International Humanitarian Law Teaching Supplement

VOLUME 3: CONSTITUTIONAL LAW

Produced by the
International Humanitarian Law Clinic
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Volume 3: CONSTITUTIONAL LAW

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Constitutional Law and International Humanitarian Law

Constitutional law is rarely conceived of as a law school topic lacking engaging or timely subject matter. Freedom of speech, religious freedom, and equal protection usually require little effort to spark student interest or class participation. History and current events offer rich and countless illustrations of the rules and doctrine that accompany these rights-based topics of constitutional law.

Yet, as most lawyers will recall, constitutional law's compelling, rights-based topics tell only half of its story. Most constitutional law courses also offer significant coverage of the structure of the United States federal government envisioned by the Constitution. Indeed, mastery of the structural questions of separation of powers, federalism, and justiciability is the price of admission to the zestier constitutional law topics involving rights and liberties. Constitutional law professors face far greater challenges bringing to life and engaging students on structural topics such as the Congressional power to regulate commerce, the Dormant Commerce Clause doctrine, and the federal courts' several doctrines of justiciability. In many cases, these comparatively tedious and inaccessible topics prematurely alienate students from constitutional law.

Fortunately, international humanitarian law (IHL) offers significant opportunities to enliven structural topics of constitutional law. Far from a gratuitous diversion into headline-grabbing issues, integration of IHL into structural topics of constitutional law offers a remarkably effective illustration of important U.S. Supreme Court doctrine. IHL principles and scenarios can easily be used to test students' understanding of cases as well as their capacity to rigorously apply constitutional law doctrines beyond traditional areas of application. This teaching supplement offers suggestions for how to incorporate IHL into constitutional law, including references to suggested cases and potential questions and topics for classroom discussion.

After a brief introduction to core IHL principles in Section I, the following sections will address two primary issues: 1) how IHL targeting principles can be used to illustrate the political question doctrine and 2) how U.S. implementation of its IHL obligations under the 1993 Chemical Weapons Convention can illustrate the treaty power.

I. Brief Introduction to IHL

International humanitarian law (also referred to *inter alia* as the law of armed conflict, the law of war, *jus in bello*) is the body of law that, for humanitarian reasons, seeks to limit the effects of armed conflict. It aims to protect persons who are not or are no longer taking part in hostilities—the sick and wounded, prisoners and civilians—and to define the rights and obligations of the parties to a conflict in the conduct of hostilities. The law is built on two complementary pillars: necessity and humanity. The necessity pillar permits belligerents to employ measures necessary to bring about the prompt submission of the enemy. The humanity pillar protects persons and objects falling outside the scope of necessary harm during armed conflict. A separate body of law, *jus ad bellum*, governs the resort to military force by States to achieve some national objective.

The primary sources of IHL are the Hague Conventions (and Annexed Regulations) of 1899 and 1907, the four Geneva Conventions of 1949, the two 1977 Additional Protocols to the Geneva Conventions, and customary international law.

IHL is based on four fundamental principles: military necessity, humanity, distinction, and proportionality. Military necessity recognizes that the goal of war is the complete submission of the enemy as quickly as possible and allows any force necessary to achieve that goal as long as it is not forbidden by the law. Destroying enemy capabilities is therefore legitimate; wanton killing and destruction is not. Humanity aims to minimize suffering in armed conflict. To that end, the infliction of suffering or destruction not necessary for legitimate military purposes is forbidden. The principle of distinction requires all parties in a conflict to distinguish between those who are fighting and those who are not and only target the former when launching attacks. It also requires those who are fighting to distinguish themselves from innocent civilians. Finally, the principle of proportionality seeks to balance military goals with protection of civilians. It prohibits an attack when the expected civilian casualties will be excessive compared to the anticipated military advantage.

II. Political Question Doctrine and IHL

United States constitutional law and federal courts courses typically include instruction in the doctrine of political question. Casebooks usually present the political question doctrine as a feature of U.S. federal judicial branch structure and, more specifically, as an aspect of the notion of "justiciability." In U.S. constitutional law, justiciability refers to the question whether an issue or party appears properly in litigation before a U.S. federal court. In addition to political question, justiciability also includes more familiar doctrines such as standing, mootness, ripeness, and the case or controversy requirement.

Like other facets of justiciability, political question operates as an exception to the power of constitutional review the U.S. Supreme Court recognized in *Marbury v. Madison*. As Chief Justice Marshall noted, "in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."[1] The political question doctrine instructs federal courts to dismiss cases involving issues of constitutional interpretation committed exclusively to or better left to the political branches, that is, the executive and legislative branches of the U.S. government.

The political question doctrine is an especially drastic approach to policing the courts' responsibilities and authority. Dismissals of constitutional cases on other grounds of justiciability such as standing, ripeness, or mootness, while vexing to complainants, are often remediable. A litigant can occasionally correct deficiencies of standing, ripeness, and mootness respectively by finding a correct party or suffering an injury herself, by waiting for a constitutional violation to actually materialize, or by filing suit

[1] 5 U.S. (1 Cranch) 137 at 166 (1803).

well prior to final resolution of the constitutional injury. Political question is different. Once federal courts determine an issue constitutes a political question, the entire subject is forever precluded from federal judicial consideration. No steps the litigant can take, apart from winning reversal of the political question determination itself, can remedy the deficiency of pleading a political question.

