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AN UNINTENDED CASUALTY OF THE WAR ON TERROR

Aya Gruber*

ABSTRACT

As the dust of the Bush administration's war on terror settles, casualties are starting to appear on the legal battlefield. The United States' human rights reputation and the Supreme Court's international influence lay wounded in the wake of U.S. policies that flouted international law by advocating torture, suborning indefinite detention, and erecting irregular tribunals. Through declining citation, the courts of the world are telling the Supreme Court that if it does not respect international and foreign law, international and foreign courts will not respect it. Some might object that the Supreme Court should not be lumped with the Bush administration because in fact it handed down several opinions setting limitations on the administration's treatment of terror detainees. While these cases, notably *Hamdan v. Rumsfeld*, set forth domestic law limitations, their conspicuous effort to avoid giving the Geneva Conventions the force of law served to confirm world opinion that the Supreme Court is "out of step." This Essay demonstrates how the Court's avoidance of the treaty status issue in *Hamdan* not only contributed to the perception of American legal exceptionalism but also paved the way for the single most anti-international opinion in Supreme Court history, *Medellín v. Texas*. In *Medellín*, the Supreme Court adopted a legal stance that creates near impassable barriers to the domestic enforcement of treaties. Nonetheless, as President Obama ruminates on maintaining military tribunals and courts brace for another round of terrorism cases, the Supreme Court may yet have a chance to

* Professor of Law, University of Colorado Law School. I thank Jorge Esquirol, John Stack, Lakshmann Guruswamy, Tung Yin, and Robert Chesney for their helpful input. This Essay draws upon the seminal treaty jurisprudence scholarship of Jordan Paust, Carlos Manuel Vázquez, Louis Henkin, and David Sloss, and to them I am particularly indebted. All errors, of course, are my own.

narrow the reach of *Medellín*, confirm the enforceability of the Geneva Conventions, and restore its international influence.

INTRODUCTION

The United States' war on terror has produced a lesser-discussed but very important casualty: the international reputation of the Supreme Court. Today, many scholars both within and outside the United States note the dwindling influence of the U.S. Supreme Court, as evidenced by declining worldwide citation. On September 17, 2008, the front page of the *New York Times* declared, "U.S. Court Is Now Guiding Fewer Nations."[1] The article observes that citations to the Canadian Supreme Court and European Court of Justice are on an upswing, especially in cases involving human rights, while, according to Professor Anne Marie Slaughter, "We are losing one of the greatest bully pulpits we have ever had."[2] The bottom line is that much of today's world views U.S. Supreme Court opinion as antiquated and out-of-step with modern constructions of global rights and obligations.[3] To be sure, several aspects of American legal practice garnered international disfavor even before the September 11 attacks, notably the nation's continued legal support for the death penalty.[4] Subsequently, the war on terror and its concurrent destruction of civil liberties, embrace of torture and indefinite detention, and contempt for international humanitarian law cemented the widespread view of America as the prototypical abuser of human rights rather than guarantor.[5] In short, the courts of the world are

1. Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1, *available at* http://www.nytimes.com/2008/09/18/us/18legal.html.

2. *Id.*

3. *See id.* (noting that the decline of U.S. Supreme Court influence can be attributed in part to "new and sophisticated" constitutional courts that are more liberal than the U.S. Supreme Court).

4. *See* John Quigley, *"If You Are Not A United States Citizen . . .": International Requirements in the Arrest of Foreigners*, 6 OHIO ST. J. CRIM. L. 661, 666−67 (2009) (noting negative public opinion in Europe towards death penalty and discussing foreign states' interventions in U.S. death penalty cases on behalf of foreign defendants).

5. David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 133 (2008) (observing that because of the United States' "[r]efusal to apply the Geneva Conventions, indefinite detentions based on flimsy

saying that if the U.S. does not respect international and foreign law, international and foreign courts will not respect the U.S.[6]

As President Obama recedes from his initial stance against *ad hoc* military justice[7] and federal courts prepare for another round of military tribunal challenges,[8] we should remain poignantly focused on the reputational damage caused by the Bush administration's "cowboy adventure into totalitarianism,"[9] which was permitted to push forward even by "liberal" "obstructionist" Supreme Court decisions.[10] As we move into a new era of international relations and (hopefully) respect for human rights, the time is ripe to learn some lessons about what was and what was not decided in the Supreme Court terrorism cases. This Essay highlights how an unfortunate misstep in the seemingly internationalist *Hamdan v. Rumsfeld*[11] decision paved the way for a jurisprudence of hostility toward international law. In this way, progressive Justices actually became complicit in the legal isolationist ideology so prevalent during the Bush era, which led the courts of the world to abandon the Supreme Court.

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evidence, detainee abuse, and the questionable invasion of Iraq . . . American stature in world public opinion has declined from sympathetic victim to pariah.").

6. David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 60–61 (2002) [hereinafter Sloss, *Non-Self-Executing Treaties*] (asserting that the United States' "cynical" approach to international law is contrary to its national interests).

7. Obama issued a campaign statement asserting, "It's time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice." *See Obama Speaks on Hamdan Conviction*, CHI. TRIB., Aug. 6, 2008, *available at* http://www.swamppolitics.com/news/politics/blog/2008/08/obama_speaks_on_hamdan_convict.html. He has since retreated from that promise. *See also infra* notes 191−96.

8. *See* Peter Finn, *Obama Set to Revive Military Commissions*, WASH. POST, May 9, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/08/AR2009050804228.html; *see infra* note 194.

9. Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law*, 33 HOFSTRA L. REV. 403, 415 (2004).

10. *See infra* notes 49−51 and accompanying text (discussing perception of *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), as a victory for liberals).

11. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

I. A GLOBALIST COURT IN AN AGE OF NATIONALISM

There can be little dispute that during the Bush administration years, especially those immediately following September 11, internationalism fell out of popular and political favor. Guantánamo, renditions, torture, and the unilateral invasion of Iraq served as stark examples of the United States' go-it-alone mentality regarding human rights and humanitarian law. This attitude was arguably a continuation of the administration's pre-September 11 "exceptionalist"[12] approach to human rights.[13] Foreign jurists and human rights supporters had already been shocked at President Bush's "unsigning" of the Rome Statute, thereby withdrawing support for the International Criminal Court,[14] and the United States' refusal to participate in international environmental regulation.[15] Of course, after September 11, as isolationist sentiment rose, America's acceptance of international law further decreased.

Indeed, many Americans, including important legal actors, openly express contempt for international law and legal institutions.[16] In this view, international human rights law is a dirty phrase synonymous with loss of American sovereignty and radical liberal ideology.[17] Following September 11, isolationist sentiment intensified as society became increasingly averse to international law, foreign values, and

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12. The term "exceptionalism" is used to describe the view that "as the exceptional nation, America should be a model . . . with a special and unique destiny to lead the rest of the world to freedom and democracy." Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1582−83 (2006). Thus, "American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored." MARGARET MACMILLAN, PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR 22 (2001).

13. *See* Philippe Sands, *Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality*, 29 HASTINGS INT'L & COMP. L. REV. 295, 301 (2006) (noting that the "[war on terror]" provided a "terrific opportunity to promote the 'anti-international law' project").

14. *See* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L. L. 683, 686−90 (2003).

15. *See* Karin Mickelson, *Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories About International Environmental Cooperation*, 43 OSGOODE HALL L.J. 137, 143−47 (2005).

16. *See* Liptak, *supra* note 1 ("Americans are deeply suspicious of foreign law.").

17. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52 (2004) (describing "nationalist jurisprudence" in which foreign law is considered "irrelevant, or worse yet, an impermissible imposition on the exercise of American sovereignty").

even foreigners.[18] Today, conservatives warn against the corrupting influence of foreign practices and characterize international law as a product of "elite" law professors who are not representative of the nation's views.[19] The body of international scholars has been described by even prominent law professors as either "feather boa-wearing"[20] liberal snobs intent on imposing patrician continental norms on ordinary American folk,[21] or worse, terrorism sympathizers.[22] One professor characterized the Supreme Court's citation of foreign and international sources as a product of "aristocratic" global "bonding" sessions at "Lake Como or the South of France."[23]

However, if the executive's actions and public opinion confirmed to the world that the United States disdains international law, what about actions of the Supreme Court itself? In the early part of the decade it appeared that an emerging globalist Supreme Court attitude could provide a much-needed foil to the existence and perception of American legal exceptionalism.[24] Justices Breyer, Ginsburg, and former Justice O'Connor vocally extolled the importance of

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18. *See* Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 679 (2007) ("[I]n the post 9/11 environment . . . heightened security concerns have also generated heightened levels of xenophobic animosity . . . .").

19. John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 314 (2006).

20. This is an actual quote from a law professor who shall remain nameless.

21. *See, e.g.*, Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 330 (2005) (arguing that internationalist judges "stand at the very apex of [international] elites").

22. *See, e.g.*, Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 879 (2004) (calling the internationalist "a rudderless person in search of a fundamental identity [who] may well find himself or herself in the comfort of zealotry and the community of terror"); *see also* U.S. DEP'T. OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (Mar. 2005) [hereinafter DEFENSE STATEMENT], *available at* http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf ("Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.").

23. McGinnis, *supra* note 19, at 327. To be sure, decrying liberal pretention has been a time-honored rhetorical strategy of old segregationists and modern neo-conservatives. Recall Dan Quayle's description of the "liberal elites" as sneering, cynical, sophisticates who supported radical ideologies like gay rights. Andrew Rosenthal, *The 1992 Campaign; Quayle Attacks a "Cultural Elite," Saying It Mocks Nation's Values*, N.Y. TIMES, June 10, 1992, at A1, *available at* http://www.nytimes.com/1992/06/10/us/1992-campaign-quayle-attacks-cultural-elite-saying-it-mocks-nation-s-values.html.

