AUTHORIZATIONS FOR THE USE OF FORCE, INTERNATIONAL LAW, AND THE *CHARMING BETSY* CANON

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Abstract: Although international law has figured prominently in many disputes around actions of the U.S. military, the precise relationship between international law and the President's war powers has gone largely unexplored. This Article seeks to clarify one important aspect of that relationship: the role of international law in determining the scope of Congress's general authorizations for the use of force. In the seminal case of *Hamdi v. Rumsfeld*, the plurality opinion used international law to interpret the authorization by Congress for the use of force, but did so without adequate attention to the content or interpretive function of international law. This Article identifies and defends a better approach: courts should presume that general authorizations for the use of force do not empower the President to violate international law. Such a presumption is consistent with long-standing tools of statutory interpretation reflected in the *Charming Betsy* canon, maximizes the presumed preferences of Congress, advances separation of powers values, and promotes normative values that favor the use of international law as an interpretive tool.

INTRODUCTION

The relationship between international law and the President's wartime authority under the U.S. Constitution is an important but largely unexplored subtext in many post-September 11, 2001 legal disputes. Examples include the detentions of Yaser Hamdi and Jose Padilla as "enemy combatants," military trials for Guantanamo de-

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tainees, and allegations of torture at Abu Ghraib prison. Critics charge that the Executive Branch violated both international law and the U.S. Constitution, while the George W. Bush administration has defended its actions in part on the grounds that they come within the President's power as Commander in Chief.[1] Government lawyers have also appealed to international law to justify an expansive view of the President's power as Commander in Chief.[2] For their part, lower courts have invoked international law in confusing ways as they seek

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[1] *See, e.g.*, Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (West Supp. 2002) (authorizing the detention and trial by military commission of non-citizens based in part on the President's power as Commander in Chief); Brief for Petitioner at *35–38, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027), 2004 WL 542777 (arguing that petitioner's detention falls within the Commander in Chief's wartime authority); Brief for Respondents at *13–16, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2003 WL 23189498 (same); Memorandum from President George W. Bush, to National Security Advisors 1–2 (Feb. 7, 2002) (determining, based on authority as Commander in Chief, that neither Taliban nor al Qaeda prisoners from the conflict in Afghanistan qualify as prisoners of war), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (date released June 22, 2004); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President 36–39, 46 (Aug. 1, 2002) (arguing that it may be unconstitutional to apply federal laws and treaties prohibiting torture to actions taken under the President's authority as Commander in Chief), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf (date released June 22, 2004); *see also* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. (forthcoming 2005) (describing various sources of international law implicated by the torture at Abu Ghraib); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1413–32 (2002) (describing objections to detentions and military tribunals based on international law and the U.S. Constitution); Sean D. Murphy, *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591, 591–96 (2004) (describing the legal debate surrounding the torture allegations at Abu Ghraib).

[2] *See, e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450, 475 (4th Cir. 2003) (accepting the government's argument and reasoning that Yaser Hamdi "is being held as an enemy combatant pursuant to the well-established laws and customs of war"), *vacated and remanded*, 124 S. Ct. 2633 (2004); Petitioner's Brief at *27–34, *Padilla* (No. 03-1027) (relying on the "laws and customs of war" to show that the President has the constitutional authority to detain U.S. citizens as enemy combatants); Transcript, U.S. Dep't of Defense, Briefing on Detainee Operations at Guantanamo Bay (Feb. 13, 2004) [hereinafter Transcript, U.S. Dep't of Defense, Briefing on Detainee Operations] ("As I stated, under the laws of war, we have a right to hold enemy combatants who represent a threat to the United States and its forces off the battlefield." (quoting Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict)), http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html (last updated Feb. 13, 2004); Press Release, U.S. Dep't of Defense, DOD Announces Draft Detainee Review Process (Mar. 3, 2004) [hereinafter Press Release, U.S. Dep't of Defense] (stating that "the law of war permits the detention of enemy combatants for the duration of the conflict"), http://www.defenselink.mil/releases/2004/nr20040303-0403.html (last updated Mar. 3, 2004).

to demarcate the constitutional authority of the President during war.[3] In the U.S. Supreme Court's landmark decision in *Hamdi v. Rumsfeld*, citation to international law by both the habeas petitioner and the government met with some success—all nine Justices made at least passing reference to international law in interpreting the scope of the President's wartime power.[4]

This Article seeks to clarify one aspect of the relationship between international law and the courts' construction of the President's war powers—the role of international law in determining the scope of Congress's general authorization for the use of force. This use of international law was important to the Supreme Court's opinions in *Hamdi*, which considered a general authorization by Congress for the President to use force; the authorization did not explicitly include detentions.[5] The four-Justice plurality opinion used international law in part to interpret the authorization as including the detention of "enemy combatants," but only until the cessation of hostilities.[6] The plurality opinion relied on international law but failed to explain in full its connection to the authorization provided by Congress, or to distinguish among different interpretive uses and different kinds of international law.[7] Justice Clarence Thomas appeared to reject the plurality's use of international law outright, at least insofar as it limited the authority of the President,[8] and four other Justices disagreed with the use of international law in the *Hamdi* case itself, but left open whether international law might be relevant in future cases.[9] The *Hamdi* opinions thus create substantial confusion

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[3] For example, the district court opinion in *Rumsfeld v. Padilla* included a long discussion of the distinction between lawful and unlawful combatants, but the purpose of that discussion is not clear. *See* Padilla v. Bush, 233 F. Supp. 2d 564, 590–93, 596 (S.D.N.Y. 2002), *aff'd in part and rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded*, 124 S. Ct. 2711 (2004). Similarly, the district court opinion in *Hamdi v. Rumsfeld* discussed international law, but the purpose of that discussion is not clear either. *See* 243 F. Supp. 2d 527, 530–31 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated and remanded*, 124 S. Ct. 2633 (2004). The Supreme Court did little to clarify the role of international law in these cases. *See infra* notes 64–135 and accompanying text.

[4] *See infra* notes 74–129 and accompanying text.

[5] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *infra* note 67.

[6] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639–42 (2004) (O'Connor, J., plurality opinion, joined by Rehnquist, C.J., and Kennedy & Breyer, JJ.).

[7] *See infra* notes 74–121 and accompanying text.

[8] *Hamdi*, 124 S. Ct. at 2679 (Thomas, J., dissenting).

[9] *Id.* at 2657–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Ginsburg, J.); *id.* at 2671–72 n.5 (Scalia, J., dissenting, joined by Stevens, J.).

about the role of international law in interpreting general authorizations by Congress for the President to use force.

The lack of clarity around this use of international law is particularly troubling for two principle reasons. First, congressional authorization is a key factor in determining the scope of the President's war powers.[10] For all nine of the Justices in *Hamdi*, the presence or absence of congressional authorization was important in determining the lawfulness of the President's actions.[11] The U.S. Court of Appeals for the Second Circuit's decision in another detention case, *Padilla v. Rumsfeld*, also turned on congressional authorization,[12] as have recent decisions by district courts.[13] The importance of congressional authorization in these cases builds on the Court's seminal opinion in *Dames & Moore v. Regan*[14] and Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[15] in which the views of Congress, gleaned from a variety of sources, were critical to the construction of

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[10] *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (granting habeas relief to civilians tried by military commissions that exceeded congressional authorization); *In re* Yamashita, 327 U.S. 1, 11, 25 (1946) (denying habeas relief when trial by military commission was specifically authorized by federal statute); Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (reasoning that "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did"); Hirabayashi v. United States, 320 U.S. 81, 91–93 (1943) (upholding conviction of American citizen of Japanese ancestry for violating an Act of Congress that made it a misdemeanor to disregard knowingly restrictions authorized by an Executive Order of the President); *Ex parte* Quirin, 317 U.S. 1, 35, 48 (1942) (denying habeas relief where trial by military commission was specifically authorized by federal statute); The Paquete Habana, 175 U.S. 677, 708, 711 (1900) (invalidating a seizure of property that lacked explicit statutory or presidential authorization and that violated the law of nations); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) (granting habeas relief to petitioner whose trial by military commission during the Civil War violated an Act of Congress); The Prize Cases, 67 U.S. (2 Black) 635, 670–71 (1862) (reasoning that because Congress had retroactively blessed the forfeitures, the Court did not have to decide whether such act was "necessary under the circumstances"); Brown v. United States, 12 U.S. (8 Cranch) 110, 129 (1814) (holding that the President lacked the power to confiscate certain property absent specific congressional authorization).

[11] *See infra* notes 74–129 and accompanying text.

[12] 352 F.3d at 718–24 (concluding that Jose Padilla's detention lacked congressional authorization), *rev'd on other grounds*, 124 S. Ct. 2711 (2004); *id.* at 728–30 (Wesley, J., concurring in part and dissenting in part) (concluding that Congress had authorized Padilla's detention).

[13] *See generally* Padilla v. Hanft, No. Civ.A.2:04-2221-26A, slip op., 2005 WL 465691 (D.S.C. Feb. 28, 2005) (mem.) (concluding that Padilla's detention lacked congressional authorization); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) (mem.) (concluding that the President lacked congressional authority to try Salim Ahmed Hamdan by military commission).

[14] 453 U.S. 654, 674, 678–79 (1981).

[15] 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

the President's foreign affairs powers.[16] As congressional authorization gains importance, the tools used to construe the scope of that authorization do as well.[17] The confusion that *Hamdi* generates about international law thus makes it difficult for the lower courts to resolve cases effectively, for the President to know the scope of his own authority, and for Congress to predict how courts and the President will interpret its authorizations for the use of force.

Second, there is general disagreement around the value of international law as an interpretive norm in a number of different contexts. The Supreme Court has made recent, highly controversial references to international and comparative sources to interpret the Eighth[18] and Fourteenth Amendments,[19] and courts have long used international law to interpret statutes, even those that do not explicitly refer to it.[20] The justification for and scope of such use is also the subject of disagreement.[21] Some of the general criticisms leveled

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[16] *See* HAROLD HUNGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 105–13, 134–41 (1990) (discussing both cases and arguing that the Court in *Dames & Moore* should have demanded "more specific legislative approval for the president's far-reaching measures"); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 139–54 (2002) (discussing and criticizing this reasoning in *Youngstown* and *Dames & Moore*); Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373, 401–26 (2002) (concluding that the concurring opinions in *Youngstown*, considered in light of subsequent opinions and commentary, stand for the principle that courts are not restricted to the language of enacted statutes in determining congressional will regarding the President's actions).

[17] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. (forthcoming 2005) (manuscript at 2–5, on file with author) (arguing that the Authorization for Use of Military Force should receive more attention from scholars in part because courts have generally resolved war powers cases based on congressional authorization and avoided questions about the President's constitutional power as Commander in Chief).

[18] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005); *id.* at 1225–29 (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 316–17 n.21 (2002); *see also* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 498–556 (2002); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1109–29 (2002).

[19] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572–73, 576–77 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *see also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 83–84, 89–90 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 70–72 (2004).

[20] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[21] *Compare* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1152–62, 1165–73, 1176–79 (1990) (defending broad application of the canon), *with* Curtis Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998)

against the interpretive value of international law include the claims that its use lacks textual antecedent and may not reflect the intent of Congress or the Framers, that norms developed in whole or in part outside of the United States have little interpretive value, and that the variety of sources in international law do little to constrain the courts' decision making.[22] Unfortunately, the plurality's loose reliance on international law in *Hamdi* is open to some of these very criticisms.

Part I of this Article introduces the controversy surrounding the use of international law to interpret statutes and the Constitution.[23] Part II analyzes the opinions in *Hamdi* and shows that the plurality relied on international law to interpret the scope of Congress's authorization without proper regard for its source, content, or interpretive function, and concludes that this use of international law does not effectively serve the interpretive purposes discussed in Part I.[24]

Part III argues that international law has significant interpretive value if it is used by the courts to limit the scope of congressional authorization to those actions by the President that do not violate international law.[25] Part III first considers the following potential justifications for using international law: (a) the text of the authorization (or legislative history) invites recourse to international sources, (b) international law is relevant in construing the intent of Congress in passing the authorization, and (c) the application of international law advances certain separation-of-powers values.[26] The last two justifications are considered through the lens of the *Charming Betsy* canon, pursuant to which the courts construe acts of Congress to avoid violations of international law whenever possible.[27] Although the context in which the canon is generally invoked is different in significant respects from the one presented here, the basis for the canon and the debate it has engendered nonetheless provide a useful framework in which to consider the interpretive use of various kinds of international law.

(arguing for a narrow canon justified largely on separation-of-powers grounds, not congressional intent or respect for international law), *and* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 215–17, 262–70 (1993) (arguing that the canon should be abandoned).

[22] *See infra* notes 33–63 and accompanying text.

[23] *See infra* notes 33–63 and accompanying text.

[24] *See infra* notes 64–135 and accompanying text.

[25] *See infra* notes 136–275 and accompanying text.

[26] *See infra* notes 136–245 and accompanying text.

[27] *See Charming Betsy*, 6 U.S. (2 Cranch) at 118.

As Part III illustrates, however, there are strong reasons to think that this use of international law both reflects the preferences of Congress and serves to foster separation of powers.[28] The participation of the political branches in the development of international humanitarian law, the formal and informal commitments made by the Executive Branch to follow that law during armed conflict, the long-standing nature of the *Charming Betsy* canon, and other factors all provide sound reasons for the courts to conclude that general authorizations for the use of force do not embrace violations of international law by the President.[29] Moreover, this use of international law arguably promotes separation of powers by seeking specific authorization from Congress for certain violations of international law rather than leaving that decision in the hands of the courts or the President.[30]

Finally, Part III concludes by revisiting the *Hamdi* case, and explains how the analysis laid out above would have strengthened the plurality's opinion and better advanced many of the interpretive functions of international law set forth in Part I.[31] Using two treaties as examples, this Part also considers how such a presumption would work with respect to various sources of international law and particular problems that might arise in those contexts.[32]

I. The Interpretive Role of International Law

The basic principles of international law are well known, but a brief review is nonetheless helpful to set the context for the discussion that follows. Treaties are international agreements; in our constitutional framework they require approval of the President and a supermajority of the Senate.[33] Self-executing treaties have effect as domestic law without any implementing legislation. Non-self-executing treaties are binding internationally, but require further legislative action to become directly enforceable by U.S. courts.[34] Customary international law is based on consistent practices that states follow out of a sense of legal obligation.[35] The status of customary international law in our

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[28] *See infra* notes 136–275 and accompanying text.

[29] *See infra* notes 136–202 and accompanying text.

[30] *See infra* notes 203–245 and accompanying text.

[31] *See infra* notes 246–275 and accompanying text.

[32] *See infra* notes 246–275 and accompanying text.

[33] U.S. Const. art. II, § 2.

[34] Restatement (Third) of the Foreign Relations Law of the United States § 111(3) (1987).

[35] *Id.* § 102(2).

domestic legal system is contested—some argue that it is federal law that binds the states and provides a basis for the jurisdiction of the federal courts, others argue that it is not, and still others take an intermediate position.[36] It is well settled, however, that the political branches can override treaties and customary international law as matters of domestic law if they choose to do so—a later-in-time statute, for example, can abrogate an earlier treaty or customary obligation.[37] Comparative law refers generally to the practices of foreign countries that are not binding on other countries as law.[38]

International law can, of course, serve as a binding norm that provides the rule of decision in domestic litigation;[39] this use of international law has provoked controversy over the past two decades.[40] To

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[36] *Cf. id.* § 111 reporters' note 3 (stating that "the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts"). *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not federal common law); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law is federal common law); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002) (taking an intermediate position); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) (describing this debate and also taking an intermediate position).

[37] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(a). The norm is still binding internationally. *See id.* § 115(b). Some commentators argue that customary international law overrides prior-enacted federal statutes. *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1563–67 (1984).

[38] Although this Article touches on issues related to the use of foreign sources in general, its focus is on international law. Some argue that a sharp distinction between international and comparative law is descriptively inaccurate and normatively unattractive, and that U.S. courts should make broad use of both as "transnational law," particularly in the human rights context. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52–54 (2004). This Article focuses on international law, in part because that is what the Supreme Court appeared to do in the *Hamdi v. Rumsfeld* decision, and in part because there are particularly strong reasons to use certain types of international law to interpret the scope of congressional authorization for the use of force. *See infra* notes 74–121 and accompanying text (discussing *Hamdi* plurality opinion); *infra* notes 164–275 and accompanying text (discussing reasons to use international law to interpret congressional authorization for the use of force).

[39] *See, e.g.*, Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (determining that resolution of dispute between families of passengers and airline depended on terms of self-executing treaties limiting liability of airlines in certain circumstances).

[40] Examples include the scope and meaning of the Alien Tort Statute and whether courts should enforce customary international law as binding on the President. *See, e.g.*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754–69 (2004) (discussing the scope of the Alien Tort Statute); *id.* at 2769–76 (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with the Court's interpretation of the Alien Tort Statute). *See generally* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) (addressing customary international law);

some extent, however, it may be fair to say that the interpretive use of international law is now taking center stage, with disagreement about its application arising in both constitutional[41] and statutory interpretation.[42] Justifications for the interpretive use of international law in both contexts fall into the following two very general (and somewhat overlapping) categories:[43] (1) international law serves to interpret text or otherwise maximize the preferences of the Framers (constitutional or statutory), and (2) it promotes a broad range of normative values, such as enhancing the international stature of the United States.

Debate around the first use of international law focuses on the extent to which it fairly captures the meaning of text or maximizes the intent of the drafters.[44] To the extent that it does, there seems to be

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Jonathan I. Charney, *Agora: May the President Violate International Law?*, 80 AM. J. INT'L L. 913 (1986) (same); Michael J. Glennon, *Raising* The Paquete Habana: *Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 322 (1985) (same).

[41] Supreme Court Justices have sparred openly about the use of international and comparative law in interpreting the Eighth and Fourteenth Amendments. *See* Washington v. Glucksberg, 521 U.S. 702, 734 (1997) (discussing the practice of euthanasia in the Netherlands in determining that state prohibition of physician-assisted suicide did not violate the Fourteenth Amendment); Oyama v. California, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) (relying in part on the United Nations Charter to strike down California's Alien Land Law); *see also* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1043–46 (2002) (considering whether a proposed application of the Thirteenth Amendment is consistent with international law); Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1762–65 (2003) (applying international law to the relationship between equal protection and the trust doctrine in Indian law); *supra* notes 18–19. *See generally* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Lori Fisler Damrosch & Bernard H. Oxman, *Introduction—Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004).

[42] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–99 (1993); *id.* at 812–22 (Scalia, J., dissenting) (disagreeing with the Supreme Court's construction of the Sherman Act based on principles of international law); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173–75 (D.C. Cir. 1994) (holding that the defendant had not waived its sovereign immunity under a federal statute); *id.* at 1180–82 (Wald, J., dissenting) (arguing that the statute should be read in light of nonderogable norms of international human rights law); *see also* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1154 (7th Cir. 2001) (discussing this issue at length). For additional discussion of the use of international law in statutory interpretation, see sources cited *supra* note 21.

[43] International sources may also serve a functional role by providing a way to evaluate empirical claims. *See, e.g.*, Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting); Koh, *supra* note 38, at 46.