Given the severe and persistent effects of characterizing a constitutional issue as a political question, one might expect the doctrine to involve clear rules or criteria of application. It does not. Political question has proved a notoriously Byzantine and elusive doctrine to judges, jurists, and students of constitutional law. As recently as 2012, the U.S. Supreme Court corrected fundamental misconceptions concerning the doctrine from lower federal courts.[2] Professor Redish describes political question doctrine as "an enigma to commentators," noting "[n]ot only have they disagreed about its wisdom and validity (which is to be expected), but they have also differed significantly over the doctrine's scope and rationale. In fact, they have even disagreed over whether the doctrine exists at all."[3] Indeed, the function, the utility, and even the propriety of the *Baker* criteria have been effectively called into question by a number of distinguished commenters.

In *Baker v. Carr* (1962), the U.S. Supreme Court offered six criteria to better identify political questions. The Court observed,

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[4]

Confusion and misapplication persist despite the *Baker* Court's efforts to illustrate the doctrine's application. Students are very often tempted to apply the *Baker* criteria too broadly. Save just a few very specific clauses, nearly any provision of the U.S. Constitution may be said to lack a "judicially discoverable standard," but federal courts hear cases concerning those same provisions routinely. Similarly, one of the major functions of the Constitution is to commit issues and authority to the political departments. Yet surely not all such provisions involve political questions that preclude judicial review. And the final four prudential *Baker* factors, which collectively caution

[2] Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012).
[3] Martin Redish, *Judicial Review and the Political Question Doctrine,* 79 NW. U. L. REV. 1031 (1985) (citing Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976)).
[4] 369 U.S. 186, 217 (1962).

courts to respect the discretion called for in the operation of the political branches, may be said to apply to almost any case reviewing the constitutionality of Congressional or Presidential action. How then are students to discern political questions in cases not addressed yet by the federal courts?

Layered over this doctrinal ambiguity, one finds serious debate about the fundamental nature of political question. Commentators are split whether political question is a constitutionally-compelled doctrine[5] or whether it is a prudential rule of the courts' own invention, resorted to not out of principle but rather as an unjustified and self-serving defense mechanism against unpopular or challenging cases.[6]

Finally, the timing and course organization of constitutional law courses add to the difficulty of teaching political question doctrine. Constitutional law coursework presents the topic early, depriving students of context and facility with the federal courts' general approach to constitutional interpretation. It is also difficult to bring the political question doctrine to life for students. The leading cases on political question involve legislative reapportionment[7] and judicial impeachment.[8] Few students come to constitutional law well versed or particularly interested in either subject, compounding their confusion and impeding their willingness to engage the doctrine of political question seriously.

Fortunately, IHL presents the student and professor of constitutional law with a context that comprehensively illustrates the operation of political question doctrine and simultaneously offers an interesting and engaging factual background for outside reading and class discussions.

The El-Shifa Pharmaceuticals Case

On August 20, 1998, the President of the United States ordered a missile strike on a pharmaceutical plant in Khartoum, Sudan. Intelligence reports indicated the plant was associated with the terrorist group al-Qaeda and Osama bin Laden, a terrorist leader thought to be responsible for attacks on U.S. embassies in Kenya and Tanzania earlier that month. Intelligence reports also indicated that the plant produced compounds used in the production of chemical weapons. The missile strike destroyed the plant. The next day, the President reported that the attack was "a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities" and was "intended to prevent and deter additional attacks by a clearly identified threat."[9] Later investigations suggested the plant was neither affiliated with bin Laden nor involved in chemical weapon production.

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[5] *Id.*
[6] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 184–89 (2d ed., 1986).
[7] Baker v. Carr, 369 U.S. 186 (1962).
[8] United States v. Nixon, 418 U.S. 683 (1974).
[9] El-Shifa Pharmaceuticals Industries Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (citing President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464, 1464 (Aug. 21, 1998)).

In *El-Shifa Pharmaceutical Industries Co. v. United States*, the District of Columbia Court of Appeals, sitting *en banc*, affirmed a U.S. District Court rejection of claims by the plant owner.[10] The court observed, "The [plant owner's] claim asks the court to decide whether the United States' attack on the plant was 'mistaken and not justified.' . . . If political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target."[11] The court's analysis emphasized the discretionary nature of decisions to launch military operations. Applying the *Baker* political question criteria, the court concluded that decisions to use force and determinations of what parties and objects present threats to our national security are textually committed to the Congress and the President. Furthermore, such decisions lack clear, judicially manageable standards, and are "'delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility."[12] The court observed, "We could not decide this question without first fashioning out of whole cloth some standard for when military action is justified."[13]

The *El-Shifa* court couched its decision in terms more reminiscent of the law of war branch regulating legality and legitimacy of the resort to force, the *jus ad bellum*, than the branch regulating the conduct of hostilities, the *jus in bello* or IHL.[14] Still, one can easily apply the court's observations concerning the former legal regime to the latter. That is, one might ask whether IHL rules on targeting present political questions precluded from consideration by federal courts.

