

BEYOND REPROACH? THE MILITARY COMMISSIONS ACT OF 2006 AND THE SUPREME COURT'S INABILITY TO NULLIFY EXECUTIVE INTERPRETATIONS OF WHAT CONSTITUTES A NONGRAVE BREACH OF THE GENEVA CONVENTIONS

Abstract: In response to *Hamdan v. Rumsfeld*, the U.S. Congress passed the Military Commissions Act of 2006, authorizing the President to determine what actions related to the treatment of suspected terrorist detainees constitute nongrave breaches of the Geneva Conventions. This Note examines how the Supreme Court should decide a case challenging one of the President's interpretations of what behavior falls within that category. It first examines the relevant cases including those addressing the power of the President to direct foreign policy, the political question doctrine, the implications of the legislative branch's authorization of executive actions, the *Chevron* doctrine, and treaty interpretation principles. It next applies the law in each of these areas to the President's authority under the Military Commissions Act and determines that any challenge to the President's authority pursuant to this Act should be either dismissed as nonjusticiable, or a decision should be rendered in favor of the President's interpretation. This Note concludes by offering other methods through which persons could bring a halt to offensive, torturous behavior.

INTRODUCTION

On June 29, 2006, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda, the primary focus of the War on Terrorism.¹ In the months following this decision, the George W. Bush ad-

¹ See 126 S. Ct. 2749, 2756–57 (2006) (holding that “there is at least one provision of the Geneva Conventions that applies here . . .” and that provision is Common Article 3). Common Article 3 articulates general principles of humanitarian law and is common to all four Geneva Conventions. Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention (Second) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Ge-

ministration encouraged Congress to rectify the apparent confusion as to what, exactly, the Geneva Conventions demand with regard to the treatment of suspected terrorist detainees, and requested that Congress "list the specific, recognizable offenses that would be considered crimes under the War Crimes Act so [military] personnel can know clearly what is prohibited in the handling of terrorist enemies."² In response, Congress passed the Military Commissions Act of 2006 ("MCA"), setting forth the governing standards of the Geneva Conventions as they apply to those charged with their enforcement.³

The MCA, amending the War Crimes Act,⁴ makes clear that these laws together now "fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3."⁵ Although the exact terms of the statute are open to interpretation, this Note proceeds from the understanding that the MCA impliedly sets out three tiers of offenses contained in the Geneva Conventions.⁶ The first tier includes grave breaches, which are listed in the text of the statute as elastic categories of offenses.⁷ The President is free to interpret them, but those interpretations are merely persuasive, not authoritative.⁸ The second category includes nongrave, or "lesser," breaches of the Geneva Conventions that are not defined clearly by either the MCA or the Conventions.⁹ The President may interpret the Geneva Conventions to determine what constitutes a nongrave breach, and those interpretations of what falls in this category are authoritative.¹⁰ Finally, there is a category of actions that are neither grave

neva Convention]; Convention (Third) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Convention (Fourth) Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

² Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1575 (Sep. 6, 2006).

³ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

⁴ War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2001 & Supp. 2007), amended by Military Commissions Act of 2006 § 6.

⁵ See Military Commissions Act of 2006 § 6(a)(2).

⁶ See *id.* § 6(a).

⁷ See *id.*; War Crimes Act of 1996 § 2441(d).

⁸ Military Commissions Act of 2006 § 6(a)(3)(C).

⁹ See *id.* § 6(a)(3)(A).

¹⁰ See *id.*; Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2006/09/what-hamdan-hath-wrought.html> (Sept. 26, 2006, 6:00 a.m.) (observing that under the—at the time, proposed—MCA, the President "now has virtually conclusive authority to interpret nongrave breaches of Geneva").

breaches nor nongrave breaches as interpreted by the President, and therefore, performing such actions does not violate the Geneva Conventions.¹¹ This Note focuses exclusively on this elusive middle category, wherein the President is empowered to determine what actions constitute nongrave offenses and are therefore punishable as violations of the Geneva Conventions.¹²

The MCA provides the President with "the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions."¹³ It requires that the President issue interpretations by executive order, which are "authoritative . . . as a matter of United States law" and are published in the *Federal Register*.¹⁴ Moreover, the MCA states that federal courts do not have jurisdiction to "hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien [properly] detained by the United States."¹⁵

Although the MCA's grant of authority to the President is unambiguous, it is less clear what specifically about the Geneva Conventions the President is authorized to interpret.¹⁶ As explained above, this Note interprets the MCA as empowering the President to determine what constitutes a nongrave offense of the Geneva Conventions.¹⁷ The MCA permits the President to set higher standards for nongrave breaches of the Conventions, but this depends on an interpretation of what constitutes a nongrave offense.¹⁸ There are also doubts as to whether the U.S.

¹¹ See Military Commissions Act of 2006 § 6(a)(3)(A)–(C).

¹² See *id.* § 6(a)(3)(A).

¹³ *Id.*

¹⁴ *Id.* § 6(a)(3)(B)–(C).

¹⁵ *Id.* § 7. Media coverage of the Military Commissions Act of 2006 has noted that the law "does not just allow the president to determine the meaning and application of the Geneva Conventions; it also strips the courts of jurisdiction to hear challenges to his interpretation." Scott Shane & Adam Liptak, *Detainee Bill Shifts Power to President*, N.Y. TIMES, Sept. 30, 2006, at A1. Another commentator is less certain of the provision's impact and instead wonders, "Might Section 8 . . . be invoked as an effort to render presidential readings of treaties final and binding on the courts?" Aziz Huq, *How the Military Commissions Act of 2006 Threatens Judicial Independence: Attempting to Keep the Courts Out of the Business of Geneva Conventions Enforcement*, FINDLAW, Sept. 26, 2006, http://writ.news.findlaw.com/commentary/20060926_huq.html.

¹⁶ See Military Commissions Act of 2006 § 6(a)(3)(A).

¹⁷ See *id.* § 6(a); Shane & Liptak, *supra* note 15.

¹⁸ Military Commissions Act of 2006 § 6(a)(3)(A) ("[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.").

federal courts can review the President's interpretations of the Geneva Conventions.¹⁹ This Note assumes that in challenges brought before the Supreme Court by those seeking to contest the President's interpretations of the Geneva Conventions, the jurisdictional element of the MCA will be rejected and the Court will be authorized to review the President's interpretation.²⁰

Having stated these foundational assumptions, this Note focuses on potential challenges to the decision of a President who, pursuant to the authority to interpret the Geneva Conventions, determines that certain interrogation tactics do not constitute nongrave offenses.²¹ This Note argues, based on the Court's own jurisprudence, that such challenges to the executive branch's interpretations should either be rejected by the Court out of deference to the President's interpretation, or considered nonreviewable.²² In setting forth this argument, this Note seeks to demonstrate how the MCA has created a formidable barrier protecting the President's power to interpret the United States' international obligations.²³ Despite accepting that a particular interpre-

¹⁹ See Huq, *supra* note 15. The issue of jurisdiction in federal courts is very much a live one, as the United States Court of Appeals for the District of Columbia Circuit decided in February 2007 that to accept the argument that the federal courts have jurisdiction to hear detainees' habeas petitions "would be to defy the will of Congress." *Boumediene v. Bush*, 476 F.3d 981, 987 (D.C. Cir. 2007). Recently granting petition for rehearing in *Boumediene v. Bush*, the U.S. Supreme Court will this fall hear a challenge to the MCA's provisions "purport[ing] to strip federal court jurisdiction over habeas corpus petitions from Guantanamo Bay prisoners." Press Release, WilmerHale, Supreme Court Grants Permission for Rehearing in Guantanamo Case (June 29, 2007), <http://wilmerhale.com/about/news/newsDetail.aspx?news=1046>.

²⁰ See Military Commissions Act of 2006 § 7. It is important to note that, pursuant to the MCA, international law cannot inform one's understanding of the Geneva Convention's requirements with regard to nongrave breaches of Common Article 3, and that the text of the MCA is explicit in making the president's interpretations of these requirements "authoritative." See *id.* § 6(a)(2), (3)(C). In light of this, it would be misleading to suggest that this jurisdictional decision would be a simple one for a court; however, recently, legislation has been introduced in the U.S. Senate that "strikes at the core of the Military Commissions Act of 2006 by giving detainees access to U.S. courts." Josh White, *Bill Would Restore Detainee's Rights, Define 'Combatant'*, WASH. POST, Feb. 14, 2007, at A8. This so-called "Restoring the Constitution Act of 2007" would "restrict the president's authority to interpret when certain human rights standards apply to detainees," and raises new questions about the validity of the MCA's provisions on jurisdiction. See *id.*

²¹ See *infra* note 139–274 and accompanying text.

²² See Shane & Liptak, *supra* note 15 (reasoning that the Bush administration would likely survive any challenges to the bill, because "[i]n adding a Congressional imprimatur to a comprehensive set of procedures and tactics, lawmakers explicitly endorsed measures that in other areas were achieved by executive fiat. Earlier Supreme Court decisions have suggested that the president and Congress acting together in the national security arena can be an all-but-unstoppable force").

²³ See *infra* note 139–274 and accompanying text.

tation by the President might seriously violate the spirit of the Geneva Conventions, this Note nonetheless maintains that the democratic machinery by which the U.S. government operates demands that such issues be resolved not by the judiciary, but by the political branches.²⁴

Part I examines the areas of U.S. Supreme Court jurisprudence relevant to deciding the issue presented here.²⁵ Part II applies the theory and precedents surveyed in Part I to the MCA and the President's authority to interpret nongrave offenses of the Geneva Conventions.²⁶ Part III offers alternative methods, outside of the judicial branch, that one could pursue in challenging the President's interpretations.²⁷ This Note concludes that the course of action most consistent with the Court's jurisprudence and the interests of democratic government would be one that defers to the President's interpretations.

I. PRECEDENT RELEVANT TO THE U.S. SUPREME COURT'S CONSIDERATION OF THE MCA AND THE AUTHORITY IT BESTOWS ON THE CHIEF EXECUTIVE

Assuming that the Supreme Court determines that it does have the power to review the President's interpretations of the United States' obligations regarding lesser offenses of the Geneva Conventions, the Court's jurisprudence in a number of different areas suggests that it should not invalidate a reasonable interpretation proffered by the executive branch.²⁸ There are certain factors that the Court often considers in determining whether it should defer to the President's interpretation of a statute or treaty.²⁹ The cases in each of the following areas of the federal appellate courts' jurisprudence are pivotal in trying to ascertain how the Court should respond to the challenged presidential action: the power of the President to direct foreign policy, the political question doctrine, the implications of the legislative branch's authori-

²⁴ See *infra* note 139–274 and accompanying text.

