

Constitutional Pathology, the War on Terror, and *United States v. Klein*

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INTRODUCTION

Many labels have attached to *United States v. Klein*,¹ the venerable Reconstruction era Supreme Court decision that established some undefined limits on congressional control over federal law and federal courts. It has been called “opaque,” “deeply puzzling,” “disjointed,” “Delphic,” “generally difficult to follow,” “exaggerated,” and “dead wrong.”² *Klein* is a case of substantial significance, although no one really knows how or why.³ Nevertheless, it has achieved a cult-like following among academics, advocates, and some judges.⁴

In a recent article,⁵ I attached a new label to *Klein* – myth.⁶ In this article, I explore the *Klein*-derived issues in two major pieces of national

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1. 80 U.S. (13 Wall.) 128 (1872).

2. See William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1074 (1999); Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1718 (2005); Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553, 570 (2005); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 34 (2002) (“Klein is sufficiently impenetrable that calling it opaque is a compliment”); Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998) (arguing that, while not exactly Fermat’s Last Theorem, Klein is “deeply puzzling”); Gordon G. Young, *Congressional Regulations of Federal Courts’ Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1190, 1193, 1195 (describing opinion as “confusing” and criticizing “excessively broad and ambiguous statements” in majority opinion); *id.* at 1212 (labeling opinion “disjointed, ambiguous, and generally difficult to follow”).

3. Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 437-438 (2006).

4. See Young, *supra* note 2, at 1195.

5. See Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53 (2010) [hereinafter *Irrepressible Myth*].

6. Todd Pettys argues that myth actually has two meanings in law. First, and most commonly, a myth is a fiction, a proposition or idea that is untrue or inaccurate. Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 992-993 (2009). But myth also describes a story or belief that, although false in some (or all) respects, nevertheless is accepted and celebrated in the legal community because it “encapsulate[s] a

security legislation enacted as part of the ongoing struggle against terrorism. The first is Section 802 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, which granted retroactive immunity from civil liability to telecommunications providers for assisting the federal government with arguably unconstitutional warrantless domestic surveillance between late 2001 and early 2007.⁷ The second is the Military Commissions Act (MCA) of 2006, which in several provisions creates adjudicative mechanisms for dealing with terror suspects and simultaneously limits the scope and manner of judicial involvement in those cases.⁸

In *Klein*, the Supreme Court struck down an 1870 law governing claims by pardoned southern property owners seeking to recover proceeds in the Court of Claims for property confiscated during the Civil War. The law prohibited any claimant who used an uncontested pardon to establish loyalty to the Union from recovering proceeds; instead, it required that courts treat the pardon as conclusive evidence that the claimant had been disloyal and thus was not entitled to recover.⁹ The legislation was intended to limit recovery by disloyal southern property owners (particularly cotton growers, such as the claimant in *Klein*, who had acted as sureties for Confederate officers).¹⁰ Congress sought not only to undo the lower-court decision in favor of the claimant in *Klein* (which then was pending on appeal), but also to undo the effects of the Court's decision holding that receipt of a pardon rendered a property owner innocent in law.¹¹

Klein asserted two reasons for finding that the law violated separation of powers: 1) Congress impermissibly prescribed "a rule of decision, in causes pending" that the courts must apply;¹² and 2) Congress had impaired the effect of a presidential pardon, and drafted the judiciary as an instrument of that impairment, by requiring courts to give the pardon a different meaning and effect (treating it as proof of guilt) than the court might otherwise have done.¹³

community's perceptions of its origins, its identity, or its commitments, and thereby advance[s] the lives of its members." *Id.* at 993. In the earlier article, I argued that both meanings were in play in any discussion of *Klein*. See *Irrepressible Myth*, *supra* note 5, at 56. My focus in this article is largely on the first meaning.

7. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, §802 (2008), *codified* at 50 U.S.C. §1885a; *In re Nat'l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 956-957 (N.D. Cal. 2009) [hereinafter *Telecommunications Records Litig.*]; *infra* Part II.A.

8. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA]; *infra* Part III.B.

9. *Klein*, 80 U.S. (13 Wall.) at 133-134, 143-144; see also *Irrepressible Myth*, *supra* note 5, at 59-64 (analyzing *Klein* decision).

10. *Irrepressible Myth*, *supra* note 5, at 61.

11. *Id.* at 62; see *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870).

12. *Klein*, 80 U.S. (13 Wall.) at 146.

13. *Id.* at 147.

Critics lambast *Klein* for its confusing, and arguably legally erroneous, language.¹⁴ As Barry Friedman said, “calling [*Klein*] opaque is a compliment.”¹⁵ But this supposed opacity is *Klein*’s first myth – the false belief that *Klein* is inscrutable, opaque, or meaninglessly indeterminate. In fact, a close reading of *Klein* and its progeny reveals several clear separation of powers principles, reflecting limits on congressional power to interfere with or limit courts and the judicial process.¹⁶ These principles are in play in this discussion of terrorism legislation.¹⁷

First, Congress cannot use its legislative power to dictate specific findings or outcomes in particular litigation. *Klein* stated that Congress had impermissibly prescribed rules of decision for the courts in pending causes. But that principle could not literally be true, since Congress prescribes rules of decision whenever it enacts substantive law that controls primary conduct and establishes the legal rules that courts apply to resolve disputes under that substantive law.¹⁸ Beginning with the decision in *Robertson v. Seattle Audubon Society*,¹⁹ the Supreme Court and lower federal courts have recognized that Congress remains free to prescribe new rules of decision, even for pending cases, by amending substantive law, thereby creating new legal circumstances to apply to a set of facts.²⁰ Congress merely must change the controlling substantive legal landscape “in any detectable way” to avoid the *Klein* problem.²¹

In other words, Congress cannot command courts how to resolve particular factual and legal issues in a case (“In *X v. Y* pending in the Southern District of Florida, the court shall find that the statute of limitations has run.”). And it cannot dictate who should prevail in a given case under existing law (“In *X v. Y* pending in the Southern District of Florida, *Y* shall prevail.”). But Congress does not impermissibly dictate outcomes so long as the congressional rule merely identifies the relevant legal and factual issues that control the outcome and the consequences of various legal and factual conclusions. Courts must be left a role in

14. Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) (“Much that is said in the opinion is exaggerated if not dead wrong . . .”).

15. Friedman, *supra* note 2, at 34.

16. See generally *Irrepressible Myth*, *supra* note 5, at 65-85.

17. This is a condensed summary of the discussion and arguments in *Irrepressible Myth*.

18. *Irrepressible Myth*, *supra* note 5, at 65-66.

19. 503 U.S. 429 (1992).

20. See *id.*, 503 U.S. at 438, 440-441; Araiza, *supra* note 2, at 1075 & n.97; Hartnett, *supra* note 2, at 578; Amanda L. Tyler, *The Story of Klein: The Scope of Congress’s Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES 106 (Vicki C. Jackson & Judith Resnik eds., 2010).

