

# RATCHETING BACK: INTERNATIONAL LAW AS A CONSTRAINT ON EXECUTIVE POWER

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Constitutional scholars have long noted the historic tendency of the Executive to accrue power in times of security concern.<sup>1</sup> In this respect, the George W. Bush Administration might generally be understood to have fulfilled constitutional expectations—asserting broad power in the years following the devastating attacks of September 11 to detain, interrogate, and try suspected terrorists, notwithstanding treaty obligations arguably to the contrary.<sup>2</sup> As we begin assessing the still new Obama Administration, it thus seems necessary to ask whether it is fulfilling the closely related constitutional expectation: that presidential power over national security only grows over time.<sup>3</sup> By most accounts, the history of executive power relative to the other branches has been one of dramatic, often security-driven, expansion.<sup>4</sup> The expansion is attributed to a number of factors, including not only the Executive’s institutional ability to act with speed and initiative, but also to the domestic and international

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1. FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (Louis Henkin, Michael J. Glennon & William D. Rogers eds., 1990); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2003).

2. See, e.g., Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1257–68 & n.52 (2006) (summarizing aspects of U.S. detention and interrogation policy, and noting potential challenges under relevant constitutional and treaty obligations). Uses of the phrase “Bush Administration” hereinafter will refer to the Administration of George W. Bush.

3. See generally KOH, *supra* note 1; ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

4. See, e.g., KOH, *supra* note 1; SCHLESINGER, *supra* note 3; William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why it Matters*, 88 B.U. L. REV. 505, 518–19 (2008).

political incentives that shape the presidency. As Harold Koh put it (writing in the wake of the Iran-Contra scandal): “[A] pervasive national perception that the presidency must act swiftly and secretly to respond to fast-moving international events has almost inevitably forced the executive branch into a continuing pattern of evasion” of restraint.<sup>5</sup> Moreover, far from acting as a constraining external force on increasingly bold assertions of presidential authority, Congress and especially the courts have allowed the President to assert it.<sup>6</sup> Together, such forces combine to ensure that only a one-way ratchet is applied to presidential power.

Yet the recent change of presidential administration provides an intriguing set of examples by which one might measure the continued salience of the one-way ratchet paradigm in the post-September 11 world. Among other contrasts, the Administrations of Bush and Obama would appear by composition to differ substantially in their relative commitment to international law as a meaningful constraint on national power. The Bush Administration had asserted broad executive power to resist the application of international law in a way that would constrain U.S. counterterrorism operations. It had also advanced the view that the power to interpret treaty obligations—to “say what the law is” as provided by treaties—rests primarily or even exclusively with the Executive himself.<sup>7</sup> The interpretation power in particular has been of some significance in inter-branch battles past; indeed, “reinterpretation” had become a central means by which Presidents have effectively amended treaty obligations they found troubling.<sup>8</sup>

In seeming distinction, the Obama Administration thus far has been peopled with officials almost certain to hold a contrary view. Among others, Legal Adviser to the State Department Harold Koh under President Obama has built a career advocating for careful adherence to international law as part of “our law.”<sup>9</sup> Obama Administration Director of the State

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5. KOH, *supra* note 1, at 122.

6. *Id.* at 123–49.

7. *See infra passim.*

8. KOH, *supra* note 1, at 43–45 (discussing the controversy over President Reagan’s broad reinterpretation of the Anti-Ballistic Missile (ABM) Treaty).

9. Harold H. Koh, *International Law as Part of Our Law*, AM. J. INT’L L., Oct. 2004, at 43; Harold H. Koh, *Mark Janis and the American Tradition of International Law*, 21 CONN. J. INT’L L. 191 (2006).

Department Office of Policy Planning Anne-Marie Slaughter has likewise advocated measures to make international law more effective in constraining national power by promoting more direct engagement within domestic legal systems.<sup>10</sup> Does the Obama Administration resist asserting a similar degree of interpretive prerogative over international law? Or does the one-way ratchet effect prove too great a temptation in this regard?

While it is still early enough in the Obama Administration to make any conclusions uncertain, this essay considers a set of steps that might be seen to reflect a greater willingness by the Administration to acknowledge limits imposed on the Executive by treaty commitments, and arguably a greater willingness to share power to interpret treaties with the courts. If these early indications prove meaningful, they raise a series of questions about the political and structural mechanisms said to drive the one-way ratchet. In the world of incentives the one-way ratchet view describes, why would an Executive move to restore any constraints on power? This essay considers the Obama Administration's early engagements with the international law of armed conflict—and the Geneva Conventions in particular—in an attempt to explore some potential answers.

Following a brief background discussion of the longstanding debate over the treaty power, this essay highlights a set of differences between the Bush and Obama Administrations on matters of treaty interpretation in U.S. counterterrorism operations. It then considers a series of explanations to account for the modest shifts, exploring what if anything these differences might tell us about why a nation facing security threat would ratchet back claims of executive power in the face of international law.

A note of caution is in order. Extrapolating from individual policy decisions to broad state behaviors is always a dicey proposition—especially so when there are differences of opinion among key decision-makers, and when there are so few examples from the current Administration from which to draw. The one-way ratchet view in particular might readily discount

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10. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 346 (2006) (urging that international law must “push states toward participation in international institutions and the international legal system generally so that the functions of international law . . . can take hold and influence state behavior and outcomes”).

the significance of any modest evidence of ratcheting back; over time, such examples might well appear to be no more than short-lived blips along what is an otherwise broadly linear trajectory. Yet such blips seem important to study—not only because they may prove a harbinger of a larger trend, but also because they can shed light on the limits of the political and structural conditions that have so far stood to explain why U.S. executive power trends upwards. If exceptions exist at all, they may tell us whether and how those conditions are susceptible to change.

#### TREATY POWER DEBATES PRE-2009 IN A NUTSHELL

Controversy surrounding how much formal power the Executive enjoys to interpret or otherwise modify international treaty obligations was hardly new to the Bush Administration. On one side of the historic debate are those who believe that the Executive enjoys substantial power to interpret (even violate) treaties as a result of his formal power under Article II of the Constitution (to “make” treaties), and his functional advantages as the “sole organ” of the United States in foreign relations.<sup>11</sup> A set of twentieth-century Supreme Court statements—noting that the “meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight”<sup>12</sup>—would seem to support this distribution of power, with judicial deference doctrine rightly serving as no “mere window dressing, but rather [as] a significant factor in treaty interpretation.”<sup>13</sup>

Others have maintained that whatever limited power the Executive has over treaty interpretation is shared, at best, with

11. John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 873–74 (2001) (reviewing FRANCES FITZGERALD, *WAY OUT THERE IN THE BLUE: REAGAN, STAR WARS, AND THE END OF THE COLD WAR* (2000)); see also Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33 (1995) (arguing that presidential authority to interpret treaties and act unilaterally in foreign affairs has a strong historical basis).

12. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); accord *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913).

13. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701 (2000); see also David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (arguing judicial deference increased during twentieth century); Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777 (2008) (arguing that twentieth-century courts deferred regularly to “executive pronouncements of foreign affairs”).

the independent power of the courts to “say what the law is” under Article III.<sup>14</sup> True that the Constitution grants the Executive the power to “make” treaties,<sup>15</sup> but it separately allocates primary interpretive power to the courts, extending the “judicial power” to all cases arising under “treaties made,”<sup>16</sup> and otherwise making treaties part of the “supreme law of the land” to which all state court judges, among others, are bound.<sup>17</sup> Accordingly, the Court has long and rightly exercised its independent authority to interpret treaties as it sees fit, with the Founding-era Court in particular showing no deference at all to Executive views on the meaning of treaties.<sup>18</sup> The Court’s passing language of deference to Executive treaty interpretation has thus been “[m]uch like a blimp,” a doctrine that seems “ponderous but in reality has no weight.”<sup>19</sup>

In the face of unsettled debates about how much power the Executive has to interpret or otherwise confront treaty obligations, and correspondingly how much deference the courts do, and should, show the Executive’s views, the Bush Administration pressed an understanding of the executive treaty power at the broadest end of the spectrum. In the counterterrorism realm, the President’s Commander-in-Chief power weighed against any construction of the Geneva

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14. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

15. U.S. CONST. art. II, § 2, cl. 2.

16. U.S. CONST. art. III, § 2, cl. 1.

17. U.S. CONST. art. VI, § 2, cl. 2; see also Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as ‘Supreme Law of the Land’*, 99 COLUM. L. REV. 2095, 2120 (1999) (“[T]he framers were virtually of one mind when it came to giving treaties the status of law . . . . The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence of this perception was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts.” (quoting Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 PERSP. AM. HIST. 233, 264 (1984))); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1276–77 (2002) (arguing, inter alia, that in light of the Framers’ understanding of the separation of powers, a commitment to the Executive of the power to “make” treaties would preclude the vesting in the same branch of the power to interpret them);

18. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretation: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

19. Martin Flaherty, *Globalization and Executive Power* 5–20 (Dec. 22, 1006, unpublished manuscript on file with author). In any case, it is not possible to demonstrate either a logical or actual causal relationship between deference to the Executive’s views per se and the outcome of the Court’s treaty decisions. Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretation*, 92 IOWA L. REV. 1723 (2007) (surveying published opinions of the federal judiciary between 1984–2005).

Conventions (regulating armed conflict) that would have the effect of constraining executive power. As an early memo from the Justice Department Office of Legal Counsel (OLC) explained in construing the scope of Common Article 3 of the Geneva Conventions so as not to cover the U.S. conflict with al-Qaeda: “[T]he Commander-in-Chief power gives the President the plenary authority in determining how best to deploy troops in the field. Any congressional effort to restrict presidential authority by subjecting the conduct of the U.S. Armed Forces to a broad construction of the Geneva Convention, one that is not clearly borne by its text, would represent a possible infringement on president discretion to direct the military.”<sup>20</sup> Common Article 3 contains a set of basic restrictions on the treatment and trial of detainees in armed conflicts that may involve non-state parties. Yet absent a clear statement from Congress—in the federal War Crimes Act or elsewhere—that the kind of armed conflicts Common Article 3 references meant to include the “war on terror,” OLC advised, Common Article 3 should be read to avoid the constitutional problem that would arise in interfering with the President’s authority to wage a transnational “war” against al-Qaeda.<sup>21</sup>

At the same time, in scholarly pages and in contemporaneous OLC memoranda, Administration attorneys argued that Article II of the Constitution grants the President “plenary” power over treaties.<sup>22</sup> Article II’s grant of the undefined “executive power,” along with the express authority to “make treaties,” required an understanding that any treaty-related powers not specifically mentioned in Article II—including the power to interpret, and the greater power to terminate or suspend treaties unilaterally—must be understood to rest with the President. “Construing the Constitution to grant

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20. Memorandum from John Yoo & Robert J. Delahunty, U.S. Dep’t of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Haynes Memo], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38, 47 (Karen Greenberg & Joshua J. Dratel eds., 2005).

21. *Id.*

22. See, Yoo, *Politics as Law?*, *supra* note 11, at 869–70; Memorandum from John Yoo & Robert J. Delahunty, U.S. Dep’t of Justice Office of Legal Counsel, to John Bellinger, III, Senior Assoc. Counsel to the President and Legal Adviser to the Nat’l Sec. Council, Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty 6 & n.6 (Nov. 15, 2001) [hereinafter Yoo ABM Memo], available at <http://www.justice.gov/olc/docs/memoabmtreaty11152001.pdf>; Haynes Memo, *supra* note 20, at 47.

unenumerated treaty authority to another branch could prevent the President from exercising his core constitutional responsibilities in foreign affairs.”<sup>23</sup> Accordingly, while “the Court has an independent duty under Article III to determine the meaning of a treaty in a case in which such a question is properly presented,” the Court must “give[] the executive’s interpretation of the treaty significant deference.”<sup>24</sup> Indeed, OLC asserted, the President is the “primary interpreter of international law and of treaties on behalf of the United States.”<sup>25</sup>

The Bush Administration’s internal views on the President’s treaty authority was soon reflected in its litigating positions. In defending its authority to detain U.S. citizen Yaser Hamdi as an “enemy combatant” in the U.S. conflict in Afghanistan, the Administration insisted that the legal question whether “captured enemy combatants are entitled to POW privileges

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23. Yoo ABM Memo, *supra* note 22, at 6.

24. *Id.* at n.6.

25. *Id.* at 6–7. The Bush Administration was hardly the first Administration to assert executive power over treaty interpretation. The Clinton Administration OLC maintained that it “belongs exclusively to the President to interpret and execute treaties.” Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to John Quinn, Counsel to the President (June 26, 1996), *available at* [http://www.justice.gov/olc/abmq.htm#N\\_4\\_](http://www.justice.gov/olc/abmq.htm#N_4_). But this claim was limited to the unremarkable notion that executive power to interpret treaties follows as a necessary corollary of the President’s duty to “take Care” that the laws are faithfully executed. *Id.* (citing U.S. CONST. art. II, § 3 and advising that “[t]he executive branch interprets the requirements of an agreement as it carries out its provisions.” (citation omitted)). The modest position that the executive must have at least some power to interpret the law, if only enough to ensure its implementation, poses no necessary threat to the “judicial power,” a power limited by the express recognition that the courts will only decide those disputes emergent enough to constitute a case or controversy. It likewise implies no answer to the question which of the two branches’ interpretation deserves primacy when they conflict—the separation of powers question at issue in the deference debate. In contrast, Bush Administration assertions of executive interpretive authority in this context rested not on the President’s duty to execute the law, but on the Article II vesting and treaty clauses. Yoo ABM Memo, *supra* note 22, at 6–7. And they were closely tied to assertions of the limits of judicial and legislative power in the face of executive authority. *See* Yoo ABM Memo, *supra* note 22, at 6 (“Even in the cases in which the Supreme Court has limited executive authority, it has also emphasized that we should not construe legislative prerogatives to prevent the executive branch from accomplishing its constitutionally assigned functions.” (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977))); *see also* Memorandum from Sheldon Bradshaw & Robert J. Delahunty, U.S. Dep’t of Justice Office of Legal Counsel, to the Senior Associate Counsel to the President & National Security Council Legal Adviser, Re: Constitutionality of the Rohrabacher Amendment 7–8 (July 25, 2001), *available at* <http://www.justice.gov/olc/72501op.pdf> (“[I]nsofar as Congress is seeking to direct the Executive Branch to advocate Congress’s interpretation of the treaty, it is usurping a constitutional power that does not belong to it.”).