²⁵ See *infra* notes 28–138 and accompanying text.

²⁶ See *infra* notes 139–259 and accompanying text.

²⁷ See *infra* notes 260–274 and accompanying text.

²⁸ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

²⁹ See *Chevron*, 467 U.S. at 842–43; *Goldwater*, 444 U.S. at 1004–05 (Rehnquist, J., concurring); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *Curtiss-Wright*, 299 U.S. at 320.

zation of executive actions, the *Chevron* doctrine, and treaty interpretation principles.³⁰

A. Foreign Affairs and the Political Question Doctrine

Both the nature of the President's authority to direct America's relations with the rest of the world and the political question doctrine have traditionally insulated certain executive branch actions from concentrated scrutiny.³¹

1. The Unique Role of the President in Directing Foreign Affairs and the Deference Presidents Receive When Acting in This Arena

The issue of treatment of enemy combatants is arguably a matter of foreign policy.³² Although the global community's demands for humane treatment have been codified in domestic law, the roots of laws like the MCA are found in international agreements such as the Geneva Conventions.³³ Thus, one must consider the authority that the MCA grants to the President in light of the President's role in foreign affairs.³⁴

The Supreme Court most notably examined the President's authority in matters of foreign affairs in 1936 in *United States v. Curtiss-Wright Corp.*³⁵ The Court in *Curtiss-Wright* determined that a joint resolution allowing the President to ban the sale of weapons to other countries was a constitutional delegation of authority to the President.³⁶ Justice Sutherland, writing for the Court, differentiated be-

³⁰ See *Chevron*, 467 U.S. at 842-43; *Goldwater*, 444 U.S. at 1004-05 (Rehnquist, J., concurring); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) *Curtiss-Wright*, 299 U.S. at 320; *Oetjen*, 246 U.S. at 302. It is important to note at the outset that the issue presented here concerns the President's authority to interpret an international agreement; this authority, however, is based on a domestic law, namely the MCA. See generally Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)). Moreover, because the United States is a party to the Geneva Conventions and they have been ratified after advice and consent from the Senate, they are part of the domestic law of the United States. See First Geneva Convention, *supra* note 1; Second Geneva Convention, *supra* note 1; Third Geneva Convention, *supra* note 1; Fourth Geneva Convention, *supra* note 1. In short, the MCA authorizes the President to interpret the Geneva Conventions, which are both international and domestic laws. See Military Commissions Act of 2006 § 6(a)(3)(A).

³¹ See *infra* notes 32-65.

³² See Military Commissions Act of 2006 § 6(a)(3)(A).

³³ See *id.*

³⁴ See *Curtiss-Wright*, 299 U.S. at 320.

³⁵ See *id.*

³⁶ See *id.* at 329.

tween the President's authority to act with respect to foreign matters as opposed to domestic matters, and established that the constitutional constraint that the federal government can act pursuant only to those powers specifically enumerated, as well as those necessary and proper to carry out those enumerated powers, is true only with regard to domestic matters.³⁷ The Court asserted that the President has broad inherent powers in the area of foreign policy.³⁸ It declared that if the powers to declare and wage war, to negotiate treaties, and to sustain diplomatic relations with other states had never been mentioned in the Constitution, they would have vested in the federal government as necessary concomitants of nationality.³⁹

The President's role in carrying out foreign policy is special.⁴⁰ In such a multifaceted external realm, complete with complex and puzzling issues and exigencies, the President alone has the power to speak as America's representative to the world.⁴¹ Among the reasons why the President is better able to act unilaterally in the area of foreign affairs, the Court includes the fact that the President has more access to information about the conditions in other countries, confidential sources of information, and diplomatic and consular advisors who are experts in their fields.⁴² Consider, for example, the daily presidential briefing, which provides the President with national security information and expert analysis unavailable to both the American public and congressional leaders.⁴³

At the time the Court issued its *Curtiss-Wright* opinion in 1936—and perhaps even more so today—it was imperative that certain information gathered by government agents be kept secret because premature disclosure could adversely affect strategic plans or cause

³⁷ *Id.* at 315–16; see also, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 4.6.1 (2d ed. 2002) (noting Justice Sutherland's explanation "that authority over domestic affairs was possessed by the states before the ratification of the Constitution and that they, by approving the Constitution, bestowed power on the national government. As to foreign policy, however, the power is inherently in the national government by virtue of its being sovereign").

³⁸ *Curtiss-Wright*, 299 U.S. at 318.

³⁹ *Id.*

⁴⁰ *Id.* at 319.

⁴¹ *Id.*

⁴² *Id.* at 320.

⁴³ See, e.g., Press Briefing, Dr. Condoleezza Rice, National Security Advisor Holds Press Briefing (May 16, 2002), <http://www.whitehouse.gov/news/releases/2002/05/20020516-13.html> (describing the controversial presidential daily briefing on August 6, 2002, referencing Osama bin Laden's methods of operation and a potential hijacking plot unlike that carried out on September 11, 2001).

other harmful results.⁴⁴ Additionally, *Curtiss-Wright* highlighted the importance of speaking with a unified voice in the United States' dealings with foreign powers, and the decision reminded Congress to grant the executive branch more discretion and freedom from statutory restrictions than would otherwise be permissible if domestic affairs alone were involved.⁴⁵ Despite the attacks that have been waged on the Court's reasoning in *Curtiss-Wright*,⁴⁶ the Court continues to cite the decision as precedent for its holdings that the President, by nature of the design of the office, has broad authority to act in the area of foreign affairs.⁴⁷

2. The Political Question Doctrine and Escaping Judicial Review

In addition to deferential rulings on the merits, challenges to the President's authority in the area of foreign policy may be dismissed as nonjusticiable political questions.⁴⁸ There are some specific categories of cases in which the Court has applied the doctrine, although the principles guiding the Court's decision about what is and is not a political question are not easily discernable from the Court's jurisprudence.⁴⁹

The difficulty with the political question doctrine stems not from its basic premise, but rather, the features that must be present in order for the doctrine to be applied to a particular case.⁵⁰ Consider, on

⁴⁴ See 299 U.S. at 320.

⁴⁵ *Id.*

⁴⁶ For an attack on the validity of the historical evidence used to support the decision in *Curtiss-Wright*, see generally Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973). For a helpful summation of the major criticisms of *Curtiss-Wright*, see CHEMERINSKY, *supra* note 37, § 4.6.1.

⁴⁷ See *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981); *Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring); see also *Youngstown*, 343 U.S. at 688 (Vinson, C.J., dissenting) (referencing President Roosevelt's "Stewardship Theory" of presidential power in general, which holds that the President serves the people and must carry out that service where the Constitution does not expressly forbid it); CHEMERINSKY, *supra* note 37, § 4.6.1 ("Curtiss-Wright is still cited by the Supreme Court as authority for broad inherent presidential power in the area of foreign policy.").

⁴⁸ See *Oetjen*, 246 U.S. at 302; Theodore Blumoff, *Judicial Review, Foreign Affairs, and Legislative Standing*, 25 GA. L. REV. 227, 235 (1991) (articulating the view that "not until the political branches disagree does the Court have before it both a controversy and a party with an arguably justiciable claim").

⁴⁹ See CHEMERINSKY, *supra* note 37, § 2.8.4 (discussing the Supreme Court's application of the political question doctrine to specific areas of foreign policy).

⁵⁰ See Blumoff, *supra* note 48, at 229 (arguing that "neither constitutional text nor Court opinions provide clear guidance" as to when federal courts should review foreign policy decisions).

the one hand, the Supreme Court's holding in 1918 in *Oetjen v. Central Leather Co.* that the Constitution empowers the political branches of government to conduct foreign relations, and that what these branches do in exercising this power is not subject to judicial review.⁵¹ A statement of this kind leads one to believe that the Court is firmly setting forth a categorical rule regarding judicial review of matters related to the conduct foreign affairs.⁵² Such credence cannot be given to that proposition, however, when the Court reminds elsewhere that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."⁵³

One of the specific instances in which the Court has, in the past, applied the political question doctrine is the President's interpretation of treaties.⁵⁴ This is relevant to the MCA because although it is a law of the United States, it explicitly references the interpretation of an international treaty—the Geneva Conventions—and, moreover, unambiguously bestows upon the President "the authority for the United States to interpret the meaning and application of the Geneva Conventions."⁵⁵ Justice Rehnquist's plurality opinion in the 1979 Supreme Court case *Goldwater v. Carter* is instructive.⁵⁶ It holds that the rescission of a treaty is a matter not for the courts, but rather for the coequal, political branches of government, both of which are equipped with adequate resources to protect and assert their own respective interests.⁵⁷

Similarly, Justice Powell, concurring in the judgment, determined that Congress's silence as to the President's authority to rescind treaties made the issue not ready for judicial review.⁵⁸ For Justice Powell, until the political branches reach a stalemate, it is improper for federal courts to address the matter.⁵⁹ In addition, citing the Court's earlier decision in *Baker v. Carr*, Justice Powell commented that the fed-

⁵¹ 246 U.S. at 302.

⁵² See *id.*

⁵³ *Baker v. Carr*, 369 U.S. 186, 211 (1961).

⁵⁴ See *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

⁵⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

⁵⁶ 444 U.S. at 1004 (Rehnquist, J., concurring).

⁵⁷ *Id.*

⁵⁸ See *id.* at 997–98 (Powell, J., concurring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a Constitutional impasse . . . [and if] the Congress chooses not to confront the President, it is not our task to do so.").

⁵⁹ *Id.* at 997.

eral courts should take care to avoid the potentiality of embarrassment resulting from different pronouncements by various branches on one question.⁶⁰ This idea is consistent with the Court's concern in *Curtiss-Wright* that the United States speak on matters of international importance through one consistent voice so as to avoid discrediting itself abroad and putting the country's national security at risk.⁶¹

Finally, to understand the implications of the MCA, it is necessary to distill two other principles articulated in *Goldwater* about the political question doctrine.⁶² The first, asserted by Justice Rehnquist, is that the President's ability to rescind a treaty obligation is a matter involving executive authority with respect to foreign affairs, and the extent to which Congress is empowered to reverse such an action by the President; therefore, it presents a nonjusticiable political question.⁶³ On the other hand, according to Justice Brennan's understanding set forth in his dissent in *Goldwater*, the political question doctrine only restrains courts from reviewing the foreign policy decision of a branch constitutionally empowered to make such a decision.⁶⁴ These two opinions each present differing views as to when an executive action involving treaty interpretation will be deemed a political question.⁶⁵

B. Congressional Contributions to the Scope of Executive Power

When the Supreme Court examines the limits of the President's power to act without the authorization of Congress, and thus, pursuant to the inherent power of the office, it frequently turns to its 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer* for guidance.⁶⁶ The Court in that case addressed a challenge raised by steel mill owners who complained that President Truman impermissibly carried out legislative functions without express congressional authorization when he ordered that the Secretary of Commerce seize and operate most of the country's steel mills.⁶⁷ The Truman administration feared that an

⁶⁰ *Id.* at 1000 (citing *Baker*, 369 U.S. at 217).