24. *See* Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 176 (2004) (calling recent Court activity a "breakthrough" in the "internationalization of the law" (quoting Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 DICK. J. INT'L L. 493, 505–11 (2000))).

international and comparative law in domestic constitutional jurisprudence.[25] In the 2003 decision *Lawrence v. Texas*, the Court cited international norms as part of its analysis striking down anti-sodomy laws.[26] In 2005, the Court took up the hotly-contested issue of the juvenile death penalty in *Roper v. Simmons*.[27] In a move that many conservatives saw, and continue to see, as an all-out assault on American values and sovereignty, the Court cited international sentiment as "confirmation" of its formal conclusion that putting juveniles to death is cruel and unusual.[28] Many, like Justice Ginsburg, believed that the Court's "'island' or 'lone ranger' mentality [was] beginning to change."[29]

The Supreme Court was in the midst of a modest revolution, inching towards globalization despite great internal conflict[30] and external controversy.[31] At the same time, the Court was asked to

25. *See, e.g.*, Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., The Supreme Court and The New International Law, Remarks to the American Society of International Law (Apr. 4, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/sp_04-04-03.html ("[E]ver stronger consensus (now near world-wide) as to the importance of protecting basic human rights, the embodiment of that consensus in legal documents, such as national constitutions and international treaties, and the related decision to enlist judges—i.e., independent judiciaries—as instruments to help make that protection effective in practice."); *see also* Sloss, *Non-Self-Executing Treaties*, *supra* note 6, at 21–24 (discussing statements from Justices regarding international and foreign law).

26. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

27. Roper v. Simmons, 543 U.S. 551 (2005).

28. *Id.* at 575 ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

29. Justice Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 335 (2004). Still, some remained skeptical of the Court's burgeoning devotion to international norms. *See, e.g.*, Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 855 (2005) [hereinafter Paust, *Mixed Record*] (noting that in 2004 term, Supreme Court viewed international law "obliquely" and often used it merely to supplement domestic construction); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 325 (2006) (asserting that in cases implicating U.S. interest, the Court has avoided international law but upheld its goals through broad interpretation of U.S. Constitutional provisions).

30. *Roper*, 543 U.S. at 628 (Scalia, J., dissenting) ("I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment.").

31. Cohen, *supra* note 29, at 273 (describing how after the Supreme Court's citation of foreign law in its opinion striking down juvenile death penalty, "[T]he halls of Congress seemed to shudder with anger as congressmen and senators rushed to react."). The Republican outcry has made an appearance in Supreme Court nominee Sonia Sotomayor's confirmation hearings. Arizona Senator Jon Kyl responded to Sotomayor's past statement that courts should look at "good ideas" from foreign law by stating, "The

assess the parameters of the Bush administration's war on terror. Here, political sides had been quickly drawn regarding constitutional restraints on executive war-making power,[32] with conservatives generally arguing for unfettered or near limitless executive authority and liberals favoring significant congressional and judicial oversight.[33] Lurking in the substrata of the various civil liberties-versus-national security debates was a bubbling political polarization over the enforceability of international law. The Geneva Conventions[34] were arguably the greatest threat to the Bush administration's ability to wage the war on terror in any manner it saw fit, even greater than the Constitution. There is very little language in the Constitution regarding presidential war power, and the principle that during war the President can bypass other constitutional provisions is largely a creature of expert commentary and sparse case law.[35] Because the "law of war" is therefore extra-constitutional, it provided the Supreme Court a virtual *tabula rasa*

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laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution." Kate Phillips, *Live Blogging the Sotomayor Hearings*, N.Y. TIMES: THE CAUCUS (July 13, 2009, 1:30 PM), http://thecaucus.blogs.nytimes.com/2009/07/13/live-blogging-the-sotomayor-hearings.

32. Interestingly, although some commentators object to the concept of a rhetorical "war" on terror, *see, e.g.*, Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post*-Hamdi *World*, 54 U. KAN. L. REV. 307, 366 (2006) (arguing that treating counterterrorism activities as legal "war" allows the government to "freely ignore the Constitution in any prosecution of alleged terrorists"), the Court and public for the most part seem to accept that we are at "war" in some fashion. *See* Detlev Vagts, *Military Commissions: Constitutional Limits on Their Role in the War on Terror*, 102 AM. J. INT'L L. 573, 580–81 (2008) (noting that Justices' views range from considering the U.S. at war with Taliban to viewing the U.S. as at war with "radical Islam"); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, [the war paradigm] may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

33. Immediately after 9-11, even Democrats appeared deferential to President Bush. *See* Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1021−27 (2007) (discussing the debate between Bush supporters and internationalists).

34. Most of the arguments regarding the Guantánamo detainees were made under the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

35. Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006). *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (discussing only two Supreme Court cases as precedent for military tribunal).

legal regime on which to scrawl its limitations (or non-limitations).[36] Thus, the Bush administration could reasonably hope to exploit the atmosphere of fear and hysteria surrounding September 11 in favor of an expansive judicial reading of constitutional war power.[37]

By contrast, the Geneva Conventions lay out with clarity and great specificity how governments must treat prisoners of war, civilians, and others during times of armed conflict.[38] The treaty accordingly represented a significant potential restraint on how the Bush administration could treat detained Afghan and al Qaeda fighters. From the beginning, the Bush administration pursued a policy of "lawyering" the Conventions[39] and setting forth numerous textual arguments, from specious to plausible, as to why they do not apply to the Guantánamo detainees.[40] It was obviously important for public relations reasons that the administration find a way to convince the

36. *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1062 (2003) ("Courts are able to apply an emergency-sensitive interpretation to constitutional arrangements, structures, powers, and rights. Governmental powers may expand, and the scope of rights protection may contract, so that the crisis can be met effectively.").

37. White House counsel lawyers advocated for an interpretation of war powers that would permit the President to bypass the Constitution, domestic legislation, and treaties. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Att'y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Dep't of Def. 10–11 (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/torturingdemocracy//documents/20011023.pdf (emphasizing President's uncontestable commander-in-chief powers); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President 34 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (asserting that Commander-in-Chief power overrides any limitations imposed by federal legislation and Convention Against Torture); *see* Katyal & Tribe, *supra* note 35, at 1269 ("[T]he Bush Administration has sought to convert the singular Commander-in-Chief Clause into a textual warrant for exceptional unilateralism.").

38. *See also* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 368 (1991) (observing that "it is difficult to imagine a more mandatory, controlling, detailed, definable, universal, and useful set of treaty standards" than those in the Geneva Conventions).

39. David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 119 (2006) (maintaining that Bush engaged in a "'hyper-technical legal analysis' to exploit ambiguities" in the Geneva Conventions) (quoting Geoffrey S. Corn, Op-Ed., *When the Law of War Becomes Over-lawyered*, JURIST, Nov. 25, 2005, *available at* http://jurist.law.pitt.edu/forumy/2005/11/when-law-of-war-becomes-over-lawyered.php).

40. For example, the administration first argued that because the Taliban was an illegitimate government, the Geneva Conventions did not apply to the Afghan conflict, but then it receded from that argument. The administration also argued that laws of war do not apply to "unlawful" combatants and made much of the fact that the Taliban fighters did not wear uniforms. For an overview of these arguments, see Gruber, *supra* note 33, at 1023–24.

public that it was in compliance with the Conventions,[41] but in the legal arena the administration advanced an argument for the wholesale jettisoning of the Geneva Conventions in domestic courts: "Non-self-execution." The administration claimed simply that as non-self-executing treaties, the Geneva Conventions could not be enforced by individuals in U.S. courts.[42] In turn, the formerly legalistic question of treaty execution became as highly politicized as the civil liberties-versus-national security debate.

Of course, the question of treaty execution long predated the war on terror. The status of treaties is mentioned in the very text of the Constitution, in the Supremacy Clause, which declares that "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 Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[43] During the early years of our republic, the fact of treaty supremacy was relatively apolitical and apparently accepted.[44] The period immediately following World War II saw a flurry of international legal activity and thrust the question of treaty supremacy into the foreground.[45] Since that time, there has been steadily growing hostility in certain legal, academic, and political circles to the concept that treaties created in part or whole by "foreign entities" are binding

41. *See* Media Note No. 2005/994 from U.S. Dep't of State, *Invitation to UN Special Rapporteurs to Visit Guantánamo Bay Detention Facilities* (Oct. 28, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/55756.htm ("U.S. policy is to treat all detainees in accordance with its international obligations and in a manner consistent with the principles of the Third Geneva Convention."); Memorandum from President Bush on the Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* U.S. DEP'T OF DEF., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS app. C (2004) [hereinafter 2002 Bush Memo], *available at* http://wid.ap.org/documents/iraq/040824finalreport.pdf.

42. *See* DEFENSE STATEMENT, *supra* note 22, at 19−20; Brief for Respondents at 9, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875 (asserting that the Geneva Conventions are non-self-executing).

43. U.S. CONST. art. VI, cl. 2.

44. *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 764–66 (1988) [hereinafter Paust, *Self-Executing Treaties*].

45. *See* David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 585 (2002) (noting that post-World War II era saw "the birth of the modern human rights era").

domestic law.[46] Although a topic of moderate activity in lower courts, until the last few years the Supreme Court had said very little on the issue and had not adopted the position that treaties are generally non-self-executing.[47]

It was upon this historical, political, and legal background that the Supreme Court rendered its 2006 decision in *Hamdan v. Rumsfeld*, invalidating Bush's military tribunals because they violated the Uniform Code of Military Justice (UCMJ).[48] The decision caused a feeling that can be fairly characterized as jubilation among progressives and internationalists.[49] Yale Law School dean and international lawyer Harold Koh declared that the *Hamdan* case "finally beg[a]n the much-needed process of turning the legal world right-side up again."[50] International law scholar George Fletcher dubbed *Hamdan* a new beginning for international law in the United States.[51] Perhaps, however, internationalists were advancing a premature "mission accomplished" declaration. Upon further examination, the *Hamdan* majority opinion is remarkable in its

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46. *See, e.g.*, Delahunty & Yoo, *supra* note 21, at 326 (rejecting European-influenced law on ground that "Europe has been given to fluctuations of ideological extremes" and in Europe "fascism and communism, which were once viewed by some as advanced, modern ideologies, were adopted by regimes that murdered millions"). *See generally* Gruber, *supra* note 33, at IV.B (discussing development of anti-treaty ideology).

47. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez–Llamas, 45 COLUM. J. TRANSNAT'L L. 20, 101 (2006) (observing that before World War II, the Court recognized presumption of treaty enforceability and after said very little about it); Carlos Manuel Vázquez, *The Four Doctrines of Self–Executing Treaties*, 89 AM. J. INT'L L. 695, 697–700, 722 (1995) [hereinafter Vázquez, *Four Doctrines*] (noting that the Supreme Court "has not said more than a sentence or two about the distinction in any case for nearly a century").

48. Hamdan v. Rumsfield, 344 F.Supp.2d 152, 173 (D.D.C. 2004). *See generally* 10 U.S.C. § 801 (1950).

49. *See* Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, CATO SUP. CT. REV. 2005–2006, at 51, 51 ("Rarely has the Supreme Court handed a 'wartime' president a greater defeat, or human rights defenders a greater victory [as in *Hamdan*]."). Bush administration defenders considered the case an agonizing defeat. David E. Sanger & Scott Shane, *Court's Ruling Is Likely to Force Negotiations over Presidential Power*, N.Y. TIMES, June 29, 2006, at A21 (quoting White House Counsel Bradford A. Berenson as stating of *Hamdan*, "What is truly radical is the Supreme Court's willingness to bend to world opinion and undermine some of the most important foundations of American national security law in the middle of a war.").

50. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2352 (2006).

51. *See generally* George P. Fletcher, *The* Hamdan *Case and Conspiracy as a War Crime: A New Beginning for International Law in the U.S.*, 4 J. INT'L CRIM. JUST. 442 (2006).

judicial restraint. Although it invalidated Bush's tribunals, it did so on the narrow ground that they violate the UCMJ, a domestic statute that was about to be superseded by the Military Commissions Act (MCA).[52] *Hamdan* did not pronounce any significant constitutional limitations on presidential war power,[53] nor did it reach the overriding foreign relations question of treaty execution.[54]

Hamdan indeed would have been one of the greatest internationalist victories had the Supreme Court been willing, after nearly fifty years of silence, to recognize the force of international law in the face of decades of growing post-World War II isolationism that pinnacled after September 11. Unfortunately, the Court appeared to fear weighing in on the issue and went to great lengths to stay mute on whether the Geneva Conventions constitute valid domestic law. The *Hamdan* majority's refusal to comment on the status of the Conventions left open a dangerous door for a divided Court, now politically polarized over the treaty execution issue, to finally adopt an isolationist stance toward treaty execution. This is the precise door the Court walked through with its March 25, 2008 decision, *Medellín v. Texas*.[55] What started out as fear of international human rights law in *Hamdan* went to loathing in *Medellín*, as the Court for the first time formally sanctioned the United States' ability to double deal in international relations.[56] But before discussing *Medellín*, two

52. Pub. L. No. 109-366, 120 Stat. 2601 (2006) (codified at 10 U.S.C. § 948a).

53. For example, the Court avoided answering whether in cases of "controlling necessity," the President could unilaterally establish a military tribunal. Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2005) ("[Whether] the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity' is a question this Court . . . need not answer today."). The Court also did not require that tribunals be *established* by Congress, but merely asserted they could not violate a pre-existing congressional limitation. *Id.* at 593 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."). In addition, the Court did not rule out the possibility that the political branches acting together could establish a standing war crime tribunal, although dicta reveal the majority's concerns with such a tribunal. *Id.* at 597−98 (noting that tribunal in *Quirin* represents "high water mark" of war power and suggesting that establishing such tribunal outside "theater of war" does not comport with common law) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920)).

54. *Id.* at 627−28 (assuming that the Geneva Conventions did not provide Hamdan with individually enforceable rights).

55. Medellín v. Texas, 552 U.S. 491 (2008).

56. Francisco Forrest Martin, *The Constitution and Human Rights: The International Legal Constructionist Approach to Ensuring the Protection of Human Rights*, 1 FIU L. REV. 71, 85–86 (2006)

preliminary questions call for examination. First, what is the status of treaties in U.S. domestic law? Second, why was *Hamdan*'s approach to the Geneva Conventions harmful to the Supreme Court's international reputation?

II. SELF-EXECUTING AND NON-SELF-EXECUTING TREATIES

The question of the status of treaties in domestic law is not unique to the United States. Every signatory nation to a treaty must grapple with the extent to which it will incorporate international law into its national legal system. Experts have identified two predominant approaches to the domestic application of treaty law: "dualist" and "monist."[57] In dualist systems, like Great Britain, even if the country signs a treaty guaranteeing individual rights, individuals have no ability to enforce those rights unless Parliament passes a separate domestic law "executing" the treaty.[58] Thus, it is said that in dualist systems, all treaties are non-self-executing.[59] In other words, treaties establish international obligations between nations but do not create any obligations to individuals who are subjects of the treaty. To illustrate, let us assume hypothetically that Britain and Japan signed a treaty requiring both countries to allow each other's citizens to work, and a British city administrator denied a Japanese citizen's application for a business license. Under the British approach, in the absence of ratifying domestic legislation, the Japanese person would not be able to sue the city for violating his treaty rights.[60] The concept is that Britain has violated its treaty obligation to Japan but has not violated the individual Japanese person's right to work in Britain.

(characterizing non-self-execution as a "weapon" that permits the United States to be "an outlaw in the international community" and engage in "double-dealing by, on the one hand, agreeing to be bound by a treaty and, on the other hand, reserving the right to not give the treaty any effect").

57. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 126 (2004).

58. Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 481−83 (1991).

59. This language comes from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829), which is widely considered the first case dealing with the domestic enforceability of treaties.

60. This essentially makes the agreement meaningless. For this reason, internationalists criticize the dualist approach for allowing bad-faith treaty signing. *See, e.g.*, Jinks & Sloss, *supra* note 57, at 124−25.

The United States historically has followed a different practice. For example, in 1924, the Supreme Court reviewed a case filed by a Japanese citizen, Asakura, against the city of Seattle for denying him a business license.[61] Asakura alleged that such action was illegal, in violation of a treaty between the United States and Japan.[62] The Supreme Court found that given the constitutional supremacy of treaties, Asakura could enforce his treaty rights by suing Seattle directly.[63] The Court adopted a monist approach and refused to require executing legislation, reasoning that the Supremacy Clause gives treaties the status of federal statutory law.[64] The bottom line is that the Constitution makes treaties part of "our law."

Unfortunately, over the years the water has been muddied with the introduction of the self-execution doctrine. In a nutshell, the doctrine divides treaties into two classes: self-executing treaties, which do not require ratifying legislation to be enforceable, and non-self-executing treaties, which do.[65] Expert views on self-execution range from extremely internationalist, like the opinion that rights-conferring treaties are supreme over federal legislation,[66] to extremely isolationist, like the view that treaties by their nature do not have domestic effect and Congress is largely without power to confer it.[67] The conflict, however, is mostly between those who believe that treaties are domestically enforceable, subject to ordinary interpretive principles (what I will call the "internationalist approach"), and those who believe that treaties are presumptively non-self-executing and must pass difficult, if not impossible, legal hurdles to be enforceable (what I will call the "exceptionalist approach").

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61. Asakura v. City of Seattle, 265 U.S. 332 (1924).

62. *Id.* at 340.

63. *Id.* at 341.

64. *Id.*; *see also Foster*, 27 U.S. (2 Pet.) at 254 (confirming that a "different principle" established by the U.S. declares a "treaty to be the law of the land").

65. *See generally* Vázquez, *Four Doctrines*, *supra* note 47 (providing in-depth analysis of self-execution doctrine).

66. *See* Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 425–26 (1989) (positing that Framers intended treaties to be supreme over federal statutes).

67. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2093–94 (1999) [hereinafter Yoo, *Globalism*].

The internationalist mantra is quite straightforward: Pursuant to the Supremacy Clause, treaties should have the status of other federal legislation. Thus, the interpretive rules governing whether federal legislation creates justiciable rights or individual private rights of action apply to treaties.[68] If a treaty simply does not confer any rights (for example, one that calls for future legislative action only) or does not give rise to private lawsuits (for example, one that explicates a uniquely international administrative remedy), it cannot be enforced judicially. However, treaties that guarantee rights to individuals, enforceable via internal or external private rights of action, are judicially cognizable—just like federal legislative law.[69] So when it comes to the Geneva Conventions, the analysis is quite simple. Geneva provides wartime detainees with a laundry list of individual rights.[70] There are several sources from which to derive Guantánamo prisoners' private right to enforce the Geneva Conventions, the most obvious being the federal habeas corpus statute, which provides that prisoners who are in custody "in violation of the Constitution or laws *or treaties* of the United States" may file a petition in federal court seeking release.[71] Therefore, Guantánamo detainees should be permitted to challenge their detention on the ground that such custody violates Geneva's dictates.[72]

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68. Thus, like with statutes, courts have an obligation to construe vague treaty terms rather than just discarding treaties that merit interpretation. *See* Vázquez, *Four Doctrines*, *supra* note 47, at 714.

69. Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 515 (2003) ("Federal courts have repeatedly held that a treaty need only expressly or impliedly provide an individual right for it to be self-enforcing.").

70. *E.g.*, Third Geneva Convention, *supra* note 34, arts. 5–7, 14, 84–85, 98, 105–06, 129–30.

71. 8 U.S.C. § 2241 (2008) (emphasis added).

