Constraints on the President's Power to Interpret Common Article Three of the Geneva Conventions

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By Heather Sensibaugh
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Abstract: This paper will explore whether the President has authority to violate customary international law norms prohibiting outrages upon personal dignity, in particular humiliating and degrading treatment by his own interpretation in the form of an executive order pursuant to the Military Commissions Act of 2006. This article argues that, in interpreting the MCA, the President is bound to comply with definitions provided by Congress and where no definitions are specified. The President’s interpretive authority is constrained by customary meanings of Common article 3 of the 1949 Geneva Conventions.

Introduction

The purpose of the Military Commissions Act (MCA) was to give the federal government flexibility to deal with what many Americans consider to be new threats and strengthen existing administrative mechanisms for dealing with these threats. Despite the gap-filling intent, certain gaps still exist in the MCA. These gaps beg the question of how and whether the President may act in those areas. What can the President do alone? What must he have congressional approval to do? While the MCA clearly delegates interpretive authority to the President, there are additional constraints on the President’s ability to interpret the meaning and application of the Geneva conventions, which Congress did not alter in the MCA.

2 “Geneva Conventions” is used here the way it is used and defined in the MCA, supra note 1, §§ 5(b); 6 (4)(A). The term refers to four treaties to which the United States is a party: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12 1949 (6 UST 3114); the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217); the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316) [hereinafter, “Third Geneva Convention”]; and the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).
5 MCA, supra note 1, § 6 (a)(3).
Some of those constraints come from provisions of the MCA itself.\(^6\) Arguing during the debate of the MCA legislation in 2006, Ike Skelton argued that the MCA should be designed so that it could withstand legal scrutiny of its constitutionality.\(^7\) Skelton identified seven possible defects in the MCA, one of which stated, “...[I]t is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention.”\(^8\) Mark Drumbl agrees that the 2006 Military Commissions Act, although better able to facilitate expressive goals than the commissions that had been struck down in *Hamdan v. Rumsfeld*,\(^9\) remains deficient in important regards.\(^10\) The first prosecution pursuant to the MCA has made certain gaps in the legislation more apparent.\(^11\) Despite Congressional efforts, gaps in the MCA will need to be clarified over time by the President, the Judiciary, or Congress itself.

One of these gaps is that it is unclear whether or not the President, acting alone, may freely interpret the definition for “outrages upon personal dignity” outside the scope of the understanding as intended in the Geneva Conventions. A definition of “inhuman treatment” outside the scope of what is permissible under the Geneva Conventions would constitute a violation of customary international law.\(^12\) The President may violate international law when Congress permits.\(^13\) Congress has not permitted a violation of international law in the Geneva

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\(^6\) *See e.g. MCA, supra note 1, § 3(1)(a) (“Definitions”).\
\(^8\) House Armed Services Committee Hearing, March 29, 2007.
\(^12\) MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (Princeton, NJ: Princeton University Press 1990), at 245.
\(^13\) The President does not have plenary power to violate international law (Glennon, *supra* note 12, at 239). Congress may violate international law pursuant to art. 1 § 8 (U.S. CONST.) (Id.). Any authority the President has to violate international law must, by necessity, originate with a legislated grant of authority. *See Digg v. Schultz*, 152 U.S. App. D.C. 313, 470 F.2d 461, 466 (1972); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (holding that “no enactment of Congress can be challenged on the ground that it violates customary international law.”)
Conventions. Nor has it defined “outrages upon personal dignity” in the MCA leaving the matter a question of interpretation delegated to the President.

This paper begins by exploring the posture of Congress with respect to the violation of customary international law in the MCA. Specifically, it establishes that Congress authorized the President to alter the content of the meaning of the Geneva Convention Relative to the Treatment of Prisoners in a Time of War (Third Geneva Convention) art. 3, which would constitute a unilateral interpretation of an international agreement without effect internationally. If the President proceeded under the authority granted by Congress, to interpret the Geneva Conventions Common art. 3 in a manner inconsistent with the object and purpose of the treaty, the President could have abrogated the treaty on the basis of delegated authority to interpret a treaty provision. Congress did not authorize abrogation of the Geneva Conventions in the MCA. The President does not possess sufficient independent authority to violate the Geneva Conventions through his interpretation without Congressional authorization. The only lawful interpretation by the President would have to be consistent with the object and purpose of the Geneva Conventions and “higher standards” promulgated by Congress in the MCA. Thus, any Presidential executive order inconsistent with the Geneva Convention would be unlawful as a matter of U.S. law.