⁶¹ See *Curtiss-Wright*, 299 U.S. at 320.

⁶² See *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring); *id.* at 1006-07 (Brennan, J., dissenting).

⁶³ *Id.* at 1002 (Rehnquist, J., concurring).

⁶⁴ *Id.* at 1006-07 (Brennan, J., dissenting) (citing *Baker*, 369 U.S. at 211-13, 217).

⁶⁵ See *id.* at 1002 (Rehnquist, J., concurring); *id.* at 1006-07 (Brennan, J., dissenting).

⁶⁶ 343 U.S. at 634-40; see *Hamdi v. Rumsfeld*, 542 U.S. 507, 581-86 (2004) (Thomas, J., dissenting) (quoting *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring)); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000) (quoting *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring)).

⁶⁷ See *Youngstown*, 343 U.S. at 582-83.

ongoing labor dispute between steel companies and their employees would cause steel production to cease, seriously compromising U.S. national defense and security.⁶⁸

Although *Youngstown* presents four different approaches, each offering a framework by which to consider the extensive and undefined powers of the President,⁶⁹ Justice Jackson's is most important for purposes of analyzing the MCA.⁷⁰ In addition to the Court frequently citing the Jackson opinion throughout its history,⁷¹ the Court recently in 2006 relied on that framework yet again in *Hamdan v. Rumsfeld*.⁷² Perhaps the best indication of how the current Court would examine inherent presidential power is how Justice Kennedy does so.⁷³ In his concurrence in *Hamdan*, Justice Kennedy made clear that the "proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*."⁷⁴ The Court, therefore, would likely rely on Justice Jackson's framework when considering challenges to the President's authority under the MCA.⁷⁵

⁶⁸ *Id.* at 583.

⁶⁹ *Id.* at 634 (Jackson, J., concurring).

⁷⁰ See *Dames & Moore*, 453 U.S. at 661 (referencing the agreement among both parties that Justice Jackson's concurring opinion in *Youngstown* "brings together as much combination of analysis and common sense as there is in this area").

⁷¹ See *id.*; see also *Hamdi*, 542 U.S. at 581-86 (Thomas, J., dissenting); *Crosby*, 530 U.S. at 375.

⁷² See generally 126 S. Ct. 2749 (2006). The Court's reliance on Justice Jackson's approach in *Youngstown* appears almost unanimous because all eight justices participating in *Hamdan* referenced, either implicitly or explicitly, Justice Jackson's model. See *id. passim*. In *Hamdan*, the Court held that the military commissions and their governing procedures established by President Bush in his November 13, 2001, comprehensive military order violated the Uniform Code of Military Justice. See *id.* at 2775, 2792-93. Five Justices also determined that the military commissions at issue failed to meet the United States' obligations under the Geneva Conventions. *Id.* at 2793. With regard to the Geneva Conventions, however, one of these five, Justice Kennedy, refused to consider the particular requirements of the Conventions, instead resting his decision on the military commissions' violation of domestic law. See *id.* at 2808-09 (Kennedy, J., concurring in part).

⁷³ Adam Cohen, *Anthony Kennedy Is Ready for His Close-Up*, N.Y. TIMES, Apr. 3, 2006, at A16. Justice Kennedy is frequently the deciding vote on a variety of highly controversial issues and "until [the Court's] membership changes again, he is likely often, although certainly not always, to have the final word on such deeply divisive issues as abortion, affirmative action and campaign finance." *Id.* At oral arguments for *Hamdan*, Justice Kennedy "strongly suggested by his questions that he would join the four moderate justices in rejecting the Bush administration's position on a key aspect of its war-on-terror powers. That would be enough, because these days, the law is pretty much what Justice Kennedy says it is." *Id.*

⁷⁴ *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part).

⁷⁵ See *id.*

Justice Jackson's approach to executive power begins with the premise, endorsed by other justices on the *Youngstown* Court as well, that the President has inherent authority to carry out any act not barred by the Constitution or an act of Congress.⁷⁶ From there, Justice Jackson goes on to identify three levels of executive authority.⁷⁷ First, when the President acts pursuant to an express or implied authorization of Congress, "his authority is at its maximum" because it includes both the inherent power of the office and all the power that Congress can delegate.⁷⁸ When the President acts at this level, he or she may be said to "personify the federal sovereignty."⁷⁹

The second level referenced by Justice Jackson involves when Congress is silent about granting a particular power to the Executive, and so there is uncertainty surrounding the constitutionality of Presidential actions and authority.⁸⁰ When acting at this level, the President can "rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁸¹ Given such ambiguity at this level of authority, circumstances often determine whether the President's actions are constitutional.⁸² Because congressional silence could be the result of rapid action by the executive branch in response to some national crisis, it makes sense that any test of power depend on "the imperatives of events and contemporary imponderables rather than on abstract principles of law."⁸³

The third level, at which the President's authority is at its "lowest ebb," includes those instances when the President takes actions that are incompatible with the expressed or implied will of Congress.⁸⁴ When acting at this level, the President is disregarding, and acting contrary to, federal law; therefore, unless the law is determined to be unconstitutional, the President's actions are not in conformity with constitutional demands.⁸⁵

⁷⁶ 343 U.S. at 635 (Jackson, J., concurring) (stating that the President's "powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress").

⁷⁷ See *id.* at 635-38.

⁷⁸ *Id.* at 635; see *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part).

⁷⁹ *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring).

⁸⁰ *Id.* at 637.

⁸¹ *Id.*

⁸² See *id.*

⁸³ *Id.*

⁸⁴ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁸⁵ See *id.* at 637-38 (Jackson, J., concurring).

C. *Deference to the Executive Branch's Interpretation of Delegated Authority Relating to Foreign Affairs*

When statutes pertain to foreign affairs and international obligations, courts typically defer to reasonable constructions of those statutes by the agencies within the executive branch charged with their administration.⁸⁶ Interpretations of international conventions often require an assessment of the varying factors that color the global political landscape, and, as *Curtiss-Wright* makes clear, the executive branch is particularly suited to operate in this area.⁸⁷ Furthermore, such interpretations also often require that the interpreting authority fill in gaps that, for whatever reason, were left open in the agreement by the framers.⁸⁸

Common Article 3 of the Geneva Conventions is an example of such an agreement, and, until the Court intervened in *Hamdan*, the President was acting according to his own understanding as to whether the protections in Common Article 3 applied to those captured during the seemingly endless War on Terrorism.⁸⁹ It makes sense that the executive branch should be responsible for dealing with these chasms, and when drafting laws involving international matters, Congress is often certain to grant the President this authority.⁹⁰

When reviewing an agency's interpretation of a statute that Congress has empowered it to administer, the Court relies on the framework first articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense*

⁸⁶ See *Regan v. Wald*, 468 U.S. 222, 242 (1984); see also *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1286 (Fed. Cir. 1988) (explaining that the "rule of deference" is particularly strong when, as here, not only is there an interpretation of the statute by the officers or agency charged with its administration, but the agency action is in the foreign affairs arena").

⁸⁷ See 299 U.S. at 320.

⁸⁸ See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 667 (2000) ("Interpretation of foreign affairs law may require assessments of international conditions and relationships. Moreover, this law may have interpretive gaps that require, in effect, lawmaking.").

⁸⁹ See 126 S. Ct. at 2796 ("Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to *Hamdan* because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' That reasoning is erroneous.").

⁹⁰ See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701-1706 (West 2001 & Supp. 2006); Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1-3 (2000).

Council, Inc. in 1984.⁹¹ *Chevron* involved the 1977 Congressional amendments to the Clean Air Act that required those states that failed to achieve the air quality standards previously set forth by the Environmental Protection Agency ("EPA"), to establish a permit program to regulate the "stationary sources" of air pollution.⁹² In implementing this permit program, the EPA allowed states to adopt a plant-wide definition of the statutory language, "stationary sources."⁹³ As a result, plants with multiple pollution-emitting devices were permitted to change one such device without meeting the permit requirements, so long as the alteration did not impact the overall pollution output of the plant.⁹⁴ The Supreme Court addressed whether this construction of "stationary source" was proper, and ultimately determined that it was.⁹⁵

In reaching this conclusion, the Court set forth a two-part inquiry for reviewing statutory interpretations by government agencies.⁹⁶ The first inquiry is whether Congress has directly spoken to the precise question that is the subject of review.⁹⁷ If it has and Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁹⁸ If, on the other hand, Congress's intent is unclear or ambiguous, the court's role is different and it must determine whether the agency's interpretation is based on a permissible construction of the statute.⁹⁹ When Congress explicitly leaves a gap for the agency to fill, this constitutes an express delegation of authority to the agency to "elucidate a specific provision of the statute by regulation," and in such instances, the agency regulations are given controlling weight unless they are arbi-

⁹¹ See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399 (Peter L. Strauss ed., 2006) ("*Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* is the Supreme Court's leading statement about the division of authority between agencies and courts in interpreting statutes."). Although the MCA is like any other piece of legislation delegating to agencies within the executive branch the authority to promulgate standards and issue regulations, the analogy to *Chevron* is strained by the fact that the MCA delegates authority not to an agency within the executive department, but rather, directly to the Executive. See Military Commissions Act of 2006 § 6(a)(3)(A). Nonetheless, *Chevron* articulates useful principles that are applicable here. See *Chevron*, 467 U.S. at 842-44.

⁹² See *Chevron*, 467 U.S. at 839-40.

⁹³ See *id.* at 840.

⁹⁴ See *id.*

⁹⁵ *Id.* at 866.

⁹⁶ See *id.* at 842-44.

⁹⁷ *Chevron*, 467 U.S. at 842.

⁹⁸ *Id.* at 842-43.

