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Federal Statutes, Executive Orders and "Self-Executing Custom"

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AGORA: MAY THE PRESIDENT VIOLATE CUSTOMARY INTERNATIONAL LAW? (CONT'D)

FEDERAL STATUTES, EXECUTIVE ORDERS AND "SELF-EXECUTING CUSTOM"

A hotly debated issue raised in this publication's October 1986 *Agora*[1] and, repeatedly, during the drafting of the *Restatement of Foreign Relations Law of the United States (Revised)* has to do with the relationship between customary international law and federal law in the United States. Most of the debate addressed whether a newly emerged custom would supersede an earlier federal statute or self-executing treaty. The reporters of the *Restatement* took a strong stand at first, placing custom on the same plane as federal statutes and self-executing treaties: in case of conflict, the latest in time should prevail.[2] Criticism rolled in, and the reporters eventually retreated a bit. The final version says only that since custom and international agreements have equal authority in international law, and both are law of the United States, "arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement."[3]

A related question is whether custom could ever supersede a federal executive act, as a matter of U.S. law. Put conversely, the question is whether a federal executive act would prevail over a contrary customary rule. A recent case, *Garcia-Mir v. Meese*,[4] has redirected the debate toward this question. Professor Henkin appears to have the best of the debate so far, but his position still needs some modification. To that end, one must focus on the President's "sole" powers and on what could be called "self-executing custom."

Garcia-Mir dealt with an executive act as well as a congressional enactment. Cuban refugees were being detained in the Atlanta Penitentiary, as excludable aliens. One group had committed crimes in Cuba before joining the "freedom flotilla" to the United States, and consequently was never paroled into this country. A second group had been paroled into the United States, but parole was subsequently revoked. In the trial court, both groups obtained

[1] *See Agora: May the President Violate Customary International Law?*, 80 AJIL 913 (1986) (pieces by Professors Charney, Glennon and Henkin); *see also* Glennon, *Raising* The Paquete Habana: *Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 322 (1985) [hereinafter cited as Glennon, *Raising* The Paquete Habana].

[2] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) [hereinafter cited as RESTATEMENT (REVISED)] §135 comment *b* and Reporters' Note 1 (Tent. Draft No. 1, 1980).

[3] *Id.* §135 Reporters' Note 4 (Tent. Draft No. 6, 1985).

[4] 788 F.2d 1446 (11th Cir.), *cert denied sub nom.* Ferrer-Mazorra v. Meese, 107 S.Ct. 289 (1986).

an order directing the U.S. Government to provide a separate parole revocation hearing for each refugee. On appeal, one issue was whether customary international law prohibiting prolonged arbitrary detention[5] required that the refugees be given individual hearings or released.

The court quoted well-known language from *The Paquete Habana:* "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[6] Taking this to mean that any executive or legislative act would prevail over custom—apparently without regard to whichever is later in time—the court found that a 1980 legislative act precluded the application of customary international law to the first group and an executive act (by the Attorney General) precluded its application to the second group.

It is questionable whether there was indeed a preclusive legislative act as to the first group.[7] I do not propose to address that issue. If the court was correct as to Congress's intent, the later-in-time rule would be on the side of the congressional enactment. However, if the custom was later in time, there is a question not recognized by the revised *Restatement* that should be answered before the custom could "arguably" prevail.

To examine the question, it is necessary to begin with an elementary point about treaties. Only self-executing treaties have the effect of federal (domestic) law in the United States. Not all treaties are self-executing. The same principle clearly should apply to customary international law. Although it is not common parlance to speak of "self-executing custom," it is apparent that certain rules of custom are, in effect, self-executing and others are not. The most obvious and most important of the potentially self-executing rules are many of those protecting basic human rights. They benefit individuals directly, and they are specific enough to be enforced judicially.

At the non-self-executing end of the spectrum would be most norms dealing with highly political types of intergovernmental conduct. Professor Henkin has given some examples (overflying foreign territory without consent, bringing down a foreign aircraft, violating a diplomat's immunity), but he has not dubbed them "non-self-executing."[8] In fact, he has said elsewhere, quite flatly, that customary international law is "self-executing."[9] His own examples show that such a flat statement cannot be justified.

