Judge Restani and the Geneva Conventions in United States Law

By Collin Mathias[*]

In 2008, when sitting by designation[2] with the U.S. Court of Appeals for the Eleventh Circuit, Judge Jane Restani of the U.S. Court of International Trade had the opportunity to write on the applicability and interpretation of the Geneva Conventions in federal court. The Eleventh Circuit opinion resolved multiple constitutional challenges to a wartime statute, evaluated a European country's commitment to international standards, and allowed a notorious Central American dictator and prisoner of war to be extradited. Her decision remains the most recent and on point case on the application of the Geneva Conventions in domestic litigation.

General Manuel Noriega was the head of the Panamanian Defense Forces and the authoritarian leader of Panama from 1983 until his capture by the United States in 1989 during a brief military intervention.[3] A grand jury indicted him on federal drug-related conspiracy charges, for which he was eventually convicted and sentenced to 30 years' imprisonment.[4] He sought a declaration in federal court that he was a prisoner of war ("POW") under the Geneva Conventions, which the Southern District of Florida granted him along with specified conditions that he must be granted while in custody.[5] And when his sentence was ending, he sought to rely on the Geneva Conventions once more to control his release, and whether he could face further criminal charges

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[2] Federal judges may sit by designation under 28 U.S.C § 292 "whenever the business of that court so requires." 28 U.S.C § 292. For a brief history of the practice of designation work by federal judges, *see* Marin K. Levy, *Visiting Judges: Riding Circuit and Beyond*, Judicature Vol. 106 No. 3 (2023), https://judicature.duke.edu/articles/visiting-judges-riding-circuit-and-beyond/#:~:text=Hundreds%20of%20judges%20each%20year,the%20federal%20courts%20each%20year.

[3] Randal C. Archibold, *Manuel Noriega, Dictator Ousted by U.S. in Panama, Dies at 83*, N.Y. TIMES, (May 30, 2017), https://www.nytimes.com/2017/05/30/world/americas/manuel-antonio-noriega-dead-panama.html.

[4] *Id.*

[5] *See United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992) ("*Noriega* I"), *aff'd* 117 F.3d 1206 (11th Cir. 1997).

in other countries.[6] Judge Restani was on the Eleventh Circuit panel that heard General Noriega's final habeas challenge.[7]

This article will first present the legal background relevant to Judge Restani's opinion. Then, the article will discuss the factual circumstances surrounding Judge Restani's opinion; how General Noriega attempted to avoid extradition to France based on his POW status. Finally, the article will reflect on remaining ambiguities in Geneva Convention application in federal habeas law and whether the opportunity to meaningfully challenge its constitutionality has passed.

I. Legal Background on Habeas Petitions Filed by Combatants in the United States

In 2006, in *Hamdan v. Rumsfeld*, the United States Supreme Court held that military commissions established by President George W. Bush in order to try detainees at Guantanamo Bay during the War on Terror violated the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.[8] As noted by a concurring opinion, though, "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[9] The Bush administration did just that, securing congressional passage of the Military Commissions Act of 2006 ("MCA").[10]

The MCA had two provisions that are relevant to this article's topic and the Geneva Conventions. The first is § 5 of the MCA, which provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or . . . [an] agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[11]

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[6] *Noriega v. Pastrana*, 564 F.3d 1290, 1293 (11th Cir. 2009) ("*Noriega* II") (Restani, J.).
[7] *Id.*
[8] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Specifically, the Court held that the Commissions were established under the UCMJ and that the UCMJ itself guaranteed a certain level of process to any commissions established under its authority. That level of process required that the Commissions comply with Geneva Convention rules. The Court did not reach the question of whether the Geneva Conventions in themselves established a judicially cognizable right.
[9] *Id.* at 636 (Breyer, J., concurring).
[10] Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA").
[11] MCA, § 5(a), 28 U.S.C. §2241 note.