72. Thus, the Geneva Conventions present a less complicated case than treaties that call on states to implement specific provisions under their domestic statutes, like the Convention Against Torture. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 4, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984) ("Each State Party shall ensure that all acts of torture are offences under its criminal law."). One could imagine a situation in which a state party either fails to implement the treaty or the implementing domestic statute falls short of the treaty's mandate by, for example, defining torture more narrowly than the treaty. Clearly, the state would be in violation of its treaty obligation. If an individual sues that state for engaging in acts that constitute torture within the meaning of the treaty, but are lawful under domestic law, there would be a thorny interpretive question regarding whether treaty drafters intended individual litigants to be able to invoke the treaty rights directly. That is, however, not the case with the Geneva Conventions. It does not call upon states to create legislation regarding the treatment of wartime detainees—it clearly binds states to treat detainees in a certain manner. *See, e.g.*, Third Geneva

The exceptionalist approach is not very simple because it is a product of ongoing legal obfuscation[73] and even manipulation.[74] It is important to understand what this approach enables. A rule that nullifies treaties as domestic law allows the United States to sign international human rights agreements and purport to support individual rights, while simultaneously divesting those agreements of any ability to actually give rights to individuals.[75] Even worse, such a rule makes old human rights and humanitarian treaties, which were signed in good faith by past administrations, easy to ignore by future administrations hostile to those rights.[76] Indeed, the Bush administration hid behind the cloak of non-self-execution in its insistence that the Geneva Conventions did not provide individual rights to the Guantánamo detainees.[77]

To trace the origin of the exceptionalist approach to self-execution, one must go back to the 1829 case *Foster v. Neilson*, which involved a dispute over land rights under a treaty between Spain and the United States.[78] In the treaty, the United States agreed that certain land transfers that had occurred between Spain and individuals "shall be ratified."[79] The Supreme Court, not wanting the transfers to be

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Convention, *supra* note 34, art. 13 ("Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.").

73. *See, e.g.*, Michael Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1887 (2005) (calling modern treaty jurisprudence "a combination of inattention and Supreme Court rhetorical ambiguity"); Vázquez, *Four Doctrines*, *supra* note 47, at 722 (asserting that modern self-execution doctrine is a result of "sloppy reasoning and careless use of precedent").

74. Gruber, *supra* note 33, at 1065 ("[T]here is evidence that anti-internationalist hostility to treaty law, tied to a more sinister desire to preserve racial hierarchy, constituted the driving force behind the self-execution doctrine.").

75. Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1265 (1993).

76. *See* Gruber, *supra* note 33, at 1067 (asserting that the self-execution doctrine "creates a clever insurmountable barrier to the domestic enforcement of treaties ratified prior to the creation of the modern intent doctrine").

77. *See supra* note 42.

78. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 253 (1829).

79. The treaty stated in pertinent part that "all the grants of land made before the 24th of January 1818, by his catholic majesty, & c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." *Id.* at 276.

legally valid—some say for political and racial reasons[80]—interpreted the "shall be ratified" phrase in an awkward manner, an interpretation it soon reversed.[81] The Court construed the word "shall" as signifying that the United States had not intended to validate the land transfers by the treaty, but only to promise that the transfers would become valid if Congress passed a law ratifying the transfers.[82] The Court thus opined that when "parties [engage] to perform a particular act . . . the legislature must execute the contract before it can become a rule for the Court."[83] In essence, under the Court's interpretation, the U.S. promised Spain exactly nothing. Realizing this, four years later the Court reinterpreted the treaty to say that the treaty itself validated the land grants.[84] However bad its interpretation of the word "shall," *Foster*'s principle is solid: an individual simply cannot seek judicial remedy from a treaty that has not conferred any individual rights. Today, however, *Foster*'s modest proposition has spawned a line of cases holding that treaties are generally non-self-executing and even a treaty clearly conferring individual rights can be unenforceable.[85]

The evolution from *Foster* to the modern self-execution doctrine occurred over decades, as the U.S. changed from a fledgling republic to a world power, and international law and legal structures underwent rapid development.[86] In the years following *Foster*, the Court continued to view treaties as valid federal law, enforcing those that contained justiciable provisions,[87] and only refusing to allow

80. *See, e.g.*, Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091, 1109 (2000) (contending that *Foster* was "born out of judicial deference to the fruits of military conquest, as redefined through congressional statutory arrangements for white occupation and land ownership").

81. United States v. Percheman, 32 U.S. (7 Pet.) 51, 69 (1833) (reversing *Foster*, 27 U.S. (2 Pet.) 253 (1820)).

82. *Foster*, 27 U.S. (2 Pet.) at 314–15.

83. *Id.* at 314.

84. *Percheman*, 32 U.S. (7 Pet.) at 69.

85. *See infra* notes 99–105 and accompanying text.

86. *See* Gruber, *supra* note 33, at 1070–71; Golove, *supra* note 45, at 585–87 (discussing self-execution in historical context).

87. *See* Paust, *Self-Executing Treaties*, *supra* note 44, at 766 (characterizing self-execution doctrine as a judicial invention and noting that after *Foster*, Court continued to enforce treaties as supreme law).

individual lawsuits when the treaties clearly created solely "horizontal" obligations between nations.[88] But with World War II came the birth of the international human rights era, including the United States' ratification of the United Nations Charter (U.N. Charter) and consideration of the Genocide Convention. These international instruments had the potential to significantly impact the American legal landscape.

One California court of appeals case, *Sei Fujii v. State*,[89] and some U.S. Supreme Court concurring opinions in *Oyama v. California*[90] relied on the U.N. Charter to strike down the racially discriminatory Alien Land Law.[91] These cases were enough to concern conservative politicians that international law might spell an end to southern racial segregation. In 1951, Republican senator John Bricker introduced a draft constitutional amendment (dubbed the "Bricker Amendment") to make all treaties unenforceable in the absence of implementing legislation.[92] Rather than admit to the underlying segregationist purpose, "Brickerites" defended the Amendment as compelled by the principle of American domestic sovereignty. One supporter stated that the Amendment marked the "line . . . between those Americans who believe in the preservation of national sovereignty . . . and those who believe that our national independence . . . should yield to . . . some kind of world authority."[93] The Bricker Amendment eventually failed to pass, and Bricker abandoned his efforts after securing

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See, e.g., Hauenstein v. Lynham, 100 U.S. 483, 488 (1879); Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1856); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 592 (1832).

88. Edye v. Robertson, 112 U.S. 580, 598–99 (1884).

89. Sei Fujii v. State, 217 P.2d 481, 488 (Cal. Dist. Ct. App. 1950) ("The Alien Land Law must . . . yield to the treaty as the superior authority.").

90. Oyama v. California, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) ("[H]ow can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"); *id.* at 673 (Murphy, J., concurring) ("[I]nconsistency with the [U.N.] Charter . . . is but one more reason why the statute must be condemned.").

91. The Alien Land Law, 1 Cal. Gen. Laws, Act 261 (Deering 1944, 1945 Supp.), prohibited people who were "ineligible" for citizenship, specifically Japanese persons, to own land.

92. There were several versions of the amendment, but the basic premise of the amendment was to ensure that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." S. REP. NO. 83-412, at 1 (1953).

93. *See, e.g.*, FRANK E. HOLMAN, STORY OF THE "BRICKER" AMENDMENT 22 (1954).

assurances from the White House that the President would not sign the Genocide Convention.[94]

This historical moment demonstrates how the self-execution doctrine has long been a vehicle of exceptionalism, permitting America to condemn human rights violations abroad, while segregating lunch counters at home.[95] The Bricker moment signaled to conservative jurists that stirring up fears over sovereignty and the dangers of the importation of "foreign moods, fads, or fashions"[96] could be a good method of stemming the forward movement of the liberal rights agenda.[97] After the Bricker era, often warning of the significant "costs" of human rights litigation,[98] lower courts started to chip away at the influence of international law by erecting doctrinal hurdles to treaty enforceability.[99]

Among other things, courts began to require specific language on domestic enforceability or other evidence of drafter intent regarding self-execution before finding a treaty enforceable.[100] Such legal maneuvers to thwart treaty law might seem facially reasonable, but upon further examination, they are quite unsound. These courts do not determine enforceability by analyzing whether the treaty creates

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94. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348–49 (1995).

95. *See* Richardson, *supra* note 80, at 1117 ("[H]istorical symmetry between the [self-execution] Doctrine having been born to uphold a government policy of racial conquest, and the Doctrine's present status of being consistently used by the judiciary and political branches to bar people of color, in a context of continuing American racism, from invoking the full width of human rights to which they are entitled for protection."). Harold Koh notes that today the United States has adopted "the perverse practice of human rights *compliance without ratification.*" Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1484 (2003). It is likely, however, that Bricker would have preferred the United States not sign any human rights treaties in the first place. Today, it is popular for politicians on both sides of the aisle to support international human rights regimes, so long as they can set their condemnatory sights on "bad" non-Western nations like China and Sudan.

96. Foster v. Florida, 537 U.S. 990, 990 (2002).

97. Resnik, *supra* note 12, at 1606 ("The arguments . . . are remarkably congruent over time: that transnational human rights conventions threaten American sovereignty, states' prerogatives, and the domestic order established therein.").

98. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 n.16, 810 (D.C. Cir. 1984) (Bork, J., concurring).

99. Gruber, *supra* note 33, at 1050–55 (discussing lower court constructions of self-execution doctrine). *See generally* Vázquez, *Four Doctrines*, *supra* note 47.

100. Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005); *see also* Yoo, *Globalism*, *supra* note 67, at 2090–91 (asserting that a treaty is non-self-executing unless "the text clearly indicates judicial enforcement").

concrete rights and obligations, but rather they look for some extra evidence that drafters intended domestic enforceability.[101] This is akin to a court refusing to enforce federal legislation without some provision stating, "And we really mean it."[102] Lower courts have set up other barriers to treaty enforcement, like the presumption that treaties create only obligations between nations and do not create individual rights[103] and the requirement that self-executing treaties contain express judicial remedy provisions.[104] The feather in the treaty exceptionalist's cap is that the Restatement (Third) of Foreign Relations Law now accepts the view that treaties are not judicially enforceable unless there is evidence that the drafters intended self-execution.[105]

This is not to say that the self-execution doctrine is merely a cover for racial oppression and the denial of human rights. Those who support the doctrine are honestly and deeply concerned with the issue of domestic sovereignty. Although sovereigntist anxiety over the

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101. *See, e.g.*, Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1463 (S.D. Fla. 1990) (finding Geneva Conventions non-self-executing, despite language in commentaries supporting domestic enforcement, because there was "no language to this effect within the agreement itself").

102. Gruber, *supra* note 33, at 1067 (asserting that using *Foster* as grounds for creating self-execution doctrine is as "untenable as using a routine statutory or contract interpretation case that refuses to implement vague terms as a basis for requiring specific language in all statutes and contracts that the documents are *really* enforceable"). Even courts that predicate non-self-execution on evidence that treaty makers desired domestic unenforceability tend to reason in an ad hoc manner that would be absurd in other legal interpretation contexts. For example, courts often derive such intent from the post-ratification of individual members of Congress. *See, e.g.*, United States v. Postal, 589 F.2d 862, 881–82 (5th Cir. 1979) (finding intent against self-execution in part from statements of individual senator); Ortman v. Stanray Corp., 371 F.2d 154, 157 (7th Cir. 1967) (relying on post-ratification statement of Attorney General). It would be hard to imagine a court refusing to enforce a contract between, say, several corporations because one board member said after the fact he would not abide by the contract.

103. Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005) (applying presumption of unenforceability to Geneva Conventions).

104. Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003); Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003) (habeas statute only applies to self-executing treaties). However, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) ("[T]he intention of the United States determines whether an agreement is to be self-executing in the United States."). It also seems to adopt the presumption of non-self-execution view because it implies that the only way for a treaty to be self-executing is for it to overlap with pre-existing domestic legislation "adequate to enable the United States to carry out its obligations." *Id.*

nefarious influence of "world courts"[106] is often difficult to disentangle from xenophobia, racially-influenced nationalism, or the preservation of conservative cultural hegemony, even the most left-leaning scholar would agree that international law should not displace all domestic law. The exceptionalist approach to self-execution, however, is simply not required to prevent international law from "taking over."[107] Our constitutional structure already contains many mechanisms to preserve sovereignty. For example, under the "last-in-time rule," Congress has the option to pass domestic legislation abrogating a treaty.[108] Moreover, the executive retains the political option to withdraw from treaties.[109] What the self-execution doctrine adds is the government's ability to ratify human rights treaties, creating the appearance of respect for human rights, and violate those rights without domestic legal liability.[110] One wonders whether Congress would have supported the Guantánamo detentions if, in order to do so, it had to pass legislation specifically repealing the venerable Geneva Conventions.[111]

Historically, the Supreme Court never jumped on the self-execution bandwagon, despite the flurry of activity in lower courts. In the nearly two centuries between *Foster* and *Hamdan*, the Court ruled in a number of treaty cases, almost always finding the treaty at issue self-executing without regard to specific language on domestic enforceability and without requiring particular evidence of drafter

106. Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (criticizing majority for taking into account "the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people").

107. *Cf.* John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2236 (1999) ("[I]f the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation.").

108. Whitney v. Robertson, 124 U.S. 190, 194 (1888).

109. For example, after the International Court of Justice (ICJ) found the United States to be in violation of its obligations under the Vienna Convention on Consular Relations in the *Avena* case, *see infra* notes 140–144 and accompanying text, the United States withdrew from the Optional Protocol to the Convention, which requires Vienna claims to be submitted to the compulsory jurisdiction of the ICJ. Medellín v. Texas, 552 U.S. 491, 500 (2008).

110. This is classic exceptionalism. *See supra* note 12.

111. *See* Gruber, *supra* note 33, at 1064 ("[Congress] would likely have been exceedingly reluctant to repeal explicitly a treaty as important and widely-publicized as the Geneva Conventions.").

intent regarding self-execution.[112] Justice Breyer sums up the prior Supreme Court treaty cases as recognizing: "(1) a treaty obligated the United States to treat foreign nationals in a certain manner; (2) the obligation had been breached by the Government's conduct; and (3) the foreign national could therefore seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement."[113] The question then becomes: Did the Supreme Court have other valid reasons for exercising restraint on the Geneva enforceability issue in *Hamdan*? A careful examination of *Hamdan*'s claims for relief and the interpretive analysis warrant an answer in the negative.

III. LEAVING THE SELF-EXECUTION DOOR OPEN IN *HAMDAN V. RUMSFELD*

Hamdan had precisely argued that his Geneva rights were being violated by Bush's military tribunal process and requested the Court to enforce his rights by transferring him to a court martial or civilian court.[114] The most natural course of action would have been for the Court to engage a simple two-step inquiry: (1) Do the detainees have enforceable rights under the Geneva Conventions; and (2) were these rights violated?[115] In fact, one of the two "questions presented" to the Court in Hamdan's brief was "[w]hether Petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?"[116] Ignoring that threshold question all together, the Court elected to address only whether the

112. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L L. 20, 88 (2006) ("[T]he Supreme Court has never applied the doctrine of non-self-executing treaties to deny a remedy to an individual whose treaty rights were violated.").

113. Sanchez-Llamas v. Oregon, 548 U.S. 331, 375 (2006) (Breyer, J., dissenting).

114. Brief for Petitioner at 8, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

115. This is precisely the way the district court addressed the issue. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158−72 (D.D.C. 2004).

116. Brief for Petitioner, *supra* note 114, at i.

tribunals substantively violated the Geneva Conventions. It did so incidentally in a very internationalist manner.

Hamdan decisively rejected the Bush administration's assertion that Common Article 3 of the Geneva Conventions does not apply to Guantánamo detainees.[117] Common Article 3 is a catch-all provision requiring that detainees in conflicts "not of an international character" be afforded basic humane treatment, including the right to be tried by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[118] The Bush administration had asserted that the term "not of an international character" meant that the provision could not apply to the "international" war between the United States and al Qaeda.[119] The Supreme Court refused to defer to the executive's interpretation[120] and instead construed "international" as meaning "between nations."[121] The Court adopted the view that the Geneva Conventions provide a comprehensive regime for regulating armed conflict, and Common Article 3 excludes only conflicts between party nations because such conflicts are covered elsewhere in the

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117. *Hamdan*, 548 U.S. at 632−35.

118. The provision is called a "common article" because it appears in all four Geneva Conventions. It provides in pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> . . . .
>
> . . . [T]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Third Geneva Convention, *supra* note 34, art. 3.

119. 2002 Bush Memo, *supra* note 41; *see also Hamdan*, 548 U.S. at 630 (noting the government's argument).

120. In another internationalist move, the Court simply ignored the body of case law indicating that courts should give "great weight" to the executive's "reasonable" interpretation of a treaty, a doctrine the Court had invoked just the day before in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) ("[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961))). *See generally* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723 (2007) (analyzing approaches to deference in treaty interpretation).

121. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2005) ("The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations.").

Conventions.[122] The Court concluded that Bush's military tribunals, primarily because they were not authorized by Congress but also because they lacked certain procedural protections, failed to comport with Common Article 3's requirement of a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[123] Amazingly, the Court was able to invalidate the tribunals on Geneva grounds without addressing the issue of whether the detainees had enforceable Geneva rights in the first place.

So how was it possible that the Supreme Court found the tribunals to violate Geneva and struck them down, while simultaneously avoiding the question of whether Geneva-based claims are judicially cognizable? Justice Stevens cleverly but unfortunately did interpretive gymnastics to attain this result. The Court asserted that Common Article 3 applied to *Hamdan*, not because the Geneva Conventions are a valid source of enforceable rights, but because Common Article 3 is silently incorporated by domestic legislation, specifically the UCMJ.[124] The UCMJ actually does not mention the Geneva Conventions and only briefly speaks of international law. Article 21 of the UCMJ states:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[125]

The Court interpreted this provision as a domestic statutory requirement that Bush's tribunals comport with international law,

122. *Id.* at 630–31.
123. *Id.* at 630–35 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135).
124. *Id.* at 627–28.
125. 10 U.S.C. § 821 (2006).

including Common Article 3.[126] Essentially, the Court treats the UCMJ as "executing" legislation. The problem with the Court's analysis is that the legislative history of and expert consensus on Article 21 do not support this conclusion. Historians are in fair agreement that Article 21, whose predecessor provision was passed long before the Geneva Conventions, was meant only to ensure that the UCMJ's creation of military courts martial would not alter the President's pre-existing authority to convene executive wartime tribunals.[127] It was not meant to require such tribunals to comport with the laws of war.

The Supreme Court chose to give detainees Geneva rights by reading them into a domestic statute that had little to do with the treaty. Moreover, the Court knew that Congress was about to pass the Military Commissions Act (MCA), which expressly replaces the UCMJ where inconsistent.[128] This Act is essentially a congressional stamp of approval on Bush's military tribunal process.[129] Although its tribunal procedures differ from those of Bush's tribunals only slightly,[130] the MCA states both that it fulfills any requirements of Common Article 3,[131] and detainees subject to military trial may not

126. In a single conclusory statement, the Court characterizes the UCMJ as "preserv[ing] what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—*with the express condition that the President and those under his command comply with the law of war*." *Hamdan*, 548 U.S. at 593 (emphasis added).

127. Scott L. Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT'L L. 529, 535 (2005) ("[T]he word 'recognized' is key to an accurate understanding [of Article 21] because it implies only acknowledgment, not establishment."); David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT'L L. & POL'Y 427, 429 (2003) (asserting that Article 21 does not authorize tribunals but rather "simply preserves the well–established jurisdiction of military commissions over crimes as established by statute or by the laws of war").