under the [Third Geneva Convention] is a quintessential matter that the Constitution (not to mention the [Third Geneva Convention]) leaves to the political branches and, in particular, the President.”<sup>26</sup> To be clear, this was not a particular determination by the President of a detainee’s eligibility for POW status on the facts. This was a generalized conclusion about the relevance of the Third Geneva Convention to a conflict between two state parties to the treaty (the United States and Afghanistan). Again when the Supreme Court took up Salim Hamdan’s later challenge to the legality of military commission proceedings at Guantanamo Bay, the Administration argued vigorously for judicial abstention in the first instance, and broad deference in the second, on the interpretation of Common Article 3 of the Geneva Conventions—a provision requiring, *inter alia*, that trials be held in a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>27</sup>

It was in direct response to the Supreme Court’s rejection of the government’s position in *Hamdan v. Rumsfeld* that the Administration sought and won passage of the Military Commissions Act of 2006 (MCA I). In addition to providing legislative authorization for the tribunals the Court had found inconsistent with Geneva Common Article 3 (among other laws), MCA I provided that “[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”<sup>28</sup> It also attempted in Section 6 to clarify any question of who had authority to interpret the Geneva Conventions:

As provided by the Constitution and by this section, *the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions* and to

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26. Brief for the Respondents at \*24 & n.9, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020 (“The President—the highest ‘competent authority’ on the subject—has conclusively determined that al Qaeda and Taliban detainees, including Hamdi, do not qualify for POW privileges under the [Third Geneva Convention]. . . . The President’s determination is based on the fact that al Qaeda and Taliban fighters systematically do not follow the law of war and therefore do not qualify as lawful combatants under Article 4 of the [Third Geneva Convention], entitled to POW privileges.”) (internal citations omitted).

27. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (citing the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364 (Art. 3, ¶ 1(d))).

28. 10 U.S.C. § 948(b) (2009).



promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.<sup>29</sup>

Pursuant to that authority, which also called for the issuance of an Executive Order to explain how Geneva's anti-torture restrictions were to apply to U.S. interrogation operations, President Bush issued an Executive Order in 2007 setting forth his interpretation of Common Article 3's parallel strictures on the humane treatment of detainees. In it, the President read section 6 of MCA I as "reaffirm[ing] and reinforc[ing] the authority of the President to interpret the meaning and application of the Geneva Conventions."<sup>30</sup> The President's Order thus provided that "a program" of detention and interrogation, operated by the CIA and described in vague terms in the Order, complied with the requirements of Common Article 3. Lest there be any doubt, the Order stated that with respect to the interpretation and application of Common Article 3, the Order was to be "treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States."<sup>31</sup>

### CLUES TO THE OBAMA APPROACH

If the one-way ratchet theory is correct, one might expect to find signs that the Obama Administration is reaching out to reinforce, or at least not cede, the primacy of the Executive's views in treaty interpretation, and otherwise to limit the role of international law in constraining executive power. Yet while published OLC memoranda discussing the Obama Administration's views of international law in this realm are scarce, what early evidence is available suggests that the pattern may not be quite so clear. Indeed, the President's most detailed

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29. 18 U.S.C. § 2441 (2006) (emphasis added). The remainder of Section A provided: "(B) The President shall issue interpretations described Federal Register, by subparagraph (A) by Executive Order published in the publication. (C) Any 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. (D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States." Relatedly, Section 5 of MCA I barred any person from "invok[ing]" the Geneva Conventions as a "source of rights" in any court of the United States.

30. Exec. Order No. 13,440(b), 72 Fed. Reg. 40,707 (July 20, 2007), available at <http://www.fas.org/irp/offdocs/eo/eo-13440.htm>.

31. *Id.*

rhetoric on the role of the international law of armed conflict offered a vigorous defense of the virtues of binding obligations under international law:

Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe that the United States of America must remain a standard bearer in the conduct of war. . . . [T]hat is why I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor those ideals by upholding them not just when it is easy, but when it is hard.<sup>32</sup>

The President's first acts in office seemed broadly consistent with such rhetoric, and included the repeal of President Bush's Executive Order 13440 regarding the meaning of Common Article 3 as applied to U.S. interrogation operations. In an Executive Order that itself made no mention of MCA I, Section 6, or to comparable claims of presidential authority to interpret international law, the Obama Executive Order affirmed that Common Article 3 of the Geneva Conventions was among the sources of law constraining the behavior of U.S. interrogators. The Order also strikingly prohibited any "officers, employees, and other agents" conducting interrogations for the U.S. Government from relying on any interpretation of Common Article 3 issued by the Department of Justice between September 11, 2001, and January 20, 2009.<sup>33</sup>

Likewise, the Obama Administration separately pursued and won passage of a revised Military Commissions Act (MCA

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32. President Barack H. Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009) [hereinafter Nobel Peace Prize], *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. Note OLC opinions would be a more instructive guide to the Administration's understanding of the legal effect of the Conventions, but few have been made public and none of those that have shed light on current understandings of the effect of treaty obligations on executive power. The President's most direct formal address on the dilemmas posed by Guantanamo Bay and related detention practices likewise said nothing detailed about the applicability of international law per se. Delivered at the U.S. National Archives, steps from the U.S. Constitution, the speech referred more broadly to the rule of law and concerns of due process generally than to any particular legal source. President Barack Obama, Remarks by the President on National Security, (May 21, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

33. Exec. Order 13,491, 74 Fed. Reg. 4,893 (Jan. 27, 2009).

II), enacted in November 2009.<sup>34</sup> In addition to amending the procedures to be followed in military commission war crimes trials (in a direction generally more favorable to commission defendants), MCA II removed an express provision in the earlier law limiting the ability of commission defendants to invoke the Geneva Conventions.<sup>35</sup> MCA I had provided: “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”<sup>36</sup> In the new law, that provision is replaced with a more modest restriction, a prohibition against commission defendants invoking Geneva as “a basis for a private right of action.”<sup>37</sup> Where the earlier restriction could be read to prevent commission defendants from invoking Geneva as any “source of rights,” even in defense against a criminal action against them, MCA II appeared to prevent defendants only from relying on Geneva to create a separate cause of action in federal court. Put differently, while the Geneva Conventions might not afford commission defendants a ticket to get into court in the absence of a separate basis for federal court jurisdiction, the Conventions would remain available as applicable law—including as a rule of decision—for any alien already properly in court.

