United States v. Klein: Judging Its Clarity and Application

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INTRODUCTION

Professor Wasserman offers several evaluations of the Supreme Court's 1872 decision in *Klein*.[1] In places he states that it was issued in a "pathological period," is confusing to read, and therefore difficult to apply. Yet elsewhere in his article he finds the decision to be understandable and recognizes that it offers several clear separation of powers principles. Between those two competing and conflicting positions, the latter analysis is on firmer ground. His article focuses on two recent national security issues – the 2008 statute granting immunity to telecoms that provided assistance to NSA surveillance, and the Military Commissions Act (MCA) of 2006 – to determine whether they are consistent with and controlled by *Klein*.

I. PATHOLOGICAL PERIODS

Professor Wasserman describes *Klein* as the 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.'"[2] Pathological periods, Blasi says, are marked by a "sense of urgency stemming from societal disorientation if not panic."[3] They come at a time of "a shift in basic attitudes, among certain influential actors if not the public at large," concerned with what Wasserman calls "central constitutional commitments."[4] Panic can affect structural features, including formal and informal separation of powers and checks and

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1. United States v. Klein, 80 U.S. (13 Wall.)128 (1872).

2. Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. NAT'L SECURITY L. & POL'Y 211 (2011) [hereinafter Wasserman] (citing Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 459 (1985)).

3. Blasi, *supra* note 2, at 468.

4. Wasserman, *supra* note 2, at 215.

balances, which may "exert much less of a restraining influence" on the political branches and the public."[5] Rigorous judicial review "must be reserved for extreme cases challenging pathological laws and action . . . as a bulwark against overreaching officials and citizens."[6]

Klein arose, Wasserman points out, "in a previous pathological period – Reconstruction."[7] That is true, but what does that say about the clarity of the decision and subsequent ability to apply it with confidence? Good things and bad things come out of periods of stress and panic. The "pathological" period after the Civil War yielded three constitutional amendments: the Thirteenth (abolishing slavery), the Fourteenth (establishing new rights), and the Fifteenth (extending the right to vote). Those years opened up new professional opportunities for women.[8] Some branches of government may perform well, others poorly. The requirement each time is to analyze a particular case or action to determine how well a political institution carries out its constitutional duties. In considering *Klein* in the context of the politics of 1872, the Court was clearly under stress but issued a decision that pushed back against indefensible legislation and did so in a manner that gave clear and valued guidance to future legislation and litigation.

II. THE QUALITY OF *KLEIN*

Wasserman begins his article by citing law review articles that characterize *Klein* as "opaque," "deeply puzzling," "disjointed," "Delphic," "generally difficult to follow," "exaggerated," and "dead wrong."[9] These shorthand critiques of *Klein* are not instructive. In his earlier article in the *University of Cincinnati Law Review*, Wasserman labels *Klein* a "myth."[10] Perhaps Professor Wasserman means this in the sense of an unfounded or false notion, or that the actual intent of the decision is eclipsed by an imagined decision in the minds of modern analysts. As I examine his article and the Court's decision, I am at a loss to discover anything about *Klein* that is mythical. Later in the article, Wasserman says that the decision "simply lacks significant judicial force."[11] I don't believe that. For reasons I will provide, I doubt if the author does either. Wasserman not only agrees with parts of *Klein* but concludes that it was appropriately applied in the telecom and military commission examples.

5. Blasi, *supra* note 2, at 467-468.

6. *Id*.

7. Wasserman, *supra* note 2, at 215.

8. LOUIS FISHER & KATY J. HARRIGER, AMERICAN CONSTITUTIONAL LAW 836 (9th ed. 2011) (federal statute in 1879 giving women the right to practice before the U.S. Supreme Court).

9. Wasserman, *supra* note 2, at 211.

10. *Id*.

11. *Id*. at 218.

