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# The Military Commissions Act, Habeas Corpus, and the Geneva Conventions

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## AGORA (CONTINUED): MILITARY COMMISSIONS ACT OF 2006

THE MILITARY COMMISSIONS ACT, HABEAS CORPUS,  
AND THE GENEVA CONVENTIONS*By Curtis A. Bradley\**

Many commentators argued that a central problem with the government's actions after the attacks of September 11, 2001, was executive unilateralism. For example, in criticizing President George W. Bush's initial effort to establish military commissions to try terrorists, Professors Neal Katyal and Laurence Tribe argued that, "in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution's text, structure, and logic demand *approval by Congress* if life, liberty, or property are to be significantly curtailed or abridged."<sup>1</sup> These commentators therefore invited the courts to play a "democracy-forcing" role to prompt greater congressional participation, through, in particular, the application of "clear statement" requirements.<sup>2</sup> In *Hamdan v. Rumsfeld*, the Supreme Court accepted this invitation.<sup>3</sup> In holding that the military commission system that President Bush had established to try terrorist detainees was invalid, the Court relied on what it believed to be restrictions in the Uniform Code of Military Justice (U.C.M.J.), a statute that is of course subject to amendment by Congress. Thus, as Justice Stephen Breyer and other Justices noted in a concurrence, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."<sup>4</sup>

The president promptly did return to Congress, and the result was the enactment of the Military Commissions Act of 2006 (MCA).<sup>5</sup> The MCA, however, is now being widely criticized by democracy-forcing advocates. Two aspects of the MCA have drawn particular criticism: its restriction on habeas corpus review, and its treatment of the Geneva Conventions. The MCA

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<sup>1</sup> Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1266 (2002) (emphasis added).

<sup>2</sup> *Id.* at 1289–90; see also, e.g., Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 53–54 (arguing that "[c]ourts should require clear congressional authorization before the executive intrudes on interests that have a strong claim to constitutional protection").

<sup>3</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); see Jack Balkin, *Hamdan as a Democracy-Forcing Decision*, BAL-KINIZATION, June 29, 2006, at <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html>.

<sup>4</sup> 126 S.Ct. at 2799 (Breyer, J., concurring).

<sup>5</sup> Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§948a–950w and other sections of titles 10, 18, 28, and 42) [hereinafter MCA]. The vote in Congress in favor of the MCA was 250-170 in the House and 65-34 in the Senate.

purports to preclude federal court jurisdiction over habeas corpus applications filed by detainees in the war on terrorism, providing them instead with review of their status determinations and military commission judgments by the U.S. Court of Appeals for the District of Columbia Circuit. Certain other provisions of the MCA either restrict judicial application of the Geneva Conventions or purport to interpret those Conventions. The habeas corpus and Geneva Convention components of the MCA are connected because, if the habeas restriction is valid, it may preclude Geneva Convention claims as well as other claims in habeas actions and thus reduce the relevance of the MCA's Geneva Convention provisions. Considering the habeas corpus and Geneva Convention provisions together may also highlight important differences between the domestic status of constitutional rights and treaty rights.

Part I of this essay describes the *Hamdan* decision and Congress's response to it in the MCA. Part II considers the validity of the general restriction in the MCA on habeas corpus review. Part III discusses the effect of the provisions in the MCA that disallow the invocation of the Geneva Conventions as a source of rights or declare that the MCA complies with the Conventions.

### I. *HAMDAN*, THE MCA, AND THE GENEVA CONVENTIONS

In November 2001, about two months after the September 11 terrorist attacks, President Bush issued a military order that, among other things, authorized the establishment of military commissions to try certain non-U.S. citizens for "offenses triable by military commission."<sup>6</sup> This order applied to three classes of people: present or former members of the terrorist organization Al Qaeda; those who "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation for, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy"; and those who "knowingly harbored" one or more individuals in the first two categories.<sup>7</sup> As legal support for this order, President Bush invoked his authority as commander in chief as well as several statutes: the Authorization for Use of Military Force that Congress issued shortly after the September 11 attacks, and sections 821 and 836 of the U.C.M.J.<sup>8</sup>

President Bush's military order was modeled on a proclamation and military order that President Franklin D. Roosevelt had issued in 1942 relating to the Nazi saboteurs case, *Ex parte Quirin*.<sup>9</sup> That case concerned the trial by military commission of eight agents of Nazi Germany

<sup>6</sup> See Military Order, Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,834 §4 (Nov. 16, 2001).

<sup>7</sup> *Id.* §2(a)(1).

<sup>8</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 note (Supp. 1, 2002)); 10 U.S.C. §§821, 836 (2000). Section 821 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." Section 836 provides that the president may prescribe procedures for courts-martial, military commissions, and other military tribunals through regulations that "shall, so far as [the president] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not . . . be contrary to or inconsistent with this chapter." Section 836 further provides that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable."

<sup>9</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

who had surreptitiously entered the United States with plans to commit acts of sabotage. Roosevelt's proclamation stated that citizens, subjects, or residents of nations at war with the United States who attempted to enter the United States in an effort to commit sabotage or espionage "shall be subject to the law of war and to the jurisdiction of military tribunals," and that

such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.<sup>10</sup>

Fn

Roosevelt's military order specifically appointed a military commission to try the Nazi saboteurs and stated that the commission would have the power to "make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."<sup>11</sup> The order further stated that "[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man," that "[t]he concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence," and that "[t]he record of the trial, including any judgment or sentence, shall be transmitted directly to [the President] for [his] action thereon."<sup>12</sup>

Fn

Fn

Although it applies to a larger and more diffuse class of individuals, President Bush's military order is more limited than the Roosevelt order in one respect: it applies only to foreign citizens. After President Bush issued the order, the Department of Defense promulgated a series of orders and instructions that, among other things, established extensive procedures for the commissions and defined the crimes that could be tried before them.<sup>13</sup> President Bush later determined that twenty detainees were eligible to be tried by military commission.<sup>14</sup>

Fn

Fn

In the meantime, the Supreme Court held in *Hamdi v. Rumsfeld* that a U.S. citizen being detained in the United States as an "enemy combatant" had a right, as a matter of due process, to "notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>15</sup> In addition, the Court held in *Rasul v. Bush* that the federal habeas corpus statute, 28 U.S.C. §2241,

Fn

<sup>10</sup> Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942). Notwithstanding this language, the Supreme Court construed the proclamation as permitting habeas corpus review. See 317 U.S. at 25. In commenting on President's Bush's similar order, Alberto Gonzales, then counsel to the president, stated that, "[u]nder the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court," and he noted that "[t]he language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review." Alberto R. Gonzales, Op-Ed, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

<sup>11</sup> Military Order, 7 Fed. Reg. 5103 (July 7, 1942).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., U.S. Dep't of Defense, Military Commission Order No. 1 (Mar. 21, 2002), 41 ILM 725 (2002), available at <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>; U.S. Dep't of Defense, Military Commission Instructions, Nos. 1–10 (Apr. 2003–Mar. 2006), available at <[http://www.defenselink.mil/news/Aug2004/commissions\\_instructions.html](http://www.defenselink.mil/news/Aug2004/commissions_instructions.html)>.

<sup>14</sup> See Jennifer K. Elsea, The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice, at CRS–3 (Congressional Research Service [CRS] Oct. 12, 2006), available at <<http://www.fas.org/sgp/crs/natsec/RL33688.pdf>>.

<sup>15</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

allowed non-U.S. citizens being detained as enemy combatants at Guantánamo to challenge the legality of their detention in the federal district court in Washington, D.C.<sup>16</sup> Fn

After these decisions, the Department of Defense established Combatant Status Review Tribunals (CSRTs) at Guantánamo. Under the CSRT process (the details of which are described below), each detainee at Guantánamo is given notice of the factual basis for his detention and an opportunity to challenge his designation as an enemy combatant. Over 550 detainees have gone through this process,<sup>17</sup> and at least several dozen have been found not to be enemy combatants as a result.<sup>18</sup> The Department of Defense also established Administrative Review Boards, which conduct a yearly review for all detainees at Guantánamo to determine whether they should continue to be held, transferred to the custody of another country, or released.<sup>19</sup> Fn  
Fn  
Fn

In December 2005, Congress enacted the Detainee Treatment Act (DTA), which added a subsection to the habeas statute directing that, except as otherwise provided in the DTA, “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”<sup>20</sup> The DTA further provided that the detainees at Guantánamo were limited to seeking review in the D.C. Circuit of the rulings of the CSRTs and final judgments of the military commissions. This review could consider only whether the CSRT or military commission had followed the standards and procedures specified by the Department of Defense (including the requirement that CSRT determinations be supported by a preponderance of the evidence), and “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States.”<sup>21</sup> Fn

In *Hamdan v. Rumsfeld*, the Supreme Court concluded that the habeas corpus restriction in the DTA did not apply to pending cases, including the case before it.<sup>22</sup> The Court further held that the military commission system that President Bush had established after September 11 violated restrictions that Congress had placed on the use of military commissions. The Court Fn

<sup>16</sup> *Rasul v. Bush*, 542 U.S. 466, 483 (2004). Section 2241 provides in relevant part that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” Such writs shall extend to prisoners “in custody under or by color of the authority of the United States . . . [or] in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §2241(a), (c) (2000).