[44] In the context of constitutional interpretation, proponents of comparative and international sources argue that language in the Constitution that implicitly refers to a community standard, such as "cruel and *unusual*," and "*due* process," make modern international sources relevant. Koh, *supra* note 38, at 46. They also observe that jurists traditionally have looked outside the borders of the United States when interpreting the scope of the Constitution. *Id.* at 45; *see also* Diane Marie Amann, *Guantanamo*, 42 COLUM. J.

widespread agreement as to its interpretive value.[45] In the context of statutory interpretation—which bears the closest relationship to interpreting the scope of authorizations by Congress for the use of force—courts use international law when it is explicitly incorporated by the statute.[46] Courts also construe statutes to avoid violations of international law "where fairly possible" under the *Charming Betsy* canon,[47] and they generally presume that statutes do not apply extraterritorially, particularly where doing so might conflict with international law.[48] Some argue that the latter two uses of international law may fail, at least in part, to reflect congressional intent, and that the canons must be justified, if at all, on other grounds.[49]

TRANSNAT'L L. 263, 301–03 (2004); Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 423–24 (2004).

[45] *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 57–58 (2004) (arguing against the use of international sources in constitutional interpretation in part because they fail to fit within traditional interpretive methods, including text); Ramsey, *supra* note 19, at 71 (criticizing the use of international practice and opinion in *Lawrence v. Texas* and *Atkins v. Virginia*, but noting that "[i]nternational sources are obviously relevant to the scope of the Constitution's structural provisions defining the international powers of the U.S. government"); Steinhardt, *supra* note 21, at 1185–86 (answering criticisms of the canon based in part on the ground that its use captures the intentions of Congress).

[46] In this situation, of course, the relationship between international law and the text of the enactment is clear. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 26–38 (1942) (interpreting the "law of war" as used in the Articles of War); *see also* 18 U.S.C. § 1651 (2000) (criminalizing piracy as defined by the law of nations); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (1994) (abrogating foreign sovereign immunity for cases in which "rights in property taken in violation of international law are in issue"). International law is also used in statutory interpretation when legislative history provides reason to do so, or when the statutory language appears to refer to a term of art under international law. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 435–40 (1987) (interpreting the Refugee Act in part based on the definition of the term "refugee" in treaties to which the United States was a party).

[47] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

[48] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991) (*Aramco*) (superseded by statute at 42 U.S.C. § 2000e(f) (1994)) (stating that "[w]ithout clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law").

[49] *See* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 655–60 (1990) (arguing that the courts should reverse the presumption against extraterritoriality in part because it no longer reflects the intentions of Congress); *see also* Bradley, *supra* note 21, at 517–23 (arguing that some uses of the *Charming Betsy* canon may fail to capture the intentions of Congress); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 112–20 (1998) (arguing that some justifications for the presumption against extraterritoriality fail to capture the intentions of Congress); *infra* notes 181–202 and accompanying text.

The wide range of normative goals that may be advanced by the interpretive use of international and comparative law is also the subject of debate and criticism. Some argue that using international sources strengthens transnational norms themselves,[50] promotes the ability of the United States to influence the development of those norms,[51] increases U.S. compliance with international law,[52] enhances the ability of the United States to protect its own interests abroad,[53] may elicit clear preferences from law makers,[54] and promotes separation of powers.[55] Critics focus on the development of international law in part outside the United States.[56] They also argue that the content of international law (particularly that of customary international law) is indeterminate and amorphous,[57] leaving too much discretion in the hands of judges rather than lawmakers.[58] Finally, and related to all of

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[50] Koh, *supra* note 38, at 53–54 (stating that "domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law, not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system").

[51] Amann, *supra* note 44, at 285, 307–08 (noting that the use of international norms in constitutional interpretation enhances the legitimacy of the Supreme Court's decisions both inside and outside the United States); Neuman, *supra* note 19, at 87 ("The Supreme Court has been a prestigious source of individual rights doctrines and argumentation in the global community. But if the Court insists on the exceptional character of its rights conceptions . . . then it will undermine the bases of its influence.").

[52] Steinhardt, *supra* note 21, at 1127–29.

[53] T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 103–04 (2004); Amann, *supra* note 44, at 285, 308–09; Neuman, *supra* note 19, at 87.

[54] *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2235–48 (2002) (defending the presumption against extraterritoriality as a tool for eliciting legislative preferences and suggesting that the presumption in favor of international law may serve the same function).

[55] Bradley, *supra* note 21, at 532–33 (justifying the *Charming Betsy* canon based in part on its promotion of separation of powers); Dodge, *supra* note 49, at 120–24 (evaluating the separation-of-powers rationale for the presumption against extraterritoriality); Steinhardt, *supra* note 21, at 1129–34 (discussing the separation-of-powers basis for the canon).

[56] Aleinikoff, *supra* note 53, at 104–06; Turley, *supra* note 21, at 205.

[57] *Sampson*, 250 F.3d at 1154 (referring to the "chameleon qualities" of customary international law); Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 715–16 (1986) (describing some understandings of customary international law as amorphous and in flux); Young, *supra* note 36, at 385 (explaining that "it is very difficult to actually determine whether a given norm satisfies the traditional requirements for customary international law"). *Contra* Steinhardt, *supra* note 21, at 1186–87 (emphasizing the fact-dependent nature of customary international law); Beth Stephens, *The Law of Our Land, Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 455 (1997) (emphasizing the limited number of customary international law norms).

[58] *See* Turley, *supra* note 21, at 265 (arguing that because there are so many sources of international law, the presumption in favor of international law can trump rival interpretive methods in virtually every case); *see also* Edward T. Swaine, *The Local Law of Global Anti-*

the foregoing, critics object to international law even when used as an interpretive (rather than rule-of-decision) norm, on the grounds that it is counter-majoritarian[59] and antidemocratic.[60]

Although some of these problems may be especially acute in the context of interpretive canons,[61] the plurality opinion in *Hamdi v. Rumsfeld* itself illustrates some of these difficulties. In general, it failed to provide a convincing link between congressional intent and its use of international law.[62] Moreover, by not distinguishing among various kinds of international law, or various interpretive uses, the opinion left open the potential use of a very broad range of interpretive sources for a very broad set of purposes. The plurality's use of international law also undermines, or at least fails to serve, many of the normative values outlined above. Its failure to focus on the content and context of international law, for example, and its lack of attention to potential violations of international law could actually serve to retard the development of international law and degrade the international stature of the United States.[63]

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trust, 43 WM. & MARY L. REV. 627, 713, 720 (2001) (reasoning that "[c]ustom's innate subjectivity surely raises serious questions regarding the judiciary's role").

[59] Alford, *supra* note 45, at 58–61 (making this argument in the context of constitutional interpretation); Steinhardt, *supra* note 21, at 1183–87 (noting and responding to this objection with respect to the *Charming Betsy* canon).

[60] Aleinikoff, *supra* note 53, at 104–06 (describing the tension between narratives of popular sovereignty and international law); Turley, *supra* note 21, at 204–10 (discussing the differences between pluralistic and countermajoritarian objections to the use of international law as an interpretive norm, and arguing that some uses raise pluralistic concerns because the norms have been developed outside the democratic process involved in passing legislation in the United States); *see also* Young, *supra* note 36, at 398–400 (describing this objection to the use of customary international law as federal common law). *But see* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 384–85 (1997) (countering in part that the federal government participates in the formation of customary international law).

[61] Turley, *supra* note 21, at 265–66 (arguing that the *Charming Betsy* canon should be jettisoned in part because it presents the "potential for outcome selection and judicial bias" and that courts should consider the use of international law in statutory interpretation on a case-by-case basis). *See generally* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (describing various problems with canons of statutory interpretation).

[62] *See infra* notes 74–121 and accompanying text.

[63] *See infra* notes 74–121 and accompanying text.

II. INTERNATIONAL LAW AND INTERPRETIVE PITFALLS: *HAMDI V. RUMSFELD*

Yaser Hamdi, an American citizen, was captured in Afghanistan in 2001 and eventually transferred to a naval brig in Charleston, South Carolina, where he was detained by the U.S. government as an "enemy combatant."[64] A habeas petition challenged his detention, and the U.S. Court of Appeals for the Fourth Circuit held that the President had the power to detain Hamdi because he was captured in a "zone of active combat operations."[65]

The Supreme Court issued four separate opinions in *Hamdi v. Rumsfeld*, none of which commanded a majority. The plurality opinion, authored by Justice Sandra Day O'Connor and joined by Chief Justice William Rehnquist as well as Justices Anthony Kennedy and Stephen Breyer, concluded that Congress had authorized the President to detain U.S. citizens as "enemy combatants," but that due process entitled Hamdi to a hearing to confirm the factual basis for the detention.[66] The plurality found congressional authorization for detentions, including those of U.S. citizens, based on the September 2001 Authorization for the Use of Military Force (the "AUMF"), which permitted the President to use "all necessary and appropriate force" against persons who "planned, authorized, committed, or aided the terrorist attacks."[67] Justice Thomas agreed that Congress had authorized the detention

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[64] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635–36 (2004) (O'Connor, J., plurality opinion). For the plurality's definition of the term "enemy combatant," see *infra* note 74. The government has since released Hamdi and returned him to Saudi Arabia.

[65] Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003) (reversing district court's order directing the government to produce information and ordering Hamdi's petition dismissed), *vacated and remanded*, 124 S. Ct. 2633 (2004). The Fourth Circuit denied rehearing en banc. *Hamdi*, 337 F.3d at 340 (en banc) (denying rehearing). Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc; Judges Luttig and Motz filed dissenting opinions. *Id.*

[66] *Hamdi*, 124 S. Ct. at 2635 (O'Connor, J., plurality opinion).

[67] *Id.* at 2639–40 (O'Connor, J., plurality opinion); *see* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF in part provides the following:

> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. § 2(a), 115 Stat. at 224.

(providing the fifth vote for this conclusion), but disagreed that a hearing was required.[68]

Justice David Souter, joined by Justice Ruth Bader Ginsburg, concluded that the AUMF did not authorize the detention of Hamdi and that the President otherwise lacked the authority to detain him, but nonetheless joined Justice O'Connor's opinion ordering a hearing (providing the fifth and sixth votes for this conclusion).[69] In part, Justice Souter relied on the language of a 1971 federal statute providing that "no citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress."[70] Although the plurality found that the AUMF satisfied this statute, Justice Souter disagreed.[71] Justice Antonin Scalia, joined by Justice John Paul Stevens, concluded that only by suspending the writ of habeas corpus could Congress authorize the detention of U.S. citizens, but that in any event Congress had not provided any specific authorization for the detentions.[72]

Thus, congressional authorization for the detentions was the fulcrum upon which the Supreme Court opinions turned; it was this issue that divided the Court five to four. In fact, the five Justices who found sufficient congressional authorization explicitly disavowed reaching any conclusions about the scope of the President's plenary power as Commander in Chief.[73] International law, in turn, played an important role in how the various opinions interpreted the scope of congressional authorization.

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[68] *Hamdi*, 124 S. Ct. at 2674–75 (Thomas, J., dissenting).

[69] *Id.* at 2652–53 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[70] *Id.* (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing 18 U.S.C. § 4001(a) (1971)).

[71] *Id.* at 2653–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[72] *Id.* at 2671–72 (Scalia, J., dissenting).

[73] *Hamdi*, 124 S. Ct. at 2639 (O'Connor, J., plurality opinion) (noting, and refusing to reach, government's argument that the President has plenary authority and thus needs no congressional authorization for Hamdi's detention); *id.* at 2679 (Thomas, J., dissenting) (same). To the extent that the plurality found the President's authority limited by the scope of congressional authorization, however, it must have concluded implicitly that the President lacked the requisite plenary authority. For example, the plurality concluded that the President lacked the authority to detain individuals indefinitely because Congress had not authorized such detentions; if the President had plenary authority, however, he could have taken the action even without authorization by Congress. *See* Sarah Cleveland, Our International Constitution (manuscript at 73, on file with author) (discussing international law and constitutional interpretation in the *Hamdi* opinion). It is unclear whether the plurality thought that indefinite detentions violate 18 U.S.C. § 4001(a) (although this seems implicit from their opinion), or whether the plurality thought that such detentions just lacked congressional authorization.

A. *Justice O'Connor's Plurality Opinion*

The plurality reached its conclusion about the scope of the AUMF in three steps, and international law played a role at each stage. The plurality concluded first that the detention of "enemy combatants"[74] was "so fundamental and accepted an incident to war" as to come within Congress's authorization for the use of "necessary and appropriate force" in the AUMF.[75] The opinion directly cited only one source for this conclusion, *Ex parte Quirin*.[76] In *Quirin*, the Court upheld the trial by military commission of a U.S. citizen charged with violating the law of war[77] based on a federal statute providing such trials for those who "by the law of war may be triable by such military commissions."[78] The language in *Quirin* to which the *Hamdi* plurality cited discusses at length the law-of-war distinction between lawful and unlawful combatants; this distinction was important in *Quirin* because unlawful combatants were subject to trial by military commission.[79] The plurality then cited three other sources for the *purposes* of military detention—a post-Civil War treatise on military law by William Winthrop, a 1946 decision by the U.S. Court of Appeals for the Ninth Circuit, and a recent law review article quoting from the Nuremburg tribunals that followed World War II.[80] All three relied on international law. Based on these four sources the plurality concluded that detention is a "fundamental and accepted" incident of war.[81]

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[74] The plurality defined "enemy combatant" narrowly (for the purposes of this case) as someone who was part of (or supporting) hostile forces in Afghanistan and who engaged in "'armed conflict against the United States.'" *Hamdi*, 124 S. Ct. at 2639 (O'Connor, J., plurality opinion) (quoting Brief for Respondents at *3, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 724020).

[75] *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion).

[76] *Id.* (O'Connor, J., plurality opinion) (citing 317 U.S. 1, 28 (1942)).

[77] The term "law of war" refers to a subset of international law that governs both the lawful use of force ("*jus ad bellum*") and the rules governing conduct during war ("*jus in bello*"). "*Jus in bello*" is also termed "international humanitarian law." *See* Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 905–06 (2002).

[78] *Quirin*, 317 U.S. at 27–28. The *Quirin* opinion refused to consider what authority the President would have had absent congressional authorization. *Id.* at 29; *see also* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 326–30 (2003) (analyzing the opinion and emphasizing its narrow scope).

[79] *See Quirin*, 317 U.S. at 28–31; *infra* notes 87–101 and accompanying text.

[80] *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion) (citing *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (2d ed. 1920); and Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (quoting Nuremberg Military Tribunal, Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 AM. J. INT'L L. 172, 229 (1947))).

[81] *Id.* (O'Connor, J., plurality opinion).

Second, the plurality reasoned, there is "no bar" to the United States detaining its own citizens as enemy combatants, and therefore the AUMF authorized such detentions.[82] The plurality cited two authorities for this proposition—a discussion in *Quirin* concluding that U.S. citizenship does not preclude status as an enemy belligerent or an unlawful combatant,[83] and the Lieber Code from the Civil War directing that captured rebels be treated as "prisoners of war."[84] On this basis, the plurality reached the conclusion central to the case: the AUMF authorized the detention of citizens, thus meeting the requirements of the 1971 statute, codified at 18 U.S.C. § 4001(a).[85] Finally, the plurality reasoned that "indefinite detention" for the purposes of interrogation was inconsistent with the law of war and thus not authorized by the AUMF.[86] The following discussion analyzes each of these three conclusions in detail, considering in particular the reliance of the plurality on international law.

1. Detention as a "Fundamental Incident" of War

The plurality relied directly on *Quirin*[87] for its conclusion that the detention of enemy combatants is a "fundamental" and "accepted"

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[82] *Id.* at 2640–41 (O'Connor, J., plurality opinion).

[83] *Id.* at 2640 (O'Connor, J., plurality opinion) (citing *Quirin*, 317 U.S. at 37–38). The full passage from *Quirin* reads as follows:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

Quirin, 317 U.S. at 37–38.

[84] *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion) (citing FRANCIS LIEBER, WAR DEP'T, GEN. ORDER NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD para. 153 (1863), *reprinted in* 2 FRANCIS LIEBER, MISCELLANEOUS WRITINGS 273 (1881)).

[85] *Id.* at 2641 (O'Connor, J., plurality opinion). The opinions by Justices Souter and Scalia disagreed with this conclusion. *Id.* at 2653–59 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 2671–72 (Scalia, J., dissenting).

[86] *Id.* at 2641–42 (O'Connor, J., plurality opinion).

[87] *Id.* at 2640 (O'Connor, J., plurality opinion) (citing 317 U.S. at 28). In addition to the difficulties with the plurality's reliance on *Quirin* discussed below, there are other, more general reasons to treat the *Quirin* precedent with great care. The opinion itself was drafted months after the Supreme Court's order was issued, and six of the eight petitioners had already been executed. *See* Bryant & Tobias, *supra* note 78, at 330. In addition, the Court had an extraordinarily difficult time drafting an opinion to justify its order, *id.* at 323–26, and the Justices had been inappropriately pressured by President Franklin Roose-

part of war, and it relied on other sources to explain the purposes of military detention. There are significant problems, however, with both *Quirin* and the other sources.

a. *Ex Parte Quirin*

Quoting from *Quirin*, the plurality reasoned that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[88] The "important incident[s] of war" language from *Quirin* refers to those who violate the law of war. It does not explicitly mention detention; instead, it refers to the power to "seize and subject to disciplinary measures."[89]

A page and a half later, the *Quirin* opinion used the second phrase quoted by the plurality, "universal agreement and practice," in the following context: "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."[90] Neither distinction makes the point for which the *Hamdi* plurality cited this language—detention is a fundamental part of warfare. *Quirin* does note in dicta that both law-

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velt, *id.* at 319–20, 331. Justices Felix Frankfurter and William Douglas later distanced themselves from the opinion, *id.* at 331, and more recently, Justice Scalia noted that *Quirin* was not the Court's "finest hour." *Hamdi*, 124 S. Ct. at 2669 (Scalia, J., dissenting opinion).

[88] *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion) (quoting *Quirin*, 317 U.S. at 28).

[89] The relevant language in *Quirin* is as follows:

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.

317 U.S. at 28–29.

[90] 317 U.S. at 30–31 (citation omitted). Although the plurality opinion cited only to page 28 of *Quirin* for this point, the language "universal agreement and practice" actually appears on page 30. *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion); *Quirin*, 317 U.S. at 30. The omitted citation refers to the following authorities:

> Hague Convention No. IV of October 18, 1907, 36 Stat. 2295; Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17–19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653–54; 2 Oppenheim, International Law (6th Ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531–32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034–35.

Quirin, 317 U.S. at 30 n.7.

ful and unlawful combatants may be detained, and that unlawful combatants may be tried by military commissions.[91] Again, however, the authorities cited in support (international law treatises and practice manuals from other countries)[92] do not mention detentions; they focus on the distinction between lawful and unlawful combatants.[93] This distinction tracks the authorization that Congress provided for the trial of those who "by the law of war may be triable by such military commissions."[94]

There are at least three problems with this reliance on *Quirin*. First, it provides weak support for the plurality's conclusion—*Quirin* itself considered only military trials and detention in anticipation of such trials, for which Congress had provided specific authorization based on the law of war. Not surprisingly, the sources upon which *Quirin* relied have little direct bearing on detention itself.

