2007

Who's Afraid of Geneva Law?

Aya Gruber
University of Colorado Law School

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
WHO'S AFRAID OF GENEVA LAW?

Aya Gruber†

I. INTRODUCTION ................................................................. 1017

II. FRAMING THE DEBATE: BUSH V. INTERNATIONALISTS ........... 1021

III. FEAR OF SELF-EXECUTION IN HAMDI AND HAMDAN ............... 1027
   A. Hamdi v. Rumsfeld .................................................... 1028
   B. Hamdan v. Rumsfeld .................................................. 1032

IV. REASON TO BE AFRAID? .................................................... 1041
   A. Self-Execution in the Supreme Court ................................ 1042
   B. Self-Execution in the Lower Courts .................................. 1050

V. THE COST OF FEAR ............................................................. 1055
   A. Placing the Geneva Conventions on Shaky Ground ............... 1055
   B. Accepting the Isolationist Self-Execution Doctrine .......... 1064
      1. Deceptive Legal Reasoning to Reach Isolationist Results 1066
      2. Historical Ties with Isolationism ............................... 1070
      3. The Use of Pretextual and Non-Normative
         “Neutral” Values .................................................... 1074

VI. CONCLUSION ........................................................................ 1084

I. INTRODUCTION

Everyone has been talking about the Geneva Conventions. We talk about
them here and abroad—in academic, political, and social circles.¹ After

† Associate Professor of Law, Florida International University College of Law, J.D.,
Harvard Law School, B.A., U.C. Berkeley. I thank Erwin Chemerinsky, Anthony D’Amato,
Drew Dayes, Christopher Edley, Stanley Fish, Elizabeth Foley, Harold Koh, Leonard
Strickman, and Francisco Valdes for their influence on this work. I am also very grateful to
Jorge Esquirol for his indispensable guidance. Finally, I appreciate the diligent work of the
editors at the Arizona State Law Journal.

¹ See Norman J. Finkel, Moral Monsters and Patriot Acts: Rights and Duties in the
Worst of Times, 12 PSYCHOL. PUB. POL’Y & L. 242, 265 (2006) (noting criticism from
international press); see, e.g., Paisley Dodds, Senator: Many Detainees at Guantanamo Likely to
Detainees, U.S. Faces Legal Quandary: Most Experts Say Al Qaeda Members Aren’t POWs but
Taliban Fighters Might Be, WASH. POST, Jan. 27, 2002, at A22; Katharine Q. Seelye, The
9/11, lines were swiftly drawn between those in favor of total executive discretion and defenders of international standards of conduct. The Bush Administration has been unwavering in its insistence that the Geneva Conventions do not limit the President’s options in conducting the war on terror. Much of the international community and certainly human rights organizations have held steadfast to their position that the United States must comply with not only the letter but the “spirit” of the Geneva Conventions. In *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld,* the Supreme Court became engaged in the debate when litigants called on it to address the applicability of the Geneva Conventions to citizen and alien terrorism detainees.

Prominent scholars and even the Justices themselves have noted a trend in the Supreme Court toward acceptance of international law and norms. Recent decisions appear to vindicate the view that the Court is willing to incorporate international standards into domestic jurisprudence. The question examined in this Article is whether the Court’s recent terrorism detention decisions confirm statements, like Justice Ginsburg’s, that the Court’s “‘island’ or ‘lone ranger’ mentality is beginning to change.” *Hamdi* and *Hamdan,* both bold opinions in their own rights, definitively limit the

---


2. See infra notes 26–41 and accompanying text (discussing Bush’s position on Geneva Conventions).


8. See, e.g., Roper, 543 U.S. at 551.

President’s power to detain and try enemy combatants. They also discuss the Geneva Conventions, and *Hamdan* even imposes Geneva-based limitations on military tribunals. Given the foregoing, many consider these cases unequivocal victories of constitutional procedure and international law over executive military discretion. This Article takes a contrary view, asserting the cases taken together are not truly “internationalist” because of their failure to declare the Geneva Conventions self-executing.

The self-execution doctrine is a judicial invention holding that a treaty only provides judicially-enforceable rights if it “operates of itself” or if Congress implements it through specific legislation. The doctrine is quite controversial and often considered patently isolationist because the Constitution declares treaties the “supreme Law of the Land.” Because of modern anti-internationalist constructions of the doctrine, which have turned the doctrine into an impenetrable barrier to treaty enforcement, no duly ratified human rights treaty has been found self-executing. As a consequence, human rights treaties have been wholly unable to provide judicial remedies to those suffering human rights abuses at the hands of the U.S. government.


The *Hamdi* and *Hamdan* cases gave the Court perfect opportunities to declare the Geneva Conventions self-executing and push back the rising tide of isolationism created by lower court skepticism of treaty law. In both cases, terrorism detainees asserted rights under the Geneva Conventions and urged the Court to hold the Conventions self-executing. The Court did not do so, but rather utilized Geneva solely to interpret the intent of Congress. In *Hamdi*, the Court used the Conventions to flesh out legislative intent and find Congress authorized Hamdi’s detention through a joint resolution, the Authorization for Use of Military Force (“AUMF”), which is a sparse document devoid of any mention of detention. In *Hamdan*, the Court held that certain Geneva Convention provisions were silently incorporated by the Uniform Code of Military Justice (“UCMJ”). While this placed the Conventions in a position to check executive power, the Court scrupulously avoided the issue of self-execution.

Let me add a caveat here—the purpose of this Article is not to present specific arguments against isolationism or American exceptionalism. That has been done with great eloquence by others. Nor is my goal to defend a due process model of the Guantánamo detentions in the face of conservative arguments regarding military necessity, which has also been done in great detail elsewhere. Rather, my less ambitious purpose is to unpack the

17. See infra Part III.
18. Id.
19. Id.
history and purported legal bases of the self-execution doctrine and demonstrate how isolationist philosophy continues to influence the Supreme Court’s view of treaties, despite claims of the Court’s burgeoning internationalism. Accordingly, this Article adopts a definitively liberal internationalist point of view but takes the atypical position that the Supreme Court’s approach to international law in the recent terrorism cases, which incorporates treaty law only through legislative interpretation, should cause concern to civil libertarians and internationalists alike.

Part I of the Article describes the Bush Administration-internationalist debate, as a preface to the analysis of international law in Hamdi and Hamdan. Part II examines the treatment of international law in Hamdi and Hamdan and shows the extent of the Court’s legal wrangling to avoid the self-execution issue. Part III asserts that the purported presumption against self-execution, which has been heavily cited by Geneva’s detractors, is not a product of Supreme Court jurisprudence but of lower court activism. Part IV critiques the Court’s choice to avoid the self-execution issue on the grounds that it placed the Conventions in a tenuous position and silently incorporated lower court hostility to treaty law.

II. FRAMING THE DEBATE: BUSH VS. INTERNATIONALISTS

The debate over the role of international law in the war on terror arose as soon as the media began to report the detention of hundreds of captured alleged Taliban and Al Qaeda fighters in Guantánamo Bay. The Bush Administration has been consistently clear in its opinion that it follows international law “principles,” but the President is not substantively bound by his international agreements. Experts note that Bush’s disrespect for international law existed prior to the 9/11 attacks. He immediately


25. See supra note 7 and accompanying text.


27. See infra notes 30–34.
established "a new policy of 'a la carte multilateralism' . . . you pick and choose the bits of international law you like and get rid of the rest." 28 The Bush Administration’s continuing contempt for international law is evidenced by a Department of Defense statement opining, “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.” 29

The Administration asserts that the Geneva Conventions are not self-executing, 30 such that the only avenue of their enforcement is through international political pressure. Alternatively, the Administration maintains that even if the Conventions are self-executing and enforceable by private individuals, the President is nonetheless free to violate them. The famous “torture” memos by various presidential legal advisors make clear the position that the President’s commander in chief powers override any conflicting treaty obligations. 31 While the Administration insists that it does not use torture in interrogation, 32 President Bush has stated, “I accept the


30. See, e.g., Defense Statement, supra note 29, at 19; see Koh, supra note 23, at 1500 (noting Bush’s creation of “‘rights-free’ zones”).

31. See U.S. Dept of Def., Working Group Report on Detainee Interrogation in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 24 (2003); Memorandum from Jay S. Bybee, Ass’t Att’y Gen., to Alberto R. Gonzales, Counsel to the President 34 (Aug. 1, 2002) [hereinafter Bybee Memo], http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (asserting that Commander-in-Chief power overrides any limitations imposed by Convention Against Torture); Memorandum from John Yoo, Deputy Ass’t Att’y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Dept. of Def. 10-11 (Jan. 9, 2002) (emphasizing President’s uncontestable Commander-in-Chief powers).

32. There is reason to be skeptical of this claim. First, Bush’s legal advisors exempt a good number of torture techniques from their definition of torture. See Bybee Memo, supra note 31, at 1 (“Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”). In addition, the Administration fought efforts to prohibit intelligence officers from using torture or inhumane treatment. See Douglas Jehl & David Johnston, White House Fought New Curbs on Interrogations, Officials Say, N.Y. Times, Jan. 13, 2005, at A1. David Luban explains, “Indeed, given that lawyers at the highest levels of government continue to loophole the laws against torture as energetically as ever ... the only reasonable inference to draw is that the United States government is currently engaging in brutal and humiliating interrogations.” Liberalism, Torture, and the Ticking Bomb, 91 Va. L. Rev. 1425, 1461 (2005).
legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan. Experts observe:

The “Bush position” boils down to this: even assuming that the Geneva Conventions are binding on the United States as a matter of international law, they do not bind the President as a matter of domestic law because the President has the constitutional authority to violate specific provisions of the Conventions to protect national security.

Moreover, Bush has engaged in a “‘hyper-technical legal analysis’ to exploit ambiguities” in the Geneva Conventions in order to “read out” the war on terror. The Administration contends that the Conventions do not apply to any of the Guantánamo detainees, even Taliban fighters, for several reasons. First, the Administration points to factual differences between the war on terror and previous wars to explain the inapplicability of Geneva law. Attorney General Alberto Gonzales infamously opined that terrorism’s “‘new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.’” In addition, the Administration initially argued that because the United States never recognized the Taliban as a legitimate government, Taliban fighters were not subject to Geneva protections. Bowing to international pressure, the Administration changed its position and admitted that the Geneva Conventions should apply to the conflict between the United States and the Taliban. Still, Bush asserted that Taliban detainees at Guantánamo were nonetheless disentitled to Prisoner of War status

33. 2002 Bush Memo, supra note 26, app C.
because of their failure to wear uniforms and complicity with Al Qaeda.\textsuperscript{40} Furthermore, Bush was unwavering on his position that Al Qaeda members detained pursuant to the larger “war” on terror are not entitled to Geneva protections.\textsuperscript{41}

By contrast, internationalists hold that the Guantánamo detentions are subject to the limits set forth in treaty-based and customary international law. Internationalists assert that to the extent that detentions and trials are occurring in the military context, the international law of war substantively apply.\textsuperscript{42} Derek Jinks and David Sloss, for example, reject the claim that the President possesses emergency power to override valid treaty obligations.\textsuperscript{43} They recognize various powers retained by the Executive to terminate a treaty by its terms or in the event of a breach, but assert that as a general rule, the President is bound by the Constitution to execute treaties because,

\begin{itemize}
  \item 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
  \item 2. Members of other militias [that] . . . fulfill the following conditions:
    \begin{itemize}
      \item (a) That of being commanded by a person responsible for his subordinates;
      \item (b) That of having a fixed distinctive sign recognizable at a distance;
      \item (c) That of carrying arms openly;
      \item (d) That of conducting their operations in accordance with the laws and customs of war.
    \end{itemize}
\end{itemize}

Third Geneva Convention, \textit{supra} note 6, art. 4(a)(2).

\textsuperscript{40} See \textit{id}. (stating that Taliban detainees are not POWs because they do not wear uniforms and violate laws of war); see also January 2002 Press Briefing, \textit{supra} note 36. Bush’s assertion that Guantánamo detainees are not POWs is apparently based on the conclusion that they do not meet criteria set forth in Third Geneva Convention Article 4(a)(2). Under Article 4 the following persons, among others, qualify as prisoner of war:

\begin{enumerate}
  \item Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
  \item Members of other militias [that] . . . fulfill the following conditions:
    \begin{enumerate}
      \item (a) That of being commanded by a person responsible for his subordinates;
      \item (b) That of having a fixed distinctive sign recognizable at a distance;
      \item (c) That of carrying arms openly;
      \item (d) That of conducting their operations in accordance with the laws and customs of war.
    \end{enumerate}
\end{enumerate}

Third Geneva Convention, \textit{supra} note 6, art. 4(a)(2).

\textsuperscript{41} The argument proceeds on two bases. First, the Geneva Conventions only apply to signatory nations, and Al Qaeda is not a signatory. See May 2003 Press Statement, \textit{supra} note 39. Second, Common Article 3 of the Geneva Conventions, which does not contain a signatory limitation, does not apply to the conflict with Al Qaeda because it only applies to domestic conflicts and the war on terror is of international scope. See 2002 Bush Memo, \textit{supra} note 26; Bybee Memo, \textit{supra} note 31.


\textsuperscript{43} Jinks & Sloss, \textit{supra} note 34, at 106 (“[T]he President never possesses the unilateral authority to violate a treaty; he must always obtain congressional approval.”).
under the Supremacy Clause, they are "the supreme Law of the Land," and the President must "take Care that the Laws be faithfully executed." According to internationalists, most portions of the Geneva Conventions are self-executing. They observe that there is no evidence that Geneva's drafters intended the Conventions to be non-self-executing and note that the majority of Geneva's articles contain mandatory language about protecting individual rights. Scholars also argue that the Conventions have been "executed" in the sense that Congress has specifically implemented them. They further assert that Geneva rights may be enforced through the habeas corpus statute, Torture Victim Protection Act, or other legal mechanisms.

Moreover, internationalists tend to read the Geneva Conventions far more broadly than the Bush Administration. They reject that the Administration is entitled to make a blanket determination that Guantánamo detainees are not covered by the Conventions. They assert that there are many colorable arguments in favor or treating Guantánamo detainees as prisoners of war. They contend that Taliban fighters could qualify for POW status under Article 4(A)(1) by virtue of their being "[m]embers of the armed forces of a Party to the conflict." This would make their failure to

44. Id. at 104 (quoting U.S. CONST. art. VI, cl. 2).
45. Id. at 107 (quoting U.S. CONST. art. II, § 3); see also Michael D. Ramsey, Torturing Executive Power, 93 GEO. L.J. 1213, 1234 (2005) (stating that President must execute treaties as laws of the land).
46. Jinks & Sloss, supra note 34, at 123–24. The intent inquiry, however, is itself problematic. See infra notes 238–46 and accompanying text.
47. See 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.”).
49. 28 U.S.C. § 2241.
52. See, e.g., Aldrich, supra note 42, at 897 (criticizing "the blanket nature of the decision to deny POW status to the Taliban prisoners"); Allison Marston Danner, Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism, 46 VA. J. INT’L L. 83, 103 (2005) (asserting that blanket determination is "the most illuminating example of the Administration’s disregard of the jus in bello").
53. Third Geneva Convention, supra note 6, art. 4(A)(1).
wear uniforms irrelevant because that provision is only a requirement for militia and resistance movements not part of regular armed forces. In addition, international scholars consistently emphasize the portions of the Geneva Conventions requiring detainees to be presumptively considered prisoners of war until their status can be determined by a competent tribunal.

