

Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law

by Erin Louise Palmer*

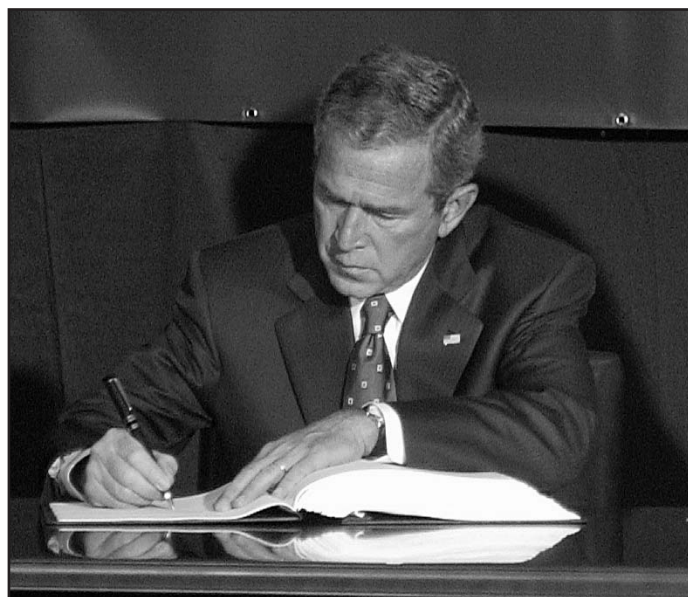
THE U.S. GOVERNMENT HAS PUBLICLY CONDEMNED torture through its policy commitments and congressional legislation. Secretary of State Condoleezza Rice has stated, “The United States Government does not authorize or condone torture of detainees. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world.”¹ President Bush has also claimed that the United States does not torture.² Congress has prohibited torture under the Torture Victim Protection Act of 1991,³ the Torture Statute,⁴ and the McCain Amendment.⁵ Despite executive statements condemning torture and firm legislative prohibitions, President George W. Bush attached a signing statement to the McCain Amendment that states, “The Executive Branch shall construe ... the Act ... in a manner consistent with the constitutional authority of the President to supervise the unitary Executive Branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.”⁶ This signing statement relies on the president’s Commander-in-Chief power to undermine domestic legislation and treaty provisions prohibiting the torture and cruel, inhuman, and degrading treatment of detainees in U.S. custody. Other signing statements further threaten compliance with domestic and international prohibitions against torture and cruel, inhuman, and degrading treatment.

This article examines the impact of signing statements on legal prohibitions against torture, beginning with an account of the historical origin of signing statements. It proceeds to explain the constitutional arguments justifying the use of signing statements as a legal extension of the president’s Commander-in-Chief power. After presenting the legal framework, this article focuses on three instances where the executive has attempted to limit the scope of domestic legislation prohibiting torture: (1) the Torture Victim Protection Act of 1991; (2) the Torture Statute, the implementing legislation for the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (3) the McCain Amendment. This article concludes by examining how signing statements, as an improper exercise of presidential Commander-in-Chief power, erode U.S. compliance with established international legal bans against torture. Signing statements that limit the scope and applicability of U.S. and international law violate domestic prohibitions against torture and threaten U.S. adherence to its international treaty obligations. Reinterpretations of the universal prohibition against torture pose a grave danger to the continued strength of well-established human rights principles.

THE HISTORY OF PRESIDENTIAL SIGNING STATEMENTS

Scholars have classified presidential signing statements into three distinct categories: (1) constitutional signing statements that note constitutional defects in legislation; (2) political signing statements that define ambiguous sections of a bill; and (3) rhetorical

signing statements that draw the public’s attention to positive or negative aspects of legislation.⁷ Constitutional signing statements, the focus of this article, are an expression of how the president plans to interpret and enforce a law passed by Congress. Signing statements may therefore affect the application of legislation both domestically and internationally.