21. See *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-1570 (9th Cir. 1993).

resolving the particular case – they must retain the power to exercise their independent best judgment to find facts, to apply the legal standard to those facts, to decide whether the congressionally dictated rule of decision (new or old) has been satisfied, and to decide which party should prevail.²² That Congress “hoped for” an outcome when it enacted a legal rule, even as to identifiable pending or anticipated litigation, does not create a *Klein* problem. After all, Congress always enacts legal rules hoping to deter some conduct and offer incentives to other conduct, and litigation outcomes are central to what is deterred or encouraged.²³

Second, Congress cannot dictate constitutional meaning to the courts. Larry Sager has been the strongest proponent of this as “*Klein*’s First Principle:”

The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.²⁴

The Constitution is violated by a statute that “will implicate the judiciary in misrepresentations of matters of constitutional substance.”²⁵ Daniel Meltzer describes the principle as prohibiting Congress from compelling federal courts to speak a “constitutional untruth.”²⁶

This principle as stated may be of relatively limited application. Congress does not often enact statutes explicitly redefining or reinterpreting the Constitution or telling courts what the Constitution means. It is difficult to find examples of Congress actually telling courts “The First Amendment shall mean X.” or “The Equal Protection Clause is violated by Y.”

Having identified these principles, we inevitably run headlong into the second, more fundamental myth of *Klein* – the myth of vigor, the false belief that *Klein* establishes vigorous judicially enforceable constitutional limitations on Congress. The clear principles we have identified are unexceptional, limited in scope, and of limited practical effect. Most blatantly *Klein*-violative laws never are enacted; *Klein*-vulnerable laws that

22. *Irrepressible Myth*, *supra* note 5, at 69-70.

23. *Id.* at 71-72.

24. Sager, *supra* note 2, at 2529.

25. *Id.* at 2533; *see* Bloom, *supra* note 2, at 1721-1722; Tyler, *supra* note 20, at 109.

26. Meltzer, *supra* note 14, at 2545; *see* Araiza, *supra* note 2, at 1075 (arguing that *Klein* prohibits Congress from turning courts into its “constitutional puppet”); Bloom, *supra* note 2, at 1721-1722 (arguing that *Klein* means courts should not be forced to reach or validate incorrect or unconstitutional outcomes).

have been enacted raise no meaningful or serious *Klein* problems and should survive any separation of powers challenge.²⁷

Understanding *Klein* requires that we maintain the distinction between constitutional objections and policy objections. Unwise policy is not unconstitutional policy. Policy preferences cannot and should not be recast in constitutional terms and converted into constitutional arguments, although there is an unfortunate tendency to try to do that through *Klein*.²⁸

Finally, *Klein* is a product of what Vincent Blasi has called a period of constitutional pathology, a period reflecting “an unusually serious challenge to one or more of the central norms of the constitutional regime.”²⁹ Pathological periods are marked by a “sense of urgency stemming from societal disorientation if not panic.”³⁰ Their defining feature is “a shift in basic attitudes, among certain influential actors if not the public at large,” about central constitutional commitments.³¹ Panic affects structural features and arrangements, such as formal and informal separation of powers and checks and balances, which may “exert much less of a restraining influence” on the political branches and the public.³²

Constitutionalism and constitutional judicial review, Blasi argues, are designed to enable the system to handle and survive pathological periods. Constitutionalism “derives from a view regarding the various objectives that are served by constraining representative institutions by means of the device of constitutional limitations.”³³ It depends “on the existence of a considerable measure of continuity and stability regarding the most basic structural arrangements and value commitments of the constitutional regime.”³⁴ Blasi’s theory is that constitutional rules and rigorous constitutional judicial review must be reserved for extreme cases challenging pathological laws and actions – for the “worst of times” in which other structural barriers have broken down and only the courts and the Constitution remain as a bulwark against overreaching officials and citizens.³⁵

Klein arose in a previous pathological period – Reconstruction. That era was marked by the passage of three constitutional amendments, tension between Congress and the President, and tension between Congress and the

27. *Irrepressible Myth*, *supra* note 5, at 55-56, 65.

28. *Id.* at 93-94.

29. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 459 (1985); *id.* at 456 (“In pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged.”).

30. *Id.* at 468.

31. *Id.* at 467.

32. *Id.* at 467-468.

33. *Id.* at 453.

34. *Id.*

35. *Id.* at 468; *id.* at 453.

Supreme Court.³⁶ The political dispute that led to *Klein* – controversy over how to handle actions in the Court of Claims by pardoned disloyal Southern property owners seeking to recover proceeds for property confiscated during the Civil War and congressional efforts to limit judicial interference with legislative plans – was one more example of that pathology.³⁷ The statute struck down in *Klein* – which compelled courts to reject claims by pardoned southern property owners and to regard the acceptance of a pardon as conclusive evidence of disloyalty – was Congress’s attempt to override recent Supreme Court decisions, which, in the legislature’s view, interfered with its policy goals for the reconstructed Union.³⁸

The period since September 2001 qualifies as a modern example of a constitutional pathological period, at least with respect to national security and anti-terror efforts. The period has been defined by two foreign wars, ongoing efforts against terrorism, and a host of controversial federal domestic and foreign measures, especially by the executive branch, on matters of national security.

Yet, examined against the identifiable ideas running through *Klein* and its progeny, both the MCA and section 802 of the 2008 FISA amendments largely survive constitutional scrutiny under *Klein*’s separation of power principles. Any constitutional defects are largely symbolic or of limited effect. The inability of these constitutional principles to stop these laws serves as a current, real world illustration of the ultimate powerlessness – the myth – of *United States v. Klein*.³⁹

Part I of this article discusses the current struggle against terrorism as an example of Blasi’s pathological periods. Part II examines the *Klein* arguments as to Section 802 of the FISA Amendments Act, concluding that the immunity provision entirely survives *Klein* scrutiny. Part III examines the arguments as to various provisions of the MCA, concluding that most survive *Klein* scrutiny and the few provisions that run afoul of *Klein* are insignificant or largely symbolic.

I. *KLEIN* AND THE WAR ON TERROR

We presently find ourselves in a Blasian pathological period triggered by the terrorist attacks of September 11 and ensuing anti-terrorism efforts. The period has been defined by two foreign wars, ongoing efforts against terrorism, and a host of controversial domestic and foreign measures by the federal government, especially the Executive, on matters related to

36. *Irrepressible Myth*, *supra* note 5, at 57, 86-87.

37. *Id.* at 57, 60-61.

38. *Id.* at 62-63,

39. My concern is solely with *Klein*-derived separation of powers arguments. The validity of either piece of legislation on other, non-*Klein* constitutional grounds is beyond the scope of this article.

terrorism and national security. This exemplifies Blasi's conception of a period of "unusually serious challenge to one or more of the central norms of the constitutional regime."⁴⁰

September 11 produced a significant shock to, and arguably a breakdown of, structural and individual rights features of the constitutional and political system.⁴¹ President George W. Bush claimed for the Executive broad power to act in the interest of national security, often to the exclusion of Congress and the courts.⁴² There has been a renewed three-way dance among the branches vying to assert power for themselves and to limit or eliminate the power of the other branches.⁴³ At issue in all of this is the nation's and government's fundamental approach to an existential crisis and the balance between security and individual liberty.

The FISA Amendments Act and the MCA are the signal legislative enactments of the current pathological time. Both were contentious. Both were sharply criticized, particularly by liberal activists and commentators. Both also bear the hallmarks of what I call *Klein-vulnerable* legislation – legislation likely to draw challenge (even unsuccessful challenge) on *Klein* separation of powers grounds. Both respond to specific court decisions or litigation, reflecting political leaders' concerns for how courts have or would resolve particular questions. Both were enacted under a strong political, and particularly electoral, spotlight. And both limit judicial involvement on key legal and constitutional issues, taking power away from

40. Blasi, *supra* note 29, at 459.

41. See, e.g., JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 114-115 (2007); ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 4, 137-139 (2008); JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 52 (2008); Paul M. Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture*, 97 CAL. L. REV. 407, 412-413 (2009); see also *Boumediene v. Bush*, 553 U.S. 723 (2008) (rejecting limitations on habeas corpus for enemy combatants); *Padilla v. Yoo*, C. 08-35, 2009 WL 1651273, *4 (N.D. Cal. 2009) (permitting claim by detainee against government lawyer who promulgated detention and interrogation policies leading to alleged constitutional violations).