Perhaps the Obama Administration’s most significant engagement on the relevance of international law to counterterrorism operations—and its most direct engagement on the role of the courts in sharing interpretive authority—has been through its ongoing litigation over the detention of some 180 individuals at the U.S. Naval Base at Guantanamo Bay, Cuba. Commenced under the Bush Administration, habeas cases brought by these detainees have since turned to consider the substantive scope of executive authority to detain individuals under the statutory Authorization for Use of Military Force (AUMF), passed by Congress in 2001.<sup>38</sup> While the AUMF itself is silent on the question of detention per se, the Supreme Court

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34. Military Commissions Act of 2009, Pub. L. No. 111-84 (2009).

35. 10 U.S.C. § 948(b) (2009).

36. 10 U.S.C. § 948b(g) (2007).

37. *Id.* § 948b(e) (2009).

38. The AUMF authorizes the use of “all necessary and appropriate force” against those “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224–25.

held in 2004 that the AUMF at a minimum extended to authorize the detention of individuals who were “part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”<sup>39</sup> Whether the AUMF could be read to authorize the detention of a broader set of individuals—including those captured outside Afghanistan, or including those merely “supporting” hostilities without being directly engaged—has been a central question in recent litigation.<sup>40</sup> While the Bush and Obama Administrations have in some respects put forward substantially similar substantive definitions of who may be detained under this authority,<sup>41</sup> Obama Administration briefs embrace the relevance of international law in understanding the scope of the AUMF to a far greater degree. Likewise, where Bush Administration demands for judicial deference to the interpretive views of the Executive were prominent, Obama Administration briefs have largely relegated discussions of the applicable degree of deference to the footnotes.

Consider the Administrations’ relative briefing on the scope of the government’s power to hold “enemy combatant” detainees in military custody. The Bush Administration filed unclassified judicial briefs setting forth a detailed understanding of the scope of its authority to hold such detainees on a number of occasions. In none of them did it rely on the international law of armed conflict as either a font of authority or effective

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39. *Hamdi v. Rumsfeld*, 547 U.S. 507 (2004) (plurality opinion of O’Connor, J.) (emphasis added); *see also id.* at 521 (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long-standing law-of-war principles.”).

40. *See, e.g., Hamdily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *al-Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009).

41. *Compare* Respondents’ Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at 8, *al-Maqaleh* 620 F. Supp. 2d 51 (No. 1:06-cv-01669) [hereinafter Respondents’ Motion to Dismiss], *available at* <http://sites.google.com/aijnetwork.org/maqaleh-v--gates/test-joint-appendix> (follow “Maqaleh v. Gates, 1:06-cv-01669, Dkt. 18, Motion to Dismiss for Lack of Jurisdiction First Amended Petition for Writ of Habeas Corpus, filed September 15, 2008” hyperlink) *with* Memorandum from Frank Sweigart, Dir. of Office of the Admin. Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, Department of Defense, Procedure for Review of “New Evidence” Relating to Enemy Combatant (EC) Status (May 7, 2007), *available at* <http://www.defense.gov/news/May2007/New%20Evidence%20Instruction.pdf>. *See also* William Glaberson, *President’s Detention Plan Tests American Legal Tradition*, N.Y. TIMES, May 22, 2009, *available at* <http://www.nytimes.com/2009/05/23/us/politics/23detain.html>.

limitation on the power of the U.S. Executive.<sup>42</sup> On the contrary, while maintaining that adequate detention authority could be found in the President's Article II powers standing alone, the Bush Administration understood the AUMF as an additional source of authority for detention under which the Executive's definition of "enemy combatants" was a "reasonable implementation of the President's responsibility to 'determine' the object of the use of force authorized by the AUMF," a determination subject to "the widest latitude of judicial interpretation."<sup>43</sup> To the extent the international law of armed conflict was relevant to defining who may be detained under the AUMF, it was only in rebuttal to detainees' arguments to that effect.<sup>44</sup> Indeed, the Administration had rejected arguments that the Geneva Conventions could be invoked by detainees seeking habeas relief at all on the grounds that, *inter alia*, (1) Geneva "supplies no basis for granting habeas relief because it is not self-executing" and therefore "does not confer any privately enforceable rights," and (2) the President's determination that the Geneva rules protected neither al-Qaeda nor Taliban fighters was conclusive *as a matter of law*.<sup>45</sup>

In contrast, the Obama Administration's opening legal brief setting forth its position on the scope of the government's detention authority over the detainees at Guantanamo Bay is shot through with reference to and reliance on international law. In addition to abandoning the Bush Administration argument that Article II of the Constitution itself provides adequate, independent authorization for the President to detain individuals engaged in armed conflict against the United States, the brief states at the outset that "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war," a body of law that includes "prohibitions and obligations" either "codified in treaties such as the Geneva Conventions" or recognized as "customary international law."<sup>46</sup> Indeed, while

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42. See Respondents' Statement of Legal Justification for Detention, *In re Guantanamo Bay Detainee Litig.* (D.D.C. Dec. 16, 2008) (Misc. No. 08-442) (summary filing locating the source of executive detention power in Article II and the AUMF, without citation to Geneva Conventions).

43. Brief for the Respondents, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

44. *Id.*

45. Brief for the Respondents, *supra* note 26.

46. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In Re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar.13, 2009) [hereinafter Respondents'

acknowledging that the law of armed conflict was less well developed for conflicts between states and armed groups (as opposed to conflicts between state powers alone), the brief maintained that “[p]rinciples derived from law-of-war rules governing international [state-to-state] armed conflicts” must nonetheless inform the interpretation of the scope of authority granted by the AUMF.<sup>47</sup> Relying on the United Nations Charter, as well as UN and NATO resolutions adopted in the wake of the September 11, 2001 attacks on the United States affirming the right of states to individual or collective self-defense, the brief understands the AUMF as, among other things, invoking “the internationally recognized right to self-defense.”<sup>48</sup> The only mention of judicial deference comes eventually in a footnote arguing that the court should defer to “the President’s judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle[s] him to treat members of irregular forces as state military forces are treated for purposes of detention.”<sup>49</sup> Notably, this appears to seek “deference” from the court not so the President may treat detainees under the AUMF however he thinks “necessary and appropriate” (in the language of the AUMF) or to a determination that the Guantanamo detainees are entitled to *lesser or no* protection under the law of war because they are not regular fighters (as the Bush Administration had maintained), but to a determination that irregular forces are entitled to *the same* status as state military forces “for purposes of detention.” In other words, one could read the brief as seeking deference to the notion that Geneva imposes *greater* duties of protection upon the Executive than courts (or the previous Administration) had thus far recognized.

### REWINDING THE ONE-WAY RATCHET?

Such a passing collection of examples provides an admittedly modest basis for drawing broad conclusions about the habits of executives once in power. Nonetheless, it seems worth

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Memorandum].

47. Respondents’ Memorandum, *supra* note 46, at 3 (U.S. authority to hold Guantanamo detainees “is derived from the AUMF, which empowers the President to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is ‘necessary and appropriate’”).