<sup>17</sup> U.S. Dep’t of Defense, List of Detainees Who Went Through Complete CSRT Process, at <[http://www.dod.mil/pubs/foi/detainees/detainee\\_list.pdf](http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf)>.

<sup>18</sup> Jennifer K. Elsea, Detainees at Guantanamo Bay, at CRS–2 (updated July 20, 2005), available at <<http://www.fas.org/sgp/crs/natsec/RS22173.pdf>> (noting that 38 detainees had been determined not to be enemy combatants in this process).

<sup>19</sup> The Administrative Review Board assesses whether the detainee is “a continuing threat to the U.S. or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g., Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant’s intelligence value and any law enforcement interest in the detainee).” Gordon England, Memorandum to Secretaries of the Military Departments et al., Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, para. 1(c) (July 14, 2006), available at <<http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>>; see also U.S. Dep’t of Defense, News Release No. 360-07, Detainee Transfer Announced (Mar. 30, 2007) (noting that, “[s]ince 2002, approximately 390 detainees have departed Guantanamo for other countries”).

<sup>20</sup> Pub. L. No. 109-148, Div. A, tit. 10, 119 Stat. 2739, §1005(e)(1) (2005).

<sup>21</sup> *Id.*, §1005(e)(2), (3). The Supreme Court is allowed to review the D.C. Circuit’s decision on a petition for a writ of certiorari.

<sup>22</sup> 126 S.Ct. 2749, 2762–69 (2006).

construed section 836 of the U.C.M.J. as mandating that “the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.”<sup>23</sup> In addition, the Court construed a reference to the “law of war” in section 821 of the U.C.M.J. as requiring compliance with procedural requirements in the laws of war, including in particular the prohibition in common Article 3 of the Geneva Conventions against the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>24</sup>

The Court’s interpretation of common Article 3 differed from the one that had been adopted by the Bush administration. In 2002 President Bush had concluded that the Third Geneva Convention, which addresses the treatment of prisoners of war, did not apply to the U.S. conflict with Al Qaeda, since Al Qaeda is not a party to the Conventions.<sup>25</sup> He also concluded that, although the Convention did apply to the U.S. conflict with the Taliban in Afghanistan, the Taliban soldiers did not comply with the requirements for prisoner-of-war status under the Convention.<sup>26</sup> Finally, President Bush concluded that common Article 3 of the Geneva Conventions, which sets forth certain minimum protections applicable in a “conflict not of an international character,” was not applicable to the conflicts with either Al Qaeda or the Taliban because these conflicts “are international in scope.”<sup>27</sup> In *Hamdan*, the Supreme Court disagreed with the president’s conclusion with respect to common Article 3. The Court reasoned that the phrase “conflict not of an international character” means a conflict that is not between states and thus encompasses even a cross-border conflict between a state and a nonstate terrorist organization.<sup>28</sup>

The Court’s reliance on common Article 3, however, was expressly based on statutory construction. The Court explained that, even if *Hamdan* could not invoke the Geneva Conventions “as an independent source of law,” they are “part of the law of war” and “compliance with the law of war is the condition upon which the authority set forth in [section 821] is granted.”<sup>29</sup> As noted above, the statutory nature of the decision was further emphasized by Justice Breyer in his concurring opinion.<sup>30</sup> This was also the theme of Justice Anthony Kennedy’s concurring opinion, in which he made clear that, “[b]ecause Congress has prescribed these limits, Congress

<sup>23</sup> *Id.* at 2790.

<sup>24</sup> *Id.* at 2795.

<sup>25</sup> George W. Bush, Memorandum: Humane Treatment of Al Qaeda and Taliban Detainees, para. 2(a) (Feb. 7, 2002), at <<http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>>.

<sup>26</sup> *Id.*, paras. 2(b), (d).

<sup>27</sup> *Id.*, para. 2(c).

<sup>28</sup> *Hamdan*, 126 S.Ct. at 2795–96. *But cf.* INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 28 (Jean S. Pictet gen. ed., 1960) (noting, in commenting on common Article 3, that “the Red Cross has long been trying to aid the victims of *civil wars and internal conflicts*, the dangers of which are sometimes even greater than those of international wars”) (emphasis added) [hereinafter ICRC III GENEVA COMMENTARY]; ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1319 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions *within its territory*.”) (footnote omitted) (emphasis added).

<sup>29</sup> 126 S.Ct. at 2795–96. Under section 821, *supra* note 8, the U.C.M.J.’s courts-martial provisions do not deprive military commissions of concurrent jurisdiction to try offenses “that by statute or by the law of war may be tried by military commissions.”

<sup>30</sup> *See supra* text at note 4.

can change them, requiring a new analysis consistent with the Constitution and other governing laws.”<sup>31</sup> Moreover, the broader theme of Justice Kennedy’s concurrence—that the president was operating in the lowest tier of presidential authority under Justice Robert Jackson’s framework from the *Youngstown Steel Seizure* case—was premised on the assumption that the case would probably have come out differently if either Congress had been silent or the president had been acting pursuant to congressional authorization.<sup>32</sup>

The Court issued the *Hamdan* decision in late June 2006. Soon thereafter, the Bush administration began consulting with Congress about possible legislation that would authorize the use of military commissions. In October 2006, Congress enacted the MCA. Since then, the Department of Defense has promulgated an extensive *Manual for Military Commissions* that regulates the procedures, rules of evidence, and elements of crimes for the commissions.<sup>33</sup> In February 2007, military commission cases were initiated under the MCA against three detainees, and in March 2007 one of the detainees (an Australian, David Hicks) entered into a plea bargain.<sup>34</sup>

The MCA expressly authorizes the president to establish military commissions subject to certain procedural requirements, and it makes clear that the provisions in the U.C.M.J. do not apply to such commissions “except as specifically provided” in the MCA.<sup>35</sup> The MCA also defines the class of individuals subject to prosecution in such commissions as “alien unlawful enemy combatant[s],”<sup>36</sup> and “unlawful enemy combatant” as someone who “has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces),” or who, before, on, or after the date of the MCA’s enactment, “has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”<sup>37</sup>

There are a number of references in the MCA to the Geneva Conventions. First, two provisions disallow reliance on the Geneva Conventions as a source of rights. One provision states 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>38</sup> Presumably, this provision is not intended to regulate the speech of enemy combatants (or their lawyers) but, rather,

<sup>31</sup> 126 S.Ct. at 2808 (Kennedy, J., concurring); see also *id.* at 2800 (“If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.”). In referring to “conformance with the Constitution and other laws,” Justice Kennedy obviously was reserving some ability to review the legality of revised military commissions.

<sup>32</sup> See *id.* at 2799 (“This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction.”); *id.* at 2800 (“[D]omestic statutes control this case.”); *id.* at 2801 (citing *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952)) (“If the President has exceeded these limits [in the U.C.M.J.], this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson’s third category, not the second or first.”).

<sup>33</sup> U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS (Jan. 18, 2007), available at <<http://www.defenselink.mil/pubs/>>.

<sup>34</sup> William Glaberson, *Plea of Guilty from a Detainee in Guantánamo*, N.Y. TIMES, Mar. 27, 2007, at A1.

<sup>35</sup> 10 U.S.C. §948(b), (c).

<sup>36</sup> *Id.* §948c.

<sup>37</sup> *Id.* §948a(1)(A). The CSRTs determine whether an individual is an “enemy combatant,” not whether the individual is an “unlawful enemy combatant.” The MCA, in turn, exempts “lawful” enemy combatants from trial by military commission, and it defines the circumstances under which an individual will qualify as a lawful enemy combatant. *Id.* §948a(2). As noted in the text, the MCA further declares that the Taliban, Al Qaeda, and “associated forces” qualify as unlawful enemy combatants.

<sup>38</sup> *Id.* §948b(g).

is designed to preclude recognition by a judicial tribunal of enforceable rights under the Conventions.<sup>39</sup> The identity of the tribunal in question is unclear, but since the provision focuses on individuals triable by military commission and appears in a section of the MCA addressing the commissions, the most likely tribunal is the military commission itself.