42. GOLDSMITH, *supra* note 41, at 124; LICHTBLAU, *supra* note 41, at 7-9; MAYER, *supra* note 41, at 49-51; Schwartz, *supra* note 41, at 423-426; see also GOLDSMITH, *supra* note 41, at 123 (describing Bush administration's "go-it-alone route").

43. Compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that presidentially established military tribunals for terror suspects violate federal law), *id.* at 636 (Breyer, J., concurring) (arguing that the President must consult with Congress absent an emergency), and GOLDSMITH, *supra* note 41, at 123, 205-207 (discussing consequences of Bush administration's decision to pursue anti-terrorism policies unilaterally), with MCA, Pub. L. No. 109-366, 120 Stat. 2600 (2006), and Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L. J. 1762, 1839-1840 (2009) (arguing that Congress repudiated the Court's understanding and reinstated the Executive's view of power over detainees).

the courts and litigants and leaving power in the hands of Congress and the Executive.

Thus, if *Klein* is ever to exert meaningful judicial doctrinal force to invalidate congressional enactments, it is precisely in these worst of times that it should. Yet both pieces of legislation largely survive challenge under any relevant *Klein*-derived principles; any provisions that are unconstitutional are largely symbolic or of limited force. One global explanation could be differences in the relationship between Congress and the President in the current pathology as compared with 1870. In both pieces of counterterrorism legislation, Congress supported and sought to bolster the asserted presidential power, rather than to undermine it.⁴⁴ The current conflict thus pits unified political branches (legislature and executive) against the courts.

The better explanation is that *Klein* simply lacks significant judicial force. Whether the threat comes from Congress, the Executive, or both in combination, even in pathological times, *Klein* does not block any significant efforts by the political branches, even against the judiciary. These two pieces of legislation, enacted in this of heightened tension, illustrate *Klein*'s lack of judicially enforceable vigor.

II. TELECOM IMMUNITY UNDER THE FISA AMENDMENTS ACT

A. Warrantless Surveillance and Telecom Immunity

Soon after the 9/11 attacks, the Bush administration established a secret intelligence-gathering program involving wiretapping overseas calls to and from U.S. residents, without a warrant and outside the procedures established in FISA.⁴⁵ All but one major telecommunications company (Qwest) assisted the National Security Agency (NSA) with the program; the companies allowed the government to install surveillance equipment in their switching stations, agreed to route overseas calls through domestic switching stations, and helped the NSA pore through the vast communications flowing between the United States and certain countries in the Middle East.⁴⁶ *The New York Times* broke the story of the program in late 2005, after sitting on it for approximately a year.⁴⁷ President Bush acknowledged the existence of the program and defended it as necessary for national security.⁴⁸

44. See *infra* notes 61, 102.

45. LICHTBLAU, *supra* note 41, at 9; Schwartz, *supra* note 41, at 412.

46. LICHTBLAU, *supra* note 41, at 149-150, 153-154.

47. *Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); LICHTBLAU, *supra* note 41, at 193-194, 209-211, 212-213; Schwartz, *supra* note 41, at 413.

48. LICHTBLAU, *supra* note 41, at 212-213; Schwartz, *supra* note 41, at 412-413.

Lawsuits followed against the NSA, various government agencies and officials, and the telecom companies.⁴⁹ The claims against the telecoms alleged that they had conspired with government officials to operate a surveillance program that violated the Fourth Amendment prohibition on unreasonable searches and seizures and the First Amendment freedom of speech, as well as various federal statutory provisions.⁵⁰

President Bush and Administration officials argued that warrant requirements and FISA procedures were outdated and ill-suited to the threats of modern terrorism and that the wiretap program was necessary to prevent new terrorist attacks.⁵¹ The Administration sought to codify (and legalize) the program already pursued and generally to broaden executive surveillance powers.⁵² As part of the codification, the Administration also sought retroactive immunity for the telecoms for their role in assisting the NSA with the (arguably unlawful-at-the-time) program.⁵³ The final measure, the FISA Amendments Act of 2008,⁵⁴ included a retroactive immunity provision,⁵⁵ along with legislative history showing that Congress specifically targeted the then pending lawsuits against the telecoms.⁵⁶

The law was sharply criticized as capitulation by the Democratic congressional majority to an unpopular and politically weak President Bush.⁵⁷ Debate over the legislation in spring and summer 2008 took on electoral dimensions as well. Then-Senator Barack Obama, at the time the presumptive Democratic presidential nominee, voted for the bill containing the immunity provision, arguing that, although he disagreed with the immunity grant and might seek to rescind it if elected, the full legislation was necessary, even if flawed.⁵⁸ Liberal activists criticized Obama for failing to stand up against the immunity provision.⁵⁹

49. See *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955; Schwartz, *supra* note 41, at 413.

50. *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955.

51. LICHTBLAU, *supra* note 41, at 308.

52. *Id.* at 307-308; Schwartz, *supra* note 41, at 414-415.

53. Schwartz, *supra* note 41, at 417.

54. Pub. L. No. 110-261, 122 Stat. 2436 (2008).

55. *Id.* §802, codified at 50 U.S.C. §1885a; *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note 41, at 417.

56. *Telecommunications Records Litig.*, 633 F. Supp. 2d at 959.

57. Schwartz, *supra* note 41, at 426; cf. Julian Sanchez, *Fear, Frenzy, and FISA*, REASON ONLINE, Aug. 7, 2007, <http://www.reason.com/news/show/121797.html>.

58. Eric Lichtblau, *Senate Approves Bill To Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1.

59. Michael Falcone, *Blogtalk: Obama's FISA Vote*, N.Y. TIMES, July 9, 2008, <http://thecaucus.blogs.nytimes.com/2008/07/09/blogtalk-obamas-fisa-vote/>; Chris Cillizza, *Wag the Blog: FISA Problems for Obama?*, WASH. POST, July 1, 2008, <http://voices.washingtonpost.com/thefix/wag-the-blog/wag-the-blog-fisa-problems-for.html>.

Section 802 prohibits civil actions in federal or state court against the telecoms arising from their providing “assistance to an element of the intelligence community.”⁶⁰ Any civil action filed or pending at the time of enactment must be dismissed if the United States Attorney General certifies to the court that the defendant telecom provider acted in connection with a presidentially authorized surveillance program in place between September 11, 2001, and January 17, 2007,⁶¹ designed to prevent or protect against a terrorist attack on the United States, and that the defendant provider acted on a written guarantee from the Attorney General or head of a portion of the intelligence community, that the surveillance had been authorized by the President, and that it had been determined by the President to be lawful.⁶² Courts must give effect to the Attorney General’s certification (meaning the case must be dismissed) unless they find the certification not supported by “substantial evidence” provided to the court.⁶³ Orders granting or denying motions to dismiss or for summary judgment under Section 802 are deemed final and immediately appealable.⁶⁴

In June 2009, the district court handling all the telecom lawsuits through Multi-District Litigation⁶⁵ upheld Section 802 against a variety of constitutional arguments, including *Klein*, and dismissed the constitutional claims against the telecoms.⁶⁶

B. *Klein* and Section 802

The primary *Klein* objection (and the one made to the district court) is that Section 802 dictates findings and litigation outcomes and cannot be saved as an amendment because it does not truly amend substantive law. If the Attorney General were to decline to present the certification to the court, the argument goes, the telecom defendants’ conduct would remain unlawful under the Fourth Amendment. Thus, it only becomes lawful when the certification commands the court to deem it lawful.