The Constitution, case law and practice related to executive interpretation of treaties will be analyzed here to discern the President’s power to interpret the Geneva Conventions after the

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15 Aug. 12, 1949, 6 U.S.T. 3316.
17 I will later explain that the content of our obligation related to humiliating and degrading treatment does not arise from our obligations in the Third Geneva Convention, art. 3, but rather must arise from a customary international law norm giving that phrase content based upon the U.S. Declaration to the Convention Against Torture (see section 4 infra).
18 MCA, supra note 1, § 6 (a)(3)(A).
passage of the MCA. What the framers intended when drafting the constitution and functional considerations will also be considered. The conclusion allays fears that the President would be able to issue an executive order permitting humiliating and degrading treatment. Hopefully, the time will not arrive for judicial review of a questionable Presidential interpretation, but they will no doubt apply as careful an analysis as was attempted here.

1. **Congress Authorized a Unilateral Interpretation Without Effect In International Law**

Determining the posture of Congress helps to understand the constraints on the President’s ability to act in violation of international law. Congress may authorize a violation of international law, but in the MCA, it never went that far. Instead, the MCA authorizes the President to “to interpret the meaning and application of the Geneva Conventions” which contravenes the international rules of interpretation for international treaties.

A general rule of interpretation of treaties is provided by the Vienna Convention on the Law of Treaties (VCLT). Art. 31(1) of the VCLT directs the parties to a treaty to give effect to the ordinary meaning of a treaty provision in light of the treaty’s object and purpose. Although

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19 This framework of analysis is borrowed from Glennon, *supra* note 12, at 52-70.
21 *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); *Compare, Edye v. United States (Head Money Cases)*, 112 U.S. 580, 599 (1884); *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934) (noting that the act of Congress would control in our courts as an expression of municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected). See also, *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* (1987) [hereinafter, “RESTATEMENT”] § 115 (1-3) and reporters note 2. Section 1 (a) states, “An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.” See also, *HENKIN, supra* note 16, at 209, 485.
24 *Id.*
the VCLT is not a treaty in force in the United States because it is not a party to the treaty, the U.S. has accepted certain provisions, including art. 31(1) as customary international law. U.S. courts have applied plain text meanings of treaties.

In the case of the Geneva Convention, Common article 3 subsection (1)(c), the plain text meaning of “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment” is unclear. The ordinary meaning for this phrase would mean that the Geneva Convention prohibits techniques or actions designed to punish or persuade, which are customarily applied in a specific situation and have the effect of lowering one’s position or dignity or that cause the human character to become degraded or debased. At least some part of this definition is subjective.

When the plain text meaning of a treaty is unclear, the VCLT rule of interpretation calls for applying context and subsequent agreement of the parties, or by applying a definition that was intended by parties. Both the VCLT and the Restatement of the Foreign Relations Law of the United States suggest that interpreting the meaning of treaty terms beyond the ordinary meaning is determined by the understanding and intent of the parties. Since the ordinary

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25 There are 105 parties to the VCLT (LORI DAMROSCHE AND LOUIS HENKIN, ET AL., INTERNATIONAL LAW (St. Paul, MN: West Group 2001)).
26 Id. Specifically, the United States accepts VCLT art. 31 (1) as a statement of customary international law. See, RESTATEMENT, supra note 21, § 325 (1).
28 See, definition 6(a) of “treatment” in WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) (Springfield, MA: G. & C. Merriam Company 1961) [hereinafter, “WEBSTERS”], at 2435. The VCLT was concluded on May 29, 1969 and entered into force on January 20, 1980. A 1961 dictionary definition for words used in the treaty would thus provide an appropriate ordinary meaning as used in the treaty.
29 See, definition of “humiliating” in WEBSTERS, supra note 28, at 1101.
30 See, definition of “degrading” in WEBSTERS, supra note 28, at 594.
31 VCLT, supra note 23, art. 31 (2).
32 VCLT, supra note 23, art. 31 (3). The RESTATEMENT suggests that both “subsequent agreement” and “subsequent practice in the application of the agreement” are to be taken into account in the interpretation of a treaty provision (supra note 21, § 325 (2)).
33 VCLT, supra note 23, art. 31 (4).
34 VCLT, supra note 23, art. 31 and RESTATEMENT, supra note 21, § 325 (2). Somewhat paradoxically, the Restatement also notes that the President has broad authority to construe the words of treaties to be asserted by the
meaning of the Geneva Convention is unclear, a further investigation into the meaning of the phrase intended at the time of signature of the Third Geneva Convention, subsequent agreements – in particular the Convention Against Torture would be relevant for determining whether the United States is under a particular obligation to prevent outrages upon human dignity and what is the nature of that obligation owed.\(^\text{35}\)

Authorizing the President to unilaterally interpret treaty provisions in the form of an executive order may constitute an explicit authorization to violate customary international law related to norms of treaty interpretation. This provision, considered alone, provides the President the necessary authority to violate the Third Geneva Convention, Common article 3 and any other international law protecting detainees from outrages upon personal dignity. The President could assert that a particular interpretation was lawful. Crucially, however, Congress never authorized a violation of any treaty obligations or other customary international law in the plain text of the MCA.

