. Lederman, and John Mikhail as Amici Curiae in Support of Respondent, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158), 2013 WL 4737189.

250. *Bond II*, 681 F.3d at 165.

Treaty power, or address the scope of Congress's ability to legislate to implement a treaty, the Court instead reversed Bond's chemical weapons convictions, not on a constitutional basis, but instead on a statutory grounds—its analysis of section 229 of the CWC Act.<sup>251</sup> Exercising the constitutional avoidance doctrine, the Court split the implementing legislation from its authorizing Treaty, in effect refuting full implementation of *Holland's* valid treaty equals valid implementing legislation shorthand. As the Court explained: “[W]e have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.”<sup>252</sup>

Analyzing the statute, the Court discovered an ambiguity in section 229 that arose from its context, an ambiguity created by the broad reach of section 229's definition of a “chemical weapon,” which existed solely because of section 229's broad potential impact on the traditional allocation of law enforcement between the Federal government and the States.<sup>253</sup> This ambiguity led the Court majority to implement a “clear statement” rule, requiring Congress to clearly state their intent when drastically altering the traditional balance between State and Federal prerogatives when legislating to implement a treaty.<sup>254</sup> Absent such a clear statement, purely local crimes were not reachable, at least in “this curious case” where there was no need for such drastic alterations with a Treaty that was instead focused on chemical warfare and terrorism.<sup>255</sup> Thus, because Congress did not clearly state an intent to reach these “purely local crimes” in the CWC Implementation Act, Ms. Bond could not be prosecuted under that statute for her purely local assault.<sup>256</sup>

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251. *Bond*, 134 S. Ct. at 2087–90.

252. *Id.* at 2088.

253. *Id.* at 2090.

254. *Id.* at 2088.

255. *Id.* at 2090.

256. *Id.* Justices Scalia, Thomas, and Alito disagreed that there was any ambiguity in the statute, concluding that the language of section 229 was clear and unambiguously reached Ms. Bond's local conduct. All three justices, therefore, wrote of their views of the treaty power, with Justice Scalia adopting the most restrictive view. For Justice Scalia, Congress only had power under the Necessary and Proper Clause to act to assist the President in “making” the Treaty. Accordingly, Con-

### B. Consequences of Bond

It is noteworthy what the *Bond* Court did not do: It made no attempt to analyze either the object and purpose of the CWC or its implementing legislation as they related to the issue under consideration, avoiding the traditional tools of treaty interpretation altogether. Additionally, it did not address how federalism concerns are to be resolved with self-executing treaties, although it did imply that a different rule would apply.<sup>257</sup> As noted above, the Senate explicitly labeled the CWC non-self-executing, and its implementing legislation was drafted to accommodate other constitutional concerns such as the Fourth Amendment restrictions on searches. In requiring Congress to make a clear statement in implementing legislation, the Court did not discuss how such a remedy would apply when a self-executing treaty affected the traditional balance between the Federal and State governments.

This concern is far from illusory. A much more direct and potentially disruptive effect on the balance between federal and state authorities in our constitutional structure is produced by a different category of treaty related to military affairs: status of forces agreements (SOFAs). In 1953, shortly before ratifying the 1949 Geneva Conventions, the United States ratified the NATO Status of Forces Agreement (SOFA),<sup>258</sup> the only SOFA

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gress had to rely on a separate Article I power in order to legislate to implement a treaty; see also *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring).

257. *Id.* at 2088 (“[W]e have no need to interpret the scope of the Convention in this case. *Bond* was prosecuted under section 229, and the statute—*unlike the Convention*—must be read consistent with principles of federalism inherent in our constitutional structure.”) (emphasis added); see also *id.* at 2101 (Scalia, J., concurring) (stating that it makes sense not to extend the arguable proposition that self-executing treaties are not limited by the subject matter of Article I, § 8 to non-self-executing treaties).