⁹⁹ See *id.* at 843.

trary, capricious, or manifestly contrary to the statute.¹⁰⁰ Although Congress's delegation of authority may be either explicit or implicit, the result is still the same, because the agency is empowered to interpret the statute.¹⁰¹

In the case of the MCA, the fact that the agency involved is actually not contained in the executive branch, but rather, the Executive, makes little difference because the President is empowered to interpret an international agreement.¹⁰² Even in those cases where there is no domestic law like the MCA involved, and the sole question surrounds the executive branch's interpretation of a treaty, the Court has "given much weight" to that branch's interpretation.¹⁰³ Historically, the Court has given considerable deference to the executive branch's conduct of foreign affairs.¹⁰⁴ Thus, arguably, the President already has the authority to interpret a treaty; however, the MCA codified this authority in federal law.¹⁰⁵

When Congress delegates foreign affairs authority to the executive branch, circumstances necessitate that it do so more broadly than it would when domestic subjects are at issue.¹⁰⁶ As has been the case throughout history, the politics of international affairs is an unstable and multifaceted arena, and as a result, one in which the more deliberate legislative branch is ill-suited to act with speedy adroitness.¹⁰⁷ On the other hand, by nature of the office, the President can quickly be

¹⁰⁰ *Id.* at 843–44.

¹⁰¹ See Merrill, *supra* note 91, at 401 ("By equating explicit and implicit delegations to agencies to fill in statutory gaps, the Court seemed to say that anytime Congress charges an agency with administration of a statute and leaves an ambiguity in the statute, it has impliedly delegated primary authority to the agency to interpret the statute. . . . This vastly expanded the sphere of delegated agency lawmaking.")

¹⁰² See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)). Although the *Chevron* framework is presented in this Note merely to provide another analytical framework by which to examine the issue at hand, it should be noted that the Court has determined that the President is not included in the Administrative Procedure Act's definition of an agency. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

¹⁰³ *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) ("While the question of the construction of treaties is judicial in its nature . . . the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight.")

¹⁰⁴ See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1199 (C.D. Cal. 1998); see also *infra* notes 126–138 and accompanying text.

¹⁰⁵ See Military Commissions Act of 2006 § 6(a)(3)(A).

¹⁰⁶ See *Zemel*, 381 U.S. at 17; see, e.g., *Humanitarian Law Project*, 9 F. Supp. 2d at 1199.

¹⁰⁷ See *Zemel*, 381 U.S. at 17.

informed of critical information and obtain the counsel necessary to act on that information.¹⁰⁸ For these reasons, when Congress delegates foreign affairs to the executive branch, it delegates such authority broadly.¹⁰⁹ In reviewing the executive branch's interpretations and exercise of the power that it has been granted, courts have given *Chevron*-like deference to that branch's determinations.¹¹⁰

With respect to the MCA, this analysis of *Chevron*-like deference beyond the framework's first inquiry could prove to be futile.¹¹¹ The *Chevron* analysis is only relevant when congressional intent is ambiguous, and this ambiguity is arguably absent from the MCA.¹¹² The U.S. Court of Appeals for the Third Circuit's 1996 decision in *Marincas v. Lewis* illustrates a comparable circumstance.¹¹³ In *Marincas*, the Third Circuit addressed whether the U.S. Attorney General correctly interpreted the Refugee Act of 1980 and the Immigration and Nationality Act when he set forth differing rules for those instances when an alien seeking asylum is a stowaway.¹¹⁴ The petitioner, a stowaway from Romania seeking political asylum in the United States, appealed a deportation order issued by the Board of Immigration Appeals.¹¹⁵

¹⁰⁸ See *id.*; *Curtiss-Wright*, 299 U.S. at 320.

¹⁰⁹ See *Zemel*, 381 U.S. at 17.

¹¹⁰ Bradley, *supra* note 88, at 683. For example, in 1984 in *Regan v. Wald*, the U.S. Supreme Court gave deference to the Executive's judgment about his authority under the Trading with the Enemy Act to restrict the scope of permissible travel-related transactions with Cuba and its nationals. See 468 U.S. at 243. Similarly in 1986, in *Japan Whaling Ass'n v. American Cetacean Society*, the Court deferred to the executive branch's interpretation of the Secretary of Commerce's statutory duties pursuant to the Pelly Amendment to the Fishermen's Protective Act of 1967 and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act. See 478 U.S. 221, 225, 241 (1986). According to these amendments, Congress granted the Secretary of Commerce the authority to determine whether a foreign state's whaling practices exceeded the quotas determined by the International Whaling Commission. See *id.* at 225. Ultimately, the Commerce Secretary determined that Japan's activities did not diminish the International Whaling Commission's effectiveness. See *id.* at 241. In conjunction with this determination, the executive branch resolved that ensuring Japan's future compliance with the quotas could best be achieved through an Executive Agreement, and in pursuing that diplomatic option, decided that the imposition of economic sanctions was not necessary. See *id.* The Court found that this was a reasonable construction of the controlling amendments, because those amendments left it to the Commerce Secretary's discretion to determine if Japan's noncompliance undermined the International Whaling Commission's effectiveness. See *id.* at 241.

¹¹¹ See *infra* notes 220-259 and accompanying text for analysis of the Military Commissions Act of 2006 and whether *Chevron* deference applies to a President's interpretations of the Geneva Conventions under that specific law.

¹¹² See *infra* notes 220-259.

¹¹³ See generally 92 F.3d 195 (3d Cir. 1996).

¹¹⁴ *Id.* at 199.

¹¹⁵ *Id.* at 197.

Congress passed the Refugee Act of 1980 to provide an orderly system governing the admission of refugees.¹¹⁶ Pursuant to the Refugee Act, the Attorney General was given the authority to promulgate asylum procedures.¹¹⁷ The petitioner in *Marincas* claimed that the Attorney General failed to interpret his grant of authority properly and insisted that Congress intended stowaways to be afforded the same procedures granted to other aliens seeking asylum.¹¹⁸ The Third Circuit, using the guiding *Chevron* framework, determined that the question could be resolved according to *Chevron*'s first inquiry because the plain meaning of the Refugee Act of 1980 was clear in its intent that the Attorney General promulgate a uniform asylum procedure regardless of whether or not the alien was a stowaway.¹¹⁹ Therefore, there was no need to proceed to *Chevron*'s second inquiry.¹²⁰

The major impetus behind the Court's deference, *Chevron* or otherwise, to the executive branch's interpretation of its statutory authority in matters of foreign affairs is accountability.¹²¹ For all of the reasons already examined, the executive branch is simply better suited to handle the foreign policy responsibilities that it has been delegated, and although agencies may not be directly accountable to the people, the Executive is.¹²² It is, therefore, entirely appropriate that this branch make policy choices to resolve the issues that Congress either accidentally failed to resolve, or intentionally left unresolved so that they could be decided by the agency charged with the administration of the statute under the constraints of everyday realities.¹²³ Thus, challenges to the executive branch's statutory construction that focus on a policy choice it made are likely to fail because this branch is both politically accountable and better equipped to make such judgments

¹¹⁶ See *id.* at 198. As the Supreme Court explained in 1987 in *INS v. Cardoza-Fonseca*, Congress enacted the Refugee Act to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world," while also fulfilling its treaty obligations. 480 U.S. 421, 449 (1987).

¹¹⁷ See Refugee Act of 1980, 8 U.S.C. § 1158(a) (2000) ("The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General . . .").

¹¹⁸ 92 F.3d at 200.

¹¹⁹ *Id.* at 201.

¹²⁰ See *id.*

¹²¹ See *Chevron*, 467 U.S. at 865. For a discussion explaining why *Chevron* deference applies to "scope-of-authority" issues, see Bradley, *supra* note 88, at 680-85.

¹²² See *Chevron*, 467 U.S. at 865.

¹²³ *Id.*

with regard to international affairs.¹²⁴ In these circumstances, deference to the executive branch is most appropriate, because "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."¹²⁵

D. *International Law and the President's Role in the Interpretation of Treaties*

This discussion focuses on the executive branch's treaty interpretation, not in the context of that authority being granted to it by a congressional act, as is the case in the MCA, but as a general matter.¹²⁶ Although there is good reason to believe that any challenge to a President's interpretation will be considered a nonjusticiable political question, there is nothing certain about such a proposition, and it is therefore important to consider how a court would review a question of this nature.¹²⁷ The Court is guided in its review of the executive branch's interpretation by the principle that although it is not sacrosanct, the meaning given to treaty provisions by the agencies charged with their negotiation and enforcement is entitled to great weight.¹²⁸ Of course, one would be hard pressed to find an instance in which the Court declared that the Executive's interpretation of a treaty is conclusive; however, the jurisprudence is clear that such interpretations carry some force.¹²⁹

Although the "*Charming Betsy* cannon" requires that laws of the United States be construed in such a way that they do not conflict with either conventional or customary international law,¹³⁰ Congress can, in fact, violate both treaty and custom.¹³¹ For example, in 1888 the Supreme Court in *Whitney v. Robertson* held that when there is a

¹²⁴ See *id.* at 865–66.

¹²⁵ *Id.* at 866.

¹²⁶ See *infra* notes 127–138 and accompanying text.

¹²⁷ See *Oetjen*, 246 U.S. at 302.

¹²⁸ *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

¹²⁹ See *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). This Note does not purport to be an exhaustive discussion of how the Court would review a challenge to an interpretation of a treaty because although it is at least important to comprehend the basic principles, a discussion of such depth is inapplicable to the issue presented here, namely the MCA. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

¹³⁰ Bradley, *supra* note 88, at 685. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (finding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . [and that] [t]hese principles are believed to be correct . . .").

¹³¹ See *Breard v. Greene*, 523 U.S. 371, 376 (1998).

conflict between a treaty and a federal law, the one that is later in time will control the other.¹³² There is also support for this same principle with regard to customary law.¹³³ Regardless of the source of international law at issue, Congress is empowered to enact statutes abrogating prior treaties or international obligations entered into by the United States so long as Congress is clear in its intent.¹³⁴

Moreover, when the President acts pursuant to constitutionally granted authority, the courts have not required that this action comport with international law.¹³⁵ In 1986, in *Garcia-Mir v. Meese*, the U.S. Court of Appeals for the Eleventh Circuit determined that, although international law prohibited arbitrary detention, the executive branch was permitted to act contrary to those norms by detaining a group of unadmitted aliens.¹³⁶ Thus, the court reaffirmed the President's power to disregard international law in service of domestic needs.¹³⁷ It follows that a President acting pursuant to a statute may have to violate an international convention if the terms of that convention conflict with the domestic law's demands.¹³⁸

II. APPLYING THE SUPREME COURT'S JURISPRUDENCE TO THE MCA'S GRANT OF AUTHORITY TO THE PRESIDENT OF THE UNITED STATES

When considering whether a President has impermissibly interpreted the Geneva Conventions with respect to what can be classified as a nongrave breach, the Supreme Court should act according to the principles of its own aforementioned jurisprudence, and either uphold the President's interpretation or find that the challenge presents a question that is nonjusticiable.¹³⁹ Although this Note assumes that

¹³² See 124 U.S. 190, 194 (1888); see also *Breard*, 523 U.S. at 376 (holding that because a congressional act is equal in weight to that of a ratified treaty, "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null") (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

¹³³ See, e.g., *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) (holding that "where a controlling executive or legislative act does exist, customary international law is inapplicable"). For purposes of the MCA, custom is only relevant to the extent that it is either crystallized in, or catalyzed by, the Geneva Conventions. See *id.*

¹³⁴ *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

¹³⁵ See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir. 1986); STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 28 (2006).

