MILITARY TRIBUNALS, INTERNATIONAL LAW, AND THE CONSTITUTION: A FRANCKIAN-MADISONIAN APPROACH

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I. Introduction

International lawyers will undoubtedly be familiar with the prodigious and remarkable body of work in international law that Professor Thomas Franck has produced over the past four or five decades. In the brilliant light of his international law writings, some may have been blinded to the fact that, over the years, Professor Franck, not satisfied with intellectually dominating one field, has produced a nearly equally prodigious and remarkable body of work in another field: U.S. constitutional law and, more specifically, the constitutional law of foreign affairs.¹

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Lest the continuing importance of this part of his oeuvre be overlooked in this conference, which focuses largely on his international law writings, I explore here some of Professor Franck’s ideas about constitutional law. Nevertheless, departing from tradition, I do not offer an exposition and critique of some important aspect of Professor Franck’s views. Instead, I present what I take to be a Franckian analysis of a major constitutional issue of great immediate concern: the constitutionality of the military tribunals that President Bush has said he intends to employ in conducting the so-called “war on terrorism.”

I adopt this somewhat unconventional approach in part because Professor Franck’s ideas on constitutional law are so many and varied; in larger part because I agree with so much of what he has claimed and advocated; and in still larger part because imitation is a high form of praise. Viewing the legal issues raised by this extraordinary act of executive/military authority through a Franckian lens offers vital insights, I believe, into how we should think about the grave constitutional issues that are now unavoidably upon us for collective decision.

Let me be more explicit about the substance of my claim: I contend that, in exercising his war powers as commander in chief, the President is constitutionally bound, at a minimum, to comply with international law, which means not only faithfully observing the obligations of treaties that the United States has ratified (a point that is not really in dispute), but also complying with customary international law in general and the laws of war (the jus in bello), as modified by the law of human rights, in particular. There has been a great deal of debate in the United States of late about the relationship between customary international law and domestic law. Some have argued strenuously, though I believe erroneously, that, under the Constitution, customary international law is not part of the laws of the United States. As a consequence, they argue, the federal courts do not have Article III subject matter jurisdiction over a case solely because the case arises under customary international law and, even more portentously, that the Supremacy Clause does not make customary international law the supreme law of the land binding on the states. Therefore,

absent an act of Congress incorporating customary international law into federal law, the states are free to choose with unfettered discretion whether or not to comply with the customary international law obligations of the United States.  

For present purposes, I put these interesting questions aside, for my argument here is in a different vein: In my view, there is an internal relationship between customary international law and the scope of the President's authority as commander in chief. In designating him commander in chief, the Constitution grants him the power to exercise (at least some of) the belligerent rights of the United States under international law. That is a very great power, but it is not a power without limits. Some of those limits—probably, indeed, the most vital limits—can be found in the principles of the separation of powers, as, most notably, in the grant to Congress of the power to declare war. Others can be found in the fundamental-rights provisions of the Constitution. Much of the constitutional litigation over the President's war powers over the past two hundred years reflects a sometimes timid judicial effort to work out the scope of just these sorts of constitutional limitations and to apply them to actual exercises of presidential authority during wartime. In light of recent events and the continuing "war on terrorism," moreover, many commentators of late have subjected these limitations to extended, if not entirely satisfactory, consideration and analysis.


5. U.S. Const. art. I, § 8, cl. 11.

6. Though overly intoxicated with the sheer magnitude of presidential power, Clinton Rossiter and Richard Longaker provide an engaging account of the historical judicial struggles over the President's war powers. See Clinton Rossiter & Richard P. Longaker, The Supreme Court and the Commander in Chief (expanded ed. 1976).

7. See, e.g., Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002); George P.
What has largely been missing from the discussion, however, has been any notice of yet another kind of limit on the President's authority: the limits that derive from the principles of international law.\(^8\)

In my view, the very nature of the commander-in-chief power requires the President, at a minimum, to remain within the bounds of the international law of war. To be sure, there is a related question about whether the President—enjoined as he is by the Constitution faithfully to execute the laws—is bound to uphold customary international law in general, and my claim undoubtedly draws strength from this correlative duty, which I believe exists as well.\(^9\) At the same time, however, the claim I will defend is narrower and has both an independent basis in constitutional text and structure and a long history of its own. It, therefore, does not depend upon how the larger issue about whether the President is generally bound by customary international law is ultimately resolved. Of course, I do not deny that my claim is likely to be controversial, and I concede at the outset that there are eminent authorities who seem to disagree.\(^10\) If I am right, however, it means that, whatever constraints the separation of powers or the terms of the Fifth and Sixth Amendments may additionally impose, President Bush is constitutionally bound, when employ-

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10. It appears, for example, that Professor Henkin disagrees, although he has not explained his view in any detail. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 47 & n.H, 243-45 (2d ed. 1996). For further discussion, see infra notes 35, 43 and accompanying text.
ing military tribunals, to comply with the requirements of international law.

Which brings me back to Professor Franck. In my reading of his work, Professor Franck is profoundly Madisonian. Madison's influence is apparent in all of his work, but it is nowhere more evident than in his writings on constitutional law. Among the core ideas that animate his writings in this area is the notion, Madisonian in origin, that the fundamental rights of the individual can be made secure only if power is divided among different organs and levels of government. Madison, of course, focused principally on the separation of powers among the branches of the federal government and between the federal and state governments. The vitality of the principle, however, does not stop at the water's edge. Extending Madison's argument, Professor Franck has emphasized the importance of international law as an additional situs of regulatory power that, in tandem with the domestic division of powers, can play a crucial role in ensuring justice and upholding the rule of law and the rights of the individual. It is this Madisonian perspective that, I will argue, provides the normative underpinnings for my claim that the President's war powers ought to be limited by international law.

In Part II of this Article, I offer an interpretation of two fundamental Madisonian principles that, I believe, guide Professor Franck's approach to constitutional interpretation. In Part III, I then argue that when these principles are applied to the problem of military commissions, they argue strongly in favor of limiting the President's authority to the range of permissible actions under international law. Finally, in Part IV, I attempt to show that this understanding of the scope of the President's war powers has deep roots in U.S. constitutional history and practice and that, far from asserting a novel principle, I am simply arguing for the continuation of a long-standing constitutional tradition. Unfortunately, however, for reasons of space, I can only sketch the historical argument here.