The rule against prolonged arbitrary detention would be a "self-executing

[5] *See, e.g.,* RESTATEMENT (REVISED), *supra* note 2, §702 (Tent. Draft No. 6, vol. 1, 1985); Universal Declaration of Human Rights, Dec. 10, 1948, GA Res. 217A, UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 9(1), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); Fernandez v. Wilkinson, 505 F.Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). *See also* Lillich, *Invoking International Human Rights Law in Domestic Courts,* 54 U. CIN. L. REV. 367, 402–04 (1985).

[6] 175 U.S. 677, 700 (1900).

[7] *See* Garcia-Mir v. Meese, 788 F.2d at 1454 n.9.

[8] Henkin, *The President and International Law,* in *Agora, supra* note 1, at 930, 935.

[9] Henkin, *International Law as Law in the United States,* 82 MICH. L. REV. 1555, 1561, 1566 (1984).

custom," though not at the level of a peremptory norm.[10] Thus, if any nonperemptory rule of custom could supersede an earlier federal statute, this one could. As a self-executing norm, it could stand on its own entirely apart from whatever auxiliary role it might play as an aid in interpreting constitutional rights and liberties.

With due respect, however, to the view of the reporters of the revised *Restatement,* it is extremely doubtful whether any customary rule, qua custom, could prevail over a validly enacted earlier federal statute.[11] Custom exists as an independent source of U.S. law only as federal common law.[12] At least in fields other than foreign relations, common law—including federal common law—yields to enacted statutory law. Usually, that comes up in the context of a statute later in time than the common law rule, but in a democratic society that has placed rule-making power in the hands of elected representatives, the principle is the same whether the enacted law is earlier or later in time than the nonconstitutional common law rule. Thus, in *Garcia-Mir,* even if the custom were later in time, it should not prevail as a nonconstitutional common law rule in the case of the first group of refugees—provided, of course, that Congress actually intended to authorize indefinite detention.

The result should be different, however, for the second group of refugees. It certainly does not follow from what has been said above that any otherwise-valid federal executive act would prevail over an earlier or later customary rule. In *Garcia-Mir,* the parties and the court focused on the question whether an executive act would have to emanate from the President, himself, to override contrary custom. The court thought not, and held that a decision by the Attorney General (to incarcerate the refugees indefinitely, pending deportation) would suffice.[13] This holding does not fully address the issue.

Even if the President had personally ordered the indefinite detention of the second group of refugees, the contrary rule of customary international

[10] *See* Lillich, *supra* note 5, at 404 n.177.

[11] A possible exception would be a customary rule in whose development the President, or his high-ranking delegate, had actively participated as commander-in-chief of the armed forces or as the chief U.S. diplomat. He does seem to have domestic lawmaking power under these constitutional grants of authority, narrowly applied. *See* the discussion in the text at notes 14–17.

[12] *See* Glennon, *Can the President Do No Wrong?,* in *Agora, supra* note 1, at 923; Glennon, *Raising* The Paquete Habana, *supra* note 1, at 343–47. *Cf.* RESTATEMENT (REVISED) §131 comment *d* (Tent. Draft No. 6, vol. 1, 1985). Professor Henkin has argued that custom is only *like* common law in that it is unwritten. *See* Henkin, *supra* note 8, at 933; Henkin, *supra* note 9, at 1561–62. But no court has ever found unwritten federal law to be anything other than federal common law.

Custom may also inform constitutional provisions, particularly in the Bill of Rights. In that context, custom is an aid to constitutional interpretation, not an independent source of law. As such, it could properly be said to be of a higher order than nonconstitutional federal law, whether statutory or common law. The court in *Garcia-Mir* treated the unadmitted aliens as not eligible for protection by "the core values of the Due Process Clause *per se.*" 788 F.2d at 1447. That may be questionable, but I do not propose here to challenge it.

[13] To the contrary, see Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law,* in *Agora, supra* note 1, at 913, 919–22.

law should prevail in a U.S. court.[14] The President has broad constitutional power to conduct foreign affairs, but his power is not unlimited. In particular, his independent power to take action that has domestic lawmaking effect must necessarily be subject to some constraints emanating from the Article I, section 1 grant of all legislative powers to Congress. That grant should preclude the President from exercising independent legislative powers, except to the extent that domestic legislative effect is a necessary concomitant of an Article II power granted to the President alone.