2. **Congress Did Not Authorize a Violation of International Law in the MCA.**

It is possible that Congress intended to write a law authorizing a violation of the Third Geneva Convention, Common article 3.\(^\text{36}\) The courts have upheld statutes that contravene

\(^{35}\) It is possible that the United States withdrew its consent to be bound by the specific wording of Third Geneva Convention, *supra* note 2, art. 3 (1)(c) with the ratification and statement to the Convention Against Torture, Cruel and Inhuman Treatment (*see* *infra* note 119). This possibility is explored and accepted in part in section 4 *infra*.

\(^{36}\) An argument could be made that MCA, *supra* note 1, section 3 (Chapter 47A, § 948b) provision that removes the Geneva Conventions as a source of rights for “alien unlawful enemy combatants” is an explicit authorization to violate art. 5 of the Third Geneva Convention which affords the same protections for persons awaiting a determination of their status as lawful combatants (Third Geneva Convention, art. 4) until the determination of an individual’s combatant status has been made by a duly constituted military commission (assuming said military commission meets the art. 5 requirement as a “competent tribunal”). The Congressional record does not seem to support this intent even given the MCA, *supra* note 1, § 5(a): “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.” Further, Art. 10 of the International
treaties, for example, when it is impossible to give effect to both.\textsuperscript{37} Congress could authorize such a violation either explicitly\textsuperscript{38} or implicitly when it relates to a subject within its powers.\textsuperscript{39} However, nowhere in the MCA does Congress authorize the President to violate the Geneva Conventions or rules of customary international law. On the contrary, in response to the the Supreme Court’s 2006 decision in \textit{Hamdan v. Rumsfeld},\textsuperscript{40} Congress took great pains to write the MCA so that it would allow the United States to abide by its obligations under international law.\textsuperscript{41}

During the debates held in both the House of Representatives and the Senate on the Military Commissions Act in September 2006,\textsuperscript{42} Congress repeatedly expressed its intention to be bound by the Third Geneva Convention in particular.\textsuperscript{43} This intention supports over a century of U.S. practice supporting the Geneva Conventions.\textsuperscript{44} Since the ratification of the treaty, by the

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\item\textsuperscript{38} Abram Chayes suggests that Congress “never explicitly authorizes the President to violate international law” (“The Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law,” \textit{80 Am. Soc’y Int’l L. Proc.} 297-98 (1986).
\item\textsuperscript{39} \textit{Taylor v. Morton}, 23 F.Cas. 784, 786 (No. 13,799) (C.C.Mass. 1855), \textit{aff’d} 67 U.S. 481 (1862); \textit{Chae Chan Ping v. United States} (\textit{The Chinese Exclusion Case}), 130 U.S. 581, 600 (1889) (both noting that Congress’ power to repeal a treaty is limited to when it relates to a subject within the powers of Congress).
\item\textsuperscript{40} 126 S.Ct. 2749 (2006).
\item\textsuperscript{41} Justice Stevens in \textit{Hamdan} found that the military commissions violated municipal law (U.S. Uniform Code of Military Justice) and the Geneva Conventions, Common article 3 (\textit{Hamdan v. Rumsfeld}, 126 S.Ct. 2749 (2006) (Stevens, J., concurring)).
\item\textsuperscript{42} \textit{See e.g.} 152 \textit{Cong. Rec.} H7522 (daily ed. Sept. 27, 2006); 152 \textit{Cong. Rec.} H7508 (daily ed. Sept. 27, 2006); 152 \textit{Cong. Rec.} S10354 (daily ed. Sept. 28, 2006 (part I)); and 152 \textit{Cong. Rec.} S10354 (daily ed. Sept. 28, 2006 (part II)).
\item\textsuperscript{44} Memorandum from Colin L. Powell to Counsel to the President; Assistant to the President for National Security Affairs (Jan. 26, 2002), \textit{available at} http://www.lawofwar.org/Torture_Memos_analysis.htm (accessed April 22, 2007).
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United States, Congress passed implementing legislation to see obligations fulfilled even though none was required.  

In the MCA itself, Congress is explicit that the United States satisfies its obligations under common Article 3. Even if they also suggest that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441” (emphasis added), but it is hard to know what this means. It could mean that foreign law or the laws of another nation state could not supply a basis for a rule of decision in the courts of the United States. The second part is even more vague. It is unclear what an “international source of law” might be, given that “international law is part of our law.” The record of the United States, including the passage of the MCA shows an overwhelming commitment to compliance with our obligations in the Geneva Conventions.