There is a curious pattern in law review articles about *Klein*. Authors regularly insist that *Klein* is unintelligible and yet clear enough for them to rely on it to support their positions. Writing in the *Utah Law Review* in 2009, Nate Olsen referred to *Klein* as "singularly obtuse."[12] Yet Olsen proceeded to cite *Klein* as clear and unquestioned authority that Congress in the telecom immunity statute had violated the Constitution.[13] An article in the *Wisconsin Law Review* refers to *Klein* as a "confusing opinion." Although Congress' powers to regulate the jurisdiction of federal courts "are vast, they do not include the power to compel a court to decide cases after removing from it the jurisdiction necessary to its deciding those cases in a manner consistent with the Constitution."[14] As will be explained, there is nothing confusing about *Klein* on that point. An article in the *Cornell Law Review* reinforces the view that *Klein* is not a "model of clarity."[15] In fact, the decision is quite clear in language and reasoning. The same article states that the "actual holding of *Klein* is very narrow."[16] The ruling, in terms of constitutional principles, decided exceptionally broad issues. As we look at the history of *Klein*, the Court was faced with extremely difficult institutional and constitutional issues and acquitted itself well.

Klein was decided in the midst of Civil War statutes that dealt with confiscation of Confederate property, the granting of pardons and amnesties to the rebels, and requiring federal officers and attorneys who practiced in federal court to swear an oath that they had never aided or served in the Confederate government. Congress passed legislation that attempted to control the reach of the President's pardon power and the capacity of federal courts to independently decide cases.[17] Congressional efforts to encroach upon the President's pardon power began in 1869 and continued over the next few years.[18] In *Klein*, pardoned southern property owners sought to recover property confiscated during the Civil War. Through a proviso in an appropriations bill, enacted on July 12, 1870, Congress attempted to block access to the recovery of property even though the property owner had been pardoned and remained faithful to his pledge of loyalty to the Union. Here are excerpts from the appropriations bill:

12. Nate Olsen, *Congress and the Court: Retroactive Immunity in the FISA Amendments Act and the Problem of* United States v. Klein, 2009 UTAH L. REV. 1353, 1357 (2009).

13. *Id*. at 1367.

14. Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes*: United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1193-1194 (1981).

15. Notes, *Is Purely Retroactive Legislation Limited by the Separation of Powers? Rethinking* United States v. Klein. 79 CORN. L. REV. 919, 923 (1994).

16. *Id*.

17. JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 40-43 (2009).

18. W. H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 37, 40 (1941).

> *Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation of otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the court of claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said court of claims, or on appeal therefrom; . . . And in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent of meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction; . . .[19]

Professor Wasserman correctly summarizes the breadth and radical nature of this proviso. The statutory language required (and the Court in *Klein* so understood) that Congress prescribed a rule of decision in a pending case that the courts must apply, 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."[20] The extraordinary nature of the appropriations proviso is reflected in the briefs prepared in support of John A. Klein, administrator of the estate of Victor F. Wilson, deceased. A brief presented to the Supreme Court condemned the proviso as unconstitutional for five reasons:

> 1st. Because Congress has not the power to annul and set aside the valid and constitutional acts of the President.
>
> 2d. It is *ex post facto*, altering the evidence necessary to convict after the commission of the alleged offense.
>
> 3d. Because it is in the nature of a bill of attainder, or of pains and penalties; and because it deprives the claimant of his property without due process of law.

19. 16 Stat. 230, 235 (1870).
20. Wasserman, *supra* note 2, at 212.