258. See *supra* note 35 for a discussion of the NATO SOFA Treaty. SOFAs address the legal status of military forces present in a foreign country with the consent of the receiving state, and in particular, “how the domestic laws of the foreign jurisdiction apply to U.S. personnel.” R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?, 1 n.2 (2012) [hereinafter CRS SOFA Report], available at <http://fas.org/sgp/crs/natsec/RL34531.pdf> [<http://perma.cc/7LE9-PJCU>] (depending on the terms of each SOFA agreement, “U.S. personnel can include members of the armed forces, DoD civilian employees, their dependent family members, and in some cases U.S. contractors accompanying the force). When foreign forces are present in the United States, a SOFA addresses the applicability of U.S. federal

entered into as a treaty. A core provision of the NATO SOFA is Article VII, addressing the allocation of criminal jurisdiction between the receiving and sending states, and retaining primary criminal jurisdiction in the sending (foreign nation) state for official acts or for criminal acts between members of the sending force or their accompanying family members.<sup>259</sup>

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and state law to those forces. The most common and central issue addressed in SOFAs is the delineation of criminal jurisdiction over a soldier. SOFAs typically use the term “member of the force” and “member of the civilian component” and “their dependents” rather than terms such as soldier or sailor. In addition to criminal jurisdiction, SOFAs also address claims and civil liability, force protection and use of deadly force to include authorization on carrying weapons, entry and exit requirements, taxation, customs and duties, vehicle registration/insurance/drivers’ licensing, the authorization to wear military uniforms, and use of the electromagnetic spectrum for communications or other military operations. See INT’L & OPERATIONAL LAW DEP’T, JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 122–24 (2012) [hereinafter 2012 OPERATIONAL LAW HANDBOOK], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf) [<http://perma.cc/SU2R-VW2L>].

259. Article VII of the NATO SOFA grants exclusive criminal jurisdiction where only the laws of one state are broken; in all other cases the NATO SOFA grants concurrent jurisdiction to both the sending and receiving state. In other words, if a service-member covered by the SOFA commits an act that violates the law of only one state, that state has exclusive jurisdiction. But in the much more common situation where the conduct violates the laws of both the sending and receiving state, jurisdiction is concurrent. Within these areas of concurrent jurisdiction, the SOFA allocates the primary right to exercise jurisdiction to the sending state for acts or omissions arising from the performance of official duties or for inter se cases where “both the accused and the victim are members of the sending state.” Major Manuel E.F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. 27–50–258, at 6 (May 1994). The receiving state is granted primary jurisdiction in all other cases. In cases of concurrent jurisdiction, either state may cede their right of primary jurisdiction to the other. See North Atlantic Treaty art. 7, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

(1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to

Because the number of foreign soldiers present in the United States are relatively few in comparison to the numbers of U.S. soldiers overseas, the effect of these agreements on the federal-state division of power has been infrequently experienced and even more infrequently litigated.<sup>260</sup> Nevertheless, because of the

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its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.).

260. The United States hosts over 7,000 military students from over 136 nations at 150 schools or installations nationwide under its International Military Education and Training (IMET) program, and at least two German units are permanent-



criminal jurisdiction provisions of the NATO SOFA, the potential interference with a state's exercise of criminal jurisdiction over foreign soldiers and their families present in its territory is far-reaching and significant. The Senate provided advice and consent to the NATO SOFA in 1953 and it was then ratified by the United States. The bulk of the treaty to include the criminal jurisdiction provisions in Article VII was understood by the Senate and Executive to be self-executing.<sup>261</sup> The framework con-

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ly stationed in the U.S. at Fort Bliss in Texas and at Holloman Air Force Base in New Mexico. Both are exclusive federal jurisdictions, although a small portion of a housing area at Holloman is under the concurrent jurisdiction of the federal government and New Mexico. Thus, there are significant numbers of foreign NATO forces and family members present in the United States as well as significant numbers of non-NATO military personnel engaged in international exchanges present throughout the United States at any given time. Although relatively small in number compared with the number of U.S. forces and associated personnel residing overseas, these foreign forces and their families experience the same distribution of crimes and accidents as any other inhabitant of the United States. See U.S. DEP'T OF DEF. & U.S. DEP'T OF STATE, FOREIGN MILITARY TRAINING, FISCAL YEARS 2010 AND 2011, JOINT REPORT TO CONG., VOL. I & II at II-2, available at <http://www.state.gov/documents/organization/171500.pdf> [<http://perma.cc/4NE6-BCRS>]; Major Martha Stansell-Liming, *Foreign Criminal Jurisdiction Inside the United States: The Other Side of the Coin*, 28 A.F. L. REV. 133 (1988) (although written in 1988, this article describes the types of offenses that foreign forces and their families can be involved in and is illustrative of situations today).

