

**ACTUAL COMMITMENT TO COMPLIANCE  
WITH INTERNATIONAL LAW AND  
SUBSEQUENT SUPREME COURT  
OPINIONS: A REPLY TO PROFESSOR  
MOORE**

*Jordan J. Paust\**

I.	INTRODUCTION.....	57
II.	PART I'S FLAWED METHODOLOGY .....	58
	A. <i>Modern Professorial Debate and Unmoored Theory</i> .....	58
	B. <i>Actual Views of Founders and Framers and Trends in Judicial Decision</i> .....	61
III.	ELUSIVE ALLEGED "VIOLATIONS" BY THE CONTINENTAL CONGRESS .....	72
	A. <i>Admittedly Unproven Customary International Law</i> .....	73
	B. <i>Treaty Interpretations and Unproven Violations</i> .....	76
IV.	CONCLUSION .....	77

I. INTRODUCTION

Professor David Moore has made some startling claims in his recent article titled, "Constitutional Commitment to International Law Compliance?"<sup>1</sup> Among them are: (1) the Continental Congress violated a rule of customary international

---

\* Mike & Teresa Baker Law Center Professor, University of Houston.

1. David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367 (2016).

law and three treaties,<sup>2</sup> despite admittedly widespread “unquestionabl[e] concern for compliance with international law” at the time of the Founding;<sup>3</sup> and (2) there was implicit, but uniformly unstated, Founder and Framers approval of a “national discretion to violate international law.”<sup>4</sup>

This reply demonstrates that (1) his claims that the Continental Congress violated a rule of customary international law and three treaties are unproven, (2) overwhelming views of the Founders and Framers and early judiciary were clear that Congress and the President are bound by customary and treaty-based international law, and (3) there was no approval by the Founders or Framers of an alleged authority of any part of the national government to violate customary or treaty-based international law. Indeed, no one declared or embraced an alleged national discretion to violate international law.

## II. PART I'S FLAWED METHODOLOGY

### A. *Modern Professorial Debate and Unmoored Theory*

Part I of Professor Moore's article draws significant attention to the views of modern professors and generally unmoored theory with respect to: constitutional commitment to international law,

---

2. See *id.* at 402-03. Moore asserts that at the time of the Founders, the “law of nations . . . endorsed a textual approach to [treaty] interpretation.” However, “[s]uspect interpretations of treaties appear several times under the Articles of Confederation: with regard to the U.S.-France Treaties of Alliance and Commerce, the U.S.-Britain Treaty of Peace, and the U.S.-Netherlands Treaty of Commerce.”

3. *Id.* at 371, 387 (noting that the Continental Congress “demonstrated commitment to international law in various ways”); see *infra* note 7 and Part II.B.1.

4. See *Moore, supra* note 1, at 386 (stating that an alleged “absence of concern” regarding alleged violations “suggest[s] that the Constitution did not seek to eliminate [an alleged] national discretion to violate international law”); *id.* at 372 (alleging unproven “support for constitutional discretion to violate international law”); *id.* at 421-22 (noting that the Constitution provides “structural provisions to facilitate international law compliance,” but declaring without actual proof that “the Constitution preserved room for national discretion to violate international law”); *id.* at 431 (stating that an unproven “lack of concern” for alleged violations “suggests a level of comfort with national discretion to violate international law”). But see *infra* notes 7, 70, and Part II.B (looking at the views of the Founders and Framers and judicial decisions to demonstrate how Congress was bound by both international law and treaties).

the duty of the President under the Take Care Clause, and the express duty of the states under the Supremacy Clause and its relation to national obligations.<sup>5</sup> Despite Professor Moore's stated quest to identify the existence and nature of historic and constitutional commitment to international law,<sup>6</sup> there is surprisingly scant attention drawn on the Founders' and Framers' actual views of compliance duties regarding customary and treaty-based international law. Additionally, Professor Moore pays trivial attention to relevant cases. Specifically, he de-emphasizes the few mentioned discoverable views of the Founders and Framers in five footnotes.<sup>7</sup> His belittlement of such views may stem from his reluctance to recognize the views' affirmation of the early historical commitment to compliance with

---

5. Moore, *supra* note 1, at 373-85.

6. *Id.* at 368-69, 385-86 (referring to "Founding-era history" and "historical research").

7. *Id.* at 369 n.4 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 270-71 (Max Farrand ed., 1911) and THE FEDERALIST NO. 64, at 436-37 (John Jay) (Jacob E. Cooke ed., 1961), and noting that both James Madison and John Jay rejected the notion that treaties could be violated); *id.* at 379 n.36 (quoting Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 641 (1972) (stating that John Quincy Adams declared that both Congress and the Executive are bound by international law)); *id.* at 381 n.52 (noting support from Alexander Hamilton and early Attorneys General that Executive compliance with international law was a duty); *id.* at 382 n.55 (citing William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 21, 34-38 (2009) (looking at how the Pacificus-Helvidius debates and *Brown v. United States* support the widespread expectation that the President is bound by international law)); *id.* at 436 n.292 (quoting THE FEDERALIST NO. 3, at 98 (John Jay) (Jacob E. Cooke ed., 1961) ("[U]nder the national government, treaties . . . as well as the laws of nations, *will always be . . . executed*")) (emphasis added). Moore also references William R. Davie's views about the supremacy of international treaties throughout his article. *Id.* at 422 n.248 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 347 (Max Farrand ed., 1911) (noting that under the law of nations, treaties are supreme over statutes)); *id.* at 424 n.256 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 498 (Max Farrand ed., 1911) ("[E]very treaty must be the law of the land as it affects individuals")); *id.* at 430 n.272 (citing 4 DEBATES IN THE SEVERAL STATES CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 119 (Jonathan Elliot ed., 2d ed. 1836) ("All civilized nations have concurred in considering [treaties] as paramount to an ordinary act of legislation")); *see also* 2 DEBATES IN THE SEVERAL STATES CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1836) (quoting James Wilson, who stated constitutional authority of federal courts "will show the world, that we make the faith of treaties a constitutional part of the character of the United States").

international law and the compliance duties of Congress and the President.