3. Limits on Presidential Authority to Interpret International Agreements

Bush, stretching back to 2002, has repeatedly declared detainees in U.S. custody should be treated “humanely, and to the extent appropriate and consistent with military necessity, in a

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45 The issue arose as to whether the Third Geneva Convention was a self-executing treaty in Hamdan v. Rumsfeld. Judge Robertson rejected the U.S. government’s argument that the Third Geneva Convention was non-self-executing treaty finding that it was a self-executing treaty except if four respects, since the Executive did not question the absence of implementing legislation (Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (2004)).

46 At least they are explicit with respect to the MCA’s provision of an effective penal sanction (MCA, supra note 1, § 6 (2)).

47 MCA, supra note 1, § 2.


manner consistent with the principles” of the Geneva Conventions. The wording “to the extent appropriate” has caused much controversy about whether or not the President could interpret the common understandings in the Third Geneva Convention inconsistently with what has been U.S. practice not to torture or otherwise humiliate detainees in the custody of the United States. Although he might like to think so, the President does not possess unlimited inherent powers to interpret the language of treaties. Nor, does he possess unlimited inherent powers to interpret customary international law, which is a concurrent presidential power.

Constitutional Text

The constitution never makes reference to international law in the section delegating power to the President. Yet, as treaties are a source of international law, the President has some Constitutional authority to interact with international law, which is found in article II of the Constitution. The President may make treaties with the advice and consent of the Senate. Article II makes no reference to the interpretation of treaties, and yet the President has some authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states pursuant to his foreign relations power in sections 2-3. The President must interpret the nation’s international obligations pursuant to his

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51 Glennon, supra note 12, at 275.
53 U.S. CONST., art. II.
54 U.S. CONST., Art. II, § 2. At times, the Senate will “express a particular interpretation of the treaty as a condition of its consent” (See HENKIN, supra note 16, at 181). The Senate may also provide understandings to certain provisions, which can be instructive for the President (Id., at 181; 449-50 n. 25).
55 RESTATEMENT, supra note 21, § 326 (1); HENKIN, supra note 16, at 249. The courts have given Executive interpretation of international agreements “weight” in Factor v. Laubenheimer, 290 U.S. 276, 294-95 (1933)(noting Executive interpretation is inconclusive upon the courts); and “great weight” in Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).
obligation to take care that the Laws be faithfully executed, which includes treaties, and (presumptively) customary international law.

The President does not, however, have exclusive authority to interpret treaties. The Senate, at times, may attach reservations, understandings or declarations (RUDs) that give terms of a treaty a specific meaning. In fact, the Constitution explicitly grants Congress the right to “define and punish” offenses against the Law of Nations. Defining and punishing offenses, however, assumes that the law has already been made, which would seem to remain in the purview of the executive branch with the advice and consent of the Senate. Professor Koh reads the offenses clause as a constitutional grant of authority to “construe the law of nations,” which seems to expand what is provided in the plain text of the Constitution. Suffice it to say, Congress, or perhaps just the Senate has some authority to interpret international law, albeit while it is still in the process of formation.

The third branch of government, the federal judiciary, is granted some authority to interpret international law. The judicial power extends inter alia to “the Laws of the United States, and Treaties made, or which shall be made, under their Authority” and to controversies with “foreign States, Citizens or Subjects.” The courts have tended to apply international law

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56 U.S. CONST., art. II, § 3; U.S. CONST., art. VI, § 2
58 Henkin suggests that the Senate’s constitutional authority to attach RUDs has not been seriously questioned (supra note 16, at 181). The Supreme Court recognized the Senate’s power to condition consent to treaties in Haver v. Yaker, 76 U.S. 32, 35 (1869) (treaty modification or amendment). See also, Fourteen Diamond Rings v. United States, 183 U.S. 176, 182 (1901) (Brown, J., concurring)(pertains to treaty amending, qualifying or modifying).
59 U.S. Const. Art. I, § 8, cl. 9 (commonly referred to as the “offenses clause”).
61 Space does not permit a further elaboration on Congressional power with respect to the formation of international law.
63 Id.
in five subject areas. Importantly, the punishment of war-related crimes, such as a violation of the Third Geneva Convention is one such area.

The Constitutional text provides at least sufficient ambiguity to accord some powers to each of the three branches with respect to an interpretation of the Geneva Conventions. The President, in making the treaty, in the conduct of his foreign relations, and in faithfully executing the laws of the land, would have some authority to interpret treaty provisions. The Congress, or more specifically, the Senate, would have the authority to attach RUDs to a treaty to alter the content of an international understanding. The judiciary may review controversies related to international law. This is quite properly the case, since three branches make up this national government, which is accorded specific rights and duties in international relations.

**Cases and Practice**

The plain text Constitutional grant of authority to interpret international law may only be clear as far as its delegation to each of the three branches. What is very unclear - and it has been the source of endless debate - are the boundaries of authority granted by the Constitution. In the realm of interpretation of treaties and customary law, controversies have arisen as to whether the President may interpret the meaning of a treaty provision with a meaning different than the one the Senate consented to in the ratification process and whether, the courts must defer to the executive’s interpretation of a treaty. The President is sometimes (wrongly) considered the sole

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65 **Id.**


organ of the nation in its external relations, which some courts and observers have concluded gives the President power to take measures, some of which may constitute violations of international law by the United States.