There are also arguments against the Bush Administration’s unequivocal claim that the Geneva Conventions do not apply to Al Qaeda because Al Qaeda is a nonstate actor and not a party to Geneva. Regarding Al Qaeda operatives captured in Afghanistan, some assert that, like Talibain detainees, Al Qaeda members can be considered members of armed forces of, or regularized militia supporting, a party to the conflict. Others maintain broadly that Al Qaeda members should be protected under the penumbral umbrella of the Third Geneva Convention’s “spirit.” As to Al Qaeda members captured in the general “war” on terror, internationalists maintain that Geneva Common Article 3 provides rights to detainees in any armed conflict involving a signatory. Finally, internationalists maintain that it is philosophically untenable for the United States to try Al Qaeda members for

54. *Id.* art. 4(A)(2); see Aldrich, *supra* note 42, at 895 (asserting that Taliban fighters can be considered members of armed forces despite non-compliance with Article 4(A)(2)’s requirements); Lawrence Azubuike, *Status of Talibain and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int’L L. 127, 146 (2003) (maintaining that Article 4(A)(1)’s only inquiry is “whether the person is a member of the armed forces of the state”); Proulx, *supra* note 42, at 843 (asserting that because Talibain was the “controlling socio-political entity throughout most of Afghanistan[,]” Talibain fighters are members of a party to conflict’s armed forces). But see Glazier, *supra* note 11, at 82–83; Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int’L L. 328, 335 (2002) (asserting that Article 4(A)(1) implicitly incorporates requirements of Article 4(A)(2)).

55. See, e.g., Proulx, *supra* note 42, at 845. Third Geneva Convention Article 5 states, “Should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Third Geneva Convention, *supra* note 6, art. 5.

56. See, e.g., Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 Va. J. Int’L L. 165, 182 (2005) (stating that if Al Qaeda fought alongside Talibain, they could be considered POWs); Vierucci, *supra* note 42, at 291 (contending that Al Qaeda units may have been under control of Talibain and therefore entitled to Article 4(A)(1) protection); Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 Yale L.J. 667, 672 (2006) (arguing that Al Qaeda groups could qualify for POW status as “armed forces” under Article 4(A)(1)).


58. See Jinks, *supra* note 56, at 188–89 (asserting that Common Article 3 is not limited to internal civil wars); Jinks & Sloss, *supra* note 34, at 116 n.87 (criticizing Bush Administration’s interpretation of Common Article 3); Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 110 (2006) (observing “[t]he expertise deficit ran particularly deep in the Administration’s interpretation of Common Article 3”).
violations of the international law of war while simultaneously holding that America is not bound by that law.\textsuperscript{59}

The Supreme Court was thrust into the debate over the legality of the terrorism detentions in \textit{Hamdi} and \textit{Hamdan}. While many rejoice at the apparent limits it set on executive discretion, this jubilation rings hollow to the many individuals who continue to be detained, tortured, and subject to military (in)justice. One of the reasons why the Supreme Court’s decisions in \textit{Hamdi} and \textit{Hamdan} seem more bark than bite is the Court did not give the Geneva Conventions the substantive recognition they are due, an action that might have proved the detainees’ only saving grace.

III. FEAR OF SELF-EXECUTION IN \textit{HAMDI} AND \textit{HAMDAN}

Bush’s stance toward international law has received worldwide criticism.\textsuperscript{60} The Administration’s policies are often considered a brazen flouting of international law in furtherance of a larger American exceptionalist policy.\textsuperscript{61} To much of the world, the United States is a country governed by the law of a ruler rather than the rule of law.\textsuperscript{62} In the terrorism cases, the Supreme Court had a unique chance to signal to the world community that the United States abides by neutral international rules, even if contrary to the President’s wishes.\textsuperscript{63} The Court, however, did not fully

\textsuperscript{59} See MARGARET MACMILLAN, PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR 22 (2001) (“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.”); Sands QC, \textit{supra} note 28, at 300 (describing Bush’s “\textit{a la carte multilateralism}”).

\textsuperscript{60} See, e.g., Finkel, \textit{supra} note 1, at 267; Ramsey, \textit{supra} note 45, at 1213 (noting the “sound and fury” directed at memos from Bush’s advisors that support broad views of Presidential war power); J.M. Spector, \textit{Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog}, 22 \textit{CONN. J. INT’L L.} 47, 117 (2006) (observing nongovernmental organizations’ criticism of Bush’s policies).


\textsuperscript{63} It would thereby quell the criticism that the United States’ perceived violations of Geneva has engendered. See AMNESTY INT’L, AMERICAS: REGIONAL OVERVIEW 2004 (2005), http://web.amnesty.org/web/web.nsf/print/36F832815378BDCC1256FDB003713A4 (condemning United States for failing to apply Conventions to detainees).
embrace this opportunity, and thus Hamdi and Hamdan are not examples of the Court’s new internationalism. In Hamdi, the Court used international law to expand the President’s powers and approve citizen detention, leaving Hamdi’s only relief to come from the Due Process clause. In Hamdan, the Court actually imposed Geneva-based limits on the President, over the heated objections of the government, but it took an extremely circuitous route to do so, precisely to avoid the issue of self-execution.

A. Hamdi v. Rumsfeld

Hamdi v. Rumsfeld, at first blush, is not a case at all concerned with international law. The holding, requiring basic due process under Mathews v. Eldridge in the proceedings to classify citizens alleged to be enemy combatants, seems uniquely domestic. Upon further analysis, however, international law, incorporated amorphously into the “universal agreement and practice” of war, played a role in the Court’s holding. The Court looked to international law, not as a limit on U.S. military action, but rather as a tool of statutory interpretation with the result of enhancing executive power.

According to the government, Yaser Hamdi was taken into U.S. custody in an apparent combat zone during ongoing hostilities with Afghanistan. Of course, Hamdi’s advocates assert that he was in fact a noncombatant who was unlawfully captured by the Northern Alliance and turned over to American forces. In June 2002, Hamdi’s father filed a habeas corpus petition in U.S. district court asserting that Hamdi’s detention was in violation of the laws and treaties of United States. The district court found

64. See infra notes 95–96 and accompanying text.
68. Id. at 518 (citing Ex parte Quirin, 317 U.S. 1, 30 (1942)).
69. Hamdi was turned over to U.S forces by members of the Northern Alliance. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 529 (E.D. Va. 2002).
70. Hamdi’s contention appears to be vindicated by the actions of the Bush Administration. The Bush Administration released Hamdi in exchange for his renunciation of U.S. citizenship and promise to stay in Saudi Arabia for five years. See Saudi-American Released to Riyadh. BBC NEWS, October 11, 2004, available at http://news.bbc.co.uk/2/hi/americas/3733942.stm. The United States almost certainly would not have taken this course of action had there been any evidence that Hamdi engaged in active combat against U.S. forces.
71. Hamdi, 542 U.S. at 511. This came after some initial legal wrangling. See Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002).
Hamdi's detention unlawful because the sparse "Mobbs Declaration," a conclusory nine paragraph document by Defense Department employee Michael H. Mobbs offered by the government as justification for Hamdi's classification as an unlawful enemy combatant, fell "far short of even... minimal criteria for judicial review." The Fourth Circuit reversed, holding that the military's treatment of Hamdi was constitutional and legal. Examining the Mobbs Declaration, the court of appeals opined that "Hamdi was indisputably seized in an active combat zone" and this fact alone was sufficient to establish President Bush had exercised legitimate war power. As to Hamdi's international law arguments, the court of appeals dismissed out of hand the claim that the Third Geneva Convention provided Hamdi any enforceable rights.

Quizzically, the Fourth Circuit asserted that even if Geneva rights were judicially cognizable, Hamdi's claim that he is a prisoner of war is "a distinction without a difference" because unlawful combatants are "subject to mere detention in precisely the same way that lawful prisoners of war are." This argument misses the mark because, in fact, the Geneva Conventions talk as much about the conditions of detention as the right to release upon cessation of hostilities. Thus, if the Geneva Conventions did apply to Hamdi and are judicially enforceable, the court had the obligation to terminate Hamdi's detention or alter the conditions of his detention to comply with Geneva.

On June 28, 2004, the Supreme Court issued an opinion reversing and remanding Hamdi's case. The plurality opinion, authored by Justice O'Connor, holds that the government has the authority to detain U.S. citizens as enemy combatants, but that detainees retain the right to challenge the bases for such classifications in proceedings governed by due

73. *Id.* at 532–33.
74. *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003). The Fourth Circuit ruled that the AUMF constituted specific congressional authorization of citizen detention. *Id.* at 467. The only role for judicial review was to determine whether the President had acted "pursuant to [his] war powers." *Id.* at 459.
75. *Id.* at 473.
76. *Id.* at 468 ("[T]he Geneva Convention is not self-executing.").
77. *Id.* at 469.
78. See, e.g., Third Geneva Convention, supra note 6, arts. 13, 15, 18, 22, 25–31.
The Court rejected the Fourth Circuit’s formulation of minimal judicial review and instead endorsed a fuller process of individualized review under the Fifth Amendment. The first substantive issue addressed by the Court was the scope of the government’s detention authority. Sidestepping the issue of executive unilateralism, the Court held that Congress had authorized Hamdi’s detention and together the branches possessed authority to detain him militarily. To find congressional authorization, the Court relied solely on the sparse AUMF, which only sanctions the general use of military force against those responsible for 9/11. Acknowledging that the AUMF says nothing about detention, the Court reasoned that because of the universality of the “law of war,” which includes the detention of fighters, Congress must have intended the President to have the power to detain U.S. citizen enemy combatants when it authorized the use of “necessary and appropriate force” against those associated with 9/11.

This is the place where international law played a part in the Court’s analysis. In fleshing out the laws and usages of war, the Court mentioned several legal treatises and the Geneva and Hague Conventions to support the proposition that the universal law of war dictates that warring powers have the authority to detain enemies for the duration of the conflict. This imputed knowledge of the “law of war” was the only interpretive technique the Court used to determine congressional intent. In short, the Court held that because Congress authorized military action, it must have assumed that action could be as broad in scope as permitted by customs and laws of war, including the exercise of military detention. Although the plurality took pains to explain how the customs of war enhance a President’s detention power, it did not consider whether that same law places limitations on that

81. Id. at 509.
82. Id. at 537–38.
83. Id. at 519–20.
85. Id. at 519 (citing Authorization for Use of Military Force, 115 Stat. 224).
86. Id. at 520–21.
87. The Court did not examine the legislative history of the AUMF or explain why it is unequivocally clear that “appropriate force” always includes the military detention of citizens. See id. at 518.
88. Id. at 519 (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).
power,\textsuperscript{89} other than the limitation that detention end when conflict ends.\textsuperscript{90} Thus, the Court relegated the Geneva Conventions to a set of amorphous principles to be relied on whenever the President seeks war powers, while ignored and violated in other respects.

Justice Souter lodged this precise criticism against the plurality opinion.\textsuperscript{91} He argued that if Hamdi’s detention is only authorized as part of the customs and laws of war, it must accordingly comport with the requirements of the Geneva Conventions.\textsuperscript{92} By holding Hamdi incommunicado and failing to give him a status hearing in front of a competent tribunal, the government was not in compliance.\textsuperscript{93} As a consequence, Hamdi’s detention was not lawful under the universal laws of war. Justice Souter stated, “[T]here is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.”\textsuperscript{94}

After finding that the AUMF authorized Hamdi’s detention, the plurality determined Hamdi could challenge the President’s determination of his enemy combatant status and articulated a process to govern such a challenge.\textsuperscript{95} The Court determined that due process requires the government to give an alleged enemy combatant notice of the factual basis for his classification and opportunity to rebut the government’s factual claims in front of a neutral decision-maker.\textsuperscript{96} Because of administrative burdens, however, the government would enjoy a rebuttable presumption of accuracy in the classification\textsuperscript{97} and the ability to rely on hearsay evidence.\textsuperscript{98} Having thus determined the process due to Hamdi, the Court simply dismissed his substantive Geneva claims, stating “we need not address at this time

\begin{itemize}
\item \textsuperscript{89} See id. at 534 n.2 (explicitly avoiding a substantive construction of Geneva Conventions).
\item \textsuperscript{90} Id. at 520 (observing “that detention may last no longer than active hostilities”). The Court acknowledged that certain factual circumstances might test the limit of what constitutes a continuing state of war, but nonetheless concluded “that is not the situation we face as of this date.” Id. at 521–22.
\item \textsuperscript{91} He contended that the detention was unauthorized by Congress but concurred for practical reasons. Id. at 549–50 (Souter, J., concurring).
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id. at 551.
\item \textsuperscript{95} Id. at 536–39 (plurality opinion).
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. at 533–34. The Court did not mention to what standard the detainee must disprove the government’s allegations. Id. at 534.
\item \textsuperscript{98} Id. at 533–34. Further the government could establish its case with information as sparse as that contained in the Mobbs Declaration. Id.; see Gruber, supra note 79, at 356 n.313 (noting that serious questions of procedure remain to be resolved).
\end{itemize}
whether any treaty guarantees him similar access to a tribunal for a
determination of his status."99

Unfortunately, the plurality never endeavored to show the process they
outlined is commensurate with the minimal procedural requirements of the
Geneva Conventions.100 Moreover, even if the process outlined by the
plurality would amount to a status determination by a “competent tribunal,”
as required by Geneva Article 5, the Court simply ignored Hamdi’s claim
that the manner of his continued detention violated the Conventions.101 The
Supreme Court Hamdi opinion thus demonstrates the extent to which the
Court fears the Geneva Conventions.102 More than merely avoiding the self-
execution issue, the Court seemed to avoid any meaningful analysis of
Geneva, even when doing so appeared vital to its interpretation of the
AUMF.

B. Hamdan v. Rumsfeld

The Hamdan case does not present as bleak a picture to internationalists
because the Geneva Conventions operated, not to justify President Bush’s
actions, but to restrain them. Unfortunately, the Court continued to place the
Conventions in a subordinate legal role by failing to declare them self-
executing. Far from embracing the opportunity to affirm the applicability of
international conventions to the war on terror, the Court went to great
lengths to avoid any substantive decision making, instead back-dooring
international law into the case as implicit congressional intent.

Salim Hamdan is the Guantánamo detainee popularly known as Osama
bin Laden’s chauffeur.103 He was captured during the initial military
invasion of Afghanistan and transferred to Guantánamo Bay. On July 3,
2003, the President announced that Hamdan and five other Guantánamo
detainees were subject to trial by military tribunal.” On July 4, 2004,
subsequent to Hamdan’s filing of a petition for writ of habeas corpus, the

100. The Fourth Circuit had grappled with this issue briefly. Hamdi v. Rumsfeld, 316 F.3d.
450, 469 (4th Cir. 2003).
101. See Hamdi, 542 U.S. 507. Hamdi had argued that “his prolonged indefinite solitary
confinement” violated Geneva Convention article 5. Brief for Petitioners at *17, Hamdi v.
102. See Jinks & Sloss, supra note 34, at 101 (noting that Hamdi failed to answer “crucial”
question of whether Geneva regulated President’s conduct of warfare); Laura E. Little,
Hamdi’s avoidance of Geneva Conventions “remarkable”).
103. See, e.g., Charles Lane, Court Case Challenges Power of President, WASH. POST,
government finally charged him with conspiracy. The government set forth various overt acts in support of the conspiracy charge, including being Osama bin Laden’s driver and bodyguard, transporting weapons to Al Qaeda members, driving bin Laden to training camps, and receiving weapons training.