261. Interestingly, in order to illustrate the potential interference with state's rights, the Senate explicitly discussed the impact of the NATO SOFA jurisdictional sharing provisions on a hypothetical foreign soldier in the U.S. involved in an automobile accident while on official duty resulting in injury or fatality to a U.S. citizen. The Senate fully understood that if ratified, Article VII would alter state criminal law under the Supremacy Clause, and further, it would regularly fall to the state courts to implement NATO SOFA obligations. Thus, the Senate envisioned a local court determining its own jurisdiction under the SOFA and the Supremacy Clause and dismissing any case in which the SOFA granted the primary right of prosecution to the foreign sending State. It is therefore clear that the Senate understood the seriousness of this potential interference with state criminal jurisdiction. However, the Senate also understood that permitting this interference was necessary to protect U.S. forces abroad from the plenary territorial sovereignty of allied receiving states, a trade-off certainly influenced by the expectation that U.S. forces would be affected by the SOFA far more frequently than allied forces in the United States.

In its hearings on NATO SOFA, the Senate expressed the understanding that state courts would comply with the Constitution's Supremacy Clause and properly assess their own jurisdiction to try a criminal case against the foreign military member under the SOFA's provisions. Furthermore, because the Senate considered the provisions of the NATO SOFA to be self-executing, Congress has never passed explicit implementing laws that would allow the federal government to compel dismissal of the state criminal proceeding if it believed that the state court

tained within Article VII creates the potential for interference with state criminal proceedings in the two situations of concurrent jurisdiction where the foreign sending State has the right of primary jurisdiction—cases arising from official duty<sup>262</sup> and *inter se* cases. Because these treaty criminal jurisdiction provisions remove the criminal jurisdiction over certain criminal actions of members of NATO sending states from a State, their impact on the traditional allocation of State law enforcement is potentially extreme.<sup>263</sup> Yet both the Senate and Executive who signed, con-

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did not properly interpret the SOFA provisions. Indeed, in its hearings the Senate recognized that there was no real federal remedy if the local state criminal court improperly determined that it had jurisdiction over a visiting force member when the foreign sending state disagreed. Instead, such disparate interpretations of the SOFA's concurrent jurisdiction provision would be left to "the realm of international negotiation." See *Agreement Regarding Status of Forces of Parties of the North Atlantic Treaty: Hearings Before the S. Comm. on Foreign Relations, 83d Cong. 70–75* (1953) [hereinafter *Senate NATO SOFA Hearing*].

Because of the limitations on removal of criminal cases in federal statute, the origins of which certainly reflect fundamental federalism concerns, enforcement of the NATO SOFA as the supreme law of the land is functionally dependent on a state court recognition and application of the SOFA's allocation of concurrent jurisdiction. This enforcement is well within a state court's capabilities, and is mandated by the Constitution's Supremacy Clause. However, should a court prove obdurate or a local prosecutor unconvinced of the importance of these SOFA provisions when weighed against local sovereignty and the safety of the local community, it would prove difficult to enforce compliance with these treaty provisions within the limits of federalism—a problem well known to the Founders as compliance with Treaty obligations was a driving reason for the failure of the Confederation. Because they remove state criminal jurisdiction where the sending State has primary jurisdiction, SOFAs affect a traditional and core area of state sovereignty.

262. For example, purely military offenses, such as sleeping during guard duty or dereliction of duty, or more generally espionage or sabotage against the home country.