Why would Professor Moore pay scant attention to actual views of the Founders and Framers and actual statements made by the early judiciary when investigating historic commitment? Why would he seemingly rely on modern professorial debate and theory in building the inquiry into early constitutional commitment in Part I of his article? The answers to these questions are not evident. This flaw, however, is similar to the methodology employed by revisionist writers that was identified in a prior debate with Professor Moore regarding uniformly recognized duties of states to comply with customary and treaty-based international law.<sup>8</sup> As noted,

I have wondered why some who prefer what is clearly a minority theoretic construct regarding the role of international law in our domestic legal processes often declare that there is “debate” among law professors, as if that makes constitutional law . . . [W]hat revisionist debaters are up against are the overwhelming views of the founders and framers, the text and structure of the U.S. Constitution, and predominant trends in judicial decision that stand unavoidably, and at times famously, in opposition to their minority revisionist preferences.<sup>9</sup>

Part II.B of this reply will demonstrate that actual statements from the Founders and Framers and the early judiciary confirm a national commitment and duty to comply with international law. Further, as demonstrated in Part III, alleged violations of

---

8. See Jordan J. Paust, *The Supremacy of International Law: A Reply to David Moore*, JURIST (Jul. 10, 2012), <http://jurist.org/forum/2012/07/jordan-paust-moore-reply.php> [<https://perma.cc/X3SH-DTHS>]. For Professor Moore's earlier remarks, see David Moore, *The Supremacy Clause and International Law: A Reply to Jordan Paust*, JURIST (Jul. 1, 2012), <http://www.jurist.org/forum/2012/07/david-moore-international-law.php> [<https://perma.cc/8759-TLDZ>].

9. Paust, *supra* note 8 (“[A]t least 45 federal (mostly Supreme Court) and 45 state court decisions . . . have consistently recognized that states are bound by treaties and at least 19 federal (mostly Supreme Court) and 30 state court cases have consistently recognized that states are bound by customary international law.”). See Jordan J. Paust, Medellín, Avena, *the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301, 313-14 n.46, 316 n.56 (2008), for the earlier study with these findings.

international law by the Continental Congress are unproven. None of the Founders or Framers stated that there had been a violation of international law, nor did they declare or embrace an alleged national discretion to violate international law.

*B. Actual Views of Founders and Framers and Trends in Judicial Decision*

1. Congress Was and Is Decidedly Bound by International Law

a. Congress Is Bound by Customary International Law

In answering Professor Moore's inquiry, it is relevant to consider John Jay's emphatic statement that "under the national government, treaties . . . as well as the laws of nations, *will always be . . . executed.*"<sup>10</sup> This statement is an affirmation which is relevant to the authorities and responsibilities of both Congress and the Executive. Similarly determinative was a 1787 letter by the Continental Congress that declared, "it is our duty to take care that all the rights . . . by the laws of nations and the faith of treaties remain inviolate."<sup>11</sup> Furthermore, a 1779 resolution by the Continental Congress claimed a supreme power (as opposed to that of the states) "of executing the law of nations" to assure that the "legality" of any action taken was (since it "must be") "determined by the law of nations," adding that "the law of nations [must] . . . be most strictly observed."<sup>12</sup>

---

10. THE FEDERALIST NO. 3, at 98 (John Jay) (emphasis added) (Jacob E. Cooke ed., 1961). See also Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42-43 (Harold C. Syrett ed., 1969) (stating that the law of nations will always be expounded and executed by the Executive branch if it decides to).

11. See Resolution of the Continental Congress (Apr. 13, 1787), reprinted in 32 JOURNALS OF THE CONTINENTAL CONGRESS 176, 177 (Roscoe R. Hill ed., 1936). In 1800, Judge Alexander Addison remarked that congressional power over aliens "is to be regulated . . . by the general law of nations." Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), reprinted in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1055, 1072 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Professor Moore should have been aware of this detailed study, which was referred to during our debate. See *supra* note 8.

12. Resolution of the Continental Congress (Mar. 6, 1779) reprinted in 13 JOURNALS OF THE CONTINENTAL CONGRESS 281, 283 (Worthington Chauncey Ford ed., 1909);

Peter Duponceau, who argued for the defense in the famous *Henfield's Case* in 1793,<sup>13</sup> expressed common expectations of the Founding-era that the people and each branch of our national government are bound by the law of nations with unmistakable relevant clarity:

The law of nations . . . may be said, indeed, to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilization, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio rigore*, whenever it is not altered or modified by particular national statutes, or usages not inconsistent with its great and fundamental principles. Whether there is or not a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.<sup>14</sup>

A famous Opinion of the Attorney General in 1865 affirmed the recognition that Congress and the President are bound by the law of nations:

The laws of nations are expressly made laws of the land by the Constitution . . . Congress . . . cannot abrogate them . . . [L]aws of nations . . . are of binding force upon the departments and citizens of the Government, though

---

Resolution of the Continental Congress (May 22, 1779), *reprinted in* 14 JOURNALS OF THE CONTINENTAL CONGRESS 627, 635 (Worthington Chauncey Ford ed., 1909), *quoted in* *Penhallow v. Doane's Adm'r.*, 3 U.S. (Dall.) 54, 82-84 (Pa. 1795) (finding the reasoning "cogent and conclusive").