II. FRANCKIAN MADISONIANISM AND THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS

Let me begin by identifying the two fundamental Madisonian principles that I believe underlie Professor Franck's constitutional law writings and that provide normative grounding.
for the incorporation of customary international law norms into domestic constitutional law. The first is his rejection of simple majoritarianism and his passionate adherence to the separation of powers and checks and balances. Indeed, the greater part of his work has been devoted to demonstrating that the separation of powers principle is no less vital in the context of foreign affairs than in the context of domestic affairs.\(^\text{11}\) Since World War II, presidents have famously claimed greater and greater unilateral authority over foreign policy and have sought, often successfully, to assume powers that the Constitution originally assigned to Congress.\(^\text{12}\) Whether upholding the power of Congress to judge when war is justified,\(^\text{13}\) defending the power of the Senate or Congress to assess whether it is appropriate to terminate a treaty,\(^\text{14}\) or vindicating the First Amendment rights of government employees from censorship by overzealous national security officials,\(^\text{15}\) Professor Franck has consistently opposed this tendency towards executive usurpation and has sought ways, as he puts it, to restore "the adversary or balance of power system which informs our democracy."\(^\text{16}\) As he conceives it, a central aim of this system is to subject the exercise of power by one branch to the judgment of an independent umpire or jury. This umpiring function is an essential part of a system designed to prevent hasty and improvident exercises of the foreign affairs powers and to check the tendency of ambitious politicians to override, in the name of foreign policy or national security, the rights of individuals.

In Professor Franck's vision, the courts have a large, but too often unfulfilled, role to play in upholding the proper functioning of this "balance of powers" system. Litigants have frequently called upon the courts to restrain the tendency of the President to invade the powers of Congress or to impinge

\(^{11}\) See sources cited supra note 1.
\(^{13}\) See, e.g., Franck, Rethinking War Powers, supra note 1; Franck, After the Fall, supra note 1.
\(^{14}\) See 2 United States Foreign Relations Law: Documents and Sources 365-567 (Michael J. Glennon & Thomas M. Franck eds., 1980).
\(^{16}\) Franck, After the Fall, supra note 1, at 606.
upon the rights of individuals. Unfortunately, their response, especially of late, has all too often been to avoid involvement by invoking one of several nonjusticiability doctrines, most notably the political question doctrine. Descrying this tendency, Professor Franck devoted an entire book to urging the courts to be more assertive in carrying out their umpiring function, systematically countering the arguments—normative, doctrinal, precedential, and historical—for judicial passivity in foreign affairs.\(^\text{17}\)

In the final analysis, however, the largest burden for preserving the system inevitably falls upon Congress and the Senate. In most instances, the Constitution assigns them the jurying function. The Senate, of course, umpires the treaty-making process, though the President's increasing use of the executive agreement form poses a threat to its unique function.\(^\text{18}\) Most dramatically, it is the role of Congress to judge, as in the recent case of Iraq, whether the President has made a sufficiently compelling case for utilizing military force. The greater part of Professor Franck's writings have been a constructive effort to offer workable solutions to reverse the pattern of presidential usurpation and congressional acquiescence that has undermined Congress's effectiveness as a jury independently evaluating the soundness of presidential exercises of power. His extensive writings on the War Powers Resolution, in particular, have sought ways to enable Congress to combat the dangers of presidential adventurism while preserving the advantages of executive expertise and energy in advancing national security and other important aims.\(^\text{19}\) Likewise, in his powerful critique of the Supreme Court's decision in \textit{Immigration and Naturalization Service v. Chadha},\(^\text{20}\) he offered a carefully reasoned approach to the so-called "legislative

\(^\text{17}\) See Franck, \textit{Political Questions}, supra note 1.


\(^\text{19}\) See, e.g., Franck, \textit{Rethinking War Powers}, supra note 1; Franck, \textit{After the Fall}, supra note 1.

veto," hewing a path that could successfully preserve the legislative veto as a mechanism for restoring the congressional/executive balance while at the same time obviating uses that would infringe on bona fide executive powers or fundamental rights.21

There is a second and related Madisonian principle that also underlies Professor Franck's approach to constitutional interpretation. It is the idea that the Constitution, where possible, ought to be interpreted to harmonize the domestic and the international legal systems by facilitating U.S. compliance with international law standards and by enabling it to participate fully in, and uphold, international institutions. This harmonization principle underlies Professor Franck's deep skepticism about the barrage of constitutional arguments that have been made in recent years to limit or block altogether the ability of the United States to participate in emerging international regimes, from human rights and arms control treaties to the WTO. Arguments of this kind, about which he has expressed due skepticism, have been rooted in the Appointments Clause,22 the principle of nondelegation of legislative, executive, or judicial authority, federalism, and even the Fourth and Fifth Amendments.23 For the most part, these challenges are wholesale denials of the legitimacy of international law and institutions rather than carefully calibrated efforts to root out the problematic features of new treaty regimes while still enabling U.S. participation.24

Perhaps, more subtly, the harmonization principle also underlies Professor Franck's work on the War Powers Resolution. The importance he attaches to upholding the congressional check on presidential uses of armed force lies, at least in part, in its tendency to promote greater U.S. compliance with Article 2(4) of the U.N. Charter.25 Congress's restraining in-

23. U.S. Const. amends. IV, V.
24. See Thomas M. Franck, Can the United States Delegate Aspects of Sovereignty to International Regimes?, in DELEGATING STATE POWERS, supra note 1, at 1-17 (discussing constitutional challenges to the United States' ability to enter into international treaties that delegate authority to international organizations).
fluence discourages the President from planning aggressive military measures, the legality of which cannot be sustained under the Charter. Indeed, understanding Professor Franck’s work on the war powers in this way helps explain one of his boldest and most remarkable claims: According to Professor Franck—and this is a view that, with qualifications, I share and have written in support of—26—the President is fully within his powers when, without authorization from Congress, he uses military force solely on the authority of a Security Council resolution.27 In making this claim, Professor Franck was arguing not only in opposition to executive hawks, who would free the President from the restraints of both Congress and the United Nations, but also in opposition to isolationist doves who, by insisting on congressional approval, would render the Security Council largely ineffective. Some have found it difficult to understand how he could so passionately advocate in favor of an enhanced congressional role in overseeing presidential uses of force and, at the same time, uphold the power of the President to use force under the authority of the Security Council without any further congressional involvement. The harmonization principle supplies a ready explanation: What Professor Franck has argued for is a constitutional division of powers that, on the one hand, encourages U.S. compliance with the nonuse of force provisions of the U.N. Charter and yet, on the other hand, enables it to participate fully in and strengthen the U.N. system of collective security.