60. 50 U.S.C. §1885a(a).

61. The temporal limitation is significant to the conclusion that Congress targeted pending litigation. The covered period begins at the signal event that triggered President Bush’s original authorization of the surveillance program and request to the telecoms for assistance and ends when Congress initially, if temporarily, codified and ratified the Administrations’ program. See Schwartz, *supra* note 41, at 417.

62. 50 U.S.C. §1885a(a)(4).

63. *Id.* §1885a(b)(1).

64. *Id.* §1885a(f).

65. 28 U.S.C. §1407(a) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceeding.”).

66. See *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955. The case is pending in the Ninth Circuit as of this writing.

It is true that Section 802 is unusual in form and operation. Congress did not attempt to alter the claim-creating substantive law, which still arguably prohibits or makes actionable defendants' underlying conduct. Instead, Congress established a statutory immunity from liability, an affirmative defense that the government and the telecoms could interpose to bar liability notwithstanding the claim-creating law, although it is the government's burden to raise the defense.⁶⁷

For *Klein* purposes, however, it should be immaterial whether an amendment to substantive law targets the claim-creating law or creates a defense that acts as an outside shield against that law. Changing applicable substantive law means changing the overall legal circumstances applicable to a case – all the legal rules of decision governing some set of facts and circumstances. We get that change from establishing an affirmative defense as much as by altering the claim-creating law. The end result in either situation is that defendants owe no legal duties and plaintiffs have no existing legal rights against those defendants under all applicable law.⁶⁸ Claims that might (depending on the facts found by the court) have succeeded in the old legal landscape (which did not include immunity) no longer succeed in the new legal landscape (which does include immunity). That qualifies as a “detectable” change in substantive law. Indeed, Congress had to leave some claim-creating law – namely, the First and Fourth Amendments – untouched because to legislatively redefine constitutional meaning to legalize the telecoms' conduct would violate *Klein*'s no-compelled-constitutional-untruths principle.⁶⁹ Adding a sub-

67. *Id.* at 963. The *Telecom Litigation* district court called Section 802 “*sui generis*,” in part because the defense only could be asserted by the government as a third-party intervenor, not by the telecom defendant that is the beneficiary of the defense. *Id.* at 959. But this may not be so. Section 802(a) prohibits the defined civil actions; while the ordinary means of establishing the immunity is the Attorney General's certification, nothing prevents a telecom or the government from proving entitlement to immunity without such a certification. Moreover, it is difficult to imagine a case in which the Attorney General would refuse to provide the certification for a meritorious immunity defense.

The district court insisted that Section 802 is not an affirmative defense but an immunity, in part because of this structure. *Id.* at 963. But the two are not mutually exclusive. Immunity simply is one type of affirmative defense. What makes something an affirmative defense is not who asserts it, but that it involves a separate legal rule, introduced into the case by someone other than the plaintiff, that bars liability notwithstanding the ordinary effect of the claim-creating legal rule. Section 802 is unique in that the government, not the telecom defendant invokes and introduces it, but that should not alter the characterization. It also is noteworthy that Section 802 is titled “Procedures for Introducing Statutory Defenses,” 50 U.S.C. §1885a, suggesting that Congress understood immunity as a defense.

68. See Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 KAN. L. REV. 227, 233-234 (2008) [hereinafter Wasserman, *Non-Extant Rights*].

69. Sager, *supra* note 2, at 2529; see *infra* notes 73-88 and accompanying text.

constitutional immunity was the only way Congress could achieve the desired amendment to substantive law.

A related argument is that, by requiring the court to accept the Attorney General's certification so long as it is supported by substantial evidence, Congress has delegated to the Executive the judicial power to find facts and to determine whether statutory requirements have been satisfied in a given case. This strips the judiciary of its independent authority to find facts and make legal determinations based on those facts and applicable law.⁷⁰

But this argument over-emphasizes the formal procedures for the immunity defense while ignoring its practical operation. The Attorney General's certification introduces immunity into the case and serves as initial proof of the defense. The court then must decide whether there is substantial evidence supporting the facts certified. In other words, the court determines whether there is substantial evidence establishing the elements of the statutory immunity reflected in the Attorney General's certification – that the telecom gave assistance to an element of the intelligence community within the time frame; that it did so in connection with the presidentially authorized national-security program; and that it acted on presidential request and assurances of the program's legality. But nothing in Section 802(b) tells courts how to resolve these issues in any given case. It remains for the court to exercise its independent decisionmaking authority to determine whether the certification has sufficient independent evidentiary support. The court must look at evidence and dismiss only if it finds sufficient support for the elements of the legal rule establishing immunity.⁷¹ The court thus retains the independent judicial role that avoids the no-dictating-outcomes principle.

It is true that Section 802 establishes a lower evidentiary standard for the immunity – the telecom company and government must prove the immunity defense only by substantial evidence, rather than the typical civil requirement of preponderance of evidence. But Congress can establish and alter evidentiary standards applicable to claims and defenses created by federal statute.⁷² *Klein* only prohibits Congress (or the Executive, via delegation) from dictating when that evidentiary standard has been satisfied on some facts in a given case, which Section 802 does not do.

Nor does Section 802 violate Sager's no-constitutional-untruths principle. The immunity provision does not affect the scope or meaning of the underlying constitutional rights allegedly violated and does not purport to redefine constitutional rights or dictate constitutional meaning to the courts. Rather, it establishes a statutory affirmative defense that protects telecoms from liability, notwithstanding whether their conduct violated the

70. *Telecommunications Records Litig.*, 633 F. Supp. 2d at 963-964.

71. *Id.* at 964.

72. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

Constitution. In fact, Section 802 obviates the need for any constitutional interpretation, because the subconstitutional immunity defense makes any violation irrelevant. Alternatively, a court might determine that the Constitution was violated, but that recovery still is barred by Section 802. In either situation, the new law does not restrict or affect the court's constitutional analysis and pronouncements, only the subsequent question of whether judicial relief is available as a result of those pronouncements.⁷³

Section 802 immunity is analogous to official immunities that limit or entirely prevent damages against government officials for constitutional violations under Section 1983⁷⁴ and *Bivens*,⁷⁵ despite, and regardless of, whether constitutional rights had been violated.⁷⁶ These immunities are a generally accepted part of the scheme of constitutional litigation. Formally, of course, official immunities under Section 1983 are not congressional creations, but common law rules that *sub silentio* survived passage and were incorporated into the statutory litigation scheme.⁷⁷ And *Bivens* is not a statutory creation at all, but a judicially devised common law cause of action meant to do the same work as Section 1983⁷⁸ that also incorporates common law defenses.⁷⁹

Of course, Congress can override common law rules by statute,⁸⁰ no less for immunities and defenses than for other common law rules. Congress may eliminate all existing immunities, statutorily narrow or expand existing immunities,⁸¹ or, as here, create entirely new immunities beyond those

73. Cf. *Crater v. Galaza*, 491 F.3d at 1127 (9th Cir. 2007) (upholding limits on federal habeas corpus relief, finding that the law “[did] not instruct courts to discern or to deny a constitutional violation,” but “simply sets additional standards for granting relief in cases”).