¹³⁶ See 788 F.2d at 1453-54.

¹³⁷ See *id.* at 1455.

¹³⁸ See *id.*

¹³⁹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concur-

the Court will determine that it has the authority to review the President's interpretations, it is still bound by its own rulings.¹⁴⁰ This Part argues that judicial precedent mandates that a President's offensive interpretation of the Geneva Conventions under the MCA should not be corrected by the courts, but rather, should be struck down by the full weight of the United States Congress.¹⁴¹

One of the difficulties in evaluating this issue is assessing what types of actions might be considered nongrave breaches of the Geneva Conventions.¹⁴² Considering what actions would fall outside the category of those predetermined grave breaches helps to frame the debate because one cannot determine his or her position on the MCA without understanding what it permits and what is really at stake for the alien unlawful enemy combatants to which it applies.¹⁴³ Pursuant to the MCA's revision of the War Crimes Act, "grave breaches" of Common Article 3 are criminal and include torture,¹⁴⁴ cruel or inhuman treatment,¹⁴⁵ performing biological experiments,¹⁴⁶ murder,¹⁴⁷

ring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

¹⁴⁰ See *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (holding that the Court "will not depart from the doctrine of stare decisis without some compelling justification"). For a discussion of the role of stare decisis in the federal courts' interpretation of the Constitution and statutes, see LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 235-54 (3d ed. 2000). It is important to note that the issue of jurisdiction would not be an easy hurdle for a party bringing the challenge at issue in this Note. See generally *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (holding that federal courts lack jurisdiction to hear habeas petitions filed by those detained as enemy combatants at Guantanamo Bay, Cuba).

¹⁴¹ See *infra* notes 156-259 and accompanying text.

¹⁴² See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

¹⁴³ See *id.*

¹⁴⁴ War Crimes Act of 1996, 18 U.S.C.A. § 2441(d)(1)(A) (West 2000, Supp. 2006 & Supp. IV 2007) ("The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.") amended by Military Commissions Act of 2006 § 6.

¹⁴⁵ *Id.* § 2441(d)(1)(B) ("The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.").

¹⁴⁶ *Id.* § 2441(d)(1)(C) ("The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.").

mutilation or maiming,¹⁴⁸ intentionally causing serious bodily injury,¹⁴⁹ rape,¹⁵⁰ sexual assault or abuse,¹⁵¹ and taking hostages.¹⁵² Thus, as one commentator notes, treatment that seeks to humiliate or otherwise shame the detainee does not fall within the elastic parameters of "grave offenses" and would not violate the Geneva Conventions unless a President were to cast such activity as a nongrave offense.¹⁵³ There are also questions as to whether "waterboarding" or sleep dep-

¹⁴⁷ *Id.* § 2441(d)(1)(D) ("The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.").

¹⁴⁸ *Id.* § 2441(d)(1)(E) ("The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.").

¹⁴⁹ War Crimes Act of 1996 § 2441(d)(1)(F) ("The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.").

¹⁵⁰ *Id.* § 2441(d)(1)(G) ("The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.").

¹⁵¹ *Id.* § 2441(d)(1)(H) ("The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.").

¹⁵² *Id.* § 2441(d)(1)(I) ("The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.").

¹⁵³ Joanne Mariner, *The Military Commissions Act of 2006: A Short Primer*, FINDLAW, Oct. 25, 2006, <http://writ.news.findlaw.com/mariner/20061025.html> (arguing that the MCA "narrows the scope of the War Crimes Act, decriminalizing certain past acts"). President Bush recently articulated interrogation standards by prohibiting "outrageous" acts intended to humiliate an individual as well as actions "intended to denigrate the religion, religious practices, or religious objects of an individual." *Bush Alters Rules for Interrogations*, MSNBC.COM, July 20, 2007, <http://www.msnbc.msn.com/id/19873918>. President Bush's commitment to religious tolerance here is commendable, but his Executive Order is so vague that it might not have much of an impact. *Bush Signs Executive Order Barring Cruel, Inhumane Treatment of Terror Suspects*, FOXNEWS.COM, July 20, 2007, <http://www.foxnews.com/story/0,2933,290180,00.html> [hereinafter *Bush Signs Executive Order*] ("Not wanting to give up its terrorism playbook, the White House did not detail what types of interrogation procedures, such as waterboarding, would be allowed. But it did offer parameters").

privation would be permissible.¹⁵⁴ Actions such as these are the issues at stake when considering a President's possible interpretations of the nongrave offenses of the Conventions.¹⁵⁵

A. *The Military Commissions Act as a Foreign Affairs Statute and the Impact of Such a Classification on Judicial Review*

The MCA states that its purpose is to "provide procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission."¹⁵⁶ This statute is concerned both with the administration of certain wartime procedures and the United States' commitments to international conventions; therefore, it undeniably constitutes a law steeped in foreign policy.¹⁵⁷

The President, with all the privileges and tools of that office, has access to information about the War on Terrorism and its progress, and information about those individuals going before the military commissions.¹⁵⁸ In making determinations about the Geneva Conventions' demands, the President must be careful to preserve the ability to manage an effective war, protect human rights, and ensure domestic security because failure in any of these areas is ultimately attributed to the Chief Executive.¹⁵⁹ Considered in this context, the President's power to interpret the Geneva Conventions pursuant to the MCA is one that must be considered in light of the President's other competing responsibilities, including both foreign and domestic pressures.¹⁶⁰ The President's unique capacity to obtain a plethora infor-

¹⁵⁴ *Bush Signs Executive Order*, *supra* note 153 (explaining that President Bush's Executive Order detailing interrogation rules is ambiguous with regard to the propriety of waterboarding and sleep deprivation techniques).

¹⁵⁵ *See id.* (insisting that the MCA demonstrates Congress's approval for "many of the Administration's most short-sighted and dangerous counterterrorism policies").

¹⁵⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, section 3, § 948b(a), 120 Stat. 2600, 2602 (codified as amended at 10 U.S.C.A § 948(e) (West 2000 & Supp. 2007)).

¹⁵⁷ *See Curtiss-Wright*, 299 U.S. at 312, 315.

¹⁵⁸ *See id.* at 320.

¹⁵⁹ *See id.*; *see, e.g.*, Christiane Amanpour, *Amanpour: Looking Back at Rwanda Genocide*, CNN.COM, Apr. 6, 2004, <http://www.cnn.com/2004/WORLD/africa/04/06/rwanda.amanpour> (noting President William Clinton's apology to the victims' families of the Rwandan genocide for his failure to do more to help those "engulfed in this unimaginable terror").

¹⁶⁰ *See Curtiss-Wright*, 299 U.S. at 320; *see also* Press Release, Ari Fleischer, White House Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2006), <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> (stating that although "[t]he war on terrorism is a war not envisaged when the Geneva Convention was

mation about the ever-changing conditions in the international arena is especially important in times of war when American troops are facing new threats and tactics from enemies in Iraq, Afghanistan, and around the world.¹⁶¹

In sum, an executive branch interpretation of the ambiguous Geneva Conventions is impacted by the pressures of war and national security; therefore, the MCA sets forth clear parameters for what constitutes "grave breaches" and provides the President with more flexibility in making determinations about the remainder of the Conventions' uncertain demands.¹⁶² The MCA also recognizes the importance of a clear and consistent interpretation of what the Geneva Conventions require.¹⁶³ This is important both to ensure that the laws of the United States are clear to those living under them and to protect America's reputation abroad.¹⁶⁴

This foreign affairs statute resembles, to some degree, the law at issue in the 1936 Supreme Court case *United States v. Curtiss-Wright Corp.*, and comparing the two offers insight into the extent to which the Court might be willing to let its decision in *Curtiss-Wright* dictate its response to a challenge to the MCA or the President's actions under its authority.¹⁶⁵ At issue in *Curtiss-Wright* was a joint resolution giving the President broad discretion to ban the sale of weapons to certain countries.¹⁶⁶ In other words, it gave the President authority to make a decision about a foreign policy matter.¹⁶⁷ The same is true of

signed in 1949 . . . [t]he President has maintained the United States' commitment to the principles of the Geneva Convention, while recognizing that the Convention simply does not cover every situation").

¹⁶¹ See *Curtiss-Wright*, 299 U.S. at 320 (holding that the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war").

¹⁶² See Mariner, *supra* note 153 (stating that "the War Crimes Act, as amended, satisfies the U.S. obligation to criminalize grave breaches of Common Article 3, and the president may issue authoritative interpretations of the remainder of the provision").

¹⁶³ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6 (a) (3) (A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831, 1832 (Oct. 17 2006) ("[The MCA] spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law. And this bill complies with both the spirit and the letter of our international obligations.").

¹⁶⁴ See *Curtiss-Wright*, 299 U.S. at 320.

¹⁶⁵ See *id.* at 329.

¹⁶⁶ See *id.* at 312.

