

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

By Heather Sensibaugh\*

*Abstract: This paper will explore whether the President has authority to violate customary international law norms prohibiting outrages upon personal dignity. Particularly, this paper will discuss whether the President can use his own interpretation, in the form of an executive order pursuant to the Military Commissions Act of 2006, in interpreting humiliating and degrading treatment.<sup>1</sup> This article argues that, in interpreting the MCA, the President is bound to comply with definitions provided by Congress. Thus, the President's interpretive authority is constrained by the customary meanings of Common Article 3 of the 1949 Geneva Conventions.<sup>2</sup>*

## **Introduction**

The purpose of the Military Commissions Act (MCA)<sup>3</sup> was to give the federal government flexibility to deal with what many Americans consider new threats and to strengthen existing administrative mechanisms for dealing with these threats.<sup>4</sup> Despite the gap-filling intent, certain holes still exist in the MCA. These gaps beg the question of how and whether the President may act in these areas. For instance, what can the President do alone and what must he have Congressional approval to do? While the MCA clearly delegates interpretive authority to the President,<sup>5</sup> 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.

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<sup>1</sup> Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA].

<sup>2</sup> "Geneva Conventions" is used here in the way it is used and defined in the MCA, *supra* note 1, §§ 5(b), 6(a)(4)(A). The term refers to four treaties to which the United States is a party: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

<sup>3</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>4</sup> 152 CONG. REC. S10354, S10399 (daily ed. Sept. 28, 2006) (Sen. Warner).

<sup>5</sup> MCA, *supra* note 1, § 6 (a)(3).

Some of the constraints on the President come from provisions of the MCA itself.<sup>6</sup> Arguing during the debate of the MCA legislation in 2006, Ike Skelton contended that the MCA should be designed to withstand legal scrutiny of its constitutionality.<sup>7</sup> 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.”<sup>8</sup> Mark Drumbl agrees that the 2006 Military Commissions Act, although better able to facilitate expressive goals than the commissions struck down in *Hamdan v. Rumsfeld*,<sup>9</sup> remains deficient in important regards.<sup>10</sup> The first prosecution pursuant to the MCA has made certain gaps in the legislation more apparent.<sup>11</sup> Despite Congressional efforts, gaps in the MCA will need to be clarified over time by the President, the Judiciary, or Congress itself.

One of the remaining gaps arises as to whether or not the President, acting alone, may freely interpret the definition for “outrages upon personal dignity” outside the scope of the understanding intended in the Geneva Conventions. A definition of “inhumane treatment” outside the scope of what is permissible under the Geneva Conventions would constitute a violation of customary international law.<sup>12</sup> The President may violate international law when Congress permits.<sup>13</sup> However, Congress did not permit a violation of international law in the

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<sup>6</sup> See, e.g., MCA, *supra* note 1, § 3(a)(1)(a) (“Definitions”).

<sup>7</sup> Mark Drumbl, *Hicks in a Broader Perspective*, AIDP Blog (March 28, 2007) (on file with the author).

<sup>8</sup> House Armed Services Committee Hearing, March 29, 2007.

<sup>9</sup> 548 U.S. 557, 126 S.Ct. 2749 (2006). (548 U.S. 557 (2006)).

<sup>10</sup> Mark Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007).

<sup>11</sup> Drumbl, *supra* note 7.

<sup>12</sup> MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 245 (Princeton University Press 1990).

<sup>13</sup> 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 *Diggs v. Shultz*, 152 U.S. App. D.C. 313, 470 F.2d 461, 466 (1972); *Comm. of United States Citizens Living in Nicar. 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”).

Geneva Conventions. Moreover, Congress did not define “outrages upon personal dignity” in the MCA,<sup>14</sup> thereby 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, this paper 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<sup>15</sup> (Third Geneva Convention) Art. 3. Such action constitutes a unilateral interpretation of an international agreement without an international effect.<sup>16</sup> 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 abrogate the treaty on the basis of delegated authority to interpret a treaty provision.<sup>17</sup> Congress did not authorize the abrogation of the Geneva Conventions in the MCA. Accordingly, in the absence of Congressional authorization, the President does not possess sufficient independent authority to violate the Geneva Conventions through his personal interpretation. The only interpretation by the President that would be lawful would need to be consistent with the object and purpose of the Geneva Conventions and “higher standards”<sup>18</sup> 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.