> 4th. It is void, because it is a legislative usurpation of the powers and functions vested by the Constitution in the judiciary.
>
> 5th. Because it is a violation of the faith of the nation, plighted by the President, under the direction and authority of Congress.[21]

The brief raised other objections to the proviso. If Congress could exclude a pardon as evidence in a civil court, "there is no reason why it should not be interdicted as testimony in a criminal court."[22] The brief pointed to language in *Ex parte Garland* (1867) that the President's pardon power "is not subject to legislative control."[23] It recognized that some would argue that *ex post facto* applies only to crimes, not to civil proceedings, but again cited *Garland* to support its position that the *ex post facto* principle covers both civil and criminal action.[24]

The Supreme Court's decision in *Klein* is not difficult to comprehend. The Court clearly found the appropriations proviso to be unconstitutional because "it invades the powers both of the judicial and of the executive departments of the government."[25] Attorney General Amos T. Akerman argued that the United States was sovereign and "not liable to suit at all, and if they submit themselves to suit it is *ex gratiâ*, and on such terms as they may see fit."[26] The Court found that reasoning unpersuasive: "It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate."[27] The Court pointed out that originally private claimants were required to go to Congress for relief, but Congress decided by statute to empower the Court of Claims "to render final judgment, subject to appeal" to the Supreme Court.[28]

Akerman also argued that rules of evidence "are at all times subject to legislative modification and control," and that Congress "may prescribe what shall or shall not be received in evidence in support of a claim on which suit is brought against the government . . . ."[29] The Court agreed that Congress had "complete control" over the Court of Claims and "may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect."[30] If Congress denied

21. Argument for Defendant in Error, in the Supreme Court of the United States, The United States, Plaintiff in Error v. John A. Klein, Administrator of Victor F. Wilson, deceased, Appeal from the Court of Claims 6 (1870).

22. *Id*. at 9.

23. *Id*. at 11 (citing *Ex parte* Garland 71 U.S. (4 Wall). 333, 380 (1867)).

24. *Id*. at 15.

25. United States v. Klein, 80 U.S. 128, 129 (1872).

26. *Id*. at 134-135.

27. *Id*. at 144.

28. *Id*.

29. *Id*. at 135.

30. *Id*. at 145.

the right of appeal in a particular class of cases, "there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."[31] But the language of the appropriations proviso "shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose it to deny to pardons granted by the President the effect which this court had adjudged them to have."[32]

According to the appropriations proviso, the Court "is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill." The Court asked: "What is this but to prescribe a rule for the decision of a cause in a particular way?"[33] The Court of Claims had rendered judgment for Klein and an appeal had been taken to the Supreme Court. It was now directed to dismiss the appeal. "Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not . . . ."[34] On this point the Court spoke without equivocation.

So did the Court speak clearly on the effort of Congress to pass legislation "impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. . . . To the executive alone is intrusted the power of pardon; and it is granted without limit."[35] The proviso required the Court "to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end."[36] The Court refused to be used in that manner. Justices Miller and Bradley dissented but on different issues. They both agreed that the proviso "is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President."[37]

The language and holding of *Klein* are straightforward and easy to comprehend. On the main issues of Congress attempting to direct the judiciary how to decide a case and to impair the substance of a pardon, the Court was unanimous. The only parts of the decision somewhat difficult to follow, and institutionally for good reasons, concerned the Court's effort to soften its invalidation of congressional legislation. It expressed it this way: "We must think that Congress has inadvertently passed the limit which

31. *Id*.
32. *Id*.
33. *Id*. at 146.
34. *Id*.
35. *Id*. at 147.
36. *Id*. at 148.
37. *Id*.

separates the legislative from the judicial power."[38] The Court had every reason to believe that a serious confrontation was looming between the legislative and judicial branches and went out of its way to offer words of respect and moderation. Perhaps the effort was destined to be unsuccessful. Congress knew what it was doing when it drafted the proviso. Yet the Court tried again: "We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfill the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims."[39] This is not the clearest sentence ever composed, but the Court was attempting to show good will. As to the holding on Congress's attempt to dictate a judicial ruling and the meaning of a presidential pardon, the decision was exceptionally straightforward and lucid.

Wasserman appears to agree that those elements of *Klein* are intelligible: "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."[40] I would differ only in suggesting that the core elements of *Klein* are knowable and understandable without a close reading.