263. Evaluating examples of these cases highlights the tensions that can emerge between state and federal authorities when compliance with an international treaty or international agreement is at stake. Two hypothetical examples involving the German forces in Texas and New Mexico illustrate the potential for federalism concerns produced by the NATO SOFA. First, recall that the SOFA grants the sending state primary jurisdiction for official duty offenses. If an on-duty German military member kills an American citizen as the result of an automobile accident while driving an official German military vehicle off-post, the State of New Mexico or Texas would ordinarily have jurisdiction to charge the German driver with vehicular homicide. However, because the alleged criminal act occurred while the soldier was in an official-duty status, the German government (as the sending State) would have a treaty-based right to assert primary jurisdiction for this offense. In the second type of case, a foreign military member might commit spousal or child abuse case in their off-post residence. Assuming both the victim and the accused in this hypothetical are German citizens present in the U.S. under the provisions of the SOFA, this case is an "*inter se*" case and, again, under Article VII

sidered, and ratified the NATO SOFA understood its critical importance in the mutual defense obligations necessary to lead the world against the Soviet threat. American soldiers benefit from this treaty on a daily basis.

Historical practice and writings from the Framers and later constitutional scholars are continually marshalled to support particular views of the breadth, or limitation, of the treaty power.<sup>264</sup> James Madison noted that the treaty power, as a distinctly federal power, was to be exercised “principally on external objects, as war, peace, negotiation, and foreign commerce.”<sup>265</sup> This statement has been invoked to support both a robust treaty power, as well as arguments by states’ rights proponents that the treaty power may deal only with matters of “international concern.”<sup>266</sup> Yet both Hamilton and Madison also emphasized that precise definition of the power was undesirable because the treaty power was intended to be sufficiently flexible to address future contingencies unknown to the drafters.<sup>267</sup> Although *Missouri v. Holland* was thought to definitively

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the Germans would have primary jurisdiction. It is easy to comprehend the sensitivities of local prosecutors and courts in cases involving these and other types of criminal misconduct committed in their jurisdictions. Nevertheless, a local court would be expected to analyze the provisions of the SOFA to determine the treaty-imposed limitations on the exercise of its jurisdiction, and in these cases, forgo prosecution or dismiss charges absent a German waiver of the right to exercise primary jurisdiction. If, however, the local court refused to defer to the German assertion of primary jurisdiction—the outcome mandated by Article VII of the NATO SOFA—the United States would be placed in breach of its treaty obligations by the actions of a local prosecutor or a state judge, with significant consequences were Germany to then refuse to defer prosecution for American military members stationed in Germany.

264. *Bond II*, 681 F.3d 149, at 159–62 (outlining various scholarly articles with opposing views of the Treaty Power); *Bond v. United States*, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring) (adopting narrow view that the Treaty Power encompassed only the making of treaties, “[o]nce a treaty has been made, Congress’s power to do what is ‘necessary and proper’ to assist the making of treaties drops out of the picture”). To legislate compliance with the United States’ treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8 powers. *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring in the judgment) (“[T]he structural and historical evidence suggest[s] that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs.”).

265. THE FEDERALIST NO. 45 (James Madison); see *Bond II*, 681 F.3d 149 at 160 n.11.

266. *Bond II*, 681 F.3d 149 at 160.

267. *Bond II*, 681 F.3d at 160; see also 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 514–15 (Jonathan Elliot

answer questions about any federalism restrictions on the treaty power, friction between this federal power and state sovereignty has produced attempts to overrule *Holland* by constitutional amendment in the 1950s, and renewed scrutiny by the Supreme Court in the last two years in *Bond*, as to what limitations, if any, are cast on the treaty power by the federalist structure of our government.

The curious case of Ms. Bond thus indicates that even if federalism considerations have no impact on the power of the nation to bind itself to LOAC obligations, they may affect the implementation of those agreements domestically, potentially to the extent of placing the U.S. in breach of its international obligations. As many LOAC obligations are reciprocal, such potential breaches place U.S. military members at risk when they are deployed abroad.

#### VII. THE STRUGGLE FOR EQUILIBRIUM, TILTED TOWARD "OUR AMERICAN VALUES"

Perhaps the only normative conclusions that can be drawn from examining LOAC treaty practice is that this area of treaty practice involves a continual search for equilibrium between the nation's sovereign prerogative to act in defense of its vital national interests and the advancement of those interests through commitment to international legal constraints. The search for this equilibrium in large measure parallels an analogous search embedded in the law itself—the equilibrium between the necessities of war and humanitarian constraint. U.S. LOAC treaty practice reveals the vital and at times competing roles of the three branches of the federal government, and the inherent limitations of federalism, in achieving this equilibrium.