The harmonization principle not only underlies Professor Franck’s work, but it is also, I believe, genuinely Madisonian, though perhaps less obviously so. It extends to the international level Madison’s famous argument in *The Federalist No. 10* extolling the advantages of a large federal republic over a republic of more limited extent.28 Madison’s aim was to demonstrate why a large republic would be more successful than a small republic in overcoming the injustices of majoritarian factions—those factions which “are united and actuated by some common impulse of passion, or interest, adverse to the rights


28. See *The Federalist* No. 10 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the advantages of the larger republic).
of other citizens."\(^{29}\) Popular governments had always foun-
dered because of an inability to control "the violence of fac-
tion," which led to "instability, injustice, and confusion."\(^{30}\)
Madison's argument was that the more extensive the territory
and the larger the number of people, the greater the number of
conflicting interests, viewpoints, and sects that would be
represented. Within this more inclusive polity, it would be
more difficult for majoritarian factions either to form or to
organize into a coherent majority party. They would thus be
less able to impose their will heedless of the rights and inter-
ests of others.\(^{31}\) Moreover, in a large republic, Madison ar-
gued, the representatives of the people in the legislature were
more likely to be highly qualified and virtuous and to be capa-
ble of maintaining a vision of the long-term interests of the
community. They would be elected from larger districts, and
therefore there would be a larger pool of suitable candidates
from which the public could choose.\(^{32}\)

 Nonetheless, Madison did not contend that all govern-
mental power should be delegated to a unified national gov-
ernment. As the numbers of persons represented by each
member of the legislature grow, representatives become in-
creasingly less familiar with the local circumstances of their
constituents. A large federal republic, thus, offered the best so-
lution. Matters of solely local concern would be reserved to
the states, but matters of general interest would be delegated
to the federal government: "The federal Constitution forms a
happy combination in this respect: the great and aggregate
interests being referred to the national, the local and particu-
lar to the State legislatures."\(^{33}\) From this division of powers,
not only among the branches but also between the federal and
state governments, arose a "double security" to the people.\(^{34}\)

 Similar considerations support the harmonization prin-
ciple. The world as a whole includes a far more diverse set of
interests, viewpoints, and sects than are found within the na-

\(^{29}\) Id. at 57.
\(^{30}\) Id. at 56.
\(^{31}\) See id. at 62 (noting that the nature of a large republic will stifle fac-
tions); see also The Federalist No. 51 at 351-53 (James Madison) (Jacob E.
\(^{32}\) The Federalist No. 10, at 63 (Jacob E. Cooke ed., 1961).
\(^{33}\) Id.
\(^{34}\) The Federalist No. 51, at 351 (Jacob E. Cooke ed., 1961).
tional community. Hence, following Madison, it will be correspondingly more difficult for powerful factions to form that can use the international lawmaking process to infringe upon the rights and interests of minorities. Furthermore, the national representatives who participate in the international lawmaking process are chosen from among the peoples of the entire globe and, hence, are likely to include a high proportion of statesmen and stateswomen who are relatively more capable of rising above factionalism to assume a vision that encompasses the rights and interests of all peoples.

Of course, the analogy between the global and domestic levels is by no means perfect. The unequal distribution of populations among nations and cultures may, to some extent, counter the positive effects of the diversity of interests, viewpoints, and sects in obstructing majoritarian oppression. Contrariwise, and more significantly, the unequal distribution of power and wealth internationally raises the specter not of majoritarian but of minoritarian oppression, enabling powerful minorities to disregard the rights and interests of the majority. The principle of electoral accountability, moreover, works only imperfectly at the international level. Nevertheless, these considerations do not undermine the Madisonian value of the international legal system, but rather, reveal the need for different kinds of safeguards at the global level. Thus, just as it is appropriate to reserve matters of purely local concern to the states and to delegate matters of aggregate interest to the national government, so, too, it is necessary to ensure that matters that do not significantly affect the global interest are reserved to domestic governments. Additionally, it is necessary and equally important to modify the majoritarian features of the domestic representative system and substitute instead a more supermajoritarian international lawmaking process. Such a system affords both majority and minority interests substantial protection against oppressive international legislation, albeit at the risk of rendering the international legal system relatively ineffective in safeguarding legitimate global interests. In practice, of course, these safeguards are well-established features of the international legal system. Indeed, the international lawmaking process is not supermajoritarian but largely consensus based, giving states, particularly influential states, a virtual veto over new principles of customary international law. The United States, in particular, wields, and has
long wielded, very disproportionate and substantial influence over the content of international law and, thus, has more reason than other states to uphold the international legal system. From a Madisonian perspective, then, there are powerful reasons to structure the U.S. constitutional system to encourage respect for and to uphold international law and institutions. From thence, as Madison might say, arises a triple security, not only to the American people but to the peoples of the world.

III. Franckian Madisonianism Applied to the President's Powers as Commander in Chief

In combination, the two fundamental principles of Franckian Madisonianism argue strongly in favor of construing the President's war powers as bounded by the international law of war. The separation of powers principle suggests that the President ought not to be empowered to define for himself the content of the law that governs his conduct of war, and the harmonization principle suggests that, at least in the absence of a contrary mandate from Congress, the international law of war is the law that he should be bound to execute.

Consider, first, the separation of powers principle. When the President conducts a war, a question immediately arises: What law is he executing? Some body of principles must necessarily guide his decisions, for what is permissible and impermissible in war is not self-defining. According to which principles is occupied territory to be governed? What respect is due to the property rights of enemy civilians? What rights should be accorded to prisoners? What are the limits on military trials? These and countless other issues are continuously arising. From the perspective of the separation of powers, therefore, the question is whether the President may define for himself the rules by which he is to be governed or whether, as an executive officer, he is bound instead to follow the rules established through an appropriate legislative process. It is a fundamental feature of our system, rooted in the Madisonian separation of powers, that the President's authority extends only to the execution of the laws and that he does not make the laws that he is bound to execute. This broad claim, no doubt, requires some qualification in practice, especially given the difficulty in some contexts of neatly separating legislative from ex-
In the context of the conduct of war, however, ceding the President the power to determine the law that applies would constitute a gross and dangerous deviation from the general structure of our institutions. In conducting war, the President is always under intense pressure to achieve the nation's war aims at the lowest possible costs to U.S. interests. He is thus subject to the constant temptation to do the expedient at the expense of the principled and is, as a consequence, particularly ill placed to define for himself the limits on his own authority.