This clause, which applied to all U.S. courts, covered actions filed by any person in the United States for habeas corpus or civil suits from invoking the Geneva Conventions as a source of rights.[12] The legislative history of this section shows that eliminating the Geneva Conventions as a source of legal rights was the goal.[13]

The other relevant clause, § 7 of the MCA, is referred to as the restriction on habeas corpus review section, and provided:

> 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.[14]

The MCA specified that § 7 applied to all pending or subsequent cases brought by "an alien detained by the United States since September 11, 2001.[15]

During the litigation of Noriega's habeas corpus petition, the Supreme Court in *Boumediene v. Bush* held that § 7 of the MCA was unconstitutional.[16] The Court held that detained people could not be prevented from seeking habeas relief regardless of status as an enemy combatant.[17] Specifically, the Court stated that § 7 of the MCA was a breach of the Suspension

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[12] *See id.*; *see also* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 328 and 328 n.41 (2007) (noting that the MCA would preclude reliance on the Geneva Conventions for suits under the Alien Torts Statute in addition to other civil suits).

[13] *See, e.g.,* H.R.REP. No. 109–731, at 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); H.R.REP. No. 109–664(II), at 17 (2006) (noting that the section "would prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States"); 152 CONG. REC. S10354, S10400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights."); *id.* at S10414 (statement of Sen. McCain) ("[This legislation] would eliminate any private right of action against our personnel based on a violation of the Geneva Conventions.").

[14] MCA, § 7(a).

[15] *Id.* § 7(b).

[16] *Boumediene v. Bush*, 553 U.S. 723, 795 (2008).

[17] *Id.* at 771.

Clause[18] and did not provide an adequate remedy to substitute habeas relief.[19] Before *Boumediene*, detainees could have status reviews under the Detainee Treatment Act of 2005,[20] but the Supreme Court determined those procedures failed to be an adequate substitute.[21] The Supreme Court did not determine the "content of the law that governs petitioners' detention."[22] With this statutory framework in mind, the article will explore how Judge Restani interpreted the MCA and any issues with the statute.

Additionally relevant is the status of the Geneva Convention in United States law, specifically, whether the Geneva Conventions are a self-executing treaty. Ratified treaties in the United States are divided into "self-executing treaties," which provide immediate legally enforceable rights in U.S. courts, and "non-self-executing treaties," which have no domestic application without implementation from Congress.[23] In *Hamdan*, the Supreme Court did not decide whether the Geneva Conventions were self-executing, instead relying on congressional incorporation of the laws of war, which include the Geneva Conventions.[24] In *Noriega I*, the Southern District of Florida held that it believed that "Geneva III is self-executing and provides General Noriega with a right of action in a U.S. court for violation of its provisions."

II. Noriega's Legal Battles

Out of a concern about the type of care Noriega would receive in federal custody, in 1992, the U.S. District Court for the Southern District of Florida designated him a POW entitled to the

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[18] U.S. Const., art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.")
[19] *Boumediene*, 553 U.S. at 792.
[20] Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat 2680, 2740–44, note following 10 U.S.C. § 801 (2005 ed., Supp. V)
[21] *Boumediene*, 553 U.S. at 792.
[22] *Id.*
[23] Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1786 (2011).
[24] *Hamdan*, 548 U.S. at 598

protections of the Geneva Convention Relative to the Treatment of Prisoners of War[25] during his imprisonment after he filed for its protections.[26]

Shortly before Noriega was scheduled to be released on parole in 2007, the United States filed a complaint for the extradition of Noriega pursuant to a treaty[27] with the French Government.[28] In response, Noriega filed a habeas corpus petition,[29] alleging that the United States violated the Geneva Conventions by acquiescing to the French Government's request to extradite him.[30] The Southern District of Florida agreed that Noriega's POW status continued to apply, protecting him until his final release, but eventually denied the petition.[31] The district court, however, stayed the extradition pending appeal due to the "credible arguments . . . , particularly with regard to the interpretation of certain provisions of the Geneva Convention[s]," on which "no other federal court has ruled."[32] Noriega appealed to the U.S. Court of Appeals for the Eleventh Circuit, where Judge Restani was sitting by designation.[33]

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[25] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention" or "Convention").