74. 42 U.S.C. §1983.

75. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

76. See, e.g., *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859-860 (2009) (absolute prosecutorial immunity); *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (qualified executive immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (absolute legislative immunity); *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (absolute judicial immunity).

77. See *Bogan*, 523 U.S. at 49.

78. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-1949 (2009) (describing *Bivens* as “federal analog” to Section 1983).

79. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1749-1750 (1991); see e.g., *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (qualified immunity in *Bivens* action).

80. See Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 769 (2004); Wasserman, *Non-Extant Rights*, *supra* note 68, at 247; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (“[L]egislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.”).

81. In 1996, Congress amended Section 1983 to extend the scope of absolute judicial immunity beyond the common law rule recognized in *Pulliam v. Allen*, 466 U.S. 522 (1984). See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853,

recognized at common law.⁸² Congress has similar power to statutorily alter common law immunities in *Bivens* actions. *Bivens* does presume that some adequate alternative statutory remedy is available to redress a plaintiff's injuries in the absence of a constitutional claim.⁸³ But any *Bivens* action already can be defeated by official immunity, so this additional defense does nothing new. Moreover, Section 802 does not leave plaintiffs without remedy; it only shifts the target of that remedy away from the telecom providers to current and former government officers who promulgated and executed the warrantless surveillance program – subject, of course, to those officials' defense of qualified immunity.⁸⁴ To define Section 802 as impermissible congressional dictation of constitutional meaning ignores the wide acceptance of existing subconstitutional defenses to constitutional liability under Section 1983 and *Bivens*.⁸⁵

A final argument is that Congress enacted Section 802 while lawsuits were pending against the telecoms, suggesting that Congress sought to achieve a specific result (dismissal of the claims) in specific actions. Congress and the President wanted to protect the telecom companies from liability, presumably so the intelligence community and the President could call on them for technical assistance and cooperation in future counterterrorism efforts.⁸⁶

But this is what legal rulemakers always do with substantive law – establish liability rules to protect and incentivize conduct deemed socially

§309 (1996).

82. For example, the Supreme Court has held that private persons and entities are not entitled to common law official immunities under Section 1983 and *Bivens*. See *Richardson v. McKnight*, 521 U.S. 399, 401 (1997). But because Congress could expand common law rules by statute, nothing precludes it from extending some form of immunity to private parties who engage in joint conduct with government officials.

83. See *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

84. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. at 1947; *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1030-1031 (N.D. Cal. 2009). But see Alexander Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812 (2010) (showing that qualified immunity does not play a major role in most *Bivens* litigation).

85. Tracy Thomas argues that there is a fundamental right, grounded in due process, to a remedy for a violation of a right and Congress can limit or deny remedy for such violation only to serve a "compelling state interest." Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1643 (2004). Because official immunities do limit remedies even if the plaintiff has established a violation of a right, the question becomes whether they are supported by compelling policy concerns, and perhaps they are not. Fallon & Meltzer, *supra* note 78, at 1820-1821; Thomas, *supra*, at 1645. But this argument sounds in Due Process, not in *Klein's* separation of powers concerns. Thus, even if there were a constitutional argument against official immunities (which also might invalidate Section 802's immunity), *Klein* still would not be doing any meaningful constitutional work.

86. *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note 41, at 417.

beneficial and punish or deter conduct deemed socially destructive.⁸⁷ That is true of every piece of legislation ever considered, and upheld, in the face of a *Klein* challenge.⁸⁸ Congress viewed it as socially beneficial for telecoms to aid the federal government in its national security and domestic surveillance efforts, so Congress altered legal rules to remove liability for providing such aid, eliminating a possible deterrent to future assistance. Again, so long as Congress is merely hoping for that outcome in these newly created legal circumstances and not statutorily dictating it in a particular case (“In *In re Telecommunications Litigation*, the telecom defendants shall not be found liable.”), we remain at the core of what legislatures must be able to do and what *Klein* cannot be read to prohibit.

Criticism of Section 802 inescapably returns to bottom-line policy preferences – disagreement with the congressionally hoped-for outcome of protecting telecoms from liability at the expense of individuals whose constitutional rights were violated by the surveillance program. One can object (not unreasonably) to allowing telecoms to get away with helping the government engage in conduct obviously unlawful at the time simply because the President asked them to do so.⁸⁹ But calling Section 802’s immunity grant unwise says nothing about its constitutionality; *Klein*, properly understood, has nothing to say about the wisdom of Congress’s hoped-for outcome.

III. THE MILITARY COMMISSIONS ACT OF 2006

A. *Military Commissions and the War on Terror*

Hostilities in Afghanistan and Iraq, along with broader efforts against terrorism, necessitated procedures for dealing with individuals captured and detained in those conflicts, both within the United States and abroad.⁹⁰ Those efforts triggered a multi-stage dance of power among the branches of the federal government.

Just after 9/11, Congress enacted the Authorization for Use of Military Force (AUMF), empowering the President to use “all necessary and appropriate force” against those that had perpetrated or supported the 9/11 attacks “in order to prevent any future acts of international terrorism against

87. See S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69, 70 (2001); Richard A. Epstein, *The Tort/Crime Distinction: A Decade Later*, 76 B.U. L. REV. 1, 4 (1996).

88. *Irrepressible Myth*, *supra* note 5, at 71-72.

89. See Posting of Michael Dorf, *Dorf on Law*, <http://michaeldorf.org/2007/12/immunity-for-phone-companies.html> (Dec. 18, 2007).

90. GOLDSMITH, *supra* note 41, at 106-108.

the United States by such nations, organizations, or persons.”⁹¹ President Bush issued a comprehensive military order authorizing the use of military commissions for trying certain classes of individuals for terror-related activities.⁹² He relied for authority on the AUMF, provisions of the Uniform Code of Military Justice, and, ultimately, his constitutional authority as Commander in Chief.⁹³ He did not seek or obtain congressional approval for military commissions or for the adjudicative processes.⁹⁴

The Supreme Court pushed back in *Hamdan v. Rumsfeld*,⁹⁵ holding that the military commissions were unlawful because not congressionally authorized;⁹⁶ in fact, they conflicted with existing law, notably the UCMJ.⁹⁷ The UCMJ, in turn, incorporated provisions of the four Geneva Conventions, particularly Common Article 3, which required that any proceeding be by a “regularly constituted court affording all the ‘judicial guarantees which are recognized as indispensable by civilized peoples.’”⁹⁸ *Hamdan* was, at bottom, a decision about the relationship between the political branches and the President’s obligation to work with Congress, either acting within the existing statutory regime or getting Congress to alter that regime.⁹⁹ *Hamdan* thus raised the very structural questions and conflicts about the relative powers of the different branches and their relationship to one another that often are central to pathological periods.¹⁰⁰

The legislative and executive reaction to *Hamdan* was quick. President Bush almost immediately began urging congressional Republicans to

91. Authorization for Use of Military Force (AUMF), §2(a), 115 Stat. 224 (2001).

92. See Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001); GOLDSMITH, *supra* note 41, at 109-110.

93. *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); Paulsen, *supra* note 43, at 1837.

94. GOLDSMITH, *supra* note 41, at 123-124.

95. 548 U.S. 557(2006).

96. *Id.* at 567; *id.* at 636 (Breyer, J., concurring); GOLDSMITH, *supra* note 41, at 136.