13. *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

14. Peter S. Duponceau, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 (1824), *as reprinted in* *Hensfield's Case*, 11 F. Cas. at 1122. District Attorney William Rawle also affirmed during *Henfield's Case* that "[t]he rights of man are the rights of all men in relation to each other." 11 F. Cas. at 1118.

not defined by any act of Congress . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government [*i.e.*, the Executive, to do so either].<sup>15</sup>

As documented in another writing, the Founders and Framers that recognized that Congress is bound by customary international law included: John Quincy Adams, Alexander Addison, William Allen, Samuel Chase, Peter Duponceau, Albert Gallatin, James Iredell, John Jay, Thomas Jefferson, Thomas Johnson, James Kent, Edward Livingston, James Madison, John Marshall, George Nicholas, William Paterson, Edmund Randolph, George St. Tucker, and James Wilson.<sup>16</sup> Important also was the understanding that the people were bound by international law and could not delegate to the federal government a power that they did not possess.<sup>17</sup>

---

15. Military Commissions, 11 Op. Att’y Gen. 297, 299-300 (1865) (Speed, James, Att’y Gen.); *see also* Right of Expatriation, 9 Op. Att’y Gen. 356, 357 (1859) (Black, Jeremiah S., Att’y Gen.) (stating that the President is bound by laws “of our own country, as controlled and modified by the law of nations”); Who Privileged From Arrest, 1 Op. Att’y Gen. 26, 27 (1792) (Randolph, Edmund, Att’y Gen.) (“The law of nations . . . [is] subject to modifications on some points of indifference.”); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) (explaining that the law of nations can facilitate the execution of decisions “provided the great universal law remains unaltered”).

16. *See generally* Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205 (2008) (providing an overview of Founders’ and Framers’ recognition that Congress is bound by customary international law). For the viewpoints of these authors, *see e.g.*, *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796); 10 ANNALS OF CONG. 607 (1800) (statement of Rep. John Marshall); 8 ANNALS OF CONG. 1980 (1798) (statement of Rep. Albert Gallatin); Who Privileged from Arrest, 1 Op. Att’y Gen. 26, 27 (1792) (Randolph, Edmund, Att’y Gen.); JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 70, 71 (1839); Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 1055, 1072 (Charles S. Hyneman & Donald S. Lutz eds., 1983); Peter S. Duponceau, *supra* note 14; SPEECH OF THE HON. JOHN QUINCY ADAMS, IN THE HOUSE OF REPRESENTATIVES, ON THE STATE OF THE NATION: DELIVERED MAY 25, 1836, at 7 (H.R. Piercy 1836); sources cited *supra* note 7. The Declaration of Independence declared that governments are instituted to secure the rights of mankind, not to violate them. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“to secure these rights, governments are instituted among men”); *see also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.) (our tribunals “are established . . . to decide on human rights”).

17. Paust, *supra* note 16, at 208-12. This fundamental first principle is one that

With respect to judicial recognition that Congress is bound by customary international law, at least twelve cases that affirmed the primacy of customary international law were based on opinions of Supreme Court Justices (which must necessarily be determinative).<sup>18</sup>

---

revisionists often do not address.

18. For summaries and analyses of the twelve Supreme Court opinions, see JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 108-15 (2d ed. 2003); Paust, *supra* note 16, at 213, 217-30. The twelve Supreme Court opinions appear in the following: *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (O'Connor, J., opinion) (stating that although political branches may terminate a treaty, power "delegated by Congress to the Executive" [presumably by statute] and such a Congress-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law"); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) ("Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute can create . . . [different] . . . obligations."); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 316 (1870) (Field, J., dissenting) ("[Congressional] power to make rules [is] . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and . . . [it] is . . . binding upon Congress . . ."); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 537, 539-40 (1867) (stating that a federal statute of limitations contained no exception regarding suspended claims during war, but "principles of international law" and the customary "law of nations" required a de facto exception because "the operation of the statute of limitation is also suspended . . . by the existence of the war and the law of nations"); *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 436-37 (1838) (finding that obligations of the U.S. "were regulated by the law of nations" and a private right to property protected thereunder is "inviolable"); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641-42 (1818) ("[C]ongress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts"); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that an act of Congress "can never be construed to violate . . . rights . . . [under the customary law of nations] further than is warranted by the law of nations"); *Dole v. New Eng. & Mut. Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (Clifford, J., on circuit) (stating that the legislative authority of a country may doubtless enlarge the definition of piracy, but, implicitly, must not "diminish" the prohibition under customary law); *United States v. Darnaud*, 25 F. Cas. 754, 759-60 (C.C.E.D. Pa. 1855) (No. 14,918) (Grier, J., on circuit) (recognizing that if Congress "were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the "law of nations"], it would be the duty of courts of justice to decline."); *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847-51 (C.C.D. Mass. 1822) (No. 15,551) (Story, J., on circuit) (recognizing "an offence against the universal law of society" and that "no nation can rightly permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations. . . ."); Justice James Wilson, Charge to the Grand Jury for the District of Virginia, May 23, 1791 (noting that the customary law of nations cannot be altered or abrogated by domestic law), *reprinted in* 2 *THE WORKS OF JAMES WILSON* 803, 813 (Robert G. McCloskey ed., 1967). *See also* *United States v. Arjona*,



b. Congress Was Bound by Treaties

It is apparent that the Founders and Framers and the early judiciary viewed Congress as also bound by treaties.<sup>19</sup> For example, as noted, John Jay declared that “under the national government, treaties . . . will always be . . . executed.”<sup>20</sup> Jay also wrote that “treaties when made are to have the force of laws, . . . and [are] just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.”<sup>21</sup> In 1843, Attorney General John Nelson added that the “supremacy of a treaty . . . is paramount to all mere legislation.”<sup>22</sup>

With respect to treaties, Supreme Court Justice Iredell affirmed that a treaty is obligatory “on all, as well on the Legislative, Executive, and Judicial Departments . . . as on every

---

120 U.S. 479, 484 (1887) (stating that the “law of nations requires every national government” to prevent wrongs from being committed within its jurisdiction); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 236 (1872) (stating that the “rule is universal and peremptory . . . by the law of nations”); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (acknowledging that an offense against the law of nations is an offense against “the universal law of society”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796) (Chase, J.) (noting that the law of nations “binds all nations”); *Penhallow v. Doane’s Adm’r.*, 3 U.S. (3 Dall.) 54, 82-84 (1795) (Paterson, J.), addressed *supra* note 12; *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 3-4 (1781) (regarding an ordinance of the Continental Congress, stating “[t]he municipal laws of a country cannot change the law of nations”); *Henfield’s Case*, 11 F. Cas. at 1107 (Wilson, J.) (“On states as well as individuals the duties of humanity are strictly incumbent”).