On November 8, 2004, the district court ruled that Hamdan’s military trial was invalid as unauthorized by Congress. The court held the UCMJ requires military tribunals to comport with the “law of war,” including applicable provisions of the Third Geneva Convention. The court found Hamdan’s commission violated Article 102 of the Third Geneva Convention, which requires POWs to be tried like soldiers, and Common Article 3, which requires trial by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The district court asserted not only that the Geneva Conventions apply through the UCMJ, but also that the treaty provides substantive rights because it is self-executing. The court reasoned:

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties’ intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.


106. Hamdan, 126 S.Ct. at 2761; see Hamdan Charging Document, supra note 105. On July 7, 2004, the Combatant Status Review Tribunal (CSRT) issued its determination that Hamdan’s detention at Guantánamo Bay was proper because he was an “enemy combatant.” Hamdan, 126 S. Ct. at 2761.


108. Id. at 159–63. The district court’s holding that the President cannot act in contravention of congressional dictates finds support in the legal framework set forth in Justice Jackson’s concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).


110. Id. at 165.

111. Id.
The D.C. Circuit reversed, holding that Hamdan's commission was a valid exercise of war power by the political branches. As to Hamdan's Geneva claims, the D.C. Circuit construed the Geneva Conventions as presumptively non-self-executing and enforceable exclusively through international mechanisms. The court of appeals moreover held that Geneva rights, even if generally enforceable, would not apply to Hamdan because Al Qaeda is not a "High Contracting Party" and Hamdan does not qualify as a prisoner of war. The court of appeals further deferred to the President's conclusion that Common Article 3 is inapplicable because the war against Al Qaeda is "international."

The Supreme Court granted certiorari to determine whether the military tribunal had authority to try Hamdan and whether Hamdan could invoke Geneva Convention protections. The Court eventually invalidated Hamdan's tribunal as an unlawful exercise of military discretion, in violation of domestic statutory law and the Geneva Conventions. While the Court might have come to this conclusion by finding the tribunals unauthorized by Congress or contrary to a self-executing treaty, the Court elected to follow a very circuitous route to invalidate the tribunals. The Court chose to avoid both the executive unilateralism and self-execution issues and was able to reach its desired conclusion through statutory interpretation. However, its legislative interpretation is fraught with problems, illustrating the extent of the Court's fear of the self-execution issue.

112. Hamdan v. Rumsfeld, 415 F.3d 33, 37-38 (D.C. Cir. 2005). In analyzing the AUMF, the court of appeals relied on Hamdi for the proposition that there is no difference between the AUMF and a formal declaration of war. Thus, the AUMF triggered presidential power to convene military commissions. Id.
113. Id. at 39.
114. Id. at 40-41.
115. Id. at 41-42. ("The second type of conflict covered by Common Article 3 is a civil war—that is, an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. . . .'").
118. The Court would have had to tackle the executive unilateralism issue—an issue it sought to avoid. See id. at 2774.
119. See Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 HARV. L. REV. 869, 931 (2007) (observing that Hamdan is illustrative of the "need for courts to find congressional authorization to apply international law to the war on terrorism").
The Court's first move was to hold that Congress had approved the use of military tribunals generally through UCMJ Article 21 and the AUMF. 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.

Although the Court's interpretation of Article 21 as an express congressional authorization finds support from the World War II case Ex parte Quirin, the majority of experts maintain that Article 21 simply seeks to preserve the President's "common law" power rather than provide express authority for tribunals. Nonetheless, the plurality dismisses any alternate interpretation of Article 21, declining to "revisit Quirin's controversial characterization of Article of War 15 as congressional authorization for military commissions."

The Court's reliance on the AUMF is also problematic, as the Court never explains why military adjudication is "necessary and appropriate" to the prosecution of war in the way, according to Hamdi, military detention is. Rather the Court concludes summarily that "the AUMF activated the President's war powers . . . [which] include authority to convene military commissions in appropriate circumstances." A better route may have been for the Court to find express congressional authorization through the 2005 Detainee Treatment Act ("DTA"), which sets forth specific review

---

120. Hamdan, 126 S. Ct. at 2774.
122. 317 U.S. 1, 28 (1942).
123. See David Stoelting, Military Commissions and Terrorism, 31 DENV. J. INT'L L. & POL'Y 427, 429 (2003) (asserting that Article 21 "simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war"). General Crowder, the drafter of Article 15, testified to the Senate that the article "just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial." S. REP. No. 64-130, at 40-41 (1916) (testimony of General Crowder). Scott Silliman explains that "[t]he word 'recognized' is key to an accurate understanding [of Article 21] because it implies only acknowledgment, not establishment." Scott L. Silliman, On Military Commissions, 36 CASE W. RES. J. INT'L L. 529, 535 (2004).
124. Hamdan, 126 S. Ct. at 2774.
125. Id. at 2775.
procedures for military commissions decisions. The Court did not do so for reasons I will discuss in more detail later in this Article.

It is therefore clear that the Court was willing to permit the President to convene terrorism military commissions under appropriate circumstances. It is equally apparent, however, that the Court intended to place meaningful limits, including international law limits, on that power. The Court engaged in a careful analysis of the Geneva Conventions to find that Hamdan’s military commission violated Common Article 3. The principal argument by the government was that the Geneva Conventions generally do not apply to Hamdan because they only govern conflicts between signatories, and Hamdan was captured pursuant to the conflict with Al Qaeda, a non-signatory. Of course, Hamdan had argued and the district court agreed, that Hamdan was entitled to Geneva protections as a person captured during the conflict with Afghanistan. The district court observed that Geneva rights “are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.” Additionally, the district court held that Hamdan should be treated as a prisoner of war until classified otherwise by a competent tribunal.

The Supreme Court found it unnecessary to determine whether the Conventions generally applied to Hamdan, because it held that Common Article 3, which provides basic rights to war captives, was sufficient to render Hamdan’s trial illegal. Although Common Article 3 is inapplicable to “international” conflicts, the Court reasoned that “[t]he term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations.” Common Article 3 accordingly applies to

127. See infra notes 158–61 and accompanying text.
129. The Court stated, “[t]ogether, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war.” Hamdan, 126 S. Ct. at 2775.
130. See id. at 2795–97.
131. See id. at 2795 (noting government’s argument).
133. Id.
134. Id. at 162.
135. See Hamdan, 126 S. Ct. at 2795–96.
136. The court of appeals had read this to exempt the “international” conflict with Al Qaeda. Id. at 2795 (citing Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005)).
137. Id.
conflicts that are not classic clashes of nations while the rest of the Conventions apply to conflicts between signatory nations. The Court thus adopted a plainly internationalist position, rejecting a well-known interpretation, and one urged by the President, that Common Article 3 only applies to internal conflicts. Applying Common Article 3 to Hamdan’s tribunal, the Court ruled that although “Common Article 3 obviously tolerates a great degree of flexibility,” Hamdan’s commission violated the provision because its deviation from regular court martial procedures rendered it an irregular court, and the lack of practical bases for the deviation violated Common Article 3’s requirement to incorporate “all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Evidently, the Court believed President Bush’s military commission procedures violated international law and correspondingly struck them down. How was the Court able to do this without holding the Geneva Conventions self-executing? The Court found a way to avoid the self-execution issue by again engaging in a questionable interpretation of the UCMJ. The Court observed that Article 21’s authorization is not unconditional, but contains the limitation that military tribunals comport with the “law of war.” The Court characterized this limitation as binding, stating that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” In turn, the Court defined the law of war by reference to the American common law experience and international treaties, principally the Geneva Conventions.

138. See id. at 2796.
139. See supra note 58 and accompanying text (contrasting President’s view of Common Article 3 with internationalist views); see also Curtis A. Bradley, International Decisions: Sanchez-Llamas v. Oregon, 100 AM. J. INT’L L. 882, 886 (2006) (citing Hamdan, 126 S. Ct. at 2795–96 and noting that the Court “did not give much deference to a contrary interpretation by the executive branch”).
140. Hamdan, 126 S. Ct. at 2798.
141. Id. at 2796–98 (quoting Third Geneva Convention, supra note 6, art. 3, ¶ 1(d)).
142. Id. at 2786 (“The UCMJ conditions the President’s use of military commissions on compliance . . . with the ‘rules and precepts of the law of nations.’”) (quoting Ex Parte Quirin, 317 U.S. 1, 28 (1942)).
143. Id. at 2774 n.23 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).
144. On this front, the Court concludes that the President exceeded common law limitations because Hamdan’s charge of conspiracy, while certainly a crime under domestic law, is not an offense cognizable under the laws of war. See Hamdan, 126 S. Ct. at 2780–81. The Court also finds a lack of common law authority to try Hamdan because his conspiratorial acts predated the 9/11 attacks and thus did not occur in a “theater of war.” See id. at 2777–78.
145. See id. at 2794.
protections into its holding and simultaneously avoid the self-execution issue. The Court concluded, “[R]egardless of the nature of the [Geneva Convention] rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”

Reading Article 21 as requiring military tribunal procedures to comply with the international law of war is problematic on many levels. First, if Article 21 was only meant to recognize existing common law jurisdiction for military tribunals, it was never intended to operate as a substantive limitation on the President’s authority. Moreover, even if Article 21 is properly interpreted as a substantive limitation rather than a descriptive recognition, the only limitation that readily appears from the text regards which offenses may be tried—only statutory or law of war offenses may be tried. Indeed, the Court provides no historical support for its conclusion that when enacting Articles 15 and 21, Congress intended to make presidential military commission procedures subject to international treaties, both present and future. Instead, the Court looks to World War II precedents, specifically Ex parte Quirin and In re Yamashita, for the proposition that the UCMJ requires military tribunal procedures to comply with international laws of war, including the Geneva Conventions. A closer reading of Ex parte Quirin reveals, however, that the limitation gleaned from Article 15 applied to the type of crimes that could be tried militarily and not the procedures of military tribunals. Similarly, in In re Yamashita, although the Court took pains to show that Yamashita’s offenses were recognized by the law of war, it never asserted that Article 15 required tribunal procedures to comply with the law of war. To the contrary, the Court stated, “The Articles left the control over the procedure ... where it previously had been, with the military command.”

In fact, there is more support in In re Yamashita for the proposition that the Geneva Conventions substantively bind the President, than for the proposition that the UCMJ incorporates the Geneva Conventions. In response to Yamashita’s contention that his military trial procedures were governed by Articles 63 and 60 of the 1929 Geneva Conventions, the Court

146. *Id.* (citations omitted).
147. See *supra* notes 120–24 and accompanying text.
148. Article 21 does not state that military commissions must be properly established under the law of war. See 10 U.S.C. § 821, art. 21 (2006).
149. See *Hamdan*, 126 S. Ct. at 2786.
150. See *Ex parte Quirin*, 317 U.S. 1, 29 (1942).
151. See *In re Yamashita*, 327 U.S. 1, 16 (1946).
152. See *id.* at 23–24.
153. *Id.* at 20.
undertook a serious analysis of the text and history of the Conventions to determine whether they governed Yamashita's case. ¹⁵⁴ It then rejected Yamashita's Geneva claim on the ground that Article 63 applied only to trials in which POWs were charged with garden-variety crimes committed during their captivity. ¹⁵⁵

Assuming, arguendo, that Article 21 codified Congress's intent to bind the President to international laws of war, there is still the argument that the unconditional authorization of military commissions in the AUMF and DTA overrode any external "law of war" limitation in the UCMJ. The Court dismisses the argument that the AUMF overrode the limitation, stating that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." ¹⁵⁶ This seems beyond contention as the AUMF does not say one thing or another about military tribunals. ¹⁵⁷ It is harder, however, to maintain that the DTA is not an unconditional authorization of the Guantánamo military commissions, given that it sets forth detailed procedures for review of those military commissions. ¹⁵⁸ It is hard to believe Congress would prescribe procedures to govern a tribunal it did not wish to authorize. ¹⁵⁹ The Court argues that the DTA cannot be an authorization because the Act reserves judgment on whether the military tribunal procedures violate the Constitution. ¹⁶⁰ However, the Court fails to entertain the possibility that Congress authorized the tribunals while simultaneously recognizing that, even with such authorization, they might ultimately be ruled unconstitutional. ¹⁶¹

In addition, it appears that the Court's legislative interpretation incorporates silent conclusions about self-execution. Although non-self-executing treaties "can be used indirectly as a means of interpreting relevant

¹⁵⁴. See id. at 22–23 & n.8.
¹⁵⁵. See id. at 22–23.
¹⁵⁷. See supra notes 20–22, 84–88 and accompanying text (criticizing the Court's characterization of AUMF as authorization for military tribunals).
¹⁵⁹. See John Yoo, An Imperial Judiciary at War: Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 83, 97 (2006) ("If Congress never approved of commissions in the first place, why would it create a review process for them?").
¹⁶⁰. Hamdan, 126 S. Ct. at 2775 (citing Detainee Treatment Act § 1005(e)(3)).
¹⁶¹. See Brief for Respondents at *15, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 460875 ("The DTA reflects Congress's judgment that the current military commissions are neither ultra vires nor too deficient to be allowed to proceed to render a final decision.").
constitutional, statutory, common law or other legal provisions," there is an argument that Hamdan’s interpretation of the UCMJ implies Geneva self-execution. Justice Thomas contends in dissent that Article 21’s supposed limitation that military commissions comply with the law of wars, if meaningful at all, only binds military commissions to conformity with self-executing treaties. As a consequence, if the Geneva Conventions are non-self-executing, they cannot be part of the “law of war” that, by statute, binds the President. Whether or not one agrees with Justice Thomas’s characterization of the law of war, his critique exposes that the Court’s decision is not neutral on self-execution. Either the Court accepts Justice Thomas’s construction of the “law of war,” in which case it must have assumed that the Geneva Conventions are self-executing, or it rejects Justice Thomas’s construction, thus indicating that the “law of war” includes non-self-executing treaties. The implication of the latter construction is that the President can violate a non-self-executing treaty through his treatment of an individual, regardless of whether any party recognizes a violation.

The above discussion reveals that Geneva self-execution was an issue that the Court should not, and perhaps even could not, avoid. The Court clearly felt that the Geneva Conventions were being violated by the President. Moreover, the Court plainly desired to compel the President’s military commissions to comply with Common Article 3. The most straightforward way to do this would have been to find the Geneva Conventions self-executing. Instead, the Court engaged in daring legislative interpretation to bind the President to international law without having to declare the Conventions the “Law of the Land.” The next Part explores the question of why the Court was so reluctant to declare the Geneva Conventions self-executing.


163. See Hamdan, 126 S. Ct. at 2845 (Thomas, J., dissenting).

164. See id.

165. Cf. D’Amato, supra note 162, at 100 (asserting that “only governments can violate non-self-executing treaties and, if and when they do, the ‘violation’ consists only of failure to enact implementing legislation and not the sorts of substantive violations of treaty principles that might be helpful to individual plaintiffs”).
IV. REASON TO BE AFRAID?

Initially, one might rationalize the Court’s avoidance of the self-execution issue as normal judicial restraint. However, putting the Geneva Conventions in the tenuous position to be easily overridden by Congress, especially given that the Military Commissions Act (“MCA”), which effectively sanitized the President’s (illegal) interpretation of Geneva, was on the near horizon, cannot be rationalized as mere judicial temperance. Moreover, it is difficult to understand why the Court would have exercised such restraint on the self-execution issue, given that it came to the same practical conclusion and the United States had much to gain credibility-wise by a finding of self-execution. One explanation might be that the Court’s hands were tied on the issue of self-execution because Supreme Court precedent definitively ruled out the possibility of finding the Geneva Conventions self-executing.