48. Respondents’ Memorandum, *supra* note 46, at 4–5.

49. *Id.* at 6 n.2.

considering what if anything the relative difference in approach taken by the two administrations tells us about the nature of shifts in executive power—and the potential role of international law in achieving any moderating effect. We might usefully consider a range of possibilities below in attempting to explain the forces motivating the seeming shift in executive engagement with the Geneva regime. The options are not meant to be mutually exclusive; indeed, it seems likely that more than one explanation is required to understand an administration's behavior—and the behavior of the multiple constituencies within each administration. Still, each explanation carries different implications for the salience of the one-way ratchet theory, and it is helpful to unpack them separately. We begin with the possibility of least significance to the one-way ratchet view—namely, Bush-to-Obama has seen no real change in understanding of the constraints imposed by international law at all.

#### A. INTERNATIONAL LAW AS PAPER TIGER

A first potential response to the account of shifting language above is that it is all rhetoric, no reality. While the Obama Administration's speeches and even legal briefs may invoke international law with more frequency or attention than did its predecessor administration, in fact the result is effectively the same. In particular, the Obama Administration continues to maintain that the United States is engaged in an ongoing global armed conflict of indefinite duration against a terrorist organization, and that it therefore has the authority to detain a broad swath of "belligerents" at Guantanamo Bay (and in Afghanistan), a category of individuals that includes members and mere "supporters" of al-Qaeda, wherever they may be seized.<sup>50</sup> The Administration may believe international law is

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50. Compare Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus at 24, *al-Maqaleh v. Gates*, 620 F. Supp. 2d 51 (D.D.C. 2009) (Nos. 06-1668, 08-1307, 08-2143), with Brief for the Respondents at 67, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196). The Obama Administration has likewise taken the position in briefing that detainees held at the newly built U.S. detention facility at Parwan at Bagram Air Field in Afghanistan (the successor prison to the Bagram Theater Internment Facility) are not entitled to seek habeas corpus in U.S. federal courts. Respondents' Motion to Dismiss, *supra* note 41, at 2–3. At the same time, the Administration has taken aggressive steps to transfer detention operations in Afghanistan to the Afghans, in keeping with an effort to bring the United States in line with international legal obligations. STANLEY MCCHRYSTAL, COMMANDER'S INITIAL ASSESSMENT at F-1 (2009), available at <http://media.washingtonpost.com/wp-srv/>

relevant to understanding the scope of the AUMF, but it also effectively contends that international law allows it to do precisely what the Bush Administration insisted it could do under differently cast legal authority. Likewise, President Obama may have issued an Executive Order requiring compliance in interrogations with Common Article 3, but as the Obama Order itself demonstrates, Executive Orders are readily subject to revision. It could easily issue a contrary Executive Order tomorrow. And while the new Military Commissions Act may allow detainees to raise Geneva Convention rights in defense against war crimes prosecution, Convention law is notoriously vague on what in fact is meant by Common Article 3's guarantee of "all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>51</sup> Given the scope of procedural rights already available to Commission defendants,<sup>52</sup> the Conventions per se are unlikely to require the Administration to behave any differently than it would already under existing statutory (and constitutional) requirements. In this regard, the fact that the Administration cites international legal obligations has no bearing at all on the scope of the power it in fact asserts. Indeed, it asserts just as much power as the predecessor regime. At worst, international law is used to provide additional diplomatic—and legal—cover for pursuing policies that expand executive power further.

The paper tiger account is tempting in a number of respects, most especially in its description of the relative similarity of detention policies between the post-*Boumediene* Bush Administration (confronting detainees' constitutional entitlement to seek habeas corpus) and the pre-Guantanamo closure Obama Administration.<sup>53</sup> Still, the view that nothing in practice has changed seems to give short shrift to recent Administration behavior in invoking international law. For one thing, some of the Administration's invocations of international law were in fact accompanied by the specific rejection of a

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politics/documents/Assessment\_Redacted\_092109.pdf. ("It is critical that we continue to develop and build capacity to empower the Afghan government to conduct all detentions operations in this country in accordance with international and national law."); see also Alissa J. Rubin, *U.S. Readies New Facility for Afghan Detainees*, N.Y. TIMES (Nov. 15, 2009), available at [http://www.nytimes.com/2009/11/16/world/asia/16bagram.html?\\_r=2](http://www.nytimes.com/2009/11/16/world/asia/16bagram.html?_r=2).

51. *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006) (Kennedy, J., concurring) (discussing procedural rules emerging from Common Article 3).

52. 28 U.S.C. 2241, *et seq.*

53. *Boumediene v. Bush*, 553 U.S. 723 (2008).



broader assertion of practical power by the prior Administration. The Bush Administration maintained that it enjoyed the power, for instance, to subject terrorist suspects to a form of mock execution by drowning (often called waterboarding).<sup>54</sup> The Obama Administration has renounced that power.<sup>55</sup> The Bush Administration embraced rules for military commissions that permitted the admissibility of testimony obtained under “cruel, inhuman or degrading treatment” under certain circumstances.<sup>56</sup> The Obama Administration’s revised military commission bill bars the use of such testimony.<sup>57</sup> The Bush Administration maintained that Congress and even the courts were limited in their authority to determine the meaning of treaties by virtue of the President’s own formal constitutional power over treaty interpretation.<sup>58</sup> The Obama Administration has to date advanced no such understanding.<sup>59</sup>

Perhaps more important, even if one accepts the argument that the Obama Administration’s references to the constraints of international law are more rhetorical than real, the question remains why an Executive would change even its rhetorical

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54. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 2004 WL 3554701 (O.L.C.) (Dec. 30, 2004); COMMITTEE ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008), *available at* [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf).

55. Senate Confirmation Hearings: Eric Holder, Day One, Wash. Post 11 (Jan. 16, 2009), *available at* <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?pagewanted=11>. It is true that executive orders are easily revoked, but all law could of course be changed pursuant to appropriate procedures; the prospect that the law might change does not undermine the binding nature of the legal obligation during the time it exists.

56. 10 U.S.C. § 948r.

57. *Id.* § 948r(a).

58. *See, e.g.,* Yoo, *Politics as Law?*, *supra* note 11, at 869–77 (arguing this in the context of the ABM treaty); Yoo ABM Memo, *supra* note 22, at 6 & n.6 (making the argument in the context of the ABM treaty again); Haynes Memo, *supra* note 20, at 47 (arguing this in the context of the Geneva Conventions).