El-Shifa presents the opportunity to illustrate a number of important principles of IHL while testing application of the political question doctrine. For instance, one of the IHL issues raised in the *El-Shifa* case concerns whether the President and U.S. armed forces collected sufficient intelligence to reasonably conclude the pharmaceutical plant was a lawful military objective. Such an inquiry might begin by exposing students to the

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[10] 607 F.3d 836 (affirming El-Shifa Pharmaceutical Industries Co. v. United States, 402 F.Supp.2d 267 (D.D.C. 2005)). A three-judge panel of the D.C. Circuit Court of Appeals had also affirmed the District Court rejection of the claim. El-Shifa Pharmaceutical Industries Co. v. United States, 559 F.3d 578 (D.C. Cir 2009). Another case that presents potentially useful political question discussion opportunities is that of Anwar al-Aulaqi, the Yemeni al-Qaeda operative killed by a U.S. drone strike in 2011. U.S. District Court Judge John Bates dismissed a suit brought by al-Aulaqi's father, challenging the government's decision to authorize the targeted killing of al-Aulaqi, primarily on standing grounds, but also discussed political question issues extensively. Al-Aulaqi v. Obama, 727 F. Supp.2d 1 (D.D.C. 2010).

[11] 607 F.3d at 844.

[12] 607 F.3d at 845 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp. 333 U.S. 103, 111 (1948)).

[13] 607 F.3d at 845.

[14] It is important to emphasize that international law maintains a strict separation between the *jus ad bellum* and *jus in bello* (IHL) and that determinations regarding the legality of the use of force (a *jus ad bellum* question) do not affect the rights or obligations of the parties to a conflict as set forth in IHL.

relevant provisions of IHL, as reflected in the following provisions of Additional Protocol I. As noted above, the IHL targeting principle of distinction requires that attackers

> at all times distinguish between . . . civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[15]

"Military objectives," for purposes of distinction, are defined as

> those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[16]

Finally, IHL provides a presumption concerning objects of uncertain character:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[17]

The *El Shifa* case and these IHL principles and obligations force students to examine whether judicial inquiry concerning implementation of IHL requires predicate policy determinations not fit for resolution by judges, a core political question issue. With law and policy—and international and domestic legal regimes—woven together, students can also consider whether judicial second-guessing of executive branch application of IHL targeting rules or principles calls for inordinate lack of respect to political branches or presents the potential of international embarrassment.

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[15] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3., art. 48 [hereinafter Additional Protocol I]. Although the United States is not a party to Additional Protocol I, Article 48 is widely regarded as reflective of customary international law binding on all States in all conflicts, whether international or non-international. *See* 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 37 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter Henckaerts & Doswald-Beck].

[16] Additional Protocol I, art. 52(2).

[17] Additional Protocol I, art. 52(3). The ICRC's study of customary international law asserts that the article 52(3) presumption in favor of civilian status reflects customary law binding on all States including non-States party to Additional Protocol I. Henckaerts & Doswald-Beck, *supra* note 15 at 35–36. The U.S. position on the customary status of article 52(3) is uncertain.

Questions for Discussion

1. Do IHL targeting issues raise matters textually committed by the Constitution exclusively to the political branches?

The textual commitment in question might be the Commander in Chief Clause of the Constitution. Article II, section 2, clause 1 states, "The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Although Presidents frequently resort to the Commander in Chief Clause to defend military action, the Supreme Court has not relied heavily on the Clause when evaluating claims of executive branch power. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court declined to adopt the President's argument that the Commander in Chief Clause was a source of authority during the Korean War to seize and compel operation of steel mills closed due to a workers strike.[18] Similarly, a plurality in *Hamdi v. Rumsfeld* declined to accept the Commander in Chief Clause as sufficient authority to subject a U.S. citizen to security detention without an opportunity to present a legal challenge.[19] Still, the Court has, admittedly in *dictum*, observed that the Commander in Chief clause must give the President broad authority to direct the day-to-day operations of the military.

It is possible to conclude that the Commander-in-Chief Clause of the Constitution commits to the President questions concerning when and, more particularly, how the United States uses armed force. Or more generally, one might ask whether the Constitution commits the targeting determinations required by Articles 48, 52(2), and 52(3) of Additional Protocol I exclusively to the political branches of the federal government. A president might argue that determinations whether an object constitutes a military objective, whether its destruction offers "a definite military advantage," and whether that same object makes an "effective contribution to military action" all concern how U.S. armed forces conduct combat operations. A President might further argue these are matters committed exclusively to the President through the Commander-in-Chief Clause.

2. If the Commander-in-Chief Clause does commit questions regarding the use of military force to the President, does it express such power in a manner similar to constitutional provisions held to involve political questions?