Second, the law of war distinction emphasized in *Quirin* between lawful and unlawful combatants undermines the plurality's reasoning. The plurality reached no conclusion as to Hamdi's combatant status;

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[91] *See Quirin*, 317 U.S. at 31.

[92] *See id.* at 31 n.8. The *Quirin* opinion cited the following authorities:

> Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445–451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th Ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

Id.

[93] Section 1109 of John Bassett Moore's *Digest of International Law* discusses the distinction between private citizens and combatants, and between those combatants who are protected by the law of war and those who are not. 7 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW § 1109, at 172–77 (1906). The treatise by Professor Charles Cheney Hyde discusses whether guerilla bands and armed prowlers qualify as prisoners of war and whether noncombatant members of the armed forces so qualify. 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 652, at 296–97, § 654, at 298–99 (1922). The referenced section in Major-General H.W. Halleck's treatise distinguishes between private citizens and combatants. 2 H.W. HALLECK, INTERNATIONAL LAW § 2, at 2 (4th ed. 1908). Professor L. Oppenheim's work distinguishes between hostilities committed by armed forces and those committed by private individuals; the latter may usually be tried as war criminals. 2 OPPENHEIM'S INTERNATIONAL LAW: A TREATISE § 254, at 455–46 (H. Lauterpacht ed., 6th ed. 1940). William Edward Hall's treatise also distinguishes between noncombatants and combatants and discusses punishments available to those who violate the law of war. WILLIAM EDWARD HALL, INTERNATIONAL LAW § 127, at 133–34, § 135, at 351–53 (Oxford, Clarendon Press 1880). T. Baty and J.H. Morgan distinguish between the treatment of combatants and noncombatants. T. BATY & J.H. MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 172 (1915). None mentions detention.

[94] *Quirin*, 317 U.S. at 27–28.

it did not decide, in other words, whether he was a lawful or unlawful combatant,[95] although the government has treated him as an unlawful combatant. This may seem to matter little, if indeed both lawful and unlawful combatants may be detained, with lawful combatants protected as prisoners of war and unlawful combatants detained without such protections. But detention as a lawful combatant during World War II (when *Quirin* was decided) meant that international law provided an extensive set of regulations governing the terms of that detention.[96] Detention as an unlawful combatant at that time meant that one fell largely *outside* the protections of the law of war and was at the "mercy" of one's captors;[97] this system was designed to protect civilians

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[95] *Hamdi*, 124 S. Ct. at 2649 n.2. Hamdi did not argue that he qualified for prisoner-of-war status. Instead, he argued that the Geneva Conventions entitled him to a hearing. *See* Cleveland, *supra* note 73 (manuscript at 73). The point here is not necessarily that the Supreme Court should have decided his entitlement to prisoner-of-war status, but instead that absent such a determination many of the sources relied upon by the plurality are of questionable relevance to the scope of the AUMF.

[96] *See generally* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention] and its annexed Regulations Respecting the Laws and Customs of War on Land [hereinafter Hague Regulations]; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Geneva Convention]. The Hague Regulations defined those detainees eligible for prisoner-of-war status and provided rules governing their detention, including their right to personal belongings (Article 4), to treatment "on the same footing as the troops of the Government who captured them" (Article 7), and to the free exercise of religion (Article 18). 1907 Hague Convention, *supra*, art. 4, 36 Stat. 2296; *id.* art. 7, 36 Stat. 2297; *id.* art. 18, 36 Stat. 2301. The 1929 Geneva Convention provided even more comprehensive protections to prisoners of war. *See* Horst Fischer, *Protection of Prisoners of War*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 321, 322–23 (Dieter Fleck ed., 1995). The United States is a party to both the 1929 Geneva Convention and the 1907 Hague Convention. *See generally* 1929 Geneva Convention, *supra*; 1907 Hague Convention, *supra*. In 1949, the Geneva Convention Relative to the Treatment of Prisoners of War replaced the 1929 Geneva Convention between contracting parties and complemented sections of the Hague Regulations. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see also Territo*, 156 F.2d at 146–47 (considering some of the terms of the 1929 Geneva Convention); OPPENHEIM, *supra* note 93, §§ 127–132, at 299–306 (discussing the relationship between the 1909 Hague Convention and the 1929 Geneva Convention, and exploring the coverage of both).

[97] The Hague Regulations and the 1929 Geneva Convention provided protections only for those who qualified as prisoners of war; others fell outside the scope of these treaties. Hague Regulations, *supra* note 96; 1929 Geneva Convention, *supra* note 96; *see* BATY & MORGAN, *supra* note 93, at 172, 195–96 (noting that the unlawful combatant "exposes himself to the certainty" of death because he is not entitled to the protections of the law of war and further noting that spies are unprotected by international law and are "to be shot"); HALL, *supra* note 93, § 135, at 351–53 (noting that for universally-recognized acts of unlawful belligerency prisoners "may be abandoned without hesitation to the fate which they deserve" and that death may be appropriate even for less well-recognized unlawful acts,

and other belligerents by providing incentives for combatants to properly identify themselves.[98] Thus, the plurality, by reference to *Quirin*, relied on international law, but that law (as it existed during World War II) provided no affirmative sanction for, or regulation of, the detention of unlawful combatants. This body of law was used to justify the detention of Hamdi as an unlawful combatant, but such detention would have fallen largely outside its purview.

International humanitarian law has changed dramatically since World War II, and this leads to the third problem with the plurality's reliance on *Quirin* and the law of war. The law of war, particularly the Geneva Conventions of 1949,[99] now provides greater protections to a much larger group of prisoners than it did during World War II.[100]

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including the failure to distinguish oneself adequately as a combatant); OPPENHEIM, *supra* note 93, §§ 251–257, at 451–59 (defining war crimes to include acts of unlawful belligerency and noting that such crimes may be punished by death or "a more lenient punishment"); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT'L L. 1025, 1026 (2004) ("Through World War II, international law permitted armies to deal harshly with unlawful combatants, even allowing them to be shot after capture."); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 368–70 (2004) (collecting sources, including the Lieber Code, which provided that those who engaged in hostilities but were not prisoners of war could be "captured and summarily shot").

[98] As one author explained shortly after the end of World War II, "International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent." Thus, such belligerents "do not benefit from any comprehensive scheme of protection." Major Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. YEARBOOK OF INT'L L. 323, 343 (1951).

[99] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 96; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; *see* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 43–46, 50–52 (2d ed. 2000) (describing the expanded protections provided by the 1949 Geneva Conventions and their Protocols).

[100] The most significant changes to the types of protected persons include those provided by Article 3 (which is common to all four of the 1949 Geneva Conventions), the Fourth Geneva Convention, and Articles 43, 45, and 75 of Protocol I. Common Article 3 expanded the type of conflict to which basic international humanitarian protections applied by providing minimum protections to certain persons detained in "armed conflict not of an international character." First Geneva Convention, *supra* note 99, art. 3, 6 U.S.T. at 3116–18; Second Geneva Convention, *supra* note 99, art. 3, 6 U.S.T. at 3220–22; Third

Again, the difficulty in *Hamdi* is that the government has not admitted that any of these protections apply to his detention.[101] It is one thing

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Geneva Convention, *supra* note 96, art. 3, 6 U.S.T. at 3318–20; Fourth Geneva Convention, *supra* note 99, art. 3, 6 U.S.T. at 3518–20; *see also* JEAN DE PREUX, INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 27–44 (Jean S. Pictet ed., A.P. de Heney trans., 1960) (detailing the efforts of the International Committee of the Red Cross to expand international humanitarian law to apply to civil wars and other non-international conflicts). The Fourth Geneva Convention provides extensive protections to some prisoners who are not covered by the other three Geneva Conventions. Fourth Geneva Convention, *supra* note 99, art. 4, 6 U.S.T. at 3520. Protocol I expanded the definition of prisoner of war (articles 43, 44) and the protections afforded those who are not prisoners of war (Article 44), including basic minimum protections for any detainee not otherwise entitled to more favorable treatment under the Geneva Conventions and Protocol I (Article 75). Protocol I, *supra* note 99 arts. 43, 44, 75, 1125 U.N.T.S. at 23–24, 37–38. The foregoing description is an obvious oversimplification of a very complicated set of interrelated treaty protections. Professors L.C. Green and Derek Jinks provide additional detail. *See* GREEN, *supra* note 99, at 229–43, 317–20. *See generally* Jinks, *supra* note 97. Professor Jinks argues that the Geneva Conventions and their Protocols provide substantial protections to all detainees, thus diminishing the importance of prisoner-of-war status. Jinks, *supra* note 97, at 380–413.

[101] *See* Memorandum from President George W. Bush, to National Security Advisors 1 (Feb. 7, 2002) (stating that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees" in part because the "relevant conflicts are international in scope"), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (date released June 22, 2004). *Contra* Jinks, *supra* note 97, at 399–405, 421–22 (arguing that Common Article 3 protects unlawful combatants in international disputes); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 512–13 n.29 (2003) (arguing that Common Article 3 protects prisoners like Hamdi). Citizens of the United States like Hamdi, who are detained by the U.S. government, fall outside the definition of a protected person under the Fourth Geneva Convention. Fourth Geneva Convention, *supra* note 99, art. 4, 6 U.S.T. at 3520 (protecting those who "at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party . . . of which they are not nationals"). Although Part II of the Fourth Geneva Convention appears to apply without regard to nationality, it is unclear that any of the protections in that Part apply to detention. *See id.* art. 13, 6 U.S.T. at 3526–28. The United States has also suggested that the Fourth Geneva Convention applies only to "civilian noncombatants." *See* Press Release, Office of the Press Secretary, The White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Mar. 15, 2005). *Contra* Jinks, *supra* note 97, at 381–86 (concluding that the Fourth Geneva Convention applies to unlawful combatants). The United States is not a party to Protocol I and has specifically objected to its expanded protections of certain kinds of combatants. *See* Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531, 534 (1986) ("It bears stressing that the essence of humanitarian law is the distinction between combatants and noncombatants. And the essence of terrorism is the negation of the distinction. Protocol I in effect blesses the negation."); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 127–34 (1985) (arguing against according combatant status to guerrillas or others "not identifiable as part of a readily distinguishable military unit"). The United States, however, has suggested that it may view Article 75 as customary international law. *See* Jinks, *supra* note 97, at 431 n.359. It has not suggested, however, that it is bound by such law in its treatment of Hamdi. At times

to reason that Congress authorized the President to detain in ways affirmatively sanctioned and regulated (and thus also limited) by the law of war; it is quite another to rely on some law-of-war authorities to support the claim of congressional authorization for a detention that purportedly falls outside the scope of those authorities.

b. *Other Sources*

The plurality opinion in *Hamdi* cited three sources that describe the *purpose* of military detention, again to support the proposition that detention is a "fundamental" part of warfare. The only case, *In re Territo*, involved an American citizen captured while fighting for Italy during World War II and detained as a prisoner of war.[102] The Ninth Circuit's language in *Territo* discussing the purpose of detention is unsupported by any other authority.[103] Moreover, the detention of

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the United States has all but acknowledged that (under its approach) the detainees fall outside the law of war. *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1056 n.217 (2004). Professor Kim Lane Scheppele provides the following description of a press conference held by former White House Press Secretary Ari Fleischer:

> A reporter, exasperated at not getting a straight answer about whether the detainees were covered by the Geneva Convention or not, asked, "There's no international convention or there's no law on which we're detaining them, it's basically, they're dangerous, they want to kill Americans, and we're going to keep them in detention." And Fleischer seemed to grant the point in his answer: "[P]ut it this way: There's a war in Afghanistan. These people did not stop fighting; it was either be killed or be captured. These people were captured."

Id. (citing Press Briefing by Ari Fleischer, White House (Jan. 9, 2002)).

[102] 156 F.2d at 143.

[103] The sentence in *Territo* to which the *Hamdi* plurality cited reads in full as follows: "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely [FN1] and in time exchanged, repatriated [FN2] or otherwise released." *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion); *Territo*, 156 F.2d at 145. *Territo* does cite purported support for the proposition that prisoners must be treated humanely. Footnote 1 cites "Floury, Prisoner of War, p. 15; Hall Int. Law, pp. 490–497; Oppenheim Int. Law, Vol. II, pp. 216–218; Rex v. Shiever, 97 Eng. Repts. 551. As to Prisoners of War, *see* Hyde Int. Law, Sec. 675, p. 1859." The referenced pages in William Edward Hall's *International Law* appear irrelevant. *See* HALL, *supra* note 93, §§ 204–207, at 490–97. The relevant pages in Professor Oppenheim's *International Law: A Treatise* discuss at length when a neutral acquires enemy status under international law; page 216 does not state that punitive measures are not permitted against such persons. *See* OPPENHEIM, *supra* note 93, § 88, at 216–18. Section 675 of Professor Hyde's *International Law: Chiefly as Interpreted and Applied by the United States* (which is not on page 1859) discusses situations under which people lose their "belligerent qualifications," and thus their right to treatment as prisoners of war. *See* HYDE, *supra* note 93, § 675, at 344–45. People in an occupied territory who rise up against the occupier, for example, are not so entitled and may "suffer death" if captured. The Eng-

Hamdi differs from that of Territo in a significant way that bears particularly on the scope of the AUMF. Territo was detained pursuant to the 1929 Geneva Convention,[104] a treaty ratified by the President and a supermajority of the Senate.[105] Not only did his detention thus fall within a carefully structured international legal framework, but the President and the Senate had also specifically considered and authorized the terms of that detention when they approved the 1929 treaty. Hamdi, however, was not detained pursuant to a treaty, and the terms and conditions of his detention thus lacked the imprimatur of *any* prior Senate and presidential authorization.

The citations by the plurality to works by Yasmin Naqvi and William Winthrop underscore this loose approach to international law. Winthrop's *Military Law and Precedents*, originally published after the Civil War, has become an important reference work for American courts and commentators.[106] The section from which the plurality quoted cites manuals of international law,[107] but it is unclear whether the plurality viewed the work as a guide to nineteenth-century American practice or as a reflection of international norms and why either is probative of modern practice. The discussion in Naqvi is devoted entirely to the treatment of prisoners of war.[108]

One might argue that the references to international law in this part of the plurality's opinion are only indirect, and that they are important because they have become incorporated into Executive

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lish case from 1759, *Rex v. Shiever*, considered the detention of a Swedish man. 97 Eng. Rep. 551, 551–52 (1759). Sweden was neutral, but the prisoner had been caught in the service of a French privateer and the court held that he was properly held as a prisoner of war. *Id.* These sources say little about either the purposes or conditions of detention, although they do outline ways in which neutrals attain enemy status. Footnote 2 cites only to sources that govern prisoners of war.

[104] *See Territo*, 156 F.2d at 144.

[105] *See* U.S. CONST. art. II, § 2.

[106] *See, e.g.*, Loving v. United States, 517 U.S. 748, 761 (1995) (citing WINTHROP, *supra* note 80, for the history of military justice); United States *ex rel* Toth v. Quarles, 350 U.S. 11, 15 n.8 (1955) (citing WINTHROP, *supra* note 80, as a leading authority on military law); Madsen v. Kinsella, 343 U.S. 341, 346–47 n.9 (1952) (citing WINTHROP, *supra* note 80, on the history and scope of military commissions); *Quirin*, 317 U.S. at 32–33 n.10, 35–36 n.12 (citing WINTHROP, *supra* note 80, for the history of military commissions and to interpret the law of war); Caldwell v. Parker, 252 U.S. 376, 386 (1920) (citing WINTHROP, *supra* note 80, to interpret the Articles of War); Carter v. McClaughry, 183 U.S. 365, 386 (1902) (citing WINTHROP, *supra* note 80, for "military usage and procedure").

[107] This discussion in Winthrop's *Military Law and Precedents* cited to "Manual, Laws of War, Part II—of Prisoners of War" published in 1880 by the Institute of International Law, and to the Lieber Code used by Union forces during the Civil War. *See* WINTHROP, *supra* note 80, at 788.

[108] Naqvi, *supra* note 80, at 572.

Branch practice or U.S. case law, not because they have anything to do with international law. There are several difficulties with this argument, however. First, if these sources are important only as guides to U.S. practice, then the plurality opinion is remarkably weak. It is hard to see how *dicta* from a 1942 Supreme Court case (that involved military trials) and *dicta* from a 1946 Ninth Circuit case (that involved only detention of prisoners of war), coupled with a law review article from the International Red Cross and a Civil War-era treatise, could possibly show that detention is part of Executive Branch practice or a "fundamental incident of war" in 2004. Instead, these sources support the plurality's opinion in part because they, in turn, reflect international law and practice, as the plurality opinion makes clear with its references to the "law of war."[109] Second, because the key question is the scope of authorization by Congress, it is difficult to see why the Hague and 1929 Geneva Conventions are relevant based only on their citation in *Territo*—a Ninth Circuit opinion from 1946—rather than based on their status as treaties under the Supremacy Clause, or based on the agreement of the Senate and President to the norms included in those treaties. Finally, to argue that the plurality refers to these international norms because they are already part of U.S. case law leads to the odd conclusion that the use of international sources is frozen, and the Court may rely only on those that it has already cited. Of course, the plurality opinion in *Hamdi* itself undermines such a conclusion by citing the 1949 Geneva Conventions, concluded after *Quirin* and *Territo*—this leaves open the question of how exactly those Conventions are relevant, and whether manuals illustrating foreign practice (like those upon which *Quirin* relied) should have equal weight.

2. "No Bar" to Detentions of U.S. Citizens

The weaknesses in the plurality's approach become even more acute when it considers the following critical question about congressional authorization: does the AUMF authorize the detention of *U.S. citizens?* Here, the plurality drew explicitly from the law of war, reasoning (based on *Quirin* and the Lieber Code) that it provides "no bar" to the detention of U.S. citizens.[110] Although the preceding part of the

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[109] *See Hamdi*, 124 S. Ct. at 2640–41 (O'Connor, J., plurality opinion).

[110] *Id.* at 2640–41 (O'Connor, J., plurality opinion). The full passage from *Quirin* reads as follows:

plurality opinion used international law to determine what activities are "fundamental" to war, this discussion used international law *not* to show that detaining one's own citizens is "fundamental" to the conduct of war, but to show that it is not *foreclosed* by the law of war.[111]

In terms of interpreting the text of the AUMF, the difference is important. In the latter situation, the law of war is used to enhance the scope of authorization to embrace everything that is not specifically prohibited by the law of war; the former reads the authorization to embrace only conduct that qualifies as "fundamental" to waging war. Unlike the detention of armed combatants in general, it is hard to see how the detention of one's own citizens is a "fundamental incident" of international armed conflict.[112] This is a far broader

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> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

317 U.S. at 37–38.

[111] *See Hamdi*, 124 S. Ct. at 2640–41 (O'Connor, J., plurality opinion).