If the separation of powers principle argues against the President's power to define the law of war for himself, the harmonization principle argues that the law that he should execute is the international law of war. There is little doubt that the conduct of war is preeminently a subject of legitimate concern to the international community as a whole, and it is not surprising that it is among the earliest and most highly elaborated components of the law of nations. By definition, war is not contained within the boundaries of a single state. It necessarily impacts upon the interests of two or more states and almost invariably affects the interests of all. Moreover, in time of war, fear and patriotic zeal will often unite a majority of citizens, "actuated by some common impulse of passion, or of interest," to endorse actions that are adverse to the rights of those perceived as enemies. Under these circumstances, domestic law is unlikely to afford much relief to those who find

35. The most plausible ground for permitting the President to violate customary international law is rooted in the claim that the President, in fact, does have some significant legislative powers, among other things, when acting as commander in chief. This would appear to be Professor Henkin's view. Henkin, supra note 10, at 47 & n.H, 243-45. For further discussion of Professor Henkin's view, see supra note 10 and infra note 43. If the President has such legislative powers, the argument goes, he can, as a matter of domestic law, supersede customary international law, just as Congress can when exercising its legislative powers. For the reasons that follow, I do not believe that the Constitution grants the President such sweeping legislative powers.


themselves caught up in the passion of the moment. As Justice Jackson warned:

No one will question that [the war] power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.\(^{38}\)

In contrast, the international law of war has developed slowly over centuries through the consensual processes of treaty making and customary international law formation. In this process, the diverse interests and viewpoints of the various nations have been carefully weighed and balanced and the resulting rules reflect widely accepted accommodations and shared views. States, particularly those which have been most influential in framing the rules, would be hard pressed to claim that the rules are the result of an oppressive combination of nations unfairly overriding the interests of the minority.\(^{39}\)

Professor Franck has made a similar point about the superior capacity of international over domestic institutions in the context of the “fateful decision” to authorize the use of force.\(^{40}\) In upholding the President’s power to use force under the authority of a Security Council resolution, he observed that the U.N. Charter vests decision-making responsibility “in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress.”\(^{41}\) The same analysis applies to the conduct of war. In a time of high anxiety, domestic law is far more likely to be un-

\footnotesize{38. Woods v. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring).}

\footnotesize{39. The far more plausible claim is that the laws of war unduly reflect the interests of powerful states over those of less powerful states and, most importantly, of persons who are likely to become victims of war.}

\footnotesize{40. Franck & Patel, UN Police Action in Lieu of War, supra note 1, at 74.}

\footnotesize{41. Id.}
duly permissive in the treatment of those perceived to be enemies than is the international law of war. Indeed, we have direct evidence for this claim in the context of military trials. Over a half century ago, Congress, with little fanfare and even less consideration, adopted statutory language that effectively gives its approval to the use of military commissions and a virtual carte blanche to the President to define their procedures.\footnote{2} If there are to be limitations on the President’s conduct of military trials, then, it will not be because of restraints imposed by Congress. Congress will not assume the crucial umpiring function.

I do not mean to overstate the benefits of bounding the President’s war powers by international law. The laws of war,\footnote{2} As part of its general revision of the Articles of War in 1916, Congress added a new Article, Article 15, which provided that “the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals 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 . . . or other military tribunals.” Ex Parte Quirin, 317 U.S. 1, 27 (1942) (quoting Article 15). Although clearly only a savings provision rather than an affirmative grant of jurisdiction, the Supreme Court in Quirin nevertheless interpreted it as a congressional authorization to use military commissions to try offenses against the laws of war. \textit{Id.} at 29. In 1950, when Congress adopted the Uniform Code of Military Justice, superseding the old Articles of War, it reenacted Article 15 as Article 21 of the Uniform Code. 10 U.S.C. § 821 (2000). The legislative history, moreover, states that “[t]he language of AW 15 has been preserved because it has been construed by the Supreme Court (\textit{Ex Parte Quirin}, 317 U.S. 1 (1942)).” H.R. Rep. No. 81-491, at 17 (1949). Under these circumstances, it would be difficult to argue that Congress has not given its imprimatur to presidential uses of military commissions to try offenses against the laws of war. \textit{See also} H.R. Rep. No. 104-698, at 5-6 (1996) (commenting favorably, in a House Judiciary Committee report recommending adoption of the War Crimes Act of 1996, on the use of military commissions for trying war crimes under international law). In Article 38, 10 U.S.C. § 836 (2000), moreover, Congress gave the President discretion in determining the procedural rules applicable in trials before military commissions. Nevertheless, I do not wish to overstate the problem. Article 21 would appear at least to limit the President to using military commissions in a manner consistent with the requirements of international law. In this respect, as I shall contend, it was simply reinforcing what would already have been the case by the force of the President’s constitutional obligations. On the other hand, if I am wrong in my constitutional analysis, there remains a statutory requirement that the President comply with international law.
like domestic law, will still be invoked in haste when calm consideration of constitutional limitations is difficult, they will still be executed under the pressure of patriotic fervor, and they will still be interpreted by judges under the influence of the same passions and pressures. Nevertheless, recognizing international law as a limit on the President’s war powers has a number of potential benefits. First, it encourages the President and other officials to take especially seriously the views of the international community about the President’s compliance with international legal standards. Those arguments are and should be recognized as directly relevant to the scope of his constitutional authority. Second, it reinforces the long and laudable tradition of the U.S. military in guiding its conduct strictly in accordance with the requirements of international law. And third, it affords courts an externally validated standard for judging the constitutionality of presidential actions and may thereby embolden them to remain steadfast and refuse to conform the law, through interpretation, to the ill-considered demands of an aroused and fearful public.

IV. **The Traditional, Constitutional Understanding Has Bounded the President’s War Powers by International Law**

Even if I am right about the desirability of limiting the President’s war powers by international law, there is still a long distance to go before it would be justifiable to claim that those limits, in fact, qualify as constitutional limits. In this Part, I will try to shorten that distance. As I sketch below, there is substantial historical evidence to suggest that the President’s power as commander in chief was, from the beginning, understood to be so limited. Although under the shadow of the Cold War, as unduly expansive conceptions of executive power came into vogue in other areas, some may have begun to doubt this understanding, it has, in fact, never been repudi-

43. Thus, for example, Clinton Rossiter, writing in 1950, conceded that the courts “have made clear that the war powers must be wielded in accordance with the great qualifications found in the Constitution or in applicable principles of international law.” Clinton Rossiter & Richard P. Lonerger, *The Supreme Court and the Commander in Chief* 8 (1951) (quoting United States v. Macintosh, 283 U.S. 605, 622 (1931)). Nevertheless, without explanation or citation, he then concluded: “Yet the latter is today simply a moral limitation.” Id. Likewise, Professor Henkin recognizes that
ated, either by the judiciary or by the political branches, and, I believe, remains the constitutional law of the United States.