97. *Hamdan*, 548 U.S. at 613.

98. *Id.* at 631-632.

99. *Id.* at 636 (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine-through democratic means-how best to do so. The Constitution places its faith in those democratic means.”). *Id.* at 653 (Kennedy, J., concurring in part) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”); see also Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 315 (2008); Paulsen, *supra* note 43, at 1835 (“[T]he ultimate upshot of the Court’s decision – as emphasized by the very narrow, far-more-succinct concurrence of four Justices – was that the President lacked authority, in the Court’s view, to take such actions alone. If Congress authorized military commissions, however, that was a different matter.”).

100. See Blasi, *supra* note 29, at 467-468 (arguing that pathological periods often affect structural relationships); *supra* notes 34-35 and accompanying text.

respond to the decision. House Republicans introduced legislation before the end of the summer, and the MCA was signed into law in October.¹⁰¹ The law changed just four months after *Hamdan* and one less than month before the Democrats would regain control of both houses of Congress in mid-term elections.¹⁰² The MCA statutorily authorized and ratified the President's military commissions regime, undid various aspects of *Hamdan* with respect to the Geneva Conventions, and sought to limit the role of federal courts in detainee cases going forward. The closeness in time between *Hamdan* and the electoral deadline made for a very abbreviated legislative process – few hearings, relatively limited debate, and Democrats declining to stage a filibuster against the bill.¹⁰³

As with the FISA Amendments Act, electoral politics influenced passage. *Hamdan* forced the detainee issue onto Congress's legislative plate and the looming elections put pressure on it to act quickly. Party politics also played a role. The Republican congressional majority cooperated with a Republican President, acceding to his policy goals to provide a political victory.¹⁰⁴ On the other hand, Democrats, sensing an opportunity to regain control of one or both houses of Congress (which they ultimately did), felt pressure to cooperate to ensure passage, needing to avoid being tagged as “soft” on terrorism by appearing to oppose robust efforts to handle enemy detainees.¹⁰⁵

Note the important distinction in the broader separation of powers mix between the MCA and the law at issue in *Klein*. In the latter, separation of powers issues arose, in part, from congressional efforts to limit presidential authority and to draft the courts to help carry out that congressional infringement on Executive power.¹⁰⁶ By contrast, the MCA reflects cooperation and agreement between the President and Congress (or at least

101. MCA, Pub. L. No. 109-366, 120 Stat. 2600 (2006); GOLDSMITH, *supra* note 41, at 138-139; Diller, *supra* note 99, at 316-325 (tracing legislative history); *see also* Paulsen, *supra* note 43, at 1839 (discussing the back-and-forth among the three branches on the question of military commissions and the Geneva Convention as an example of how separation of powers functions).

102. Diller, *supra* note 99, at 315; *see also* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 327 (2007).

103. Diller, *supra* note 98, at 316-325 (tracing legislative process).

104. Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, The President, The Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505, 535 (2007). Party politics were an important part of *Klein* as well. Radical Republicans in Congress were in conflict first with Democratic President Andrew Johnson then with his successor Ulysses S. Grant, a Republican, but not part of the Radical Republican camp. *Irrepressible Myth*, *supra* note 5, at 57, 86.

105. Diller, *supra* note 99, at 315.

106. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871); *Irrepressible Myth*, *supra* note 5, at 64, 76.

a congressional majority); *Hamdan* judicially stopped the Executive from exercising powers in conflict with congressional command; the MCA was subsequent congressional acquiescence in that exercise of presidential power.¹⁰⁷ Where the legal principles of *Klein* arose from a three-way power struggle, the MCA arose from efforts by the three branches to cooperate towards the end goal – the Court forced Congress to act and Congress independently granted the President the authority he wanted.¹⁰⁸

B. *Klein and the MCA*

The MCA contains a number of provisions that we might call *Klein*-vulnerable, in the sense of being likely to attract *Klein* arguments, although all such arguments fail in large part.¹⁰⁹

In Section 948(b), alien unlawful enemy combatants are prohibited from invoking the Geneva Conventions as a source of rights before military commissions.¹¹⁰ And in Section 5, all persons are prohibited from invoking the Geneva Conventions in habeas proceedings or in civil actions in federal court against the United States or one of its officers or agents.¹¹¹ In Section 948b(f), military commissions are declared to be “regularly constituted court[s], affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”¹¹² The MCA then defines how U.S. obligations under the Geneva Conventions are to be implemented as domestic law. Section 6 amends the War Crimes Act¹¹³ to provide that only “grave breaches” of Common Article 3 violate domestic law, then defines grave breaches, omitting from the statutory definition some recognized Convention rights.¹¹⁴ It then declares that the War Crimes Act (as amended) fully satisfies the United States’ obligations under the Geneva Convention to provide effective penal sanctions for grave breaches.¹¹⁵ Finally, Section 6 provides that “[n]o foreign or international source of law shall supply a

107. Yin, *supra* note 104, at 534 (“Congress instead agreed with the President as to the tools he claimed to need to fight the global war on terrorism.”).

108. *Id.* at 505, 534-535.

109. My concern in this paper remains solely with *Klein*-derived separation of powers arguments. The validity of military commissions or the MCA, particularly Section 5, on other constitutional grounds, including arguments that it works a suspension of the Writ of Habeas Corpus, does not sound in *Klein* concerns and is beyond the scope of this paper. *Cf.* *Noriega v. Pastrana*, 130 S. Ct. 1002, 1006 (2010) (Thomas, J., dissenting from denial of certiorari).

110. MCA, *supra* note 101, at §948b.

111. *Id.* at §5(a), *codified* at note to 28 U.S.C. §2241; *see also* Bradley, *supra* note 102, at 327.

112. MCA, *supra* note 101, at §948b(f); Bradley, *supra* note 102, at 341 & n.125.

113. 18 U.S.C. §2441.

114. MCA, *supra* note 101, at §6(a)(1), (b)(1)(B); Bradley, *supra* note 102, at 329.

115. MCA, *supra* note 101, at §6(a)(2); Bradley, *supra* note 102, at 329.

basis for a rule of decision in the courts of the United States in interpreting the [domestic] prohibitions” of the War Crimes Act.¹¹⁶

These provisions all draw fire under either *Klein* principle; in fact, one provision arguably even violates *Klein*. Perhaps this is not unexpected from legislation, enacted in pathological times, that attempts to control and limit one branch (the judiciary) in favor of another (the executive). But this does not change *Klein*'s true narrowness. However pathological the current times and however politically controversial the MCA, only one small part of it could possibly be invalidated and even that small provision may not, in the end, be legally significant.

1. Section 5

Consider Section 5's prohibition on invoking the Geneva Conventions in civil and habeas actions. The obvious initial attack is under the no-constitutional-untruths principle. By prohibiting parties from raising and courts from considering the Geneva Conventions as a source of substantive rights in federal court, even while leaving unchanged U.S. treaty obligations under the Conventions, Congress has dictated the judicial analysis and principles courts can apply, stripping them of their independent judgment.¹¹⁷

But this objection to Section 5 runs aground on a proper understanding of subconstitutional law. As I previously argued, an essential limit on the no-untruths principle is that it does not apply to subconstitutional legal rules, notably statutes. Congress remains master of the meaning (within the parameters of internal and external constraints on its prescriptive jurisdiction) of statutes and statutory legal rules.¹¹⁸ There is no such thing as Congress compelling a court to speak a “statutory untruth” – no such thing as limiting or controlling judicial interpretive authority or independent judgment on matters of statutory substance. The “truth” of the statutory rule, and what the court always is bound to wield its independent judgment to find, is whatever Congress deems the truth of the rule to be.¹¹⁹ And legislative control over statutory truth extends to everything affecting statutory meaning – how a statute should be understood, and how it should be applied in reaching decisions – including definitions of terms, legal standards, interpretive instructions, interpretive and constructive rules,

116. MCA, *supra* note 101, at §6(a)(2).

117. Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1239-1240 (2007).