To be sure, there is modern scholarship suggesting that no treaties are self-executing. Other cases and commentators assert that treaties are presumptively non-self-executing, and only a finding of an explicit intent to self-execute on the part of treaty makers will render a treaty domestically enforceable. These sentiments have culminated in the Restatement (Third) of Foreign Relations adopting the position that treaties are not presumptively self-executing and will not be deemed self-executing unless


167. See Paust, supra note 7, at 841 (stating that “[t]his roundabout use of the laws of war” may seem appropriate as “normal judicial caution,” but “such caution in the face of international crime is less than satisfying”).

168. In fact, many believe that the Court’s holding and legal machinations were anything but restrained. See, e.g., Julian Ku & John Yoo, Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch, 23 CONST. COMMENT. 179, 199 (2006) (noting “lengths to which the Hamdan majority was willing to go to reach its desired result”).


there is specific evidence that the drafter intended domestic judicial enforcement. It is this modern self-execution doctrine that the Fourth and D.C. Circuits adopted to conclude that the Geneva Conventions are not self-executing. The modern view of self-execution is criticized by many scholars as an unjustified restriction on treaty law, in contravention of the Constitution.

The modern self-execution doctrine is largely a product of scholarly comment and lower court activism. Over the last hundred years, the Supreme Court has done very little to expand the doctrine. Accordingly, the next two sections tell two distinct stories. One is the story of self-execution in Supreme Court jurisprudence. In this tale, self-execution is a narrow doctrine that permits a relatively painless finding that the Geneva Conventions are self-executing. The second story is about lower court activism broadening the threshold test for self-execution to require, among other things, a specific intent to self-execute, creating a nearly insurmountable barrier to domestic treaty enforcement.

A. Self-Execution in the Supreme Court

The Supremacy Clause provides that “all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” As a result of this clear language, the important treaties ratified in the first several decades of our fledgling Republic were considered a priori effective by the Court. Then, in 1829, the concept of self-execution appeared in Foster v. Neilson, a Supreme Court case involving land rights under a treaty between Spain and the United States. The Court ruled that the

175. See infra notes 228–57 and accompanying text (discussing modern intent doctrine); see also Vázquez, supra note 174, at 705–10 (discussing intent theory of self-execution).
176. See infra notes 177–227 and accompanying text.
177. U.S. CONST. art. VI, cl. 2.
178. Paust, supra note 13, at 764–66 (asserting that Framer’s intent and early judicial decisions provide no precedent for self-execution doctrine).
179. 27 U.S. (2 Pet.) 253 (1829).
treaty could not be enforced judicially because it only obligated Congress to pass future legislation ratifying land grants and thus did not create any present rights.\textsuperscript{180} Today, courts frequently cite \textit{Foster} as the basis for the self-execution doctrine,\textsuperscript{181} relying on the following language:

\begin{quote}
[A treaty is] to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.\textsuperscript{182}
\end{quote}

While seemingly straightforward, \textit{Foster}'s holding was itself troubling. The treaty at issue stated in pertinent part:

\begin{quote}
"[A]ll the grants of land made before the 24th of January 1818, by his catholic majesty . . . 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 domination of his catholic majesty."\textsuperscript{183}
\end{quote}

The Court’s interpretation that the terms, “shall be ratified,” only obligated Congress to perform a future act of ratification,\textsuperscript{184} created a big enforcement problem. Although breaches of future contractual obligations can generally be enforced by courts through damages or specific performance,\textsuperscript{185} the Supreme Court or President cannot force Congress to legislate in order to fulfill a treaty promise. The Court thus construed the treaty in such a manner as to assume the President promised Spain something he could never deliver.\textsuperscript{186} However, the plain language of the

\textsuperscript{180} \textit{Id.} at 254, 314–15.

\textsuperscript{181} \textit{See}, e.g., Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 879 (D.C. Cir. 2006); Kwan v. United States, 272 F.3d 1360, 1363 (Fed. Cir. 2001); Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995); Edwards v. Carter, 580 F.2d 1055, 1093 n.37 (D.C. Cir. 1978); People of Saipan ex rel. Guerrero v. U.S. Dep’t of Interior, 502 F.2d 90, 101 (9th Cir. 1974).

\textsuperscript{182} \textit{Foster}, 27 U.S. at 254, 314.

\textsuperscript{183} \textit{Foster}, 27 U.S. at 276 (quoting treaty).

\textsuperscript{184} \textit{Id.} at 314–15.

\textsuperscript{185} \textit{See} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 357 cmt. a (1981).

\textsuperscript{186} \textit{See \textit{Foster}}, 27 U.S. at 314 ("[W]hen the terms of the stipulation import a contract . . . the legislature must execute the contract before it can become a rule for the Court."); cf. Vázquez, supra note 51, at 1128 (noting "pitfalls" in \textit{Foster}'s treaty interpretation). Henry J. Richardson III explains \textit{Foster}'s curious treaty interpretation as being "born out of judicial deference to the fruits of military conquest, as redefined through congressional statutory arrangements for white occupation and land ownership." Henry J. Richardson III, \textit{Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement}, 45 \textit{VILL. L. REV.} 1091, 1109 (2000).
treaty indicated the President did seek to ratify those grants.\textsuperscript{187} Because of this problem, four years later, in \textit{United States v. Percheman},\textsuperscript{188} the Court reversed \textit{Foster} and held that the grants were ratified by the treaty because "shall be ratified" denoted a present obligation.\textsuperscript{189} Nonetheless, \textit{Foster}'s general principle—treaties shall be enforced by their terms, such that if the terms create no clear present obligations the treaty cannot be enforced—appears sound.\textsuperscript{190}

The immediate aftermath of \textit{Foster} and \textit{Percheman} was varied, with some cases simply continuing to reaffirm that treaties are presumptively binding and enforceable.\textsuperscript{191} Other cases distinguished between executory treaties—those that only create future obligations—and executed treaties, holding the former unenforceable in the absence of implementing legislation.\textsuperscript{192} After \textit{Foster}, two other limitations on the domestic enforceability of treaty provisions emerged. The \textit{Head Money Cases} of 1884 established that treaties are not judicially enforceable when they only create "horizontal" obligations, that is, duties between sovereigns, as opposed to "vertical" obligations to individuals.\textsuperscript{193} Other older cases established the equality of treaties to federal legislative law, thereby precluding the enforcement of treaties violative of the Constitution.\textsuperscript{194} Under

\begin{itemize}
  \item \textsuperscript{187} This interpretation is supported by the Spanish translation of the treaty as providing that the land grants "shall remain confirmed." \textit{See} United States v. Percheman, 32 U.S. (7 Pet.) 51, 69 (1833) (emphasis added).
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{189} \textit{See id. at 89.}
  \item \textsuperscript{190} Unfortunately, lower courts in recent years have found treaties that do confer present individual rights to be horizontal and therefore non-self-executing. \textit{See}, e.g., Diggs v. Richardson, 555 F.2d 848, 850–51 (D.C. Cir. 1976); Kasi v. Commonwealth, 508 S.E.2d 57, 64 (Va. 1998).
  \item \textsuperscript{191} \textit{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); \textit{see also} Paust, \textit{supra} note 13, at 771–73.
  \item \textsuperscript{192} \textit{See, e.g.,} Terlinden v. Ames, 184 U.S. 270, 285, 288–89 (1902); Fong Yue Ting v. United States, 149 U.S. 698, 720–21 (1893); Chae Chang Ping v. United States, 130 U.S. 581, 600 (1889); \textit{see also} Paust, \textit{supra} note 13, at 772 n.82 (citing cases). There are modern day offshoots of the executory-executed distinction. Recent lower court decisions have held overly ambiguous treaty provisions unenforceable because enforcing such provisions would strain judicial competence. \textit{See, e.g.,} Am. Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 770 (N.D. Cal. 1989).
  \item \textsuperscript{193} Edye v. Robertson (\textit{Head Money Cases}), 112 U.S. 580, 598–99 (1884); \textit{see also} Sloss, \textit{supra} note 23, at 27 (describing the horizontal/vertical treaty distinction).
  \item \textsuperscript{194} \textit{See, e.g.,} Reid v. Covert, 354 U.S. 1, 16–18 (1957); De Geyofroy v. Riggs, 133 U.S. 258 (1890); \textit{Worcester}, 31 U.S. at 593 (stating treaties are enforceable "unless they shall be deemed unconstitutional"); \textit{see also} \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} § 111 cmt. a, § 115(3) (1987); Louis Henkin, \textit{U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker}, 89 AM. J. INT’L L. 341, 342 (1995) ("[N]one
this view of self-execution, a treaty in violation of, for example, the First Amendment would be unenforceable.\textsuperscript{195} A more controversial formulation of the constitutionality test declares treaties unenforceable if they regulate subject matter thought to be within the "exclusive" power of Congress.\textsuperscript{196}

Over the last hundred years the Court has said very little on self-execution and certainly not much that broadened the self-execution doctrine.\textsuperscript{197} The Supreme Court has often held treaties conferring individual rights to be self-executing, without looking for any explicit intent to self-execute.\textsuperscript{198} Such cases, like the 1924 case Asakura v. City of Seattle, allow private suit directly under treaties to enjoin the government from continued violations, even in the absence of treaty language on judicial enforcement.\textsuperscript{199} Further, the Court has made clear in cases like Cook v. United States\textsuperscript{200} that a treaty conferring individual rights is domestically enforceable even if it contains provisions outlining international procedures for enforcement. Moreover, the Court has gone so far as to find a treaty self-executing, despite its references to domestic law.\textsuperscript{201}

of the three branches . . . can give effect to a treaty provision that is inconsistent with the Constitution.").

195. Henkin, supra note 194, at 342 (noting that hate speech provision of the International Covenant on Civil and Political Rights ("ICCPR") might not be enforceable because of free speech).

196. See Edwards v. Carter, 580 F.2d 1055, 1058 & n.7 (D.C. Cir. 1978) (arguing that treaty power could not override Congress's exclusive authority to declare war, appropriate money, and raise taxes), cert. denied, 436 U.S. 907 (1978); see also Restatement (Third) of the Foreign Relations Law of the United States (1987); cf. Paust, supra note 13, at 779–80 (maintaining that, save for declaring war, treaties may operate in all other areas, where Congress has concurrent powers).

197. Sloss, supra note 23, at 73 ("[T]he Court has never stated or implied that the treaty makers have the power to countermand the Supremacy Clause."); Vázquez, supra note 174, at 722 (noting that Supreme Court "has not said more than a sentence or two about the distinction in any case for nearly a century").

198. See, e.g., Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (holding treaty enforceable as "the supreme law of the land" without looking for intent to self-execute).

199. The Court did not question Asakura's ability to sue for injunction directly under the treaty. See Asakura, 265 U.S. at 342; see also Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 162 (1940) (finding right to sue directly under Pan American Trademark treaty).

200. 88 U.S. 102 (1933). Cook involved a U.S. government forfeiture action against a British vessel that the vessel claimed violated a convention between the United States and Great Britain. Id. at 107–08; see Convention for Prevention of Smuggling of Intoxicating Liquors, U.S.-Gr. Brit., art. IV, Jan. 23, 1924, 43 Stat. 1761. The Court dismissed the forfeiture action, holding that the Convention was self-executing, despite the fact that it prescribed specific international procedures for vindicating treaty violation claims by British vessels. Id. at 119–22.

Of course, not every Supreme Court case in the last hundred years has found the relevant treaty self-executing. The Court has held, for example, that merely “precatory” provisions describing aspirations are not self-executing.\(^2\) Nonetheless, the sparse collection of self-execution cases over the last hundred years paint a picture of a Court neither hostile to internationalism nor generally inclined to search for a broad intent to self-execute prior to enforcing a treaty. Moreover, the Court has been willing to allow those claiming rights under treaties to assert their claims in a variety of forms, without regard to the existence of an internal private right of action. Justice Breyer, in *Sanchez-Llamas v. Oregon*,\(^3\) sums up the prior Court 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 of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national.\(^4\)

\(^{202}\) See, e.g., INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). This “precatoriness” analysis has also been utilized by lower courts. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring); Sei Fujii v. State, 242 P.2d 617, 620–21 (Cal. 1952); cf. Vázquez, supra note 174, at 714 (asserting courts have an obligation to construe vague treaty terms). At least one case, *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 49 (1913), however, appears broadly to hold a treaty non-self-executing on the basis of intent. The Court found the Brussels Convention non-self-executing based on the postratification “sense of Congress.” *Id.* This finding of non-self-execution may have been informed by some intuition about patent law being an exclusive area of congressional prerogative. Cf. Robertson v. Gen. Elec. Co., 32 F.2d 495, 500–01 (4th Cir. 1929) (creating special rule for enforceability of patent treaties). In the end, lower courts have not relied on *Cameron Septic* to support a general principle that self-execution can be determined by postratification congressional intent. A Westlaw KeyCite search performed at the time this Article was written revealed only two nonpatent cases that cite *Cameron Septic*, and they both cite it only for the general proposition that non-self-executing treaties do not create judicially cognizable rights. See Miliken v. State, 131 So. 2d 889, 891 (Fla. 1961); Garcia v. Pan Am. Airways, 55 N.Y.S.2d 317, 322 (N.Y. App. Div. 1945).

\(^{203}\) 126 S. Ct. 2669 (2006).

\(^{204}\) *Id.* at 2696 (Breyer, J., dissenting); 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) (observing that “the Supreme Court has never applied the doctrine of non-self-executing treaties to deny a remedy to an individual whose treaty rights were violated”).
It appears that the portions of the Geneva Conventions relevant to Hamdi and Hamdan can pass the Supreme Court’s tests for self-execution. The Geneva Conventions largely pass the Foster test, because the provisions conferring rights on prisoners of war are not future, contingent, or merely aspirational—they confer concrete present rights. Turning to the other tests, early Supreme Court cases, most notably the Head Money Cases, distinguish treaties creating “horizontal” obligations between states, which are enforceable only through international processes, from treaties creating “vertical” obligations to individuals. In its Hamdan decision, the D.C. Circuit characterized the Head Money Cases as standing for the proposition that all treaties are are presumptively horizontal. In fact, the court of appeals used selective quotation to create a fictional default rule of treaty inferiority. The Head Money Cases specifically provide that when a treaty’s provisions “confer certain rights upon the citizens or subjects of one of the nations,” such provisions are “in the same category as other laws of congress.” Because portions of the Geneva Conventions confer individual rights, under the Head Money Cases, those provisions are self-executing.

Alternatively, proponents of Geneva non-self-execution argue that even if some treaties are vertical, the Geneva Conventions are horizontal because

206. See, e.g., Third Geneva Convention, supra note 6, arts. 5–7, 14, 84–85, 98, 105–06, 129–30; see United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (“[T]he ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations.”); 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). Only a few provisions call for future legislation. See, e.g., Third Geneva Convention, supra note 6, art. 129 (“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing . . . grave breaches of the present Conventions.”). Unfortunately, some courts argue that the existence of such a provision renders all of the treaty non-self-executing. See, e.g., Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985).
207. See supra note 193 and accompanying text.
208. Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005) (“As a general matter, a ‘treaty is primarily a compact between independent nations.’”) (quoting Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884)).
they intend only interstate enforcement. There is some precedential support for this proposition, given that the Supreme Court stated in a footnote in the World War II case *Eisentrager* that “[i]t is . . . the obvious scheme of the [Geneva Conventions] that responsibility for observance and enforcement of these rights is upon political and military authorities.” The “curious” *Eisentrager* dicta, however, mistakenly assumes that Geneva is wholly horizontal. Although the Conventions do mention international procedures, they also provide rights to individuals. As *Cook* and other Supreme Court precedents make clear, the existence of specific international procedures within a treaty does not necessarily preclude domestic remedies for breaches of the treaty provisions conferring individual rights. Moreover, it is worth noting that despite the dicta in footnote, the *Eisentrager* Court went to lengths to show that Geneva Conventions did not substantively apply to *Eisentrager*.