In the many historical debates over the war powers, there has been surprisingly little direct discussion of the relationship between the President's power as commander in chief and international law. In most instances, the understanding that the President could exercise only legitimate belligerent rights under the law of war appears as a sometimes explicit, sometimes implicit background assumption held on all sides in a debate over whether a particular exercise of executive authority was constitutional. For example, it is often implicit in the fact that the constitutionality of the executive act at issue is being measured by its consistency with the law of nations and that the only point of disagreement is over what the law of nations requires or permits. Furthermore, and perhaps ironically, recognition of international law limits on the President's authority is most often asserted by those arguing for a broader rather than a narrower conception of executive power. In these debates, both sides agree that the law of war places outside limits on the President's power. Their debate is about whether the Constitution places further limits on his war powers, either by requiring him to obtain congressional authorization before exercising a particular belligerent right or by constraining his conduct altogether in view of the fundamental-rights guarantees of the Bill of Rights. Indeed, many of the great controversies over the scope of the President's war powers are precisely about the nature of any additional constitutional limitations that may apply beyond the requirements of international law. Those who emphasize that the President properly exercises the belligerent rights of the United States under international law are generally arguing for the more expansive view. That fact is a telling indication of the highly permissive character of the law of war and an acknowledgment

the President exercises "the rights that the state of war accords the United States under international law in regard to the enemy as well as to neutrals," HENKIN, supra note 10, at 47, and that "[i]nternational law is the law of the United States, and where international law forbids the use of force by the United States, such use of force would seem to be a violation of the President's constitutional duty to take care that the laws be faithfully executed." Id. at 47 n.H. At the same time, however, he suggests that sometimes the President, under his powers as commander in chief, may disregard international law. See id. at 243-45.
that placing international law limitations on the President's war powers, rather than narrowly constraining them, accords the President ample room for taking measures necessary to preserve the security of the nation.

The understanding that the President's authority is limited by international law has been evident in all the wars that the United States has fought over the course of its history. Indeed, it goes back even further, to the Revolution itself, which established a precedent that would later govern under the Constitution. The concluding paragraph of the Declaration of Independence set the stage with its ringing affirmation that "AS FREE AND INDEPENDENT STATES, [the former Colonies] have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do." What independent states may of right do, as the drafters of the Declaration were fully aware, was determined by the law of nations, and in the nation's founding document they thus unequivocally proclaimed the new nation's intention to abide strictly by its requirements. In conducting the Revolutionary War, moreover, the Continental Congress conscientiously lived up to this standard, making repeated efforts to ensure that the laws of war were fully complied with by all of the Revolutionary forces. Congress resolved early on, for example, "[t]hat the legality of all captures on the high seas must be determined by the law of nations." It also repeatedly revealed its understanding of the limited scope of the commander in chief's authority. Far from believing that Washington had discretionary authority to disregard the laws of war, Congress instead assumed direct responsibility for making judgments about whether the British had violated the laws of war and for deciding upon the retaliatory measures, consistent

44. The Declaration of Independence para. 32 (U.S. 1776) (emphasis added).
with those laws, that the commander in chief would be authorized to take. For his part, Washington scrupulously complied with the limits imposed by the laws of war, including when he ordered a trial, by military commission, of Major John André. Indeed, Washington acted aggressively to ensure compliance by all of the revolutionary forces, "mak[ing] it known to all persons acting in a military capacity . . . that I shall hold myself obliged to deliver up to the Enemy or otherwise to punish such of them as shall commit any Act which is in the least contrary to the Laws of War.

After the adoption of the constitution, moreover, both Hamilton and Madison endorsed the view that the President as commander in chief is bound by international law. In their famous Pacificus-Helvidius debate, for example, Madison argued that the President is bound to comply with the law of nations under both his power as commander in chief and his general duty to faithfully execute the laws. As to the first, he


49. For an account of the whole affair, see ROBERT MCCONNELL HATCH, MAJOR JOHN ANDRE: A GALLANT IN SPY'S CLOTHING (1986). Major André was Benedict Arnold's British coconspirator and was captured behind American lines in civilian dress carrying a message from Arnold. As a result, Arnold's treachery was discovered in the nick of time. The military commission appointed by Washington found that he was a spy and that "agreeably to the law and usage of nations . . . he ought to suffer death." Id. at 262. See also Letter of George Washington to Henry Clinton (September 30, 1780), in 20 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES (John C. Fitzpatrick ed., 1931). As a result, despite his many high-level admirers among the American elite, André was ultimately hanged.


noted that when Congress declares war, it thereby repeals all of the laws, both municipal and international, existing in a state of peace insofar as they are inconsistent with the state of war. In its place, it ipso facto enacts, "as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy."52 That new code was none other than the laws of war. As to the second, he expressly agreed with Hamilton's claim that "[t]he Executive is charged with the execution of all laws, the laws of Nations, as well as the Municipal law which recognises and adopts those laws."53 Elaborating on this point, he emphasized that the executive "is bound to the faithfulness execution of [the laws of neutrality, which were a part of the law of war] as of all other laws internal and external, by the nature of its trust and the sanction of its oath . . . ."54 Indeed, even if executing the international law of neutrality would provoke a foreign nation to war, "[t]he duty of the executive to preserve external peace, can no more suspend the force of external laws, than its duty to preserve internal peace can suspend the force of municipal laws."55 Some years later, provoked by Jefferson's constitutional scruples about responding offensively to a declaration of war by the Bey of Tripoli and an attack by a Tripolitan cruiser on a U.S. warship, Hamilton noted: "The moment that two nations are, in an absolute sense, at war, the public force of each may exercise every act of hostility, which the general laws of war authorize, against the persons and property of the other."56 In other words, when a state of war actually exists—whether as a result of a declaration by Congress or, as in the case of the Bey, an act of a foreign power—the President as commander in chief may take all those measures permitted by the laws of war. Conversely, short of rendering the first point meaningless, he may not take measures that that law prohibits.