[112] The laws governing the conduct of war, or *jus in bello*, developed largely around international conflict and were designed to mitigate the harms inflicted by one country on the nationals of another country. *See* Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 1, 11 (Dieter Fleck ed., 1995) ("For the most part, humanitarian law does not attempt to regulate a state's treatment of its own citizens."). For example, although international law generally affords lawful combatants protection from criminal prosecution (for their lawful use of force), international law does not prevent a nation from criminally prosecuting its own citizens for treason (or other crimes) when they take up arms against it. GREEN, *supra* note 99, at 119–20 (noting that deserters "are entitled to receive from the soldiers capturing them the same treatment as any other captive" although under national law they may be tried for treason); HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 74–76 (1977) (arguing that any detainee should be protected by international law regardless of nationality, but that the Detaining Power can charge him with treason under its municipal law and "try him in accordance with the guarantees contained in the relevant provisions of the Convention"); OPPENHEIM, *supra* note 93, § 86, at 213 (indicating that "traitorous subjects" who "fight in the armed forces of the enemy" cannot claim the privileges of the law of war; instead "[t]hey may be, and always are, treated as criminals"). There is even some question as to whether the Third Geneva Convention applies at all when a country detains one of its own nationals. Both *Territo* and Justice Souter's opinion in *Hamdi* suggest that it does. *See Hamdi*, 124 S. Ct. at 2457–60 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *Territo*, 156 F.2d at 145 (interpreting the 1929 Geneva Convention). In its brief in *Hamdi*, the government argued that the Third Geneva Convention did not protect Hamdi but did not mention this argument. *See* Respondents' Brief at *22–24, *Hamdi* (No. 03-6696). Nevertheless, there are some good reasons to think that the Third Geneva Convention does not protect people detained by governments of which they are nationals. *See* Amann, *supra* note 1; Jinks, *supra*

use of international law that potentially invites reliance on a wide variety of sources. Indeed, the *only* evidence the plurality cited to support reading the AUMF to include such detentions is that the law of nations posed "no bar" to this interpretation,[113] coupled with the purposes of detention itself.

3. No Authorization for "Indefinite Detention"

The plurality's last use of international law was the most explicit, and it worked to limit the scope of the AUMF. Directly relying on four treaties and one law review article, the plurality concluded that the AUMF did not authorize "indefinite detention for the purpose of interrogation."[114] Here, in contrast to the earlier references to international sources, the plurality limited its sources to treaties to which the United States is a party,[115] and did so to avoid what might have been a direct conflict between the scope of the AUMF and international law.

The difficulty with the plurality's analysis is that it ignored the content of international law itself, as well its status in the domestic legal system and the participation of the political branches in developing or approving such law. For example, the plurality failed to note that the United States is a party to all four of the treaties upon which it relied.[116] It also failed to consider whether those treaties are self-

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note 97, at 421–22 n.302. Although modern international law provides some protections to people detained by their own governments, *see supra* note 107, this does not show that such detentions are a "fundamental incident" of war. The detention of Confederate citizens pursuant to the Lieber Code during the Civil War does not change this conclusion; Congress had already suspended the writ of habeas corpus. *See Hamdi*, 124 S. Ct. at 2672 n.5 (Scalia, J., dissenting). In any event, because the Confederate states were the enemy in that conflict, detention of their citizens merely suggests that detention itself was an integral part of that war; it does not suggest that the detention of U.S. citizens is fundamental in armed conflicts against foreign entities.

[113] Justice Scalia criticized the majority's conclusion on this point, concluding that Congress did not authorize the detentions of a citizen with the AUMF, citing in part "the statutory prescription that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.'" *Hamdi*, 124 S. Ct. at 2671 (Scalia. J., dissenting) (quoting 18 U.S.C. § 4001(a) (2000)). He pointed out that some of the plurality's authorities are irrelevant because they do not "address the detention of *American citizens*." *Id.* at 2671 n.5 (Scalia, J., dissenting).

[114] *Id.* at 2641 (O'Connor, J., plurality opinion).

[115] The plurality relied on the Third Geneva Convention of 1949, the 1929 Geneva Convention, and the 1907 Hague Convention. *See id.* (O'Connor, J., plurality opinion). It also relied on the 1899 Hague Convention, which was superseded by the 1907 Hague Convention for those states party to both. *See* DOCUMENTS ON THE LAWS OF WAR 67–68 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

[116] *See supra* note 101.

executing and have direct effect as domestic law without any implementing legislation,[117] and it did not discuss whether either of these features was relevant in using the treaties to interpret the AUMF. Furthermore, the treaties cited generally govern the treatment of prisoners of war,[118] but the plurality nowhere concluded that Hamdi is a prisoner of war. Perhaps the plurality meant to suggest that the difference between prisoners of war and others does not matter for purposes of detention, but this is problematic because the four conventions are devoted largely to establishing who qualifies as a prisoner of war and setting forth special rules governing their treatment. The plurality did not, in other words, cite to any authority that prohibits indefinite detention of non-prisoners of war.[119] There are, in fact, international norms that may bar such detention,[120] but they are not among the sources that the plurality cited.[121]

B. *Justice Thomas's Dissenting Opinion: More Expansive Congressional Authorization*

Justice Thomas joined the plurality in concluding that the AUMF authorized Hamdi's detention, but he did not use international law to

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[117] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987).

[118] *See supra* note 96. Article 3 of the Third Geneva Convention may provide some protections for unlawful combatants, *see* Jinks, *supra* note 97, at 403–09, but the President denies that Article 3 applies to Hamdi's detention. *See supra* note 100.

[119] One might argue that Article 3 of the Third Geneva Convention prevents indefinite detention of certain non-prisoners of war because it prohibits "cruel treatment" and the "passing of sentences" without "previous judgment pronounced by a regularly constituted court." Third Geneva Convention, *supra* note 96, art. 3(1)(a), (d), 6 U.S.T. at 3320. Even if this argument is plausible, it was not advanced by the plurality, and Article 3 does not, according to the Bush administration, apply to Hamdi's detention.

[120] *See, e.g.*, Brief of Amicus Curiae Global Rights in Support of Petitioners at *8–9, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 354184 (arguing that various treaties and customary international law prohibit "arbitrary detention").

[121] The plurality reasoned that the AUMF authorized detention for the duration of hostilities, based on "longstanding law-of-war principles," but also concluded that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion). This suggests that if the type of conflict involved is unlike the one that generated the law of war, the plurality might not view the law of war as supporting the government's interpretation of the AUMF. One difficulty with this point is that it would seem to apply to other parts of the plurality's opinion—why, for example, do limitations on the treatment of prisoners of war apply even to those who may not qualify as prisoners of war? Moreover, the standard of deviation that the plurality suggests—"practical circumstances" that are "entirely unlike" those contemplated by the law of war—is a very difficult one to apply.

reach that conclusion. Instead, Justice Thomas emphasized that Congress and the President, not the courts, have primary control over national security issues, and that broad authorizations of authority to the President by Congress do not imply a denial of specific powers not explicitly enumerated by Congress.[122] He also suggested the problem, discussed above, that the plurality's reasoning that the AUMF does not authorize unlimited detentions was based only on treaties that apply to prisoners of war.[123] Justice Thomas left open the possibility that international law could be used to expand, but not limit, the scope of congressional authorization for the President's actions.[124]

C. *Opinions of Justices Scalia and Souter: No Congressional Authorization*

Four Justices concluded that the AUMF did not provide congressional authorization for the detention of Hamdi. Although all four concluded that international law did not support the plurality's interpretation of the AUMF, none took a clear position on the use of international law to construe authorizations for the use of force in future cases. Justice Souter, joined by Justice Ginsburg, reasoned in part that Hamdi's detention may violate Article 5 of the Third Geneva Convention, which requires a "competent tribunal" to determine combatant status.[125] On this basis, Justice Souter rejected the plurality's conclusion that the law of war authorized Hamdi's detention and that the AUMF should be interpreted accordingly.[126]

Justice Scalia, joined by Justice Stevens, also concluded that the AUMF did not authorize the detentions, although Justice Scalia rea-

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[122] *Id.* at 2675–80 (Thomas, J., dissenting). Justice Thomas also relied on *Moyer v. Peabody*, which interpreted an 1897 act of the Colorado legislature. *See id.* at 2679 (Thomas, J., dissenting) (citing Moyer v. Peabody, 212 U.S. 78, 84 (1909)).

[123] *Id.* at 2679 (Thomas, J., dissenting) ("I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply."). The "treaty that does not apply" seems to be the Third Geneva Convention, which Justice Thomas apparently concluded does not apply based on the government's argument that the President conclusively determined that Hamdi is not a prisoner of war. *See id.* at 2679, 2685 n.6 (Thomas, J., dissenting).

[124] Elsewhere in his opinion Justice Thomas suggested that consistency with the law of war may strengthen the President's assertion of authority, at least "to the extent that the laws of war show that the power to detain is part of a sovereign's war powers." *Id.* at 2685 (Thomas, J., dissenting). This is a potentially powerful and important argument, but it is not related to the use of international law to construe the scope of congressional authorization.

[125] *Id.* at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citing Third Geneva Convention, *supra* note 96, art. 5, 6 U.S.T. at 3324).

[126] The plurality opinion did not explicitly respond to Justice Souter's conclusions regarding Article 5 of the Third Geneva Convention. *See supra* note 95 and accompanying text.

soned that congressional authorization short of suspending the writ of habeas corpus would not make the detentions constitutional in any event.[127] Justice Scalia rejected the majority's reliance on international law in part because the sources cited by the plurality did not address the detention of U.S. citizens.[128] Justice Scalia, like Justice Souter, rejected the plurality's use of international law to interpret the AUMF as authorizing Hamdi's detention, but he took no clear position on the broader question of whether international law might serve to construe general use of force resolutions in other cases.[129]

D. *Conclusion*

The plurality's opinion has the following three analytical weaknesses: a failure to distinguish among different types of international law, a lack of attention to the content of international law, and a failure to distinguish among different interpretive uses of international law. First, the plurality did not distinguish among different types of international law, although the different sources seem to vary widely in their relationship to the AUMF. For example, treaties, the terms of which have already been considered and approved by the President and the Senate and which actually apply to the detention, would provide a particularly strong basis for determining the scope of authorization by Congress.[130] The *Hamdi* plurality, however, invoked treaties without deciding whether or not they applied, seemed to employ outdated treatises on equal footing, and failed to clarify whether the Geneva and Hague Conventions are self-executing.

The plurality also failed to focus on the content of international law. For example, it cited the Hague and Geneva Conventions for the "clearly established principle of the law of war that detention may last no longer than active hostilities."[131] These sources, however, establish

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[127] *Hamdi*, 124 S. Ct. at 2671–72 (Scalia, J., dissenting).

[128] *Id.* at 2671–72 n.5 (Scalia, J., dissenting). The opinion distinguishes *Territo* and *Quirin* on the grounds that those cases involved citizens who (unlike Hamdi) were "conceded to have been members of enemy forces." *Id.* at 2670 nn.3–4 (Scalia, J., dissenting).

[129] Confusing matters somewhat is Justice Scalia's observation that although "captivity may be consistent with the principles of international law" this "does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens." *Id.* at 2671–72 n.5 (Scalia, J., dissenting). Because this language appears in a discussion of whether Congress authorized the detentions, it is unclear whether it suggests that international law is inapplicable in that context, or whether it is inapplicable as a tool of *direct* constitutional interpretation.

[130] *See supra* notes 102–105 and accompanying text.

[131] *Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion).

this principle for *prisoners of war*, and the plurality did not conclude that Hamdi qualified as such.[132] Moreover, if Hamdi is entitled to prisoner-of-war status, the United States is in violation of its treaty obligations, but the plurality appeared to ignore this possibility entirely, reasoning instead that its conclusion was "based on longstanding law-of-war principles."[133] This disregard for whether the United States is in violation of its treaty obligations suggests not respect, but instead a disdain for the binding nature of international law.[134]

The plurality also did not distinguish among the different interpretive roles that international law can play in construing congres-

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[132] *Id.* (O'Connor, J., plurality opinion). Moreover, the plurality opinion not only used international law to interpret the scope of the AUMF, it also used international law (and cases applying international law) to the virtual *exclusion* of any other interpretive tool, such as close analysis of the legislative history of 18 U.S.C. § 4001(a) (2000) or a discussion of the Patriot Act. Justice Souter relied on both in reaching the opposite conclusion from the majority. *Id.* at 2652–60 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Scalia, too, reached the opposite conclusion based in part on the text of § 4001(a), the canon of statutory interpretation that seeks to avoid "grave constitutional concerns," and World War II era cases in which the Supreme Court refused to find statutory authorization for the President's actions. *Id.* at 2669–71 (Scalia, J., dissenting). Perhaps international law serves as a better interpretive tool, but the plurality opinion does not explain why.

[133] *Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion).

[134] Of course, the plurality "fixed" these potential violations of international law by ordering a hearing (avoiding Article 5 violations) and prohibiting indefinite detention. *Id.* at 2673 (Scalia, J., dissenting) (describing "what might be called" the plurality's "Mr. Fix-it Mentality" and "its mission to Make Everything Come Out Right"). The plurality did so, however, without noting that the detentions might violate international law; this, in turn, suggests that Congress enacted the AUMF with a view toward "fundamental incidents of war" as reflected in a handful of cases half a century old, but with little regard to the current obligations of the United States under international law. The disregard for the content of international law, particularly the failure to focus on potential violations of international law, could eventually serve to fuel criticism that the United States only complies with international law when it is convenient to do so. *See* Amann, *supra* note 44, at 285 (noting that U.S. demands for Iraqi compliance with the Third Geneva Convention had a "disconcertingly hollow ring" in light of the treatment of Hamdi, Padilla, and the Guantanamo detainees); *id.* at 285 n.95 ("'The Secretary of Defense would be in a better position to defend the Geneva Conventions if he were applying them himself.'" (quoting *Pas d'interview*, LE MONDE, Mar. 26, 2003)); Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47, 72 (2004) ("The across-the-board determination that the detainees were ineligible for POW status came under intense criticism by human rights organizations, European governments, the International Committee of the Red Cross, and multilateral institutions." (footnotes omitted)); Editorial, *The Guantanamo Story*, WASH. POST, Jan. 25, 2002, at A24 (arguing that the Guantanamo detentions suggested that the "Bush administration would respect international law only so far as it chose to"); Editorial, *Stick to the Prison Rules: The Geneva Convention Protects Us All*, GUARDIAN, Jan. 18, 2002, at 19 (arguing that the "U.S. administration is more at home with an improvised process that sometimes skirts the frontiers of legality than with international agreements that impose firm reciprocal responsibilities").

sional authorization for the President's actions.[135] Some actions of the President may be prohibited by international law, others may be affirmatively sanctioned by international law, and still others fall largely outside of international law. Thus, by asking generally what constitutes a "fundamental incident" of war, the Court obscured the fact that Hamdi falls outside many of the legal regimes put in place by the very international legal sources upon which the opinion depends.

All told, the plurality's direct and indirect recourse to international law is flawed. Although the detention even of U.S. citizens as enemy combatants may be a fundamental incident of armed conflict, the plurality's analysis falls short of demonstrating this conclusion. The plurality opinion potentially permits a broad and open-ended use of many international legal sources (binding on the United States or not), without sufficient attention to the actual content of international law or the participation of the political branches in its development, and with little effort to link meaningfully its analysis to the text of the AUMF or any other measure of congressional intent. As a result, the plurality opinion is open to the argument that its use of international sources leaves too much discretion to judges; that it fails to provide meaningful guidance for Congress, the President, or the lower courts; and that it does not advance the development of transnational norms or enhance the international position of the United States.

III. Congressional Authorization and Violations of International Law

This Part explores in detail one potential use of international law suggested by the *Hamdi v. Rumsfeld* opinion, and addresses some of the problems identified above.[136] The plurality opinion in *Hamdi* concluded that Congress had not authorized "indefinite detention for the purpose of interrogation" in the AUMF because the Third Geneva

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[135] *See* John K. Setear, A Forest with No Trees: The Supreme Court and International Law in the 2003–04 Term 33 (Univ. of Va. Law Sch., Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12, 2004) (describing this part of the plurality's opinion as having "a definite air of attention to customary international law"), *available at* http://law.bepress.com/uvalwps/uva publiclaw/art12 (Oct. 4, 2004).

[136] This analysis does not foreclose other potential uses of international law in construing the AUMF, if such uses also avoid the pitfalls discussed above. In particular, this Part does not consider whether the AUMF should be interpreted in a way consistent with international law, as opposed to an interpretation that disfavors violations of international law. For example, one might ask whether the AUMF authorizes the President to detain prisoners of war. Although such detention is fully consistent with the Third Geneva Convention (assuming that its conditions are met), international law does not *require* such detention.

Convention, the 1929 Geneva Convention, and the Hague Conventions require the release of prisoners after the "conclusion of peace" or end of "active hostilities."[137] The plurality did not conclude, however, that these conventions actually applied to Hamdi's detention. Justice Thomas, however, suggested that international law should not be used to limit the scope of authorization for the use of force by Congress.[138] There are strong reasons to conclude that general authorizations for the use of force should not be interpreted to empower the President to violate international law. Therefore, if Hamdi's detention conflicts with those laws, the courts should presume that the AUMF does not grant such authority to the President. The point is not that the plurality reached the wrong conclusion, but that by focusing more specifically on whether the international norms actually applied to this detention, the plurality would have better linked its conclusion to the presumed intentions of Congress and better promoted separation-of-powers values.

The first Section of this Part considers the use of international law based on the text of the AUMF, concluding that the text may support a general recourse to international law as an interpretive tool and that there are some cases that may support this use of international law.[139] Neither the text of the authorization nor the cases, however, provide any clear basis upon which to distinguish among various uses and sources of international law.[140] The following Section considers the interpretive value of international law through the well-established canon of statutory construction that seeks to avoid violations of international law.[141] The final Section revisits the plurality's opinion in *Hamdi*, considering how this canon of statutory construc-

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[137] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2641 (2004) (O'Connor, J., plurality opinion).

[138] *See id.* at 2679 (Thomas, J., dissenting). In one respect, the approach advanced here is similar to that used by Justice Souter, who examined the Third Geneva Convention in far greater detail than did the plurality and concluded that the government had failed to demonstrate that Hamdi's detention comported with its requirements because it had not afforded him an Article 5 hearing. Justice Souter, however, used this reasoning to conclude that the government could not rely on international law to support its position. Under the analysis here, however, if Hamdi's detention conflicts with international law this does not just prevent the government from relying on international law to support an expansive view of the President's power in this case; it also means that the courts should presume that the AUMF does not authorize such detentions. The analysis presented here is, moreover, somewhat different from that advanced by Justice Souter, and this Article leaves open the more general question of whether consistency with international law is an appropriate tool for interpreting the AUMF. *See supra* note 136.

[139] *See infra* notes 143–163 and accompanying text.

[140] *See infra* notes 143–163 and accompanying text.