[26] *See Noriega* I, 808 F. Supp. at 791. This was the first time an individual detained in the United States asked for a judicial determination of POW status. *See* Geoffrey S. Corn & Sharon G. Finegan, *America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 La. L. Rev. 1111, 1115 (2011). In *Noriega* I, the district court found that the United States' actions in Panama constituted an "armed conflict" under article 2 of the Third Geneva Convention, that Noriega was a member of the armed forces under article 4, and that a district court was a "competent tribunal" to determine POW status under article 5. *See Noriega* I, 808 F. Supp. at 793-96. Thus, the district court concluded that Noriega was a POW, and identified specific Geneva Convention rights it believed he was entitled to receive in federal custody. *Id.* at 799-803. The decision was not challenged on appeal.

[27] Extradition Treaty, U.S.-Fr., art. 1, Apr. 23, 1996, S. Treaty Doc. No. 105–13 (2002).

[28] *Noriega II*, 564 F.3d at 1293.

[29] Noriega originally filed his habeas petition under 28 U.S.C. § 2255. *See United States v. Noriega*, No. 88–0079–CR, 2007 WL 2947572 (S.D. Fla., Aug. 24, 2007). Section 2255 is the mechanism for a federal prison to launch a collateral attack on an imposed sentence, which involves "mov[ing] the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The district court dismissed the § 2255 petition as not cognizable because Noriega did not challenge a defect in his sentence. *See Noriega*, No. 88–0079–CR, 2007 WL 2947572. The district court accepted Noriega filing the same claims under 28 U.S.C. § 2241. *See United States v. Noriega*, No. 07–CV–22816–PCH, 2008 WL 331394, at *3 (S.D. Fla., Jan. 31, 2008).

[30] *See Noriega*, No. 88–0079–CR, 2007 WL 2947572. Noriega's challenge was based on article 87 of the Third Geneva Convention, which prohibits a country from transferring a POW to another country if that country does not recognize the detained person's POW status. Third Geneva Convention, *supra* note 20, art. 87.

[31] *Id.*

[32] *See id.* at *1.

[33] *See Noriega* II, 564 F.3d at 1292.

III. Judge Restani's Opinion in *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2008)

When analyzing Noriega's claim, Judge Restani started by stating that the parties agreed that "the issues present in [*Boumediene v. Bush*], concerning the constitutionality of § 7 of the MCA, are not presented by § 5 of the MCA."[34] She held, instead, that:

> Section 5, in contrast, as discussed more fully, *infra*, at most changes one substantive provision of law upon which a party might rely in seeking habeas relief. We are [thus] not presented with a situation in which potential petitioners are effectively banned from seeking habeas relief because any constitutional rights or claims are made unavailable.[35]

Thus, Judge Restani rejected any Suspension Clause argument that Noriega could have raised for his habeas petition.[36]

Next, Judge Restani found it unnecessary to decide whether the Geneva Conventions are self-executing treaties.[37] Relying on *Medellin v. Texas*¸[38] she reasoned that, although treaties are part of the supreme law of the land, "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty."[39] Congress is able to pass statutes that supersede the domestic effect of treaties.[40] This brought Judge Restani to the other component of the MCA at issue: whether, despite § 5's declaration that "no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or [. . .] civil action or proceeding" in which the United States is a party, the Geneva Conventions could be relied upon by a party.

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[34] *Noriega* II, 564 F.3d at 1294. Both of the parties conceded this point in the Eleventh Circuit. *See id.* Noriega maintained that MCA § 5 somehow did not bar his reliance on Geneva III. *Id.* It reemerged in Noriega's petition for a writ of certiorari, however, as recognized by Justice Thomas in his dissent of denial of the petition. *Noriega v. Pastrana*, 559 U.S. 917, 1005-06 (2010) ("*Noriega* III").