¹⁶⁷ See *id.*; Blumoff, *supra* note 48, at 275 (explaining the foreign affairs focus of the statute).

the MCA, which authorizes the President to interpret the Geneva Conventions and the standards they set forth with regard to the treatment of enemy combatants.¹⁶⁸ *Curtiss-Wright* recognized that the President is the sole organ in international relations and that the President's power in that area does not come from Congress.¹⁶⁹ The MCA adds further support for a President's interpretation of the Geneva Conventions because it adds the approval of Congress on top of the already inherent power vested in the Executive.¹⁷⁰

The *Curtiss-Wright* Court cited numerous examples of legislation, some from the period of America's infancy, giving the President, in areas of foreign policy, either unrestricted judgment or more latitude than would otherwise be given in the domestic sphere.¹⁷¹ Although the Court noted in *Curtiss-Wright* that it was authorized to overrule an unconstitutional act of Congress regardless of how much precedent there was to support Congress's decision, it recognized the unusual weight of the long history of legislation granting the President significant authority in foreign policy matters.¹⁷² The MCA seems to fit comfortably within this tradition.¹⁷³ Additionally, the Court recently in 2006 in *Hamdan v. Rumsfeld* invited the President to seek authorization from Congress to establish military commissions with new governing procedures, and the political branches dutifully responded with the MCA.¹⁷⁴

As the above analysis demonstrates, although *Curtiss-Wright* is important here because of Justice Sutherland's instructive dicta about the President's authority to determine and carry out foreign policy, it is also useful for its insight into how the Court, acting pursuant to *Curtiss-Wright*, should view a challenge to the MCA.¹⁷⁵ Because both cases involve laws empowering the President to direct foreign policy, it is fitting that the MCA and the President's actions pursuant to it be

¹⁶⁸ See Military Commissions Act of 2006 § 6(a)(3)(A).

¹⁶⁹ See 299 U.S. at 320.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 322-24.

¹⁷² See *id.* at 327 (noting that the "impressive array of legislation . . . enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem").

¹⁷³ See Shane & Liptak, *supra* note 15 (observing of the MCA that "[i]n adding a Congressional imprimatur to a comprehensive set of procedures and tactics, lawmakers explicitly endorsed measures that in other eras were achieved by executive fiat").

¹⁷⁴ See 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

¹⁷⁵ See 299 U.S. at 320.

treated much like the joint resolution at issue in *Curtiss-Wright*, and be upheld.¹⁷⁶

B. *The Uncertain Application of the Political Question Doctrine to the President's Interpretations of the Geneva Conventions*

As noted in Part I, the Supreme Court might also determine that a challenge to the President's interpretations of the Geneva Conventions presents a nonjusticiable political question.¹⁷⁷ Although it makes no difference to one seeking to invalidate the President's interpretations whether the Court upholds the interpretation or refuses to reach a decision on justiciability grounds, the outcomes represent two distinct results.¹⁷⁸ The MCA represents an agreement between the political branches of government about the best ways to deal with America's detained terrorist enemies, but the extent to which challenges to the MCA—and the President's interpretations of the Geneva Conventions—present a nonjusticiable political question is unclear.¹⁷⁹

On the one hand, the Court in 1918 in *Oetjen v. Central Leather Co.* held that the conduct of foreign relations is constitutionally committed to the executive and legislative branches of government, and the decisions made by those branches are not subject to the review of an unelected judiciary.¹⁸⁰ Applied to the MCA, this would mean that the Court could not review a President's interpretations of the Geneva Conventions with regard to nongrave offenses, because Congress and the President have together reached a decision on how such questions are to be resolved.¹⁸¹ It is difficult to accept this outcome, especially in light of the Court's recent *Hamdan* decision wherein it rejected the President's assertion that Common Article 3 does not apply to the international struggle with al Qaeda.¹⁸² In the case of the MCA, how-

¹⁷⁶ See *id.* at 329.

¹⁷⁷ See *Oetjen*, 246 U.S. at 302.

¹⁷⁸ Compare *Curtiss-Wright*, 299 U.S. at 320, 329 (holding that the President, by the nature of the office, is entitled to deference when conducting international relations), with *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring) (holding that whether Congress is able to negate the actions of the President in the conduct of foreign affairs presents a political, and therefore, nonjusticiable political question).

¹⁷⁹ See Blumoff, *supra* note 48, at 230–31 (observing that there is no shortage of opinions on the subject, but also no clear, consistently applied rule from the Court as to when and if ever federal courts should review political decisions involving foreign policy).

¹⁸⁰ 246 U.S. at 302.

¹⁸¹ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); *Oetjen*, 246 U.S. at 302.

¹⁸² See *Hamdan*, 126 S. Ct. at 2795.

ever, the President is no longer acting unilaterally when interpreting international obligations, but rather doing so with express authorization from Congress.¹⁸³

On the other hand, the Court in 1961 in *Baker v. Carr*, despite accepting the premise that many issues related to foreign affairs constitute political questions, held that not all cases touching on foreign affairs lie beyond judicial cognizance.¹⁸⁴ *Baker* offers examples of scenarios involving foreign policy matters when the Court has ruled on the presented issue, such as those instances when the Court, in the face of inconclusive action from the political branches, has construed the meaning of the treaty.¹⁸⁵ But those challenging the President's authority to interpret the Geneva Conventions will find little support in *Baker*, as that opinion goes on to hold that even if such a challenge is justiciable, a court will not construe a treaty's demands in a manner inconsistent with a federal law passed after the treaty's ratification.¹⁸⁶

Looking closer at how the Court would treat a presidential interpretation of the Geneva Conventions requires a careful analysis of the Court's 1979 decision in *Goldwater v. Carter*, involving the President's unilateral rescission of a treaty in the face of Congressional silence.¹⁸⁷ In his concurring opinion, Justice Rehnquist, joined by Justice Stevens and others, maintained that the President's rescission of a treaty and Congress's authority to negate that action are nonjusticiable matters of foreign affairs.¹⁸⁸ Applying this principle to a challenge to the President's *interpretation*—a less extreme action than *rescission*—of the Geneva Conventions, it seems almost certain that the Court, applying Justice Rehnquist's logic, should determine that the issue is nonjusticiable.¹⁸⁹ This conclusion becomes even more certain when considered in light of the MCA's express grant of power to the President to interpret the Geneva Conventions, a feature absent from *Goldwater*.¹⁹⁰

Justice Rehnquist's proposition that foreign affairs disputes among the political branches pose nonjusticiable questions is not the

¹⁸³ See Military Commissions Act of 2006 § 6(a)(3)(A). The Court in *Hamdan* invited Congress to pass legislation of this kind, and the Congress was happy to oblige. See 126 S. Ct. at 2799 (Breyer, J., concurring).

¹⁸⁴ See 369 U.S. 186, 211 (1961).

¹⁸⁵ See *id.* at 212.

¹⁸⁶ See *id.*

¹⁸⁷ See 444 U.S. at 997–98 (Powell, J., concurring).

¹⁸⁸ See *id.* at 1002 (Rehnquist, J., concurring).

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 997–98 (Powell, J., concurring).

only scheme offered in *Goldwater*.¹⁹¹ Justice Powell articulates the position that a matter of this type is reviewable by the courts only when the political branches reach a "constitutional impasse."¹⁹² In the case of the MCA, there is no such impasse between the political branches because both appear to be in agreement about the allocation of power between the President and Congress.¹⁹³ Justice Powell is careful to limit the Court's review out of concern for the embarrassing, as well as confusing, result of different branches offering different accounts of the law.¹⁹⁴ This is especially important in the case of the MCA, since one of its aims is to clarify the laws of the United States for those interrogating terrorist enemies.¹⁹⁵

Justice Brennan offers a third approach, expounding that the political question doctrine restricts the courts from reviewing a foreign policy decision made by a branch constitutionally empowered to make such a decision.¹⁹⁶ Under this approach, the courts are free to discern whether a branch is constitutionally delegated as the appropriate authority.¹⁹⁷ This view raises questions about the President's constitutional authority to interpret treaties, as well the authority of Congress to empower the President to issue such interpretations; but those seeking to challenge the President's interpretations of the Geneva Conventions face the formidable barrier that is raised by Congress and the President's agreement on the matter.¹⁹⁸ The degree of

¹⁹¹ See *id.* at 998 ("Mr. Justice Rehnquist suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree.").

¹⁹² See *Goldwater*, 444 U.S. at 997 (Powell, J., concurring).

¹⁹³ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

¹⁹⁴ See *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring) (quoting *Baker*, 369 U.S. at 217).

¹⁹⁵ Remarks on Signing the Military Commissions Act of 2006, *supra* note 163, at 1832 (applauding the legislation because it "spells out specific, recognizable offenses that would be considered crimes in the handling of detainees so that our men and women who question captured terrorists can perform their duties to the fullest extent of the law"). For a thoughtful discussion of the federal laws governing the prosecution of American citizens who violate the law of war while outside the territorial limits of the United States, see generally Anthony E. Giardino, Note, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699 (2007).

¹⁹⁶ See *Goldwater*, 444 U.S. at 1006-07 (Brennan, J., dissenting).

¹⁹⁷ See *id.* at 1007.

¹⁹⁸ Harold Hongju Koh et al., *The Treaty Power*, 43 U. MIAMI L. REV. 101, 124 (1988) ("Even without the political question doctrine, however, disputes over the distribution of the treaty power will generally be nonjusticiable precisely because they are not about pri-

caution with which the Court approaches issues of treaty interpretation is unmistakable and exemplified in *Hamdan*, which offers new insights, and hence more confusion, into this problem.¹⁹⁹

C. *Hamdan v. Rumsfeld as a Source of Guidance for the Supreme Court in Its Review of the President's Interpretation of the Geneva Conventions*

In 2006 in *Hamdan* the Court rejected the Bush administration's first effort to establish military commissions to prosecute terrorist detainees like Osama bin Laden's bodyguard and personal driver, Salim Ahmed Hamdan.²⁰⁰

The Court's ruling is important in proposing a course of action for the Court when faced with a future challenge to the President's interpretation of the Geneva Conventions for two reasons.²⁰¹ First, it represents an occasion in which the Court has intervened and invalidated the President's interpretation of a treaty.²⁰² *Hamdan* rejected the Bush administration's argument that Common Article 3 of the Conventions did not apply to the conflict with al Qaeda.²⁰³ Whether the Court would take similar action if again presented with a challenge to the President's interpretations of the Geneva Conventions depends on the impact of the MCA, which was passed after *Hamdan*.²⁰⁴ Unlike at the time of *Hamdan*, Congress has now explicitly authorized the President to make official interpretations of the Geneva Conventions with respect to nongrave offenses.²⁰⁵

Second, while the *Hamdan* Court did much to clarify what comprises a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,"²⁰⁶ it left open to Congress the option to alter the procedures governing those

vate rights. Rather, they concern institutional prerogatives for which the Constitution provides safeguards other than the judicial review.").

¹⁹⁹ See *Hamdan*, 126 S. Ct. at 2796, 2798 (holding that Common Article 3's requirement that Hamdan be tried by a "regularly constituted court" must be satisfied, but that secret evidence can be withheld from the detainee, despite custom and Common Article 3's demands, if there is statutory authorization for doing so).

²⁰⁰ See *id.* at 2761, 2786.

²⁰¹ See *id.* at 2795, 2798.