55. Id. at 159-60.
Early Supreme Court decisions, arising out of the so-called "Quasi-War" with France in the late 1790s and the War of 1812, likewise affirm this view. For example, in *Bas v. Tingy*, a case that arose out of the Quasi-War, Justice Chase offered these general observations about the war powers:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time. *If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.*

Likewise, Chief Justice Marshall expressed the same view shortly thereafter in *Talbot v. Seeman*, noting:

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied...that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

Later Marshall Court decisions, arising out of the War of 1812, are to a like effect. Justice Story was most explicit in his dissenting opinion in the leading case of *Brown v. United States*. At issue in *Brown* was whether the President, as commander in chief, had authority, after the congressional declaration of war, to order the confiscation of British property located in the United States. According to Story, the issue turned on whether confiscation was permitted under the law of nations, and, concluding that it was, he upheld the confiscation. In the course of his reasoning, he declared:

57. 4 U.S. (4 Dall.) 37 (1800).
58. *Id.* at 43 (emphasis added). Justice Washington adopted a similar view. *See id.* at 40-41.
59. 5 U.S. (1 Cranch) 1 (1801).
60. *Id.* at 28 (emphasis added).
62. *Id.* at 150. For Justice Story's extended discussion of the law of nations, see *id.* at 139-45. Story decided the case on circuit and then delivered
When the legislative authority . . . has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.\(^6\)

Chief Justice Marshall, writing for the Court, did not disagree on this point, nor with Story's understanding of the law of nations.\(^6\) Rather, what was in dispute was whether the President had authority to adopt all those measures permitted by the laws of war or whether the Constitution placed further limits on his authority. Marshall took the more restrictive view, arguing that before the President could order the confiscation of enemy property located in the United States, he needed first to obtain the sanction of Congress, in which the power to declare war and to make rules regarding captures resided.\(^6\)

All agreed, as Marshall had himself expressed in *Talbot*, that the outside limit on the President's authority was given by the law of nations.

The next war, the Mexican-American War of 1846, forced Americans to begin to think more systematically about international law and the laws of war, most importantly because, for the first time, the U.S. military occupied foreign territory.\(^6\) As a result, the executive branch undertook more organized efforts to ensure that the conduct not only of military campaigns but also of military government was in accordance with inter-

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\(^6\) Id. at 123. Justice Story makes this point repeatedly and emphatically throughout the opinion. See id. at 145-53.

\(^6\) See id. at 125-28.

\(^6\) Thus, drawing heavily on his experience as a ranking official in the military government of California during the war, Henry Halleck published his leading treatise on international law, with an emphasis on the laws of war, in 1861, on the eve of the Civil War. See H.W. Halleck, *International Law; Or, Rules Regulating the Intercourse of States in Peace and War* (1861). Halleck later became a top Union general during the Civil War and a much-needed authority on international law within the military establishment.
national understanding of the President’s duty to comply with the laws of war was reflected, among other things, in several Supreme Court decisions. In Cross v. Harrison, for example, at issue was the collection of tariffs on goods imported into California during the period that began with the conquest from Mexico, continued through the conclusion of the treaty of peace ceding California to the United States, and ended with the formal appointment, under an act of Congress, of a customs collector. The least controversial issue in the case was the validity of the so-called “war tariff.” Instituted under presidential authority, the war tariff began with the conquest and ended with the ratification of the peace treaty, thus coinciding precisely with the period of belligerent military occupation. In upholding the tariff, the Court noted that it was a “lawful exercise of a belligerent right over conquered territory” under international law and thus was within the scope of executive authority. “No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest.”

This view was, if anything, strengthened during the Civil War, when it became the official position of the Lincoln Administration and its supporters and repeatedly received the imprimatur of the Supreme Court. Indeed, it was on the theory that the President, as commander in chief, may exercise the lawful belligerent rights of the United States under international law that Lincoln justified the imposition of a naval blockade on Southern ports, the seizure and destruction of vast quantities of property located in the South as enemy property, and even the Emancipation Proclamation. Affirmations

67. 57 U.S. (16 How.) 164 (1853).
68. Id. at 193; see also id. at 190-92, 194, 196, 198-99.
69. Id. at 190.
70. The classic account of the constitutional questions arising out of the Civil War is JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926). There is also an illuminating discussion in MARK E. NEELY, JR., THE FATE OF LIBERTY (1991). For a discussion of Lincoln’s thinking about the laws of war, see BURRUS M. CARNAHAN, Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 Am. J. Int’l L. 213, 219-27 (1998). The depth of the Lincoln Administration’s commitment to upholding the laws of war was evidenced most dramatically by Francis Lieber’s famous Code, which was embodied in Lincoln’s General Orders No. 100, Instructions for the Government of Armies of the United States in the
of this understanding, moreover, appear not only in Supreme Court decisions, but also in Attorney General opinions, in the arguments of the President's lawyers before the Supreme Court, in the treatises and theoretical texts of Lincoln's supporters and advisers, in congressional speeches, and in learned public debates. Perhaps the most significant example is found in the singular decision of the *Prize Cases*.\(^7\) Decided at the height of the war, the *Prize Cases* were a challenge to Lincoln's constitutional authority to impose the naval blockade and raised fundamental questions about the nature of the war and the President's power as commander in chief.\(^7\) The Administration's position was that, under international law, the Civil War was the legal equivalent of a public war between two independent nations and therefore that the President was empowered, in carrying on the war, to exercise the belligerent rights of the United States under the laws of war. As Richard Henry Dana put it in his celebrated argument on behalf of the United States, "[t]he function to use the army and navy being in the President, the mode of using them, *within the rules of civilized warfare*, and subject to established laws of Congress, must be subject to his discretion . . . ."\(^7\) Although the Court was otherwise sharply divided, on this point all of the justices agreed. The very question at issue, according to the majority, was whether the President had "a right to institute a blockade of ports in possession of persons in armed rebellion . . . , on the principles of international law, as known and acknowledged among civilized States[.]")\(^7\) Only after a lengthy consideration of the applicable principles of the law of nations, with


72. At stake was not only the legality of the naval blockade, but also the Lincoln Administration's theory that a domestic insurrection gave rise to the right of the President to treat the rebellious states, loyal and disloyal citizens alike, as belligerents (i.e., public enemies) and hence as subject to the laws of war and the President's war powers. Most of the extraordinary powers Lincoln exercised during the Civil War were premised on this claim. See RANDALL, * supra* note 70, at 48-73.

73. The *Prize Cases*, 67 U.S. at 660 (emphasis added).

74. *Id.* at 665.
citations to Vattel and other leading publicists, did the Court conclude that the President had indeed acted within his constitutional authority. The dissent, moreover, was entirely in agreement with the majority's understanding of the scope of the President's war powers, at least in the case of a public war recognized as such under the law of nations. The point of disagreement was whether, under the law of nations and the Constitution, the Civil War could be regarded in law as a public war, "which will draw after it belligerent rights . . . ." According to the dissent, until Congress had so declared, it could not. No matter how great the magnitude of the war, in fact, the President could not exercise his war powers as commander in chief until Congress had acted.