Another provision states:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or its territories.<sup>40</sup>

This provision obviously applies more broadly to any person, not just individuals triable by military commission, and it is specifically directed at U.S. courts, not the military commission tribunals. It would encompass actions for habeas corpus relief, as well as civil claims for damages or other relief, such as claims brought under the Alien Tort Statute.<sup>41</sup> It would not bar, however, the invocation of the Geneva Conventions as a defense in a criminal proceeding brought in federal court, or in a civil proceeding brought against a private party or foreign state.<sup>42</sup> Nor does it bar international law claims in civil proceedings that are based on materials other than the Geneva Conventions and Protocols, although there may well be independent barriers to such claims.<sup>43</sup>

Several provisions also relate to interpretation of the Geneva Conventions. The MCA states that a military commission established in accordance with the terms of the Act “is a regularly

<sup>39</sup> See Joint Statement of Senators [John] McCain, [John] Warner, and [Lindsey] Graham on Individual Rights Under the Geneva Conventions, 152 CONG. REC. S10,401, S10,402 (daily ed. Sept. 28, 2006) [hereinafter Senators’ Joint Statement] (“It is not the intent of Congress to dictate what can or cannot be said by litigants in any case.”). As a result, the First Amendment considerations raised by Professor Carlos Vázquez concerning this provision are probably not implicated. See Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AJIL 73, 84–85 (2007) (in the initial Agora on the MCA in the previous issue). Professor Vázquez’s suggestion that §948b(g) might be a speech provision appears to be based in part on the assumption that Congress in the MCA was allowing detainees to raise Geneva Convention claims in appeals to the D.C. Circuit, but not in the military commissions. In fact, it does not appear that treaty claims are included in the D.C. Circuit’s scope of review. See *infra* text at notes 56–64.

<sup>40</sup> MCA, sec. 5(a), 28 U.S.C. §2241 note.

<sup>41</sup> The Alien Tort Statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. §1350 (2000). Although it is only a jurisdictional statute, it has been construed by the Supreme Court as conferring some authority on the federal courts to develop common law causes of action for violations of customary international law. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); see also Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007). Some detainees in the war on terrorism have attempted to bring claims against U.S. government actors under the statute. See, e.g., *Rasul v. Rumsfeld*, 414 F.Supp.2d 26 (D.D.C. 2006); see also *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004) (noting that the detainees at Guantánamo were not jurisdictionally precluded from bringing claims under the Alien Tort Statute).

<sup>42</sup> See Vázquez, *supra* note 39, at 92.

<sup>43</sup> See *id.* at 93. For example, in ratifying human rights treaties, such as the Convention Against Torture, the Senate and the president have expressly declared the treaties to be “not self-executing,” and courts have construed these declarations as rendering the treaties judicially unenforceable. See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); see also *Sosa*, 542 U.S. at 735 (noting that the United States ratified the International Covenant on Civil and Political Rights “on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts”) (emphasis added). In addition, customary international law, which was historically referred to as part of the “law of nations,” may not be judicially enforceable against the executive. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that courts are to apply the law of nations “where there is no . . . controlling executive or legislative act”); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453–54 (11th Cir. 1986) (holding that customary international law is not judicially enforceable against the attorney general).

constituted court” that satisfies the requirements of common Article 3.<sup>44</sup> I will say more about the effect of this provision below in part III. Fn

Another interpretive provision deals with the U.S. obligation under Article 129 of the Third Geneva Convention to enact legislation to punish “grave breaches” of the Convention, which are defined as breaches involving

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.<sup>45</sup> Fn

Prior to the enactment of the MCA, the War Crimes Act covered, among other things, “any conduct . . . which constitutes a violation of common Article 3.”<sup>46</sup> The MCA amends the War Crimes Act to provide that only “grave breaches” of common Article 3 are criminalized, and it defines what those breaches are, notably omitting both the denial of a regularly constituted court and humiliating or degrading treatment.<sup>47</sup> The MCA further states that the provisions of the War Crimes Act, as amended by the MCA, “fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character.”<sup>48</sup> Fn

In the section of the MCA that amends the War Crimes Act, the MCA also provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”<sup>49</sup> Finally, the MCA states that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions” in the War Crimes Act.<sup>50</sup> Fn

## II. RESTRICTION ON HABEAS CORPUS REVIEW

In addition to its Geneva Convention provisions, the MCA amends the general habeas corpus statute to state:

<sup>44</sup> 10 U.S.C. §948b(f).

<sup>45</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Arts. 129, 130, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Third Geneva Convention].

<sup>46</sup> 18 U.S.C. §2441(c) (2000).

<sup>47</sup> See MCA, sec. 6(a)(1), (b)(1)(B), 18 U.S.C. §2441 note. Although Article 130 of the Third Geneva Convention, *supra* note 45, defines grave breaches to include “depriving a prisoner of war of the rights of fair and regular trial,” this is presumably a reference to the procedural rights of lawful combatants in an international armed conflict, not the minimal rights specified in common Article 3 for an “armed conflict not of an international character.” As a result, it is not clear that the United States is obligated under the Third Geneva Convention to criminalize the denial of a regularly constituted court under common Article 3. Indeed, it is not clear that the obligation to criminalize grave breaches has any application to conduct that takes place in noninternational armed conflicts. Cf. Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AJIL 48, 52 (2007) (“The Conventions require criminal penalties only for ‘grave breaches’ and do not require that such penalties be applied against the full range of violations of common Article 3—if, indeed, the ‘grave breaches’ provisions apply to that article at all.”).

<sup>48</sup> MCA, sec. 6(a)(2), 18 U.S.C. §2441 note.

<sup>49</sup> *Id.*, sec. 6(a)(3)(A).

<sup>50</sup> *Id.*, sec. 6(a)(2).

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>51</sup>

Unlike the DTA, the MCA makes clear that this habeas restriction applies to pending cases.<sup>52</sup> In addition, unlike the DTA, the MCA's habeas restriction applies to all alien enemy combatants, not just those detained at Guantánamo.

The MCA, like the DTA, provides that the U.S. Court of Appeals for the D.C. Circuit shall have exclusive jurisdiction to review final decisions rendered by the military commissions.<sup>53</sup> This jurisdiction is limited to considering "whether the final decision was consistent with the standards and procedures" specified in the MCA, and "to the extent applicable, the Constitution and the laws of the United States."<sup>54</sup> The MCA also preserves the DTA's similar D.C. Circuit review for the enemy combatant determinations of the CSRTs.<sup>55</sup>

If the habeas restriction in the MCA is valid, it would bar the raising of Geneva Convention claims in habeas actions just as it would bar the raising of other claims. In addition, the plain language of the provisions on D.C. Circuit review in the DTA and the MCA suggests that this review does not encompass Geneva Convention claims. The general federal habeas statute, which was amended by the DTA and the MCA, refers to custodial challenges based on "the Constitution or laws or treaties of the United States."<sup>56</sup> The provisions on D.C. Circuit review in the DTA and the MCA, by contrast, refer simply to "the Constitution and the laws of the United States," with no mention of treaties. The natural inference from this omission is that detainees are not allowed to challenge their CSRT decisions or military commission judgments on the basis of treaties such as the Geneva Conventions.<sup>57</sup> This conclusion finds further support in the fact that both the Constitution and certain federal statutes distinguish between treaties and the laws of the United States.<sup>58</sup>

<sup>51</sup> *Id.*, sec. 7(a), amending 28 U.S.C. §2241(e).

<sup>52</sup> MCA section 7(b) provides:

The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

28 U.S.C. §2441 note.

<sup>53</sup> 10 U.S.C. §950g(a).

<sup>54</sup> *Id.* §950g(c).

<sup>55</sup> *Id.*, sec. 7(a), 28 U.S.C. §2441 note.

<sup>56</sup> 28 U.S.C. §2241(c)(3) (2000).

<sup>57</sup> It is not clear whether the Geneva Conventions are at all relevant to the CSRT process. Common Article 3 addresses trials, but not detention determinations. Article 5 of the Third Geneva Convention, *supra* note 45, addresses prisoner-of-war determinations, but it simply refers to a "competent tribunal" without specifying procedural requirements and, in any event, the CSRT process is not used to determine whether the detainees qualify as prisoners of war. See Robert M. Chesney, *Judicial Review, Combatant Status Determinations, and the Possible Consequences of Boumediene*, 48 HARV. INT'L L.J. ONLINE 62, 65 (2007), <<http://www.harvardilj.org/online/110>>; see also Geoffrey Corn, Eric Talbot Jensen, & Sean Watts, *Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher*, 116 YALE L.J. SUPP. 327, 327 (2007) ("In our view, because predicate analysis identified no qualifying POW groups to which detainees could claim membership, the CSRTs were appropriately precluded from determining POW status.").