The cases and practice related to the President’s ability to violate international law are instructive to the discussion of whether or not the President may interpret international law, since his ability to interpret would only be permissible so long as it did not constitute a violation of the law. Where the President was precluded from committing a violation, there too would his interpretive authority end. In *The Paquete Habana*, the majority opinion stopped short of answering the question whether the President could violate international law. Writing the dissenting opinion, Judge Fuller left no question on the matter, “In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether…”

Given the plain text meaning of the Constitution implying shared power to interpret American obligations under international law, Judge Fuller’s approach is not reasonable. Case law and practice have, over time, arrived at a reasoned approach to the President’s authority to violate international law. Presidential authority would depend on three factors: (1) whether the law was law for the United States in the form of a treaty or federal common law in the form customary international law; (2) absent a treaty, whether there was a controlling legislative,

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69 RESTATEMENT, supra note 21, § 115, Reporter’s note 3.

70 The Paquete Habana, 175 U.S. 677 (1900).

71 The Paquete Habana, 175 U.S. 677, 721 (1900) (Fuller, M., dissenting).

executive or judicial act that would trump existing federal common law; (3) if no controlling constitutional act, whether there was a clearly defined, widely accepted norm applicable. In the matter of treaties, as in federal common law applications of customary international law, the case law suggests that the President may only violate international law when acting with Congress. Acting without Congressional concurrence, the President’s authority is limited by federal common law. “In the absence of statutory authorization, …the President is bound by … rules of customary international law [that are] clearly defined and widely accepted.”

Agreement on a re-interpretation of the meaning of a treaty would seem to be allowed, provided that the meaning was consistent with the object and purpose of a treaty. An interpretation of any international law would, by analogy, seem to be within the realm of the faithful execution clause unless and until the President’s interpretation amounted to an abrogation of the treaty.

Framers’ Intent

The framers were interested in limiting executive power in the realm of his ability to act unilaterally in making international agreements to be sure. The framers intended for the federal courts to apply customary international law consistent with the requirements necessary for the maintenance of international harmony, presumably so that the United States could be viewed as

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73 A “controlling executive act” may not be one made by the President himself. See Garcia-Mir v. Meese, 788 F.2d 1446, 1454 (1986).
74 The Paquete Habana 175 U.S. 677, (1900)
75 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); Compare Swift v. Tyson 41 U.S. 1 (1842).
76 See e.g. Brown v. United States, 12 U.S. 110 (1814); The Nereide, 13 U.S. 388 (1815).
78 S. REP. No. 100-146 at 54-55 (1987).
79 Quoting Michael Glennon in Executive Power Panel, supra note 38, at 304.
80 Volumes have been written on this. See e.g. Glennon, supra note 12, 181-183.
law-abiding.\textsuperscript{82} In 1789, the Continental Congress expressly resolved that the United States would cause the "'law of nations to be strictly observed.'"\textsuperscript{83} The framers were seemingly less particular about the ways in which international law became law of the land than upholding such obligations, once they did.

\textit{Functional Considerations}

While it may be sensible to think that the President has sole power to enter into international agreements to carry out his powers granted by the Constitution,\textsuperscript{84} it is equally sensible to think that where the Constitution has accorded a role to each of the three branches of government, that each branch should exercise those powers at the right time. That the President has voiced his opinion about the meaning of treaties, that the Senate has provided RUDs to clarify the meaning of treaty provisions, and the courts have relied on some norms of customary international law only supports that it is possible to have each branch serve its respective function in the area of treaty interpretation.

\textit{Note on The President, Congress and the Courts}

Since the MCA directs the federal courts in the MCA not to apply customary international law as an interpretive tool in the United States,\textsuperscript{85} it is useful to consider (albeit briefly) the court’s ability to check the President’s interpretive authority after the passage of the MCA 2006.

\textsuperscript{82} Glennon, \textit{supra} note 12, at 246.
\textsuperscript{84} Glennon, \textit{supra} note 12, at 183.
\textsuperscript{85} Drumbl, \textit{supra} note 7, n. 11.
Restricting the ability of the from relying on customary international law flies in the face of long-standing practice, but could, in theory, be done unless such a restriction is prohibited by the constitution. In The Nereide, Justice Marshall suggested that the “Court is bound by the law of nations, which is part of the law of the land” until Congress passed an act that violated international law. Congress would be barred from legislating a prohibition that the constitution requires. The applicable provision is Article III, § 2, which extends the juridical power of the United States to all cases “arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” Congress could not write legislation constraining the ability of the courts to apply the laws of the United States. This appears to be consistent with the intent of some Senators in writing the MCA.