Numerous subsequent decisions of the Court likewise reaffirmed the view expressed by the Court in the Prize Cases. In Planters' Bank v. Union Bank, for instance, the Court ruled that a military commander, like the President himself, was vested with the power "to do all that the laws of war permitted . . . ." Likewise, in New Orleans v. Steamship Co., a case about the scope of the executive's authority in governing occupied territory, the Court declared: "There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war." In Miller v. United States, the Court considered the far more radical question of whether even Congress, in exercising its war powers, was limited by the laws of war. Although not without significant historical support, the view that Congress is so limited raises large theoretical questions and is in tension with the so-called "last in time" rule, under which Congress is recognized as having authority to override, for purposes of domestic law, the obligations of an existing treaty. It is striking, therefore, that while the Court explicitly declined to rule on the question, it was at pains to

75. See id. at 665-74.
76. Id. at 689 (Nelson, J., dissenting); see also id. at 687-91.
77. See id. at 688-90, 693.
78. 83 U.S. (16 Wall.) 483 (1873).
79. Id. at 495.
80. 87 U.S. (20 Wall.) 387 (1874).
81. Id. at 394.
82. 78 U.S. (11 Wall.) 268 (1870).
83. See, e.g., Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Chinese Exclusion Case (Chae Chin Ping v. United States), 130 U.S. 581, 600 (1889).
establish that the Confiscation Acts were fully in accord with the requirements of international law. Its reasoning, moreover, goes far toward suggesting that their validity did, in fact, depend on their consistency with the laws of war.\textsuperscript{84} Equally striking, Justice Field, in a powerful dissent, explicitly embraced the view that even Congress was limited by international law:

The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. When the United States became an independent nation, they became, to use the language of Chancellor Kent, "subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law." And it is in the light of that law that the war powers of the government must be considered. The power to prosecute war granted by the Constitution, as is well said by counsel, is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the means of destruction which government, in the prosecution of war, may use, and there is a limit to the subjects of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution. The plain reason of this

\textsuperscript{84} After stating the argument that Congress was bound by the law of nations, the Court explicitly left the question open, finding it unnecessary to decide the issue because the Confiscation Acts were, in any case, justified under the laws of war. \textit{See Miller}, 78 U.S. at 305. Instead, it stated (rather coyly) that the power to declare war "involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." \textit{Id}. It then went on to insist, however, that the means used by Congress were legitimate because they were in accord with the laws of war. \textit{See id.} at 305-12. It is difficult to imagine that the Court would have applied any other standard to measure what means were "legitimate," unless it applied one that was more rather than less restrictive of Congress's power.
is, that the rules and limitation prescribed by that law were in the contemplation of the parties who framed and the people who adopted the Constitution. Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.85

That there was such respectable support for this far-reaching view suggests the ready acceptability of the much weaker view, wholly consistent with the general structure of the Constitution, that the President, as commander in chief, is bound to comply with international law.86

For reasons of space, I cannot rehearse here the depth of support for this view in the Lincoln Administration and Congress, among leading legal authorities, and in the wider public debate. Particularly noteworthy, though, is William Whiting’s famous Civil War treatise on the war powers.87 Whiting was the Solicitor for the War Department, and the treatise, which he published in 1862, was especially influential within the Administration.88 Central to his general argument was his claim that “[t]he restraints to which [the President] is subject, when in war, are not found in municipal regulations, which can be administered only in peace, but in the laws and usages of nations regulating the conduct of war.”889 The book was in large part an effort to establish the power of the President to emancipate slaves, and its influence over Lincoln’s thinking is evident in the legal justification that the President himself offered in support of the Emancipation Proclamation. In a letter responding to a constitutional challenge to his authority to issue the Proclamation, he replied, “I think the constitution invests its commander-in-chief, with the law of war, in time of

85. Id. at 315-16 (Field, J., dissenting) (quoting James Kent, Commentaries on American Law 1 (O.W. Holmes ed., 12th ed. 1873)).

86. It is also striking that, some years later, Justice Field was the author of The Chinese Exclusion Case, which affirmed the “last in time” rule in relation to treaties. See 130 U.S. at 600.


88. See Neely, supra note 70, at 220.

89. Whiting, supra note 87, at 53.
The Proclamation was constitutional, he argued, because it was in accordance with what the law of war permitted, in contrast to those things which the law of war prohibited, such as "the massacre of vanquished foes, and non-combatants . . . ." 91 Whiting, in turn, relied upon a series of celebrated speeches given by John Quincy Adams in the House of Representatives twenty-five years before, in which Adams had argued for a similar construction of the war powers. 92 Thus, Adams declared:

[T]he powers incidental to war are derived, not from the internal, municipal sources, but from the laws and usages of nations . . . .

There are, then, Mr. Chairman, in the authority of Congress and of the Executive two classes of powers, altogether different in their nature, and often incompatible with each other: the war power and the peace power. The peace power is limited by regulations and restricted by provisions, prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations. 93

In the aftermath of the Civil War, this understanding was further consolidated. For example, it was incorporated into what became the leading treatise on military law, Winthrop's *Military Law*, first published in 1886 and widely used within the military. 94 Speaking of the President's authority over occupied territory, Winthrop wrote:

The power of military government thus vested in the President or his military subordinates is a large and extraordinary one, being subject only to such conditions and restrictions as the law of war, in defining the particulars to which it may extend, imposes upon the scope of its exercise. As it is expressed by the Supreme Court, the governing authority "may do anything necessary to strengthen itself and weaken the

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91. Lincoln, *supra* note 90, at 408.
92. See Whiting, *supra* note 87, at 76-81.
93. CONG. GLOBE, 24th Cong., 1st Sess. app. at 488 (1836).
94. 2 W. WINTHROP, MILITARY LAW (1886).
enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war.”95

Supreme Court cases arising out of the Spanish-American War were to the same effect. In The Paquete Habana,96 the Court found that two Spanish fishing vessels, captured as prize, had been taken in violation of international law and therefore awarded damages to the owners. Famously, Justice Gray, for the Court, declared that “[i]nternational law is part of our law, and must be ascertained and administered ... as often as questions of rights depending upon it are duly presented for their determination.”97 He then continued, in language that has given rise to much controversy: “For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .”98 Some have read this language to suggest that the Court believed that the President has authority to override customary international law by “controlling executive acts.”99 However, although the language is certainly infelicitous, understood in context, Justice Gray was suggesting no such thing. Rather, he was responding to the district court’s view that the vessels were valid prize because the court was not “‘satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure.’”100 What Justice Gray was saying, as other parts of the opinion make clear, is that, even in the absence of a treaty, statute, or valid executive proclamation or instruction affording protection to the fishing vessels, the vessels might still be exempt under a principle of customary international law. In other words, even in the absence of any other form of positive enactment, the Court was bound to enforce customary international law and, therefore, had to examine the various sources for determining the content of customary international law.