III. TELECOM IMMUNITY

According to Wasserman, when Congress passed the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, granting immunity to the telecoms involved in NSA surveillance, the "legislative history" shows that "Congress specifically targeted the then pending lawsuits against the telecoms."[41] However, Wasserman does not explore the legislative history of committee reports and floor debate. When we examine those documents, we can see that members of Congress were well aware of the restrictions of *Klein* and consciously avoided legislation that attempted to dictate to courts how to decide a case. Wasserman agrees that the FISA legislation does not conflict with *Klein*. 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."[42] In short, courts under this 2008 statute are not puppets of Congress and subordinate to legislative directions. In the

38. *Id*. at 147.
39. *Id*. at 148.
40. Wasserman, *supra* note 2, at 213.
41. *Id*. at 219.
42. *Id*. at 220.

words of Wasserman: "The court thus retains the independent judicial role that avoids the no-dictating-outcomes principle."[43]

The U.S House of Representatives bill on the 2008 FISA legislation was reported under a closed rule (allowing no amendments) and providing for one hour of debate.[44] There was little time on this rule to debate constitutional principles. No one during House debate on this resolution for a closed rule discussed the constitutional principle of *Klein* that Congress could not dictate to federal courts how to decide a case.[45] However, the bill recognized several opportunities for federal judges to make independent assessments of assertions made by executive officials in court. If a judge determined that facts submitted by federal officers and approved by the Attorney General "are insufficient to establish probable cause" for surveillance, "the judge shall enter an order so stating and provide a written statement for the record of the reasons for the determination."[46] Similarly, a federal judge could determine that a certification of the Attorney General concerning a planned surveillance was "clearly erroneous."[47] In terms of the immunity accorded to telecoms, a civil action may not lie against "any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed," if the Attorney General certifies to the district court that the assistance was appropriately provided.[48] The certification by the Attorney General "shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section."[49]

After adoption of the rule, the House began debate on the bill. Representative Silvestre Reyes, chairman of the U.S. House of Representatives Intelligence Committee, spoke about the independence of federal courts to decide immunity for the telecoms: "This bill does not grant immunity to any government official who might have violated the law, and this bill does not grant automatic immunity to telecom companies, as the Senate bill would have. . . . Congress isn't deciding the question of immunity; the District Court will."[50] Representative Bobby Scott made a similar observation: "The bill also provides retroactive immunity to communication companies who may have violated people's rights, and whether or not those rights have been violated should be reviewed by the courts, not decided here in Congress."[51]

43. *Id*. at 222.
44. H.R. Rep. No. 110-721, 110th Cong., 2d Sess. 1 (2008).
45. 154 CONG. REC. H5739-H5741 (daily ed. June 20, 2008).
46. *Id*. at H5747, §703(c)(3)(B).
47. *Id*., §703 (c)(3)(D).
48. *Id*., at H5752, §802(a)(1).
49. *Id*., §802 (b)(1).
50. *Id*. at H5758.
51. *Id*. at H5759.

During Senate debate, Chairman of the Senate Judiciary Committee Patrick Leahy spoke about the importance of judicial review in correcting "the overreaching and excesses of the Executive."[52] In referring to *Klein*, he said that Congress "simply does not have authority to tell the courts, a coequal branch, how it must decide a case."[53] Senator Christopher Dodd added: "We are not deciding the case. We are merely saying the courts ought to do that."[54] As enacted, the FISA Amendments Act of 2008 provided that a civil action "may not lie or be maintained in a Federal of State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States" that the assistance was provided pursuant to a certification from the executive branch.[55] The certification "shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section."[56]