There are three Article II grants that might qualify. They are the grant of authority as commander-in-chief of the armed forces; the authority to receive ambassadors and other public ministers (i.e., to be the chief diplomat); and the authority to execute faithfully the laws of the United States.[15] The latter grant, though sometimes regarded as a source of independent presidential authority, obviously is not. To treat it as a source of independent authority would simply be to grant undefined and undefinable powers to the presidency. Neither the intent of the Framers nor the practice of the last 200 years supports any such untamed presidential authority.

Much more convincing is the argument that, in the absence of authorization from an act of Congress, the President's domestic lawmaking power emanates only from his constitutional authority as commander-in-chief and as chief diplomat. This would give him such legislative power as is necessary for the effective use of the armed forces against opposing armed forces (at least in the event of a congressionally declared war or a true necessity for immediate self-defense), as well as lawmaking authority in the contexts of the recognition of foreign governments,[16] the diplomatic representation of American nationals in their dealings with foreign governments, and other essentially diplomatic functions. These are rather narrow powers, as well they should be in a constitutional system that allocates "all legislative powers" to Congress.[17]

In *Garcia-Mir,* this means that the refugee-detention decision of the executive branch should not have prevailed over a contrary "self-executing" rule of customary international law. This would be true whether the custom crystallized before or after the executive branch's decision, and whether the decision was made by the President himself or by someone else in the executive branch. The decision to detain refugees simply was not the type of decision entrusted to a commander-in-chief of the armed forces or to a diplomat carrying out normal diplomatic functions. It was made by the Attorney General, essentially to maintain law and order. It is immaterial that

[14] *But see* Charney, *supra* note 13.

[15] *Cf.* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 39–44 (1972).

[16] *See* United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

[17] Professor Henkin gives the President too much latitude when he contemplates independent presidential power stemming from a role defined as the "sole organ" in foreign affairs, as well as from the commander-in-chief role. *See* Henkin, *supra* note 8, at 934, 936. He is the "sole organ" as chief diplomat, but that is a narrower category than Professor Henkin seems to have in mind.

the Attorney General's authority to deal with refugees stems from a foreign relations statute, the Immigration and Nationality Act.[18] There is no indication of congressional intent in that Act to authorize a step that would violate international law.

If a decision of the executive branch is not made by the President himself, or by authority the President has clearly delegated to a high-ranking civilian Defense Department official (in the case of the commander-in-chief power) or to a high-ranking State Department official (in the case of diplomacy), the presumption should be that it is not within the powers of the commander-in-chief or of the chief diplomat. If the presumption is not convincingly rebutted, "self-executing custom" should prevail as a matter of federal common law. Even if the executive branch's act is by the President or his high-ranking civilian delegate, "self-executing custom" should prevail unless the act squarely comes within one of the two relevant Article II powers.[19]

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THE PRESIDENT AND INTERNATIONAL LAW: A MISSING DIMENSION

As the chairman of the panel at the 1985 ASIL Annual Meeting on the question "May the President Violate Customary International Law?" I must confess that the issue that originally troubled me when I suggested this topic for discussion remains securely hidden in the shadows of the debate. Yet I think it is of central importance. The reason it has remained obscure, despite its significance, is that it is an extraordinarily difficult intellectual puzzle. My brief purpose here is to bring it into the light, not to try to solve it.

We can begin by noting an organizing principle that appears to have been accepted either explicitly or implicitly by all of the persons who have contributed so far to the debate. The organizing principle is that there are two distinct questions involved here: (1) May the President, under the law of the United States, violate international law? and (2) May the United States, under international law, violate international law? The second question has been posed somewhat differently in the debate, such as: May Congress violate international law? or May the President, with explicit congressional approval, violate international law? But these are just variants on the question.

As I have put the second question, the answer would seem to be logically compelled. How could international law be legally violated by any country?

[18] 8 U.S.C. §§1101 *et seq.* (1982).

[19] This is a narrower point than some commentators have made. In an interesting article containing much historical analysis, Professor Lobel argues that explicit congressional approval is necessary for the President to override customary international law. *See* Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1120 (1985). *See also* Glennon, in *Agora, supra* note 1, at 924, 930; Glennon, *Raising* The Paquete Habana, *supra* note 1, at 331–39, 363.

* Of the Board of Editors.