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U.S. President Bush signs UN Convention

James Monroe issued the first signing statement, which argued that “the President, not Congress, bore the constitutional responsibility of appointing [military] officers.”⁸ Just over a dozen signing statements were issued before 1981.⁹ The strategic use of signing statements increased rapidly during the Reagan administration. President Reagan challenged 71 legislative provisions, President George H.W. Bush challenged 232, and President Clinton challenged 140.¹⁰ The figures for President George W. Bush vary, with administration officials citing 110¹¹ challenges and some scholars identifying up to 807.¹² President George W. Bush has only vetoed one piece of legislation throughout his tenure, implying that he is using signing statements in lieu of his veto powers.¹³

President Reagan based his increased use of signing statements on a 1986 Justice Department memorandum authored by Samuel Alito.¹⁴ Alito asserted, “Since the president’s approval is just as important as that of the House or Senate, it seems to follow that the president’s understanding of the bill should be just as important as that of Congress.”¹⁵ As the American Bar Association recognized in its critique of signing statements, “For the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives.”¹⁶

The Clinton administration also supported signing statements. A 1993 Office of Legal Counsel opinion addressing the legal significance of signing statements noted their utility for

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(1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption, (2) directing subordinate officers within the Executive Branch how to interpret or administer the enactment, and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition.¹⁷

The opinion focused on the distinction between these apparently valid uses of signing statements and their more questionable use “to create legislative history to which the courts are expected to give some weight when construing the enactment.”¹⁸

In 1994 Assistant Attorney General Walter Dellinger authored a memorandum clarifying that the president should “sustain a particular provision as constitutional” if he believes that the courts would uphold that provision.¹⁹ The memorandum emphasized the importance of weighing the effect of compliance with a provision on the constitutional rights of individuals with the executive’s constitutional authority, as well as whether compliance or noncompliance would facilitate judicial resolution.²⁰ Later interpretations concluded that if a “law were not struck down [by the courts], the President would have no choice but to enforce it.”²¹

CONSTITUTIONAL JUSTIFICATIONS FOR THE USE OF SIGNING STATEMENTS

Presidents have relied on Article II, Section 3 of the Constitution to support their use of signing statements. Article II, Section 3 states that the president “shall take Care that the Laws be faithfully executed.” Proponents of the use of signing statements rely on this constitutional provision to the exclusion of Article I, which gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution [its] powers.” Further, Article III empowers the judiciary to determine all “Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties.” *Marbury v. Madison* solidified the power of judicial review by acknowledging the judiciary’s constitutional duty to “say what the law is.”²² The president’s duty to execute laws in accordance with the Constitution should not render meaningless Congress’ power to legislate and the judiciary’s power to interpret the law.

Proponents of signing statements argue that the president cannot enforce unconstitutional laws.²³ Walter Dellinger’s 1993 opinion for the Office of Legal Counsel stated that such practice is similar to judicial action construing legislation in a manner that adheres to the Constitution.²⁴ Although the Executive should not enforce unconstitutional laws, presidential signing statements are misleading because the president has already signed the legislation, often praising Congress and the drafters of the legislation. Commentators have observed that “[t]he President, through his signing statement, can shade the meaning of the language voted upon by Congress.... Under the guise of signing statements used to interpret the acts of Congress, the President can state his objections to a bill in the form of interpretations without fear of contradiction by Congress.”²⁵ According to the Constitution, the president’s role in the legislative process is limited to proposing legislation or vetoing proposed legislation.²⁶ The presidential signing statement therefore functions much like the constitutionally prohibited line-item veto.²⁷

The current administration has relied heavily on the president’s Commander-in-Chief power to justify signing statements. Article II, Section 2 states, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Various signing statements call for the execution of legislation “in a manner consistent with the President’s constitutional authority as Commander in Chief.”²⁸ In their reliance on the president’s Commander-in-Chief power, proponents of signing statements ignore Congress’ broad constitutional authority to control numerous aspects of foreign affairs and national security.²⁹