Professor Wasserman finds that nothing in the 2008 statute "tells courts how to resolve these issues in any given case." A court is at liberty "to exercise its independent decisionmaking authority to determine whether the certification has sufficient independent evidentiary support." After looking at evidence, the court may dismiss "only if it finds sufficient support for the elements of the legal rule establishing immunity." Wasserman concludes that federal courts reviewing these cases retain "the independent judicial role that avoids the no-dictating-outcomes principle."[57] To that extent, Wasserman sees no inconsistency between the 2008 statute and the principles set forth in *Klein*. If left to a "*Klein*-free" climate, Congress "could have required that courts find in every case that the telecom companies acted in accord with presidential request and dismiss the actions," 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."[58] Therefore, *Klein* is clear enough to understand and clear enough to apply. As Wasserman concludes, "[n]either the FISA Amendments Act nor the MCA raises real *Klein* problems."[59]

52. *Id*. at S6460 (daily ed. July 9, 2008).
53. *Id*. at S6460-6461.
54. *Id*. at S6463.
55. Pub. L. No. 110-261, 122 Stat. 2468, §802(a)(2) (2008).
56. *Id*. at 2469, §802(b)(1).
57. Wasserman, *supra* note 2, at 222.
58. *Id*. at 234.
59. *Id*. at 235.

IV. MILITARY COMMISSIONS ACT OF 2006

In *Hamdan* v. *Rumsfeld*,[60] the Supreme Court held that the military commissions created by President George W. Bush on November 13, 2001 were not authorized by Congress. As Wasserman notes, "they conflicted with existing law," including the Uniform Code of Military Justice.[61] In response to the Court's decision, Congress passed the Military Commissions Act of 2006 to provide statutory backing.[62] To Wasserman, the MCA "sought to limit the role of federal courts in detainee cases going forward."[63] The statute would have raised clear issues under *Klein* if it had removed federal courts altogether. However, the MCA did not remove all federal courts. In case of an adverse ruling from the Court of Military Commission Review, the defendant could appeal to the U.S. Court of Appeals for the District of Columbia Circuit (referred to here as the D.C. Circuit).[64] The statute assigned exclusive appellate jurisdiction to the D.C. Circuit and the Supreme Court.[65] The jurisdiction of the D.C. Circuit was limited to the consideration of "(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States."[66]

The significant limitation on federal courts came in a section on habeas corpus: "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."[67] That was the issue taken to the Supreme Court in *Boumediene* v. *Bush*,[68] a decision that Wasserman briefly cites, without any analysis. It was because of *Boumediene* that federal district courts began to review the status of detainees in Guantánamo.[69]

What, then, is the connection between the MCA and *Klein*? Wasserman notes that party politics played a role in the enactment of the MCA.[70] Similarly, party politics "were an important part of *Klein* as well."[71] But that factor is insufficient to link the MCA to *Klein*. Wasserman points

60. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
61. Wasserman, *supra* note 2, at 226.
62. Pub. L. No. 109-366, 120 Stat. 2600 (2006).
63. Wasserman, *supra* note 2, at 227.
64. 120 Stat. 2621, §950d(d).
65. *Id*. at 2622, §950g.
66. *Id*. at 950g(c).
67. *Id*. at 2636, §7(a)(e)(1).
68. Boumediene v. Bush, 553 U.S. 723 (2008).
69. *See, e.g*., Mohammed v. Obama, 689 F.Supp.2d 38 (D.D.C. 2009).
70. Wasserman, *supra* note 2, at 227.
71. *Id*. at 227, n.104.

to "the important distinction in the broader separation of powers mix between the MCA and the law at issue in *Klein*." Separation of powers issues are frequently present without raising any connection to *Klein*. More specifically, Wasserman states that 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."[72]

Judged by what Wasserman says in this section of his article, the arguments fail completely. He states that one provision of the MCA "arguably" violates *Klein*. But then he backs away from that hypothetical: "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."[73] In determining whether a *Klein* problem exists with the MCA, Wasserman turns to "subconstitutional law" and the "no-constitutional-untruths principle," a discussion I found difficult to follow.[74]