[141] *See infra* notes 164–245 and accompanying text.

tion could apply based on claims that Hamdi's detention violated the Third Geneva Convention and the International Covenant on Civil and Political Rights (the "ICCPR").[142]

A. *The AUMF: Text and Legislative History*

The plurality appears to have used international law in part because the text of the AUMF, coupled with the historical practice of the United States, invites the use of international law as an interpretative tool. Or, to use language that the plurality did not, one might argue that international law can help determine the plain meaning of the text of the AUMF as understood by an ordinary speaker of English,[143] or to provide context that illuminates the terms used in the AUMF.[144]

The phrase "all necessary and appropriate force" as used in the AUMF might invite recourse to international law for several reasons, at least if it is equated with an authorization to conduct war or "armed conflict" between states.[145] The development of laws and customs of war regulating the conduct of belligerents has been a focus of international law for centuries.[146] As a result, there is a well-developed and sophisticated network of treaties, customary international law, and treatises setting forth the rules and regulations governing the conduct of war.[147] The United States has been an active, and at times leading, participant in the development of *jus in bello*.[148]

Moreover, considered in context, the AUMF clearly contemplated the use of force against *foreign* states, groups, and individuals,[149]

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[142] *See infra* notes 246–275 and accompanying text.

[143] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

[144] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994).

[145] This is the language used by the Geneva Conventions, which apply the law of war to armed conflicts between states, even absent formal declarations of war. First Geneva Convention, art. 3, *supra* note 99, 6 U.S.T. at 3116–18; Second Geneva Convention, art. 3, *supra* note 99, 6 U.S.T. at 3220–22; Third Geneva Convention, art. 3, *supra* note 96, 6 U.S.T. at 3318–20; Fourth Geneva Convention, art. 3, *supra* note 99, 6 U.S.T. at 3518–20. The term "war" is no longer as significant under international law as it once was. *See* GREEN, *supra* note 99, at 43–44; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 3 (2004).

[146] *See* GREEN, *supra* note 99, at 20–52.

[147] *See supra* note 99 (naming some of the most important modern treaties on international humanitarian law); *see also* GREEN, *supra* note 99, at 20–52 (same); Greenwood, *supra* note 112, at 1–38 (describing the history and contemporary scope of international humanitarian law).

[148] *See infra* notes 185–195 and accompanying text.

[149] Section 2(b)(1) of the AUMF also provides that it is "specific statutory authorization" within the meaning of the War Powers Resolution, and section 2(a) and that the use

perhaps inviting the use of international sources in a way that a purely domestic act of Congress would not. Thus, even though the relevant language of the AUMF is *not* a defined term under international law, these sources might nonetheless serve as a guide to the commonly understood meaning of "necessary and appropriate force," and provide useful interpretive context.

There is arguably some limited support for this approach in Supreme Court cases involving the scope of the President's powers when Congress has authorized the use of force through a declaration of war. In *Brown v. United States*, for example, the Court considered the Executive Branch's authority to seize enemy property in the United States during a declared war.[150] Reasoning that under the law of nations the state of war itself did not vest enemy property in the foreign sovereign, Chief Justice Marshall concluded that a general declaration of war was not sufficient; Congress had to specifically authorize the seizure of property.[151]

In more recent cases, the Court has generally depended on specific, statutory authorization for the President's actions; where the Court found such authorization lacking, it held the President's actions unlawful.[152] In these cases, the Court did not turn to the general

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of force is authorized to "prevent any future acts of *international* terrorism." Authorization for Use of Military Force, §§ 2(a)–(b)(1), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (emphasis added); *see* David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L. J. 71, 75 (2002) (noting that the language of the AUMF does not include the word "abroad" in reference to the use of force, but arguing that such language was probably unnecessary because of the reference to the War Powers Resolution).

[150] 12 U.S. (8 Cranch) 110, 123 (1814).

[151] *Id.* at 129; *see* The Paquete Habana, 175 U.S. 677, 710 (1900) (explaining that the issue in *Brown* was whether the British property "could lawfully be condemned as enemy's property . . . without a positive act of Congress" and that the Chief Justice "relied on the modern usages of nations" in "showing that the declaration of war did not, of itself, vest the Executive with authority to order such property to be confiscated"); *see also* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 383–84 (2003) (discussing the *Brown* case and the limitations imposed by the law of war on the President's authority).

[152] *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (granting habeas relief to petitioners whose military trials exceeded the scope of congressional authorization under the Hawaii Organic Act); *Ex parte* Endo, 323 U.S. 283, 302–04 (1944) (granting habeas relief to petitioner whose detention was authorized neither by federal statute nor by executive order). A possible exception is *Madsen v. Kinsella*, in which the Supreme Court appeared to suggest in places that the statute in question did not authorize the military trial of a dependent wife of a U.S. soldier, but elsewhere suggested that the statute was satisfied. 343 U.S. 341, 354–55 (1952) (stating that "[t]he 'law of war' in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government," sug-

authorization for the use of force (such as a declaration of war) coupled with international law to uphold the President's actions. Similarly, in *Ex parte Quirin*, the Court's reliance on the Articles of War as providing specific authorization for the military commissions was problematic because the President had failed to comply with certain requirements imposed by the statute.[153] Finding congressional authorization by virtue of the declaration of war would have solved this problem, and the Court could have relied on consistency with international law to reach this conclusion, but it did not do so.[154] The World War II era cases used international law largely to interpret statutes that specifically referenced it,[155] or (less clearly) to set the scope of the President's constitutional power,[156] rather than to interpret the scope of a general authorization for the use of force.

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gesting that the statute was satisfied). In suggesting that the President's authority did not come from the statute, the Court stated the following:

> In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.

Id. at 348. Where the Court has found congressional authorization, by contract, it has generally upheld the contested action. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943) (upholding detention authorized by both Congress and the President).

[153] The Articles of War required submission of the commission's decision to the Judge Advocate General's Office for review, but President Franklin Roosevelt's order made himself the sole reviewing authority. *See* G. Edward White, *Felix Frankfurter's "Soliloquy" in* Ex Parte Quirin, 5 GREEN BAG 2D 423, 429–31 (2002).

[154] The problem with this, as Justice Hugo Black reasoned, was that if the President was not bound by the Articles of War, he might have the power "'to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves.'" *Id.* at 431 (quoting Letter from Justice Hugo Black to Chief Justice Harlan Fiske Stone (Oct. 2, 1942) (Hugo L. Black Papers, Library of Congress) (further citation omitted)); *see* Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's War*, 98 NW. U. L. REV. 1567, 1575 n.60 (2004) (discussing *Quirin*'s reliance on the Articles of War rather than the declaration of war).

[155] Several cases, for example, interpreted the language of Article 15 of the Articles of War, which provided that the Articles "shall not be construed as depriving military commissions . . . of concurrent jurisdiction . . . in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions." 10 U.S.C. § 821 (2000); *see, e.g., Madsen*, 343 U.S. at 350–55; *In re* Yamashita, 327 U.S. 1, 19–20 (1946); *Ex parte* Quirin, 317 U.S. 1, 26–28 (1942).

[156] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 769–73, 781 (1950) (holding that enemy aliens detained abroad after conviction by military tribunal lacked the constitutional right to petition U.S. courts for writs of habeas corpus, relying in part on the international and comparative sources that distinguish between citizens and aliens and between friendly and enemy aliens).

Comparing the AUMF to other congressional authorizations for the President to use force does not substantially clarify the appropriate role of international law in interpreting the AUMF. A history of explicit reference to international law in such authorizations, for example, might make significant the absence of such language in the AUMF. There is no clear pattern, however, of explicit references to international law in congressional authorizations for the use of force.[157] Moreover, although the AUMF is arguably a very broad authorization for the use of force, it is not as broad as the Bush administration sought, and its language and scope are generally consistent with other such authorizations.[158]

Notably, the subsequent resolution in 2002 concerning Iraq authorized the President to use "the Armed Forces of the United States as *he determines* to be necessary and appropriate" in order to defend national security and enforce United Nations Security Council resolutions.[159] The AUMF, conversely, uses the phrase "necessary and appropriate force" without the "he determines" language. This com-

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[157] *See, e.g.*, Declaration of War Against Germany, S.J. Res. 1, 65th Cong., Pub. Res. No. 1, ch. 1, 40 Stat. 1 (1917). The 1917 Declaration of War Against Germany stated the following:

> [T]he President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

Id.; *see* Declaration of War Against Japan, S.J. Res. 116, 77th Cong., Pub. L. No. 77-328, 55 Stat. 795 (1941) (resembling the 1917 Declaration of War Against Germany); *see also* Gulf of Tonkin Resolution, H.R.J. Res. 1145, 88th Cong., Pub. L. No. 88-408, 78 Stat. 384 (1964) (providing Congress's support for "the determination of the President to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression"). Congress included a reference to international law when, in 1991, it authorized the President to use force against Iraq to "achieve implementation of [United Nations] Security Council Resolutions." Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3 (1991). The Authorization for Use of Military Force Against Iraq Resolution of 2002 includes similar language. Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002); *see infra* note 159.

[158] Bradley & Goldsmith, *supra* note 17, at 39–41.

[159] § 3(a), 116 Stat. at 1501 (emphasis added). The full text of section 3(a) of the Authorization for Use of Military Force Against Iraq Resolution of 2002 reads as follows:

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.

Id.

parison suggests that the 2002 Iraq authorization gives greater authority to the President to determine what is "necessary and appropriate," arguably leaving a greater role for the courts to use a variety of sources to determine what constitutes "necessary and appropriate" under the 2001 AUMF.[160] Although these differences in language may suggest differences in how much weight to accord the President's own interpretation of the scope of authorizations for the use of force, they do not clarify how the courts should use international law to interpret such authorizations.

The legislative history of the AUMF also provides little guidance as to how it should be interpreted specifically with respect to international law. A few remarks from members of Congress suggest that the AUMF was *not* intended to authorize violations of international law,[161] and there are no floor statements to the contrary. These are poor sources for statutory interpretation, however, and the AUMF was passed without any conference reports, which might have provided better tools of interpretation.[162] Furthermore, one staff member involved in drafting the AUMF commented that although the language was designed to comply with international law forbidding retaliation, international law was otherwise a secondary consideration for those who wrote the AUMF.[163]

Neither the text, nor the cases, nor the legislative history described above fully explain how international law should be used to interpret the scope of the AUMF. The following section explores and defends one such use of international law: general authorizations for the use of force, such as the AUMF, do not authorize violations of international law by the President.

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[160] The AUMF does use the phrase "he determines," but not in reference to what force is "necessary and appropriate." *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). Instead, it uses that phrase in reference to determining the appropriate target of the force—"those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.*

[161] 147 CONG. REC. H5638, H5644 (daily ed. Sept. 14, 2001) (statement of Rep. Roukema) (emphasizing that force should be used not just for retaliation, but also to defend the rule of international law); *id.* at H5653 (statement of Rep. Barr) (arguing that Congress should declare war to give "the President the tools, the absolute flexibility he needs under international law and The Hague Convention to ferret these people out"); *id.* at H5673 (statement of Rep. Clayton) (noting that Congress would monitor the President's use of force to make sure it is "in accordance with international laws"); *id.* at H5675 (statement of Representative Jackson) (stating that "we must . . . affirm the principles that came under attack on September 11—respect for innocent life and international law").

[162] *See* Abramowitz, *supra* note 149, at 71.

[163] *Id.* at 75 n.16.

B. *Through the* Charming Betsy *Lens*

The *Charming Betsy* canon provides that when "fairly possible," courts will construe statutes or acts of Congress so as not to conflict with "international law or with an international agreement of the United States."[164] The canon derives its name from Chief Justice Marshall's 1804 opinion for a unanimous Supreme Court in *Murray v. Schooner Charming Betsy*.[165] That case considered whether the schooner's owner had violated the Nonintercourse Act of 1800, which prohibited trade with France.[166] The Act applied to "any person or persons resident within the United States, or under their protection."[167] The *Charming Betsy*'s owner argued in part that because he was a Danish citizen, applying the Act to him would violate principles of neutrality under international law.[168] The Court reasoned that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains" and concluded that the Act did not apply to the owner because he was not under the diplomatic protection of the United States.[169]

1. Applying the *Charming Betsy* Canon

The plurality opinion in *Hamdi* did not identify the *Charming Betsy* canon, nor did it express particular concern about *violations* of international law; instead, the opinion discussed the limitation it imposed based on international law—no indefinite detentions—as simply based on "long-standing law-of-war principles."[170] The canon, despite the difficulties discussed below, nevertheless provides some good initial reasons to construe a general authorization for the use of force to avoid a conflict with international law.

First, the canon itself is a long-standing, well-established interpretative device that courts employ in many different contexts.[171] Courts

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[164] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

[165] 6 U.S. (2 Cranch) 64 (1804).

[166] *Id.* at 107. This principle of interpretation is even older than the case from which it takes its name. *See* Bradley, *supra* note 21, at 485–86.

[167] Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800).

[168] *Charming Betsy*, 6 U.S. (2 Cranch) at 107.

[169] *Id.* at 118. The language in the *Charming Betsy* case ("if any other construction remains") is thus stronger than the language of the *Restatement (Third) of the Foreign Relations Law of the United States* ("where fairly possible").

[170] *Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion).

[171] *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004) (antitrust); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (anti-discrimination); McCulloch v.

have cited customary international law, as well as treaties, as the basis for applying the *Charming Betsy* canon.[172] If courts generally construe acts of Congress to avoid conflict with international law, they should accordingly refuse to interpret the term "all necessary and appropriate force" as embracing the violation of international law by the President.

Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963) (National Labor Relations Act); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (Jones Act); Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1345, 1348–49 (Fed. Cir. 2004) (Tariff Act of 1930); Spector v. Norwegian Cruise Line Ltd., 356 F.3d 641, 646–47 (5th Cir.) (Americans with Disabilities Act), *cert. granted*, 125 S. Ct. 26 (2004); Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (Immigration and Nationality Act); Cheung v. United States, 213 F.3d 82, 92 (2d Cir. 2000) (federal extradition statute); United States v. Robinson, 843 F.2d 1, 3 (1st Cir. 1988) (smuggling statutes); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464–65 (S.D.N.Y. 1988) (Anti-Terrorism Act of 1987). The case is also cited for the proposition that courts should construe statutes to avoid constitutional questions. Edward J. DeBartolo Corp. v. Fla. Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[172] *See Hoffmann-La Roche*, 124 S. Ct. at 2366 (invoking the canon based on international comity); *Rossi*, 456 U.S. at 32 (applying canon based on a sole executive agreement); *McCulloch*, 372 U.S. at 20–22 (applying canon to avoid the "'delicate field of international relations'" (citation omitted) without specifying specific sources of international law); Chew Heong v. United States, 112 U.S. 536, 549 (1884) (applying cannon based on a treaty); *Kim Ho Ma*, 257 F.3d at 1114 (applying canon based both on customary international law and on the ICCPR, a non-self-executing treaty); *see also* Bradley, *supra* note 21, at 483 (observing that the *Charming Betsy* canon presumably applies to all international obligations of the United States); *cf.* Steinhardt, *supra* note 21, at 1179–82 (arguing that the canon should apply based both on various kinds of international law and on norms that have not achieved the status of law). The Supreme Court recently considered the ICCPR and noted that it "did not itself create obligations enforceable in the federal courts." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004). Elsewhere, the opinion remarked that "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing." *Id.* at 2763 (citing 138 CONG. REC. H8071 (1992)). This language might be read broadly to suggest that non-self-executing treaties (at least those in the area of international human rights law) should not provide the basis for the *Charming Betsy* canon because employing the canon involves, at least in a broad sense, "interpreting and applying" such law. But the question in *Sosa v. Alvarez-Machain* was whether the international norm supplied a private cause of action under the Alien Tort Statute, and in the quoted passage the Court was explaining its general hesitation to conclude that it did. *Id.* at 2762–64. In *Hamdi*, by contrast, the federal habeas statute provides the right of action, and the international norm is not employed as a rule of decision, but instead as a method of construing the scope of congressional authorization for the use of force. Justice Breyer, who joined this section in *Sosa*, went on to reason that the *Charming Betsy* canon might apply in this case, based on "notions of comity," without recognizing any tension between the canon and the majority's opinion. *See id.* at 2782 (Breyer, J., concurring in part and concurring in the judgment).

Second, the canon is bolstered by another related, interpretive canon. Courts typically assume that Congress does not intend to repeal domestic law by implication;[173] they should accordingly hesitate to construe Congress as authorizing the President to violate U.S. law absent more specific language than that found in the AUMF.[174] This interpretative canon would apply to self-executing treaties, which qualify as domestic law under the Supremacy Clause.[175]

Third, the canon provides some concrete limits on what sorts of international legal materials are relevant—subject to some limitations discussed below, only international agreements binding on the United States and international norms so well-entrenched that nations are legally obligated to follow them as customary international law would serve as interpretive sources.[176] Although this does not solve problems associated with defining the scope of customary international law itself, it at least limits the courts largely to these norms. Moreover, international humanitarian law offers a particularly well-defined body of treaty and custom-based norms,[177] much of which is incorporated into U.S. and foreign practice.[178] This has the dual advantage of providing a clearer background norm against which Congress can authorize the

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[173] *See, e.g.*, United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976).

[174] *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 130–31 (2004) (noting that many violations of the Geneva Conventions are crimes under U.S. law and concluding that it is "difficult to sustain a claim that Congress impliedly repealed various provisions of the U.S. penal code and the Uniform Code of Military Justice with a single, sweeping resolution").

[175] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) cmt. c (1987).

[176] When applying the canon based on "international comity," the Supreme Court has sometimes used sources that do not clearly qualify as binding under customary international law. *See* Steinhardt, *supra* note 21, at 1146–52. As discussed below, there is a strong argument that courts should apply the canon to avoid potential violations of international law, which leaves somewhat more discretion in the hands of the courts, but also enjoys many advantages. *See infra* notes 246–256 and accompanying text.

[177] *See* Jinks, *supra* note 97, at 374–75 n.30 (arguing that international humanitarian law is more detailed, better incorporated into domestic law, and has a better-enforcement regime than international human rights law); *see also* Derek Jinks, *September 11 and the Law of War*, 28 YALE J. INT'L L. 1, 2 (2003) (indicating that the laws of war offer a "widely-accepted" and "fully articulated normative framework"); *supra* note 147 and accompanying text (indicating that a body of treaties, customary international law, and treatises sets forth the rules and regulations governing the conduct of war).

[178] *See* Greenwood, *supra* note 112, at 33–37 (describing the incorporation of international humanitarian law into German law and practice); Jinks, *supra* note 97, at 376–77, n.44 (describing the incorporation of the Third Geneva Convention into national military manuals of the United States, Canada, and the United Kingdom); *infra* 197–201 and accompanying text.

use of force as well as providing some limits on the scope of relevant norms that courts can employ.

One might argue that unlike a statute, the AUMF is an explicit grant of authority to the Executive Branch, and thus the canon simply does not apply. Under one variation of this argument, the AUMF authorizes the President to do anything that he finds appropriate. Eight of the nine Justices rejected this approach in *Hamdi*, however, by limiting the scope of the AUMF contrary to the views of the President.[179] Another variation of this argument is that the AUMF should be interpreted as authorizing the President, not Congress, to make decisions about particular violations of international law. The canon itself suggests that this argument is incorrect for the reasons given above, as do the factors discussed in the following discussion, including a more specific analysis of the likely intent of Congress, the text of the Constitution, and other separation-of-powers considerations.[180]

2. Objections Based on Congressional Intent

The *Charming Betsy* canon is frequently justified based on the presumed intentions of Congress, yet some have questioned whether that presumption is accurate,[181] particularly in the context of international human rights.[182] Professor Curtis Bradley, for example, has argued

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[179] *See supra* notes 66–72 and accompanying text.