118. *Irrepressible Myth*, *supra* note 5, at 81-83.

119. *Id.* at 81.

permissible sources of legislative history and interpretive guidance, and even interpretive methodology.¹²⁰

The analysis in the treaty context might depend on how we understand treaties as judicially enforceable domestic law.¹²¹ On the “nationalist” view of treaties (which the Supreme Court most recently accepted¹²²), treaties are not judicially enforceable federal domestic law unless either the treaty itself is self-executing and the Senate ratifies it on that understanding, or Congress enacts implementing legislation.¹²³ Domestic judicial enforceability of treaty obligations thus is up to the Senate and the President in the treaty-creation process or to the full Congress and the President in the legislative process.¹²⁴ In other words, treaties are no different than statutes as subject to congressional control as to enforceability and execution.¹²⁵ Congress may choose not to provide implementing legislation, in which case a non-self-executing treaty does not become enforceable in private domestic litigation.¹²⁶ Conversely, Congress may decide after the fact to statutorily alter a treaty’s domestic enforceability by “unexecuting” it, rendering it unenforceable for purposes of domestic law going forward.¹²⁷ This is effectively what Section 5 does – whatever the prior status of Common Article 3 as a matter of domestic law prior to the MCA, those treaty provisions now are unenforceable as domestic law, at least in federal court in habeas proceedings and in civil actions against the government and government officials.¹²⁸

If statutes and treaties are alike in the source of their enforceability, they similarly are alike as to the effect of *Klein*’s no-untruths principle. The truth of all subconstitutional legal rules (statutes or treaties) rests with the

120. *Id.* at 82.

121. See David Sloss, *The United States, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 511 (Derek Jinks & David Sloss eds., 2009) (describing “fundamental disagreement” as to whether treaty creating binding international obligations, without more, binds domestic legal actors as a matter of domestic law); Ernest A. Young, *Treaties as “Part of Our Law”*, 88 TEX. L. REV. 91, 107-108 (2009).

122. See *Medellin v. Texas*, 128 S. Ct. 1346 (2008); Sloss, *supra* note 120, at 512 (discussing the nationalist interpretation of *Medellin*).

123. *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note 102, at 337; Paulsen, *supra* note 43, at 1789.

124. Bradley, *supra* note 102, at 340; Paulsen, *supra* note 43, at 1798 (arguing that treaties’ “force is utterly contingent on the prospective actions and decisions of U.S. constitutional actors”); Sloss, *supra* note 121, at 511-512.

125. Bradley, *supra* note 102, at 340; Paulsen, *supra* note 43, at 1785-1786; Young, *supra* note 121, at 113, 125.

126. *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note 102, at 340; Paulsen, *supra* note 43, at 1789; cf. *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001) (discussing standards for determining congressional intent that statute to be privately judicially enforceable).

127. Bradley, *supra* note 102, at 339; see also Paulsen, *supra* note 43, at 1789 (arguing that a law that contradicts or interprets narrowly a treaty obligation prevails as a matter of U.S. law).

128. Bradley, *supra* note 102, at 340-341; Paulsen, *supra* note 43, at 1848.

maker of that rule – Congress – which has free reign to determine the content of the rule, as well as methods for determining that content. Just as a court cannot logically be compelled to speak a statutory untruth because the truth of the statute’s meaning is congressionally determined, neither can a court logically be compelled to speak a “domestic-enforcement-of-a-treaty untruth.” Treaty enforcement and the truth of the underlying treaty rule for enforcement purposes are congressionally determined. And that holds whether Congress directly establishes the meaning of the subconstitutional rule or, as with Section 5, limits the legal sources courts can use to determine meaning.

Under the competing transnationalist view of treaty enforceability, treaties have the full force of law within the domestic legal system by simple operation of the Supremacy Clause.¹²⁹ The *Klein* objection does not fare much better under this view, however. Treaties remain sub-constitutional law; like statutes, they remain subject to later congressional revision.¹³⁰ Thus even if the Geneva Conventions were self-executing, Congress can, by superseding enactment, limit their domestic effect, which is what Congress did through Section 5.¹³¹

The only potential no-untruths argument against Section 5 is an implicit one. The no-constitutional-untruths principle prohibits Congress not only from dictating constitutional meaning (something it has never really done explicitly), but also from dictating or limiting the legal sources and ideas that courts can rely on in elucidating constitutional meaning.¹³² Limiting the sources to which courts can refer necessarily (or at least potentially) produces a constitutional untruth; it compels the court to understand the Constitution in a way different than the judge deems appropriate in her independent judgment and to announce that different understanding as a constitutional rule.¹³³

Suppose, for example, a litigant in a civil or habeas action attempted to present the Geneva Conventions not as a source of rights that had been violated, but instead used the Conventions to define the contours of due process in arguing that her Fifth Amendment rights had been violated. By prohibiting the courts from using the Geneva Conventions to determine constitutional meaning, Section 5 would compel the court to understand and apply the Constitution differently than it might if left to its own interpretive

129. Sloss, *supra* note 121, at 511.

130. *Id.*

131. *Noriega v. Pastrana*, 564 F. 3d 1290, 1296 (11th Cir. 2009).

132. *Irrepressible Myth*, *supra* note 5, at 80.

133. *Id.* In the prior article, I argued that no-untruths would be violated by frequently proposed, but never enacted, bills preventing federal courts from considering or citing foreign and international law in interpreting the Constitution. *Irrepressible Myth*, *supra* note 5, at 80-81; see, e.g., Constitution Restoration Act of 2005, S.520, 109th Cong., §201 (2005) (as introduced in the Senate).

devices. We now have a genuine *Klein* violation, at least to the extent Section 5 is understood to prohibit courts from even considering the Geneva Conventions as interpretive sources for defining constitutional meaning.

But this one glimmer of *Klein* effectiveness should not be understood to reflect any real vigor in the doctrine or any real problem with Section 5. Importantly, this is not the best reading of Section 5, which appears to target efforts to derive and domestically enforce rights directly from the Conventions. Federal cases that have triggered discussions of, and challenges to, Section 5 all have involved efforts to directly enforce the Conventions as sources of right, not to use them merely as interpretive sources for defining constitutional rights.¹³⁴

2. Section 6

Next, consider the limits that Section 6 imposes on the interaction between the Geneva Conventions and the War Crimes Act. This might be challenged on both no-untruths and no-dictating-outcomes principles. But both arguments again fail.

Congress has not dictated case outcomes here. It simply has defined a treaty term (“grave breach of Common Article 3”) as a matter of enforceable domestic statutory law.¹³⁵ The MCA does not purport to tell courts whether a grave breach has occurred in any particular case, only what qualifies as a grave breach for purposes of domestic law and what relevant facts, if found, show a grave breach in a particular case. Courts retain independent judgment in finding facts and applying the statutory definition to those facts to reach a conclusion on whether a grave breach has occurred in a given case.