²⁰² See *id.* at 2795.

²⁰³ See *id.*

²⁰⁴ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)). The MCA, which gives the President the authority to interpret certain provisions of the Geneva Conventions, was agreed to by both the executive and legislative branches. See *id.*

²⁰⁵ See *id.* § 6(a) (3) (A).

²⁰⁶ See *Hamdan*, 126 S. Ct. at 2796.

courts.²⁰⁷ *Hamdan*, therefore, enforced the demands of Common Article 3 of the Geneva Conventions in one instance—namely, that it applies to the conflict with al Qaeda—but allowed for Congress to determine exactly what those demands are.²⁰⁸ The MCA answered this invitation and put the Bush Administration and Congress in agreement as to what is appropriate conduct of the War on Terrorism.²⁰⁹

D. *The Executive and Legislative Branches Acting in Concert*

In considering a challenge to the President's interpretation of the Geneva Conventions, the Court will be guided by Justice Jackson's framework first presented in 1952 in *Youngstown Sheet & Tube Co. v. Sawyer*.²¹⁰ Any interpretation by the President would be pursuant to the authority expressly granted by Congress via the MCA; therefore, the President's authority would be at its very peak and the office may be said to "personify the federal sovereignty."²¹¹ So long as the MCA is not unconstitutional, the Court should not disturb the President's interpretations.²¹² Justice Breyer and Justice Kennedy's separate concurrences in *Hamdan* also support this proposition because both invited Congress and the President to enact a law on which they could both agree.²¹³

The hypothetical scenario that is the subject of this Note fits easily into Justice Jackson's first category.²¹⁴ Even though the MCA gives little, if any, statutory language to guide the President in interpreting the Geneva Conventions' nongrave offenses, those interpretations do not fall in Justice Jackson's "zone of twilight."²¹⁵ The MCA is explicit in authorizing the President to make interpretations, and it is this

²⁰⁷ See *id.* at 2798.

²⁰⁸ See *id.* at 2799 (Breyer, J., concurring) (stating that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to create military commissions and the procedures governing them).

²⁰⁹ See Military Commissions Act of 2006 § 6.

²¹⁰ See 343 U.S. at 635 (Jackson, J., concurring); see also *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (stating that the "proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson" in *Youngstown*).

²¹¹ See *Youngstown*, 343 U.S. at 635.

²¹² See *id.*

²¹³ See *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring); *id.* at 2800 (Kennedy, J., concurring).

²¹⁴ See *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

²¹⁵ See *id.* at 637.

grant of authority itself that is the focus of the inquiry.²¹⁶ Even if the President were considered to be acting in the "zone of twilight," the circumstances involved and the imperatives of the situation would guide the Court's review.²¹⁷ There is arguably no greater imperative than the crisis of war and international terrorism, so the Court might well find that under these circumstances the President's interpretations are constitutional.²¹⁸ Thus, applying Justice Jackson's *Youngstown* framework to the issue at hand demonstrates just how difficult it would be for the Court to invalidate a presidential interpretation of the Geneva Conventions' nongrave offenses.²¹⁹

E. *Analogizing the President's Authorization to Interpret the Geneva Conventions to Chevron*

Setting aside the issue of where the power to interpret international treaties lies, the MCA authorizes the President to interpret the requirements of the Geneva Conventions with respect to its nongrave offenses and to publish those interpretations so as to make their binding effect known.²²⁰ In this way, the MCA is like any other piece of legislation delegating to agencies within the executive branch the authority to promulgate standards and issue regulations.²²¹ The analogy is strained, however, by the fact that the MCA delegates authority not to an agency within the executive department, but rather, directly to the Chief Executive.²²² Despite this, the Court should address a challenge to the President's interpretations of what constitutes a nongrave offense of the Geneva Conventions with an eye toward its 1984 decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*²²³

²¹⁶ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

²¹⁷ See *Youngstown*, 343 U.S. at 637.

²¹⁸ See *id.* at 637 n.3 (noting the ambiguity surrounding who has the authority to authorize the suspension of the writ of habeas corpus, and President Lincoln's assertion that "it [is] an executive function" even in the face of judicial challenge).

²¹⁹ See *id.* at 635-38.

²²⁰ See Military Commissions Act of 2006 § 6(a)(3)(A)-(C).

²²¹ See, e.g., Clean Air Act, 42 U.S.C. § 7409(b)(1) (2000) (authorizing the Administrator of the Environmental Protection Agency to prescribe national primary ambient air quality standards "based on such criteria and allowing an adequate margin of safety, [as] are requisite to protect the public health").

²²² See Military Commissions Act of 2006 § 6(a)(3)(A).

²²³ See *Chevron*, 467 U.S. at 842-43. *United States v. Mead Corp.* appears irrelevant in this analysis. See 533 U.S. 218, 231-32 (2001). The *Mead* Court determined that the Customs ruling letter at issue did not qualify for *Chevron* deference because "the terms of the con-

Pursuant to the framework articulated in *Chevron*, the court should first determine whether Congress's intent is clear as to the President's interpretation of the Geneva Conventions, and if so, that intent must be given effect.²²⁴ Because congressional intent in the MCA appears clear, the Court's inquiry would likely end here.²²⁵ If, however, the Court determines that Congress has not directly addressed the precise question at issue, then it must examine whether the President has construed the statute in a permissible manner.²²⁶

The Court's treatment of the hypothetical problem presented in this Note should both commence and conclude with the first *Chevron* inquiry.²²⁷ As stated above, the MCA's grant of authority to the President to "interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches" is direct and devoid of ambiguity.²²⁸ Congress's intent in the MCA is easily discernable: Congress wants the President to interpret what nongrave offenses are, and wants those interpretations to be authoritative in the same way that those of any other agency are.²²⁹ Thus, a challenge to a President's interpretations would likely be rebuffed because effect must be given to Congress's will.²³⁰ Therefore, the Court should follow the approach of the U.S. Court of Appeals for the Third Circuit in 1996 in *Marincas v. Lewis* and end its inquiry at *Chevron*'s first step.²³¹

Alternatively, and perhaps less convincingly, one could focus on the clumsy and bewildering portion of the MCA that regards what, if

gressional delegation [gave] no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law." *Id.* With regard to the MCA, however, the language of the statute makes clear that "[a]ny Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations." See Military Commissions Act of 2006 § 6(a)(3)(C).

²²⁴ *Chevron*, 467 U.S. at 842–43.

²²⁵ See *id.*; *Marincas v. Lewis*, 92 F.3d 195, 200–01 (3d Cir. 1996).

²²⁶ See *Chevron*, 467 U.S. at 842.

²²⁷ See *id.*

²²⁸ See Military Commissions Act of 2006 § 6(a)(3)(A). Although the MCA unambiguously gives the President interpretative authority, the boundaries of that interpretative discretion are wholly unclear; for this problem, however, *Chevron* is not relevant. See *id.*; *Chevron*, 467 U.S. at 842–44.

²²⁹ See Military Commissions Act of 2006 § 6(a)(3)(A)–(C).

²³⁰ See *id.*

²³¹ See 92 F.3d at 201 (explaining that there was no need to proceed to *Chevron*'s second inquiry because the Refugee Act of 1980 was clear in what it demanded of the Attorney General).

any, statutory limits exist to cage the President's interpretative discretion.²³² Even under this approach, however, it appears unlikely that the President's interpretation would be invalidated under *Chevron's* second prong.²³³ The *Chevron* Court expressed that it would give considerable weight to the executive department's statutory constructions so long as they were not arbitrary, capricious, or manifestly contrary to the statute.²³⁴ The fact that the MCA is a foreign affairs statute adds to the weight of the executive branch's construction because such interpretations typically receive substantial deference.²³⁵ Interpreting the Geneva Conventions requires acute awareness of the demands of geopolitical crises and the expectations of other signatories party to the Conventions, both of which occupy a realm wherein the President has considerable capabilities, constitutional authority, and expertise.²³⁶ Additionally, given that a treaty is at issue, the President's interpretation of that document, if consistently followed, should be given additional weight.²³⁷

In this context, the Court would likely follow its 1986 decision in *Japan Whaling Ass'n v. American Cetacean Society*, involving a federal law that gave the Commerce Secretary the authority to make decisions about the whaling practices of other countries, relative to the standards set by an international commission.²³⁸ The Court deferred to the Secretary's construction because it neither contradicted the language of the law nor frustrated congressional intent.²³⁹ Similarly, the President's interpretations of the Geneva Conventions, to the extent they are reasonable, would be seen as in conformity with a Congress that recognized the exigencies of the post-September 11, 2001 world and wished to give the President broad discretion on this matter.²⁴⁰

It could also be argued that when evaluating the President's interpretations, the Court should not be concerned with whether the interpretation itself was arbitrary and capricious, but rather whether the President's reading of the MCA was arbitrary and capricious.²⁴¹

²³² See Military Commissions Act of 2006 § 6(a)(3)(A).

²³³ See *Chevron*, 467 U.S. at 844.

²³⁴ See *id.*

²³⁵ See *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1286 (Fed. Cir. 1988).

²³⁶ See *Curtiss-Wright*, 299 U.S. at 320.

²³⁷ See *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921).

²³⁸ See 478 U.S. 221, 225 (1985).

²³⁹ See *id.* at 240.

²⁴⁰ See *id.*

²⁴¹ See *Chevron*, 467 U.S. at 844.

The terms of the statute are clear, and the MCA, without question, delegates the authority to interpret to the President.²⁴² It appears, therefore, that those who challenge the President's interpretations would be doing so not on the grounds authority is lacking under the MCA, but because those critics fundamentally disagree with those interpretations.²⁴³ For this, *Chevron* provides no remedy.²⁴⁴

Ultimately, the administrative law concepts at work in *Chevron* representing a concern for expertise and accountability would undoubtedly overwhelm any challenge to the President's interpretations of the Geneva Conventions.²⁴⁵ The President has particular expertise in dealing with matters of foreign policy,²⁴⁶ thus satisfying administrative law's desire to vest authority in that office.²⁴⁷ Particularly satisfying in the case of the MCA, however, is the fact that the "agency" is the elected office of the presidency, which is far more accountable than any department secretary or administrator.²⁴⁸

F. *The President's Interpretations of the Geneva Conventions and the Constraints Imposed by International Law*

The basic principles relevant to a President's authority to interpret a treaty have reduced import when considering the problem presented in this Note because the MCA articulates a position of agreement on treaty interpretation between the legislative and executive branches.²⁴⁹ That said, the law governing treaty interpretation is a complex area worthy of careful study in its own right, and although this discussion does not purport to present even a cursory survey of that pasture, certain principles are worth mentioning because of their relevance to the question posed.²⁵⁰

²⁴² See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

²⁴³ See Huq, *supra* note 15 ("[W]hat happens when the executive reads Geneva in a clearly unreasonable way?").