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ed., 2 ed. 1859) ("The object of treaties is the regulation of intercourse with foreign nations, and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise."); HENKIN, *supra* note 35, at 186 (citing THE FEDERALIST NO. 23 (Alexander Hamilton), that powers essential to the common defense, "ought to exist without limitation . . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.").

This search for equilibrium is similar to that conducted by James Madison himself. Considered a political pragmatist, Madison's constitutional interpretations did not follow an evolutionary development. Instead, they "pragmatically changed with circumstances in order to maintain political equilibrium . . . equilibrium between national departments, the federal center, and the state periphery."<sup>268</sup> This Article posits that similar shifts can be seen among the various branches, and between state and federal power in the maintenance of equilibrium in the treaty power, with a small tilt toward an equilibrium that preserves American values.

The Senate, in the early 1950s, consented to an unprecedented expansion of binding international obligations through the treaty power.<sup>269</sup> Accepting both the NATO Treaty itself, and the NATO SOFA, as well as the 1949 Geneva Conventions, the Senate understood both the necessity of mutual defense arrangements and the concomitant restriction on U.S. unilateral action.<sup>270</sup> Because of the shared worldview between the President and the Senate that arose in the aftermath of World War II and the advent of the Cold War, the Senate understood and accepted the necessity of binding international ties in the U.S. policy of "active diplomacy," even when those agreements af-

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268. Donald Burke, *James Madison's Dystopian Vision: The Failure of Equilibrium*, 43 AM. J. LEGAL HIST. 254, 259, 279 (1999); see also Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y. L. SCH. L. REV. 635, 643 (2005). Believing that the viability of the constitution depended on finding "equilibrium between two or more sources of power," Madison would change his views on states' rights, after 1789 when he judged power had shifted too greatly from the state periphery in favor of the national center, and at the federal level from the Congress to the weak Executive. Burke, *supra*, at 260, 265. Madison would transition from interpreting the Constitution solely through original meaning (the meaning of its text), original intent (as evidenced by the Convention), and original understanding (supported by evidence from the state ratifying conventions), deploying each to support his ultimate agenda: to "prevent what he perceived to be potential abuses of power through shifts creating an imbalance. They were used as tools to restore a desired equilibrium in order to preserve property relationships and individual liberty." *Id.* at 275.

269. Among significant treaties entered into during this post-World War II period were: the UN Charter, which was signed and ratified within three months in 1945; the creation of multi-lateral defense obligations in the NATO Treaty, signed and approved within a three month period in 1949; the NATO SOFA, ratified in 1953, despite opposition by Senator Bricker and his supporters; and the 1949 Geneva Conventions, ratified in 1955.

270. See *Senate NATO SOFA Hearing*, *supra* note 261, at 68-75.

fects both the rights of U.S. soldiers overseas and the jurisdiction of domestic U.S. state courts. These important treaties were concluded at the same time as Senator Bricker's failed attempts to amend the U.S. Constitution to overrule *Missouri v. Holland* and limit the treaty power's domestic effects to those areas already strictly within Congress's Article I powers. The rejection of the Bricker Amendment and the acceptance of these binding international treaty obligations reflects an acceptance by the Senate of the necessity of a robust treaty power at the federal level. Significant to the Senate's acceptance of these limits on autonomy is the perception that they reflected both American values and practice.<sup>271</sup>

By the 1990s, however, the Soviet Union had disintegrated, and the omnipresent threat that had motivated the imperative of maximizing congressional and presidential consensus on foreign policy dissipated. No longer was foreign policy conceived of as an area immune from partisanship and this change in national security perspective produced increased friction between the Senate and the President in relation to treaty obligations. As a result, even seemingly uncontroversial treaties, such as the Chemical Weapons Convention, were subject to divisive battles in the Senate during its consideration of their ratification. Similar opposition can be seen in the Senate's decades-long and still extant delay in considering Additional Protocol II to the Geneva Conventions, and in its passage of the 2006 Military Commissions Act provision that prohibited the invoking of the Geneva Conventions "as a source of rights" in habeas or civil proceedings in any U.S. court.