Congress's power to declare wars suggests, at a minimum, that the President shares war-making power with the legislative branch. Yet the questions of whether a particular objective is appropriate for attack or *how* to go about conducting hostilities rather than *when* to fight might more clearly reside exclusively with the President. This question of whether a constitutional provision commits an issue exclusively to a political branch has proven especially difficult to apply. Most constitutional law casebook treatment of political question doctrine includes *Nixon v. United States*. In *Nixon*, the U.S. Supreme Court concluded that the Constitution commits the impeachment power

[18] 343 U.S. 579, 643–44 (1952).
[19] 542 U.S. 507, 531–32 (2004).

exclusively to the Senate.[20] The *Nixon* Court emphasized the Constitution's use of the term "sole power" when describing the Senate's impeachment power. The Court concluded that use of the term "sole," a term used exceedingly rarely in the Constitution's enumerations of authority, reflected the framers' intent to confer the impeachment power exclusively to the Senate, free from intermeddling by federal courts. Thus, the Court determined that questions arising from exercise of the Senate impeachment power constituted political questions under *Baker*'s textual commitment factor. Ask students to consider whether the Commander-in-Chief Clause grant of power to the President, which does not feature the term "sole," would still be regarded as equivalent to the Impeachment Clause's exclusive grant of authority to the Senate.

3. Do targeting issues offer sufficiently discoverable and manageable standards for evaluating compliance?

In examining the IHL rules applicable to the *El-Shifa* attack, ask students whether these provisions offer courts manageable standards under *Baker* and *Luther v. Borden*. In *Luther*, the seminal political question case, the Court held that claims made under the Constitution's Guarantee Clause, or as it is also known, the Republican Form of Government Clause, present political questions because the Clause did not offer the Court a rule for decision.[21] In *Luther*, the Court declined to address claims arising from disputed exercises of authority by purported agents of the government of Rhode Island. The Court reasoned that addressing the claims would require a predicate determination whether the Rhode Island government was sufficiently representative to constitute a "Republican Form of Government" under the Guarantee Clause. Examining the Clause, the Court held that its text offered no meaningful criteria for evaluation of the claim and therefore its enforcement was better left to the political branches.

- Consider whether a court could really apply the term "military objective" in a principled manner. On one hand, IHL offers a fairly detailed definition of the concept through the Additional Protocol I, article 52(2) passage quoted above. Further elaboration can be found in States' military manuals and in expert commentary. In this respect, the principle of distinction may be distinguished from the task the Guarantee Clause claim presented the *Luther* Court.

  On the other hand, can a court really gain access to the information, expertise, and inputs required to assess whether an object nominated for attack "make[s] an effective contribution to military action"? Can a court evaluate and apply with rigor a standard calling for an evaluation of whether a particular attack "offers a definite military advantage"?

  As one examines more closely the terms used to define military objective, difficulties of application become more apparent. IHL envisions, and experience in armed conflict demonstrates, that such determinations are best made by members of the armed forces, trained and experienced in the application of lethal

[20] 506 U.S. 224, 234 (1993).
[21] 48 U.S. (7 How.) 1 (1849).

force. Notwithstanding the legalistic language of article 52(2), it is fair to ask students to assess whether that provision provides a standard that judges are competent to apply in a contested case.

- Now alter the facts slightly and suppose the U.S. missile attack on the pharmaceutical plant had resulted in a high number of civilian casualties—35 civilians were killed and property essential to producing critical medical supplies worth several million dollars was destroyed. In this circumstance, does IHL present courts with political questions lacking "judicially discoverable and manageable standards"?

- In addition to defining military objectives, IHL requires that attackers refrain from indiscriminate attacks. According to customary international law, indiscriminate attacks include

  > an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[22]

  IHL commentators and States' armed forces typically refer to the above passage as the rule of proportionality. Attacks that are indiscriminate in the sense described above violate the IHL principle of proportionality. Although adherence to the principle—and recognition of its essential role in protecting civilians—is widespread, the exact contours of the proportionality requirement are elusive,[23] much like the notion of political question itself.

- A number of points about proportionality might be worth emphasizing with students. First, the IHL principle of proportionality carries a specific meaning, somewhat distinct from common usage. In essence, IHL proportionality accepts that civilian casualties are often unavoidable and are in some cases acceptable consequences of attacks during armed conflict. The precise number or amount tolerated is not absolute but is rather a function of the military advantage expected from an attack. Thus, attacks expected to produce large tactical or even strategic gain might justify higher levels of civilian damage and greater civilian casualties. Alternatively, attacks expected to gain slight or only marginal military advantage could not justify significant or widespread collateral damage to civilians or civilian objects.

- Second, the nature of the comparison called for by the proportionality rule is problematic. On its face, the rule calls for comparison of dissimilar inputs. Military advantage can result from the destruction of a wide range of objects that

[22] Additional Protocol I, art. 51(5)(b).
[23] Rogier Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, 46 ISRAEL L. REV. 271 (2013).

are useful to enemy forces including buildings, infrastructure such as roads or bridges, vehicles, weapons, ammunition, equipment, or electronics. Similarly, military advantage can result from attacks on a wide range of enemy personnel, from the lowest-ranking, common soldier to a highly skilled military technician to an irreplaceable commander-in-chief of the enemy's armed forces. The expected military advantage of an attack in quantitative terms thus varies wildly according to the objects and specific persons attacked.