[35] *Noriega* II, 564 F.3d at 1294

[36] *Id.*

[37] *Id.* at 1295-96.

[38] *Medellin v. Texas*, 552 U.S. 491 (2008).

[39] *Noriega* II, 564 F.3d at 1295–96.

[40] *Id.* at 1296; *see also e.g. Breard v. Greene,* 523 U.S. 371, 376 (1998) (per curiam) (quoting *Reid v. Covert,* 354 U.S. 1, 18 (1957) (plurality opinion)) (finding that petitioner's claim for relief based on violations of the Vienna Convention on Consular Relations was subject to later enacted Antiterrorism and Effective Death Penalty Act); *Medellin*, 552 U.S. at 509 n.5 ("Indeed, a later-in-time federal statute supersedes inconsistent treaty provisions."). Professor Bradley refers to this as the "last-in-time rule." Bradley, *supra* note 7, at 339.

Noriega argued to the Eleventh Circuit that, although § 5 prevented him from invoking the Third Geneva Convention as a source of rights through a habeas petition, he maintained the right "to enforce the provisions" of the Treaty against the Secretary of State, Bureau of Prisons, and the Department of Justice.[41] He asserted that article 118 of the Third Geneva Convention required that, as a POW, he be repatriated to Panama after his criminal sentence ended.[42] The Government responded by arguing that Noriega's Geneva Convention claims were outside the scope of a habeas petition, that the Geneva Convention was not self-executing, and that it made no guarantee against the extradition that Noriega sought to avoid.[43] Noriega responded by arguing that the Geneva Conventions were self-executing, and the United States was unable to argue otherwise since it had not argued or appealed this issue in Noriega's first case, when the Southern District of Florida ruled that the treaty was self-executing as part of its determination that he was a POW.[44]

Considering Noriega's argument, Judge Restani decided that Noriega was still relying on the Third Geneva Convention as a source of rights for his habeas claim, despite his arguments to the contrary.[45] She highlighted that § 5 is not limited to habeas corpus petition, and instead "attempts to remove entirely the protections of the Convention from any person, even a citizen of the United States, in any American courtroom whenever the United States is involved."[46] Analyzing the legislative history, Judge Restani stated that the plain text of § 5 made it unambiguous and was clearly intended to preclude any court from treating the Geneva Conventions as "a source of rights, directly or indirectly," that was "judicially enforceable in any

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[41] *Noriega* II, 564 F.3d at 1296.
[42] *Id.* at 1296-97; *see* Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1297.
[46] *Id.* at 1296.

court of the United States."[47] She concluded, accordingly, that § 5 plainly prohibited Noriega from making any Geneva Convention claim. As all of Noriega's requests for relief were based in the Geneva Convention and thus plainly barred, Judge Restani held that Noriega failed to state any valid claim for habeas relief.[48]

In the alternative, however, Judge Restani proceeded to address the merits of the extradition question as though "the Third Geneva Convention [were] self-executing and that § 5 of the MCA does not preclude Noriega's claim."[49] Considering the Third Geneva Convention, she relied on article 119 to state that the United States was authorized to prolong Noriega's detention and POW status for the duration of his criminal sentence.[50] Next, she cited article 12 for "the principle that repatriation is not automatic."[51] She stated that article 12 imposed the requirement that POWs may only be transferred to a country that is a party to the Third Geneva Convention and would apply it.[52] And because France was also a party to the Third Geneva Convention and the United States obtained specific information from the Republic of France that Noriega would receive the same rights and protections the United States provided Noriega, Judge Restani concluded that the extradition would satisfy article 12.[53]