Signing statements that rely on the president’s Commander-in-Chief power have resulted in the virtual nullification of certain legislation. For example, one signing statement declared legislation forbidding U.S. troops in Colombia from participating in combat against rebels as “advisory in nature.” Another signing statement argued that military lawyers must follow legal conclusions reached by the Justice Department and the Pentagon when giving advice to their commanders despite legislation prohibiting Defense Department personnel from interfering with such communication. Another signing statement attempted to discard requirements that the Pentagon ensure that military prison guards remain informed of the requirements for humane treatment under the Geneva Conventions. Yet another signing statement claimed that the president could bypass laws requiring notice to Congress before the diversion of money for secret operations, including “black sites” that secretly imprison suspected terrorists.³⁰ Signing statements that claim the express will of Congress is “advisory,” limit judicial subject matter jurisdiction, or directly contradict congressional will threaten the separation of powers. As former U.S. Supreme Court Justice Jackson recognized in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, presidential action that contravenes the express or implied will of Congress poses a threat to the “equilibrium established by our constitutional system.”³¹

The Bush administration’s emphasis on the president’s Commander-in-Chief power reveals a broader goal to expand executive influence in foreign affairs and national security. As one commentator has observed, “This administration ... considers that it does exercise the prerogative power and certainly in any area that touches on foreign, military, national security, or intelligence policy.”³² Although the courts have confirmed the need for deference to the executive in these contexts, “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³³

SIGNING STATEMENTS AND TORTURE PROHIBITIONS

PRESIDENT GEORGE H.W. BUSH’S SIGNING STATEMENT FOR THE TORTURE VICTIM PROTECTION ACT OF 1991

On March 12, 1992, President George H.W. Bush attached a signing statement to the Torture Victim Protection Act of 1991.³⁴ This statement strongly condemned torture wherever it may occur³⁵ and called upon Congress to pass legislation implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Despite his condemnation of acts of torture wherever they may occur, President Bush argued that aliens could “misuse” the statute to litigate against other aliens in U.S. courts, thereby overburdening the U.S. legal system. President Bush further stated, “I must note that I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context

of United States military operations abroad or law enforcement actions.... I do not believe it is the Congress' intent that H.R. 2092 should apply to United States Armed Forces or law enforcement operations...."³⁶ President Bush's statement, when read in its entirety, sought to limit remedies afforded by the Act to U.S. nationals tortured by foreign states or their officials. Such an interpretation appears paradoxical given the president's broad and apparently universal proscription of torture in the opening paragraph to the signing statement.

PRESIDENT GEORGE W. BUSH'S SIGNING STATEMENT FOR THE MCCAIN AMENDMENT PROHIBITING TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT

In December 2005 Congress amended the Department of Defense's 2006 Appropriations Act and established the United States Army Field Manual on Intelligence Interrogation as the authoritative standard for the interrogation of individuals "in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility."⁴⁶

“President Bush declared: ‘It is for the president — not Congress or the courts — to determine when the provisions of the McCain Amendment interfere with his war-making powers, and when they do, he will freely ignore the law.’”

THE TORTURE STATUTE AND ATTEMPTS TO LIMIT ITS SCOPE

In 1994 Congress enacted the Torture Statute,³⁷ the implementing legislation for the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention). The Torture Statute imposes criminal penalties on U.S. nationals or any other individual present in the United States who, acting under color of law, "intended to inflict severe physical or mental pain or suffering."³⁸ Penalties under the Torture Statute range from 20 years of jail time to the death penalty depending upon whether the victim died as a result of the prohibited conduct.

