

THE CONSTITUTIONAL STATUS OF CUSTOMARY INTERNATIONAL LAW

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The question of the hour is: “How does international law limit the war on terror?” Constraints of space restrict this piece to the role that customary international law plays in the war. The answer to the more specific question—“How does *customary* international law limit the war on terror?”—is more complicated than one might suppose.

Customary international law¹ might limit America’s conduct of the war in one of two ways. First, American politicians might choose to adhere to customary international law if they believe that such adherence is in America’s best interest. Second, American politicians might believe that they are legally bound to respect international law, including customary international law, in the conduct of the war.

The notion that politicians would choose to respect customary international law in fighting the war seems dubious. One suspects that the principal players—the President, members of Congress, and cabinet secretaries—do not really even know what customary international law is. They are all familiar with the Constitution, statutes, and treaties of the United States because these are forms of law they encounter every day. But customary international law is a more obscure beast. Obviously, if politicians are generally unaware of customary international law, it cannot greatly limit their decision making.

To the extent that principals in the political branches are aware of customary international law, that awareness likely stems from the efforts of staff members who are committed to customary international law. Yet, politicians are likely to get conflicting signals from their staff regarding the status of customary international law. Those staff members who are skepti-

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

cal of customary international law are likely to tell their principals that customary international law forms no part of United States law, and that even if it does, many claimed principles of customary international law are of doubtful vintage and provenance. Given the diversity of viewpoints about the status and content of customary international law, politicians are likely to view customary international law as something of a non-issue. Conflicting advice gives politicians the freedom to do whatever they wish.

Likewise, the overriding desire to defeat the enemy makes it even less likely that politicians will pay much heed to customary international law in the war context. The shadowy and uncertain principles of customary international law pale in comparison to the need for victory. For all these reasons, it is doubtful that customary international law limits the war on terror in any meaningful way. In the end, most politicians will not resist the urge to shove customary international law out of the way.

Finally, the Supreme Court has made it clear that both the President and Congress can break free of customary international law by simple decree. In *The Paquete Habana*,² after claiming that “[i]nternational law is part of our law,”³ the Court went on to declare that “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.”⁴ *Paquete Habana* thus provides a roadmap to abandon the constraints of customary international law: override it by passing contrary laws or overcome it by taking a contrary “controlling executive” action.

Of course, this speculation about *voluntary* adherence to customary international law leaves open the question whether politicians are legally *obligated* to respect customary international law. International law scholars have argued that American officials must respect customary international law because the Constitution makes that law part of the “supreme Law of the Land.”⁵ Those who claim that customary international law is part of the “supreme Law of the Land” always cite the

2. 175 U.S. 677 (1900).

3. *Id.* at 700.

4. *Id.*

5. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

middle phrase of the Supremacy Clause—“Laws of the United States which shall be made in Pursuance thereof.”⁶ Customary international law is among the “Laws of the United States” and hence part of the “supreme Law of the Land,” or so the argument goes. If customary international law is part of the “supreme Law of the Land,” politicians who swore an oath to the Constitution must respect and enforce customary international law.

In fact, the Supremacy Clause gives us no good reason to believe that customary international law is part of the “supreme Law of the Land.” To the contrary, the Supremacy Clause makes clear that customary international law is not part of the “Laws of the United States” and hence not part of the “supreme Law of the Land” in four ways. First, customary international law is not made “in Pursuance” of the Constitution. It does not matter whether “in Pursuance” of the Constitution refers to being made to further the Constitution’s ends (“establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare”⁷), or being made under the auspices of the Constitution. Customary international law is made neither as a means of pursuing the Constitution’s goals nor under the Constitution’s auspices. Second, customary international law is not “made” at all. Customary international law, in the view of the Founders, was a species of common law and, as such, was something to be discovered rather than made. Reference to “Laws . . . made” clearly brings to mind man-made, positive law.⁸

Third, the Supremacy Clause applies only to laws made in the future—that is, “laws . . . which *shall be made*.”⁹ Even if one could say that customary international law was “made in Pursuance” of the Constitution, only customary international law made after the Constitution’s ratification would qualify as supreme law. No one advocates this narrow incorporation of customary international law because it would leave many of the most august principles of customary international law outside the scope of the Supremacy Clause. Finally, that the Supremacy

6. *Id.*

7. U.S. CONST. pmbl.

8. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 850 (1997).

9. U.S. CONST. art. VI, cl. 2 (emphasis added).

Clause separately lists treaties as part of the “supreme Law of the Land,” and fails to list customary international law expressly, strongly suggests that the latter was not supposed to have the status of supreme law automatically. In other words, the specification of one species of international law and the omission of others suggest that those omitted should not be regarded as supreme law. Considered together, these arguments undermine the claim that the Supremacy Clause somehow incorporated customary international law.

Some scholars make a different argument, asserting that because the President must “take Care that the Laws be faithfully executed,”¹⁰ he must enforce customary international law and ensure that he never violates it himself. This argument depends on a broad reading of “Laws” that is implausible as a matter of text and history. With respect to text, the Faithful Execution Clause does not reference *all* laws. For instance, no one thinks it references state laws. Rather, the context of the Constitution indicates that it was meant to extend to federal laws only. Because there is no basis for assuming that federal law encompasses customary international law, there is no reason to read the duty of faithful execution as extending to that species of law.

History supports the same conclusion. The Faithful Execution Clause is an analogue of clauses found in the Constitutions of New York, Pennsylvania, and Vermont.¹¹ There is no evidence that any of the state analogs were regarded as extending to treaties, let alone to customary international law. Nor is there any evidence that the Constitution’s framers or ratifiers regarded the Faithful Execution Clause as incorporating customary international law. In the discussions of the President’s law execution role, no one referenced his *ability* to execute customary international law.¹² Nor did anyone go further and contend that the President would be under a *duty* to execute customary international law.