- Quantifying the civilian consequences of an attack can be a similarly complex and fickle undertaking. Not only must the attacker somehow quantify the value of civilian lives and civilian property, but the proportionality rule also requires difficult determinations as to what counts. That is, the attacker must determine whether to include only civilians and civilian objects immediately and directly affected by the attack or whether to include secondary or "knock-on" effects of the planned attack. For instance, in an attack on a power station used jointly by military forces and civilians, should an attacker only calculate civilian damage with respect to the station itself? Or would foreseeable knock-on effects such as loss of functionality at water purification facilities count toward civilian damage as well? And what about unforeseeable knock-on effects?

- Finally, the standard of evaluation called for by proportionality is notoriously vague. Recall the rule states that civilian damage may not be "excessive" in relation to military advantage. While many resort to a scale metaphor to explain proportionality, the metaphor is somewhat imprecise. Rather than require that military advantage *outweigh* civilian damage, proportionality actually requires that the latter not exceed the former too greatly. The point at which this occurs is infamously elusive and may well prove to be a highly subjective determination more indicative of one's tolerance for the horrors of war than one's facility with the law.

- In light of the above discussion, does a claim based on the IHL rule of proportionality present a political question to U.S. federal courts? Turning to the altered facts of the *El-Shifa* example, the answer is uncertain but worthy of discussion. Would the 35 civilian casualties and damage to millions of dollars of medical equipment be excessive in relation to the military advantage expected from the attack? Ask students to identify the latter. Recall that President Clinton characterized the attack as "a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities" and "intended to prevent and deter additional attacks by a clearly identified threat." Suppose further that the destruction of the medical equipment at the plant resulted in further civilian casualties as a result of shortages of medication. Could the military advantage of eliminating a terrorist threat be quantified in terms comparable to the direct losses of civilian life and property in the attack? If so, would the indirect losses of life resulting from medication shortages change the result? More importantly for the constitutional law issue of political question, could a federal court undertake the task in a principled fashion? Do the tools of

evidence and argument by parties equip federal courts with the necessary inputs for a rigorous and sound determination under the IHL principle of proportionality? Is such a determination even possible given that proportionality is a prospective analysis—based on the information reasonably available to the commander at the time of the attack—and not a retrospective one?

4. With regard to the prudential considerations that have long been acknowledged as an important aspect of political question doctrine, would second-guessing the President's decision to attack the El-Shifa plant be impossible "without an initial policy determination of a kind clearly for nonjudicial discretion?"

In fact, all but the first of the *Baker* factors appears to be prudential in nature rather than constitutionally compelled. Unlike its statements with respect to the first and second *Baker* factors, the Supreme Court has offered few clues as to the operation of these prudential factors. Recently, one justice, concurring in a case involving political question doctrine, wondered whether the final four factors essentially describe the same thing.[24]

In discussing these prudential considerations, ask students to consider as well any or all of the following questions:

- Would applying the relevant IHL standards to the circumstances of the attack display a "lack of respect due coordinate branches of government?"
- Does application of IHL targeting rules call for "unquestioning adherence to a political decision already made?"
- And finally, does "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" dictate that a federal court pass on questions of IHL targeting rules?

One might easily imagine significant embarrassment from having two branches of the U.S. federal government take opposing views on the legality of a lethal action affecting the sovereign territory of another State and the lives and property of its citizens.

If the answer to any of the above prudential considerations is "yes," then what might such determinations by federal courts mean for the utility and enforceability of IHL generally? Can IHL make meaningful contributions to humanity in armed conflict if it is only domestically enforceable against the United States by the political branches of government? Would a federal court's determination that IHL targeting rules present political questions undermine the object and purpose of IHL treaties to which the U.S. is party? Are U.S. commitments to IHL merely aspirational or symbolic then?

III. The Treaty Power

The treaty power is a second instructional topic drawn from structural issues of constitutional law courses that might profit from injection of IHL considerations.

[24] Zivotofsky v. Clinton, 132 S.Ct. 1421 (2012) (Sotomayor J. concurring).

Constitutional law courses typically include examination of the treaty power in coverage of federal legislative powers or separation of powers. While students usually understand that the United States government has constitutional authority to enter into treaties with other nations, most bring little background knowledge of the extent of the obligations the United States has undertaken and still fewer understand how treaty obligations are integrated into our legal system. Furthermore, few students appreciate the collateral constitutional issues raised by the federal government's exercise of the treaty power. Although the Constitution's procedural prerequisites for treaty adoption or ratification such as Senate advice and consent are easily understood, deeper issues, especially those related to federalism, are less likely to be anticipated and fully appreciated by students without deliberate instruction. The United States' IHL treaty obligations under the 1993 Chemical Weapons Convention and a case related to that treaty pending before the Supreme Court at the time of this writing offer timely and interesting opportunities to consider complex issues of federalism arising under the treaty power.