In a joint statement, Senators McCain, Warner, and Graham suggest that if treaties are to be given effect as Federal law under our legal system, determining their meaning as a matter of Federal law is the province and duty of the judiciary headed by the Supreme Court. They

86 “The courts have always considered the law of nations to be part of the law of the United States” (Glennon, supra note 12, at 254).
87 Brown v. United States, 12 U.S. 110, 128-129 (1814); The Nereide, 13 U.S. 388, 423 (1815). See also, Diggs v. Schultz, 470 F.2d. 461, 466-67 (1972) (“Under our constitutional scheme Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.”) “Denouncing” cannot amount to a legislated restriction on a constitutional power of the judiciary to apply customary international law.
88 13 U.S. 388, 423 (1815).
89 Marbury v. Madison, 5 U.S. 137 (1803). For further discussion on this point see Glennon, supra note 12, at 251-252.
90 U.S. Const., art. II, § 3.
91 “[T]his legislation would not stop in any way a court from exercising any power it has to consider the United States’ obligations under the Geneva Conventions, regardless of what litigants say or do not say in the documents that they file with the court… this legislation explicitly reserves untouched the constitutional functions and responsibilities of the judicial branch of the United States… Congress does not intend with this legislation to prohibit the Federal courts from considering whether the obligations of the United States under any treaty have been met.” (Joint Statement of Senators McCain, Warner, and Graham on Individual Rights Under the Geneva Conventions, September 28, 2006. 152 Cong. Rec. S10354, 109th Congress, 2nd Session (2006) [hereinafter, “Joint Statement of Senators”]). Senator Biden later granted that the work of these Senators effectively kept the President from reinterpreting the Geneva Conventions by statute. He said, “[O]ur colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions. That would have been an enormous mistake and an invitation for other countries to define for themselves what the Geneva Conventions require” (152 Cong. Rec. S10354, 109 Cong. 2d Sess. (2006)). Without a Supreme Court finding against a Presidential interpretation, however, it would be hard to conclude that the legislation is as effective as Senator Biden seems to think.
conclude that “the President certainly has the constitutional authority to interpret our Nation's treaty obligations, such interpretation is subject to judicial review.” Whether this statement is absolutely correct is another matter. A plausible case could be made that judicial review of Presidential authority to interpret our nation’s international obligations could be removed where no clearly defined rule of customary international law exists.

The Supreme Court held in Clearfield Trust v. United States that federal common law controlled the “duties of the United States.” The federal courts have also applied federal common law to executive officials in cases involving grants of immunity and with respect to executive activities in the realm of foreign relations. Courts may consider questions of international law and decide them against executive policy. Federal courts apply their own rules to acts of the Executive, not statutes. Federal courts may make law of the United States, which have as much legal validity and obligation as if they had been made from the legislature.

Since there has not been a ruling presenting a rationale for the federal courts’ creation of substantive rules of decision based on foreign law or otherwise, Professor Glennon suggests two possible jurisdictions for the common-law power of the federal judiciary: jurisdictional grants and Congressional acquiescence. A jurisdictional grant would assume that the “laws of the

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92 Joint Statement of Senators, supra note 91.
93 318 U.S. 363 (1943).
95 See, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (applying the act-of-state doctrine); Banco Nacional de Cuba v. Farr, 383 F.2d. 166, 168 (2d. Cir. 1967), cert. denied, 390 U.S. 956 (1968) (noting that the constitution did not mandate the act-of-state doctrine thus placing it in the same category as customary international law as federal common law). For further discussion, see Glennon, supra note 12 at 260-261.
96 United States v. Pink, 315 U.S. 203 (1943) (showing extreme deference to the Executive); Zschering v. Miller, 389 U.S. 429, 432 (1968) (denying Executive preference to enforce an Oregon statute that was outside the powers of the state of Oregon since foreign policy is vested in the federal government); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (rejecting judicial deference to the Executive).
97 Glennon, supra note 12, at 256.
99 Glennon, supra note 12, at 258.
United States” provision of the Constitution includes federal statutes and federal common law. The second jurisdiction is based on the consistent support of Congress for the federal courts to participate in lawmaking when they apply federal common law. Professor Glennon suggests that “[w]hen Congress chooses not to legislate and the federal interest is sufficiently strong with respect to a particular controversy, a judge-made rule is not only permissible but vital to the smooth functioning of a modern federal government.”

By this rationale, Congress could limit the court’s ability to check the President by withdrawing a jurisdictional grant or usurping an area where acquiescence was controlling by speaking through legislation. That may yet be the effect of the MCA. Perhaps even more worrisome than the court’s inability to check the President’s power by applying federal common law is the possibility that the court would not be able to find its own meaning of “outrages upon personal dignity” in customary practice of states to support an individual’s claim against the U.S. government for treatment similar to that received by detainees at Abu Ghraib.