The originalist evidence to the contrary comes from Alexander Hamilton’s *Pacificus*. In *Pacificus No. 1.*, Hamilton wrote that the “law of Nations” was a “part” of “the laws of the

10. U.S. CONST. art. II, § 3.

11. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 723–24, 758.

12. *Id.* at 742–53 (illustrating discussions of eighteenth-century political theorists).

land.”¹³ He also argued that the President was “charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws. [The Executive] is consequently bound, by faithfully executing the laws of neutrality. . . .”¹⁴ In making this argument, Hamilton was defending the Neutrality Proclamation and the prosecutions it promised of those who violated America’s neutrality.

Although Hamilton was right that the President might proclaim neutrality through the exercise of his executive power, he was wrong to suggest that the President could enforce customary international law. Most famously, a jury acquitted Gideon Henfield on the charge that he violated the law of nations when he assisted the French.¹⁵ The general sense is that the jury concluded that Henfield violated no law because Congress had passed no law making violations of neutrality illegal. This meant that customary international law, including the laws of neutrality, was not part of the “Supreme Law of the Land;” therefore it was not incumbent upon the President to faithfully execute it.

Consistent with these conclusions, President Washington later asked Congress to make violations of neutrality illegal, something that would have been utterly unnecessary if the law of nations (that is, customary international law) was already part of the laws of the land.¹⁶ Congress complied, suggesting that it too believed such legislation was necessary.¹⁷ Hence, whereas Hamilton supported the view that customary international law was part of the law of the land, his position was repudiated by an Act of Congress and by his Chief Executive.

If all this is true, what are we to make of judicial decisions from the eighteenth and nineteenth centuries that treat customary international law as a species of applicable law? Some

13. *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 40 (Harold C. Syrett ed., Columbia Univ. Press 1969).

14. *Id.*

15. See *Henfield’s Case*, 11 F. Cas. 1099, 1100–05 (C.C.D. Pa. 1793) (No. 6,360); see also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 342–46 (2001).

16. President George Washington, State of the Union Address (Dec. 3, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 13, 131–32 (James D. Richardson et al. eds., 1897).

17. Act of June 5, 1794, ch. 50, 1 Stat. 381.

judges continued to think that customary international law was part of United States law even after the *Henfield* case.¹⁸

If certain members of the founding generation regarded customary international law as law that could be applied in courts, they did not come to that belief by interpreting either the Supremacy Clause or the Faithful Execution Clause. Instead, they came to that conclusion out of conceptions of natural law in general and customary international law in particular.

International law scholars like Emmerich Vattel and American jurists like James Wilson regarded customary international law as binding on nations as a matter of natural law, not through the text of positive law. Both spoke of customary international law as eternal and mandatory.¹⁹ Wilson in particular did not link customary international law to particular provisions in the Constitution. Rather, following in Vattel's footsteps, Wilson seemed to believe that all nations had to respect customary international law.

Accordingly, to the extent that the founding generation believed that customary international law was the law of the United States, they held this belief because of extra-constitutional commitments to the law of nations and natural law. The Framers did not believe that the Constitution itself incorporated customary international law. For those who believed that customary international law *was* natural law, such incorporation would have been totally unnecessary.

Are we bound to honor the Founders' commitment to customary international law? People have a difficult enough time getting their heads around the idea that we should be bound to the Constitution that the Framers wrote and adopted over two centuries ago. Although many Americans may regard the Founders as law-givers, they typically regard them as givers of positive law—treaties, statutes, constitutions—that was actually enacted. Americans, I suspect, do not believe that they are bound to all species of law that the Founders embraced. Even if it could be shown that all the Founders regarded the Ten Commandments as binding,

18. *E.g.*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (adjudicating rights under the law of nations).

19. *See* EMMERICH DE VATTEL, *THE LAW OF NATIONS*, §§ 7–8 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1883) (1758) (describing customary international law as “immutable” and “binding”); James Wilson, *Lecture on the Law of Nations*, in 1 *THE WORKS OF JAMES WILSON* 149, 151 (Robert McCloskey ed., 1967) (describing customary international law as “unchangeable” and “obligatory”).

many Americans would not feel obligated to treat the Ten Commandments as law. Not having enacted the Ten Commandments into positive law, the Founders have not satisfied what might be considered an American prerequisite for establishing a law entitled to acceptance by posterity.

If we did adopt the view that the law of nations is eternal and obligatory—a view that some of the Founders may have embraced—the implications would be fairly radical. Because the customary law of nations arose from immutable natural law, customary international law would take precedence over contrary constitutional, statutory, and treaty provisions. In a sense, customary international law would serve as a Super-Constitution constraining our enacted constitutions, laws, and treaties. Needless to say, few would find such a view palatable. Indeed, most modern devotees of customary international law believe that Congress can override such law, a view that would have been anathema to those Founders who regarded customary international law as eternal and obligatory. Those who cite the extra-constitutional views of some Founders as a reason to embrace customary international law must decide whether they really wish to embrace an argument with consequences that seem quite radical to modern understandings.

Having said all this, nothing prevents Americans from embracing customary international law in a more modest way. More specifically, nothing precludes Congress from codifying it as part of the “supreme Law of the Land.” Congress has express power to define “Offenses against the Law of Nations.”²⁰ Should Congress do this, customary international law would be part of the “supreme Law of the Land,” subject, of course, to the usual constitutional protections and limitations. Until this happens, however, the question whether to honor customary international law is best described as a choice rather than as a legal obligation.

20. U.S. CONST. art. I, § 8, cl. 10.