Instruction on the treaty power usually begins with the text of the Constitution itself. Article VI states that treaties "made under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby." Students will recognize this passage of the Constitution as the Supremacy Clause. Students also usually understand the legal effect of the Supremacy Clause in terms of preemption. That is, most students appreciate that under the Supremacy Clause, validly enacted federal law overrides State law. Fewer students, however, understand the Clause as evidence of our system of federalism—an attempt by the framers of the Constitution to manage relations between the national government and the states. Emphasizing that the Supremacy Clause speaks directly to state judges often brings this point home more obviously. The Clause clearly anticipates that state court judges would be called upon to interpret and implement federal law in their courtrooms. The Clause also suggests the plenary nature of federal power. When validly exercised, federal power is complete and sweeps aside competing or conflicting legal obligations and rights.

Derived from the Supremacy Clause and the Treaty Negotiation Clause of Article II, the treaty power is understood to include not only authority to negotiate and ratify treaties but also authority to execute and implement the international legal obligations undertaken through treaties. Like that of most nations based on the common law tradition, the U.S. approach to implementing treaty obligations is described as a dualist system. Dualist systems generally regard treaties as non self-executing,[25] requiring a two-step process to implement treaties. Dualist states first complete the process for treaty ratification as prescribed by both the treaty in question and by the states' domestically prescribed procedures. The second step of the dualist process then envisions the state converting the international legal obligations of the treaty into domestic law, usually in the form of national legislation. Only when the second step is complete are the treaty obligations enforceable in the dualist state's domestic legal system. In contrast, monist

[25] Some treaties, however, purport on their face to be self-executing. *See e.g.* Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), as noted in TWA v. Franklin Mint Corp, 466 U.S. 243 (1984).

legal systems do not require the second step of domestic implementation. In the monist tradition, treaties become domestically enforceable law immediately upon ratification.

Most constitutional law casebooks illustrate the treaty power, especially the extent of Congress's power to implement U.S. treaty obligations domestically through legislation, with Justice Oliver Wendell Holmes's opinion in *Missouri v. Holland*.[26] In *Holland*, the Court heard a state's complaint that federal legislation passed to implement obligations under a 1916 treaty with Great Britain to protect migratory birds exceeded Congress's authority under the Treaty Power. The federal law in question prohibited killing protected migratory bird species except as permitted by regulations issued by the U.S. Secretary of Agriculture. Missouri argued that regulating hunting and harvesting of wild species was an activity reserved to the states by the Constitution's Tenth Amendment. Missouri's claim implicated not only the validity of the Secretary's regulations under the Tenth Amendment but also the validity of the treaty itself as an exercise of the treaty power. Missouri argued that the federal government exceeded its treaty powers by committing the United States to a course of action Congress could not itself undertake. Essentially, Missouri argued that the federal treaty power could operate validly only in areas specifically enumerated for federal action under the Constitution.

In a surprisingly broad opinion, the Court upheld the treaty and the federal regulations as valid exercises of not only the treaty power but also the Constitution's Necessary and Proper Clause. Addressing the validity of the treaty, the Court observed, "Acts of Congress are supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[27] The Court concluded that the government had satisfied its obligations under the treaty power simply by observing the Constitution's procedural requirements for treaty adoption. Addressing the validity of the legislation that gave rise to the Secretary's hunting regulations, the Court noted, "If the treaty is valid there can be no dispute about the validity of the statue under Article 1, Section 8 as a necessary and proper means to execute the powers of the Government."[28] The Court has rarely described a federal power as operating in such a plenary fashion or in such sweeping terms.

Accordingly, jurists and scholars have long marveled at the breadth of the treaty power envisioned by the *Holland* opinion.[29] The Court's description of the treaty power appears to reject any external limits on the treaty power whatsoever. Following *Holland*, the only limits on the treaty power appear to be the procedurally required formalities of Presidential negotiation and Senate advice and consent. Constitutional law casebooks

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[26] 252 U.S. 416 (1920).
[27] 252 U.S. at 433.
[28] 252 U.S. at 432. Article I, section 8 follows an extensive enumeration of legislative powers and provides Congress the additional power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. 1, §8.
[29] *See* David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

frequently prompt students to consider whether, under the logic and reach of *Holland*, the Congress and President might enter a treaty that required the United States to take action inconsistent with fundamental individual liberties such as those protected by the First Amendment. Similarly, students are frequently asked to consider whether *any* federalism-based limits on federal government authority apply to the treaty power. For instance, under *Holland*, may the federal government resort to the treaty power to infringe on areas traditionally reserved to states, such as family matters of marriage, divorce, and child custody? While useful as analytical explorations, these inquiries often trouble students. In particular, many students find it very difficult to reconcile *Holland*'s rejection of any workable limits on the treaty power with the Court's recent revitalization of the Tenth Amendment.[30]

Fortunately, a more productive line of inquiry might be found by resorting to U.S. implementation of an important IHL treaty. In 2013, the Supreme Court heard argument in a case with IHL implications that may lead the Court to reexamine the extent and nature of the treaty power described in *Holland* and may assist with its instruction. In *Bond v. United States*, the Court will determine whether a federal statute that implements U.S. obligations under the 1993 Chemical Weapons Convention (CWC) impermissibly intrudes into realms traditionally reserved to states, specifically local policing and law enforcement powers. It is certainly possible, or even likely, that construing the statute narrowly will permit the Court to avoid the Constitutional question of whether the statute exceeds Congressional authority under the treaty power. However, the case presents riveting and sordid facts, a good introduction to an important IHL treaty, and—last but certainly not least—an opportunity to consider and scrutinize the treaty power as announced in *Holland*.