At one point, Wasserman claims that 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."[75] However, Congress frequently and explicitly dictates constitutional meaning. In some cases it is in response to the refusal of the Supreme Court to decide the meaning of a constitutional provision. As one example, a litigant brought to the Court the issue whether covert funding by the CIA violated the Statement and Account Clause, which requires that the "Receipts and Expenditures of all public Money shall be published from time to time."[76] The Court in 1974 held that the litigant lacked standing, forcing the issue back to the elected branches for resolution.[77] In response to recommendations by the 9/11 Commission, Congress passed legislation in 2007 to require the publication of the aggregate budget for the intelligence community.[78] Many separation of power issues, left undefined by the courts, are settled by the elected branches.[79]

Even when the Supreme Court decides an issue, Congress can assert its own constitutional interpretation that protects individual rights to a greater

72. *Id*. at 228.

73. *Id*. at 229.

74. *Id*. at 230-231.

75. *Id*. at 231.

76. U.S. CONST., art. I, §9, cl. 7.

77. United States v. Richardson, 418 U.S. 166 (1974).

78. 121 Stat. 266, 335, sec. 601 (2007). *See* LOUIS FISHER, THE SUPREME COURT AND CONGRESS: RIVAL INTERPRETATIONS 221-225, 246-251 (2009).

79. Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990), *available at:* http://www.loufisher.org/docs/ci/460.pdf.

degree than the judiciary. In 1986, the Court held that the military needs of the Air Force trumped the religious liberty of a serviceman.[80] Within one year, balancing the same two values, Congress passed legislation directing the military services to change their regulation to permit the wearing of religious apparel provided it does not interfere with the performance of military duties.[81] Congress has often protected individual and minority rights to a greater degree than the Supreme Court.[82]

Toward the end of the article, Wasserman starts with a "suppose" and concludes that with Section 5 of the MCA "[w]e now have a genuine *Klein* violation . . . ."[83] Yet he again pulls back from this hypothetical violation: "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."[84] The "strongest *Klein* argument" targeted another section of the MCA, but again Wasserman finds no violation.[85]

CONCLUSION

In his previous article, Wasserman suggested that "[h]owever 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."[86] *Klein* established a strong and persuasive position against congressional encroachment. It was never established by Wasserman that *Klein* was weak as a judicial doctrine, unclear in meaning, and therefore difficult to apply in future cases. He adds: "the point of the pathological perspective is that, in truly pathological periods, those constraints break down, theoretically leaving Congress with greater leeway and willingness to act broadly."[87] The period after the terrorist actions of 9/11 represented, in Wasserman's view, a pathological period, but Congress did not attempt in either legislative action to dictate to federal courts how to decide a case.

He concludes "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."[88] But Wasserman does not find a *Klein* problem even at the margins, either with forced readings or in symbolic ways. When Congress in 1870 overstepped with the appropriations proviso, the Court in

80. Goldman v. Weinberger, 475 U.S. 503 (1986).

81. 101 Stat. 1086-1087, § 508 (1987). For further details, see FISHER, THE SUPREME COURT AND CONGRESS, *supra* note 79, at 169-171, 192-197.

82. LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION (2011).

83. Wasserman, *supra* note 2, at 232.

84. *Id*. at 232.

85. *Id*. at 233-235.

86. *Id*. at 234.

87. *Id*. at 234-235.

88. *Id*. at 235.

a forthright and clear opinion struck down the legislative intrusion. Wasserman nevertheless concludes that "*Klein* exerts no meaningful judicially enforceable doctrinal force against either piece of legislation, irrespective of their pathological origins and controversial history."[89] The reason there was no need for judicial enforcement is that in neither case did Congress create a problem with *Klein*. Congress in the telecom immunity statute recognized the binding force of *Klein* and did not violate it, as Wasserman admits. Despite his efforts, Wasserman could not find a *Klein* problem with the Military Commissions Act. The meaning of *Klein* is clear. Congress did not violate it after 9/11. If it does, which is highly unlikely, the courts are there to apply *Klein* and protect judicial independence.

89. *Id*.