At the time Geneva was signed, treaties did not generally mention domestic remedies, likely because a treaty can effectively address international procedures commonly governing all signatories, but cannot easily prescribe domestic procedures, given the diversity of signatories.

---


216. *See supra* note 206 and accompanying text; *see also* Sloss, *supra* note 204, at 96 (noting “numerous cases in which the Supreme Court has approved domestic judicial enforcement of a treaty that was silent with respect to domestic judicial enforcement, but provided expressly for international dispute resolution”) & n.395 (citing Supreme Court cases).

217. *Eisentrager*, 339 U.S. at 789; *see Hamdan*, 126 S. Ct. at 2793 (noting that *Eisentrager* rejected Geneva Conventions claims “on the merits”).

218. *Eisentrager*, 339 U.S. at 789; *see Hamdan*, 126 S. Ct. at 2793 (noting that *Eisentrager* rejected Geneva Conventions claims “on the merits”).

219. *See Flaherty*, *supra* note 12, at 71 (“[The Geneva Conventions] reflect an older conception of international law, which generally did not address how a domestic legal system should provide remedies or otherwise be ordered.”).

As a consequence, the "scheme" in Geneva providing international procedures to govern inter-sovereign disputes,\(^\text{221}\) does not necessarily indicate that the drafters meant to prevent individuals adversely affected by violations from seeking domestic recourse.\(^\text{222}\)

Turning to the constitutionality test, there is no specific constitutional right with which the Third Geneva Convention can be said to conflict.\(^\text{223}\) A harder case, of course, is whether the Geneva Conventions usurp powers exclusively reserved to Congress.\(^\text{224}\) Even if one were to assume *arguendo* Congress has exclusive power to define and punish offenses against the law of nations,\(^\text{225}\) it would not necessarily imply that a treaty could not govern procedural aspects of military trials or the conditions of detention.\(^\text{226}\) Moreover, it seems counterintuitive that the subject matter of the conduct of war is one of the "exclusive" powers of Congress, given the amount of latitude the President receives in the prosecution of war and the rich history of treaty law regarding conditions of warfare.\(^\text{227}\)

Consequently, Supreme Court history on the self-execution issue reveals a very narrow self-execution doctrine, whose prerequisites to treaty enforceability consist of clarity, constitutionality, and the conferring of individual rights. Under this doctrine, the Geneva Conventions could have fairly easily been found self-executing. Thus, Supreme Court jurisprudence itself cannot explain the current Court's aversion to treaty self-execution. This aversion then must be a product of lower court activity and scholarly comment.

---

\(^{1}\)that other signatories' dualist systems should not affect self-execution issue); Vázquez, *supra* note 174, at 704.

\(^{221}\) See, *e.g.*, Third Geneva Convention, *supra* note 6, art. 132 (discussing Geneva Convention procedures).

\(^{222}\) Flaherty, *supra* note 12, at 71 (observing that "[a]t worst [the Conventions] leave the decision regarding whether a sovereign government should add complementary domestic remedies or defenses to the sovereign").

\(^{223}\) *See supra* note 194 and accompanying text.

\(^{224}\) *See supra* note 196 and accompanying text (discussing this controversial construction of self-execution).

\(^{225}\) *See* U.S. CONST. art. I, § 8, cl. 10 (granting Congress power "to define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations").

\(^{226}\) Whether a legislative power is exclusive is the subject of much debate. Sloss, *supra* note 23, at 30 n.131 (noting "wide range of scholarly views" on the subject).

\(^{227}\) The regulation of the conduct of war can be analogized to the regulation of immigration, something the branches participate in jointly and a subject appropriate for treaty regulation. The Supreme Court has held that treaties regulating the treatment of immigrants are self-executing although Congress has the power to establish a uniform rule of naturalization. *See* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Fok Young Yo v. United States, 185 U.S. 296, 302 (1902).
While the Supreme Court has remained relatively reticent on the issue of self-execution, lower courts have been busy expanding the self-execution doctrine into a significant barrier to treaty enforceability.\textsuperscript{228} The result is that the modern self-execution doctrine has reversed the constitutional presumption that treaties are the supreme law of the land.\textsuperscript{229} Many lower courts have interpreted \textit{Foster} as establishing treaty-maker intent as the touchstone of self-execution.\textsuperscript{230} Today, lower courts engage in generalized intent inquiries to determine the domestic enforceability of treaty law.\textsuperscript{231}

This modern intent doctrine manifests in milder and stronger forms. In its milder form, courts will not enforce a treaty if the language of the treaty or other evidence indicates that U.S. drafters did not intend the treaty to be self-executing.\textsuperscript{232} If such “intent to non-self-execute” is found, courts will hold that the treaty is not domestically enforceable, regardless of how clearly the treaty confers rights. In its stronger form, the intent theory requires a finding of specific “intent to self-execute” as a prerequisite to treaty enforceability.\textsuperscript{233} These cases take treaty and drafter silence as establishing nonenforceability, thus voiding the historical presumption that treaties are by their very nature supreme federal law.\textsuperscript{234}

\textsuperscript{228} David Sloss asserts that the “presumption against individual enforcement of treaties” can be traced to “a set of federal circuit court opinions in the 1970s and 1980s.” Sloss, supra note 204, at 92.

\textsuperscript{229} See, e.g., Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005); Standt v. City of New York, 153 F. Supp. 2d 417, 423 (S.D.N.Y. 2001) (stating that as a “rule,” treaties “rarely grant rights that may be enforced by an individual”); see also supra note 174 (discussing constitutional criticism of modern intent doctrine).

\textsuperscript{230} See, e.g., Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968–69 (4th Cir. 1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); White v. Paulsen, 997 F. Supp. 1380, 1386 (E.D. Wash. 1998).

\textsuperscript{231} See, e.g., Renkel v. United States, 456 F.3d 640, 644 (6th Cir. 2006); Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (stating that Convention Against Torture must look to “intent of the signatory parties in language and surrounding circumstances”). Much of the time this intent against self-execution is found from a non-self-execution (“NSE”) declaration. See infra notes 235–39 and accompanying text.

\textsuperscript{232} See, e.g., Beazley v. Johnson, 242 F.3d 248, 267 (5th Cir. 2001) (finding provisions of ICCPR non-self-executing because of Senate intent); United States v. Postal, 589 F.2d 862, 881 (5th Cir. 1979) (basing non-self-execution decision on statements of individual senator).

\textsuperscript{233} See, e.g., Igartúa-De La Rosa, 417 F.3d at 150 (holding treaty self-executing only when it “conveys [such] an intention”); Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1463 (S.D. Fla. 1990) (internal quotation marks omitted) (stating that intent to self-execute must be evident from language of treaty or “circumstances surrounding its execution”).

\textsuperscript{234} See Vázquez, supra note 174, at 709 (asserting that intent doctrine has “transformed the self-execution inquiry in a manner that seems fundamentally incompatible with the text of the Constitution”).
WHO'S AFRAID OF GENEVA LAW?

The intent doctrine, even in its milder form, has allowed the Senate to preclude the domestic enforceability of treaties that confer individual rights by ratifying them with express non-self-execution ("NSE") declarations.\(^{235}\) Courts have construed such reservations to be the definitive answer to the question of self-execution.\(^{236}\) Internationalists criticize NSE declarations on a number of doctrinal and philosophical grounds. Some contend that such declarations should be only one factor in the analysis of self-execution.\(^{237}\) Others argue that NSE declarations are not relevant at all because when a treaty otherwise meets the tests for self-execution, it is supreme law that cannot be rendered null by the Senate alone.\(^{238}\) In addition, scholars characterize as underhanded the government's practice of attaching NSE declarations deliberately to human rights conventions specifically drafted to create individual rights rather than interstate obligations.\(^{239}\)

\(^{235}\) See, e.g., 138 CONG. REC. S8071 (daily ed. Apr. 2, 1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing."). See also Vázquez, supra note 174, at 706-07 n.55 (discussing NSE declarations).


\(^{237}\) See Stefan A. Riesenfeld & Frederick M. Abbott, The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties, 67 CHI.-KENT L. REV. 571, 632 (1991) (stating that the decision of self-execution must be made by courts); see also Igartúa-De La Rosa, 417 F.3d at 189 (Howard, J., dissenting) ("A declaration by the Senate that a treaty is non-self-executing should not be dispositive.").

\(^{238}\) See HENKIN, supra note 15, at 201–03; see also Henkin, supra note 194, at 347 (asserting that the Constitution does not "allow the President or the Senate, by their ipse dixit, to present a treaty that by its character could be law of the land from becoming law of the land"); John Quigley, Human Rights Defenses in U.S. Courts, 20 HUM. RTS. Q. 555, 585 (1998) (asserting that NSE declaration attached to ICCPR is "not part of what, according to the Supremacy Clause, is the supreme law of the land"); Stefan A. Riesenfeld & Frederick M. Abbott, Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties, 67 CHI.-KENT L. REV. 293, 296–97 (1991) (arguing that courts "are not bound to apply expressions of opinion adopted by the Senate").

The non-self-execution phenomenon demonstrates the willingness of lower courts to determine self-execution by going beyond the plain language of the treaty. Some courts are even willing to derive such intent from statements made by select U.S. treaty negotiators, officials from the executive branch, and individual senators. Other courts answer the intent inquiry by applying a multifactored test that makes the self-execution inquiry, not an issue of actual treaty-maker intent, but one of constructive intent.

Finally, lower courts sometimes find a treaty non-self-executing because it does not itself provide a “private right of action,” that is, it specifies individual rights, but not how to remedy them. Generally, however, the lack of a private right of action does not inevitably make a law unenforceable. A separate federal statute can provide mechanisms for vindicating statutory and constitutional rights. Moreover, the Court has found that remedies can stem directly from federal rights, both legislative and constitutional, even when specific remedial language is absent. Nonetheless, in the treaty context courts mistakenly hold that because certain treaties themselves do not provide private rights of actions, they are non-self-executing and may not be enforced, even when a private right of

240. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 376 (7th Cir. 1985) (relying on preratification statement of President Ford); 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 postratification statement of Attorney General); see also Vázquez, supra note 174, at 705 n.47 (citing cases).

241. See, e.g., Frolova, 761 F.2d at 373; People of Saipan v. U.S. Dep’t of Interior, 502 F.2d 90, 97 (9th Cir. 1974). Vázquez criticizes the multifactored test as an invitation for judges to “engage in an open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea.” Vázquez supra note 174, at 715.

242. There is some confusion among the lower courts as to whether the treaty must show intent to provide a private right of action or an actual private right of action. Compare Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (requiring “an intent to provide a private right of action”); United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985) with United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) (“A treaty is self-executing if it creates privately enforceable rights.”); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978); Smith v. Socialist People’s Libyan Arab Jamahiriya, 886 F. Supp. 306, 311 n.6 (E.D.N.Y. 1995).


244. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (holding that “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”) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
action can otherwise be found.\textsuperscript{245} Moreover, lower courts tend to ignore the Supreme Court precedent that individuals may sue directly under a treaty to enjoin governmental violations.\textsuperscript{246}

Obviously, the Geneva Conventions are much less likely to be found self-executing under the lower court constructions of self-execution. Were the Supreme Court to adopt the milder form of the modern intent inquiry, a finding of treaty-maker intent in favor of non-self-execution would be dispositive. While there is no NSE declaration attached to the Geneva Conventions and scant evidence within their language or history to suggest signatories had such intent,\textsuperscript{247} lower courts, like the D.C. Circuit, argue that the lack of domestic enforcement provisions coupled with the existence of international procedures demonstrates treaty drafters did not intend self-execution.\textsuperscript{248} Even worse, courts have found the Geneva Conventions non-self-executing by adhering to the stronger intent test and requiring specific treaty language that the treaty-makers desired domestic application.\textsuperscript{249} The government in its \textit{Hamdan} brief argued that the Court could only find self-execution if there was "text or drafting and ratification history to suggest the \textit{revolutionary} intent to create judicially enforceable rights."\textsuperscript{250} For treaties signed before the past three or four decades, like the Geneva

\textsuperscript{245} See, e.g., Raffington v. Cangemi, 399 F.3d 900, 903 (8th Cir. 2005) ("seriously doubt[ing]" whether a claim based on a non-self-executing treaty is "cognizable in habeas"); 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). \textit{But see} Atuar v. United States, 156 F. App'x 555, 563 n.12 (4th Cir. 2005) (entertaining "the possibility that a habeas corpus petition may require a court to review a particular detention in light of a non-self-executing but constitutionally ratified treaty"); Vázquez, supra note 174, at 710 (asserting that treaty rights may be invoked defensively or through external mechanisms); Jennifer L. Brillante, \textit{Comment, Continued Violations of International Law by the United States in Applying the Death Penalty to Minors and Possible Repercussions to the American Criminal Justice System}, 29 BROOK. J. INT'L L. 1247, 1267 (2004) (criticizing this view of self-execution).

\textsuperscript{246} See supra notes 198–99 and accompanying text; \textit{see also} Kenneth C. Randall, \textit{Federal Questions and the Human Rights Paradigm}, 73 MINN. L. REV. 349, 394–411 (1988) (discussing various tests under which courts could find human rights treaties create implied private rights of action); Sloss, supra note 23, at 83 (suggesting courts should find private rights of action whenever "a treaty provision is sufficiently determinate").

\textsuperscript{247} See Sloss, supra note 211, at 794 n.66 (observing that there is no evidence of such intent in the Senate record).

\textsuperscript{248} See \textit{Hamdan} v. Rumsfeld, 415 F.3d 33, 38–40 (D.C. Cir. 2005).

\textsuperscript{249} See, e.g., Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1463 (S.D. Fla. 1990) (finding Geneva Conventions non-self-executing, despite contrary language in commentaries supporting domestic enforcement because there was "no language to this effect within the agreement itself").