In 2006, a microbiologist named Carol Anne Bond learned of her husband's romantic involvement with another woman. Bond then stole a number of toxic chemicals from her workplace and attempted to poison her husband's paramour at least 24 times over several months, spreading the chemicals over the woman's car door, mailbox and home doorknob.[31] Bond later faced, among other charges, two counts of possessing and using a chemical weapon in violation of a federal law. Prior to pleading guilty, she moved to dismiss the chemical weapons charges on the ground that the criminal statute exceeded Congress's authority under the federal treaty power. Both the District Court and Court of Appeals ultimately rejected Bond's challenges and upheld her guilty pleas.

The federal statute in question in *Bond* is the Chemical Weapons Implementation Act of 1998 (CWIA).[32] Section 229(a)(1) of the Act prohibits use of a "chemical

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[30] *See e.g.* Printz v. United States, 521 U.S. 898 (1997) (striking down federal law directing state agencies to adopt gun control regulations); United States v. Lopez, 514 U.S. 549 (1995) (striking down federal gun control legislation, in part, on federalism concerns grounded in the Tenth Amendment); New York v. United States, 505 U.S. 144 (1992) (striking down federal nuclear waste disposal regime requiring states take ownership of waste on federalism grounds).

[31] United States v. Bond, 681 F.3d 149, 151 (3d Cir. 2012).

[32] Pub. L. No. 105–277, Div. I, 112 Stat. 2681–856.

weapon" to "cause death, temporary incapacitation, or permanent harm" to another person. The statute defines a chemical weapon as "a toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose."[33]

Congress enacted the CWIA to implement U.S. obligations under the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC), which the U.S. ratified in 1998.[34] Along with its sister treaty, the Geneva Protocol of 1925, the CWC represents the international community's primary legal effort through IHL to eliminate the use of chemical weapons in armed conflict. Alongside rules and principles for targeting operations, such as those showcased above, IHL has resorted to bans on certain categories of weapons to ensure a minimum level of humanity in warfare. In addition to chemical weapons, IHL includes bans or significant limitations on the use of, *inter alia*, poison;[35] undetectable fragments;[36] biological agents;[37] land mines;[38] incendiary weapons;[39] and, to an increasingly accepted extent, cluster munitions.[40] These means-based limits are thought to vindicate the fundamental IHL principle prohibiting unnecessary suffering.[41] The unifying characteristics of these regulated or banned weapons are either their inherent capacity or tendency to inflict inhumane or unnecessary suffering or their indiscriminate nature.

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[33] 18 U.S.C. 229F(1)(A).
[34] Sep. 18, 1997, 2056 U.N.T.S. 211 [hereinafter CWC].
[35] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 23(a), October 18, 1907, 36 Stat. 2277.
[36] Protocol I to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137.
[37] Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015, U.N.T.S. 164.
[38] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; Amended Protocol II (to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996, 2048 U.N.T.S. 133; Protocol II (to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168.
[39] Protocol III to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137.
[40] Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357.
[41] The customary expression of the principle of unnecessary suffering is found in Article 23(e) of the 1907 Hague Regulations, which forbids States "To employ arms, projectiles, or material calculated to cause unnecessary suffering."

At the time of this writing, 190 States had ratified or acceded to the CWC, including most recently, and under notorious conditions, Syria.[42] The CWC is the most comprehensive ban of chemical weapons in IHL. The widespread ratification of the CWC and its ban on weapons long thought to be inherently inhumane have led many to conclude that its provisions reflect customary international law, binding on all States regardless of their failure to ratify.[43]

From the preamble and text of the treaty, it is clear that States ratifying the CWC undertake obligations greater than merely refraining from the use of chemical weapons in armed conflict. The CWC also requires that States parties enact domestic legislation prohibiting "natural and legal persons anywhere on its territory . . . from undertaking any activity prohibited . . . under this Convention."[44] In its brief to the Court in *Bond*, the United States Solicitor General noted several important objectives of the CWC and Congress's implementing legislation. The Solicitor General argued that the CWIA

> implements the non-proliferation and free-trade goals of the [Chemical Weapons] Convention. Forbidding misuse and diversion by any person, regardless of a terrorism nexus or state sponsorship, reduces illicit trafficking in toxic chemicals and promotes confidence in licit chemical markets. It also helps prevent state actors or terrorists from adopting the "screen" of a private actor to further chemical weapons goals. Finally, prohibiting all use of chemical weapons limits the ability of terrorists and hostile states to study chemical weapon use by independent individuals in order to evaluate the chemicals' weaponization potential.[45]