<sup>58</sup> For the Constitution, see Article III, Section 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties . . ."), and Article VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . ."). For statutes in addition

For the most part, the legislative history of the DTA and the MCA confirms that the D.C. Circuit review does not encompass treaty claims. In discussing the MCA, for example, Senator Jon Kyl noted that the D.C. Circuit would be able “to judge whether the CSRT process is consistent with the Constitution and with federal statutes—though *no treaty lawsuits are authorized*.”<sup>59</sup> Similarly, Senator Jeff Sessions stated that the D.C. Circuit could review “whether those [CSRT] standards are constitutional and are consistent with *nontreaty* Federal law.”<sup>60</sup> And Senator John Cornyn observed that the D.C. Circuit “will determine whether the CSRT system as a whole is consistent with the Constitution *and with Federal statutes*.”<sup>61</sup> Numerous additional statements in the legislative history observe that the D.C. Circuit could review whether the CSRT process was consistent with the Constitution and laws of the United States, and these statements make no mention of treaties.<sup>62</sup>

One statement in the MCA’s legislative history, however, is potentially to the contrary—a statement by Senator Lindsey Graham that the D.C. Circuit could consider whether the CSRT process “constitutionally pass[es] muster as being adequate due process not only under the Geneva Conventions but under our Constitution to the extent it applies.”<sup>63</sup> It remains unclear to what extent Senator Graham was suggesting here that Geneva Convention claims could be pursued independently of a constitutional due process challenge. In any event, even for those who place great weight on legislative history, it is difficult to see how this single statement (although admittedly from a key sponsor of the legislation) would constitute a sufficient reason to reject the natural inference of the plain language of the statute, especially in light of the more numerous contrary statements in the legislative history.<sup>64</sup>

The validity of the MCA’s habeas restriction may turn on whether the Guantánamo detainees have a constitutional right of habeas corpus review.<sup>65</sup> Article I, Section 9 of the Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when

to 28 U.S.C. §2241, see, for example, 28 U.S.C. §1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”), and 28 U.S.C. §1257 (2000) (stating that the Supreme Court has jurisdiction to review state court decisions “where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States”).

<sup>59</sup> 152 CONG. REC. S10,268 (daily ed. Sept. 27, 2006) (Sen. Kyl) (emphasis added).

<sup>60</sup> 152 CONG. REC. S10,404 (daily ed. Sept. 28, 2006) (Sen. Sessions) (emphasis added).

<sup>61</sup> *Id.* at S10,403 (Sen. Cornyn) (emphasis added).

<sup>62</sup> In discussing the DTA, for example, Senator Carl Levin simply noted that the D.C. Circuit would be able to review “whether the application of [the CSRT] standards and procedures is consistent with the Constitution and laws of the United States.” 151 CONG. REC. S12,802 (daily ed. Nov. 15, 2005) (Sen. Levin). Similarly, the House Armed Services Committee report on the MCA states that “the jurisdiction of the D.C. Circuit should be limited to the consideration of whether the final decision was consistent with the standards and procedures for military commissions and to the extent applicable, the Constitution,” making no mention of treaties. H.R. REP. NO. 109-664, pt. 1, at 23 (2006).

<sup>63</sup> 152 CONG. REC. S10,266 (daily ed. Sept. 27, 2006) (Sen. Graham).

<sup>64</sup> See also *Examining Proposals to Limit Guantanamo Detainees’ Access to Habeas Corpus Review: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Sept. 25, 2006), (testimony of Bradford Berenson) (“This [D.C. Circuit review in the DTA] . . . appears to exclude any claims based on treaty rights that have not been incorporated into U.S. law or are not mirrored in any U.S. constitutional protections that would apply to the detainees.”), at <[http://judiciary.senate.gov/testimony.cfm?id=24168&wit\\_id=5775](http://judiciary.senate.gov/testimony.cfm?id=24168&wit_id=5775)>.

<sup>65</sup> The constitutional issue is the same whether the limit on suspension is viewed as the protection of a right or as a limitation on Congress. Cf. *Boumediene v. Bush*, 476 F.3d 981, 995–98 (D.C. Cir. 2007) (Rogers, J., dissenting) (arguing that the Suspension Clause should be viewed as a limitation on Congress), *cert. denied*, 127 S.Ct. 1478 (2007). Either way, the issue is whether the limitations on Congress’s ability to suspend the writ of habeas corpus apply, as a constitutional matter, to non-U.S. citizens held at Guantánamo.

in Cases of Rebellion or Invasion the public Safety may require it.”<sup>66</sup> The Supreme Court has explained that, at a minimum, this Suspension Clause protects the common law writ of habeas corpus as it existed in 1789, when the Constitution took effect.<sup>67</sup> The Court has also observed that, “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”<sup>68</sup>

There appears to be little dispute that the constitutional right of habeas corpus review applies to individuals detained in the United States. In *Hamdi v. Rumsfeld*, the plurality stated that “absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”<sup>69</sup> It is not clear, however, whether or to what extent the constitutional right of habeas review extends to individuals, particularly noncitizens, apprehended and detained outside the United States. In two recent decisions considering the effect of the MCA (including the decision on remand in *Hamdan*), courts concluded that the noncitizen detainees at Guantánamo do not have a constitutional right to habeas review.<sup>70</sup> In doing so, they concluded that the English common law writ of habeas corpus would not have extended to a non-citizen apprehended and detained outside British territory. In addition, these courts relied heavily on the Supreme Court’s 1950 decision in *Johnson v. Eisentrager*, in which the Court held that it lacked jurisdiction to consider habeas petitions filed by German nationals who had been apprehended and tried by the U.S. military in China and subsequently imprisoned in occupied Germany.<sup>71</sup>

In my view, these courts gave insufficient attention to the Supreme Court’s decision in *Rasul v. Bush*.<sup>72</sup> In *Rasul*, the Court held that the federal habeas statute applied to the detainees at Guantánamo. Although the Court limited itself to addressing the reach of the habeas statute rather than the constitutional right of habeas corpus, the Court noted that the detainees at Guantánamo

differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years

<sup>66</sup> U.S. CONST. Art. I, §9, cl. 2.

<sup>67</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

<sup>68</sup> *Id.* There is significant academic disagreement over whether the Suspension Clause was intended as a restraint on Congress’s ability to withdraw the habeas jurisdiction of the federal courts (as the Supreme Court appears to assume) or merely as a limitation on Congress’s ability to interfere with the habeas jurisdiction of the state courts. Compare, e.g., Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, with WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 129–80 (1980). This issue is complicated by the Supreme Court’s decision in *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1871), in which the Court held that state courts did not have the authority to order the release of someone held in federal custody.

<sup>69</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). For decisions addressing the ability of U.S. citizens detained by U.S. military authorities in Iraq to seek habeas relief in a U.S. court, compare *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007) (allowing the detainee to seek habeas relief, where he had not been charged or convicted by a non-U.S. tribunal), with *Munaf v. Geren*, 2007 U.S. App. LEXIS 7974 (D.C. Cir. Apr. 6, 2007) (not allowing the detainee to seek habeas relief after being convicted by an Iraqi court). Cf. *Hirota v. MacArthur*, 338 U.S. 197 (1948) (denying leave to file petitions for writs of habeas corpus to Japanese citizens who had been tried by a military tribunal in Japan).

<sup>70</sup> See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9 (D.D.C. 2006).

<sup>71</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>72</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>73</sup> Fn

In addition, the Court emphasized that the United States exercises “complete jurisdiction and control” over the Guantánamo naval base in Cuba “and may continue to exercise such control permanently if it so chooses.”<sup>74</sup> Finally, the Court reasoned that application of the habeas statute to Guantánamo was “consistent with the historical reach of the writ of habeas corpus.”<sup>75</sup> Fn  
 These statements would seem to be relevant not only to the statutory right of habeas corpus, Fn  
 but also to the constitutional right.<sup>76</sup> Fn

It is also worth noting that the vote in *Rasul* was 6-3, with Justice Kennedy’s concurrence providing the sixth vote. One of the Justices in the majority has since retired from the Court, which may leave Justice Kennedy as the “swing vote” on this issue. Importantly, Justice Kennedy’s concurrence in *Rasul* distinguished *Eisentrager* and asserted that Guantánamo “is in every practical respect a United States territory.”<sup>77</sup> Justice Kennedy’s contextual approach Fn  
 in *Rasul* resembles the approach he suggested some years earlier in his concurrence in *United States v. Verdugo-Urquidez*, concerning the extraterritorial application of the Constitution.<sup>78</sup> Fn  
 As a result, there is reason to believe that a majority of the current Justices on the Supreme Court would conclude that the constitutional right of habeas review extends to Guantánamo. This conclusion is not necessarily surprising, given the difficulty as a functional matter of justifying a regime under which full constitutional review applies if the U.S. government detains someone on U.S. soil, but no constitutional review applies if the government simply moves the person offshore to nearby Guantánamo, a place where the government has essentially the same degree of control over the detention.<sup>79</sup> Fn

<sup>73</sup> *Id.* at 476.

<sup>74</sup> *Id.* at 480. The United States occupies the Guantánamo naval base pursuant to a 1903 lease agreement with Cuba, in which the United States “recognizes the continuance of the ultimate sovereignty of the Republic of Cuba” over the base, and Cuba “consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.” Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Art. III, Feb. 23, 1903, TS No. 418. As agreed in a 1934 treaty between Cuba and the United States, Cuba cannot unilaterally terminate the lease “[s]o long as the United States of America shall not abandon the said naval station.” Treaty Defining Relations with Cuba, U.S.-Cuba, Art. III, May 29, 1934, 48 Stat. 1683, TS No. 866.