[180] *See infra* notes 181–245 and accompanying text.

[181] There are many debated grounds for discounting "congressional intent" when interpreting congressional enactments. *See generally* SCALIA, *supra* note 143; Easterbrook, *supra* note 144. Yet every commentator to consider the *Charming Betsy* canon at length concludes that, at least to some extent, it is properly based on the presumed intentions of Congress. *See* Bradley, *supra* note 21, at 533; Steinhardt, *supra* note 21, at 1185–86; Swaine, *supra* note 58, at 717–18 n.365; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987) (stating that "[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States"); *cf.* Turley, *supra* note 21, at 269 (arguing that the canon should be replaced by case-by-case consideration of each statute to evaluate the likely intent of Congress among other considerations). More importantly, the courts seem to employ the canon because they believe that it maximizes the preferences of Congress. *See, e.g.*, *F. Hoffman-La Roche*, 124 S. Ct. at 2366 ("This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."); *Rossi*, 456 U.S. at 31–32 (reasoning that "if Congress intended [a particular outcome] it must have intended to repudiate [certain] executive agreements," then applying the *Charming Betsy* canon to counter this interpretation); *Chew Heong*, 112 U.S. at 540 (indicating that courts should not doubt that treaty compliance and the "honor of the government and the people of the United States" were "present in the minds of [members of Congress] when the legislation in question was enacted").

[182] Bradley, *supra* note 21, at 520–23. Among the potential reasons to discount the *Charming Betsy* canon is that America's strength as a superpower may make compliance

that we have "fairly specific evidence" of the views of the political branches with respect to customary international law in the human rights area.[183] Citing the failure of the United States to ratify many human rights treaties and the substantial reservations it has made to others,[184] Professor Bradley questions the empirical claim that the political branches actually wish to comply with customary international law. Whatever force this argument might have in the human rights context, however, it does not apply with respect to international humanitarian law.

First, as a general matter, the United States has long been a leader in the development of the law of war, including international humanitarian law.[185] The Lieber Code, adopted as law by the Union during the Civil War, were the "first modern codification of the law of armed conflict,"[186] and they became the basis for many similar codes of wartime conduct, as well as future treaties to which the United

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with international law less urgent today than it was when the canon first developed. *Id.* at 492, 519. The continued vitality of the canon undercuts this argument as a general matter; in any event, this reasoning has less force with respect to the rules of warfare where the United States may fear immediate reprisals against its military personnel. The capture by Iraq of U.S. troops and the U.S. insistence that they be treated according to the rules of war provides one illustration. *See* Amann, *supra* note 44, at 285. A final possible reason to discount the canon, at least in the *Hamdi* case itself, is that international tension and discord are unlikely to result from the military's treatment of its *own citizens* as opposed to foreign nationals. This consideration should not, however, defeat the application of the canon. First, international law is increasingly concerned with how nations treat their own citizens. Second, the canon, even as a function of congressional intent, is not designed solely to avoid international discord. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 114, 115 cmt. a (explaining the *Charming Betsy* rule as a function of congressional intent without suggesting any limitation based on fear of retaliation or international diplomatic fallout). In any event, it seems unlikely that in authorizing the use of force Congress intended that the treatment of U.S. citizens would fall *below* the international standards for the treatment of foreign combatants, so there is good reason to apply an intent-based version of the canon here, even apart from concerns about international tensions.

[183] Bradley, *supra* note 21, at 520.

[184] *Id.* at 520–21 nn.242–45 (discussing the ICCPR in particular).

[185] *See* President Ronald Reagan's Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, PUB. PAPERS 91–92 (Jan. 29, 1987) (describing the United States as "in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict"); OPPENHEIM, *supra* note 93, § 125, at 293 (stating that "[t]he Treaty of Friendship concluded in 1785 between Prussia and the United States of America was probably the first to stipulate . . . proper treatment for prisoners of war" (footnote omitted)); Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 6–13 (describing the American commitments and contribution to international humanitarian law from the Revolutionary War through World War I).

[186] *See* GREEN, *supra* note 99, at 29 n.63.

States is a party.[187] Since 1916, the Articles of War have referred to "offender or offenses that by the law of war may be lawfully triable by such military commissions,"[188] forcing the Supreme Court to interpret the law of war in cases including *Ex parte Quirin*[189] and *In re Yamashita*.[190] The United States is also a party to the major conventions governing international humanitarian law,[191] and played a leading role in initiating and drafting many of them.[192] Although the United States has refused to become a party to Protocols I and II to the Geneva Conventions,[193] it has recognized that much of Protocol I and all

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[187] *See id.* at 29–30 (discussing the role of the Lieber Code in the Civil War and concluding that "[t]he rules embodied in the Lieber Code were so consistent with accepted practice that . . . between 1870 and 1893 similar manuals or codes were issued by Prussia, 1870; The Netherlands, 1871; France, 1877; Russia 1877 and 1904; Servia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893").

[188] Articles of War of 1916, art. 15, 39 Stat. 650, 653 (1916).

[189] 317 U.S. at 27–36; *see supra* notes 88–98 and accompanying text.

[190] 327 U.S. at 13–15 (analyzing whether charges that the general failed to control his troops and prevent brutal atrocities violated law of war, including norms derived from the Hague Conventions); *id.* at 31–40 (Murphy, J., dissenting) (finding it "impossible to agree that the charge . . . stated a recognized violation of the laws of war").

[191] *See supra* note 99.

[192] The Lieber Code, for example, had "tremendous impact on the codification of international humanitarian law," including the 1899 and 1907 regulations annexed to the 1907 Hague Convention, and the 1949 Geneva Conventions. *See* Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 279–80 (1997). The initiative for the 1907 Hague Conventions came from President Theodore Roosevelt. DOCUMENTS ON THE LAWS OF WAR, *supra* note 115, at 67.

[193] In addition to the failure to ratify Protocols I and II to the Geneva Conventions, *see supra* note 99, one could also cite the failure of the United States to sign the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507. *See generally* Jodi Preusser Mustoe, Note, *The 1997 Treaty to Ban the Use of Landmines: Was President Clinton's Refusal to Become a Signatory Warranted?*, 27 GA. J. INT'L COMP. L. 541 (1999). But Presidents George H.W. Bush and William J. Clinton took extensive actions to achieve compliance with the treaty and its goals, including a legislative moratorium on landmine production (passed during the George H.W. Bush administration but later repealed under the Clinton administration) and the allocation of significant funds to remove landmines internationally. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 657–62 (1998). Moreover, during the wars in Afghanistan and Iraq, the George W. Bush administration did not use landmines. The International Campaign to Ban Landmines reported in September 2002 that in Afghanistan "there were reports of limited use of mines and booby-traps by Taliban and Al-Qaeda fighters, as well as the Northern Alliance" but "there were no instances of use of antipersonnel mines by the United States or coalition forces." INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2002: TOWARD A MINE-FREE WORLD 6 (2002), *available at* http://www.icbl.org/lm/2002/print/report/intro.pdf. The Physicians for Human Rights reported that "it appears that US and allied troops did not plant landmines during [the war in Iraq]," although Iraqi forces did lay mines. PHYSICIANS FOR HUMAN RIGHTS, WAR IN IRAQ, BULLETIN NO. 6, REPORTS FROM THE FIELD: DETAILED MINEFIELD AND CLUSTER BOMB TARGET

of Protocol II codify customary international law,[194] and U.S. military manuals on international law often track the language of Protocol I.[195] There is little basis for any general claim that the political branches do not wish to comply with international humanitarian law.

Second, the Executive Branch has consistently reiterated its commitment to follow the law of war, both custom and treaty-based. From the famous blockade ordered by President Abraham Lincoln at the outset of the Civil War that generated *The Prize Cases*, to the seizure of Cuban fishing vessels during the Spanish-American War, to the military trials of World War II, to U.S. conduct in the Persian Gulf War, Presidents have made explicit their desire to comport with the law of war.[196]

This remains true today, with the Bush administration defending its treatment of detainees around the world as consistent with interna-

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SITE INFORMATION MUST BE MADE AVAILABLE TO PROTECT CIVILIAN POPULATIONS AND RECONSTRUCTION PERSONNEL (2003), http://www.phrusa.org/research/iraq/bulletin_050603.html (date released May 6, 2003). Thus, although hesitant to sign the Landmine Convention because of military commitments in Korea, the United States has not undermined it, but has instead worked toward the goals that it espouses. The point here is not that the United States complies with all international humanitarian norms; the point is instead that the U.S. government generally seeks to comply with such norms and that Congress is unlikely to intend that they be violated.

[194] *See* L. Lynn Hogue, *Identifying Customary International Law of War in Protocol I: A Proposed Restatement*, 13 LOY. L.A. INT'L & COMP. L. REV. 279, 282–87 (1990) (arguing against ratification of Protocol I and noting that many of its provisions reflect customary international law); Jinks, *supra* note 97, at 385 n.114 ("The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law." (quoting from JUDGE ADVOCATE GENERAL'S SCH., U.S. ARMY, *Legal Framework of the Law of War, in* LAW OF WAR WORKSHOP DESKBOOK 25, 32 (Brian J. Bill ed., 2000))); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 681 (1994) (arguing that Protocol I should be ratified by the United States and noting that some of its provisions reflect customary international law).

[195] Robert Kogod Goldman, *The Legal Regime Governing the Conduct of Operation Desert Storm*, 23 U. TOL. L. REV. 363, 364 (1992).

[196] *Quirin*, 317 U.S. at 12; *Paquete Habana*, 175 U.S. at 712 (quoting presidential declaration of blockade in pursuance of law of nations); Abraham Lincoln, Proclamation of Blockade Against Southern Ports, Apr. 19, 1861 (announcing blockade in pursuance of the law of nations); U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 33 (1992) (describing U.S. compliance with the Geneva Conventions during the Persian Gulf War); Colonel James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance with the Rule of Law*, 41 NAVAL L. REV. 83, 84–95 (1993) (describing U.S. compliance with international law during the Persian Gulf War); *see also* Golove, *supra* note 151, at 378–94 (detailing the "long and laudable tradition of the U.S. military in guiding its conduct strictly in accordance with the requirements of international law," citing examples from the Revolutionary War, armed conflict with France in 1790s, the War of 1812, the Mexican-American War, the Civil War, the Spanish-American War, World War I, and World War II).

tional law.[197] Although this administration has advanced controversial opinions about the *scope* of the Geneva Conventions,[198] it has not denounced or repudiated its intentions to comply with international humanitarian law.[199] With respect to Operation Iraqi Freedom, for example, a Joint Chiefs of Staff directive explicitly requires the application of law of war obligations "during all stages of operational planning and execution of joint and combined operations."[200] In addition, the Department of Defense requires all branches of the armed forces to comply with the law of war in conducting military operations and related activities.[201] The consistent commitment by the Executive

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[197] *See, e.g.*, Transcript, U.S. Dep't of Defense, Briefing on Detainee Operations, *supra* note 2 (stating that "our policies are treating the detainees entirely consistent with the framework of the Geneva Convention"); Transcript, U.S. Dep't of Defense, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003) [hereinafter Transcript, U.S. Dep't of Defense, Briefing on Geneva Convention], http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html (last updated Apr. 7, 2003). W. Hays Parks stated the following:

> Let me talk a little bit about DOD policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations.

Transcript, U.S. Dep't of Defense, Briefing on Geneva Convention, *supra*.

[198] *See, e.g.*, Memorandum from John Yoo & Robert J. Delahunty, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, General Counsel, U.S. Dep't of Defense 1–2 (Jan. 9, 2002) (discussing the application of treaties and laws to al Qaeda and Taliban detainees and concluding that the Geneva Conventions do not apply to detainees from the war in Afghanistan).

[199] *See, e.g.*, Press Release, U.S. Dep't of Defense, *supra* note 2 ("[T]he law of war permits the detention of enemy combatants for the duration of the conflict. It permits this detention without the use of a review process. Nonetheless, the Department of Defense has decided as a matter of policy to institute this review process."); *see also supra* note 197.

[200] CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM § 4(b) (Mar. 25, 2002). The law of war definition includes "treaties and international agreements to which the United States is a party, as well as applicable customary international law." *Id.* § 5(a).

[201] *See generally* U.S. DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf. The Executive Branch has also specifically committed itself to the Geneva Conventions. *See* DEP'T OF THE ARMY, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES § 1-5(a)(2) (Oct. 1, 1997) ("All persons taken into custody by U.S. forces will be provided with the protections of the [Geneva Convention Relative to the Treatment of Prisoners of War] until some other legal status is determined by competent authority."), *available at* http://www.army.mil/usapa/epubs/pdf/r190_8.pdf; *supra* note 197; *see also Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that Army Regulation 190-8 was adopted to implement the Geneva Conventions).

Branch to comply with international law supports the view that Congress would assume that the courts and the President would interpret its authorization as extending only to those actions that do not violate the law of war.

Third, treaties reflect limitations to which the Senate at least has already given its formal advice and consent. The Senate itself and the President, for example, have previously considered and approved the limitations on the use of force that are codified in treaties such as the Geneva Conventions. Moreover, in approving such treaties, the Senate has considered the scope of appropriate force in the same context (in one sense) as it arises in the following case: defining and *limiting* the actions that the U.S. military is permitted to take. This is a separate argument from the desire to avoid repeal of domestic law, which would apply only to self-executing treaties.[202] Here, the point is that the limitation on the use of force is one that the Senate has already considered and approved, and this point applies to non-self-executing as well self-executing treaties.

In summary, there are excellent reasons based on the presumed intentions of Congress to apply the *Charming Betsy* canon in interpreting general authorizations for the use of force by Congress. Potential objections about the use of customary international law as an interpretive norm are at least partially answered by the role that the United States has played in the development of international humanitarian law, the clear commitment of the Executive Branch to comply with that law, and the (at least relatively) well-defined content of this branch of customary international law.

3. Objections Based on Separation of Powers

The promotion of separation of powers is sometimes advanced as another basis for the *Charming Betsy* canon.[203] The roles of the three branches differ somewhat, however, when courts consider a statute and when they consider authorizations for the use of force, and these differences could make the *Charming Betsy* canon inapplicable in the latter situation. If courts construe an ambiguous civil statute to conflict with international law, generally they risk putting the nation in violation of international law without the clear intent of either of

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[202] *See supra* notes 173–175 and accompanying text.

[203] Bradley, *supra* note 21, at 524–33; Steinhardt, *supra* note 21, at 1129–34.

the political branches to do so.[204] Phrased differently, to the extent the canon is based on separation-of-powers concerns, it may be designed at least in part to prevent courts from construing statutes to create a violation of international law unintended by either Congress *or* the President.[205] In considering the scope of Congress's authorization for the use of force, however, the preferences of the President are clear; it is the President's actions that are under judicial scrutiny. The question is thus whether the canon is designed simply to disable the courts in favor of action by either the Congress or the Executive Branch, or whether it also reflects a preference for legislative (as opposed to presidential) action that violates international law.

The U.S. Court of Appeals for the Ninth Circuit explicitly recognized this issue in *United States v. Corey*, a case involving the extraterritorial application of a federal criminal statute.[206] The defendant argued that application of the statute to his conduct abroad would violate international law and that under the *Charming Betsy* canon the court should refuse this interpretation.[207] The panel rejected this argument on the grounds that concurrent jurisdiction did not violate international law.[208] In dicta, however, Judge Alex Kozinski also reasoned that the concerns underlying the *Charming Betsy* canon "are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government" and that "we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law

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[204] This is not generally true of criminal statutes, however, where the government brings the action and thus has made the decision that the benefits of interpreting the statute in violation of the law of nations outweigh the risks; some have resisted application of the canon in the criminal context for these reasons. *See, e.g.*, United States v. Corey, 232 F.3d 1166, 1179 n.9 (9th Cir. 2000). It is not necessarily true of civil statutes either because the government can and frequently does brief the court on the questions before it, ensuring that the court reaches its decision fully informed of the government's views on the case. In *Hoffman-La Roche, Ltd. v. Empagran*, for example, the government filed an amicus brief in an antitrust suit brought by private purchasers of vitamins against private manufacturers and distributors. *See* 124 S. Ct. at 2369.

[205] Bradley, *supra* note 21, at 526 (stating that "by requiring Congress to decide expressly whether and how to violate international law, the canon reduces the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President"); Steinhardt, *supra* note 21, at 1132 (noting that the canon might be based on concerns about the United States speaking with "one voice" in foreign affairs issues, including the "prospect of embarrassing the executive branch").

[206] *Corey*, 232 F.3d at 1177–79.

[207] *See id.* at 1169.

[208] *Id.* at 1179.

and determined that it serves the interests of the United States."[209] This suggests that the separation-of-powers values upon which the canon is based make it inapplicable when the court is evaluating the President's own actions.

The historical use of the canon, however, provides a somewhat different picture. Judge Kozinski supported his reasoning with the observation that the Supreme Court had never invoked the canon against the government in a case to which it was a party.[210] This is incorrect—in 1913, the Supreme Court ruled against the United States in *MacLeod v. United States*, a case involving the collection of duties in occupied territory.[211] The United States imposed the duties on the *Venus*, a vessel bound for Cebu, an island held by local forces who collected their own duties from the vessel.[212] The government claimed that a subsequent act of Congress had ratified its actions.[213] The Court disagreed, explaining that international law permitted the collection of tariff duties only in places under the occupation and control of the United States, which did not include Cebu.[214] The Court thus con-

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[209] *Id.* at 1179 n.9.

[210] *Id.* Judge Kozinski also characterized the *Charming Betsy* case itself as involving a "private dispute," but this is not entirely accurate. On the one hand, the vessel was seized by a captain in the U.S. Navy, pursuant to an act of Congress that made commerce with France illegal, and in accordance with an order by the President directing naval officers to "do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies." *Charming Betsy*, 6 U.S. (2 Cranch) at 78. Thus, the case stands on somewhat different footing than a purely private dispute. On the other hand, the captain stood to gain financially from the capture, and the government was not a party to the litigation. After losing in the lower court, the captain sought assistance from the federal government, which apparently paid for the bond necessary to appeal the case. *See* Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 9–10 (2001). Eventually, Congress ordered the captain compensated from federal funds after he lost the case before the Supreme Court; one argument advanced for his compensation from the Senate was that he acted as an agent of the federal government and had no discretion to disobey the orders given to him. *Id.* at 18–19. One commentator has noted that the 1805 bill signed by President Thomas Jefferson to compensate the captain was "the first time that Congress ever indemnified a public officer for a service-related judgment." *Id.* at 19.

[211] 229 U.S. 416, 435 (1913).

[212] *Id.* at 418–19.

[213] *Id.* at 423–24.