59. Indeed, a federal appeals court recently rejected the Obama Administration’s position that international law must be understood as informing the interpretation of the AUMF. *al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (“The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts. . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President’s war powers.” (citations omitted)).

stance toward treaty law in a way that might imply a limit on power previously asserted. One can imagine various answers to this question as well—and some are considered in the discussion of alternative explanations for recent shifts below. But the most basic explanation for the Executive’s one-way ratchet tendencies—the existence of political incentives that drive Presidents to claim more power rather than less—does not seem to explain why a President would make such a rhetorical move. On the contrary, if domestic political posturing were the most salient explanation, one might equally imagine a new President moving visibly—even if not practically—to embrace and consolidate broader authority by rejecting international law constraints conclusively.<sup>60</sup>

#### B. INTERNATIONAL LAW AS LITIGATION STRATEGY

A second possible reading of Obama Administration actions would acknowledge that the Administration has shifted posture somewhat—at least rhetorically and in some respects practically—to recognize legal constraints posed by treaty obligations, but would attribute the Administration’s behavior to savvy and necessary litigation strategy in the numerous Geneva-related cases that have moved and are moving through the domestic federal courts. Since 2001, the Supreme Court has issued a series of decisions recognizing to varying degrees the relevance of international law to executive policies of detention and trial. Most significant among these: the *Hamdi v. Rumsfeld* plurality opinion in 2004, which made no mention of judicial deference to the Executive and expressly construed the AUMF in light of “longstanding law-of-war principles”;<sup>61</sup> and *Hamdan*, two years later, in which the Court was even more aggressively non-deferential to executive treaty interpretation, squarely rejecting the Bush Administration’s position that Common Article 3 did not apply to the conflict in Afghanistan.<sup>62</sup> It is on these two issues in particular—the relevance of international law to the interpretation of the AUMF and the applicability of Common Article 3 to interrogation operations—that the Obama

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60. See Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483 (2010) (describing public opinion polls finding that many Americans, and sometimes majorities, support counterterrorism practices involving “heavy force,” including harsh interrogation techniques such as waterboarding).

61. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

62. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Administration has been most aggressive in embracing the constraints of international law. Under the circumstances, Administration attorneys would have been foolish at best not to recognize the implications of such holdings in its policy positions and legal briefs.

At the same time, where the courts have been less vocal in checking executive prerogatives, the Obama position has remained largely unchanged from the Bush position. Recall, for example, that the Supreme Court issued a ruling much more favorable to the Executive in *Munaf v. Geren*,<sup>63</sup> an often overlooked 2008 decision in which the Court reached out to decide the merits of a habeas petition filed by Americans held by U.S. forces in Iraq. Among other claims, the Americans had argued that U.S. obligations under the Convention Against Torture (and federal implementing regulations) barred the United States from transferring them to the Iraqis for criminal prosecution given the likelihood that they would face torture in Iraqi custody.<sup>64</sup> While the Court avoided deciding key aspects of the transfer question as a matter of law, it took an enormously deferential stance toward the Executive's factual determination that the United States had received adequate assurances from the Iraqis that the Americans would be reasonably treated.<sup>65</sup> In parallel contrast, the Obama Administration's position on its

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63. 128 S. Ct. 2207 (2008).

64. *Id.* at 2226 & n.6 (2008) (citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *adopted* Jan. 9, 1975, 1465 U.N.T.S. 85, S. TREATY DOC. NO. 100-20, at 6 (1988) (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”) (addressing claims under Foreign Affairs Restructuring and Reform Act of 2008, Pub. L. No. 105-277, div. G, 112 Stat. 2681–822 (1998))).

65. *Munaf*, 128 S. Ct. at 2226 (2008) (“In these cases the United States explains that, although it remains concerned about torture among some sectors of the Iraqi Government, the State Department has determined that the Justice Ministry—the department that would have authority over *Munaf* and *Omar*—as well as its prison and detention facilities have ‘generally met internationally accepted standards for basic prisoner needs.’ The Solicitor General explains that such determinations are based on ‘the Executive’s assessment of the foreign country’s legal system and . . . the Executive[’s] . . . ability to obtain foreign assurances it considers reliable.’ The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, ‘we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks.’”) (internal citations omitted).

authority to transfer terrorist suspects from one country to another outside standard extradition channels—the practice of so-called ‘extraordinary rendition’—has been little changed from the Bush Administration. Indeed, the Obama Administration early on moved to embrace the existing executive view that diplomatic assurances are an adequate means for guarding against the transfer of individuals to countries where they may face torture.<sup>66</sup> Where the Court’s decisions had not clearly compelled otherwise, the Administration thus embraced the generally broad authority the past President asserted, despite the evidently broad swath of international law regulating interstate transfers. In short, the argument proceeds, the Obama Administration has ceded power claimed by the Bush Administration only to the extent that it has been compelled to do so by the domestic courts. Such behavior should not, therefore, be understood as bearing on that aspect of the one-way ratchet theory that maintains that executives have no political or institutional incentive to willingly cede power their predecessors have effectively seized. In this case, there is nothing ‘willing’ about it.

It may well be the case that the Obama Administration’s relatively greater embrace of international legal constraints in this realm can be attributed at least in part to its realistic assessment of the domestic legal consequences of a contrary view. But some caution may be in order before concluding that litigation is a complete explanation. First, the Supreme Court’s rulings in *Hamdi* and *Hamdan* only went so far. They did not of themselves compel the Administration to take any action with respect to interrogation policy per se; nor did they require the Administration to ease restrictions on the invocation of the Geneva Conventions by defendants in military commission trials. And while the Court was far from deferential to the Executive’s interpretation of international law in either case, the Court hardly precluded Executives from raising strong arguments in favor of judicial deference or abstention in the future. Yet while Obama Administration briefs are not devoid of requests for judicial deference to executive treaty interpretation—indeed, obligations of zealous advocacy would seem to require Administration lawyers to invoke whatever such

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66. Greg Miller, *Obama Preserves Renditions as a Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, available at <http://articles.latimes.com/2009/feb/01/nation/na+rendition1>.

arguments are reasonably available—such demands are notably muted compared to the previous Administration. Perhaps more striking than the Guantanamo brief described above, the Administration recently filed a brief urging the Supreme Court to deny certiorari in the case of Manuel Noriega, the sole official “prisoner of war” currently in U.S. custody. Noriega had argued unsuccessfully in federal habeas court that the Third Geneva Convention requirement of repatriation at the conclusion of hostilities precluded the United States from extraditing him to France to face criminal prosecution.<sup>67</sup> The United States had vigorously disputed this reading of the Convention on its merits, and the Obama Administration reasserted that argument in its Supreme Court brief. But far from the Bush Administration’s position in *Hamdi* that the President’s views on the applicability of Geneva to the Afghan conflict was “conclusive” as a matter of law on the Court,<sup>68</sup> the Obama Administration made a far more modest claim—namely that the Executive’s views on the meaning of the treaty were entitled to a degree of “respect,”<sup>69</sup> a notably lesser degree of deference than “great weight” on the continuum of standards usually discussed.<sup>70</sup> One might conceive of a litigation strategy that makes it sensible for the Executive to demand less deference from the Court than it believes it deserves. But the strategic motivation from a litigation perspective is far from obvious.

Perhaps more important, even if litigation strategy were a

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67. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (Thomas, J., dissenting).

68. Brief for the Respondents *supra* note 26, at 23–24 (“Both Article 5 and the military’s regulations call for a military tribunal only when there is ‘doubt’ as to an individual’s ‘legal status’ under the [Third Geneva Convention] to receive POW privileges, and not as to each and every captured combatant. In the case of Hamdi and the other al Qaeda and Taliban detainees in the current conflict, there is no such doubt. The President—the highest ‘competent authority’ on the subject—has conclusively determined that al Qaeda and Taliban detainees, including Hamdi, do not qualify for POW privileges under the [Third Geneva Convention].”).