<sup>75</sup> *Rasul*, 542 U.S. at 481.

<sup>76</sup> One circumstance that has changed since *Rasul*, however, is that each detainee at Guantánamo has received a hearing before a CSRT, and thus it is no longer true that they have “never been afforded access to any tribunal.” The Court did not indicate in *Rasul* the extent to which this factor was significant, but it seems unlikely that a majority of the Court would conclude that the mere existence of the CSRT process is sufficient by itself to preclude constitutional review at Guantánamo, since a principal reason for such constitutional review would be to assess the sufficiency of that very process.

<sup>77</sup> *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring); *cf. In re Yamashita*, 327 U.S. 1, 9 (1946) (allowing habeas action to be filed challenging military commission trial in the Philippines, then a territory of the United States, and noting that Congress “has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus”).

<sup>78</sup> *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 275–78 (1990) (Kennedy, J., concurring). Justice Kennedy’s contextual approach to the applicability of the Constitution abroad is similar to the approach of Justice Harlan. *See Reid v. Covert*, 354 U.S. 1, 65–67 (1957) (Harlan, J., concurring).

<sup>79</sup> *But cf. J. Andrew Kent, A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521 (2007) (“Textual and structural evidence suggests that the constitutionally protected writ of habeas corpus is only available within the United States.”).

If the detainees at Guantánamo do have a constitutional right of habeas review, this right would remain in effect unless validly suspended by Congress.<sup>80</sup> As noted above, the Constitution provides that the writ of habeas corpus may be suspended “in Cases of Rebellion or Invasion.” The United States is obviously not faced with a “rebellion” and, more than five years after the September 11 attacks, the United States is far from clearly faced with an “invasion.” To be sure, even if it is not a “political question,”<sup>81</sup> courts will probably hesitate to second-guess the political branches about whether the United States is confronted with an invasion (perhaps from terrorist cells still operating within the United States, for example). Nevertheless, the suspension of the writ of habeas corpus has been a rare event in U.S. history, and both the justiciability and the substance of the suspension issue raise difficult questions. Courts are likely, therefore, to require a clear indication that Congress has intended to suspend the writ before addressing whether such a suspension is valid.<sup>82</sup> Yet there is no such clear indication in either the text or the drafting history of the MCA. The MCA does not refer to suspension or invoke the Suspension Clause and its restrictions do not purport to be temporary. In addition, the legislative history of the MCA suggests that Congress did not believe that the detainees had a constitutional right of habeas review that would need to be suspended.<sup>83</sup>

Assuming that the Guantánamo detainees have a constitutional right of habeas corpus review that has not been suspended, a central issue would be whether the judicial review provided for in the DTA and the MCA is sufficient to protect the constitutional right. As an initial matter, the constitutional right is unlikely to require access to a federal district court, as opposed to an appellate court. Indeed, the Supreme Court has specifically noted that “Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.”<sup>84</sup> More generally, the Court has recognized Congress’s authority to regulate how challenges to detention are reviewed, stating, for example, that “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention” does not violate the Suspension Clause.<sup>85</sup> Congress’s broad authority

<sup>80</sup> Although the Suspension Clause does not state this expressly, the Supreme Court has assumed that only Congress has the authority to suspend the writ of habeas corpus. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (“Only in the rarest of circumstances has Congress seen fit to suspend the writ. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.”) (citation omitted); *id.* at 562 (Scalia, J., dissenting) (“Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause’s placement in Article I.”).

<sup>81</sup> *Compare Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting) (“[W]hether the attacks of September 11, 2001, constitute an ‘invasion,’ and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court.”), with Amanda L. Tyler, *Is Suspension a Political Question?* 59 STAN. L. REV. 333 (2006) (arguing that the determination of whether the conditions for suspension exist is not a political question).

<sup>82</sup> *Cf. INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) (“The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.”).

<sup>83</sup> See, e.g., H.R. REP. NO. 109-664, pt. 2, at 5 (2006) (expressing the view that “United States constitutional protections do not apply to alien prisoners of war held outside of our borders”); 152 CONG. REC. S10,267 (daily ed. Sept. 27, 2006) (Sen. Graham) (“[I]f there is a constitutional right of habeas corpus given to enemy combatants, that is a totally different endeavor, and it would change in many ways what I have said.”).

<sup>84</sup> *St. Cyr*, 533 U.S. at 314 n.38.

<sup>85</sup> *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

to regulate the jurisdiction of the lower federal courts (which the Constitution did not even require Congress to establish) provides further support for this conclusion.<sup>86</sup> Fn

In considering whether the constitutional right of habeas corpus has been sufficiently protected, the basic question will be whether the CSRT process, along with the D.C. Circuit review, offers an adequate means of testing the legality of detention.<sup>87</sup> Under the CSRT process, each detainee at Guantánamo is given an unclassified description of the factual basis for his classification as an enemy combatant and an opportunity to challenge the classification before a panel of three military officers who have not been involved in the apprehension, detention, interrogation, or previous determination of that detainee's status.<sup>88</sup> In this process, the detainee is provided with the assistance of a "personal representative" (a commissioned officer who is not a judge advocate and does not act as legal counsel) and an interpreter.<sup>89</sup> The tribunal may consider "any information it deems relevant and helpful to a resolution of the issues before it."<sup>90</sup> The detainee is allowed to present evidence, "including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant."<sup>91</sup> The tribunal decides whether a "preponderance of evidence" supports the government's classification, and it applies a rebuttable presumption that the government's evidence supporting the classification is genuine and accurate.<sup>92</sup> As discussed above, detainees are allowed under the DTA and the MCA to appeal the determinations of the CSRTs to the D.C. Circuit (which can, among other things, review whether the CSRT's determination was in fact supported by a preponderance of evidence), and the detainees can be assisted by legal counsel in these appeals. Fn

Many aspects of the CSRT process appear to be consistent with the due process standards articulated by the plurality in *Hamdi* for a U.S. citizen detained in the United States as an enemy combatant. The CSRT process gives a detainee notice of the factual basis for his classification (albeit with some limitations concerning classified material) and an opportunity to

<sup>86</sup> See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (noting that only the Supreme Court's jurisdiction "is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); see also H.R. REP. NO. 109-664, pt. 2, *supra* note 83, at 4-5 ("The Committee strongly believes that the Constitution gives Congress the power to determine whether the Federal courts have jurisdiction over applications for a writ of habeas corpus pursuant to 28 U.S.C. §2241 filed by or on behalf of an alien detained . . . at Guantanamo Bay, Cuba.")

<sup>87</sup> The government's brief opposing the grant of certiorari in *Boumediene* was largely focused on this question. See Brief for the Respondents in Opposition, at 12-19, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (Sup. Ct. Mar. 2007), at <<http://www.scotusblog.com/movabletype/archives/BoumedieneBIO.pdf>>. I am assuming here that the constitutional right of habeas corpus does not include a right to challenge conditions of confinement, as opposed to the legality of detention. Cf. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (describing the "core" of habeas corpus as a challenge to the "fact or duration" of confinement).

<sup>88</sup> See Gordon England, Memorandum for Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), available at <<http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>> [hereinafter CSRT Memorandum]. Some litigants have argued that the D.C. Circuit review cannot be adequate because it is premised on there being a CSRT determination, and there is no statutory requirement that the military conduct such a determination. However, these determinations are mandated by military directive for all detainees at Guantánamo, however, and the military appears to have followed this directive. If the military ever fails to provide a CSRT to a detainee entitled to one, presumably a court could address, on a case-specific basis, the potential infringement of the constitutional right to habeas corpus entailed by that failure.

<sup>89</sup> *Id.*, Enclosure 1 (Combatant Status Review Tribunal Process), at 2.

<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.* at 6.

contest that classification. Although the decision maker in the first instance is a panel of military officers rather than an Article III court, the plurality in *Hamdi* stated that it was possible that the due process standards it articulated “could be met by an appropriately authorized and properly constituted military tribunal”; and it referred favorably to the military process for determining whether a detainee qualifies as a prisoner of war under the Third Geneva Convention, which encompasses fewer procedural protections than the CSRT process.<sup>93</sup> As for the flexible evidentiary standards in the CSRTs, the *Hamdi* plurality appeared to endorse such flexibility (even for a proceeding involving a U.S. citizen), noting, for example, that it may be appropriate to allow hearsay evidence, and that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”<sup>94</sup>

Nevertheless, *Hamdi* may not provide support for some features of the CSRT process. Two features that have generated particular criticism are the reliance on classified evidence that is not shared with the detainee (but is shared with the detainee’s personal representative) and the allowance of evidence obtained by coercion. The negative effect of these features is exacerbated, it is argued, by the lack of assistance of counsel in the CSRT process. These and other alleged deficiencies, however, could perhaps be addressed by the D.C. Circuit on an “as applied” basis in reviewing individual CSRT determinations.<sup>95</sup> Under the terms of the DTA and the MCA, the D.C. Circuit can evaluate whether the CSRT has followed its own standards and procedures (including the requirement that the CSRT determination be supported by a preponderance of evidence), and, to the extent that the Constitution and other laws apply to Guantánamo, whether the tribunal process conforms with those laws.<sup>96</sup> In particular, if the Due Process Clause applies to Guantánamo (which seems likely if the constitutional right of habeas corpus applies there),<sup>97</sup> then it could be used by the D.C. Circuit to address problems with specific CSRT determinations.