This paper will analyze the Constitution, case law, and practice related to executive interpretation of treaties to discern the President’s power to interpret the Geneva Conventions after the passage of the MCA. This paper will also consider what the Framers intended when

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<sup>14</sup> MCA, *supra* note 1.

<sup>15</sup> Aug. 12, 1949, 6 U.S.T. 3316.

<sup>16</sup> ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 345-50 (Clarendon Press 1961); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 209-210 (Oxford University Press 2d Ed. 1996) (1972).

<sup>17</sup> I will later explain that our obligation to stop humiliating and degrading treatment does not arise from our obligations in the Third Geneva Convention, art. 3, but rather arises from a customary international law norm based upon the U.S. Declaration to the Convention Against Torture (*see* section 4 *infra*).

<sup>18</sup> MCA, *supra* note 1, § 6 (a)(3)(A).

drafting the Constitution as well as functional considerations.<sup>19</sup> 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 in the event it does, the courts will undoubtedly apply at least as careful an analysis as attempted here.

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

Determining the posture of Congress facilitates an understanding of the constraints on the President's ability to act in violation of international law.<sup>20</sup> Congress may authorize a violation of international law,<sup>21</sup> but the MCA does not go 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.<sup>22</sup>

A general rule of treaty interpretation is provided by the Vienna Convention on the Law of Treaties (VCLT).<sup>23</sup> In particular, 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.<sup>24</sup> Although the VCLT is not a treaty in force in the U.S., because it is not a party to the treaty,<sup>25</sup> the

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<sup>19</sup> This framework of analysis is borrowed from Glennon, *supra* note 12, at 52-70.

<sup>20</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (suggesting Justice Jackson's tripartite framework in *Steel Seizure* is more like a spectrum). Accord, *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, R., concurring).

<sup>21</sup> *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899). Compare, *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 599 (1884); *Whitney v. Robertson*, 124 U.S. 190, 195 (1888); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd.*, 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) § 115 (1-3) and reporters n.2 [hereinafter RESTATEMENT]. 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.

<sup>22</sup> MCA, *supra* note 1, § 6(a)(3)(A).

<sup>23</sup> May 23, 1969, 1155 U.N.T.S. 331.

<sup>24</sup> *Id.*

<sup>25</sup> There are 105 parties to the VCLT. LORI DAMROSCH, ET AL., INTERNATIONAL LAW (West Group 2001).

U.S. has accepted certain provisions as customary international law, including Art. 31(1).<sup>26</sup> As a result, U.S. courts generally apply the plain text meanings of treaties.<sup>27</sup>

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 of this phrase would indicate that the Geneva Convention prohibits techniques or actions designed to punish or persuade that are customarily applied in a specific situation<sup>28</sup> and have the effect of lowering one’s position or dignity<sup>29</sup> or that cause the human character to become degraded or debased.<sup>30</sup> 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<sup>31</sup> and subsequent agreement of the parties,<sup>32</sup> or applying a definition intended by the parties.<sup>33</sup> Both the VCLT and the Restatement of the Foreign Relations Law of the U.S. suggest that interpreting the meaning of treaty terms beyond their ordinary meaning is determined by the understanding and intent of the parties.<sup>34</sup> Because the ordinary meaning of the Geneva Convention is unclear, further investigation into the meaning of the phrase intended at the time of signature of the Third Geneva Convention and subsequent agreements is necessary.

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<sup>26</sup> *Id.* Specifically, the United States accepts VCLT art. 31 (1) as a statement of customary international law. *See* RESTATEMENT, *supra* note 21, § 325 (1).

<sup>27</sup> *See, e.g., United States v. Stuart*, 489 U.S. 353, 368, 374 (1989).

<sup>28</sup> *See* definition 6(a) of “treatment” in WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2435 (G. & C. Merriam Company 1961) [hereinafter WEBSTERS]. The VCLT was concluded on May 29, 1969 and entered into force on January 20, 1980. A 1961 dictionary definition would thus provide an appropriate ordinary meaning for words used in the treaty.

<sup>29</sup> *See* definition of “humiliating” in WEBSTERS, *supra* note 28, at 1101.

<sup>30</sup> *See* definition of “degrading” in WEBSTERS, *supra* note 28, at 594.

<sup>31</sup> VCLT, *supra* note 23, art. 31 (2).