19. See, e.g., PAUST, *supra* note 18, at 81-82 n.14 (observing the impact and influence of federal judicial power on treaties); *id.* at 99-100 (“[I]t was expected quite early that federal statutes must be interpreted so as to be consistent with international law.”); *id.* at 128 nn.7-8 (looking at the importance of treaties on ordinary acts of legislation); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 7, at 267-68, 277-79 (noting John Rutledge’s opinion that treaties would be a “sufficient bar” to local or municipal laws and Charles Pinckney’s view that treaties will be “paramount to the laws of the land”); JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 286 (3d ed. 1826) (a treaty “is as much obligatory on Congress as upon any other branch of the government . . . The House of Representatives are not above the law”).

20. THE FEDERALIST NO. 3, *supra* note 10, at 98.

21. THE FEDERALIST NO. 64, *supra* note 7, at 436-37.

22. *Extradition Under Treaty of Washington*, 4 Op. Att’y Gen. 201, 209 (1843) (Nelson, John, Att’y Gen.).

individual of the nation.”<sup>23</sup> Prior to Justice Iredell’s statement in 1796, Chief Justice Jay declared that “we may repeal or alter our statutes, but no nation can have authority to vacate or modify treaties at discretion. Treaties, therefore, necessarily become the supreme law of the land.”<sup>24</sup> In 1835, the Supreme Court affirmed that a treaty “was inviolable by the power of [C]ongress.”<sup>25</sup> In 1867, the Court recognized that “Congress has no constitutional power to settle the rights under treaties except in cases purely political”<sup>26</sup> and that “Congress is bound to regard the public treaties.”<sup>27</sup> In contrast, the Court declared in 1870 that “[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty,”<sup>28</sup> thereby adopting what became known as the last-in-time rule. Yet, in 1872 the Court affirmed its earlier recognition that “Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.”<sup>29</sup>

By the 1880s, the Supreme Court refined its last-in-time rule

---

23. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796).

24. *Henfield’s Case*, 11 F. Cas., 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360).

25. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 755 (1835).

26. *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *see also* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 631-32 (1857) (Curtis, J., dissenting) (claiming that “[i]f Congress should pass any law which violated such rights of any individual . . . [under a treaty,] the act of Congress would be inoperative”).

27. *Reichart v. Felps*, 73 U.S. (6 Wall.) 160, 165 (1867).

28. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) (citing *Taylor v. Morton*, 23 F. Cas. 784, 785-86 (C.C.D. Mass. 1855) (No. 13,799) (“Treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the president, while they continue unrepealed, and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than congress possesses it.”), *aff’d on other grounds*, 67 U.S. (2 Black) 481 (1863); *In re Clinton Bridge*, 5 F. Cas. 1060, 1062 (C.C.D. Iowa 1867) (No. 2,900) (stating that “whatever obligation” might pertain under a treaty, “the courts possess no power to declare a statute . . . void, because it may violate such obligations”). Two years after *Taylor v. Morton*, Justice Curtis either recognized rights under treaties exception to congressional “repealing” or changed his position entirely. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) at 631-32, addressed *supra* note 26.

29. *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *see also* *Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 327 (1870) (stating that a joint congressional resolution could not relate back and give validity to a land conveyance that was void under a treaty).

to allow domestic superiority of newer legislation<sup>30</sup> *if*: (1) the legislation is unavoidably inconsistent;<sup>31</sup> (2) Congress expressed clear and unavoidable intent in the legislation to override a particular treaty;<sup>32</sup> and (3) none of the exceptions to the last-in-time rule (such as the “vested rights,” “rights under” treaties, or laws of war exceptions) are applicable.<sup>33</sup> The views of the Founders, Framers, and early Supreme Court Justices, however, demonstrate that the basis for the last-in-time rule is suspect. Moreover, there is no support for the primacy of legislation over a treaty in the text of the Constitution.

## 2. The President Is Bound by International Law

### a. Bound by Customary International Law

As noted in another writing,

Under the United States Constitution, the President is expressly bound faithfully to execute the “Laws.”<sup>34</sup> In view of such a constitutionally-based mandate and limitation on presidential power, there has been a unanimous and unswerving recognition by Founders, Framers, and the federal and state judiciary that during an armed conflict to which the laws of war apply, the President, despite whatever competence the Commander in Chief power provides, and all persons within the executive branch are bound by the laws of war.<sup>35</sup>

With respect to executive duties under customary international law, relevant views of the Founders and Framers included those

---

30. PAUST, *supra* note 18, at 100-01.

31. *Id.* at 101.

32. *Id.* at 99, 101.

33. *See id.* at 102-07, 120, 134-42 nn.20-57 (documenting eighteen opinions of Supreme Court Justices). Concerning the “rights under” treaties exception to the last-in-time rule, see also text *supra* notes 26, 29 (outlining the different exceptions to the last in time rule).