<sup>93</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004). Article 5 of the Third Geneva Convention, *supra* note 45, simply provides that if there is doubt about a detainee’s status, the detainee is to enjoy the protection of the Convention “until such time as their status has been determined by a competent tribunal,” and does not define the process to be used by such a tribunal. Under army regulations, this status determination involves procedures that are less elaborate than those of the CSRTs. See U.S. Dep’t of the Army, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Regulation 190-8, §1-6 (1997). For example, no “personal representative” is provided for the prisoner-of-war determinations, and no appeal is allowed of the determination, let alone an appeal to a federal court.

<sup>94</sup> *Hamdi*, 542 U.S. at 534.

<sup>95</sup> *Cf.* *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”).

<sup>96</sup> At the time this essay was written, petitions were pending before the D.C. Circuit arising from CSRT determinations. See *Parhat v. Gates*, No. 06-1397 (D.C. Cir.); *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.).

<sup>97</sup> The same considerations that apply when determining whether a constitutional right of habeas corpus extends to Guantánamo (such as the extent of U.S. jurisdiction and control there) would likely apply when considering whether and to what extent the Fifth Amendment Due Process Clause extends to Guantánamo. *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (“[T]he question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”) (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)); see also *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (stating that “[t]he guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law” applied to U.S. territorial possessions).

One must keep in mind, however, that the CSRT process applies, by its terms, only to detainees at Guantánamo.<sup>98</sup> It does not apply, for example, to Ali Saleh Kahlal al-Marri, a Qatari citizen who was apprehended in the United States and subsequently determined by the president to be an enemy combatant.<sup>99</sup> The MCA's habeas restriction, however, does apply to al-Marri since he is an alien who was classified as an enemy combatant. The validity of the MCA's habeas restriction is therefore substantially more questionable for him, and he can also of course make a stronger argument for having an underlying constitutional right of habeas review, since he is being detained in the United States.

### III. GENEVA CONVENTION PROVISIONS

For the remainder of the essay, I will assume for the sake of argument that the MCA's general limitations on judicial review do not by themselves deprive the courts of jurisdiction to consider Geneva Convention challenges by individuals defined by the MCA as enemy combatants. This might be the case, for example, if (despite my arguments to the contrary) the MCA's habeas restriction were deemed to be unconstitutional or its D.C. Circuit review provisions were construed to encompass Geneva Convention claims. Moreover, an individual detained as an enemy combatant might attempt to raise a Geneva Convention claim in a proceeding other than a habeas corpus action—for example, a suit for damages.

Detainees might seek to pursue a variety of claims under the Geneva Conventions. They may wish to argue that they are entitled to the full protections of prisoners of war under the Third Geneva Convention. They may attempt to enjoin, or obtain redress for, interrogation practices or conditions of confinement. And, for those subject to trial by military commission, they may seek to argue that the commissions do not constitute a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” under common Article 3 of the Conventions.

The Geneva Conventions would not be judicially enforceable, however, if either they are “non-self-executing” or Congress has validly precluded their judicial enforcement in the MCA. Courts have long held that only self-executing treaties are judicially enforceable in the absence of implementing legislation.<sup>100</sup> The concept of self-execution has given rise to much debate and confusion, but the basic question is whether the treaty (or treaty provision) was intended

<sup>98</sup> See CSRT Memorandum, *supra* note 88 (referring only to detainees at Guantánamo).

<sup>99</sup> See *Al-Marri v. Wright*, 443 F.Supp.2d 774 (D.S.C. 2006). Al-Marri was deemed to be an enemy combatant through a presidential directive rather than through the CSRT process. See George W. Bush, Determination (filed June 23, 2003, C.D. Ill.), available at <<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf>>. The Department of Defense has ordered that, upon dismissal of al-Marri's habeas petition, he be provided with a CSRT determination. See Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule, at 4–5, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 13, 2006), available at <[http://www.pegc.us/archive/Al-Marri\\_v\\_Bush/CA4\\_gov\\_mot\\_to\\_dismiss\\_20061113.pdf](http://www.pegc.us/archive/Al-Marri_v_Bush/CA4_gov_mot_to_dismiss_20061113.pdf)>.

<sup>100</sup> See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (explaining that a self-executing treaty “operates of itself without the aid of any legislative provision,” whereas a non-self-executing treaty “addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“When the stipulations [of a treaty] are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . .”); *Auguste v. Ridge*, 395 F.3d 123, 132 & 133 n.7 (3d Cir. 2005) (“Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation.”).

to be judicially enforceable.<sup>101</sup> As noted above, the Supreme Court in *Hamdan* did not decide whether the Geneva Conventions are self-executing, relying instead on what it construed to be congressional incorporation of the laws of war, which include the four Geneva Conventions and common Article 3 thereto. Fn

There are strong arguments, in my view, that the Geneva Conventions were not intended to be judicially enforceable in the absence of implementing legislation. The Geneva Conventions concern the ways a nation's military interacts with classes of people during armed conflict. The most natural means of enforcing these Conventions is therefore through military regulation and diplomatic relations. The practical problem of allowing for judicial review of the claims of potentially thousands of prisoners of war provides a strong functional justification for this interpretation. The Geneva Conventions were ratified against the backdrop of World War II, a war in which the U.S. military held over four hundred thousand prisoners of war in the United States,<sup>102</sup> and many more outside the United States, and it is almost inconceivable that the United States expected that these types of prisoners (who would now be covered by the Geneva Conventions) could bring treaty claims in U.S. courts, either in habeas corpus or other proceedings. Fn

The Supreme Court's decision in *Johnson v. Eisentrager* supports this conclusion. There, the Court specifically stated in a footnote that the 1929 Geneva Convention—the predecessor to the Geneva Conventions ratified by the United States in 1955—was not self-executing. As the Court explained:

It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.<sup>103</sup> Fn

The United States ratified the current Geneva Conventions after this decision, and there is no indication in the Conventions that they were intended to provide for a new right of judicial review. Instead, the Conventions provide only for diplomatic mechanisms to resolve disputes under the Conventions.<sup>104</sup> The executive's view that the Geneva Conventions are not self-ex- Fn

<sup>101</sup> See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4)(a) (1987) [hereinafter RESTATEMENT (THIRD)] (stating that a treaty is non-self-executing and therefore will not be given effect as law in the absence of implementing legislation, “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”). Although some courts have suggested that it is appropriate to look to the intent of all the parties to the treaty, I agree with the *Restatement of Foreign Relations Law* that it is the intent of the United States that should be determinative for this issue. See *id.* §111 cmt. *b.* Self-execution concerns a matter of domestic implementation, an issue that is not normally the focus of international law or negotiation, and in some countries treaties are always non-self-executing, making it even less likely that these countries will have an intent concerning whether a treaty is self-executing in the United States.

<sup>102</sup> See ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA 3 (1979).

<sup>103</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950). The majority in *Hamdan* referred to this footnote as a “curious statement” but did not disavow it. See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2794 (2006).

<sup>104</sup> See, e.g., Third Geneva Convention, *supra* note 45, Art. 11 (providing that the protecting powers, “where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, . . . shall lend their good offices with a view to settling the disagreement”); *id.*, Art. 132 (“At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.”); see also *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (“[W]hat discussion

cuting is also probably entitled to some deference by the courts,<sup>105</sup> especially since this view appears to have been endorsed by Congress in the MCA.<sup>106</sup>

In any event, even if the Conventions would be self-executing in the absence of the MCA, Congress made clear in the MCA that they are not to be applied by courts as a source of rights.<sup>107</sup> These provisions are sufficient in my view to preclude judicial enforcement of the Conventions. To put it differently, I believe that Congress had the authority to decide that the United States will implement the Geneva Conventions through military regulations, congressional oversight of the military, criminal law, and diplomatic relations rather than through private judicial enforcement.