128. 10 U.S.C. § 948b(d) (2006).

129. M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal's* "Internal Separation of Powers," 116 YALE L.J. POCKET PART 126, 129 (2006), *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/executive-power/can-process-cure-substance?-a-response-to-neal-katyal%26%238217;s-%26%238220;internal-separation-of-powers%26%238221 ("[MCA] substantially follows the President's pre-*Hamdan* conception of military commissions.").

130. *See* Gruber, *supra* note 33, at 1058–64 (comparing MCA to Bush's tribunals).

131. 10 U.S.C. § 948b(f) (2006) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions.").

invoke the Geneva Conventions in litigation.[132] Thus, any international law-like protection culled from UCMJ would be short-lived and soon replaced by the MCA's contempt for international law.

As a consequence, although *Hamdan* might be seen as a liberal victory because it used the Geneva Conventions to give detainees greater rights, the case proved far less momentous as an indicator of the United States' participation in a worldwide human rights regime. To the contrary, the Court deliberately chose to refrain from stemming the tide of anti-internationalism in American treaty jurisprudence, even though a statement on the status of treaties appeared by every indication warranted, if not required.

It is difficult to say why the majority chose to secure Geneva rights through the UCMJ rather than addressing the self-execution issue head on. Perhaps there were not enough votes supporting Geneva enforceability, and the majority wanted to render immediate relief to the detainees. It could be that the majority feared prompting a presidential withdrawal from or congressional repeal of the Geneva Conventions. Maybe the Court's silence on treaty status was merely overprotective but misguided judicial restraint. Attempting to discover the inner motivations of the justices is the province of Court historians and biographers. Nonetheless, as Professor Jordan Paust points out, "every violation of the laws of war is a war crime" and "such caution in the face of international crime is less than satisfying."[133] The "liberal" *Hamdan* majority certainly did not take the opportunity to affirm the status of treaties in a time when an understanding and acceptance of the international laws of war were more important than ever. This oversight paved the way for the single most exceptionalist Supreme Court treaty decision in history, *Medellín v. Texas*.[134]

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132. *Id.* § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.").

133. Paust, *Mixed Record*, *supra* note 29, at 841.

134. Medellín v. Texas, 552 U.S. 491 (2008), *stay of execution denied*, 129 S.Ct. 360 (2008).

IV. WALKING THROUGH THE DOOR IN *MEDELLÍN V. TEXAS*

Medellín is the Supreme Court's "first case ever to deny relief solely on the ground that the treaty relied upon was non-self-executing."[135] *Medellín* is the ultimate in a series of cases involving the United States' violation of foreign nationals' rights under the Vienna Convention on Consular Relations (Vienna Convention).[136] The Vienna Convention, to which the United States is a party, guarantees foreign nationals arrested in signatory countries the right to meet with consular officials.[137] The petitioner Medellín, a Mexican national, was arrested for murder in Texas. State officials did not afford Medellín the opportunity to confer with Mexican consular officials, and a Texas jury eventually convicted and sentenced him to death.[138] Medellín raised the issue of Texas's violation of the Vienna Convention in his state habeas corpus appeal. The state court dismissed the habeas appeal on procedural default grounds because Medellín had not raised the Vienna Convention issue in a timely manner during trial or direct appeal.[139]

The United States Supreme Court had first ruled on the procedural default question in the 1998 case *Breard v. Greene*, holding that habeas petitioners' Vienna Convention claims are subject to the Antiterrorism and Effective Death Penalty Act's (AEDPA) procedural rules, just like all other habeas claims. The *per curiam* opinion contains language tending to indicate that the authors considered the Vienna Convention to confer enforceable rights. It states:

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135. Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601 (2008) [hereinafter Vázquez, *Law of the Land*].

136. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 352−353 (2006) (affirming *Breard* holding despite intervening contrary judgments by ICJ); Breard v. Greene, 523 U.S. 371, 375−76 (1998) (holding that even assuming Vienna Convention is self-executing, petitioner's claim of violation was barred because of procedural default in state habeas proceedings).

137. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, T.I.A.S. No. 6820, 21 U.S.T. 77, 596 U.N.T.S. 261.

138. *Medellín*, 552 U.S. at 500–05.

139. *Id.*

> [A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply . . . . The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act . . . . Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be.[140]

After *Breard*, the International Court of Justice ("ICJ") ruled in two separate cases, the 2001 *LaGrand Case* (involving a German national)[141] and 2004 Case Concerning Avena and Other Mexican Nationals (*Avena*),[142] that subjecting the Vienna Convention's requirements to AEDPA's procedural default rules violates the terms of the Convention. In *Avena*, the ICJ ordered the United States to conduct special hearings to determine whether the named Mexican nationals had been prejudiced by the Vienna Convention violation.[143] After *Avena*, President Bush issued a memorandum that the United States "[would] discharge its international obligations" under *Avena* "by having State courts give effect to the decision."[144]

In 2006, the Court in *Sanchez-Llamas v. Oregon* re-affirmed *Breard*'s procedural default holding in the face of the contrary ICJ decisions.[145] The Court asserted that it would give the ICJ opinions no more deference than "respectful consideration," which did not

140. *Breard*, 523 U.S. at 376. The claim that a self-executing treaty is subject to state procedural default rules has engendered its own critique. *See, e.g.*, Quigley, *supra* note 4, at 677.

141. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

142. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) [hereinafter *Avena*].

143. *Id.*

144. *Medellín*, 552 U.S. at 503.

145. Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

compel a reversal of *Breard*.[146] The political landscape and composition of the Court, which was now in the midst of sorting through the war on terror debate,[147] had changed considerably since 1998. Chief Justice Roberts's opinion for the Court evidences much more caution on the issue of treaty enforceability. The opinion notes that the government "strongly dispute[s]" that the Vienna Convention is self-executing and emphasizes the government's position that treaties are presumptively non-self executing.[148] Tellingly, the Court repeats the government's selective quotation of an 1884 Supreme Court decision, *Head Money Cases*, for the proposition that a treaty "is primarily a compact between independent nations" and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."[149] The Court does not mention other language from the case, often ignored by treaty exceptionalists, which states that a treaty may "prescribe a rule by which the rights of the private citizen or subject may be determined," and a "court resorts to the treaty for a rule of decision for the case before it as it would to a statute."[150]

Medellín's case was not rendered moot by the holding in *Sanchez-Llamas*, because unlike the defendants in that case, he was one of the individuals named in *Avena.* As a consequence, his argument was not about Supreme Court deference to ICJ interpretation of the Vienna Convention, but was about whether state officials were obligated to give effect to the ICJ judgment and grant the named individuals hearings.[151] Medellín advanced two arguments in favor of enforcement: (1) Texas had an obligation to comply with treaties that require the United States to implement ICJ judgments; and (2) Texas

146. *Id.* at 353.
147. The *Sanchez-Llamas* opinion was issued the day before *Hamdan*.
148. *Sanchez-Llamas*, 548 U.S, at 343 (citing Brief for United States at 11, *Sanchez-Llamas*, 548 U.S. 331 (2006) (No. 04-10566)).
149. *Id.* (quoting Brief for United States at 11, *Sanchez-Llamas*, 548 U.S. 331 (2006) (No. 04-10566)).
150. Edye v. Robertson, 112 U.S. 580, 599 (1884).
151. Medellín v. Texas, 552 U.S. 491, 498 (2008).

had an obligation to comply with the President's memorandum.[152] Of concern here is the Court's analysis of Medellín's first claim.

Chief Justice Roberts once again wrote the opinion of the Court, and noted as a threshold matter that Texas would have to comply with the judgment if *Avena* constituted "binding federal law" that could be invoked as a source of substantive rights.[153] The United States is a signatory to two conventions that bear on the question of the force of the *Avena* ruling. The Optional Protocol to the Vienna Convention (Optional Protocol) provides that disputes regarding Convention interpretation fall under the "compulsory jurisdiction" of the ICJ.[154] The United Nations Charter requires signatory nations to "undertake[] to comply" with ICJ rulings.[155] The Court found that neither of these agreements required Texas to comply with *Avena*.[156]

The Court's analysis begins with the division between domestically enforceable self-executing treaties and unenforceable non-self-executing treaties.[157] Again, such a division is acceptable to internationalists so long as non-self-executing treaties are confined to those that do not create individual rights or expressly forbid private lawsuits. Justice Roberts's version of the division, however, seems to be an exceptionalist one, for he quickly forays into the land of presumptions against enforceability. As was foreshadowed by *Sanchez-Llamas*, he begins with the selected quote from the *Head Money Cases*, adding "*of course*" a treaty is "primarily a compact between independent nations."[158] Roberts, however, does include the language from *Head Money Cases* that self-executing treaties "have the force and effect of a legislative enactment."[159] It is, therefore, not entirely clear from this language whether the Court endorses the view

152. *Id.* at 503–04.
153. *Id.* at 504.
154. Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.
155. U.N. Charter art. 94, para. 1.
156. *Medellín*, 552 U.S. at 511.
157. *Id.* at 504–05.
158. *Id.* at 505 (quoting Edye v. Robertson, 112 U.S. 580, 598 (1884)) (emphasis added).
159. *Id.* at 505–06 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

that treaties are presumptively non-self-executing and what the formula is for overcoming such a presumption.

In a footnote, the Court makes this curious statement: "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'"[160] The Court thus indicates that, in order to be enforced, treaties must pass two separate hurdles:[161] (1) they must meet a self-execution test (whatever that may be); and (2) they must contain "express language" that private individuals can sue to remedy violations.[162] However, the Court does not apply the express private right of action requirement it apparently endorses. The Court could have disposed of Medellín's claim simply by saying that neither of the treaties involved specified that individuals have a right to sue in national courts to force compliance with ICJ decisions. Instead, the Court's limited discussions of standing invoke the statutory structure of the ICJ and U.N. Charter language, rather than the absence of express right-to-sue provisions. One argument asserts the ICJ statute expressly prohibits non-parties (the technical parties to *Avena* were the U.S. and Mexico) from seeking to enforce judgments.[163] The other posits that the U.N. Charter's "sole remedy" for a breach is U.N. Security Council action.[164] Of course, there are strong objections to the contention that whenever a treaty specifies an international remedy it means to forbid domestic enforcement.[165]

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160. *Id.* at 506 n.3 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907).