\textsuperscript{250} Brief for the Respondents in Opposition at *26, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2005 WL 2214766 (emphasis added); \textit{see also} Sloss, supra note 204, at 22 (noting government's recent position that treaties are presumptively non-self-executing).
Conventions, this test sets up an almost impossible hurdle, as it was unusual at that time for treaties to reference domestic enforceability.\textsuperscript{251}

In addition, the Fourth Circuit in \textit{Hamdi} held the Geneva Conventions non-self-executing on the ground that they lack an internal private right of action.\textsuperscript{252} However, the federal habeas corpus statute specifically provides a cause of action when a person is in "custody in violation of the . . . treaties of the United States."\textsuperscript{253} The Supreme Court had already observed in \textit{Rasul} that the Guantánamo detainees' claims "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"\textsuperscript{254} Consequently, whether or not Geneva itself provides a direct right of action to detainees,\textsuperscript{255} at the time Hamdan and Hamdi filed suit, a federal statute, the habeas corpus statute, already provided them a specific legal avenue of redress.\textsuperscript{256} Nonetheless, the Fourth Circuit incorrectly held that the lack of an internal private right of action, or intent to provide one, precluded enforcement, even if other valid legal mechanisms provided a cause of action.\textsuperscript{257}

\begin{flushright}
\textsuperscript{251} See Flaherty, \textit{supra} note 12, at 71 (observing that older treaties, like the Geneva Conventions, did not generally mention domestic enforceability).
\textsuperscript{252} Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003).
\textsuperscript{253} 28 U.S.C. § 2241(c)(3) (2006). In addition, the Fourth Circuit could have applied the test for implied private rights of action in statutes, \textit{see Cort v. Ash}, 422 U.S. 66, 78 (1975), and found that Hamdi and Hamdan were in the class of persons toward which the Conventions were directed, the treaty-makers intended to give them a private rights, relief would not frustrate the Conventions' purpose, and the subject matter of Geneva is not an area reserved to states.
\textsuperscript{255} Standing to enforce a treaty does not always have to come from a specifically promulgated private right of action. \textit{See supra} notes 199–201 and accompanying text; \textit{see also} Consulate General of Mexico v. Phillips, 17 F. Supp. 2d 1318, 1322–23 (S.D. Fla. 1998); Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (finding that Paraguay had standing to sue as party to Vienna Conventions, regardless of whether Conventions created private rights of action), \textit{aff'd}, 134 F.3d 622 (4th Cir. 1998); Paust, \textit{supra} note 47, at 516 (arguing that Geneva Conventions "retain the possibility of private causes of action for their breach—a practice that predates the conventions"). Moreover, detainees should be able to invoke Geneva rights defensively, much in the way criminal defendants can invoke the Constitution defensively. \textit{See United States v. Duarte-Acero}, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (individuals can raise ICCPR claims "defensively").
\textsuperscript{256} While \textit{Hamdan} was pending before the Supreme Court, Congress passed the Detainee Treatment Act of 2005 limiting review of Guantánamo detainees' habeas claims. Pub. L. No. 109-148, 119 Stat. 2739 (2005). There is a question, however, whether the DTA can be squared with the Suspension Clause, which states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. 1, § 9, cl. 2.
\textsuperscript{257} \textit{See Hamdi}, 316 F.3d at 468–69; \textit{see also} Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003); \textit{supra} notes 242–46 and accompanying text (critiquing private right of action analysis). This analysis also sets up a significant barrier to treaty enforcement because it is
The Supreme Court’s fear of declaring the Geneva Conventions domestically enforceable is somewhat understandable in this conservative era of hostility toward international law. The appellate decisions in *Hamdi* and *Hamdan* fall squarely within this modern trend. Perhaps, then, the Supreme Court in *Hamdan* did the best thing it could do—it imposed Geneva limitations on the President without having to get involved with the messy issue of self-execution, given lower court doctrine. I will demonstrate below, however, that the Court’s choice to ignore self-execution is not neutral, but rather it definitively undermines claims of the Court’s respect for international law.

V. THE COST OF FEAR

The grave costs of anti-internationalism in this day and age become apparent upon the recognition that we live in “a world with increasingly porous borders.” The increased transnationalism of government conduct renders remedies under domestic law often unavailable to people injured by actions of foreign sovereigns. Consequently, an important check on government power in an age of globalism is international law.

The combination of increasing internationalism of government action with growing contempt for treaty law can only lead to an explosion of human rights abuses. In this Part, I assert that the terrorism cases are not internationalist for two principle reasons. First, the *ex post* position occupied by the Geneva Conventions is tenuous at best. Second, and more important, the Court’s obvious avoidance of self-execution evidences an internalization of the isolationist principle that treaties are presumptively unenforceable.

A. Placing the Geneva Conventions on Shaky Ground

In order to understand the status conferred on the Geneva Conventions by *Hamdi* and *Hamdan*, one simply need consider how the Conventions operate after the cases. In *Hamdi*, the Supreme Court made clear that a

unusual for a treaty to set forth domestic procedures for private action, given the fact that countries with differing domestic laws are involved.


259. See Koh, *supra* note 23, at 1500 (suggesting international law as a check on Bush’s rights-free zones); Little, *supra* note 102, at 14 (arguing that international materials could reign in President’s claims of embarrassing policies).

A detainee may challenge his classification as an enemy combatant in an evidentiary hearing with basic procedural protections.\textsuperscript{261} Not preserved, however, is a detainee’s ability to assert that the fact of his detention or its conditions violate the Geneva Conventions.\textsuperscript{262} In fact, \textit{Hamdi} fits an unfortunate pattern of the Court refusing to find international law domestically binding, but holding that an undifferentiated international law of war provides the basis for enhancing Presidential power.\textsuperscript{263} The regrettable consequence is that \textit{Hamdi} seems to follow the Bush administration’s strategy of “invoking the law of war to avoid prosecuting terrorist suspects in civilian courts, while ignoring the limits that the law of war imposes on the detention, treatment, and trial of prisoners.”\textsuperscript{264} Indeed, likely because of its avoidance of international law, \textit{Hamdi} has not resulted in terrorism detainees being treated in accordance with the Geneva Conventions or released from illegal detention.\textsuperscript{265}

Obviously, \textit{Hamdan} does not paint such a bleak picture of the Supreme Court’s stance on the Geneva Conventions. In fact, one might believe that internationalist critique of \textit{Hamdan} is purely academic because the Court came to the same realistic result it would have upon a finding of self-execution.\textsuperscript{266} Although the Court ended up striking down the tribunals, the importance of its avoidance of self-execution can be seen upon analysis of events after the decision.\textsuperscript{267} Hot on the heels of the Court’s “liberal” \textit{Hamdan} decision striking down the tribunals, Congress passed the Military Commissions Act (MCA), an act widely characterized as illiberal and anti-

\begin{itemize}
\item \textsuperscript{261} See supra note 10 and accompanying text.
\item \textsuperscript{262} See supra notes 17–21 (discussing \textit{Hamdi}’s avoidance of international law).
\item \textsuperscript{263} See, e.g., Ex Parte Quirin, 317 U.S. 1, 7 (1942) (defining Article II power with reference to law of nations). See also Jenny S. Martinez, Note, \textit{International Decisions: Hamdi v. Rumsfeld}, 98 AM. J. INT’L L. 782, 787 (2004) (observing that “the Supreme Court appears in \textit{Hamdi} to have embarked on a questionable path toward creating its own, new constitutional common law of war, ungrounded either in international humanitarian law or in any specific legislation enacted by the U.S. Congress”).
\item \textsuperscript{265} See Little, supra note 102, at 14 (asserting that “[a]n unequivocal cue from the Supreme Court about the importance of international and comparative standards” might have affected executive policies); Evan J. Wallach, \textit{The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib}, 36 CASE W. RES. J. INT’L L. 541, 568–70 (2004) (maintaining that Guantanamo processes do not comply with Geneva).
\item \textsuperscript{266} See supra notes 8–12 and accompanying text (discussing scholars who describe \textit{Hamdan} as a liberal victory).
\item \textsuperscript{267} See Hafetz, supra note 264, at 35 (criticizing the Court’s limited holding as potentially “entrench[ing] a system of indefinite detention without sufficient procedural safeguards”).
\end{itemize}
internationalist\textsuperscript{268} that sets up tribunal procedures similar to those instituted by President Bush.\textsuperscript{269} The Act unambiguously strips federal courts of jurisdiction to entertain habeas corpus petitions or other claims by “unlawful combatants,” a class defined relatively broadly.\textsuperscript{270} It also precludes detainees from legally asserting Geneva claims and directs courts to defer to the President’s interpretation of the Conventions.\textsuperscript{271} The Hamdan Court applied the Geneva Conventions as part and parcel of congressional


\textsuperscript{270} The MCA provides, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” Military Commissions Act of 2006, Pub. L. No. 109-366 § 7(a), 120 Stat. 2600, 2636 (to be codified in scattered sections of 10, 18, 28, 42 U.S.C.) It further defines an “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents” or “a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant.” \textit{Id.} § 3(a)(1) (codified at 10 U.S.C. § 948a(2)). This definition is much broader than \textit{Hamdi}’s definition of enemy combatant as “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States.” \textit{Hamdi} v. Rumsfeld, 542 U.S. 507, 516 (2004) (internal quotations omitted). Recently, the D.C. Circuit dismissed Guantánamo detainees’ petitions for habeas review, finding the jurisdiction-stripping provisions of the MCA constitutional. Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007).

\textsuperscript{271} See Military Commissions Act § 3(a)(1) (codified at 10 U.S.C. § 948b(g)) (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions. . . .”); \textit{Id.} § 6(a)(3)(A) (amending 18 U.S.C. § 2241 Note) (“[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions. . . .”).
intent. Congress has now clarified that it does not intend for detainees to have Geneva protections.

The question is whether a finding of self-execution would have made a difference. Perhaps, the MCA’s procedures in fact comply with the applicable provisions of the Geneva Conventions. Without even addressing whether the MCA complies with the Geneva Conventions generally, it does not even appear to meet Common Article 3’s requirements. Hamdan held that, pursuant to Article 3, tribunals must constitute “ordinary military courts” and “[a]t a minimum” mirror courts martial unless “some practical need” explained the deviation. The Court specified that “any variance” from regular court martial procedures had to be justified specifically and the President’s claim of need based on the threat of terrorism is not sufficient justification.

The Court highlighted several troubling divergences between courts martial and Bush’s tribunals. The Court observed that the ability to exclude defendants from their hearings and the Secretary of Defense’s authority to change rules midtrial rendered the tribunals irregular under Common Article 3. Furthermore, the evidentiary rule allowing “admission of any evidence that ‘would . . . have probative value to a reasonable person’” violated Article 3’s requirement of appropriate judicial guarantees. Justice Kennedy’s concurrence, which is cross-referenced by the plurality, addresses in more detail the deviations between Bush’s commission procedures and court martial procedures, including the limited numbers of jurors, the nonindependent appellate authority, and the ability of military lawyers to sit as judges.

While the MCA does provide some guarantees absent from Bush’s original order, there are several important variances between MCA and UCMJ procedures. Here, I will not provide an exhaustive list of differences, but I will highlight some divergences that show that MCA procedures do

272. See supra notes 142–46 and accompanying text.
273. See Abrams, supra note 269, at 1134 (observing that Hamdan’s approach ensured that “the Court itself might not necessarily be the final arbiter of the issues presented”).
275. Id. at 2797 (quoting Justice Kennedy’s concurrence, id. at 2804).
276. Id. at 2792.
277. Id. at 2797.
278. Id. at 2797 n.65.
279. Id. at 2786–87 (calling it a “striking feature” that MCA makes hearsay, coerced confessions, and unsworn statements admissible); see also id. at 2807–08 (Kennedy, J., concurring) (criticizing commissions’ evidentiary rules).
280. Id. at 2806–07.
not satisfy Common Article 3's requirement of procedural parity.\(^\text{281}\) As a general matter, the MCA makes the speedy trial, pretrial investigation, and much of the self-incrimination provisions of the UCMJ inapplicable to military commissions, and specifies that any other conflicting provisions are inapplicable.\(^\text{282}\) The Act does, however, largely address Justice Kennedy's concerns by increasing the number of jurors on noncapital offenses, setting up a more independent appellate authority, and specifying that qualified military judges may preside over commissions.\(^\text{283}\) Moreover, it gives defendants the right to be present at proceedings against them, alleviating the plurality's apparent principal concern.\(^\text{284}\) Nonetheless, in addition to the problematic jurisdiction-stripping portions of the Act,\(^\text{285}\) there are two exceedingly troubling divergences between the MCA and UCMJ.

First, the MCA's provisions governing self-incrimination differ significantly from those in the UCMJ. The UCMJ holds as a general principle that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."\(^\text{286}\) It also requires that an interrogee be informed of charges and warned about his right to remain silent.\(^\text{287}\) Further, the UCMJ categorically prohibits obtaining statements "through the use of coercion, unlawful influence, or unlawful inducement."\(^\text{288}\) In contrast, the MCA does not generally prohibit compelled self-incrimination but only states that "[n]o person shall be required to testify against himself at a proceeding."\(^\text{289}\)

In addition, the MCA does not require any warnings before interrogations

\(^{281}\) For more detailed discussions of the MCA, see generally Abrams, supra note 268 and Eun Young Choi, Note, Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism, 42 HARV. C.R.-C.L. L. REV. 139 (2007).


\(^{283}\) See id. (codified at 10 U.S.C. § 948m(a)) (requiring five commission members for noncapital adjudications); id. (codified at 10 U.S.C. § 950f(a)) (providing for interlocutory appeals to a three-judge Court of Military Commission Review); id. (codified at 10 U.S.C. § 948j(b)) (requiring commission judges to be qualified civilian and military judges).

\(^{284}\) See id. (codified at 10 U.S.C. § 949a(b)(B)).


\(^{287}\) Id. § 831(b).

\(^{288}\) Id. § 831(d).

\(^{289}\) Military Commissions Act § 3(a)(1) (codified at 10 U.S.C. § 948r(a)).
and permits the admission of coerced statements.\(^{290}\) One of the big questions during the period before the MCA’s ratification was whether the government should be able to engage in interrogation techniques likely to qualify as torture under international law.\(^{291}\) Although the MCA generally prohibits the admission of confessions obtained by torture, amazingly, defendants prosecuted for torture are excepted from this provision.\(^{292}\) Moreover, the general prohibition against torture interrogations is significantly qualified.\(^{293}\) The MCA gives military judges near total discretion to admit all coerced confessions obtained before December 30, 2005, and discretion to admit all other coerced confessions so long as the interrogation methods used do not constitute “cruel, inhuman, or degrading treatment” as defined in the DTA.\(^{294}\)

Second, the MCA allows the Secretary of Defense to promulgate evidentiary rules that vary significantly from those set forth in the UCMJ.\(^{295}\) The MCA counsels the Secretary to promulgate rules of evidence consistent with court-martial procedure, but only in “so far as the Secretary considers practicable or consistent with military or intelligence activities.”\(^{296}\) The Act asserts that the Secretary “may” specify “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person,”\(^{297}\) and permit the introduction of hearsay.\(^{298}\) The problem with these provisions is that *Hamdan* specifically criticized the

\(^{290}\) *Id.* (codified at 10 U.S.C. § 948r(b)–(d)).


\(^{292}\) Military Commissions Act § 3(a)(1) (codified at 10 U.S.C. § 948r(b)).

\(^{293}\) *Id.* (codified at 10 U.S.C. § 948r(d)). This leads some experts to conclude that any sense of victory on the torture issue is illusory. See W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 Am. J. Int’l L. 852, 854 (2006).

\(^{294}\) Military Commissions Act § 3(a)(1) (codified at 10 U.S.C. § 948r(c)–(d)).

\(^{295}\) *See id.* (codified at 10 U.S.C. § 949a(a)) (allowing the Secretary of Defense to promulgate rules concerning “[p]retrial, trial, and post-trial procedures, including elements and modes of proof”).

\(^{296}\) *Id.*

\(^{297}\) *Id.* (codified at 10 U.S.C. § 949a(b)(2)(A)). See supra note 279 and accompanying text (discussing *Hamdan*’s treatment of this provision). This language is disturbingly discretionary when compared with Federal Rule of Evidence 401, which provides, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401; see also Choi, supra note 281, at 157–60 (arguing that MCA language may permit admission of evidence that would likely be found irrelevant under both Federal Rules and Military Rules of Evidence).

\(^{298}\) Military Commissions Act § 3(a)(1) (codified at 10 U.S.C. § 949a(b)(2)(E)).
original military commissions' loose evidentiary rules for allowing the admission of "multiple hearsay," "unsworn . . . statements," and "other forms of evidence generally prohibited on grounds of unreliability." On January 18, 2007, the Secretary of Defense promulgated a voluminous manual intended to operationalize the MCA. Not surprisingly, the evidentiary portions include the general statement that "[a]ll evidence having probative value to a reasonable person is admissible . . . ." In addition, the manual permits the admission of hearsay, which can only be excluded if the opponent proves by a preponderance of evidence that the statements are unreliable.