[214] In support, the Supreme Court cited the Hague Convention of 1899, which provides in part that "'[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.'" *Id.* at 426 (quoting the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 42, 32 Stat. 1803, 1 Bevans 247, 259). The Court also cited various sources to show that the insurgents at Cebu had established a de facto government, including John Bassett Moore's *Digest of International Law* and prior practice of the U.S. Executive Branch. *Id.* at 428–30.

cluded that the statute did not authorize the actions of the military collector, reasoning—without citing the *Charming Betsy* case[215]—that "it should not be assumed that Congress proposed to violate the obligations of this country to other nations."[216]

The Court has applied the same reasoning (again without citing the *Charming Betsy* canon) against the government in cases involving U.S. treaty obligations. In *Chew Heong v. United States*, the Court interpreted a federal statute to permit a former Chinese resident of the United States to reenter the country.[217] This interpretation was consistent with U.S. treaty obligations, but contrary to the views of the Executive Branch. The Court emphasized that repeal of a treaty involves "question[s] of good faith with the government or people of other countries."[218] Thus, *Chew Heong* and other cases like it suggest that at

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[215] The Court has since cited *MacLeod* for the *Charming Betsy* principle. *Lauritzen*, 345 U.S. at 578.

[216] *MacLeod*, 229 U.S. at 434. The paragraph reads in full as follows:

> The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.

Id. Although the Supreme Court also based this interpretation on a proclamation by the President, that proclamation did not explicitly reference the law of war; instead it used the term "occupation," *see id.* at 420, which the Court construed in light of international law. *Id.* at 425–26, 432. Thus, the Court used international law not only to construe a statute contrary to the views of the United States, but also to construe a Presidential Proclamation contrary to the views of the government.

[217] 112 U.S. 536, 560 (1884); *see also* Steinhardt, *supra* note 21, at 1154–56 (arguing that the Supreme Court used the *Charming Betsy* canon (without citing it) to defeat the government's interpretation of a statute in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

[218] *Id.* at 549. The Supreme Court construed the statute so as to not abrogate the treaty, contrary to the government's interpretation. It reasoned that

> the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.

Id. at 540. Thus, the foreign policy implications of the issue were much on the mind of the Court, but it still refused to defer to the Executive Branch.

least with respect to treaties, courts have a preference for legislative rather than executive decisions.[219]

In a more recent case in which the government made its views known through an amicus brief, *Hartford Fire Insurance Co. v. California*,[220] the majority of the Court construed the statute at issue in a manner consistent with the government's position without citing the *Charming Betsy* canon. The dissent, however, authored by Justice Scalia and joined by Justices O'Connor, Kennedy, and Thomas relied on the canon extensively to interpret the statute contrary to the views of the United States, without suggesting any potential conflict.[221] Lower courts, too, have used the canon to defeat the government's interpretation of a statute.[222] Even when using the canon to interpret a statute in harmony with the executive's views, courts do not simply discount the canon in deference to the government's position.[223] The actual use of

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[219] *See, e.g.*, Cook v. United States, 288 U.S. 102, 118–22 (1933) (construing a reenacted Tariff Act to avoid abrogating or modifying an earlier treaty, contrary to the interpretation afforded the Act by the Executive Branch); United States v. Payne, 264 U.S. 446, 447–49 (1924) (construing a subsequent Act of Congress in harmony with an earlier treaty and contrary to the views of the Executive Branch). These cases, like *Chew Heong*, do not cite the *Charming Betsy* canon. They apply the same reasoning, however, by construing statutes to avoid conflict with international law in cases involving treaty obligations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 reporters' note 1 (1987) (citing *Chew Heong* and *Cook* as applications of the *Charming Betsy* canon); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L LAW 313, 322–23 (2001) (citing *Chew Heong* as an application of the canon); Bradley, *supra* note 21, at 488 n.48 (citing *Cook* and *Chew Heong* as applications of the canon).

[220] 509 U.S. 764 (1993).

[221] *Id.* at 815–20 (Scalia, J., dissenting); *see also* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 325 n.124 (describing the government's amicus brief, which argued that application of the statute "would not frustrate British policy," a conclusion that the dissent implicitly rejected).

[222] *See, e.g.*, *Allegheny*, 367 F.3d at 1348 (interpreting the Tariff Act of 1930 against the Commerce Department in part based on a ruling of the World Trade Organization (the "WTO")); *Kim Ho Ma*, 257 F.3d at 1114–15 (interpreting the Immigration and Nationality Act against the Immigration and Naturalization Service); FTC v. Compagne de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (interpreting FTC Act against the FTC); *Palestine Liberation Org.*, 695 F. Supp. at 1464–72 (reading the Anti-Terrorism Act of 1987 in conformity with the United Nations Headquarters Agreement and denying an injunction sought by the government to close down the observer mission of the Palestine Liberation Organization at the United Nations Headquarters); The Over The Top, 5 F.2d 838, 842–44 (D. Conn. 1925) (dismissing a libel brought by the United States in part because the government's interpretation of the statute might contravene a treaty between the United States and Great Britain); *cf.* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493–95 (D.C. Cir. 1984) (interpreting the Commodity Exchange Act against the Commodity Futures Trading Commission).

[223] *See, e.g.*, *Hoffman-La Roche*, 124 S. Ct. at 2362, 2366–68. In *Hoffman-La Roche*, the government's amicus brief detailed the foreign policy problems associated with applying

the canon thus suggests a preference for a legislative, rather than purely executive, decision to violate international law. This is true both because the courts refuse to automatically defer to the executive, even when its views are clear and those of Congress are not, and because courts occasionally use the canon to defeat the interpretation offered by the government.

This conclusion is supported by the Supreme Court's application of a related canon, the presumption against extraterritorial application of statutes, directly counter to the government's position.[224] The Court has applied the presumption against extraterritorial application of U.S. law to defeat an agency's interpretation of a statute.[225] Indeed, in one case the Court reasoned that "[f]or us to run interference in such a delicate field of international relations there must be present

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the statute broadly, including "tension with our trading partners," the risk of foreign retaliation in the form of "statutory counter-reactions," and the risk of undermining cooperation with foreign agencies. Brief for the United States as Amicus Curiae Supporting Petitioners at *21–22, F. Hoffman-La Roche Ltd. v. Empagran, 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 234125. For these reasons, the government's brief urged the Supreme Court to apply the presumption against extraterritorial application of federal statutes. *See id.* The Court did so, quoting from the *Charming Betsy* case, but spent several pages analyzing international law and the potentially deleterious effects of the statute on the interests of other nations, based in part on briefs filed by the governments of Germany, Japan, and Canada; the amicus brief for the United States was cited in passing at the end of the discussion. *Hoffman-La Roche*, 124 S. Ct. at 2366–68. The Court never suggested that the government's views on the foreign policy implications of the case rendered the *Charming Betsy* canon inapplicable. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, the Court construed a statute in conformity with the views of the U.S. government (and against the National Labor Relations Board), applying the *Charming Betsy* canon without showing any particular deference to the government's amicus brief, although the Court did show concern with interpreting the statute contrary to State Department regulations. *McCulloch*, 372 U.S. at 20–22.

[224] Some maintain that the presumption against extraterritoriality is entirely distinct from the presumption in favor of international law. *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting) (describing the two as "wholly independent"); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991) (*Aramco*) (Marshall, J., dissenting) (same). The Supreme Court has elsewhere suggested that the presumption against extraterritoriality is based on the desire to avoid "'international discord,'" Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (quoting *Aramco*, 499 U.S. at 248), as well as on other factors, including the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 204 n.5; *see* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 174 (1993) ("We have recently held, however, that the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations.").

[225] *See Aramco*, 499 U.S. at 248; *see also* Turley, *supra* note 21, at 221 (describing this opinion as upholding a very strong presumption that "maximizes the role of the legislative process in resolving controversial matters"); *id.* at 219 n.172 (noting that although some rules defer to the Executive Branch, the "presumption against extraterritoriality defers to the legislative branch").

the affirmative intention of the Congress clearly expressed" because Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[226]

A somewhat analogous question arises in the relationship between the *Charming Betsy* canon and the deference afforded to agency interpretations of statutes under *Chevron USA v. National Resources Defense Council*.[227] When the agency interpretation of a statute is entitled to deference, and when that interpretation would violate international law, courts must resolve the conflict between the two interpretive tools. Were the preferences of the Executive Branch enough to defeat the canon, however, there would be no conflict—the agency interpretation would control under either *Chevron* or *Charming Betsy*. Lower courts, however, generally have not concluded that *Chevron* automatically trumps the *Charming Betsy* canon. Instead they have often used the two interpretive canons in tandem;[228] in cases of conflict, courts have taken varying approaches.[229] The Supreme Court has not

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[226] Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957); *see also McCulloch*, 372 U.S. at 22 (reasoning that Congress "'alone has the facilities necessary to make fairly such an important policy decision'" and concluding that arguments urging another interpretation should be directed to Congress (quoting *Benz*, 353 U.S. at 147)).

[227] 467 U.S. 837 (1984).

[228] *See, e.g.*, Warren Corp. v. EPA, 159 F.3d 616, 623–24 (D.C. Cir. 1998) (using the *Charming Betsy* canon to conclude that the agency's interpretation of the statute was reasonable under *Chevron*); Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581–82 (Fed. Cir. 1995) (reversing the Court of International Trade and deferring to the Department of Commerce's interpretation of the statute in part because it was consistent with the international obligations of the United States); *see also* Lawrence R. Walders & Neil C. Pratt, *Trade Remedy Litigation—Choice of Forum and Choice of Law*, 18 ST. JOHN'S J. LEGAL COMMENT. 51, 68–73 (2003) (describing the courts' efforts to reconcile the two interpretive approaches in the context of international trade); *cf.* Luigi Bormioli Corp. v. United States, 304 F.3d 1362, 1365–66, 1368 (Fed. Cir. 2002) (reasoning that the language of the statute was clear, and there was no reason to consider *Chevron* deference, in part because the government's reading of the statute was consistent with international law). In another case in which *Chevron* deference and *Charming Betsy* pointed toward the same result, the U.S. Court of Appeals for the Fifth Circuit refused to defer to the Department of Agriculture and rejected the Department's reliance on the canon. Miss. Poultry Ass'n, Inc. v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993) (refusing to use the canon based on the General Agreement on Tariffs and Trade ("GATT") and rejecting the Department's reading of the statute).

[229] *See Allegheny*, 367 F.3d at 1343, 1348 (holding, based in part on the *Charming Betsy* canon and a decision of the WTO, that the language of the statute spoke directly to the issue in question and that the agency's interpretation was due no deference under *Chevron*); Timken Co. v. United States, 354 F.3d 1334, 1342–44 (Fed. Cir. 2004) (deferring to the Commerce Department's interpretation of the statute, and refusing to apply the *Charming Betsy* canon in part because the WTO ruling in question was distinguishable); Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334, 1343–45 (Ct. Int'l Trade 1999)

considered a direct conflict between the two and has sent somewhat mixed signals about the relationship between the canons.[230]

The foregoing discussion shows at the very least that the views of the Executive Branch do not automatically defeat the canon. This is true apparently even in the context of *Chevron* deference, where the reasons to defer are strong, in part because the preferences of the Executive Branch are expressed through the formal mechanisms of a federal agency.[231] Thus although interpretation of the AUMF does not involve *Chevron* deference,[232] the courts' reluctance to discard the *Charming Betsy* canon (and the presumption against extraterritoriality)

(reasoning that "unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine"); Caterpillar Inc. v. United States, 941 F. Supp. 1241, 1244, 1247 (Ct. Int'l Trade 1996) (applying the *Charming Betsy* canon to construe the 1930 Tariff Act contrary to the interpretation given by the U.S. Customs Service); *see also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 739–40 (2003) (generalizing based on the *Caterpillar Inc. v. United States* decision to conclude that "where the administration interpretation is inconsistent with the international obligation, courts have applied *Chevron* and *Charming Betsy* and reversed the decision."); Walders & Pratt, *supra* note 228, at 70–73 (describing different approaches taken in the trade cases). A recent trade case involving the Tariff Act of 1930 emphasized the deference due the Department of Commerce and accorded "no deference" to a WTO case. Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1347–49 (Fed. Cir. 2005).

[230] *See* Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 134–37 (2002) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 421 (1999) and arguing that in immigration cases the Supreme Court has ignored the *Charming Betsy* canon in favor of *Chevron* deference); *cf.* Bradley, *The* Charming Betsy *Canon*, *supra* note 21, at 523–24 (arguing that the Supreme Court has not been receptive to efforts to expand the canon beyond its current scope). In contrast, Justice Scalia considered a conflict between *Chevron* and the presumption against extraterritoriality and concluded that the presumption trumped. *Aramco*, 499 U.S. at 260 (Scalia, J., concurring in part and concurring in the judgment). The majority agreed that the presumption trumped deference to the agency, but it applied *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), not *Chevron*, deference. *Id.* at 257–58. In another case, the Court cited *Charming Betsy* for the proposition that statutes should be interpreted to avoid constitutional questions, and in this context concluded that *Charming Betsy* trumped *Chevron*. *DeBartolo Corp.*, 485 U.S. at 575.

[231] *See* United States v. Mead Corp., 533 U.S. 218, 229–34 (2001) (discussing *Chevron* deference and denying deference to the U.S. Customs Service's classification letters). As the Supreme Court recently noted, "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *Id.* at 230.

[232] Nothing in the *Hamdi* opinions suggested that *Chevron* deference was due the President's interpretation of the AUMF, and only Justice Thomas suggested that the courts should give substantial deference to the President's interpretation of the AUMF. *See Hamdi*, 124 S. Ct. at 2674–75 (Thomas, J., dissenting). The distinct issue of deference to the Executive Branch as to the content of international law is considered below. *See infra* notes 270–275.

when faced with *Chevron*, suggests that the canon should apply in construing the AUMF, even if it runs contrary to the views of the President. It also suggests that the canon has functioned not only to disable the courts in favor of either of the political branches, but that it also reflects some preference for legislative rather than executive decision making.

Other considerations also provide reasons, beyond the descriptive analysis above, to prefer legislative rather than executive decisions to violate international law in the context of interpreting the AUMF. For example, the Executive Branch is often correctly said to have particular expertise with respect to international law and to represent the nation in foreign affairs.[233] This might suggest that the *Charming Betsy* canon should not apply in this context, because the courts should defer to any decision of the President that might violate international law rather than seeking more explicit authorization from Congress.[234] The text of the Constitution, however, undermines this argument by vesting Congress—rather than the President—with much of the authority to make decisions regarding international law, particularly in the context of war. These specific, textual grants of authority undermine broader, non-textual arguments about the President's superiority in all areas of foreign affairs and national defense.

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[233] *Hamdi*, 124 S. Ct. at 2675 (Thomas, J., dissenting) (reasoning that "[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations" and citing the President's virtues of speed, decisiveness, and secrecy); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964) ("[T]he Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, . . . but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates."); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 32 (2d ed. 1996); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 687–88, 702 (2000); John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 873–77 (2001) (reviewing FRANCES FITZGERALD, WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS AND THE END OF THE COLD WAR (2000)).

[234] *Cf. Sale*, 509 U.S. at 188 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested. That presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112, cmt. c (1987); Bradley, *supra* note 233, at 687–88, 702, 708–09 (arguing that the expertise of the Executive Branch is one basis on which to defer to its interpretation of customary international law, as well as some statutes and treaties).

The Constitution, in Article I, section 8, grants to Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[235] All three were both defined terms at international law and integrally related to the conduct of war.[236] For example, letters of marque and reprisal were permitted under certain circumstances by the law of nations; they empowered the seizure of foreign subjects or property, and their use was considered a limited form of hostilities short of war.[237] Under British precedent, it was the *executive* who issued such letters, but the U.S. Constitution lodges this authority with Congress.[238] The power of Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"[239] provides another example (although one less directly connected to war),[240]

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[235] U.S. CONST. art. I, § 7, cl. 11.

[236] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 572, at 411–12 (reprint 1987) (Boston, Hilliard, Gray & Co. 1833) ("The power to declare war would of itself carry the incidental power to grant letters of marque and reprisal, and make rules concerning captures."); FRANCIS WHARTON, COMMENTARIES ON LAW §§ 216–218, 455 (Philadelphia, Kay & Brother 1884) (describing international law governing the right of capture and noting that the Constitution vests Congress with the power to authorize them); Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 336–57 (2003) (describing the meaning of "declare war" in eighteenth-century international law); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1613–15 (2002) [hereinafter Ramsey, *Textualism and War Powers*] (describing the meaning of "letters of Marque and Reprisal" in eighteenth-century international law); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 198–208 (1996) (describing the effect of declaring war under international law and noting that "attacking without a declaration might violate international law").

[237] David Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1173 (1992); Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 66–70 (1995); Ramsey, *Textualism and War Powers*, *supra* note 236, at 1613–18. Indeed, William Blackstone noted that the "'prerogative of granting [letters of marque and reprisal] . . . is nearly related to . . . making war; this being indeed only an incomplete state of hostilities.'" Lobel, *supra*, at 68 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 258 (photo. reprint, Garland Publ'g 1978) (1765)). When a letter was issued, captors depended on prize courts applying international law to confer title to the seized property. *See* David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 41–52 (1995) (reviewing 11 J.H.W. VERZIJL ET AL., INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE (1992)). The Continental Congress passed resolutions to prevent American privateers from violating international law. *See* Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 975–76 (1997).

[238] *See* Lewittes, *supra* note 237, at 1173. One commentator has also emphasized that Congress, not "the discretion of a commanding officer," controls the right to capture and confiscate property during war. WHARTON, *supra* note 236, § 217.

[239] U.S. CONST. art. I, § 7, cl. 10.

[240] Many examples of the exercise of this power, however, are connected to war. A nineteenth-century commentator, for example, provided the following two "[i]llustrations

because failure to punish individuals guilty of such crimes could also put the United States in violation of the law of nations.[241] The Commander-in-Chief power may have lodged some power to violate international law in the hands of the President, but under eighteenth-century international law there were far fewer norms governing the actual conduct of battle than there are today.[242]

Applying the canon to construe the scope of congressional authorization for the President's actions does no violence to separation-of-powers principles for another reason. If constitutional text puts the power in question squarely in the President's hands (under the Commander-in-Chief Clause, for example), then this tool of construction is unnecessary, because the scope of authorization by Congress is not relevant. If Congress directly speaks to the issue, the canon does not apply. It is only in play to the extent that the President's authority is at least partly a function of congressional authorization and to the extent that the scope of such authorization is unclear. Aside from the modest preference for legislative action described above, the *Charming Betsy* canon can also serve a separation of powers function if it accurately reflects congressional intent by keeping delegations of congressional power to those that Congress actually intended (or would have intended) to authorize. It also serves separation-of-powers values if it does a good job of eliciting preferences from Congress[243] and if it provides a bright-line rule against which

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of the exercise of this power": the "'neutrality laws,'" which forbid the "fitting out and equipping of armed vessels, or the enlisting of troops, for either of two belligerent powers with which the United States is at peace"; and "the laws which prohibit the organizing within the country of armed expeditions against friendly nations." HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 197 (St. Paul, West Publ'g Co. 1895).

[241] *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 465–67 (2000). A major debate in the 1780s was whether this power properly belonged to the federal or state governments. *See id.*

[242] *See* GREEN, *supra* note 99, at 28–53 (tracing the history and sources of law of armed conflict).

[243] *See* Elhauge, *supra* note 54, at 2238–46. Elhauge emphasizes that some canons can be justified as effectively eliciting preferences from Congress, but to do so they should favor the parties with the weakest access to the congressional agenda. In Hamdi's case, such a justification would suggest that the party urging compliance with international law should be favored over the President, who has particularly good access to Congress. *See infra* note 244.