34. U.S. CONST. art. II, § 3 (“he shall take Care that the Laws be faithfully executed”).

35. Paust, *supra* note 16, at 240.

of John Quincy Adams,<sup>36</sup> Philip Barbour and Alexander Smyth,<sup>37</sup> Peter Duponceau,<sup>38</sup> Alexander Hamilton,<sup>39</sup> John Jay,<sup>40</sup> Thomas Jefferson,<sup>41</sup> James Madison,<sup>42</sup> John Marshall,<sup>43</sup> George Washington,<sup>44</sup> and Attorney General William Wirt.<sup>45</sup> As famously

---

36. See SPEECH OF THE HON. JOHN QUINCY ADAMS, *supra* note 16 (“But the powers of war are all regulated by the laws of nations, and are subject to no other limitation.”); ADAMS, *supra* note 16, at 71 (“the executive power . . . confers upon him the power, and enjoins upon him the duty, of fulfilling all the duties . . . of the nation in her intercourse with all the other nations of the earth”); Moore, *supra* note 1, at 379 & n.36 (declaring that both Congress and the Executive are bound by international law).

37. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J., 463, 533-34, 534 nn.406-08 (observing that the “laws of war” and “laws of nations or treaties” regulate presidential actions).

38. See *Henfield’s Case*, 11 F. Cas. 1099, 1122 (C.C.D. Pa. 1793) (No. 6,360) (noting that the people and our government are bound by the law of nations).

39. Hamilton, *supra* note 10; Paust, *supra* note 16, at 232 n.96, 242 n.135; Moore, *supra* note 1, at 381 n.52 (declaring that Executive compliance with international law was a duty)

40. Chief Justice Jay, Draft Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793) (“By the Law of Nations our Conduct . . . is to be regulated both in peace and in war”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (Jay, C.J.) (noting that it was in the United States’ interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations”); THE FEDERALIST NO. 3, *supra* note 10, at 98.

41. Charles M. Wiltse, *Thomas Jefferson on the Law of Nations*, 29 AM. J. INT’ L. 66, 75-81 (1935) (noting Jefferson’s expression for the necessity for adherence to the laws of war during the Revolutionary War).

42. James Madison, *Helvidius No. 2*, reprinted in 6 THE WRITINGS OF JAMES MADISON 151, 159 (Gaillard Hunt ed., 1906) (professing that the executive is “bound to the faithful execution” of both internal and external laws).

43. SPEECH OF THE HON. JOHN MARSHALL, DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ON THE RESOLUTIONS OF THE HON. EDWARD LIVINGSTON, RELATIVE TO THOMAS NASH 27 (1800) (maintaining that the country is bound by the laws of nations and the duty of upholding these laws has been devolved on the executive branch).

44. Wiltse, *supra* note 41, at 75 (noting that Jefferson’s policy of neutrality was originally declared by Washington).

45. *Restoration of a Danish Slave*, 1 Op. Att’y Gen. 566, 570-71 (1822) (Wirt, Att’y Gen.) (“The President is the executive officer of the laws of the country; these laws are not merely the constitution, statutes, and treaties of the United States, but those general laws of nations which . . . impose on them, in common with other nations, the strict observance of a respect for their natural rights and sovereignties. . . This obligation becomes one of the laws of the country; to the enforcement of which, the President, charged by his office with the execution of all our laws, . . . is bound to look.”).

affirmed by Alexander Hamilton:

The Executive is charged with the execution of all laws, [including] the laws of Nations . . . [and] is the constitutional Executor of the laws, [which includes o]ur Treaties, and the laws of Nations . . . It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war. . . . [The President has both] a right, and . . . duty, as Executor of the laws . . . to do whatever else the laws of Nations . . . [and “Treaties”] enjoin.<sup>46</sup>

As James Madison recognized, “the executive is bound faithfully to execute the laws of neutrality . . . It is bound to the faithful execution of these as of all other laws, internal and external, by the nature of its trust and the sanction of its oath.”<sup>47</sup>

With respect to relevant U.S. Supreme Court cases, at least fourteen Supreme Court opinions from 1800 to 1903 affirmed that the President and members of the executive branch are bound by the customary laws of war and related international law.<sup>48</sup> At

---

46. Hamilton, *supra* note 10, at 40-43.

47. Madison, *supra* note 42.

48. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“[O]perations of the nation in . . . [foreign] territory *must* be governed by treaties . . . and the principles of international law.”) (emphasis added); *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (“From its very nature, the war power . . . tolerates no qualifications or *limitations*, unless *found in* the Constitution or in *applicable principles of international law.*”) (emphasis added), *overruled on other grounds*, *Girouard v. United States*, 328 U.S. 61, 69 (1945); *Dooley v. United States*, 182 U.S. 222, 231 (1901) (noting that authority and laws regarding war are established by the usage of the world); *The Paquete Habana*, 189 U.S. 453, 464 (1903) (implying that the President must comply with the international laws pertaining to the capture of vessels); *The Paquete Habana*; *The Lola*, 175 U.S. 677, 698-714 (1900) (observing that “international law is part of our law”); *New Orleans v. The Steamship Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) (implying that limits exist “in the laws and usages of war”); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315-16 (1870) (Field, J., dissenting) (“The power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law”); *The Prize Cases*, 67 U.S. (2 Black) 635, 667-68, 671 (1863) (noting that the President is bound to see that the laws are executed, including in context the “laws of war,” “*jure belli*”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 149, 153 (1814) (Story, J., dissenting) (explaining that there is no definition for the powers, objects, and modes of warfare that the President is limited to and therefore he must be governed by the law of nations as applied to warfare); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.) (recognizing that the general laws of war apply where the relevant facts of the case are tied to hostilities between nations);

least four other opinions by Supreme Court Justices between 1813 and 1868 also affirmed that the President is bound by customary international law.<sup>49</sup> Additionally, there were many 19th and early 20th century lower court cases and Attorneys General opinions that recognized that the President is bound by customary international law.<sup>50</sup>