As an initial matter, it is well settled that Congress has the authority to override treaties for purposes of U.S. law.<sup>108</sup> This “last-in-time rule” constitutes a recognition that an attribute of national sovereignty is the ability to decide whether and how to comply with international obligations, and that when a federal statute is enacted after ratification of a treaty, the statute is “the latest expression of the sovereign will.”<sup>109</sup> Although lesser-included arguments are not always sound, they are *sometimes* sound, and here it seems to me that the ability of Congress to override a treaty altogether for purposes of U.S. law suggests that it enjoys the authority simply to preclude domestic judicial enforcement of the treaty. Imagine, for example, that the Geneva Conventions specifically contained a provision allowing for domestic judicial enforcement of their provisions. No one disputes that Congress could override that judicial enforcement provision for purposes of U.S. law, while otherwise maintaining that the United States would comply with the other terms of the Conventions. It would seem odd to conclude that Congress could not mandate a similar outcome when the Conventions *lack* such a judicial enforcement provision and Congress would thus not even be violating the treaties.<sup>110</sup>

there is of enforcement [in the Geneva Conventions] focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations.”), *vacated and remanded on other grounds*, 542 U.S. 507 (2004).

<sup>105</sup> See, e.g., *More v. Intelcom Support Serv.*, 960 F.2d 466, 471 (5th Cir. 1992) (“Accepting *arguendo* that the Treaty is ambiguous and admits of two constructions, one providing for self-executing private rights and another not so providing, we would have to accept the interpretation of the Department of Defense, the U.S. Government agency charged with enforcing the Treaty.”).

<sup>106</sup> The legislative history of the MCA appears to confirm that Congress did not view the Geneva Conventions as self-executing. See, e.g., H.R. REP. NO. 109-664, pt. 2, *supra* note 83, at 3 (noting that the MCA would “clarify that the Geneva Conventions are not judicially enforceable in United States courts”); *id.* at 17 (“Until the *Hamdan* decision, the prohibitions contained in Common Article 3 were not considered enforceable in United States courts. This section demonstrates Congress’ intent to return to that original understanding of Common Article 3.”); Senators’ Joint Statement, *supra* note 39, 152 CONG. REC. S10,401 (referring to the “widely-held view that the Geneva Conventions provide no private rights of action to individuals”); see also, e.g., *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 49 (1913) (emphasizing “sense of Congress” that treaty was not self-executing). Professor Vázquez suggests that the restrictions in the MCA on invoking the Geneva Conventions would be “superfluous” if Congress believed that the Conventions were non-self-executing. Vázquez, *supra* note 39, at 76 n.30. In enacting these restrictions, however, Congress may have simply been guarding against the possibility that, despite Congress’s view to the contrary, courts might find the Conventions to be self-executing. This would explain, for example, why it did not attempt to “unexecute” the Conventions in all settings, such as in criminal proceedings in federal court. See *supra* text at note 44.

<sup>107</sup> See *supra* text at notes 38–40.

<sup>108</sup> See, e.g., *Breard v. Greene*, 523 U.S. 371, 376 (1998); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 597–99 (1884).

<sup>109</sup> *Whitney*, 124 U.S. at 195.

<sup>110</sup> Or imagine that the Geneva Conventions were statutes rather than treaties. If Congress at time *T1* had specified various requirements in a statute and provided for judicial enforceability, it could uncontroversially (under its last-in-time authority over prior statutes) provide at time *T2* that the statutory obligations would still apply but be

Congress's ability to preclude judicial enforcement of the Geneva Conventions can also draw support from the Senate's frequent inclusion of "non-self-execution" declarations with its advice and consent to treaties, pursuant to which the treaties are rendered non-self-executing.<sup>111</sup> While some commentators have challenged the validity of such declarations, courts have consistently upheld them.<sup>112</sup> The Supreme Court has itself observed that a non-self-execution declaration means that a treaty does "not itself create obligations enforceable in the federal courts."<sup>113</sup> Although the issuance of senatorial declarations at the time of ratification is not precisely the same as a congressional restriction on judicial enforcement after ratification, the Senate's practice at least confirms that the political branches have some control over whether a treaty is judicially enforceable.

While Carlos Vázquez assumes in his analysis in the initial Agora on the MCA that non-self-execution declarations included by the Senate as part of its advice and consent to a treaty are "valid and effective,"<sup>114</sup> he argues that a congressional attempt to "unexecute" an otherwise self-executing treaty would "raise substantial questions under the Supremacy Clause" of the Constitution.<sup>115</sup> His argument, however, is based on an overly broad view of that clause. Professor Vázquez reasons that the framers included treaties in the Supremacy Clause so as to reduce "international friction" associated with treaty violations.<sup>116</sup> While this is true as far as it goes, Vázquez neglects to mention that the international friction the framers were concerned about was friction caused by *state* violations of treaties (such as the peace treaty with Great Britain), not friction caused by national governmental violations.<sup>117</sup> To put it differently, there is no evidence that the framers intended their inclusion of treaties in the Supremacy Clause to operate as a limitation on the federal political branches—as opposed to the states—in their implementation of treaties. Moreover, federal statutes are also included in the Supremacy Clause, but Congress often uncontroversially restricts private judicial enforcement of statutes.<sup>118</sup> Congress also often restricts the domestic judicial enforceability of congressional-executive agreements (that is, international agreements concluded by the president with the approval of a majority of Congress).<sup>119</sup>

enforced in ways other than judicial enforcement. *See also* Richard H. Fallon Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2093–94 (forthcoming 2007) ("As a matter of U.S. domestic law, Congress unquestionably may limit or preclude judicial enforcement of rights under international conventions.").

<sup>111</sup> *See generally* Bradley & Goldsmith, *supra* note 43, at 419–22.

<sup>112</sup> *See, e.g.*, *Auguste v. Ridge*, 395 F.3d 123, 141 n.17 (3d Cir. 2005) (collecting cases).

<sup>113</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *see note 43 supra*.

<sup>114</sup> Vázquez, *supra* note 39, at 90.

<sup>115</sup> *Id.* at 91–92.

<sup>116</sup> *Id.* at 91.

<sup>117</sup> *See, e.g.*, THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that, under the Articles of Confederation, "[t]he treaties of the United States . . . are liable to the infractions of thirteen different legislatures"); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) (noting concern by James Madison regarding "the tendency of the States to these violations" of the law of nations and treaties). Most judicial decisions that have enforced treaties directly have involved enforcement against states and localities. *See* Tim Wu, *When Do American Judges Enforce Treaties?* 97 VA. L. REV. (forthcoming 2007).

<sup>118</sup> In enacting the Genocide Convention Implementation Act, for example, Congress provided that the Act should not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. §1092 (2000); *see also* Bradley & Goldsmith, *supra* note 43, at 447; Paul B. Stephan, *Private Remedies for Treaty Violations After Sanchez-Llamas*, 11 LEWIS & CLARK L. REV. 65 (2007).

<sup>119</sup> The U.S. implementing legislation for the World Trade Organization agreements, for example, provides that "[n]o provision of any of the [agreements], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." Moreover, "[n]o State law, or the application

Vázquez further claims that barring Geneva Convention claims from the military commission trials would raise “severe constitutional problems” because “Congress . . . cannot give [courts] jurisdiction and instruct them to decide the case without regard to applicable federal law.”<sup>120</sup> The short answer to this argument is that if Congress has effectively unexecuted the Geneva Conventions (of if the Conventions were not self-executing to begin with), they are not “applicable federal law” for the courts. Vázquez relies on *Yakus v. United States*,<sup>121</sup> but it is not to the contrary. In that case, the Supreme Court upheld a statutory scheme that allowed someone to be convicted of violating an administrative regulation without being given an opportunity to challenge the validity of the regulation in the criminal proceeding, noting that the validity of the regulation could be challenged in a separate administrative hearing.<sup>122</sup> The Supreme Court has since observed that the decision in *Yakus* “was motivated by the exigencies of wartime, dealt with the propriety of regulations rather than the legitimacy of an adjudicative procedure, and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum.”<sup>123</sup> That is, by negative implication, *Yakus* may stand for the proposition that a criminal defendant must be given some opportunity to challenge the underlying validity of the provision under which he or she is being convicted. The validity of the military commission prosecutions, however, stems from the MCA and Congress’s constitutional authority to enact the MCA, and defendants are fully allowed to argue that their military commission trials are inconsistent with these sources of authority. If the Geneva Conventions are not self-executing, they are simply not part of the U.S. law governing the validity of the commissions, and *Yakus* is irrelevant.<sup>124</sup>

If the courts were nevertheless able to decide a Geneva Convention claim in this context, Congress’s statement that a military commission established under the MCA “is a regularly constituted court” that satisfies common Article 3 is unlikely to be dispositive of the issue. A Civil War–era decision, *United States v. Klein*, probably stands for the proposition that, although Congress has broad authority both to regulate federal court jurisdiction and to change nonconstitutional law, it cannot both have courts decide a legal issue and tell them *how* to

of such a State law,” it continues, “may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.” 19 U.S.C. §3512(a)(1), (b)(2)(A).