161. *Id.* at 547–49 (Breyer, J., dissenting) (criticizing opinion for "erect[ing] legalistic hurdles that can threaten" the application of existing treaties and negotiations of new ones).

162. *Medellín*, 552 U.S. at 506 n.3 (citing approvingly the presumption that "treaties do not create privately enforceable rights in the absence of express language to the contrary").

163. *Id.* at 511–12 ("Article 59 of the statute provides that '[t]he decision of the [ICJ] has *no binding force* except between the parties and in respect of that particular case.'").

164. *Id.* at 492.

165. The argument is that the fact that a treaty contains international remedial procedures but leaves out domestic ones does not indicate that the treaty intended to make international remedies exclusive. A treaty is an appropriate place to set forth a single uniform international remedy, but it would be unwieldy and unwise for a multilateral treaty that involves multiple nations with differing legal systems to prescribe domestic processes. *Id.* at 548 (Breyer, J., dissenting) ("[G]iven the differences among nations,

Nevertheless, the Court stops far short of applying the express private right of action rule it appears to support.

Turning back to self-execution, the Court indicates that the self-execution inquiry is separate from the private right of action query. The question thus becomes exactly what constitutes *Medellín*'s test for self-execution. The major ambiguity in *Medellín*, and thus its saving grace for internationalists, is its failure to distinguish between two concepts of unenforceability: (1) the idea that a treaty is non-self-executing if, by it terms, it does not create any justiciable rights or obligations; and (2) the concept that a treaty is non-self-executing even if it does create concrete rights or obligations but does not contain language indicating that the drafters intended "domestic effect."[166] The majority opinion contains some language tending to endorse the second view. It states, "[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."[167] Similar to its standing analysis, however, the Court does not apply the intent test it seems to support and instead focuses on demonstrating that the Optional Protocol and U.N. Charter substantively do not require the U.S. to implement the *Avena* ruling.

The case would have been much worse for internationalists had the Court found that the Optional Protocol and U.N. Charter provisions clearly obligated the U.S. (and Texas) to comply immediately with the ICJ judgment, but Medellín could not sue to enforce the obligation because U.S. treaty makers had not intended the provisions to be domestically enforceable.[168] Instead, what the *Medellín* majority

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why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another?").

166. *Id.* at 549 (Breyer, J., dissenting) (noting that in determining self-execution, treaty text "matters very much" but "not because it contains language that explicitly refers to self-execution"). Justice Breyer further opines that drafting history is relevant to determine what the substantive obligations in the treaty are but that courts should not try to discover some intent to self-execute. *Id.*

167. *Medellín*, 552 U.S. at 519; *see also* Brief for United States at 5, *Sanchez-Llamas*, 548 U.S. 331 (2006) (No. 04-10566) (asserting that a treaty would be non-self-executing if it were "ratified without provisions clearly according it domestic effect").

168. The dissent apparently interprets the majority provision as doing precisely this. *Medellín*, 552 U.S. at 547 (Breyer, J., dissenting) (calling it "misguided" that the "majority looks for language about

did was interpret the scope of the substantive obligations contained within the Optional Protocol and U.N. Charter. The Court held that the Optional Protocol's directive that parties "submit" to the "compulsory" authority of the ICJ only requires signatories to send cases to the ICJ and appear for hearings, but it does not require actual compliance with ICJ judgments.[169] Regarding the U.N. Charter, the Court opined that "undertake[] to comply" only signifies that parties like the United States "pledged" their "faith" to one day create legal structures to enforce ICJ judgments.[170] In essence, Justice Roberts makes the same questionable interpretive move as the *Foster* Court did when interpreting the Spanish treaty. The *Medellín* majority's analysis renders the U.N. Charter language on ICJ judgments basically meaningless because it does not actually bind the signatories to comply with ICJ judgments.[171] Questionable as the interpretive analysis may be, it does not simply discard the treaty provisions because there is no language on self-execution.

However, at the tail end of the opinion, the Court again shifts into exceptionalist mode and concludes that "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law."[172] Yet given its interpretive analysis, it is hard to understand exactly what international obligation the United States has, since "undertak[ing] to comply" does not mean compliance.[173] The bottom line is that, despite catch phrases to the contrary, the Court resolves Medellín's claims for relief on the ground that the Optional Protocol and U.N. Charter simply do not create the substantive duties Medellín claimed. Thus, despite any disagreement with Roberts's

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'self-execution' in the treaty itself and . . . erects 'clear statement' presumptions designed to help find an answer").

169. *Id.* at 508.

170. *Id.* (asserting that the Charter "does not provide that the United States 'shall' or 'must' comply with an ICJ decision").

171. *See supra* notes 153−55 and accompanying text.

172. *Medellín*, 552 U.S. at 523.

173. This interpretation clearly gives the United States a "get out of ICJ judgment free card," again signaling U.S. aversion to international law. It was also unnecessary given that the U.S. had withdrawn from the Optional Protocol after *Avena*. *See supra* note 109.

interpretation of treaty text,[174] an internationalist might see an optimistic aspect of the Court's self-execution analysis.[175] *Medellín* leaves some room to argue that what the Court meant by non-self-executing is simply that the treaty at issue does not create rights and obligations.[176] Perhaps, the argument can still be made that a treaty that clearly grants individuals rights, like the Geneva Conventions, is by its very nature self-executing.[177]

V. A SECOND CHANCE FOR THE GENEVA CONVENTIONS

It appears likely that the Supreme Court will not rule on the domestic enforceability of the Geneva Conventions any time soon. Congress, through the MCA, has now set forth specific processes governing military trials of "alien unlawful combatants." These tribunals obviously comply with any constitutional mandate that military tribunals be established by both political branches of government.[178] The fact that Congress has approved the tribunals also

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174. *Medellín*, 552 U.S. at 534 (Breyer, J., dissenting) (criticizing majority's interpretation of "undertake to comply"); *see also* Vázquez, *Law of the Land*, *supra* note 135, at 661 ("In international law usage, an 'undertaking' is well recognized to be a hard, immediate obligation.").

175. For example, Professor Vazquez asserts:

> Fortunately, the opinion supports an alternative reading, under which *Medellín* can be understood to have found the relevant treaty to be non-self-executing because the obligation it imposed required the exercise of nonjudicial discretion. So read, *Medellín* is an example of an entirely distinct form of non-self-execution, and is thus consistent with . . . a presumption that treaties are self-executing in the *Foster* sense.

Vázquez, *Law of the Land*, *supra* note 135, at 608.

176. This would be interpreting the majority opinion to mean what Justice Stevens's concurring opinion states. Justice Stevens opines:

> I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution. (citation omitted) I also endorse the proposition that the Vienna Convention on Consular Relations is itself self-executing and judicially enforceable. Moreover, I think this case presents a closer question than the Court's opinion allows. In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals*.

Medellín, 552 U.S. at 533 (Stevens, J., concurring) (internal citations and quotations omitted).

177. There is still, however, the private right of action hurdle that the Court seemed to endorse. *See supra* notes 160–65 and accompanying text. Such a rule would prevent enforcement of the Conventions even via habeas corpus. *See supra* note 104.

178. Again, *Hamdan* did not go so far as to require this, but at least required that such tribunals not violate a pre-existing Congressional limitation. *See supra* note 53. There is a possibility, however, that

helps to satisfy Common Article 3's requirement of a "regularly constituted court." Indeed, the MCA proclaims itself to be in compliance with Common Article 3.[179] Experts, however, argue that in fact many of the procedures in the MCA are incompatible with Common Article 3's requirement that courts provide "all the judicial guarantees [which are] recognized as indispensable by civilized peoples."[180] Conceivably, then, a detainee subject to military trial under the MCA could assert that his Geneva rights are being violated. If such a case were to arrive at the Supreme Court, the Court would not be able to "backdoor" the Geneva Conventions through UCMJ Article 21, as it did in *Hamdan*, because the MCA expressly replaces the UCMJ where inconsistent.[181] Thus, in order to enforce such a detainee's Geneva rights, the Court would have to decide the self-execution question.

Of course, the Supreme Court might simply find that the MCA complies with Common Article 3, rendering a decision on self-execution unnecessary, or strike down the tribunals on domestic grounds. Moreover, it could possibly bypass the self-execution question all together by holding that the MCA replaced contrary Geneva provisions as a "last-in-time" statute.[182] However, courts generally look for clear language before finding that a treaty has been superseded by statute.[183] Although the MCA does seek to stop

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the Court could further refine its constitutional analysis regarding war power and invalidate the tribunals on domestic constitutional grounds.

179. 10 U.S.C. § 948b(f) (2006).

180. Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88, 99 (2008); David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1006 (2008); Gruber, *supra* note 33, at 1058 (discussing "several important variances between MCA and UCMJ procedures").

181. *See supra* note 128 and accompanying text. In addition, the MCA makes clear that it does not seek to incorporate law of war protections more extensive than its own provisions. *See* 10 U.S.C. § 948b(f)–(g).

182. *See supra* note 108 and accompanying text.

183. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (citing cases); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) (superseding treaty requires "explicit statutory language"); Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (stating that "intention to abrogate or modify a treaty is not to be lightly imputed to the Congress"); Cook v. United States, 288 U.S. 102, 120 (1933); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987) (stating that legislation must have clear purpose to supersede treaty).

individual invocations of the Geneva Conventions in military trials, elsewhere it confirms that the Geneva Conventions retain the force of international law.[184] If the MCA is insufficiently clear to constitute an express repeal of Geneva, the novel question becomes whether Congress, without repealing a treaty, can "unexecute" it, that is, force it to become non-self-executing.[185]

This is, however, a question the Court will not likely address, given that military tribunals are being phased out and the number of detainees is decreasing. Since the June 2008 decision in *Boumediene v. Bush* permitting detainees to bring habeas corpus petitions despite the MCA's habeas-stripping provisions,[186] district courts have demonstrated a willingness to release detainees. For example, the district court for the District of Columbia ordered the release of Boumediene and several others on the ground that the government failed to prove by a preponderance of the evidence that they were "enemy combatants."[187] Hundreds of other detainees have been released discretionarily and, as of the writing of this Essay in January 2010, only 196 remain.[188] On January 22, 2009, President Obama signed an Executive Order to shut down the Guantánamo facility

184. For example, the MCA states, "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." MCA, 10 U.S.C. § 948b(f) (2006). *See* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 82 (2007) (noting MCA's "clear intent to preserve the Geneva Conventions intact").

185. Addressing this question, Professor Vázquez states, "[T]here is no evidence that Congress intended to 'unexecute' the self-executing provisions of the Geneva Conventions or otherwise deny any part of them domestic legal force. A congressional attempt to do so, moreover, would raise substantial questions under the Supremacy Clause." Vázquez, *supra* note 184, at 91−92. Even graver concerns would be raised if the "un-execution" was permitted to have retroactive effect. *Cf.* Gruber, *supra* note 33, at 1063 ("MCA's directive that individual detainees are prohibited from invoking the Conventions can be seen merely as Congress's post-ratification view of Geneva self-execution, which is itself not dispositive of and perhaps irrelevant to the treaty's status."). Resolving the "un-execution" question in the affirmative would be decidedly anti-internationalist. Like the conservative construction of the self-execution issue, it essentially allows Congress to tailor the force of human rights conventions domestically while duplicitously purporting to support such rights. *See supra* notes 110–11 and accompanying text.

186. Boumediene v. Bush, 553 U.S. 723 (2008).

187. Boumediene v. Bush, 579 F. Supp.2d 191, 197–98 (D.D.C. 2008).

188. *See* Peter Finn, *Justice Task Force Recommends about 50 Guantanamo Detainees be Held Indefinitely*, WASH. POST, Jan. 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104936.html.

within a year and harmonize U.S. interrogation tactics with the Geneva Conventions.[189] The one terrorism detention case pending at the time before the Supreme Court that might have brought the Geneva Conventions back into play, *Al-Marri v. Pucciarelli*,[190] was rendered moot in February 2009 when President Obama transferred Al-Marri's case to the criminal system.[191]

Still, recent events have served to revive the debate over military tribunals. The one-year deadline for closing Guantanamo has come and gone.[192] Moreover, President Obama, apparently under pressure from Congress, has retreated from his commitment to permanently close the Bush terrorism play-book.[193] He now endorses military trials, albeit under an apparently more civil-rights oriented version of Bush's commissions,[194] and supports indefinite detention of certain

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189. The Executive Order reads in pertinent part:

> The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Exec. Order No. 13492, 74 Fed. Reg. 4, 897 (Jan. 22, 2009).

190. Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008) (granting certiorari).

191. *"Enemy Combatant" Ali al-Marri Charged for Alleged Role in Terrorist Activities*, FOX NEWS, Feb. 27, 2009, *available at* http://www.foxnews.com/story/0,2933,501788,00.html. The Supreme Court more recently dismissed the "Uighur case" from its docket and remanded the case to district court. Kiyemba v. Obama, 130 S. Ct. 1235 (2010) (per curiam). However, this case was in any event unlikely to raise Geneva Convention issues because the case was about the propriety of a habeas court ordering the release of unquestionably unlawfully detained prisoners into the United States. *Id.* The issue was not the legality of the detention under international law.

192. *One Year Later, Guantanamo Still Open*, CBS NEWS, Jan. 22, 2010, http://www.cbsnews.com/stories/2010/01/22/politics/main6129494.shtml.

193. Jonathan Weisman & Evan Perez, *Obama Leans Toward Switch to Military Trials on 9/11*, WALL ST. J., Mar. 6, 2010, *available at* http://online.wsj.com/article/SB10001424052748703915204575103703790191316.html (noting that Congress's threat to cut funding to civilian trials and local government resistance has led the Obama administration to favor trying Khalid Sheik Mohammed in a military tribunal, despite a pledge to try him in federal court in New York); Ed Pilkington, *Obama to Continue Military Tribunals at Guantánamo*, THE GUARDIAN, May 15, 2009, *available at* http://www.guardian.co.uk/world/2009/may/15/guantanamo-bay-military-trial-obama (noting that the Guantánamo closure issue "has increasingly been highlighted by Republican politicians who see it as a potential stick with which to beat the administration, and many Democrats, nervous about the reaction of their constituents, have also expressed their alarm").

194. *See* Lara Jakes, *Obama to Revive Military Tribunals for Gitmo Detainees, with More Rights*, HUFFINGTON POST, May 14, 2009, *available at* http://www.huffingtonpost.com/2009/05/14/obama-to-revive-military-_n_203783.html.

terror suspects.[195] Meanwhile, trials under MCA procedures are on-going.[196] As a consequence, the possibility that the Supreme Court will have another opportunity to rule on Geneva's applicability to the war on terror still exists. If the occasion arises, the Supreme Court will have another chance to turn "the legal world right-side up again"[197] and to show that it is not a "lone ranger"[198] by affirming the domestic enforceability of the Geneva Conventions. Although *Medellín* may have created yet another legalistic barrier between the "war" detainees[199] and their human rights, the case leaves some room for a future decision giving effect to the Geneva Conventions.

CONCLUSION

As President Obama inches ever closer to embracing the "twilight zone" model of terrorism law, it would be wise to keep in mind the reputational harm the Bush administration's war on terror caused the United States. One human rights advocate warned the Obama administration, "The results of the cases [tried in military commissions] will be suspect around the world. It is a tragic mistake to continue them."[200] More than just a source of embarrassment, there are real consequences to America's sullied international reputation. Our experiments with "alternative" military justice not only affect

195. *See supra* note 188 (observing that the Obama administration has identified fifty Guantánamo inmates that should be held indefinitely).

196. Apparently, government lawyers, now part of the Obama administration, are continuing to rely on evidence obtained through torture. Del Quentin Wilber, *ACLU Says Government Used False Confessions*, WASH. POST, July 2, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/01/AR2009070103477.html.

197. Koh, *supra* note 50, at 2352.

198. Ginsburg, *supra* note 29, at 335.

199. There is some point at which the Court is going to have to grapple with whether terrorism detentions fall within a war paradigm. Thus far, the fact that the cases have involved Taliban or al Qaeda persons with a connection to Afghanistan combined with continuing war-like conditions in Afghanistan have allowed the Court to presume a war paradigm. *See supra* note 32. One expert notes that characterizing terrorism as part of war furthers terrorists' agenda by "allow[ing] terrorists to portray themselves as military figures and their victims as 'collateral damage.'" Pilkington, *supra* note 193 (quoting Shayana Kadidal, Guantánamo lawyer with the Centre for Constitutional Rights).

200. *See Human Rights Activists Assail President Obama's Decision on Military Commissions*, ABC NEWS: POLITICAL PUNCH, (May 15, 2009, 7:26 PM), http://blogs.abcnews.com/politicalpunch/2009/05/human-rights-ac.html (quoting Gabor Rona, International Legal Director of Human Rights First).

our high court's world influence, they operatively prevent the United States from assuming a leadership role in defining and defending international human rights. For example, in 2007, the Chinese government responded to the U.S. State Department's annual human rights report by stating that America had no standing to comment on others' human rights violations given its conduct of the war on terror. Specifically, the Chinese characterized the United States as "pointing the finger" at other nations while ignoring its "flagrant record of violating the Geneva Convention."[201] Supreme Court validation of treaty law would no doubt help repair the international reputation of the United States.[202]

The lesson here is about fear and missed opportunity. Guantánamo stands as a stark reminder of the great importance of international humanitarian law during times of crisis. The Geneva Conventions were the very barrier between terrorism detainees and a government regime singularly committed to national security through any means possible. Unfortunately, when international law mattered most, even the liberal Supreme Court justices avoided cementing its legal status. By contrast, Medellín, a convicted murderer, was apparently afforded the full panoply of constitutional protections, and in all likelihood, his inability to confer with consular officials did not prejudice his case. Much less was at stake, and those on the Supreme Court critical of humanitarian law impediments to waging the war on terror could fashion anti-internationalist rules with little public fanfare or liberal resistance. Consequently, although *Hamdan* will likely go down in history as evidence of the Court's willingness to protect individual rights in the face of massive public fear and executive pressure, it also represents a failure to truly support the comprehensive

201. *See* Edward Cody, *Beijing Hits Back at U.S. for Raising Rights Concerns*, WASH. POST, Mar. 9, 2007, at A16, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030800747.html.

202. Even if the President forges ahead with policies contrary to international humanitarian law, the Court can still do its part to salvage U.S. reputation. As one scholar writes, "An unequivocal cue from the Supreme Court about the importance of international and comparative standards would have sent an important human rights message and may have averted controversy and embarrassment resulting from executive policies." Laura E. Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. INT'L L. REV. 1, 14 (2006).

international regime governing war-time detention, a regime in which the United States long ago vowed to participate. But all may not be lost. The Supreme Court might have another chance to rule on the status of the Geneva Conventions, and *Medellín* leaves some wiggle room on self-execution. If the Supreme Court is once again to be a beacon of judicial light, it must move beyond the xenophobic exceptionalism of the Bricker past and embrace the straightforward and fair principle that signed and ratified treaties are the law of the land.