69. Brief for the Respondent in Opposition at \*11–12, *Noriega*, 130 S.Ct. 1002 (2010) (No. 09-35), 2009 WL 2904602 (“[T]he court of appeals’ conclusion that petitioner’s extradition to France is not barred by the Third Geneva Convention is a reasonable construction of the convention that comports with its text and overall purposes. The court of appeals’ reading is also consistent with the views of the Executive Branch, which are entitled to respect.” (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”))).

70. William Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

complete answer, there are reasons to pause before concluding from this that the Administration's relative acceptance of greater international legal constraints poses no challenge to the one-way ratchet view. On the contrary, the success of the one-way ratchet approach to presidential power has been thought to depend not only on executive incentives, but also on the existence of an equal and opposite set of incentives by Congress and particularly the courts. That is, the one-way ratchet has worked because the President's propensity to seek power has been met by the judiciary's propensity to let him have it.<sup>71</sup> If the President is now in fact reining in assertions of authority in response to judicial push-back, the litigation strategy explanation is in this sense an argument that the ratchet mechanism is not altogether functioning as expected.

### C. INTERNATIONAL LAW AS TRANSNATIONAL PROCESS

A third set of potential explanations poses perhaps the greatest challenge to the one-way ratchet view. Consider next that the Obama Administration is indeed responding to political incentives as the one-way ratchet view contemplates, but those incentives are, in this instance, pushing the Administration to seek greater *constraints* on its power. From the rich literature on why states comply with international law,<sup>72</sup> one might explain the phenomenon in various ways. On one view, the Obama Administration's early behavior is a case study in the transnational legal process explanation of why states comply with international law. The notion here, advanced by Harold Koh among others, is that once a nation enters a regime of international legal rules—say, the rules regulating armed conflict—its bureaucracy and governing apparatus are drawn into a dialectic engagement with a range of governmental and nongovernmental actors seeking to ensure the mutual domestic internalization of those rules.<sup>73</sup> As those rules become internalized by domestic legal and social structures and institutions, they themselves function to ensure ongoing compliance.<sup>74</sup> If such a mechanism is at work here, the Obama

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71. KOH, *supra* note 1, at 134–49.

72. See generally FOUNDATIONS OF INTERNATIONAL LAW (Harold H. Koh & Oona A. Hathaway eds., 2005) (reviewing and assembling literature).

73. Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2651 (1997).

74. *Id.* (describing transnational legal process as “the evolutionary process whereby repeated compliance gradually becomes habitual obedience.”).

Administration is simply manifesting the political success such transnational actors have had during the past eight years in forcing the more effective internalization of Geneva rules.

Transnational nongovernmental organizations, the news media, academic advocates, and civil society more broadly can indeed make a strong case of having played an instrumental role in bringing about what change has occurred. It was hardly an accident that the group flanking President Obama in the Oval Office when he signed the early Executive Order mandating compliance with Common Article 3 was a collection of retired U.S. admirals and generals.<sup>75</sup> The group had been catalyzed and organized over a period of years by the NGO Human Rights First, and had played a pivotal role in securing the passage of an amendment, sponsored by Senator John McCain, to the Detainee Treatment Act of 2005 clarifying that the international law ban on “cruel, inhuman and degrading treatment” applies wherever U.S. officials operate.<sup>76</sup> In addition, a series of investigative reports, including those conducted by the Pentagon, surrounding the publication of photos of torture by U.S. agents at Abu Ghraib found rampant violations of Convention rules, and recommended disciplinary (and on occasion criminal) action against troops involved.<sup>77</sup> The U.S. Army Field Manual on Human Intelligence Collector Operations likewise underwent revision in 2006, and emerged reinforcing the guidance that all interrogation operations were to be conducted within the constraints established by the McCain Amendment, the Geneva Conventions, and other relevant laws.<sup>78</sup> The examples could go on.

Yet one might also identify various objections to this view. As was made apparent by the internal opposition the Bush Administration faced within the Pentagon when it moved to ease Geneva restrictions, Geneva Convention rules had been

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75. *Obama Signs Order to Close Guantanamo Bay*, CNN.COM (Jan. 22, 2009), available at <http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html>.

76. For a discussion of the role retired military leaders played in this and other anti-torture initiatives, see Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L. J. 1255, 1279–88 (2006).

77. See, e.g., MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), available at [http://www.dod.gov/pubs/foi/detainees/taguba/TAGUBA\\_REPORT\\_CERTIFICATIONS.pdf](http://www.dod.gov/pubs/foi/detainees/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf).

78. DEPT OF THE ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

seemingly well internalized already by the U.S. Armed Forces—in Army regulations implementing the Conventions, in field manual rules, in training programs, in legal instruction—in the years following Vietnam.<sup>79</sup> It is possible that the domestic and international response to events like Abu Ghraib somehow solidified the internalization of these norms in a way that had not happened before, but the degree of difference is not entirely clear. And while some of the government responses to Bush Administration policies tended to reinforce Geneva norms, other responses have had more the opposite effect. For instance, in an amendment to the federal habeas corpus statute still on the books, Congress in 2006 barred individuals from so much as “invoking” the Geneva Conventions as a “source of rights” in any U.S. court.<sup>80</sup> The effect, and legality, of this provision

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79. Military lawyers in particular pushed back vigorously against Bush Administration efforts to avoid the strictures of the Geneva regime. *See, e.g.*, 151 CONG. REC. S8794 (daily ed. July 25, 2005) (statement of Sen. Graham) (introducing into the congressional record memos prepared by service JAG officers, including Memorandum from Brig. Gen. Kevin M. Sandkuhler, Staff Judge Advocate to Commandant of the Marine Corps, to Gen. Counsel for the Dep’t of the Air Force, Re: Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003); Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate Gen., U.S. Air Force, to General Counsel for the Dep’t of the Air Force, Re: Comment on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. 6, 2003) (“[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral ‘high-road’ in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.”); Memorandum from Maj. Gen. Thomas J. Romig, Judge Advocate Gen., U.S. Army, to Gen. Counsel for the Dep’t of the Air Force, Re: Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Mar. 3, 2003) (“While the OLC analysis speaks to a number of defenses that could be raised on behalf of those who engage in interrogation techniques later perceived to be illegal, the ‘bottom line’ defense proffered by OLC is an exceptionally broad concept of ‘necessity.’ This defense is based upon the premise that any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war. I question whether this theory would ultimately prevail in either the U.S. courts or in any international forum. If such a defense is not available, soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit.”).

80. 28 U.S.C.A. § 2241(e) (2007) (attempting to strip the courts of jurisdiction over



remains to be tested conclusively.<sup>81</sup> At a minimum, however, it must be seen as an obstacle to the enforcement of the Geneva Conventions that did not previously exist.