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[47] *Id.*; *see also Boumediene v. Bush,* 476 F.3d 981, 988 n.5 (D.C. Cir. 2007) (concluding that "[s]ection 7 [of the MCA] is unambiguous, as is section 5(a)"), *rev'd by Boumediene*, 553 U.S. at 795 (holding that § 7 unambiguously eliminates habeas jurisdiction but is unconstitutional but not discussing § 5).
[48] *Noriega* II, 564 F.3d at 1297.
[49] *Id.*
[50] *Id.*; Article 119 states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." Third Geneva Convention art. 119. This modifies article 118's requirement that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.*, art. 118.
[51] *Noriega* II, 564 F.3d at 1298. Article 12 provides that "[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." Third Geneva Convention art. 12.
[52] *Noriega* II, 564 F.3d at 1298.
[53] *Id.*

Noriega contended that article 12 did not apply to extradition because it omitted any explicit reference to extradition.[54] Judge Restani looked to the "parallel" article 45 to the Fourth Geneva Convention,[55] which specifically stated that it did not prohibit extradition.[56] She emphasized that both article 12 of the Third Geneva Convention and article 45 of the Fourth Geneva Convention were about transfer, and found it compelling that the same convening parties expressed an understanding that the word transfer included extradition.[57] She discussed that reading the articles differently would obligate a country "to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges."[58] She declined to endorse "such an inconsistent result, particularly when both articles permit the transfer of prisoners of war or civilians under the same limited restraints."[59] As a result, Judge Restani and the Eleventh Circuit concluded that Noriega could be extradited under U.S. law and the Third Geneva Convention.[60]

Following his loss at the Eleventh Circuit, Noriega petitioned for a writ of certiorari to the Supreme Court, which was denied.[61] Notably, though, Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented from the denial of certiorari.[62] Noriega sought Supreme Court review in order to argue that § 5 of the MCA "affect[s] 28 U.S.C. § 2241 in a manner that implicates the constitutional guarantee of habeas corpus" under the Suspension Clause similarly to the Supreme Court's holding in *Boumediene*.[63] Noriega also asserted that § 5 implicated the Supremacy Clause

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[54] *Id.*
[55] Geneva Convention Relative to the Protection of Civilian Persons in Time of W ar, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention").
[56] *Noriega* II, 564 F.3d at 1298-99. "The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law." Fourth Geneva Convention, art. 45.
[57] *Noriega* II, 564 F.3d at 1299.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Noriega* III, 559 U.S. at 1002-03.
[62] *Id.*
[63] *Id.*

of the U.S. Constitution,[64] calling into question whether a statute can "effect[] a complete repudiation of the treaty."[65]

In the dissent, Justice Thomas did not take a position on the merits of Noriega's petition, instead imploring that the Supreme Court should have taken the case in order to "help the political branches and the courts discharge their responsibilities over detainee cases."[66] Justice Thomas stated that Noriega's case addressed an open question regarding "whether statutory efforts to limit § 2241 implicate the Suspension Clause" as § 5 of the MCA did here.[67] Although he noted that Noriega was at the time the only POW held by the United States in prison, he argued that the case would be an effective vehicle to clarify the law for Guantanamo Bay detainees as well.[68] He highlighted the unique opportunity presented to the court to review a Geneva Convention question arising from a conviction from a federal court (as opposed to a military tribunal) and lacking classified information or extraterritorial detention issues. Thomas saw an opportunity to reach four issues: first, whether or not MCA § 5(a) could validly remove Geneva Convention habeas claims from federal court; second, whether the Geneva Convention was self-executing and judicially enforceable; third, if the Geneva Conventions are self-executing and judicially enforceable, whether federal courts have the authority to classify detainees as POWs; and fourth, whether any of the Geneva Conventions required the United States to repatriate detainees released from United States custody.

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[64] U.S. Const. art. VI, cl. 2 ("Supremacy Clause").
[65] *Noriega* III, 559 U.S. at 1005 (quotation marks omitted). Interestingly, Judge Restani stated in *Noriega II* that Noriega conceded this argument at the Eleventh Circuit. *Noriega* II, 564 F.3d at 1294. Noriega likely imprecisely conceded only that *Boumediene* was not directly on point precedent but maintained that the MCA somehow did not bar his claim.
[66] *Noriega* III, 559 U.S. at 1002.
[67] *Id.* at 1006.
[68] *Id.* at 1008-09.