<sup>32</sup> 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. RESTATEMENT, *supra* note 21, § 325 (2).

<sup>33</sup> VCLT, *supra* note 23, art. 31 (4).

<sup>34</sup> VCLT, *supra* note 23, art. 31; 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 United States in its relations with other states (§ 326 (1)), but that authority is not unlimited. Glennon, *supra* note 12, at 134.

In particular, the Convention Against Torture is relevant in determining whether the U.S. is under a particular obligation to prevent outrages upon human dignity and, if so, in determining the nature of that obligation.<sup>35</sup>

Furthermore, when Congress authorizes the President to unilaterally interpret treaty provisions in the form of an executive order, this may constitute an explicit authorization to violate customary international law related to norms of treaty interpretation. Such an authorization, considered alone, gives the President the necessary authority to violate the Third Geneva Convention, Common Article 3, as well as other international laws protecting detainees from outrages upon personal dignity based on the President's assertion that a particular interpretation is 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.<sup>36</sup> The courts have upheld statutes that contravene

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<sup>35</sup> It is possible that the United States withdrew its consent to be bound by the specific wording of the Third Geneva Convention, art. 3 (1)(c) with the ratification and statement to the Convention Against Torture, Cruel and Inhuman Treatment. *See* note 120 *infra*. This possibility is explored and accepted in part in section 4 *infra*.

<sup>36</sup> An argument could be made that the MCA 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 § 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." Furthermore, Art. 10 of the International Covenant on Civil and Political Rights provides all persons deprived of their liberty treatment "with humanity and with respect for the inherent dignity of the human person." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

treaties, for example, when it is impossible to give effect to both.<sup>37</sup> Congress could authorize such a violation either explicitly<sup>38</sup> or implicitly when it relates to a subject within its powers.<sup>39</sup> However, Congress does not authorize the President to violate the Geneva Conventions or rules of customary international law anywhere in the MCA. On the contrary, in response to the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld*,<sup>40</sup> Congress took great pains to write the MCA so that it would allow the U.S. to abide by its obligations under international law.<sup>41</sup>

During the debates in both the House of Representatives and the Senate on the Military Commissions Act in September 2006,<sup>42</sup> Congress repeatedly expressed its intention to be specifically bound by the Third Geneva Convention.<sup>43</sup> This intention supports over a century of U.S. practice supporting the Geneva Conventions.<sup>44</sup> Moreover, since the ratification of the treaty by the U.S., Congress passed implementing legislation to see obligations fulfilled even though none was required.<sup>45</sup>

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<sup>37</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); RESTATEMENT, *supra* note 21, note 2 to preface, § 114 (construing a statute inconsistent with a treaty). Compare, *Baker v. Carr*, 369 U.S. 186, 212 (1962); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (construing a treaty in a manner inconsistent with statute).

<sup>38</sup> Abram Chayes suggests that Congress “never explicitly authorizes the President to violate international law.” Panel Discussion, *The Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law*, 80 AM. SOC'Y INT'L L. PROC. 297-98 (1986) [hereinafter Panel Discussion].

<sup>39</sup> *Taylor v. Morton*, 23 F.Cas. 784, 786 (No. 13,799) (C.C.Mass. 1855), *aff'd* 67 U.S. 481 (1862); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 600 (1889) (both noting that Congress' power to repeal a treaty is limited to those related to subjects within the powers of Congress).

<sup>40</sup> 548 U.S. 557, 126 S.Ct. 2749 (2006).

<sup>41</sup> Justice Stevens in *Hamdan* found that the military commissions violated municipal law (U.S. Uniform Code of Military Justice) and the Geneva Conventions, Common Article 3. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (Stevens, J., concurring).

<sup>42</sup> See, e.g., 152 CONG. REC. H7522 (daily ed. Sept. 27, 2006); 152 CONG. REC. H7508 (daily ed. Sept. 27, 2006); 152 CONG. REC. S10354 (daily ed. Sept. 28, 2006 (part I)); and 152 CONG. REC. S10354 (daily ed. Sept. 28, 2006 (part II)).

<sup>43</sup> See, e.g., 152 CONG. REC. H7508, H7515 (statement of Rep. Pelosi); *Id.*, H7516 (statement of Rep. Diaz-Balart); 152 CONG. REC. S10354 (daily ed. Sept. 28, 2006 (part II) (statement of Sen. Leahy); *Id.*, S10408 (statement of Sen. Biden).