A 2002 memorandum from Jay S. Bybee to Alberto R. Gonzales, then-Counsel to President George W. Bush, interpreted the Torture Statute to encompass the Convention's definition of torture, as well as U.S. reservations to the Convention.³⁹ U.S. reservations to the Convention include a limitation on cruel, inhuman, and degrading treatment to "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution."⁴⁰ Alberto R. Gonzales has interpreted this reservation as limiting the protections afforded to U.S. citizens under the Convention.⁴¹

The Bybee memorandum also limited the definition of torture to "[p]hysical pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁴² The memorandum emphasized the president's Commander-in-Chief power to conclude that "in the circumstances of the current war against al Qaeda and its allies, prosecution under [the Torture Statute] may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."⁴³ In 2004 a replacement memorandum concluded, "Because the discussion in that memorandum concerning the President's Commander-in-Chief power ... was — and remains — unnecessary, it has been eliminated from the analysis that follows."⁴⁴ It is questionable whether removal of the Commander-in-Chief analysis "was prompted because the reasoning was wrong or because it was not necessary for the purpose of the original opinion."⁴⁵

The McCain Amendment sought to address any arguments justifying geographical limitations on the explicit prohibition of cruel, inhuman, and degrading treatment.⁴⁷

President George W. Bush attached a signing statement to the McCain Amendment limiting federal subject matter jurisdiction over applications for writs of habeas corpus for so-called enemy combatants.⁴⁸ The signing statement concluded, "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on judicial power." Under President Bush's interpretation, "it is for the president — not Congress or the courts — to determine when the provisions of [the McCain Amendment] interfere with his war-making powers, and when they do, he will freely ignore the law."⁴⁹

Placing emphasis on the president's Commander-in-Chief power undermines legislative action to prohibit torture and cruel, inhuman, and degrading treatment. For example, the executive's broad invocation of power under Article II of the U.S. Constitution limits the Torture Victim Protection Act of 1991, the Torture Statute, and the McCain Amendment by placing actions that implicate foreign affairs or national security within the exclusive control of the executive. When faced with unambiguous legislation, signing statements that offer alternate interpretations of the law flout the will of Congress and threaten the separation of powers. Any attempt to re-write unambiguous congressional legislation also threatens the judiciary's power to "say what the law is."⁵⁰

IMPLICATIONS FOR U.S. OBLIGATIONS UNDER INTERNATIONAL LAW

In addition to undermining domestic legislation, signing statements that weaken prohibitions against torture and cruel, inhuman, and degrading treatment also violate well-established international law norms. Presidents can use signing statements to undermine compliance with U.S. treaty obligations. Certain treaties are directly enforceable in U.S. courts. For example, the United States is obligated to adhere to the requirements imposed under the Geneva Conventions that prohibit torture and humili-

“The president’s
Commander-in-Chief power
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for reinterpreting domestic
legislation prohibiting
conduct that is recognized
throughout the world
community as illegal.”

ating and degrading treatment.⁵¹ In *Hamdan v. Rumsfeld*, the Supreme Court rejected the lower court’s holding that the Geneva Conventions did not create a private right of action and held that Common Article 3 applies to the conflict with Al-Qaeda.⁵² Signing statements that offer alternative interpretations of these prohibitions violate the requirements of the Geneva Conventions.

Signing statements also undermine compliance with domestic legislation that implements international prohibitions against torture. The Torture Statute, the implementing legislation for the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, created criminal penalties for individuals who “commit or attempt to commit” torture.⁵³ The president is acting contrary to the will of Congress when he issues signing statements offering alternative interpretations of Congress’ unambiguous prohibition against torture. As Justice Jackson argued in *Youngstown*, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁵⁴

Further, signing statements frustrate U.S. compliance with international norms prohibiting torture. The International Covenant on Civil and Political Rights (ICCPR) prohibits torture and cruel, inhuman, and degrading treatment. As the Supreme Court noted in *Sosa v. Alvarez-Machain*, however, “Several times ... the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”⁵⁵ Although the ICCPR is a non-self-executing treaty, it embodies norms recognized by the international community. Attempts to undermine these norms places the United States in contravention of international will.