After the Supreme Court denied the certiorari petition, the United States extradited Noriega to France.[69] He would eventually be convicted and sentenced to seven years' imprisonment in France.[70]

IV. Legacy of *Noriega*

As illustrated by Justice Thomas's dissenting opinion, the legacy of *Noriega* II implicates two provisions of the Constitution: the Supremacy Clause and the Suspension Clause. There have been few attempts since Judge Restani's opinion *Noriega* II to seek any civil relief in a U.S. court based on the Geneva Conventions.[71] In a concurring opinion for a denial of rehearing en banc for the rejection of habeas claims of a Guantanamo Bay detainee, then-Judge Brett Kavanaugh cited *Noriega* II to suggest that, "[i]n other words, to the extent the Conventions were once self-executing, Congress has effectively unexecuted them, at least for habeas matters of this kind."[72] Similar to *Noriega* II, he declined to entertain any challenge based on the Supremacy Clause.[73] Then-Judge Kavanaugh's concurrence also agreed with Judge Restani's analysis of § 5 of the MCA that it did not implicate the Suspension Clause because it only addressed "the substantive law that courts may apply to resolve habeas petitions," and is not a complete bar to habeas relief.[74]

In full the Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

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[69] Elisabeth Malkin, *Noriega Extradited to France to Face Charges*, N.Y. TIMES, (Apr. 26, 2010), https://www.nytimes.com/2010/04/27/world/americas/27noriega.html

[70] David Jolly, *French Court Sentences Noriega to Seven Years*, N.Y. TIMES (July 7, 2010), https://www.nytimes.com/2010/07/08/world/americas/08noriega.html.

[71] Geoffrey S. Corn & Dru Brenner-Beck, *Exploring U.S. Treaty Practice Through A Military Lens*, 38 HARV. J.L. & PUB. POL'Y 547, 589 (2015) ("[A]s the result of section 5 of the MCA, the issue of self-execution of the Geneva Conventions will not likely be tackled by U.S. courts, as future litigants are likely to run into the same obstacle that prevented Noriega from invoking the treaty to bar his extradition.")

[72] *Al-Bihani v. Obama*, 619 F.3d 1, 22 (D.C. Cir. 2010) (Kavanaugh, J. concurring) (quotation marks omitted).

[73] *Id.*

[74] *Id.*

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[75]

A plain reading of the text appears to put the U.S. Constitution, congressional statutes, and treaties made under "the Authority of the United States" as "the supreme Law of the Land."[76] In the *Head Money Cases*, the Supreme Court confirmed this reading, placing treaties equivalent with the authority of Congressional statute.[77]

In the *Head Money Cases*, the Supreme Court faced cases brought by recently arrived immigrants who had to pay 50 cents per person at Customs under an act of Congress regulating immigration.[78] When plaintiffs argued that the tax violated treaties between the United States and their home countries, the Supreme Court described treaties as "primarily a compact between independent nations," and depend on those nations "for the enforcement of its provisions."[79] When a treaty confers private rights to subjects, though, the Supreme Court stated that the Supremacy Clause put those treaties as "a law of the land as an act of congress is."[80] From there, the Supreme Court held that treaties have "no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date."[81] Thus, even if there had been no obvious repudiation of these treaties, Congress could modify them by a later statute placing the immigration tax.[82]

There is a minority view, however, that Congress cannot "unexecute" a previously self-executing treaty, and, thus, § 5 may not be constitutional under the Supremacy Clause.[83] Professor

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[75] U.S. CONST. art. VI, cl. 2.
[76] *Id.*
[77] *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884) ("*Head Money Cases*").
[78] *Id.* at 586-87.
[79] *Id.*at 598.
[80] *Id.*
[81] *Id.* at 599.
[82] *Id.*
[83] Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 91-93 (2007)