---

Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (stating that war's "extent and operations are . . . restricted by the *jus belli*, forming part of the law of nations"); Paust, *supra* note 16, at 230 n.89, 240 n.135 (providing an overview of the federal cases that demonstrate that the President is expressly bound faithfully to execute the Laws); *see also* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (stating that power "delegated by Congress to the Executive Branch" as well as a relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law"); *In re Neagle*, 135 U.S. 1, 64 (1890) (inferring that the President is bound by all "obligations growing out of . . . our international relations"); *Herrera v. United States*, 222 U.S. 558, 572 (1912) (quoting *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted,' . . . [I]f it was done in violation of the laws of war . . . , it was done in wrong."); *United States v. Adams*, 74 U.S. 463, 469 (1869) (arguing that "[t]he war powers of Congress, and of the President, as commander-in-chief . . . and (as a necessary consequence) of his subordinate commanding generals . . . are unlimited in time of war, except by the law of war itself.") (emphasis omitted); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35, 137 (1852) (noting that illegal orders provide no defense); Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 984-86 (1994) (providing full documentation of actual claims—which never involved a claim to violate the laws of war—and the meaning of several sentences in Justice Gray's opinion, similar phrases in an earlier opinion of Justice Gray and their relation to judicial responsibility to identify and clarify the content of customary international law, and the holding).

49. *See, e.g.*, *United States v. Am. Gold Coin*, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (Miller, J., on circuit); *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (noting that principles of the law of nations are applicable even without being founded by any act of Congress); *Dias v. The Revenge*, 7 F. Cas. 637, 638-39 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on circuit) (stating that the president, though enabled with special powers during war, is still constrained by the law of nations); *The Joseph*, 13 F. Cas. 1126, 1130-31 (C.C.D. Mass. 1813) (No. 7,533) (Story, J. on circuit) (stating that he "cannot yield to this construction" that the President can "abridge the general rights of capture" under the law of nations); *see also* *United States v. Smith*, 27 F. Cas. 1192, 1229 (C.C.D.N.Y. 1806) (Paterson, J., on circuit) (finding that the Neutrality Act "is declaratory of the law of nations" and the President is bound to "take care that the laws be faithfully executed"); *Henfield's Case*, 11 F. Cas. 1099, 1102 ("[T]he laws of nations . . . are those laws by which civilized nations are bound to regulate their conduct"); Jay, *supra* note 40 (noting that conduct relative to other nations should be regulated during times of both war and peace).

50. For examples of cases that bind the President to customary international law,

b. Bound by Treaties

With respect to executive duties under treaty law, relevant views of Founders or Framers include those of the following: John Quincy Adams,<sup>51</sup> Philip Barbour and Alexander Smyth,<sup>52</sup> William R. Davie,<sup>53</sup> Alexander Hamilton,<sup>54</sup> John Jay,<sup>55</sup> James Madison,<sup>56</sup> John Marshall,<sup>57</sup> George Washington,<sup>58</sup> and William Wirt.<sup>59</sup> John Jay's 1786 report to the Continental Congress stated that a treaty of the United States immediately bound "the whole nation, and superadded to the laws of the land," and was to be "received and observed by every member of the nation."<sup>60</sup> The Continental Congress unanimously adopted Jay's report.<sup>61</sup> With respect to U.S. Supreme Court Justice opinions, at least eleven cases<sup>62</sup> plus

---

*see, e.g.*, PAUST, *supra* note 18, at 170-73; Paust, *supra* note 16, at 240 n.135, 243 n.138. *See also* Right of Expatriation, 9 Op. Att'y Gen. 356, 362-63 (1859) (Black, Jeremiah S., Att'y Gen.) (asserting that the President is bound by laws "of our own country, as controlled and modified by the law of nations"); Who Privileged From Arrest, 1 Op. Att'y Gen. 26, 27 (1792) (Randolph, Edmund, Att'y Gen.) ("The law of nations . . . [is] subject to modifications on some points of indifference."); Restoration of a Danish Slave, 1 Op. Att'y Gen. 566, 570-71 (1822) (Wirt, Att'y Gen.) (affirming that the president is obligated to execute all of the laws of the United States, which includes the general laws of other nations).

51. *See sources supra* note 7.

52. Kent, *supra* note 37 (observing remarks by Barbour and Smyth that "the 'laws of war' and 'laws of nations or treaties' regulate presidential actions").

53. *See Moore, supra* note 1, 422 n.248; *see also supra* text accompanying note 7.

54. Hamilton, *supra* note 10 at 40-43; PAUST, *supra* note 18, at 81 n.4, 180 n.2.

55. Report of Secretary of Foreign Affairs John Jay, Oct. 13, 1786, *reprinted in* 1 C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268, 270 (1902); PAUST, *supra* note 18, at 181 n.7.

56. Madison, *supra* note 42.

57. PAUST, *supra* note 18, at 170.

58. Message of Mar. 30, 1796, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 371 (M. Farrand ed. 1911) (affirming that "every treaty . . . henceforward becomes the law of the land").

59. Restoration of a Danish Slave, 2 Op. Att'y Gen. 556, 570-71 (1822) (Wirt, Att'y Gen.).

60. Report of Secretary of Foreign Affairs John Jay, *supra* note 55, at 270.

61. *See* PAUST, *supra* note 18, at 181 n.7.

62. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (quoted *supra* note 48); Valentine v. Neidecker, 299 U.S. 5, 14 n.12, 18 (1936) (holding that the President's power is found in the terms of the treaty); Cook v. United States, 288 U.S. 102, 121 (1933) ("Our Government, lacking power to seize, lacked power[] because of the

opinions of two Justices on circuit<sup>63</sup> recognized that the Executive is bound by treaty law. Lower federal courts had recognized the same.<sup>64</sup>

### III. ELUSIVE ALLEGED “VIOLATIONS” BY THE CONTINENTAL

---

Treaty”); *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (“[A]ll executive Officers . . . shall be bound by oath of affirmation, to support this constitution”); *Francis v. Francis*, 203 U.S. 233, 240, 242 (1906) (stating that ratified treaties are the supreme law of the land and that the President is bound to see executed); *In re Neagle*, 135 U.S. 1, 64 (1890) (“[H]e shall take care that the laws be faithfully executed”); *Chew Heong v. United States*, 112 U.S. 536, 563 (1884) (“[T]reaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President. . . .”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 594 (1832) (“[T]reaties . . . must be respected and enforced. . . .”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 152-53 (1814) (Story, J., dissenting) (recognizing that the President does not have the ability to act outside the constraint of the law); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (“Where a treaty is the law of the land . . . an executive . . . act[ing] independent of . . . other circumstances . . . would be a direct infraction of that law, and of consequence, improper”); *Ware v. Hylton*, 3 U.S. (3 Dall.) at 272 (1796) (quoted at text *supra* note 23); PAUST, *supra* note 18, at 169-72 (discussing various cases where the judiciary has recognized that the President is bound by international law); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (noting that restrictions on searches can “be imposed . . . by treaty”); *Ford v. United States*, 273 U.S. 593, 606 (1927) (stating that Executive branch violation of a treaty distinguishes cases regarding jurisdiction).

*Valentine*, *Francis*, *In re Neagle*, *Chew Heong*, and *The Schooner Peggy* are among seven Supreme Court cases and three other opinions of Supreme Court Justices affirming that the President has authority to execute treaties without an act of Congress. The other two cases are *Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925); and *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 415 (1840). See also *Worcester*, *supra*. The opinions of three Justices on circuit are *In re Sheazle*, 21 F. Cas. 1214, 1217 (C.C.D. Mass. 1845) (No. 12,734) (Woodbury, J., on circuit) and the two opinions, *infra* note 63. Quotations from these and other relevant cases are available in Paust, *supra* note 9, at 313 n.46. Not one of these ten opinions of Supreme Court Justices was addressed by the majority opinion in *Medellin v. Texas*, 552 U.S. 491 (2008), which stated in error that “[W]hen . . . [treaty] stipulations are ‘not self-executing they can only be enforced pursuant to legislation.’” 552 U.S. at 505, 526 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). See also *Wilson v. Girard*, 354 U.S. 524, 530 (1957) (finding that the Executive can execute a treaty by executive agreement and take measures to comply).

63. *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (Curtis, J., on circuit); *United States v. Cooper*, 25 F. Cas. 631, 641-42 (C.C.D. Pa. 1800) (Chase, J., on circuit).

64. PAUST, *supra* note 18, at 172.



## CONGRESS

A. *Admittedly Unproven Customary International Law*

Professor Moore claims that, during the existence of the Continental Congress, a rule of customary international law required “mandatory ratification” of a treaty by a country after it was negotiated and signed by a representative of the country and that there could be no change in the text from that which had been signed by the representative.<sup>65</sup> He notes instances both where agreements were later ratified by the Continental Congress without change<sup>66</sup> and where they were subject to review by the Continental Congress.<sup>67</sup> Additionally, he contends that when they were not ratified without congressional consideration, the Continental Congress violated a rule of customary international law<sup>68</sup> even though no one in the United States was concerned with<sup>69</sup> or argued that a violation of customary international law occurred or would have been permissible.<sup>70</sup>

There are at least two critical problems with his conclusion. First, Professor Moore admits that “it is *unclear* that mandatory ratification was customary international law,”<sup>71</sup> although seemingly buried in a footnote. Professor Moore also admits that Emmerich de Vattel (on whom he relies for the existence of such an alleged rule in the mid-1700s) recognized, in complete

---

65. Moore, *supra* note 1, at 390-92.

66. *Id.* at 392-93.

67. *Id.* at 393-98.

68. *Id.* at 371 (stating that the Confederation government “violated international law”); *id.* at 389 (finding that Congress “departed from the law of nations requirement of mandatory ratification”); *id.* at 399 (demonstrating that Congress began “departing from international law” when insisting on discretionary ratification); *id.* at 420 (illustrating that the Confederation government “did not uniformly comply” with the law of nations or treaty obligations).

69. *Id.* at 421, 430-31.

70. See *id.* at 421 n.247 (“[S]tatements that the national government or a subset of its branches could violate international law are . . . missing.”); *id.* at 430-31 (“[N]owhere is there an express reference to the national violation of international law”); *id.* at 432 n.274 (“Monroe treats mandatory ratification as a principle of good faith rather than a provision of the law of nations”). The absence of any such statements is not surprising in view of the documented statements. See *supra* Part II.B.

71. *Id.* at 391 n.103 (emphasis added).

contradiction, that “*it is customary to place no dependence on [princes’] treaties, till they have agreed to and ratified them,*”<sup>72</sup> despite a practice in the 1600s of having “the agent of the monarch who sent him . . . carr[y] full powers . . . to negotiate and sign on the monarch’s behalf.”<sup>73</sup> Similarly, President George Washington formally declared that “the general understanding and practice of nations . . . [had been] not to consider any treaty, negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers.”<sup>74</sup>

Also apparent from the actual practice of the Continental Congress and the Founders’ stated expectations or *opinio juris* concerning such practice is that Professor Moore, although he has documented such events, has not proven that mandatory ratification continued as a rule of customary international law during the Founding.<sup>75</sup> Importantly, there is no known statement by a Founder that mandatory ratification was an absolute rule of law.<sup>76</sup> At least one Founder, James Monroe, treated the concept “as a principle of good faith rather than a provision of the law of nations.”<sup>77</sup> Additionally, President Washington declared that “the general understanding and practice of nations” was to the contrary.<sup>78</sup> And thus, Professor Moore does not substantiate his argument that the majority of the Founders and Framers stated or expected that such absolute rule of law existed.