During this same period the courts—and most notably the Supreme Court—seemed to indicate a greater inclination to impose limitations on national power through the treaty interpretation process. In *Yamashita* and *Eisentrager*, the Supreme Court in the late 1940s and early 1950s narrowly construed treaty provisions to permit the military commission trials of General Yamashita and 28 German prisoners, even though this interpretation was arguably a contravention of the humanitarian object and purpose of the 1929 Geneva Conventions. Yet, even at this time, vociferous dissents by Justices Murphy and Rutledge advocated

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271. See discussion *supra* in section IIA, and *Senate GC Hearings*, *supra* note 34.

interpretations that reflected an inconsistency between a narrow and permissively oriented interpretation of the Geneva Conventions and fundamental American values.<sup>272</sup> In 2006, however, the Supreme Court interpreted Common Article 3 of the 1949 Geneva Conventions to provide a floor of humanitarian protection to Salim Hamdan, invalidating his military commission trial conducted solely under executive authority. Although subject to debate, the Court's decision to interpret Common Article 3 to apply to the "non-international armed conflict" against al-Qaeda was an effort to fulfil the humanitarian purposes of the 1949 Geneva Conventions.<sup>273</sup>

Finally, the defeat of the Bricker Amendments during the 1950s sustained the holdings of *Missouri v. Holland* and ensured that federalism would pose no real constraints on the treaty power. Nevertheless, the resurgence of federalism in the Court's commerce clause jurisprudence in the 1990s may have predicted a similar return of federalism challenges to the treaty power. In its *Bond* decisions, the Court recognized both that federalism protects the liberty of individual citizens, and that treaties will not be interpreted to intrude on traditional areas of state responsibilities absent a clear Congressional statement of their intent to do so. In its 2014 decision, the Court also cast doubt on *Holland's* shorthand holding that a valid treaty equals valid implementing legislation, creating possibilities of attack against future treaty implementing legislation. The three concurrences in that case would have gone even further in restricting the scope of the federal treaty power, even in this core LOAC treaty, with Justice Scalia's eliminating it as an inde-

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272. See *supra* notes 160 & 166.

273. This broad interpretation has been criticized as being inconsistent with its original meaning as a civil or internal war. See discussion *supra* part IV. These controversies reflect an underlying tension in the interpretation of treaty law: which branch is to have the primary, and definitive, role in treaty interpretation, as a subspecies of legal interpretation. See Burke, *supra* note 268, at 260–61 (early debates on the locus of the removal of executive officials in the constitution centered on which branch had authority to interpret the constitution. In Madison's view, all three branches were required to interpret the constitution, albeit with the courts having the final say); cf. *Medellín v. Texas*, 552 U.S. 491, 516 (2008) (disagreeing with the dissent, because the effect of its determination that the treaties at issue were self-executing "would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced.")

pendent power altogether.<sup>274</sup> This resurgence of federalism concerns, particularly where the underlying treaty lies at the core of the treaty power, may reflect an underlying new susceptibility to a treaty impacting a state's traditional role, something also seen in the 2008 *Medellin* decision. Nevertheless, the Supreme Court, although sanctioning federalism challenges to treaty-based legislation, did not address the key treaty power questions raised, preserving the broad ruling of *Missouri v. Holland*, at least for the near future.

#### VIII. CONCLUSION

As in any political system, voluntary international obligations assumed by a nation reflect the values and history of the nation acting on the international stage, both of which can change over time. In the U.S., the policy objectives, views of the proper U.S. role in the world, and perception of U.S. values influence all three branches of government as they fulfill their constitutional roles in the formation, implementation, and interpretation of treaties. Although limited in number, because they implicate the core functions of the national government—foreign policy and national defense—LOAC treaties and the cases implicating them provide important insights into U.S. treaty practice. The role of treaties and international law influence all three branches' search for the equilibrium between national and international imperatives. Done against the background of their reverence for, and commitment to, the law of nations,<sup>275</sup> the Framers designed the Constitution to involve all three branches of the U.S. Government in formulating and enforcing its international obligations. Although cases interpreting LOAC treaties are sparse, they do exist, and they do provide evidence of the significant influence the judiciary has and will continue to have on the rules that regulate the use of U.S. military power.