Carlos Vásquez has written that at least one purpose of the Supremacy Clause was "to avoid the international friction that could be expected to result from violations of treaties by the United States."[84] He reasoned that, if a treaty is ratified with the international understanding that it would be binding law within the United States, a later statute "making the treaty judicially unenforceable" would result in international friction.[85] He distinguishes this friction, which he asserts the Supremacy Clause is designed against, from a clear congressional "outright repudiation of a treaty," which he claims sends a clear signal even if it might be internationally unpopular and allowed under the Constitution.[86] This view appears to elevate treaties above Congress's statutes.[87]

Functionally, there is no difference between § 5 of the MCA and the taxes at issue in the *Head Money Cases*. To the extent that the Geneva Conventions conferred private rights to a person within the United States, Congress would be free to "repeal[] or modif[y]" those rights by a later statute.[88] This is essentially what Judge Restani held regarding § 5 of the MCA did to the Geneva Conventions in *Noriega* II.[89] This appears to be a clear application of Supremacy Clause

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[84] *Id.* at 91.
[85] *Id.*; Professor Bradley characterizes this as "an overly broad view" of the Supremacy Clause, which he asserts was designed to prevent international friction caused by treaty violations of the many U.S. states. Bradley, *supra* note 7, at 340 (citing THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that, under the Articles of Confederation, "[t]he treaties of the United States ... are liable to the infractions of thirteen different legislatures"); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) (noting concern by James Madison regarding "the tendency of the States to these violations" of the law of nations and treaties).
[86] Vázquez, *supra* note 68, at 91.
[87] *Id.*.
[88] *Id.*
[89] *See Noriega* II, 564 F.3d at 1296–97. There is a similar parallel in another area of law that Judge Restani is also familiar with: trade remedies law. In *Suramerica de de Aleaciones Laminadas, C.A. v. United States*, the U.S. Court of Appeals for the Federal Circuit considered whether a specific domestic producer's petitions for antidumping and countervailing duty investigations "should be considered to be filed 'on behalf of' the domestic industry." 966 F.2d 660, 665 (Fed. Cir. 1992); *see also* 19 U.S.C. §§ 1671a(b), 1673a(b). When interpreting the meaning of "on behalf of" in the statute, the Federal Circuit refused to consider international law norms. *Suramerica de Aleaciones Laminadas*, 966 F.2d at 667 ("[E]ven if we were convinced that Commerce's interpretation conflicts with the [General Agreement on Tariffs and Trade ("GATT")], which we are not, the GATT is not controlling."). The Federal Circuit held that "[t]he GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.* at 668

precedent, which is perhaps why Justice Thomas's dissent in *Noriega* III did not address any of Noriega's arguments based on it.[90]

Turning to the second point of constitutional legacy left by Noriega, Justice Thomas's *Noriega* III dissent focused on the opportunity the certiorari petition presented for the Supreme Court to answer whether § 5 of the MCA was constitutional under the Suspension Clause.[91] The closest case to that question would be *Boumediene*, where the Supreme Court held that § 7 of the MCA violated the Suspension Clause.[92] *Boumediene*, ultimately, however, was only a case requiring detainees to have a "meaningful opportunity" to challenge their detention before a court.[93] The Supreme Court declined to "address the content of the law that governs petitioners' detention."[94]

Another Suspension Clause case, *I.N.S. v. St. Cyr*, [95] interpreted immigration statutes in order to allow continued habeas review. Following congressional action that limited "judicial review" of detention orders in the immigration context, the Supreme Court held that habeas review under 28 U.S.C. § 2241 must continue in order to avoid a conflict with the Suspension Clause.[96] Specifically, the Supreme Court stated that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."[97] And in *Boumediene*, the Supreme Court relied on *St. Cyr* for the principle that habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."[98]

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[90] *Noriega* III, 559 U.S. at 1005.
[91] *Id.* at 1005–06.
[92] *Boumediene*, 553 U.S. at 795.
[93] *Id.* at 779.
[94] *Id.* at 798.
[95] *I.N.S. v. St. Cyr*, 533 U.S. 289, 310-11 (2001), *superseded by statute*.
[96] *Id.* at 312-13.
[97] *Id.* at 300.
[98] *Boumediene*, 553 U.S. at 789 (citing *St. Cyr*, 533 U.S. at 302) (quotation marks omitted).