There is also the argument that the MCA has now rendered military commissions "regularly constituted court[s]" for the purposes of Common Article 3. Although Hamdan noted that "[t]he regular military courts in our system are the courts-martial established by congressional statutes," it did not define Common Article 3 regularity solely with reference to congressional approval. Consequently, the Court's analysis leaves open the possibility that Common Article 3 prohibits "special tribunal[s]" authorized by Congress. Moreover, even if the MCA makes military commissions "regularly constituted court[s]," the MCA's lack of procedural protections renders such courts unable to "afford[] 'all the judicial guarantees which are recognized as indispensable by civilized peoples,'" as required by Common Article 3. Consequently, in addition to the potential

---

301. Id. pt. III, § 4 (Rule 402).
302. Id. pt. III, § 8 (Rule 803(b)(1)).
303. Id. pt. III, § 8 (Rule 803(c)).
306. The Court explained that the question of regularity is "[i]nterstitially intertwined" with the issue of procedural guarantees. Id. at 2797. Thus, a process sanctioned by Congress that does not guarantee such protections would not be a "regularly constituted court" for Article 3 purposes.
307. Id. The Court highlights the provision in Protocol 1 art. 75 that "[n]o one shall be compelled to testify against himself or to confess guilt." Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol 1) art. 75(4)(f), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1]. The MCA appears to violate this directive by allowing detainees to be compelled to confess guilt. See supra notes 288–94 and accompanying text.
that continued treatment of detainees under the MCA violates the Geneva Conventions in ways unaddressed by the Court, the military commissions set up by the MCA appear to violate Common Article 3.

Unfortunately, Hamdan's treatment of the Geneva Conventions severely curtails current detainees' ability to claim that the MCA's provisions are unlawful. Common Article 3 was only made relevant through Article 21 of the UCMJ. The MCA now makes clear that portions of the UCMJ inconsistent with the MCA are no longer valid. Thus, the Court's treatment of the Geneva Conventions as only relevant to congressional intent invited Congress to legislate Geneva out of Guantánamo, an invitation it more than happily obliged. One may counter, however, that a finding of self-execution would not have placed detainees in a better position because of the last-in-time rule. This not wholly uncontroversial rule holds that later-enacted statutes have priority over inconsistent treaties and vice versa. The argument is that the MCA, to the extent that it is inconsistent with even self-executing Geneva Conventions, controls the fate of the terrorism detainees. While this argument is plausible, there remains the possibility that the MCA's language is not sufficient to annul the

308. See supra notes 17–22 (discussing Hamdan's avoidance of general application of Geneva Conventions III and IV).


310. See supra notes 119–24 and accompanying text.

311. See supra notes 280–294 and accompanying text.

312. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); see John Fabian Witt, Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?), 120 HARV. L. REV. 754, 794 (2007) (book review) ("Hamdan rests exclusively on statutes, which Congress is free to amend or repeal. Indeed, Congress appears to have done just this in the Military Commissions Act of 2006.") (footnote omitted).

313. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that a later enacted statute supercedes conflicting treaty). Many of the same criticisms lodged against the self-execution doctrine are set forth regarding the last-in-time rule.

Geneva Conventions generally or Common Article 3 specifically. In order to supercede a duly ratified treaty, Congress’s intent to repeal the treaty must be clear. Promulgating legislation touching subject matter also governed by a treaty does not necessarily mean that Congress intended to supercede the treaty.

The MCA, it seems, does not seek to nullify the Geneva Conventions. First, the MCA’s stated intent is to establish military commissions that comply with Common Article 3. The fact that the MCA wrongly interprets Geneva as allowing the specified tribunals, does not necessarily mean that the Act sought to eviscerate Common Article 3. Moreover, the 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.

Perhaps this is all sound and fury signifying nothing given that the jurisdiction-stripping portions of the MCA divest detainees of a forum to


316. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 cmt. a (1987) (A statute containing “matters inconsistent with international law . . . does not necessarily imply a Congressional purpose to supersede the international law.”); cf. Jordan J. Paust, Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom, 28 VA. J. INT’L L. 393 (1988) (noting that treaties have not been superceded by statutes in cases where treaty provision has gained constitutional status, where treaty is executed or creates vested rights, and where relevant legislation is derived from war power (because such is naturally subject to law of nations)).

317. Moreover, the government has not denounced the Geneva Conventions under the procedures laid out in the Conventions. See Third Geneva Convention, supra note 6, art. 142.

318. See supra notes 305–08 and accompanying text.

319. Admittedly, this seems to raise a fairly novel question of whether Congress’s incorrect interpretation of a treaty is a repeal of the treaty. Michael Van Alstine states, “It is possible, under the last-in-time rule for a congressional statute to overturn a judicial interpretation of a treaty. The problem with this option, is that the meaning of a treaty is then subject to the vagaries of the domestic legislative process.” Michael P. Van Alstine, The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection, 93 GEO. L.J. 1885, 1934 n.345 (2005) (internal citation omitted).

assert rights even under self-executing Geneva Conventions. Of course, this depends on whether the jurisdiction-stripping portions of the MCA survive constitutional review, which they very well might if lower court decisions are any indication. I believe, however, the Court declaring the Geneva Conventions self-executing rather than exhorting Congress to test the limits of presidential war power would have made a difference. Congress might very well have seen only two options: set up procedures that unambiguously comply with the Conventions or explicitly supercede the Conventions. Although one could argue that this would have created a perverse incentive for Congress to nullify the Conventions, Congress, especially under its post-election configuration, would likely have been exceedingly reluctant to repeal explicitly a treaty as important and widely-publicized as the Geneva Conventions.

In the end, therefore, Hamdan allowed Congress to rubber stamp procedures in violation of the Geneva Conventions, while retaining the pretense of respect for Geneva’s principles. The Court thus became complicit in the U.S. government’s strategy of claiming to the world that it adheres to the “principles” of international law while simultaneously divesting that law of substantive effect. Let me assume for a moment, however, that the MCA, as written, would trump even self-executing Geneva Conventions, such that a finding of self-execution would have made no practical difference. Even then the Court’s avoidance of self-execution is not neutral because it evidences an internalization of the principle that treaties are not supreme law.

B. Accepting the Isolationist Self-Execution Doctrine

As noted earlier, historically, treaties were presumptively the law of the land. Many notable legal historians have discussed the events surrounding the drafting and ratification of the Supremacy Clause and concluded the

322. See supra note 309 and accompanying text (discussing cases denying jurisdiction under MCA provisions).
323. See supra notes 61–62 and accompanying text (discussing American exceptionalism); infra notes 345–48 and accompanying text (criticizing United States’s two-faced approach to international norms).
Framers embraced a “monist” conception of treaty law, that is, treaty law and domestic law are one in the same, to signal to other sovereigns that the burgeoning republic would honor its international agreements. Internationalism was part and parcel of the structure of the Constitution. It then took over forty years for the concept of self-execution to be introduced into the law. Even then, the early cases stood for the relatively circumscribed principle that a self-executing treaty must be definite, constitutional, and create individual rights.

Fast forward to today. The modern approach to self-execution bears little resemblance to the limited judicial intervention represented by the early cases. How did courts get from Foster and the limited meaning of non-self-execution to this overarching idea that the question of intent must be primary in any treaty enforceability inquiry? While some assert that the modern self-execution doctrine is simply the result of years of sloppy legal reasoning, there 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. First, the shoddy legal reasoning behind modern self-execution analyses, combined with their isolationist results, render facially pretextual any claim that such modern approaches are merely good faith interpretations of Foster. Second, the development of self-execution law was intertwined historically with efforts to obstruct international law from advancing civil rights. Third, the supposed neutral arguments in favor of treaty non-self-execution appear to be mere masks for deeper isolationist sentiments.


326. See Vázquez, supra note 174, at 698–99 (observing that the Supremacy Clause was in part a response to the problem of repeated violations by states of peace treaties with Britain).

327. Paust, supra note 13, at 760.

328. See supra notes 177–226 and accompanying text (discussing early formulations of self-execution doctrine).

329. See supra notes 228–57 and accompanying text (examining modern constructions of self-execution).

330. See, e.g., Van Alstine, supra note 319, at 1887 (calling modern bad faith treaty jurisprudence product of a “combination of inattention and Supreme Court rhetorical ambiguity”); Vázquez, supra note 174, at 722 (asserting that modern self-execution doctrine is result of “sloppy reasoning and careless use of precedent”).
1. Deceptive Legal Reasoning to Reach Isolationist Results

The modern self-execution doctrine is not a necessary consequence of constitutional interpretation, but rather a product of anti-internationalist judicial activism. Proponents of the modern self-execution doctrine tend to rely on language from Foster distinguishing between an executed treaty, which is automatically domestic law, and a treaty in which "either of the parties engages to perform a particular act," which must be executed by the legislature to be enforceable. Supporters of the modern intent doctrine assert that this language calls for a differentiation between treaties in which parties have manifested intent to self-execute, which are enforceable, and treaties absent such intent, which are not. The proposition that the modern intent analysis is a natural consequence of Foster may appear initially reasonable, but further examination exposes it as a total subterfuge. Basing the modern intent doctrine on Foster is an amazing legal sleight of hand which reveals that more was really going on than a mechanical adherence to precedent.

While Foster was arguably a case concerned with intent, such intent regarded solely the terms of the treaty. The Foster Court, charged with the task of interpreting the treaty, determined, however wrongly, that the parties executed a somewhat illusory contract to ratify land grants subject to the future approval of a third-party (namely Congress). Despite the many criticisms one could lodge against this conclusion, Foster is clearly an opinion that seeks to enforce a treaty by its terms. Today, however, lower courts have unjustifiably relied on Foster as support for creating a

331. See Sloss, supra note 204, at 88 (observing that modern courts "have expanded the Foster exception to the point where it threatens to swallow the underlying principle").

332. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). Sloss notes, "Commentators have generally understood Foster and Percheman to distinguish between treaty provisions that have no domestic legal effect in the absence of implementing legislation (non-self-executing) and provisions that do have domestic legal effect, even without implementing legislation (self-executing)." Sloss, supra note 23, at 21-22; see also Sloss, supra note 204, at 78 (claiming that virtually every modern case that reverses presumption of treaty enforceability relies on Foster).

333. See, e.g., Moore, supra note 171, at 14-16 (lower courts citing Foster as basis for intent theory); Moore, supra note 171, at 15-16 (asserting that both Foster and Percheman looked to parties’ intent regarding enforceability to determine effect of treaty).

334. See Vázquez, supra note 174, at 701-02 (observing that Foster merely recognizes that enforceability of a treaty "may be altered by the parties to the treaty through the treaty itself").

335. See Sloss, supra note 204, at 85-87 (noting that Foster interpreted the treaty to grant "the plaintiffs an inchoate title in the subject property" but not "vested legal rights").

336. See supra notes 182-89 and accompanying text (criticizing Foster’s holding as contrary to text and intent of treaty).

337. See Sloss, supra note 23, at 13 (asserting that the inquiry in Foster was not "whether the treaty makers intended to create a non-self-executing treaty"); Vázquez, supra note 174, at 701-02.
secondary hurdle to enforcement that can only be overcome if the parties have stated, either in the treaty or elsewhere, that they specifically desire the treaty to have domestic effect. This conclusion 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.

Lower courts’ justiciability analyses rest on similarly questionable logic. They hold that a lack of an internal private right of action automatically makes a treaty unenforceable, even when a private right of action can be found elsewhere in the law. Such a conclusion, however, would be unheard of in the statutory context and is, in fact, at odds with Supreme Court precedent. Consequently, over time, courts have used defective reasoning to twist Foster’s limited holding into doctrine that erects specific evidentiary hurdles to treaty enforceability.

The above demonstrates that the modern intent doctrine was not a logical outgrowth of Foster, but a deliberate choice. This choice has two principal effects: (1) It creates a clever insurmountable barrier to the domestic enforcement of treaties ratified prior to the creation of the modern intent doctrine; and (2) it facilitates the current practice of signing treaties in bad faith. Addressing the first effect, as noted before, requiring intent to self-execute as a prerequisite to treaty enforceability likely renders any treaty ratified before the last forty years unenforceable. The only reason a signatory would add a provision specifically saying that the legal instrument

338. See supra notes 228–57 (discussing modern intent doctrine); see also Vázquez, supra note 174, at 708 (asserting that such cases “have reversed the presumption recognized by the Court in Foster and Percheman”).

339. The fact that certain statutes are executory has never been ground to require all legislation in that area to evidence intent to self-execute. See United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 155 F. 842, 845 (1st Cir. 1907) (noting that statutes can be executory by their terms). For example, the fact that some statutes are non-self-executing because they set forth only general directives that administrative agencies must convert into binding rules does not mean that all legislation is therefore presumptively unenforceable in the absence of specific language that the statute does not address itself to agency implementation. See, e.g., 15 U.S.C. § 78j(b) (2006).

340. See supra notes 242–46 and accompanying text (describing the private right of action test).

341. See supra notes 198–99 and accompanying text (discussing Asakura); see also Sloss, supra note 204, at 57–70 (discussing Supreme Court cases finding treaties self-executing in absence of private right of action).

342. See Paust, supra note 13, at 767 (asserting that later commentators “have distorted [Foster’s] meaning and created tests . . . patently inconsistent with the text of the Constitution, the predominant expectations of the Framers and early judicial opinions”).

343. See supra notes 249–57 and accompanying text (discussing effect of stronger intent doctrine on Geneva Conventions).
is enforceable is if she thought doing so was required. Prior to recent judicial developments, there was little reason for drafters to believe that specifically declaring intent to self-execute was necessary. Therefore, looking for specific language on self-execution operatively makes any older treaty presumptively non-self-executing, regardless of whether treaty drafters intended to create domestically enforceable rights.

As for the second effect, the modern self-execution doctrine permits the United States to continue the ruse of signing human rights treaties, so that it can appear to be following modern civilized trends, while simultaneously making them unenforceable. The widely shared view among internationalists is that the NSE declaration trend borders on bad faith, especially when combined with evidence that the government will not set forth implementing legislation in the future. Scholars contend that such declarations are inconsistent with the international law principle that domestic laws should not preclude enforcement of valid treaty obligations. In addition, these reservations seem fundamentally incompatible with “America’s self-perception as a leading proponent of human rights.” In sum, the modern self-execution doctrine, which is mired in a bog of confusing and unintuitive legal principles, may not readily

344. See Sloss, supra note 23, at 71 (noting that prior to 1965, there was little support for modern intent self-execution doctrine); Sloss, supra note 204, at 101 (noting that before World War II, the Court continued to recognize presumption of treaty enforceability and after the War said very little on the issue).

345. See supra notes 26–35 and accompanying text (noting that President Bush has vowed to abide by Geneva “principles” while simultaneously arguing for the Conventions’ unenforceability); see also Henkin, supra note 194, at 346 (asserting that signing treaties with non-self-executing declarations allows United States to claim respect for international law while guaranteeing that law is essentially empty); Paust, supra note 239, at 1284 (arguing that “as long as the [United States’ non-self-execution] policy remains, ... our government is not functioning as one of, by, and for, the people of the United States”); cf. Jed Rubenfeld, Unilateralism and Constitutionalism, 79 N.Y.U. L. REV. 1971, 1989 (2004) (asserting that the United States simply never intended for international law to be anything other than vehicle for exportation of Americanism).