In addition to threatening U.S. treaty obligations, signing statements weaken U.S. compliance with customary international law, which arguably forms a part of federal common law⁵⁶ and is therefore enforceable in U.S. courts.⁵⁷ Customary international law consists of widely accepted state practice stemming from a sense of legal obligation.⁵⁸ States are bound by customary international law unless

they are persistent objectors during the formation of a norm of customary international law.⁵⁹ To avoid its obligations under customary international law, the United States could argue that it is a persistent objector or that the war on terror is a “new” type of war around which new norms of customary international law are developing.⁶⁰

The U.S. government has argued that cruel, inhuman, and degrading treatment is not a norm of customary international law because such treatment does not rise to the level of torture. The Bybee memorandum, for example, concludes that “certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within [the Torture Statute’s] proscription against torture.”⁶¹ In addition, U.S. courts have limited the enforcement of cruel, inhuman, and degrading treatment based on the belief that it does not reach the level of customary international law: “the prohibition ... poses more complex problems of definition than are presented by norms forbidding torture, summary execution, disappearance or arbitrary detention.”⁶² Signing statements further threaten the enforcement of legislation prohibiting cruel, inhuman, and degrading treatment by relying on military necessity and the president’s Commander-in-Chief power. U.S. state practice, therefore, contradicts the norm of customary international law prohibiting cruel, inhuman, and degrading treatment⁶³ and opens the door to legal arguments that the United States is a persistent objector to the prohibition.⁶⁴

It is worth noting that regardless of U.S. state practice, certain norms are non-derogable. These *jus cogens* norms are binding on all states, regardless of whether they are persistent objectors during the formation of a norm of customary international law.⁶⁵ Well-established principles of international law expressly prohibit any attempt to remove executive action from the scope of these prohibitions.⁶⁶ Thus, presidential signing statements that implicitly authorize torture, a *jus cogens* norm, violate international law.

CONCLUSION

U.S. presidents have historically relied on signing statements to modify the application and reinterpret the meaning of national statutes and international treaties. Some legal scholars and administration officials have upheld signing statements as a viable means for articulating presidential understanding of legislation and for guiding judicial interpretation of legislation.

History aside, President George W. Bush’s use of signing statements threatens to undermine unambiguous domestic and international prohibitions against torture and cruel, inhuman, and degrading treatment. Consequently, President Bush’s signing statements jeopardize an individual’s right to be protected from egregious human rights violations. The president cannot invoke his Commander-in-Chief power to justify the reinterpretation of domestic legislation to conflict with international legal standards prohibiting torture.

Recent signing statements invite the reinterpretation of treaty norms, which the United States has a duty to uphold under the Constitution, and customary international law norms, which are part of the federal common law. The United States therefore risks violating both domestic and international law by acting in contravention of these well-established prohibitions. The president cannot justify actions that are contrary to domestic and international obligations. To do so would give the president the power to “easily contrive a constitutional excuse to decline enforcement of any law he deplored, and transform his qualified veto into a monarch-like absolute veto.”

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ENDNOTES: Reinterpreting Torture