<sup>44</sup> Memorandum from Colin L. Powell to Counsel to the President, Assistant to the President for National Security Affairs (Jan. 26, 2002), available at [http://www.lawofwar.org/Torture\\_Memos\\_analysis.htm](http://www.lawofwar.org/Torture_Memos_analysis.htm) (last visited April 22, 2007).

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

Furthermore, Congress is explicit in the MCA itself that the U.S. shall satisfy its obligations under Common Article 3.<sup>46</sup> Although Congress also declares that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the U.S. *in interpreting the prohibitions* enumerated in subsection (d) of such section 2441” (*emphasis added*),<sup>47</sup> it is difficult 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.<sup>48</sup> The second part is even more vague. In particular, it is unclear what an “international source of law” might be, given that “international law is part of our law.”<sup>49</sup> Specifically, 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**

Since 2002, President George W. Bush has repeatedly declared that detainees in U.S. custody should be treated “humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles” of the Geneva Conventions.<sup>50</sup> The wording “to the extent appropriate” has caused much controversy as to 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 custody. Although he

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

<sup>47</sup> MCA, *supra* note 1, § 2.

<sup>48</sup> See 28 U.S.C. 1652 (rule of decision); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>49</sup> *The Paquete Habana*, 175 U.S. 677 (1900); see also *Erie R.R. Co. v. Tompkins*, 304 U.S. at 78. Professor Glennon suggests this could be dictum since only the specific norm relied on could be part of United States law. Glennon, *supra* note 12, at 265, citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 46 (Clarendon Press 1979). Whether or not customary international law is properly thought of as federal common law has raised and continues to raise considerable controversy among legal scholars. For arguments in favor, see Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998). For arguments against, see Jack Goldsmith and Curtis Bradley, *Customary International Law as Federal Common Law: A Critique of the Modern Position* 110 HARV. L. REV. 815 (1997).

<sup>50</sup> E.g., Memorandum on the Humane Treatment of al Qaeda and Taliban Detainees (Feb. 2, 2002), [www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf);

might like to think so, the President does not possess unlimited inherent powers to interpret the language of treaties.<sup>51</sup> Moreover, the President does not possess unlimited inherent powers to interpret customary international law, a concurrent presidential power.<sup>52</sup>

### *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,<sup>53</sup> the President has some constitutional authority to interact with international law, a right found in Article II of the Constitution.<sup>54</sup> Notably, the President may make treaties with the advice and consent of the Senate.<sup>55</sup> 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.<sup>56</sup> The President must interpret the nation's international obligations pursuant to his obligation to "take Care that the Laws be faithfully executed," which includes treaties<sup>57</sup> and (presumptively) customary international law.<sup>58</sup>

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

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<sup>51</sup> Glennon, *supra* note 12, at 134. See also *The Anti-Ballistic Missile Treaty Interpretation Dispute*, Committee on International Arms Control and Security Affairs of the Association of the Bar of the City of New York, 43 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 300 (1988).

<sup>52</sup> Glennon, *supra* note 12, at 275.

<sup>53</sup> Statute of the International Court of Justice art. 38 (1)(b), 59 Stat. 1031 (1945), T.S. No. 993.

<sup>54</sup> U.S. CONST., art. II.

<sup>55</sup> 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 clarify certain provisions, which can be instructive for the President. *Id.* at 181, 449-50 n.25.

<sup>56</sup> 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).

<sup>57</sup> U.S. CONST., art. II, § 3; U.S. CONST., art. VI, § 2

<sup>58</sup> Agora, *May the President Violate Customary International Law?* 80 AM. J. INT'L L. 913, 917 (1986).

of a treaty a specific meaning.<sup>59</sup> In fact, the Constitution explicitly grants Congress the right to “define and punish” offenses against the Law of Nations.<sup>60</sup> The right to define and punish 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.<sup>61</sup> Suffice it to say, Congress, or perhaps only the Senate, has some authority to interpret international law, albeit while it is still in the process of formation.<sup>62</sup>

The third branch of government, the federal judiciary, is granted some authority to interpret international law.<sup>63</sup> 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.”<sup>64</sup> Moreover, the courts tend to apply international law in five subject areas.<sup>65</sup> Importantly, the punishment of war-related crimes, such as a violation of the Third Geneva Convention, is one such area.<sup>66</sup>

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 has some authority to interpret treaty provisions in making the treaty, in the conduct of

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<sup>59</sup> Henkin suggests that the Senate’s constitutional authority to attach RUDs has not been seriously questioned. Henkin, *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).