#### D. INTERNATIONAL LAW AGAINST THE ONE-WAY RATCHET

If the transnational legal process effect here seems uncertain, it may be more useful to consider a related explanation an international legal realist might offer. In this view, both Bush and Obama Administrations have pursued realist objectives. Both Administrations read treaty obligations in a way that serves the Executive's national security strategy; the Obama Administration simply has a somewhat different national security strategy than the Bush Administration did. The dramatic exchange of internal memos early in the Bush Administration with contrasting recommendations to the President regarding the applicability of the Geneva Conventions sheds useful light on this distinction. Then White House Counsel Alberto Gonzales had embraced the OLC view (described above) that the Third Geneva Convention had no application to the armed conflict with al-Qaeda, basing his argument in significant part on the Administration's strategic policy interests in "preserv[ing] flexibility" in the new "war against terrorism," facilitating the rapid collection of information from detainees, and leaving open future options for the treatment of non-state actors.<sup>82</sup> In response, then Secretary of State Colin Powell took a very different view of the strategic wisdom of the wholesale rejection of the application of Geneva to the conflict in

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habeas petitions filed by Guantanamo detainees). The Obama Administration has also faced strong criticism for its decision not to pursue more aggressively criminal prosecution of former Bush Administration officials for their involvement with the torture of detainees in U.S. custody. See, e.g., Glenn Greenwald, *When Presidential Sermons Collide*, SALON.COM, Mar. 25, 2010, <http://www.salon.com/> (search for "When Presidential Sermons Collide"; then follow "When Presidential Sermons Collide" hyperlink under "Archived Results"). Critics have voiced concern that failure to pursue prosecutions here will undermine the ability of Geneva Convention prohibitions against torture to deter officials in future conflicts. See, e.g., Mark Danner, *If Everyone Knew, Who's to Blame*, WASH. POST, Apr. 26, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042402654.html?hpid=opinionsbox1>.

81. See *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (No. 09-35) (denying certiorari); *Al Warafi v. Obama*, 2101 WL 1404001, \*10 (D.D.C. 2010) (holding that the 2006 amendment bars detainee from claiming in habeas proceeding that his detention is unlawful under the First Geneva Convention).

82. Memorandum from Alberto R. Gonzales, White House Counsel, to the President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), in *THE TORTURE PAPERS*, *supra* note 20, at 118–21.

Afghanistan.<sup>83</sup> Insisting that particularized determinations about the availability of prisoner-of-war protections to individual detainees leaves room for substantial strategic flexibility, Powell emphasized that a lack of adherence to the Geneva regime would have a significant negative impact on U.S. counterterrorism efforts, undermining cooperative relationships with allies, and limiting the power of U.S. moral authority to persuade wavering neutrals in the struggle against international terrorism.<sup>84</sup>

While the Obama Administration may not yet have had occasion to articulate its full understanding of the President's treaty interpretation power in general, its rhetoric surely embraces the Powell view of the United States' strategic interests in Geneva compliance in particular. As the President explained in a highly publicized May 2009 speech at the National Archives in Washington, D.C.:

We uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security –asset—in war and peace; in times of ease and in eras of upheaval. Fidelity to our values is the reason why . . . enemy soldiers have surrendered to us in battle, knowing they'd receive better treatment from America's Armed Forces than from their own government. It's the reason why America has benefitted from strong alliances that amplified our power, and drawn a sharp, moral contrast with our adversaries . . . . And where terrorists offer only the injustice of disorder and destruction, America must demonstrate that our values and our institutions are more resilient than a hateful ideology.<sup>85</sup>

For President Obama, the Bush interpretation of Geneva that enabled the use of waterboarding and the establishment of the detention facility at Guantanamo Bay “serve[d] as a recruitment

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83. Memorandum from Colin L. Powell, U.S. Sec'y of State, to the Counsel to the President and the Assistant to the President for National Security Affairs, Draft Decision for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, in *THE TORTURE PAPERS*, *supra* note 20, at 122–25.

84. Powell also urged that wholesale rejection of Geneva would potentially further endanger U.S. troops who fall into this or other enemies' hands, and confuse troops charged with detention operations (whose only training had been to Geneva Convention standards). *Id.* While starkly critical of the Gonzales/OLC view, the Powell memo took no position on the President's structural authority to interpret Geneva conclusively one way or another.

85. Remarks by the President on National Security, *supra* note 32.

tool for terrorists, and increase[d] the will of our enemies to fight us, while decreasing the will of others to work with America.”<sup>86</sup> In short, the Bush interpretation no longer served the Obama presidency’s strategic approach to counterterrorism. For the realist, executive compliance, *vel non*, with international legal obligations is and ever has been a function of presidential political assessments of the national interest—and in this regard, it is in line with the one-way ratchet thesis. It just so happens that in this case, the political incentives to which the Executive is responding lead it to embrace rather than shun legal constraint.

The notion that the two administrations have articulated differing views of their counterterrorism approaches at the strategic level is not difficult to accept.<sup>87</sup> It is likewise certainly true that the Obama interpretation of Geneva—to prohibit waterboarding, for example—is in line with the policy strategy the new Administration has articulated. But if the strategic interest explanation is right, the consequences for the one-way ratchet theory are severe. That is, this explanation for the Obama Administration’s behavior would accept that the President responds to domestic and international political incentives (including allies’ pressure to comply), but it would also suggest that those incentives might on occasion at least lead the ratchet to swing either way—toward greater or lesser assertions of executive power, or, at a minimum, to something other than a perennial executive commitment to power maximization over issues of national security.

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86. *Id.* The notion that the Bush approach was compromising relations with international allies was hardly the President’s alone. A remarkable study by a committee of the British Parliament reported that “Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment.” Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007. The full report of the Committee is available at [http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725\\_isc\\_final.pdf](http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf). See also Craig Whitlock, *Testimony Helps Detail CIA’s Post-9/11 Reach*, WASH. POST, Dec. 16, 2006, at A1 (quoting State Department legal adviser John B. Bellinger III as indicating that ongoing disputes with U.S. allies have “undermined cooperation and intelligence activities”).

87. See also Nobel Peace Prize, *supra* note 32; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, A New Approach for Safeguarding Americans, Address Before the Ctr. for Strategic and Int’l Studies (Aug. 6, 2009), available at [http://csis.org/files/attachments/090806\\_brennan\\_transcript.pdf](http://csis.org/files/attachments/090806_brennan_transcript.pdf); *Senate Confirmation Hearings: Eric Holder, Day One*, N.Y. TIMES, Jan. 16, 2009, at 11, available at <http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?pagewanted=11>.

## CONCLUSION

If the realist explanation turns out to be a meaningful piece of the puzzle in this particular case, then there are interesting implications for both constitutional and international law. For constitutional law, the realist effect demonstrates the need to revisit and perhaps update our understanding of the political pressures facing the President, to better account for the pressure that may be applied by an international community with structures, laws and norms vastly better developed than those facing the Presidency as it stood at the founding, or immediately following World War II. For international law, the realist explanation offers another example of the ways in which international law, while often lacking in institutional enforcement mechanisms, may well shape state conduct nonetheless. Under any circumstances, it remains to be seen whether the Obama Administration's initial moves surrounding the Geneva regime will be sustained, or swamped by larger initiatives. In the meantime, this early example opens an avenue for greater exploration at the conclusion of the Administration's term.