4. Revisiting the President’s Authority – Congressional Delegation in the MCA and the Zone of Twilight

The President’s authority to interpret the Third Geneva Convention presumes that the United States has obligations to uphold Common article 3, in particular. In determining that the United States has an obligation to protect detainees from outrages upon personal dignity, one

100 art. III, § 2.
101 Glennon, supra note 12, at 258.
102 The definitions adopted by Congress would not necessarily protect detainees from being piled on top of one another naked as they were in Abu Ghraib. See section 4 infra.
103 In a very controversial memorandum to the President on January 25, 2002, White House Counsel, Alberto Gonzales asserted what would become the government’s position regarding detainees associated with the Taliban or Al Qaeda. For as flawed as the reasoning of that memorandum is generally, at least one point seems fair. Gonzales voiced a concern that certain provisions of the Third Geneva Convention were “undefined.” Listed as a “positive” that “preserves [Executive] flexibility,” Gonzales writes, “…some of the language of the GPW [Third Geneva Convention] is undefined (it prohibits, for example, “outrages upon personal dignity” and “inhuman treatment”), and it is difficult to predict with confidence what actions might be deemed to constitute violations of relevant provisions of GPW” (Memorandum from Alberto R. Gonzales to the President [of the United States] [Jan. 25, 2002], available at http://www.msnbc.msn.com/id/4999148/site/newsweek/ (accessed April 23, 2007)).
could look to the substance of the treaty text as supreme law of the land or to customary international law, which is like federal common law applicable in the United States. The United States has ratified the Third Geneva Convention without reservation. That ratification does not preclude the United States from altering the content of its obligation by subsequent agreement. In its reservation to the Convention Against Torture, the United States, acting through the Senate, applied a special meaning to the phrase “cruel, inhuman or degrading treatment or punishment.” It is of course possible that the United States intended to consent only to this portion of the Third Geneva Convention as well.

There is some support for the idea that the content of U.S. obligations in the Third Geneva Convention Common article 3 (1)(c) have changed as the U.S. understanding of the terms used therein have been articulated. As mentioned, Congress has given the President authority as provided by the Constitution and MCA, § 6 to interpret the meaning and application of the Geneva Conventions and “to promulgate higher standards” and “administrative regulations” for violations of treaty regulations which are not grave breaches of

104 U.S. CONST. art. VI.
105 RESTATEMENT, supra note 21, §§ 111-114.
106 See section 1 infra. The United States ratified the Convention Against Torture with a relevant reservation to article 16 (1) of that treaty, which reads: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…” Art. 16(2) purports not to alter any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment, but it would be hard to assert that the U.S. had any other meaning for that phrase in domestic law other than the one articulated in the CAT reservation.
107 See infra note 119.
108 The special meaning given is the same as that “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States (Reservation of the United States Regarding Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (See infra note 119).
109 MCA, supra note 1, § 6 (3)(A).
110 This phase would seem to violate the U.S. CONST., art. III, § 2 which provides that the Federal judicial power shall extend to “…cases involving ambassadors and controversies with ‘foreign States, Citizens, or Subjects” (Koh, supra note 16). Indeed, Congress provided that “nothing in [section 6 of the MCA] shall be construed to affect the constitutional functions of Congress and the judicial branch of the United States” (MCA, supra note 1, § 6 (3)(D)).
the Geneva Conventions. According to a Joint Statement submitted to the Congressional Record during the debate of the MCA by Senators Warner, McCain, “when Congress says that the President can interpret the meaning of Geneva, it is merely reasserting a longstanding constitutional principle.” If that is really what the President is doing, then he is free to interpret only insofar as those constitutional principles have been established in U.S. law.

If the United States had not altered the content of its obligations in the Third Geneva Convention before the MCA, the situation presented in the MCA suggests that it has redefined some of its obligations. Further, these obligations appear to be stronger commitments than those presented in the Third Geneva Convention – particularly if the phrase “outrages upon personal dignity” has no meaning in U.S. law. For Congress has given the President authority to issue an executive order that would act as an authoritative interpretation of Common article 3 but carves out an exception for what would be a grave breach of Common article 3. The grave breaches Congress defines, include definitions for “torture,” “cruel and inhuman treatment,” “performing biological experiments,” “murder,” “mutilation or maiming,” “intentionally causing serious bodily injury,” “rape,” “sexual assault or abuse,” and “taking hostages.” Congress established violations (grave breaches) of common Article 3, which are prohibited by United States law.