Congress can make future authorizations and against which the President can take action.[244]

In summary, under one separation-of-powers perspective, application of the *Charming Betsy* canon to interpret general authorizations for the use of force is unnecessary because one of the political branches—the President—has already decided in favor of the action in question. But neither does application of the canon keep the decision for the courts, another potential separation-of-powers value. Instead, it disables the courts,[245] but favors a legislative over an executive decision to violate the norm in question. There are some reasons to think that the history of the *Charming Betsy* and other canons supports a modest preference for the legislature, and the text of the Constitution also provides some grounds on which to favor legislative decisions regarding the violation of international law during war. The canon also operates in a context that minimizes separation-of-powers problems because it leaves the ultimate decision about violating international law with the political branches, it does not apply if the

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[244] *Cf.* Finley v. United States, 490 U.S. 545, 556 (1989) (stating that "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules"). Error costs are a potential reason not to employ the canon. Applying the canon will push courts toward construing congressional authorization narrowly, and the courts may err on the side of denying to the President power that Congress intended to confer. Particularly during war, these error costs might be too high to justify the canon. Several considerations suggest that this is not true, however. First, the Executive Branch appears to have the best chance of securing legislation from Congress to correct any errors by the courts. *See* Elhauge, *supra* note 54, at 2238 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 tbl.7 (1991)). The flurry of legislation that followed the September 11, 2001, attacks provides strong evidence of the President's power to control the legislative agenda in times of war. *See* Bryant & Tobias, *supra* note 16, at 386–91 (2002) (describing part of the legislative agenda in September and October of 2001, including the Senate's suspension of its normal operating procedures in the days after September 11, 2001, in order to expedite the President's requests); *Events of Sept. 11 Spur Revised Custody Procedures, Altered Legislative Landscape*, 78 INTERPRETER RELEASES 1493, 1493–95 (Sept. 24, 2001) (describing changes to the legislative agenda immediately following the attacks of September 11, 2001); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1276–77 (2002) (noting that after September 11, 2001, Congress functioned "with much more than all deliberate speed. In record time, it considered and enacted a broad array of laws, many of them in almost precisely the form sought by the President"). Mr. Hamdi, however, is less likely to secure corrective action by Congress. Second, decisions that must be made quickly, and that respond immediately to an armed threat or armed attack, may fall within the President's plenary authority as Commander in Chief.

[245] The courts do have to make a determination as to whether the President's action violates (or potentially violates) international law. *See infra* notes 246–256 and accompanying text. The point here is that to the extent that the canon is animated by the concern that courts might interpret a statute to violate international law without the explicit authorization of Congress, it is appropriate to apply it in this context.

President's actions fall within his plenary authority under the Constitution, and it works to maximize the preferences of Congress.

C. Hamdi *Revisited*

This Section returns to the plurality's opinion in *Hamdi*, and considers how the *Charming Betsy* canon would have functioned based on the claim that the detention violated the Third Geneva Convention and the ICCPR. These examples illustrate that by applying the canon the plurality would have made a better use of international law—one that is more carefully linked to the intentions of Congress, serves separation-of-powers functions, and promotes some normative goals. In considering these examples, this Section also addresses two additional questions about the canon. The discussion of the Third Geneva Convention considers the extent to which courts should decide difficult questions of international law in applying the canon, and the discussion of the ICCPR considers the application of a non-self-executing human rights treaty as the basis for the canon.

1. The Third Geneva Convention

Consider first the plurality's conclusion that the AUMF did not authorize Hamdi's detention beyond "the cessation of active hostilities," based in part on Article 118 of the Third Geneva Convention.[246] The plurality reached this conclusion relying on the "law of war," but it did so (as Justice Thomas suggested) without actually deciding whether Hamdi was entitled to the protection by this term of the Third Geneva Convention,[247] and without citing any customary international law that would otherwise protect him. This problematic reference to international law is poorly linked to the text of the AUMF or the presumed intent of the drafters; in one sense it also shows a disregard for the binding norms of international law. Applying the *Charming Betsy* canon, by contrast, would serve both functions. The Geneva Conventions provide a particularly robust basis for the canon; they are long-standing

[246] Third Geneva Convention, *supra* note 96, art. 118, 6 U.S.T. at 3406. The plurality also cited to the 1899 and 1907 Hague Conventions and the 1929 Geneva Convention, all three of which have been largely superseded by the Geneva Conventions of 1949. *See Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion); *supra* note 96. This Section puts aside the question of whether the Third Geneva Convention applies to detainees who are nationals of the detaining power. *See supra* note 112.

[247] *See supra* notes 114–121 and accompanying text.

treaties[248] incorporated into current U.S. military practice, to which the executive has repeatedly said it will adhere.[249]

This application of the canon raises an additional separation-of-powers consideration, however. The protection against indefinite detention in the Third Geneva Convention only applies if Hamdi qualifies as a prisoner of war, or is entitled to an Article 5 hearing (and is thus entitled to prisoner-of-war protections unless and until the hearing determines otherwise).[250] In this situation, the Court must make some determination about the content of international law to apply the canon; to this extent, it is not just deferring to Congress for more specific direction on questions of international law.[251]

There are three potential approaches to this problem—not employ the canon (and avoid the question), apply the canon to avoid a *possible* violation of international law, or decide the issue of entitlement to prisoner-of-war status. Deciding among these approaches depends upon the interpretive value of the presumption on the one hand, and the difficulty in (or costs associated with) determining whether the executive's actions violate international law on the other. In this case, the interpretive value of the presumption is high, making the first approach unattractive (unless other interpretive tools clearly

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[248] The Geneva Conventions may or may not be self-executing. *See* Omar Akbar, Note, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195, 219–23 (analyzing Article 5 of Third Geneva Convention and suggesting that it is self-executing). *Compare* Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, C.J., concurring), *rev'd on other grounds sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004) (indicating that the Geneva Conventions of 1949 are not self-executing), *and* Hamdi v. Rumsfeld, 316 F.3d 450, 468–69 (4th Cir. 2003), *rev'd on other grounds*, 124 S. Ct. (2004) (same), *with* United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (indicating that some parts of the Third Geneva Convention are self-executing).

[249] *See supra* notes 191–198 and accompanying text. *Jus in bello* norms that the United States has acknowledged are part of customary international law also serve as a strong basis for application of the canon. *See, e.g.*, *supra* notes 194, 200.

[250] Third Geneva Convention, *supra* note 96, art. 118, 6 U.S.T. at 3406 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). Article 4 sets out the criteria for prisoner-of-war status, *id.* art. 4, 6 U.S.T. at 3320–22, and Article 5 provides that should "any doubt arise" as to whether a prisoner meets the requirements of Article 4, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* art. 5, 6 U.S.T. at 3322–24. It bears repeating that Hamdi did not argue that he was entitled to prisoner-of-war status, *supra* note 95, and his briefs make only passing reference to the international materials cited by Justices O'Connor and Souter. *See* Brief for Petitioners at *16–17, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 378715. This confirms that the relationship between international law and the scope of the AUMF is uncertain, and that using the *Charming Betsy* canon in this context would provide some much-needed clarity.

[251] *See* Bradley, *supra* note 21, at 531–32; Turley, *supra* note 21, at 238.

resolve the question). The second approach makes use of the canon, but avoids any decision about the content of international law, except that a violation is possible, which avoids what (in some cases) might be a difficult decision about international norms. It does so, however, at the risk of denying the President some power that he might enjoy if the court fully analyzed the international norm in question. Here, however, the issue the court must decide is simply the entitlement to an Article 5 hearing—which still leaves the ultimate decision as to entitlement to prisoner-of-war status up to those conducting the hearing (generally military personnel),[252] not the court. In this case, the third approach is probably best.

Nevertheless, the best default rule is probably to construe general authorizations for the use of force to avoid a potential conflict with the Third Geneva Convention. This approach is most consistent with the historical use of the canon, which has not traditionally involved answering difficult questions of international law.[253] The risk of under-enforcement is mitigated by the factors considered above,[254] as well as the (admittedly limited) deference afforded to the executive as to the content of international law.[255] The risk is also limited by the Supreme Court's obligation to scrutinize international law carefully enough to conclude that there is real risk of a violation and by the relatively well-defined set of norms embraced by international humanitarian law.[256]

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[252] *See* Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under* Ex Parte Quirin, 71 FORDHAM L. REV. 2565, 2573–75 (2003) (describing Article 5 military hearings during the Vietnam War).

[253] *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 382–83 (1959) (applying the canon based in part on the "relevant interests of foreign nations" and the "legitimate concern of the international community"); *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (interpreting statute to avoid conflict with international law, but not clearly identifying the legal obligation in question); *Spector*, 356 F.3d at 646–47 (applying canon to avoid "stark likelihood" of violating international law); *see also* Swaine, *supra* note 58, at 715–17 (defending what he calls "compound avoidance-avoiding"); *cf. Aramco*, 499 U.S. at 255 (employing the presumption against extraterritoriality to avoid "difficult issues of international law").

[254] *See supra* note 233–244 and accompanying text. For example, the canon only applies when the scope of authorization is unclear, Congress can override the courts' interpretation, and the President has good access to the legislative agenda, especially during times of national security crises. *Supra* note 244. Also, the canon is used in this context to avoid potential conflicts with international law, not to make binding interpretive decisions that violate international law. *Cf.* Bradley, *supra* note 21, at 531–32 (observing that the canon invokes international law primarily to avoid conflicts, not to give "independent, affirmative effect" to international law).

[255] *See infra* note 270–275 and accompanying text (discussing deference to the Executive Branch regarding the content of international law).

[256] *See supra* notes 147, 177.

2. International Covenant on Civil and Political Rights

The detention of Hamdi may also violate the ICCPR, which prohibits arbitrary detention.[257] For the following two reasons, however, the alleged violations of the ICCPR form a weaker basis upon which to rest the presumption: an understanding to the ICCPR added during the ratification process states that it is not self-executing,[258] and the fact that the ICCPR is a human rights treaty, not part of international humanitarian law.

Because the ICCPR is not self-executing, courts cannot directly enforce it absent implementing legislation.[259] The ICCPR could nonetheless serve as an interpretive norm (because it is not being used as a directly enforceable right), but if the non-self-executing declaration also reflects a preference against the domestic courts interpreting the ICCPR in any context at all,[260] this would suggest at least that it does not make a good basis for the *Charming Betsy* canon.

There are several reasons, however, to reject this view. First, it would have the effect of elevating customary international law and

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[257] International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR], http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Mar. 15, 2005); *see* Brief of Amicus Curiae Global Rights in Support of Petitioners at *9–14, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 354184 (arguing that Hamdi's detention violated the ICCPR); Brief of Amicus Curiae International Law Professors Listed Herein in Support of Petitioners at *12–18, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 354186 (same).

[258] SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23 (1992), *reprinted in* 31 I.L.M. 645, 657 (1992). The Bush Administration never clearly explained the meaning of the non-self-executing understanding (which it proposed). Instead, it suggested both that it meant that the ICCPR created no private right of action, and elsewhere that it meant that the ICCPR did not create "private rights enforceable in U.S. courts." *See* David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 165–69 (1999). The first meaning would pose no bar to the use of the ICCPR as an interpretive norm (because the ICCPR is not used to supply the cause of action). The second explanation better tracks the *Restatement (Third) of the Foreign Relations Law of the United States*, but some courts appear to use the first formulation. *See, e.g., Hamdi*, 316 F.3d at 468 ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." (quoting Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992)).

[259] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987).

[260] *Cf. Sosa*, 124 S. Ct. at 2763 ("Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing."); *supra* note 172.

sole executive agreements over non-self-executing treaties as an interpretive norm,[261] despite the formal participation of the President and Senate in negotiating and ratifying all treaties. Second, the courts have not suggested that the canon turns on this distinction. Third, the Supreme Court has repeatedly interpreted treaties without deciding whether or not they are self-executing.[262] Finally, because courts have failed to clarify fully how to distinguish between self-executing and non-self-executing treaties,[263] this distinction would undermine the clarity of the canon and provide less guidance for Congress about how its authorizations for the use of force will be interpreted.

The ICCPR also lies outside the law of war, providing the other potential objection for using it in this context. In contrast to the Geneva Conventions, for example, the ICCPR is not incorporated into U.S. military practice, the Executive Branch has not publicly committed itself to adhering specifically to the ICCPR during armed conflict, and in general international human rights norms may be less well-defined than international humanitarian law.[264] Nonetheless, the ICCPR is a treaty and thus received the approval of a supermajority of the Senate, and the ICCPR itself has a derogation procedure for times of "public emergency" that threaten national security,[265] meaning that the text of the ICCPR explicitly contemplates application of the treaty in such situations. Indeed, the ICCPR permits derogation from the provision that Hamdi's detention is said to violate—the prohibition against arbitrary detention.[266] That the treaty makers explicitly determined how it would apply in times of national security crises (and a

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[261] *See Hoffman-La Roche*, 124 S. Ct. at 2366 (interpreting a statute to "avoid unreasonable interference with the sovereign authority of other nations" because "[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow" (citing the *Charming Betsy* canon)); *Rossi*, 456 U.S. at 32 (applying the canon based on an executive agreement, not a treaty).

[262] *See* Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 716 (1995) ("In countless cases, the vast majority of those raising treaty-based claims, the Court has resolved the case without even mentioning the self-execution issue.").

[263] *Id.* at 716 n.99 (discussing the doctrine's "problematic status" and the Court's failure to "address . . . the doctrine in many years despite the glaring need for clarification").

[264] *See* Jinks, *supra* note 97, at 374–75 n.30.

[265] ICCPR, *supra* note 257, art. 4(1), 999 U.N.T.S. at 174 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation . . . .").

[266] *Id.* art. 4(2) ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."). The prohibition against arbitrary detention is found in Article 9. *Id.* art. 9(1), 999 U.N.T.S. at 175.

supermajority of the Senate agreed) suggests that all other things being equal, the AUMF should be construed to avoid violations of the ICCPR, even during national emergencies.

Some cases may present difficult interpretive questions—for example, the precondition for derogation (a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed")[267] does not lend itself well to judicial determination. In other words, the interpretive value of the ICCPR is lower to begin with, and here the costs of deciding whether there is a potential violation of international law are high. In the *Hamdi* case itself, however, there is no need to determine whether the preconditions for derogation are met, because the President has not taken the necessary steps to derogate from the terms of the treaty.[268] Moreover, the substantive term prohibiting arbitrary detention is one that the U.S. courts and international tribunals have considered in a number of cases.[269] On balance, in this situation, the courts should construe the AUMF to avoid a potential conflict with the ICCPR's ban on arbitrary detention.

All in all, this discussion suggests that in the context of international human rights law the canon may be easier to overcome, and that the following factors are relevant in determining whether it

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[267] *Id.* art. 4(1), 999 U.N.T.S. at 174.

[268] The Covenant requires the following:

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

ICCPR, *supra* note 257, art. 4(3), 999 U.N.T.S. at 174. Although the United States has not taken this step, the United Kingdom has. Citing the September 11 attacks and the U.N. Security Council Resolutions condemning them as threats to international peace and security, the United Kingdom submitted an extensive letter to the Secretary General detailing the security threat to the United Kingdom and describing the precise government actions that might derogate from Article 9 of the ICCPR, and their temporal limitations. *See* Derogation Notification, Dec. 18, 2001, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited Mar. 15, 2005).

[269] *See, e.g.*, *Kim Ho Ma*, 257 F.3d at 1114 (applying the *Charming Betsy* canon to avoid a conflict with the ICCPR's prohibition on arbitrary detention); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383–84 (9th Cir. 1998) (concluding that plaintiff's detention did not violate ICCPR's ban on arbitrary detention); *cf. Sosa*, 124 S. Ct. at 2767–69 (holding that the ICCPR did not create a private right of action because it is not self-executing and further holding that customary international law based on the ICCPR did not create a right of action for short-term detentions); Vuollane v. Finland, U.N. Human Rts. Comm'n, 35th Sess., Communication No. 265/1987, U.N. Doc. ICCPR/C/35/D/265/1987 (1989) (finding Finland had violated ICCPR's ban on arbitrary detention).

should apply: the participation of the political branches in the development of the norm in question (and their continued commitment to that norm), the extent to which it was intended to apply during times of armed conflict, and the specificity of the norm in question. If these considerations show that the action under consideration may violate well-defined requirements of international law to which the political branches have assented, and from which derogation is not permitted, courts should hesitate to read a general authorization for the use of force as embracing it.

Finally, this discussion raises an analytically distinct but important question as to the proper deference to afford the Executive Branch in determining the *content* of international law. This issue has been discussed in some detail elsewhere,[270] but several considerations bear mention here. First, the inevitable functional arguments about the President's unique ability to understand international problems associated with foreign affairs and national defense[271] must be considered in conjunction with the text of the Constitution, which explicitly lodges with Congress many powers directly related to both international law and the conduct of war.[272] Article III of the Constitution also explicitly extends the judicial power of the United States to cases that arise under treaties;[273] federal courts thus would seem to be fully empowered to interpret them.[274] Second, it bears repeating that if the President is exercising his own authority as Commander in Chief (or some other power granted by the Constitution), then the canon is not in play at all. Third, affording the President very limited deference as to the content of international law is supported by the reasoning of six Justices in the *Hamdi* case, two of whom made clear and four of whom suggested that the President is due no particular deference even regarding the *content* of international law, at least when it is used to construe the scope of congressional authorization for the use of force.[275]

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[270] *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015–19 (1994); Bradley, *supra* note 233, at 701–15; Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1298–1302 (2002); Yoo, *supra* note 233, at 871–73.

[271] Yoo, *supra* note 233, at 864.

[272] *See supra* notes 233–242 and accompanying text.

[273] U.S. CONST. art. III, § 2.

[274] Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1846 (2004) (noting that "treaty interpretation" as the "domestic law of the United States" is a "quintessentially judicial function").

[275] *See Hamdi*, 124 S. Ct. at 2650 (O'Connor, J., plurality opinion); *id.* at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

CONCLUSION

Congressional authorization for the President's actions plays a crucial role in the courts' construction of the President's war and foreign affairs powers. When Congress authorizes the use of force generally—either by resolution or by declaring war—international law can serve as an important tool in determining the scope of that authorization. Both human rights activists and government lawyers have employed international law in this way, the former arguing that authorizations are limited by international law and the government arguing that the President's actions are authorized if they are consistent with international law.

In *Hamdi*, the U.S. Supreme Court had the opportunity to clarify the appropriate use of international law in this context, but it failed to do so. It used international law to construe the scope of congressional authorization, but without careful consideration of the source, content, or interpretive function of the legal norms upon which it relied. As a result, it is difficult to understand exactly how those sources are linked to the interpretation of Congress's authorization, and it is difficult to predict how the Court will use international law in future cases. This only contributes to the general confusion regarding the use of international law to interpret the Constitution and acts of Congress.

There are, however, better ways of approaching international law, and this Article has supplied one example. By presuming that general authorizations for the use of force do not include actions that violate international law, courts could better link their use of international law to the intentions of Congress and serve separation of powers in several different ways. Such an approach would likely also advance many of the normative goals sometimes associated with domestic application of international law, including the development of a robust system of transnational norms and the enhancement of the role of the United States in their development.