²⁴⁴ See *Chevron*, 467 U.S. at 842-43.

²⁴⁵ See *id.* at 865-66.

²⁴⁶ See *Curtiss-Wright*, 299 U.S. at 320.

²⁴⁷ See *Chevron*, 467 U.S. at 865.

²⁴⁸ See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(A), 120 Stat. 2600, 2632 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

²⁴⁹ See *id.*

²⁵⁰ See generally *Whitney v. Robertson*, 124 U.S. 190 (1888).

The MCA authorizes the President to make determinations about what constitutes a nongrave breach of the Geneva Conventions, and those interpretations are entitled to great weight.²⁵¹ Pursuant to the MCA, the President's interpretations are authoritative "as a matter of United States law."²⁵² As a result, to the extent that the President's interpretation conflicts with what may well be a more accurate reading of the Conventions' demands, the President's interpretation—having legal effect later in time—will control and take primacy over the original meaning of the Conventions' terms.²⁵³ Whatever the Geneva Conventions initially held, Congress is free to abrogate those requirements as it did when it authorized the President to interpret the Conventions.²⁵⁴ So long as Congress is clear in its action and purpose, the courts, from that point onward, are under no obligation to interpret the statute harmoniously with the treaty.²⁵⁵

In the hypothetical problem at issue, the Court would not be bound by an earlier understanding of the Geneva Conventions in evaluating the President's interpretations of lesser offenses.²⁵⁶ Additionally, as the U.S. Court of Appeals for the Eleventh Circuit made clear in 1986 in *Garcia-Mir v. Meese*, the ultimate determinate of the obligations of the United States is domestic welfare, as the President understands it.²⁵⁷ In other words, when acting in accordance with a constitutional grant of authority, the President may disregard international law in service of domestic needs.²⁵⁸ Notwithstanding what some may think the Geneva Conventions require, the President, with authorization from Congress and in furtherance of the national welfare, is free to interpret authoritatively what constitutes a nongrave breach of those Conventions as he or she determines appropriate.²⁵⁹

²⁵¹ See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

²⁵² See Military Commissions Act of 2006 § 6(a)(3)(C).

²⁵³ See *Whitney*, 124 U.S. at 194 (stating that the laws of the United States and its treaty obligations are of the same force, and that "[w]hen the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other").

²⁵⁴ See Military Commissions Act of 2006 § 6(a)(3)(C).

²⁵⁵ See *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

²⁵⁶ See *id.*

²⁵⁷ See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454–55 (11th Cir. 1986).

²⁵⁸ See *id.* at 1455.

²⁵⁹ See *Whitney*, 124 U.S. at 194; *Garcia-Mir*, 788 F.2d at 1454–55; *Palestine Liberation*, 695 F. Supp. at 1465. By no means complete or representative of all the scholarship or jurisprudence in this area of the law, this discussion of the President's authority to interpret

III. EXTRAJUDICIAL ALTERNATIVES AVAILABLE TO THOSE CHALLENGING THE PRESIDENT'S INTERPRETATIONS OF THE GENEVA CONVENTIONS

When faced with a challenge to one of the President's interpretations of what constitutes, a nongrave breach of the Geneva Conventions, the Court, if it is to act according to its own prior jurisprudence, should either affirm the President's interpretation or refuse to hear the case on justiciability grounds.²⁶⁰ This Note does not dispute that anyone bringing such a challenge may have the moral high ground, but it does recognize the Supreme Court's prior rulings leading to the inevitable conclusion that an Article III court is not the appropriate forum to strike the President's interpretation.²⁶¹ Put simply, construing the Geneva Conventions in such a way that permits torture is wrong, but this admonition should come not from the bench of the Supreme Court, but rather from the halls of Congress.²⁶²

This Part explores three extrajudicial approaches that one seeking to change the President's interpretations might pursue.²⁶³ First, political activism that seeks to bring change to the leadership in Washington, cannot be underestimated.²⁶⁴ As the 2006 midterm elections demonstrated, sometimes the best way to alter the course of America's dealings with the world is through elections at home.²⁶⁵ Those elections brought not just new legislative majorities, but also demonstrated the popular discontent with Republican leadership and the Iraq War.²⁶⁶ In response to this discontent, President Bush altered his previous course of action by accepting the resignation of Defense Sec-

trearies is offered merely to demonstrate a potential factor in the Court's decision that, when considered with the others presented earlier in this Note, would close yet another door to one's challenge of the President's interpretations of the Geneva Conventions. See *Whitney*, 124 U.S. at 194; *Palestine Liberation*, 695 F. Supp. at 1465.

²⁶⁰ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

²⁶¹ See *Chevron*, 467 U.S. at 842-43; *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) *Curtiss-Wright*, 299 U.S. at 320; *Oetjen*, 246 U.S. at 302.

²⁶² See *Chevron*, 467 U.S. at 842-43; *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *Curtiss-Wright*, 299 U.S. at 320.

²⁶³ See *infra* notes 264-274.

²⁶⁴ See Dan Balz, *For Bush's New Direction, Cooperation Is the Challenge*, WASH. POST, Nov. 9, 2006, at A1.

²⁶⁵ See *id.*

²⁶⁶ See *id.*

retary Donald Rumsfeld in hopes of finding a "fresh perspective" on that struggle.²⁶⁷ Despite the example set by those who so often circumvent the political process and rush to the judicial branch to bring about social change, these elections demonstrate the overwhelming force of popular opinion and its ability to achieve the same result.²⁶⁸

Second, the legislative process provides another outlet by which the President's interpretations of the Geneva Conventions can be changed.²⁶⁹ The President's interpretations are only effective to the extent that Congress will tolerate them, and because the President's interpretations carry the same force as other administrative agency regulations, Congress always has the option of passing a law that overrides those interpretations.²⁷⁰ In fact, the 110th Congress has already seen the introduction of the "Restoring the Constitution Act of 2007," which is one example of such legislation.²⁷¹

Finally, related to this idea of the legislative process is the fact that Congress is equipped with tools of oversight.²⁷² A clear manifestation of this is the MCA's requirement that "[n]ot later than December 31 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on any trials conducted by military commissions under this chapter during such year."²⁷³ This is by no means an exhaustive account of the options available to those unhappy with the President's policies, and regardless of which option is pursued, the fact remains that an unsavory interpretation of the Geneva Conventions should be invalidated by Congress, using all the force of the people it represents.²⁷⁴

²⁶⁷ See *id.* ("The president took the most dramatic step yesterday in acknowledging how much the landscape has changed. At a midday news conference he announced that he had accepted the resignation of Defense Secretary Donald H. Rumsfeld . . .").

²⁶⁸ See *id.*

²⁶⁹ See Press Release, Sen. John McCain, McCain Urges Final Passage of the Military Commissions Act of 2006 (Sept. 28, 2006), http://mccain.senate.gov/press_office/view_article.cfm?id=760.

²⁷⁰ See *id.*; see also Bradley, *supra* note 88, at 673 ("Courts defer to agencies because Congress has presumptively delegated lawmaking power to those agencies. Congress legislates against the backdrop of this presumption and is always able to override it.").

²⁷¹ See White, *supra* note 20.

²⁷² See Military Commissions Act of 2006, Pub. L. No. 109-366, section 3, § 948e(a), 120 Stat. 2600, 2603.

²⁷³ See *id.*

²⁷⁴ See *Chevron*, 467 U.S. at 842-43; *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *Curtiss-Wright*, 299 U.S. at 320. Allowing the Court to fill this role and invalidate the President's interpretations would set a dangerous precedent. See *Chevron*, 467 U.S. at 842-43; *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring); *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) *Curtiss-Wright*, 299 U.S. at 320; *Oetjen*, 246 U.S. at 302. If the

CONCLUSION

The MCA empowers the President to interpret the Geneva Conventions and make determinations as to which actions constitute nongrave breaches of those treaties. Assuming that the Supreme Court has jurisdiction to hear a challenge to one of these interpretations, its own prior jurisprudence would require that it either uphold the President's interpretation or dismiss the challenge on justiciability grounds.

The MCA makes clear that the President's interpretations of what constitutes a nongrave breach of the Geneva Conventions is authoritative. Additionally, the President's interpretations of these treaties are steeped in foreign policy, an area in which the President enjoys great deference and inherent power. The fact that the MCA is a law of the United States codifying Congress's explicit authorization of the President's power to interpret these Conventions further adds to the legal weight of these interpretations. Because Congress's intent is clear in giving the President this authority, a reviewing court should also recognize the deference traditionally given to those empowered by the legislature to perform the tasks that the controlling statute enumerates. Finally, the Court's prior decisions also expound on the deference traditionally given to a President when interpreting a treaty to which the United States is a party. This precedent, judicial principles spanning various areas of the law, and the text of the MCA, make clear that federal courts do not present a path to change for those challenging the wisdom of the President's decisions. The President, with respect to the federal courts, lies beyond reproach. A remedy lies elsewhere—namely, in the political branches and the political process itself.

For some, the MCA adequately circumscribes the President's authority by ensuring that no detainee is subject to the grave breaches of

Court were to review the President's interpretations and determine that they conflict with the Geneva Conventions' demands, the Court would essentially be imposing the international law's higher standards to a domestic law. *See* Military Commissions Act of 2006 § 6(a)(2). With a precedent of this kind on the record, any international convention to which the United States were a party could be used as lever by which the Court could then ratchet up the companion domestic law's requirements. *See* *United States v. Georgescu*, 723 F. Supp. 912, 921 (E.D.N.Y. 1989). Moreover, the wisdom of passing an act like the MCA should not affect a court's decision of whether to review the President's interpretation, because in future cases, the public policy considerations could be different. *See* Military Commissions Act of 2006 § 6(a). If a law were passed that some viewed as more positive than the MCA, might an activist court interfere with that law and overrule it, citing this instance as its precedent for doing so? *Id.*

the Geneva Conventions, and that the remaining interrogation procedures are those required to fight an effective war against terrorism. For others, it allows for behavior that is both an affront to human dignity and inconsistent with American ideals. Both views present important realities, but there is only one certainty. Now, more than ever, it is important for Americans to exercise the freedom that soldiers risk their lives everyday to defend. Ultimately, real change comes from the advocacy of the American people who, through their voices and actions, project an image of America across the globe.

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