How does § 5 of the MCA's prohibition on the use of the Geneva Conventions as a source of a private right fit into this Suspension Clause precedent? It is a question that has largely gone unanswered since Justice Thomas's dissent. Still, § 5 does seem to prohibit review of a question of law and refuse to grant a prisoner an opportunity to demonstrate the erroneous application of relevant law.[99] As noted earlier, one current Supreme Court justice, while a circuit court judge, has written that he does not believe § 5 implicates the Suspension Clause.[100] The answer may be that § 5 demonstrates sufficient congressional intent to make the Geneva Conventions no longer "relevant law."[101] This part of *Noriega* II fails to fully address why § 5 does not implicate the Suspension Clause in the same way that *St. Cyr* did.[102]

Regardless, because Judge Restani addressed Noriega's claims through the MCA and also applied the Geneva Conventions alternatively, and still denied relief, the decision is insulated from any deficiency in the MCA. Still, the unambiguous language of § 5, as well as the dwindling number of Guantanamo detainees and absence of POWs makes it increasingly unlikely there will ever be as good of a chance to address the constitutionality of the statute as Noriega's. Further, given the distinctions present in the Geneva Conventions themselves between the rights of POWs and detainees,[103] the reluctance of the United States government to refer to detained individuals as POWs, and (as Justice Thomas highlights) the relative uncertainty (and certainly rarity) surrounding court authority to declare a detained individual to be a POW, it is unlikely any future case will implicate as clearly as Noriega's case the ability of petitioner to claim whatever Geneva Convention rights do apply to a POW. As Thomas's dissent highlighted, *Hamdan*, which is often

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[99] *Id.*; *St. Cyr*, 533 U.S. at 300.
[100] *Al-Bihani*, 619 F.3d at 22 (Kavanaugh, J. concurring).
[101] *Boumediene*, 553 U.S. at 789
[102] *Noriega* II, 564 F.3d at 1294.
[103] It has generally been the position of the United States, and affirmed by a district court, that Taliban detainees do not receive protections as POW under the Geneva Conventions. *United States v. Hamidullan*, 114 F. Supp. 3d. 365, 387 (E.D. Vir. 2015).

cited to stand for the principle that Geneva Convention rights to apply to detainees, rested upon the role of the Uniform Code of Military Justice in setting up the Military Commissions.

It is unlikely another case with the facts necessary to challenge § 5 of the MCA for a POW because § 5 of the MCA likely prohibits a judicial determination that someone is a POW.[104] The Southern District of Florida's decision only came after Noriega sought the declaration by asserting his rights under the Geneva Conventions.[105] Now § 5 would likely prevent someone from filing a civil motion seeking a similar determination through habeas or similar relief. Thus the statute has substantially increased the barrier to find a case similar to Noriega's to challenge the statute.

V. Conclusion

Judge Restani's opinion in *Noriega II* provided a nuanced and complete analysis of a rare topic of the application of international law norms and treaties in U.S. domestic law. Section 5 of the MCA still exists as note to 28 U.S.C. § 2241, and will continue to limit habeas petitions as long as it is part of the law. Given the rarity of POW litigation and the gradual decline in detainee related litigation, though, it is increasingly unlikely that another litigant will have the opportunity to present a Suspension Clause challenge to § 5 of the MCA, and one of the least-litigated clauses in the U.S. Constitution will continue to go undefined.

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[104] MCA, § 5(a).
[105] *Noriega* I.