95. Id. at 799 (quoting New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 393 (1874)).
96. The Paquete Habana, 175 U.S. 677 (1900).
97. Id. at 700.
98. Id.
99. See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986).
100. The Paquete Habana, 175 U.S. at 715 (Fuller, C.J., dissenting) (quoting district court opinion).
international law in order to decide the case. The dissent, moreover, seemed to agree on this point. Contrary to the majority, the dissenting justices rejected the claim that there was a rule of customary international law that protected the Spanish fishing vessels. Although international practice favored lenient treatment for such vessels, they asserted, no binding rule of international law had yet ripened. The captures were valid, according to the dissent, because the President "is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended." Implicitly, then, had there been such an "immutable rule," the dissent agreed that the President would have been bound. Shortly after the decision in the Paquete Habana, moreover, the Court in Dooley v. United States blithely reaffirmed its many earlier rulings that constrained the President in the exercise of his war powers to conform to the requirements of international law. Recalling its earlier decisions about the President's power to institute military government in occupied territory, it again noted that the only limits on his authority were "'those which are found in the laws and usages of war.'"

Finally, these understandings survived the First and Second World Wars. Thus, in the wake of World War I, Quincy Wright, in his leading treatise entitled The Control of American Foreign Relations, wrote: "[T]he courts have held that the President's power in conducting war is limited by international law and any action he may authorize contrary to that law is void. Congress alone can authorize military methods conflicting

101. The dissent so interpreted the majority. After noting that the Court had rejected the district court's view that, in the absence of a treaty, statute, or executive proclamation according them an exemption, the fishing vessels were lawful prize, Chief Justice Fuller stated:

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation or instruction, granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

Id.

102. See id. at 719-20.
103. Id. at 720.
104. 182 U.S. 222 (1901).
105. Id. at 251 (quoting New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 393 (1874)); see also id. at 230-32.
with international law . . . ."106 As late as 1931, the Supreme Court, per Justice Sutherland—no opponent of executive power in foreign affairs—confidently asserted in dicta that, despite its breadth, limits on the war power were to be "found . . . in applicable principles of international law."107 Furthermore, the now famous World War II cases *Ex Parte Quirin*108 and *In Re Yamashita*109 also reflect the traditional view. In these cases, the Court upheld the use of military commissions to try offenses against the laws of war precisely because the trials were authorized, not prohibited, by international law. Indeed, although the Court gave short shrift to the Fifth and Sixth Amendment challenges,110 it carefully scrutinized the military proceedings to ensure their compliance with international law standards.111 Only after an exacting review of the international law authorities, for example, did it conclude that the offenses charged were indeed violations of the laws of war and thus within the jurisdiction of military commissions.112 In *Quirin*, the Court, citing many of the prior decisions discussed above, explicitly reaffirmed the view that international law governs the conduct of war, asserting that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."113 Similarly, in *Yamashita*, the Court stated, "We do not make the laws of war but we respect them so far as they do not conflict with commands of Congress or the Constitution."114 The absence of any mention of a similar power in the President is of obvious significance. It is true that, in both cases, the Court found

106. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 169 & n.47 (1922); see also id. at 85 n.59.
110. See *Ex Parte Quirin*, 317 U.S. at 38-45 (rejecting Article III and Fifth and Sixth Amendment claims); *In Re Yamashita*, 327 U.S. at 23 (rejecting Fifth Amendment due process claim).
111. See *Quirin*, 317 U.S. at 28-38; *Yamashita*, 327 U.S. at 13-24.
112. See *Quirin*, 317 U.S. at 28-38; *Yamashita*, 327 U.S. at 13-18.
114. 327 U.S. at 16.
that Congress had authorized the use of military commissions to try offenses against the laws of war.\textsuperscript{115} The strong suggestion in the opinions, however, is that the President's unilateral authority would, if anything, have been narrower than Congress's. Indeed, the Court was quite careful to note that there may well be offenses against the laws of war as recognized in international law that might, for constitutional reasons, only be triable in the ordinary civil courts.\textsuperscript{116} It would be inconsistent with the whole thrust of the opinions to imagine that the Court would have permitted military trials that were in violation of the laws of war.

From this brief historical review, it should be evident that the claim that the President's war powers are bounded by international law is not novel. Indeed, that understanding has prevailed for most, if not all, of the history of the United States.

V. CONCLUSION

As we have seen, there are both powerful Franckian normative reasons and strong historical grounds for constraining the President's constitutional war powers by the standards of international law. If that is right, then President Bush, should he decide to go forward with military trials as part of the war on terrorism, is constitutionally obligated, at a minimum, to ensure that any trials comply with international standards. Of course, other constitutional limitations that I have not considered here may also apply and, indeed, may even be stricter than the corresponding requirements of international law. Even if that is not the case, however, international law does apply and should be enforced by the courts should a case arise in which they may properly exercise jurisdiction.\textsuperscript{117}

\begin{footnotes}
\item 115. The Court read Article 15 of the Articles of War as providing congressional authorization for the use of military tribunals to try offenses against the laws of war. \textit{See} 317 U.S. at 28-29, 35-36; 327 U.S. at 7-8. As previously noted, \textit{see supra} note 42, this interpretation of Article 15 was doubtful, since the Article was only a savings provision stating that nothing in the Articles of War deprived military commissions of their traditional jurisdiction over offenses against the laws of war. Nothing in Article 15 purported to authorize military commissions to exercise jurisdiction.
\item 116. \textit{See Quirin}, 317 U.S. at 29.
\item 117. \textit{See} Johnson v. Eisentrager, 339 U.S. 763 (1950). This decision, which restricts the availability of habeas corpus normally available to enemy aliens
\end{footnotes}
held outside of U.S. territory, may mean that many of those tried by military commissions will not have access to the courts. Even in the absence of judicial review, however, the President is constitutionally bound to accord those individuals the rights provided by international law.