<sup>120</sup> Vázquez, *supra* note 39, at 86.

<sup>121</sup> *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>122</sup> *Id.* at 444.

<sup>123</sup> *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 n.15 (1987).

<sup>124</sup> Presumably, in situations in which crimes under the MCA are defined by reference to the Geneva Conventions (such as crimes against “protected persons”), defendants in military commissions may invoke the Conventions to argue that they have not committed the crime. Such invocations would not make the Conventions a “source of rights” as disallowed in the MCA, and they would not involve applying the Conventions as a “rule of decision” as prohibited by section 6(a)(2). See Vázquez, *supra* note 39, at 84 (“At a minimum, then, section 948b(g) is subject to an implicit exception for portions of the Geneva Conventions incorporated by reference into the MCA itself.”).

<sup>125</sup> See *id.* at 77–78. It is not clear that Congress was attempting to bind courts to this provision. It may have simply been communicating its views about common Article 3. Vázquez suggests that Congress could not reasonably have had a view about whether the military commissions it was authorizing complied with common Article 3, because the MCA delegates to the secretary of defense the authority to promulgate pretrial and trial procedures for the commissions, and Congress would not have known what those procedures would look like at the time it enacted the MCA. *Id.* at 79. Congress, however, could have held the view that a commission with the basic structure and procedures outlined in the MCA would be a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” As I note below, such a view would be reasonable.

decide it because to do so would unduly interfere with the judicial function of deciding cases.<sup>126</sup> Fn  
Indeed, in a decision issued a day before *Hamdan*, involving efforts to enforce a different treaty (the Vienna Convention on Consular Relations), the Supreme Court made clear that “[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”<sup>127</sup> Fn

However, even assuming that a court would retain authority to determine compliance with the Geneva Conventions, it is not clear that a judicial finding of noncompliance should affect judicial enforcement of the Act. As discussed above under the last-in-time rule, Congress can override treaties for purposes of U.S. law. Congress has clearly stated here that it is authorizing the president to establish military commissions in accordance with the terms of the MCA.<sup>128</sup> Fn  
Even if a court found that the Geneva Conventions had been violated, it would probably be required to give effect to the statute.

To be sure, pursuant to the *Charming Betsy* canon, court will attempt to construe statutes to avoid violations of international law.<sup>129</sup> This canon may carry particular force with respect to the relationship between the MCA and common Article 3 of the Geneva Conventions, given Congress’s declaration in the MCA that the commissions it is authorizing comply with that article. The *Charming Betsy* canon applies, however, only if the terms of a statute are ambiguous.<sup>130</sup> How much effect the canon can have on the interpretation of the MCA is not clear because, among other things, the Act sets forth very specific procedures for the commissions.<sup>131</sup> Fn

In any event, the courts would be likely to give substantial deference to the combined judgment of Congress and the president about what common Article 3 requires and thus likely not to find a violation unless it was very clear that something in the commission system was inconsistent with common Article 3. The Supreme Court has stated that “great weight” is to be

<sup>126</sup> See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) (finding statute to be unconstitutional because it purported to “prescribe rules of decision to the Judicial Department of the government in cases pending before it”); cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (“Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress ‘amend[s] applicable law.’ *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992).”) (citations omitted).

<sup>127</sup> *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2684 (2006); (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also Curtis A. Bradley, Case Report: *Sanchez-Llamas v. Oregon*, in 100 AJIL 882 (2006). As noted above, another provision in the MCA states that the amendment to the War Crimes Act fully satisfies U.S. obligations under Article 129 of the Third Geneva Convention to “provide effective penal sanctions” for “grave breaches” of the Convention. That provision, section 6(a)(2), should also not be dispositive for courts, but I think it is unlikely that anyone will have standing to challenge this potential underimplementation of the criminal enforcement obligations imposed by the treaty. See text at note 48 *supra* (quoting section 6(a)(2)).

<sup>128</sup> See 10 U.S.C. §948b(b).

<sup>129</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); RESTATEMENT (THIRD), *supra* note 101, §114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

<sup>130</sup> See, e.g., *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (“The canon against construing ambiguous statutes to abrogate prior treaties does not help plaintiffs here, however, because the amended Migratory Bird Treaty Act is unambiguous . . . .”); *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003).

<sup>131</sup> See Vázquez, *supra* note 39, at 80–82.

accorded to the executive's construction of treaties.<sup>132</sup> This deference stems from a variety of factors, including the lead role of the executive in negotiating treaties, its status as the principal "organ" of the United States in international communications, its expertise in treaty affairs and foreign relations more generally, and its special access to information concerning the likely effect of particular treaty interpretations. Although the Court seemed not to accord deference to the executive in *Hamdan* when construing Article 3 of the Geneva Conventions, we now have both Congress *and* the executive weighing in on this matter, making the case for deference even stronger.<sup>133</sup> Moreover, Congress stated expressly in the MCA that it is delegating authority to the executive "to interpret the meaning and application of the Geneva Conventions," and courts give *Chevron* deference in the analogous situation in which Congress delegates interpretive authority to administrative agencies.<sup>134</sup>

Deference may be especially determinative here, because it is far from clear that the military commissions as authorized by the MCA violate common Article 3. That article merely requires "judicial guarantees which are recognized as indispensable by civilized peoples," and the official International Red Cross *Commentary* states that the article was intended simply to preclude "summary justice."<sup>135</sup> The military commissions authorized in the MCA, however, afford extensive procedural guarantees, including the right to counsel, rights to present and respond to evidence and to present and cross-examine witnesses, the presumption of innocence, and the right against self-incrimination.<sup>136</sup> Moreover, Congress in the MCA supplemented the procedures for the commissions, for example, by giving defendants the right to be present during all trial proceedings and the right to appeal to a new Court of Military Commission Review (as well as the automatic right to appeal to the D.C. Circuit), and by requiring that a military judge preside over the trial, as is done for courts-martial.<sup>137</sup> In addition, the MCA makes clear that statements procured by torture are not admissible in the military commissions.<sup>138</sup> While a statement obtained through coercion short of torture can be admitted if the evidence was obtained prior to the enactment of the DTA, such admission is allowed only if a military judge finds that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and . . . the interests of justice would best be served by admission of the

<sup>132</sup> See, e.g., *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); see also *Sanchez-Llamas*, 126 S.Ct. at 2685 ("In addition, '[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.") (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

<sup>133</sup> See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) ("We think then, however individual judges might construe the treaty of St Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.").

<sup>134</sup> MCA sec. 6(a)(3)(A), 18 U.S.C. §2441 note; see *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); see also 152 CONG. REC. S10,244 (daily ed. Sept. 27, 2006) (statement by Senator Levin that this provision "gives [the President] the authority to adopt regulations interpreting the meaning and application of the Geneva Conventions in the same manner and to the same extent as he can issue such regulations interpreting other laws"). *But cf.* 152 CONG. REC. S10,399 (daily ed. Sept. 28, 2006) (statement by Senator McCain, concurred in by Senator Warner, that "[n]othing in this bill gives the President the authority to modify the conventions or our obligations under those treaties").

<sup>135</sup> ICRC III GENEVA COMMENTARY, *supra* note 28, at 39; see also *id.* at 40 ("We must be very clear about one point; it is only 'summary' justice which it is intended to prohibit.").

<sup>136</sup> For a detailed description of the procedures set forth in the MCA, see Elsea, *supra* note 14.

<sup>137</sup> 10 U.S.C. §948j, 949d(b), 950c.

<sup>138</sup> *Id.* §948r(b).

statement into evidence.”<sup>139</sup> Despite whatever procedural imperfections one might find in the commission’s authority, it is difficult to equate them with “summary justice.” Fn

#### IV. CONCLUSION

In the MCA, Congress sought to limit judicial review over the detention and trial of what it defined as enemy combatants, and to preclude courts from applying the Geneva Conventions as a source of rights. For the reasons I have discussed, there is a reasonable likelihood that the Supreme Court will conclude that detainees at Guantánamo have a constitutional right of habeas corpus review that was not validly suspended by the MCA. Depending on how they are interpreted, however, the provisions in the MCA and the DTA for D.C. Circuit review could suffice to preserve this constitutional right.

Unlike constitutional rights, rights under the Geneva Conventions fall under the broad authority of Congress to restrict the judicial enforceability of treaty provisions. Although Congress probably cannot have courts apply the Geneva Conventions and also control how they interpret them, it does have the authority to direct that the Conventions be enforced outside the courts. The policy wisdom of Congress’s restrictions on judicial enforceability of the Geneva Conventions is of course open to debate, but these restrictions are legally valid and should be given effect unless they are revised pursuant to the same democratic process that produced them.<sup>140</sup> Fn

<sup>139</sup> *Id.* §948r(c).

<sup>140</sup> A number of bills have been introduced in Congress to amend the MCA. The likelihood that any of these bills will be enacted is unclear, given the possibility of a presidential veto.