Poised against the humanitarian and international ambitions of U.S. participation in the CWC and the domestic legislation Congress saw fit to implement those obligations, Ms. Bond emphasized the need to honor long-standing federalism-based limits on the federal government. Ms. Bond argues that the federal government's action in the case "threatens the bedrock notion that the federal government is one of limited and enumerated powers."[46] She notes, "According to the government, the ratification of a valid non-self-executing treaty frees Congress from the Constitution's liberty-protecting structural constraints and permits it to enact any legislation rationally related to the treaty."[47] In fact, she has asked the Court to overturn the expansive notion of the treaty power expressed in

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[42] International Committee of the Red Cross, States Parties to the Following International Humanitarian Law and Other Related Treaties, Jan. 6, 2014, *available at* http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByTopics.xsp. Angola, the Democratic People's Republic of Korea, Egypt, Israel, Myanmar, and South Sudan have not ratified the CWC.
[43] Henckaerts & Doswald-Beck, *supra* note 15, at 259.
[44] CWC *supra* note 34, art. VII(1)(a).
[45] Brief of Respondent at 16, Bond v. United States, No. 12–158 (2013).
[46] Brief of Petitioner at 3, Bond v. United States, No. 12–158 (2013).
[47] *Id.*

Holland and to revitalize federalism and the Tenth Amendment as meaningful external limits on the federal government's power to join and implement treaties.

Whatever the outcome in *Bond*, the case will surely present opportunities to illustrate the contours of the treaty power more clearly through the compelling goals and objectives of one of the most important and widely ratified IHL treaties.

Questions for Discussion

1. Would federalism-based limits on the treaty power, such as those advocated by the Petitioner in *Bond*, hamper U.S. ability to participate meaningfully in the community of nations, and in particular to support important obligations to ensure humanity in armed conflict, without significant discretion from courts as to how to implement these obligations domestically?

- The U.S. has not ratified every major IHL treaty. Most conspicuously, the U.S. is not party to the 1977 Additional Protocols to the 1949 Geneva Conventions.[48] These two treaties supplement the 1949 Conventions and add specific protections related to the conduct of hostilities in both international and non-international armed conflict. The U.S. has lodged specific objections to AP I, but it has signed AP II, which has been sent to the Senate for its advice and consent for ratification. Is it all the more important then—in the context of how the courts view federalism concerns and limits—that the U.S. assiduously and rigorously implement the IHL instruments that it has ratified?

2. Do IHL treaties, with their emphasis on humanity and their operation under the uniquely demanding conditions of armed conflict, call for a more deferential approach from Courts with respect to the treaty power and the scope of permissible implementing legislation?

- The CWC is not unique in its call for States parties to enact domestic implementing legislation. IHL treaties rely heavily on domestic implementation through national legislation to achieve their humanitarian goals. For example, the 1949 Geneva Conventions, synonymous for many with IHL and the law of war, require States to "respect and to ensure respect for the present Convention in all circumstances."[49]

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[48] Additional Protocol I; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. The U.S. is, however, party to the largely uncontroversial Additional Protocol III to the 1949 Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261 (adopting a red crystal, alongside the red cross and red crescent, as a recognized protective emblem under the Conventions).

[49] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for

3. Does the grave threat of chemical weapons use and proliferation, in particular, justify an expanded notion of the treaty power or an exceptional approach?

- Might the Court adopt a case-by-case approach to the treaty power? That is, might the Court balance the need to protect traditional notions of federalism against the relative importance of preventing the spread of chemical weapons?
- Are Presidential and Congressional IHL enforcement and implementation decisions worthy of judicial deference as issues of national security?

4. Are the values associated with federalism sufficiently compelling to justify frustrating the objectives devised by Congress and cited by the Solicitor General as necessary to implement U.S. obligations under the CWC?

- Reciprocity, though now of debatable relevance to IHL, has been an important aspect of the operation of treaties in the international legal system generally. The Solicitor General's brief to the Court emphasized U.S. obligations under the CWC to prevent proliferation of chemical weapons. Would striking the CWIA diminish U.S. standing to insist that other States observe and implement their obligations toward the U.S. under the CWC?

Conclusion

With a small investment of preparation, professors can incorporate IHL into their instruction of structural issues of constitutional law to great pedagogical effect. In particular, IHL targeting rules and scenarios offer opportunities to bring to life the murky and difficult rules of U.S. federal courts' political question doctrine. Consideration of the nature and extent of important U.S. IHL treaty obligations can produce a deeper appreciation of the complexities of the federal treaty power. Two other issues that offer fertile ground for incorporating IHL into constitutional law classroom discussion are habeas corpus (with regard to detention during armed conflict) and separation of powers, both of which are discussed extensively in Volume I of the Teaching IHL Supplements on National Security Law.[50] Exploration of political

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the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 1, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter GC II]; Convention (III) Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV]. Similarly, States parties to the Geneva Conventions "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined" in the respective Conventions. GC I, art. 49; GC II, art. 50; GC III, art. 129; GC IV, art. 146.

[50] Volume I: National Security Law is available at http://www.law.emory.edu/centers-clinics/international-humanitarian-law-clinic/teaching-ihl-workshop.html.

question and federalism through the lens of IHL not only enriches understanding of important constitutional law doctrine, but integration of IHL can also inspire students to undertake further instruction and study in the fascinating and perennially important effort to bring a measure of humanity to armed conflict.