- ¹ U.S. Dep't of State, *Remarks Upon her Departure for Europe*, <http://www.state.gov/secretary/rm/2005/157602.htm> (Dec. 5, 2005).
- ² BBCNews, *U.S. does not torture, Bush insists*, <http://news.bbc.co.uk/2/hi/americas/4415132.stm> (Nov. 7, 2005).
- ³ 28 U.S.C. § 1350 (note). The TVPA permits civil suits in the United States against individuals who act under color of foreign law to perpetrate acts of torture.
- ⁴ 18 U.S.C. §§ 2340-2340A (2000).
- ⁵ Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1001, 119 Stat. 2739 (McCain Amendment). The McCain Amendment both recognizes the U.S. Army Field Manual as the authority on interrogation techniques by the Department of Defense and expressly prohibits torture and cruel, inhuman, and degrading treatment of individuals under custody or control of the U.S. government.
- ⁶ Statement by President of the United States, *Statement by President George Bush upon Signing H.R. 2863*, 2005 U.S.C.C.A.N. S50 (Dec. 30, 2005).
- ⁷ See Christopher S. Kelley, *A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton* 3-5 (Apr. 3-6, 2003); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the use and abuse of presidential signing statements*, 35 *Presidential Studies Quarterly* 3, 516-17 (Sept. 1, 2005).
- ⁸ Kelley, *A Comparative Look at the Constitutional Signing Statement* at 5.
- ⁹ Andrew Sullivan, Time, "We Don't Need a New King George" (Jan. 19, 2006), available at <http://www.time.com/time/magazine/article/0,9171,1149361,00.html>.
- ¹⁰ See American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Recommendation* 11, 14 (Aug. 2006), available at http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/.
- ¹¹ Michelle E. Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, Statement before the Committee on the Judiciary, United States Senate, on Presidential Signing Statements (June 27, 2006).
- ¹² Charlie Savage, *Boston Globe*, "Bush blocked probe, AG testifies; Senate examines wiretap program" (July 19, 2006), available at http://www.boston.com/news/nation/articles/2006/07/19/bush_blocked_probe_ag_testifies/.
- ¹³ On July 19, 2006, President Bush issued his first veto of the Stem Cell Research Enhancement Act of 2005. See George W. Bush, Message to the House of Representatives (July 19, 2006), available at <http://www.whitehouse.gov/news/releases/2006/07/20060719-5.html>.
- ¹⁴ Marc V. Garber and Kurt A. Wimmer, *Presidential Signing Statements as Interpretation of Legislative Intent: An Executive Aggrandizement of Power*, 24 *Harv. J. on Legis.* 363, 367 (1987).
- ¹⁵ Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, Memorandum to Litigation Strategy Working Group, *Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law* (Feb. 5, 1986).
- ¹⁶ American Bar Association, "Recommendation" at 10.
- ¹⁷ Walter Dellinger, Opinion of the Office of Legal Counsel, Memorandum for Bernard M. Nussbaum, Counsel to the President, *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993).
- ¹⁸ *Id.*
- ¹⁹ Walter Dellinger, Assistant Attorney General, Memorandum for the Honorable Abner J. Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm>.
- ²⁰ *Id.*
- ²¹ American Bar Association, "Recommendation" 13-14, citing Special White House Briefing on Provision in the FY1996 Defense Authorization Bill Relating to HIV-positive Armed Services Members, *Federal News Service* (Feb. 9, 1996) and Allison Mitchell, *New York Times*, "President Finds a Way to Fight Mandate to Oust H.I.V. Troops" (Feb. 10, 1996).
- ²² 5 U.S. (1 Cranch) 137 (1803).
- ²³ See Dellinger, *The Legal Significance of Presidential Signing Statements*.
- ²⁴ *Id.* at 6.
- ²⁵ Garber and Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent* at 375-76.
- ²⁶ U.S. Const. art. I, sec. 7, cl. 2.
- ²⁷ See generally *Clinton v. New York*, 524 U.S. 417 (1998).
- ²⁸ See *Statement by President George Bush Upon Signing H.R. 2863*.
- ²⁹ See Savage, "Bush challenges hundreds of laws."
- ³⁰ See generally Charlie Savage, *Boston Globe*, "Examples of the president's signing statements," http://www.boston.com/news/nation/articles/2006/04/30/examples_of_the_presidents_signing_statements/ (Apr. 30, 2006).
- ³¹ 343 U.S. 579, 638 (1952).
- ³² Cooper, *George W. Bush, Edgar Allan Poe, and the use and abuse of presidential signing statements*.
- ³³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).
- ³⁴ Statement by President of the United States, *Statement by President George Bush upon Signing H.R. 2092*, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992).
- ³⁵ President Bush states, "The United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur."
- ³⁶ *Id.*
- ³⁷ 18 U.S.C. §§ 2340-2340A (2000).
- ³⁸ *Id.*
- ³⁹ Jay S. Bybee, Assistant Attorney General, Memorandum for Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* 1 (Aug. 1, 2002), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf#search=%22torture%20memo%22 (Bybee memorandum).
- ⁴⁰ U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).
- ⁴¹ Amnesty International, *United States of America*, "Guantánamo and beyond: The continuing pursuit of unchecked executive power," <http://web.amnesty.org/library/Index/ENGAMR510832005?open&cof=ENG-IRQ> (May 13, 2005).
- ⁴² The Bybee memorandum asserted that "[f]or purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years."
- ⁴³ *Id.* at 2.
- ⁴⁴ Memorandum Opinion for the Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004).
- ⁴⁵ Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 *Ind. L.J.* 1145, 1151 (2006).
- ⁴⁶ McCain Amendment, 119 Stat. 2739..
- ⁴⁷ See generally 13 No. 2 *Hum. Rts. Brief* 39-40 (2006).
- ⁴⁸ *Statement by President George Bush Upon Signing H.R. 2863*.
- ⁴⁹ Dahlia Lithwick, *Presidential signing statements are more than just executive branch lunacy*, <http://www.slate.com/toolbar.aspx?action=print&id=2134919> (Jan. 30, 2006).
- ⁵⁰ *Marbury*, 5 U.S. (1 Cranch) at 177.
- ⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135.
- ⁵² 126 S. Ct. 2749, 2793-98 (2006).
- ⁵³ 18 U.S.C. §§ 2340 -2340(A).
- ⁵⁴ 343 U.S. at 637.
- ⁵⁵ 542 U.S. 692, 728 (2004) (internal citations omitted).
- ⁵⁶ The Supreme Court recognized in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