<sup>60</sup> U.S. CONST., art. I, § 8, cl. 9 (commonly referred to as the “offenses clause”).

<sup>61</sup> Koh, *supra* note 49, at 1825.

<sup>62</sup> Space does not permit a further elaboration on Congressional power with respect to the formation of international law.

<sup>63</sup> U.S. CONST., art. III, § 2.

<sup>64</sup> *Id.*

<sup>65</sup> THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS 111 (West Publishing Group 2d. Ed. 1993) (1987).

<sup>66</sup> *Id.*

his foreign relations, and in faithfully executing the laws of the land. Congress, or more specifically, the Senate, has 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<sup>67</sup> and whether the courts must defer to the executive's interpretation of a treaty.<sup>68</sup> The President is sometimes (wrongly) considered the sole organ of the nation in its external relations,<sup>69</sup> which some courts and observers have concluded gives the President power to take measures that may constitute violations of international law by the United States.<sup>70</sup>

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<sup>67</sup> Glennon, *supra* note 12, at 134-145 (discussing the controversies that arose regarding the ABM Treaty (Treaty Between the United States of America and the Union of the Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435) and the INF Treaty (Treaty between the United States of America and the Union of the Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter Range Missiles, Treaty Doc. No. 100-11 (1988)).

<sup>68</sup> See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) (both noting “weight”). Compare *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929). Contra, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“great weight”).

<sup>69</sup> For example Philip Trimble argues that the President's powers as “sole organ” derive from the “vestings clause.” PHILIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 47-78 (New York, NY: Foundation Press 2002). John Marshall actually coined the phrase on the floor of the House of Representatives. 6 *Annals of Cong.* 613 (1800), cited in Glennon, *supra* note 12, at 8 n. 34. Justice Sutherland quoted Marshall in *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936).

<sup>70</sup> RESTATEMENT, *supra* note 21, § 115, reporter's note 3.

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 would be 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.<sup>71</sup> Writing the dissenting opinion, Judge Fuller left no question on the matter, "[i]n 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 . . . ."<sup>72</sup>

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 of customary international law;<sup>73</sup> (2) absent a treaty, whether there was a controlling legislative, executive<sup>74</sup> or judicial act that would trump existing federal common law;<sup>75</sup> (3) if no controlling constitutional act, whether there was a clearly defined, widely accepted norm<sup>76</sup> applicable. In the matter of treaties, as in federal common law applications of customary international law, the case law suggests that the President may violate international law only when acting with Congress.<sup>77</sup>

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<sup>71</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>72</sup> *Id.* at 721 (Fuller, M., dissenting).

<sup>73</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 42-43 (Oxford University Press 4th Ed. 1990) (1966).

<sup>74</sup> A "controlling executive act" may not be one made by the President himself. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454 (1986).

<sup>75</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>76</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). Compare, *Swift v. Tyson* 41 U.S. 1 (1842).

<sup>77</sup> See, e.g., *Brown v. United States*, 12 U.S. 110 (1814); *The Nereide*, 13 U.S. 388 (1815).

Acting without Congressional concurrence, the President's authority is limited by federal common law.<sup>78</sup> "In the absence of statutory authorization . . . the President is bound by . . . rules of customary international law [that are] clearly defined and widely accepted."<sup>79</sup>

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.<sup>80</sup>

### *Framers' Intent*

The Framers were interested in limiting executive power in the realm of its ability to act unilaterally in making international agreements to be sure.<sup>81</sup> The Framers intended for the federal courts to apply customary international law consistent with the requirements necessary for the maintenance of international harmony,<sup>82</sup> presumably so that the United States could be viewed as law-abiding.<sup>83</sup> In 1789, the Continental Congress expressly resolved that the United States would cause the "law of nations to be strictly observed."<sup>84</sup> 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.

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<sup>78</sup> Glennon, *supra* note 12, at 267, *citing* to Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

<sup>79</sup> S. REP. NO. 100-146 at 54-55 (1987).

<sup>80</sup> Michael Glennon, *in* Panel Discussion, *supra* note 38, at 304.