---

72. *Id.* (emphasis added); *see also id.* at 390 n.101 (stating that “a prince can honorably refuse to ratify . . . [only if he is] able to allege strong and substantial reasons”); *id.* at 401 (noting Great Britain’s view “that a refusal of ratification should be accompanied by a statement of good reasons”).

73. *See id.* at 390.

74. JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 744, at 188 (1906).

75. A rule of customary international law must be based in general patterns of practice and general patterns of *opinio juris* or expectations that the practice is legally appropriate or required. PAUST, *supra* note 18, at 3-5; 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.”).

76. *See Moore, supra* note 1, at 397 (“[U]nder the laws . . . of nations,’ the United States is not obligated to ratify a treaty entered in excess of instructions.”).

77. *Id.* at 432 n.274.

78. MOORE, *supra* note 74.

The second problem is that in some instances, actual practice included treaty negotiations by representatives that were given “full powers” (and ratification followed)<sup>79</sup> and other negotiations by representatives whose drafts recognizably are not “finally conclusive until they . . . have been transmitted to . . . Congress assembled, for their examination and final direction”<sup>80</sup> or when retention of authority of the Continental Congress otherwise pertained.<sup>81</sup> Clearly, a difference existed between the practice of using negotiators with full powers and using those that did not have full powers or whose agreed-to drafts were subject to review by the Continental Congress. The differences in practice support the conclusion that existence of an alleged rule of mandatory ratification, based in general practice in the mid-1700s (as well as generally shared *opinio juris*), has not been proven. Moreover, the argument that the Framers chose to provide the Senate with “constitutional power to advise and consent [to ratification by the President, which] is inconsistent with [an alleged rule of] mandatory ratification,” does not prove that there is “a constitutional mandate to depart from international law.”<sup>82</sup> It is illogical to claim that a majority of the Founders and Framers (or any of them) approved discretion to violate international law without any documented statement that such an absolute rule of customary international law existed or any statement by a Founder or Framers that a rule of law was being violated.<sup>83</sup> No such proof exists. The pattern of practice by the Founders and Framers, the lack of shared *opinio juris* regarding the existence of a rule of mandatory ratification, and the shared expectation of constitutional propriety of the need for Senate advice and consent at its discretion (and ratification thereafter at the President’s discretion) combine in necessary opposition to the alleged existence of such an absolute rule of mandatory ratification as

---

79. Moore, *supra* note 1, at 392-93.

80. 3 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, 413 (Thomas B. Wait ed., 1820).

81. Moore, *supra* note 1, at 395.

82. *See id.* at 400 n.146.

83. *See supra* note 70 (indicating that no statements concerning the Founders or Framers recognition of such beliefs exist).

customary international law at the time of the Framing.

*B. Treaty Interpretations and Unproven Violations*

Similarly, with respect to treaties, there is no proof that a Founder or Framers stated the Continental Congress violated a treaty; and thus, there is no proof that a majority shared such an expectation. Further, there is no proof that a Founder or Framers declared that the federal government or any Constitutionally-created entity could violate treaties; and thus, there is no proof that a majority of the Founders and Framers shared such an expectation). Necessarily, proof that the Founders and Framers approved a national discretion to violate treaties does not exist.

Professor Moore opines that there had been “self-interested interpretation,”<sup>84</sup> “[s]uspect interpretations,”<sup>85</sup> “questionable interpretations,”<sup>86</sup> “more than a little creativity” in interpretation,<sup>87</sup> a “stretch,”<sup>88</sup> and a “legalistic reading . . . [that] might be legally supportable”<sup>89</sup> with respect to the three treaties addressed. Assuming that these characterizations are correct, the binding nature of the treaties would be reaffirmed<sup>90</sup> while the shared meaning of particular terms would be disputed. Not one of Professor Moore’s phrases, even if correct, proves that treaty violations had actually occurred or that anyone approved the violation of a treaty.<sup>91</sup> Again, no proof exists to prove the Founders and Framers approved federal discretion to violate treaties.

---

84. Moore, *supra* note 1, at 371, 386, 420 (noting that the national government “worked to bend treaties to national advantage”). This, of course, is often what governments do.

85. *Id.* at 403.

86. *Id.*

87. *Id.* at 405.

88. *Id.* at 406.

89. *Id.* at 417.

90. *See also id.* at 412-13 (noting that in one instance, “[t]hey [Congress] proffered various justifications” and stated that a separate agreement was “none of France’s business”); *id.* at 414 n.221 (stating that conduct “did not violate the treaty”). *Cf. id.* at 413 (noting James Wilson’s concern that signing the preliminary articles without France was a violation of the spirit of the treaty with France).

91. *See also supra* notes 7, 15, and Part II.B.

## IV. CONCLUSION

This reply demonstrated that claims that the Continental Congress violated a rule of customary international law and three treaties are unproven. No Founder or Framers is known to have stated that there had been any such violation or that violations should be permitted in the future. In fact, the views of Founders and Framers and the early judiciary were overwhelmingly against such notions. Their views expressed the belief that Congress and the President are bound by customary and treaty-based international law. Despite Professor Moore's assertions, there was no approval or embrace by the Founders or Framers of an alleged national discretion to violate international law.

Today, there are at least forty-three opinions of Supreme Court Justices that affirm the following: (1) Congress is bound by customary international law, and (2) the President is bound by customary and treaty-based international law.<sup>92</sup> Fifteen other Supreme Court Justice opinions supplement this belief,<sup>93</sup> and eighteen Supreme Court Justice opinions affirm various exceptions to the last-in-time rule, which, when one or more apply, guarantees the primacy of certain treaty-based rights and duties in the face of conflicting newer congressional legislation.<sup>94</sup>

---

92. *See supra* notes 18, 48, 49, 62, 63.

93. *See supra* notes 18, 48, 49, 62.

94. *See supra* note 33.