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⁵⁷ The Supreme Court has acknowledged that a private right of action exists under federal common law in certain instances: “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the Alien Tort Claims Act] was enacted.” *Sosa*, 542 U.S. at 732.

⁵⁸ See generally Jordan J. Paust, *The Significance and Determination of Customary International Human Rights Law: The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 Ga. J. Int’l & Comp. L. 147 (1996).

⁵⁹ See *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18, 1951). The International Court of Justice held that a possible customary international law norm would be “inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.”

⁶⁰ One article noted, “if the United States consistently rejects the inclusion of a terrorist organization under Common Article 3, should such an inclusion become customary international law, the persistent objector doctrine indicates that the law would not bind the United States, unless it evolves into a jus cogens norm.” “Executive Power – Military Commissions – D.C. Circuit Upholds the Constitutionality of Military Commissions for Guantánamo Bay Detainees. – Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir.), Cert. Granted, 126 S. Ct. 622 (2005),” 119 Harv. L. Rev. 1606, n. 53 (Mar. 2006).

⁶¹ Bybee memorandum at 1.

⁶² *Xuncax v. Gramajo*, 886 F.Supp. 162, 186 (D. Mass. 1995).

lxiv Professor Robert Goldman argues that “[a]lthough cruel, degrading, or inhuman treatment is . . . clearly prohibited by customary law, its status as jus cogens remains unclear.” *Trivializing Torture: The Office of Legal Counsel’s 2002 Opinion Letter and International Law Against Torture*, 12 No. 1 Hum. Rts. Brief 1 (2006). See, e.g., American Convention on Human Rights art. 5, signed Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222. Both the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibit cruel, inhuman, and degrading treatment.

⁶⁴ Scholars debate whether customary international law stems from a state’s policies or how a state acts in practice; therefore, whether executive and judicial action as opposed to congressional policy would form state practice is questionable. *But see Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 185.

⁶⁵ According to Harold Hongju Koh, Dean of Yale Law School, “the implications are clear: Under U.S. law, the President may not, on his own constitutional authority, violate a jus cogens norm such those against torture or slavery or genocide.”

⁶⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2(2), Dec. 10, 1984.

⁶⁷ See American Bar Association, *Recommendation* 11, 14.