111 MCA, supra note 1, § 6 (3)(A).
112 Joint Statement of Senators, supra note 91.
113 Congress did not intend for its definition of grave breaches to define the whole of its obligations in the MCA (see supra note 1, § 6 (3)(d)(5)).
114 If the meaning is “uncertain” as Alberto Gonzales asserts in his Jan. 25, 2002 memorandum to the President (supra note 103), and only clearly defined, widely accepted rules may be binding on the U.S., then “outrages upon personal dignity” is not binding on the U.S. by the “unsettled” test in the Paquete Habana or the “non-specific” test in Erie (supra note 49).
115 The MCA carves out an exception to the authority of the President’s interpretation for “grave breaches,” which are defined in § 6 (d)(1)(A-I).
116 MCA, supra note 1, § 6 (3)(c).
117 Subsection (d) of 18 USC 2441; MCA, supra note 1, § 6 (b); Id., § 6 (c).
By establishing a separate category for grave breaches for cruel, degrading and inhuman treatment, Congress sought to limit the obligations of the United States to articulated war cromes. “Cruel, inhuman, or degrading treatment or punishment” thus took on a meaning of cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and the MCA;\footnote{MCA, supra note 1, § 6 (d).} Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.\footnote{done at New York, December 10, 1984, available at http://www.ohchr.org/english/countries/ratification/9.htm#reservations (accessed April 20, 2007).}

Since Congress has chosen to remain silent on the question of what “outrages upon personal dignity means,” in the MCA, but nonetheless granted the President interpretive authority to give that phrase meaning with an executive order, it would seem that in issuing such an order the President would be acting at his highest ebb of power.\footnote{Steel Seizures, supra note \_\_\_.} Even at the highest ebb, the President would be subject to any constraints placed on a definition for “outrages upon personal dignity” in customary international law. Customary international law exists in federal common law in the zone of twilight where there is no Congressional act,\footnote{Supra note 38, at 299.} and the Supreme Court has said that federal common law exists where there is no controlling executive act, legislative act, or judicial act.\footnote{The Paquete Habana 175 U.S. 677, 700 (1900).} Since Congress has only spoken with respect to the delegation of interpretive authority and not on a permissible violation of customary international law, the President is still bound by customary international law norms in the Third Geneva Convention as it applies to detainees.
Conclusion

If the United States must violate international law to deal with the terrorist threat the MCA is designed to combat, then the President should have had no trouble persuading Congress to authorize that violation.\(^\text{123}\) That was not the case. In Congressional debates, members reiterated the importance of honoring our international commitments agreed to in the Geneva Conventions for legal and practical reasons.\(^\text{124}\) Congress failed to enact a sufficient definition for “outrages upon personal dignity,” and as such, this concept is in a kind of “zone of twilight”\(^\text{125}\) where customary international law is relevant.\(^\text{126}\)

The question I leave for others is whether there is a degree of consensus\(^\text{127}\) in customary international law norm regulating “outrages upon personal dignity.”\(^\text{128}\) If there is protection afforded by this reasonably settled international norm, Americans may yet have hope that the Supreme Court will decide to apply these norms to unreasonable interpretations by the Executive that permit too much by our moral standards, but may be permissible according to the strict definitions given by Congress in the MCA.\(^\text{129}\) Since Congress did not define what an outrage upon personal dignity is, the President and the federal courts still may interpret this phrase. Given that federal courts have applied customary international law in the past as part of U.S. law, they may do so again even in the face of the MCA’s purported limitations to judicial interpretive authority.

\(^{123}\) Glennon, supra note 12, at 271.
\(^{124}\) See supra note 4.
\(^{125}\) Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 635 (1952) (Jackson, R., concurring).
\(^{126}\) Glennon, supra note 12, at 281.
\(^{127}\) The Paquete Habana implied that an international norm be “a settled rule of international law” (175 U.S. 677, 694 (1900)).
\(^{128}\) Supra note 2, Common article III (1)(c).
\(^{129}\) Supra note 1, § 6 (c)(2).
Professor Henkin observed that customary international law, and even the interpretations of a treaty, may change in response to new needs or new insights.\textsuperscript{130} He continued,

A state might knowingly deviate from what had been established law (or established interpretation of a treaty) in the hope of changing the law. But that state does so at its own peril. It does so at the peril that it will not succeed in changing the law and will be adjudged to have violated the law.\textsuperscript{131}

The municipal law of the United States is not wholly dissimilar when interpretations of customary international law and treaties are concerned. The President might knowingly deviate from an established interpretation or agreed upon term in the hope of changing the law, but if he exceeds the bounds of his authority, Congress or the Judiciary will hold him to account. In the matter of the Military Commissions Act and the Geneva Conventions, Congress has taken a clear stance to constrain the President’s ability to interpret the ambiguous meaning of some protections afforded by Common article 3, albeit while authorizing a violation of the laws of treaty interpretation. Hopefully the President will not take advantage of the opportunity to render the idea of outrages upon personal dignity meaningless, but only time will tell.


\textsuperscript{131} Id.