Similarly, Congress is within its prescriptive authority in prohibiting courts from using foreign and international law in interpreting the Geneva Conventions for purposes of the War Crimes Act. Again, *Klein*’s no-untruths-principle prevents Congress from dictating to courts what the Constitution means, which includes a prohibition on Congress controlling the sources courts can rely on in determining that meaning.¹³⁶ But *Klein* does not limit congressional authority over statutory meaning, including controlling the sources that courts use in deciding statutory meaning.

134. See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Noriega*, 564 F.3d at 1293.

135. There is general agreement that Congress can define statutory terms. See Araiza, *supra* note 2, at 1131; Linda D. Jellum, “Which Is To Be the Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 880, 882 (2009); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2127 (2002) (“[D]efining terms is, in the first instance, an inherent incident of the legislative power.”).

136. *Irrepressible Myth*, *supra* note 5, at 80; see *supra* note 26 and accompanying text.

Unlike with the Constitution, Congress has the power to define how courts understand and interpret congressional enactments, including defining permissible analytical rules, sources, methods, and techniques.¹³⁷

Congress, of course, could have eliminated all domestic judicial enforcement of the Geneva Conventions.¹³⁸ It follows that it can take the lesser step of controlling the manner of judicial enforcement, by eliminating the Conventions as a permissible source of interpretive rules for the domestic-enforcement statute, thereby narrowing that statutory enforcement.¹³⁹

Section 6 also differs from an effort to prohibit judicial use of foreign and international law in constitutional interpretation,¹⁴⁰ given the greater definitional and interpretive control that Congress has over statutes and over enforceability of treaties as domestic law. It is worth noting that Justice Scalia is the most vocal judicial critic of congressional efforts to limit the use of foreign and international law in constitutional cases, insisting that “No one is more opposed to the use of foreign law than I am, but I’m darned if I think it’s up to Congress to direct the court how to make its decisions.”¹⁴¹ Yet Scalia joined the *Medellin* majority in adopting a broad, nationalist approach to congressional control over enforceability of treaties as domestic law. Reconciling those two positions turns on there being a difference, for *Klein* separation of powers purposes and the non-truths principle, between controlling judicial decisionmaking as to the Constitution and controlling it as to subconstitutional statutory law.

3. Section 948(f)

The strongest *Klein* argument targets Section 948b(f)’s declaration that a military commission is a regularly constituted court satisfying U.S. obligations under the Geneva Conventions. Here, Congress does seem to be dictating a conclusion – when confronted with the issue, a court is obligated to find that the commission is a regularly constituted court, a finding that automatically triggers the conclusion that the United States has complied with its treaty obligations. This goes beyond dictating the legal consequence of a factual conclusion (what all statutes do); it compels courts

137. *Irrepressible Myth*, *supra* note 5, at 80-81.

138. *See Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note 102, at 341; Paulsen, *supra* note 43, at 1789.

139. Paulsen, *supra* note 43, at 1836-1837.

140. *See, e.g.*, Constitution Restoration Act of 2005, S.520, 109th Cong., §201 (2005) (as introduced in the Senate); *Irrepressible Myth*, *supra* note 5, at 81-83.

141. Charles Lane, *Scalia Tells Congress To Mind its Own Business*, WASH. POST, Mar. 19, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051801961.html>; *see Irrepressible Myth*, *supra* note 5, at 80-81.

to find in a particular case that military commissions are regularly constituted courts.

It is not clear, however, how much Section 948(f) matters beyond symbolism. First, Curtis Bradley suggests Congress may not have expected the provision to be judicially enforced; it may be something akin to a sense-of-Congress provision that courts might disregard when presented with a live controversy challenging a military commission.¹⁴² Second, Michael Paulsen argues that section 948(f) could be read as a conclusion not for purposes of domestic judicial enforcement, but only for purposes of U.S. international relations and the nation's political (as opposed to legal) obligations to comply with treaty and convention commitments.¹⁴³ *Klein* obviously is concerned only with the former. It has nothing to say about Congress compelling a conclusion for political and diplomatic purposes.

Neither of these represents the only way to interpret section 948(f), of course. But it could be the view courts adopt when confronted with a *Klein* argument, if only as a savings construction to avoid these very separation of powers problems.

CONCLUSION

However weak *Klein* may be as judicial doctrine perhaps it plays a role in Congress by curbing the worst legislative excess. Knowing that *Klein* is out there, Congress simply restrains itself from going as far as it might.¹⁴⁴ Perhaps left to its *Klein*-free devices, Congress would have required that courts find in every case that the telecom companies acted in accord with presidential request and dismiss the actions; perhaps Congress would have declared that, in all claims arising from counterterrorism activities, courts could not find a grave breach of Common Article 3. But Congress did not do so, even in this most pathological of periods. And it has not done so since the law struck down in *Klein* itself 140 years ago.¹⁴⁵

The proposition that *Klein* causes this prudence is unprovable, of course, since we cannot really speculate on what far-out legislation Congress might have enacted. Nor can we know precisely how *Klein* itself affects individual legislators or restrains legislative action.

But the point of the pathological perspective is that, in truly pathological periods, those constraints break down, theoretically leaving

142. Bradley, *supra* note 102, at 341 n.125.

143. See Paulsen, *supra* note 43, at 1770 (“[I]nternational law is primarily a political constraint on the exercise of U.S. power, not a true legal constraint; it is chiefly a policy consideration of international relations – of international politics.”).

144. See *Irrepressible Myth*, *supra* note 5, at 88-90.

145. See *id.* at 55 (stating that the only law ever invalidated on *Klein* grounds was the law at issue in *Klein* itself).

Congress with greater leeway and willingness to act broadly.¹⁴⁶ Moreover, as Paul Diller argues, it may not matter, since Congress (or at least individual members of Congress) may be willing to vote in favor of unconstitutional legislation, knowing that there is a political benefit to voting in favor of the law with no policy or constitutional risk, since the courts are there to invalidate the legislation.¹⁴⁷ That willingness logically grows in pathological times, where the ordinary restraints are removed anyway. In fact, Diller views the MCA as a classic example of a law passed by Congress despite widespread doubt among legislators as to its constitutionality.¹⁴⁸

Neither the FISA Amendments Act nor the MCA raises real *Klein* problems, other than at the margins, on forced readings, or in largely symbolic ways. It is true that both laws restricted the courts, judicial authority, and judicial decisionmaking; both were enacted with pending or threatened litigation in mind and in direct response to that litigation; and in both Congress sought to achieve “hoped for” outcomes favorable to congressional policy preferences and, arguably, against individual liberties. But, as shown here, *Klein* exerts no meaningful judicially enforceable doctrinal force against either piece of legislation, irrespective of their pathological origins and controversial history. The worst we can say of both pieces of legislation is that they represent unwise public policy. That does not render them unconstitutional or invalid.

146. Blasi, *supra* note 29, at 453; *Irrepressible Myth*, *supra* note 5, at 90.

147. Diller, *supra* note 98, at 283, 295-296.

148. *Id.* at 283-284. Diller focuses his discussion on Section 7 of the MCA, the provision that most directly undid *Hamdan* by stripping federal courts of jurisdiction to hear habeas claims from detainees at Guantanamo Bay, in favor of military commission proceedings. See Pub. L. No. 109-366, 120 Stat. at 2632, §7, *codified at* 28 U.S.C. §2241(e). The Court struck the jurisdiction-stripping provision down as an unconstitutional suspension of the Writ of Habeas Corpus. *Boumediene v. Bush*, 553 U.S. 723 (2008).