<sup>81</sup> Volumes have been written on this. *See, e.g.*, Glennon, *supra* note 12, 181-183.

<sup>82</sup> Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 38 (1952).

<sup>83</sup> Glennon, *supra* note 12, at 246.

<sup>84</sup> 14 Journals of the Continental Congress 1774-1789, at 635 (1909), *in* Koh, *supra* note 49 at 1824-25.

### *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,<sup>85</sup> it is equally sensible to think that where the Constitution has accorded a role to each of the three branches of government, 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 that the courts have relied on some norms of customary international law all support the principle of having each branch serve its respective function in the area of treaty interpretation.

### *Note on the President, Congress, and the Courts*

Since the MCA directs the federal courts not to apply customary international law as an interpretive tool in the United States,<sup>86</sup> it is useful to consider (albeit briefly) the courts' ability to check the President's interpretive authority after the passage of the MCA in 2006.

Restricting the ability of the courts to rely on customary international law flies in the face of long-standing practice,<sup>87</sup> but could, in theory, be done<sup>88</sup> unless such a restriction is prohibited by the Constitution. In *The Nereide*, Justice Marshall wrote that the "Court is bound by the law of nations, which is part of the law of the land," until Congress passes an act that violates international law.<sup>89</sup> Congress would be barred from legislating a prohibition that the

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<sup>85</sup> Glennon, *supra* note 12, at 183.

<sup>86</sup> Drumbl, *supra* note 7, n.11.

<sup>87</sup> "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.

<sup>88</sup> *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.

<sup>89</sup> 13 U.S. at 423.

Constitution requires.<sup>90</sup> The applicable provision of the Constitution 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.”<sup>91</sup> 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.<sup>92</sup>

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 conclude that while “the President certainly has the constitutional authority to interpret our Nation's treaty obligations, such interpretations are subject to judicial review.”<sup>93</sup> 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.

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<sup>90</sup> *Marbury v. Madison*, 5 U.S. 137 (1803). For further discussion on this point *see* Glennon, *supra* note 12, at 251-252.

<sup>91</sup> U.S. CONST., art. II, § 3.

<sup>92</sup> “[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, 152 CONG. REC. S10354, 109th Congress, 2nd Session (Sept. 28, 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.” *Id.* 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.

<sup>93</sup> Joint Statement of Senators, *supra* note 92.

The Supreme Court held in *Clearfield Trust v. United States* that federal common law controlled the “duties of the United States.”<sup>94</sup> The federal courts have also applied federal common law to executive officials in cases involving grants of immunity<sup>95</sup> and with respect to executive activities in the realm of foreign relations.<sup>96</sup> Courts may consider questions of international law and decide them against executive policy.<sup>97</sup> Federal courts apply their own rules to acts of the Executive, not statutes.<sup>98</sup> Federal courts may make laws of the United States, which have as much legal validity and obligation as if they had been made by the Legislature.<sup>99</sup>

Since no ruling has presented 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.<sup>100</sup> A jurisdictional grant would assume that the “laws of the United States” provision of the Constitution<sup>101</sup> 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

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<sup>94</sup> 318 U.S. 363 (1943).

<sup>95</sup> See *Barr v. Matteo*, 360 U.S. 564 (1959).

<sup>96</sup> 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.

<sup>97</sup> *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).

<sup>98</sup> Glennon, *supra* note 12, at 256.

<sup>99</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959); The Federalist No. 64 (John Jay) (on the powers of the Senate), available at <http://www.constitution.org/fed/federa64.htm> (last visited April 12, 2007).

<sup>100</sup> Glennon, *supra* note 12, at 258.

<sup>101</sup> art. III, § 2.

respect to a particular controversy, a judge-made rule is not only permissible but vital to the smooth functioning of a modern federal government.”<sup>102</sup>

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.<sup>103</sup>

#### **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.<sup>104</sup> In determining that the United States has an obligation to protect detainees from outrages upon personal dignity, one could look to the substance of the treaty text as supreme law of the land<sup>105</sup> or to customary international law, which is like federal common law applicable in the United States.<sup>106</sup> The United States has ratified the Third Geneva Convention without reservation. That ratification

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<sup>102</sup> Glennon, *supra* note 12, at 258.

<sup>103</sup> 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*.

<sup>104</sup> 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/> (last visited April 23, 2007).