Perhaps the nation has entered an era of a greater willingness by the judiciary to prioritize the object and purpose of relevant LOAC treaties over Executive interpretation. Such an interpretive perspective would certainly help explain decisions

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274. *Bond v. United States*, 134 S. Ct. 2077, 2098–2102 (2014) (Scalia, J., concurring).

275. See generally Golove & Hulsebosch, *supra* note 32.



like *Hamdan* and *Noriega*. Whether this perception is justified or exaggerated, it is interesting that in the wake of the *Hamdan* decision, Congress sought to foreclose reliance on the Geneva Conventions as a basis for judicial relief. This provision of the Military Commission Act of 2006 was, ironically, challenged by none other than General Noriega when he sought to block his post-incarceration extradition to France based on France's inability or unwillingness to ensure respect for his rights as a POW. The district court rejected his challenge based on this statutory ban on asserting the Geneva Conventions as a source of right in U.S. courts, a holding upheld by the Eleventh Circuit. None other than Justice Thomas questioned the validity of such a statute when he dissented in the subsequent denial of Noriega's petition for certiorari to the Supreme Court.<sup>276</sup> Even more important, in the 2009 MCA, Congress significantly limited this bar. Ultimately, this merely reflects the ongoing ebbs and flows of influence asserted by each branch of our government on the treaty creation, implementation, and interpretation process as each seeks the appropriate equilibrium.

It is also possible that the nation is experiencing an era in which Congress is taking a more narrow view of international law as a mechanism to restrict U.S. national power; a narrowing that can be seen through its role in LOAC formation, advice and consent, and statutory treaty implementation. In its approval of the 1949 Geneva Conventions, the Senate embraced the imposition of binding international standards governing armed conflict in large measure because it saw those standards as embodying the values and practices of the United States in the face of the emerging Cold War threat from the eastern bloc. In other cases, the Senate, and Congress more generally, resisted treaties they believed limited U.S. freedom of action in foreign affairs and war powers. Most notably, the Senate has leveraged the advice and consent process to compel Executive commitment to implement treaty obligations consistent with Senate will, and at times to even assert pressure on the President in relation to matters in no way connected to the treaty. The ratification struggle over the CWC illustrates both of these Senate practices, resulting

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276. *Noriega v. Pastrana*, cert. denied, 559 U.S. 917, 918 (2010) (Thomas, J., dissenting from denial of cert.).

in presidential concessions that were arguably inconsistent with the object and purpose of the treaty.

Limitations imposed by the U.S. federalist system of government are also now impacting the nation's implementation of LOAC treaty obligations. The *Bond* case demonstrates that individual citizens will have standing to contest the validity of implementing legislation or perhaps self-executing treaties in circumscribing their behavior in areas traditionally reserved to the states. Regardless, although not resolving Justice Holmes' invisible radiations from the Tenth Amendment, *Bond* establishes that implementing legislation will not be interpreted to interfere with the traditional division of law enforcement authority between federal and state governments absent a clear statement from Congress of that intent. Given the central concern of the Framers during the drafting of the Constitution over the states' interference with the fulfillment of national treaty obligations, it is ironic that federalism may still have an impact on such an important function of the federal government in the twenty-first century.

Ultimately, while it is true that "war is a challenge to law,"<sup>277</sup> it remains an open question whether it is the law, or war itself, that must adjust. Leveraging the nation's military power to advance vital national security interests while advancing the regulation of hostilities through the treaty power will, as it has in the past, impose pressures on the three branches of the U.S. government and on our federal system itself. Their actions in response will provide a lens into how treaties and international law itself will operate in U.S. practice in the future.

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277. *Al-Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) ("War is a challenge to law, and the law must adjust.").