<sup>105</sup> U.S. CONST. art. VI.

<sup>106</sup> RESTATEMENT, *supra* note 21, §§ 111-114.

does not preclude the United States from altering the content of its obligation by subsequent agreement.<sup>107</sup> In its reservation to the Convention Against Torture,<sup>108</sup> the United States, acting through the Senate, applied a special meaning to the phrase “cruel, inhuman or degrading treatment or punishment.”<sup>109</sup> 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) has changed as the U.S. understanding of the terms used therein has been articulated. As mentioned, Congress has given the President authority as provided by the Constitution and MCA, § 6<sup>110</sup> to interpret the meaning and application of the Geneva Conventions<sup>111</sup> and “to promulgate higher standards” and “administrative regulations” for violations of treaty regulations which are not grave breaches of the Geneva Conventions.<sup>112</sup> According to a Joint Statement submitted to the Congressional Record during the debate of the MCA by Senators Warner, McCain, and Graham, “when Congress says that the President can interpret the meaning of Geneva, it is merely reasserting a longstanding constitutional

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<sup>107</sup> See Section 1 *supra*. 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.

<sup>108</sup> See note 120 *infra*.

<sup>109</sup> 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* note 120 *infra*).

<sup>110</sup> MCA, *supra* note 1, § 6(3)(A).

<sup>111</sup> This phrase 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 49. 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).

<sup>112</sup> MCA, *supra* note 1, § 6(3)(A).

principle.”<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> For Congress has given the President authority to issue an executive order that would act as an authoritative interpretation<sup>116</sup> of Common Article 3 but carves out an exception for what would be a grave breach of Common Article 3.<sup>117</sup> The grave breaches defined by Congress include definitions for “torture,” “cruel and inhumane 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,<sup>118</sup> which are prohibited by U.S. law.

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 crimes. “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

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<sup>113</sup> Joint Statement of Senators, *supra* note 92.

<sup>114</sup> Congress did not intend for its definition of grave breaches to define the whole of its obligations in the MCA. *See* MCA, *supra* note 1, § 6(3)(d)(5)).

<sup>115</sup> If the meaning is “uncertain” as Alberto Gonzales asserts in his Jan. 25, 2002 memorandum to the President (*see supra* note 104) 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*.

<sup>116</sup> 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).

<sup>117</sup> MCA, *supra* note 1, § 6 (3)(c).

<sup>118</sup> 18 USC § 2441(d) (2006); MCA, *supra* note 1, § 6(b), § 6(c).

Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and the MCA<sup>119</sup> and the Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.<sup>120</sup>

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.<sup>121</sup> 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 are no Congressional acts,<sup>122</sup> and the Supreme Court has said that federal common law exists where there is no controlling executive act, legislative act, or judicial act.<sup>123</sup> 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

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<sup>119</sup> MCA, *supra* note 1, § 6 (d).

<sup>120</sup> United States Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *available at* <http://untreaty.un.org/english/bible/englishinternetbible/parti/chapteriv/treaty14.asp#N12>.

<sup>121</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

<sup>122</sup> Panel Discussion, *supra* note 38, at 299.

<sup>123</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

to authorize that violation.<sup>124</sup> 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.<sup>125</sup> 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”<sup>126</sup> where customary international law is relevant.<sup>127</sup>

The question I leave for others is whether there is a degree of consensus<sup>128</sup> in customary international law norms regulating “outrages upon personal dignity.”<sup>129</sup> 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.<sup>130</sup> Since Congress did not define an outrage upon personal dignity, 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.

Professor Henkin observed that customary international law, and even the interpretations of a treaty, may change in response to new needs or new insights.<sup>131</sup> 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.<sup>132</sup>

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<sup>124</sup> Glennon, *supra* note 12, at 271.

<sup>125</sup> 152 CONG. REC. S10354, S10399 (daily ed. Sept. 28, 2006).

<sup>126</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>127</sup> Glennon, *supra* note 12, at 281.

<sup>128</sup> *The Paquete Habana* implied that an international norm be “a settled rule of international law.” 175 U.S. 677, 694 (1900).

<sup>129</sup> Third Geneva Convention, *supra* note 2, Common Article III (1)(c).

<sup>130</sup> MCA, *supra* note 1, § 6 (c)(2).

<sup>131</sup> Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293, 311 (1991).

<sup>132</sup> *Id.*

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.