346. See Paust, supra note 239, at 1257 (asserting that “wretched” example of United States reserving on ICCPR exemplified the Senate’s practice of being “miserably compliant with the Executive and its failed leadership”); Sloss, supra note 23, at 11 (arguing if a treaty creates a primary right, a court has an obligation to consider available remedies).


appear as what it is—a mechanism whose primary purpose is to allow the United States to double deal in international law.349

There are other aspects of the modern self-execution doctrine that seem patently anti-internationalist. Some courts, like the Seventh Circuit in *Frolova v. Union of Soviet Socialist Republics*, resolve the self-execution issue by applying a multifactored test analyzing: “(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.” Some of this test is arguably an extension of Foster’s principles,351 while other portions incorporate the modern intent doctrine and are thus subject to the criticism above.352

The most patently anti-internationalist portions of the test require courts to consider the availability of nontreaty remedies and analyze the costs of

---

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

350. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (citing *Tel-Oren* v. Libyan Arab Republic, 726 F.2d 774, 808–10 (D.C. Cir. 1984); United States v. Postal, 589 F.2d 862, 876–77 (5th Cir. 1979); People of Saipan v. Dep’t of Interior, 502 F.2d 90, 97 (9th Cir. 1974); Sei Fujii v. State, 217 P.2d 617, 620–22 (Cal. 1952).

351. The sixth prong, involving the capability of the judiciary to resolve the dispute, can be interpreted in a couple of different ways. One way is compatible with Foster in that it holds certain treaty terms are so ambiguous that it would strain judicial competency to interpret and enforce them. *See Foster v. Neilson*, 27 U.S. (2 Pet) 253, 374 (1829); *Tel-Oren*, 726 F.3d at 809 (refusing to enforce U.N. Charter provisions because they are “phrased in broad generalities, suggesting that they are declarations of principles”); *cf*. Vázquez, *supra* note 174, at 715 (stating that “there may be imprecise treaty provisions that the judicial branch is well suited to enforce”). Another way to interpret prong six is to say that the judiciary cannot enforce treaties if doing so interferes with proper political processes. *See Frolova*, 761 F.2d at 375 (citing *Flynn v. Shultz*, 748 F.2d 1186, 1189–93) (7th Cir. 1984) (holding present case involved “foreign policy matters” that “courts are ill-equipped to anticipate or handle”); *Tel-Oren*, 726 F.2d at 810; *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). Most modern courts, however, do not go this far, instead holding that the primary implication of the political question doctrine is that courts should defer to the political branch’s interpretations of treaties. *See generally* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (analyzing judicial deference in relation to executive branch’s interpretation of treaties); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (examining judicial deference on political questions).

352. *Supra* notes 228–57 and accompanying text (discussing modern intent doctrine).
permitting a private right of action. However, if a treaty’s provisions are redundant of domestic laws, then the litigant or court should have the ability to choose the law under which to obtain or grant relief, just as if both a federal statute and a constitutional provision provided similar rights. Thus, Frolova relegates treaties to the law of very last resort. In addition, the inquiry into costs of treaty enforceability evidences a prejudice against international law. Courts cannot refuse to give effect to statutes whenever they feel a suit is too costly. Yet this is exactly what judges are invited to do for treaties. This unjustified consideration of the “costs” of treaty litigation most likely stems from Judge Bork’s concurrence in Tel-Oren v. Libyan Arab Republic, which is fairly obsessed with the burdens of treaty enforcement. He warns that permitting private Geneva claims would “flood courts throughout the world” and “create perhaps hundreds of thousands or millions of lawsuits.”

2. Historical Ties with Isolationism

There is also historical evidence that an aversion to foreign “liberal” law drove the modern self-execution doctrine. History reveals an incredibly unpalatable legal moment as one of the main catalysts of the isolationist stance toward treaty law. The post-World War II era experienced a drastic rise in the prominence of international organizations and international conventions. The United States, which was still mired in post-Jim Crow inequality and the racial sentiment surrounding internment, ratified the U.N. Charter, which boldly stated several human rights principles incompatible with racial stratification. The growth of international organizations and human rights conventions concerned segregationists and conservatives

353. Frolova, 761 F.2d at 373.
354. The problem is that courts are “exceedingly timid in enforcing treaties, particularly when individuals have sought to enforce them against the executive branch of the federal Government.” Vázquez, supra note 174, at 717.
355. Tel-Oren, 726 F.2d at 809 n.16, 810 (Bork, J., concurring).
356. Henry Richardson traces Foster’s racial underpinnings and asserts that the self-execution doctrine “has generally served as a barrier to the direct incorporation from treaties of international rights into American law [and] . . . generally prevented African-Americans and other peoples of color in the United States from directly invoking their international human rights in local and federal courts.” Richardson, supra note 186, at 1099.
358. See Quigley, supra note 209, at 579 (asserting that United States’s racial situation was an obstacle to approval of post-World War II human rights treaties).
In 1951, Senator John Bricker, a Republican from Ohio, introduced a draft amendment to the Supremacy Clause to make all treaties unenforceable in the absence of implementing legislation. In addition, the amendment would serve to prohibit Congress from ratifying a treaty whose provisions Congress would not have had the power to enact as legislation. Two racial discrimination cases, *Oyama v. California* and *Sei Fujii v. State*, served as catalysts for this legislation.

*Oyama* presented a challenge to California’s racist Alien Land Law by a Japanese immigrant who had purchased land at market value and deeded it to his citizen minor son, Fred. The Law prevented aliens ineligible for citizenship, namely Japanese, from owning land and invalidated any transfer made with the intention of avoiding the Law. The California Supreme Court held that under the Alien Land Law, Fred never owned the property because the transfer was invalid. The U.S. Supreme Court reversed and held, not that the Alien Land Law was facially unconstitutional, but that the law, as applied to a citizen, Fred, violated the Equal Protection clause. Notably, four justices expressed the view that the Law should be struck down as violative of the U.N. Charter. Justices Black, Douglas, Murphy and Rutledge opined that the United States’ commitment to human rights under the U.N. Charter supported invalidating California’s discriminatory law. Similarly, in *Sei Fujii*, a California court of appeals struck down that same Law specifically on the ground that it violated the U.N. Charter, observing that the Charter had become the “supreme Law of

---


360. 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).

364. *Id.* at 636, 644; *see also* Alien Land Law, 1 Cal. Gen. Laws Act 261 (Deering 1944, 1945 Supp.).
367. *Id.* at 640.
368. *See id.* at 649–50 (Black, J., concurring, joined by Douglas, J.) (“How 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, joined by Rutledge, J.) (stating that “inconsistency with the [U.N.] Charter . . . is but one more reason why the statute must be condemned”).
the Land” such that “every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent.” Eventually, the Supreme Court of California overturned that portion of the opinion, finding the U.N. Charter non-self-executing because it only stated “general purposes.”

Although neither case ended up prioritizing the U.N. Charter over domestic law, they were enough to concern Senator Bricker that the U.N. Charter and the proposed International Covenant on Human Rights threatened to undermine racial segregation in the South. In Senator Bricker’s view, Oyama and Sei Fujii signaled the looming threat of international human rights covenants “forcing unacceptable theories and practices upon the citizens of the United States of America.” One Brickerite warned the Senate that if the Amendment failed to pass, liberals could assert “that the entire civil rights program has already effectively been imposed on the United States through the United Nations Charter itself, without the need for any congressional action whatever.”

The Bricker Amendment eventually failed to pass the Senate by one vote, but Bricker only agreed to abandon his quest upon President Eisenhower’s assurance that he would neither seek ratification of the Genocide Convention nor sign other human rights treaties. There is a consensus among many scholars and historians that the Bricker Amendment was based in large part on a desire to preserve racial hierarchy. Scholars note the:

371. 97 CONG. REC. 9,11361 (1951) (statement of Sen. Bricker). The quotation is an excerpt from a resolution adopted by the Tampa Rotary Club that Senator Bricker inserted into the Record. Id.
373. Henkin, supra note 194, at 348–49. Eisenhower’s Secretary of State promised that the administration would not seek ratification of any of the various proposed human rights treaties. See also Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the S. Comm. on the Judiciary, 83d Cong. 825 (1953).
374. See, e.g., Stanley A. Halpin, Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution, 30 HASTINGS INT’L & COMP. L. REV. 1, 8 (2006) (“Brickerites[,] . . . real concern appeared to be defending state sovereignty and preserving the ability of southern states to maintain segregation and white supremacy in the face of the U.N. Charter.”); Henkin, supra note 194, at 348 (“The campaign for the Bricker Amendment apparently represented a move by anti-civil-rights and ‘states’ rights’ forces to seek to prevent—in particular—bringing an end to racial discrimination and segregation by international treaty.”). But see Nelson Richards, The Bricker Amendment and Congress’s Failure to Check the Inflation of the Executive’s Foreign Affairs Powers, 1951-1954, 94 CAL. L.
[H]istorical symmetry between the 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 . . . .

It seems, however, there was more underlying the Bricker Amendment than the simple desire to preserve white privilege. As one scholar put it, “while the U.S. Senate’s refusal to ratify the early human rights conventions may well have reflected Southern racism, it also reflected something else.” The Bricker era was a backlash to the emergence of international organizations and the signing of the U.N. Charter. Frank Holman, former American Bar Association President and architect of the Bricker Amendment, explained that the Amendment marked the “line . . . between those Americans who believe in the preservation of national sovereignty and national independence and those who believe that our national independence . . . should yield to international considerations and some kind of world authority.”

The Bricker era brought to light a xenophobic, anti-internationalist, anti-human rights philosophy that persists today and currently taints Supreme Court law, even law purporting to be internationalist. This anti-internationalist sentiment cannot be explained away as merely instrumental to the United States’ ability to avoid implementing human rights laws that upset racial, gender, or other hierarchy. It is true that since 9/11, the United States appears to have erected barriers to Geneva specifically so that

REV. 175, 177–78 (2006) (asserting that concerns over communism abroad and President Truman’s amassing of executive power prompted the Bricker Amendment).

375. Richardson, supra note 186, at 1117.
377. FRANK E. HOLMAN, STORY OF THE “BRICKER” AMENDMENT 22 (1954). Holman believed that “all lovers of America” should be concerned because the “Amendment is the greatest issue which faces America today, greater than taxes or inflation or even Communist infiltration.” Id. at 104.
378. See Henkin, supra note 194, at 349 (observing that Bricker-type ideology infected future treaty law).
379. Of course one could easily argue isolationist or unilateralist theories are themselves fairly transparent covers for hostility to the values represented by international instruments—racial equality, women’s rights, socialism, etc. See Carolyn Cox Cohan, International Mavericks: A Comparative Analysis of Selected Human Rights and Foreign Policy Issues in Iran and the United States, 33 GEO. WASH. INT’L L. REV. 197, 271 (2001) (asserting that United States aversion to human rights treaties is attributable to “[m]odern America’s fiercely competitive capitalism, its disdain for comprehensive social welfare policies, and its thriving and varied sectarian Protestant culture”).
it can persist in human rights violations.\textsuperscript{380} Much of the time, however, the United States is compliant with the norms embodied in human rights instruments that it refuses to sign or reserves on.\textsuperscript{381} What drives the resistance to ratification and/or domestic application of human rights treaties when the United States has every intention of conformity? Harold Koh explains that the practice of complying but not signing allows the United States to appear compliant with international law while vindicating its national commitment to protect its legal institutions from the influence of foreign bodies.\textsuperscript{382} Thus, while initially instrumental to preservation of racial segregation, the anti-internationalist philosophy has taken on a life of its own.

3. The Use of Pretextual and Non-Normative "Neutral" Values

While racial critiques have uncovered the overtly bigoted and antiforeign agenda of the Brickerites, at the time of the proposed amendment, even Senator Bricker set forth seemingly nonracial, nonisolationist "objective" arguments in favor of his Amendment, grounded in states rights and balance of power.\textsuperscript{383} Today, proponents of modern self-execution are often guarded about revealing their aversions to law influenced by "un-American foreigners."\textsuperscript{384} Instead, they adopt Bricker's objectivist strategy of advancing facially neutral structural arguments that the doctrine is compelled by constitutional configuration.\textsuperscript{385} When one peels away the artifice of these constitutional arguments, however, it is easy to see the isolationist ideal at work. Moreover, examining these proponents' philosophies as a whole reveals a basic hostility to international law.

\textsuperscript{380} See supra notes 26–38 and accompanying text (discussing the President's violation of international law).

\textsuperscript{381} See Koh, supra note 23, at 1484 (asserting that the United States has adopted "the perverse practice of human rights compliance without ratification").

\textsuperscript{382} Id. at 1484–85. He opines, "[T]he United States tries to have it both ways. On the one hand, it enjoys the appearance of compliance. On the other, it maintains the illusion of unfettered sovereignty." Id. at 1485.

\textsuperscript{383} See Golove, supra note 357, at 585 (asserting that Bricker's arguments involved federalism and separation of powers concerns); Richards, supra note 374, at 180 ("Holman and Bricker believed that a massive gap in the Constitution needed filling before a small group of internationalists . . . pilfered America's valued freedoms.").

\textsuperscript{384} See infra notes 443–45 and accompanying text (noting John Yoo's resistance to being termed "isolationist").

WHO'S AFRAID OF GENEVA LAW?

One of the principal arguments against giving treaties domestic effect advanced both by Bricker and scholars today is federalism. The federalist argument asserts that treaties should be presumptively non-self-executing in order to preserve state rights or presumptively invalid in areas of state control.

Federalists hold that Congress can only execute a treaty if it has independent legislative authority in the subject area of the treaty. This argument was put to rest over one hundred years ago in Missouri v. Holland, when the Supreme Court held ratified treaties effective, even if touching on an area of exclusive state prerogative.

One should not be surprised at the use of federalism to counter human rights treaties given that federalism is often espoused to defeat civil rights laws, and federalism concerns typically mask larger political conservatism, as in Bricker's case. In fact, some argue that federalism was forged into the Constitution particularly to support the continuation of slavery.

One such critical scholar asserts that "jurisdictional divides (local versus national, domestic versus international)" have always served as "the bases for refusing to alter status regimes." In the treaty context, "America's standoffishness from the twentieth-century international human rights movement is rooted in protection of local as well as national prerogatives to set the standards of interpersonal hierarchies." Thus, to some scholars, federalism is "a stance that has been deployed throughout America's history to deflect transnational efforts to enhance the equality and dignity of human beings."

386. See infra notes 387–88 and accompanying text (explaining Brickerites' federalism arguments). Curtis Bradley sets forth a very qualified defense of federalism, endeavoring to "simply" show that "if federalism is to be the subject of judicial protection . . . there is no justification for giving the treaty power special immunity from such protection." Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 394 (1998).

387. See Yoo, Treaties, supra note 170, at 2238–39 (arguing that treaties should be non-self-executing to avoid rendering treaty power "an unlimited authority to legislate on any subject").


389. 252 U.S. 416 (1920).

390. Id. at 434–35.

391. See Golove, supra note 357, at 585 (observing that those lodging antitreaty federalism arguments "principally had racial segregation in mind").

392. See, e.g., Resnick, supra note 385, at 1578 ("[A] specific premise of the American constitutional agreement to 'split the atom of power' was that it enabled slavery to survive, if not flourish. States claimed a sovereign prerogative to determine which persons were recognized as legally entitled to the sanctity of their own bodies and the fruits of their own labors.").

393. Id. at 1578–79.

394. Id. at 1579.

395. Id. at 1584.
Perhaps, however, federalism is not completely instrumental and there is a core value lurking in these arguments. Federalists would certainly say the value is “states rights”—in this context, the right to be free from international obligations imposed by the federal government. The problem is that our constitutional structure forecloses the argument that states have such a “right.” As a nation, there are certain things upon which we must all speak with one voice. Under the Constitution, treaty law is such a thing. There is ample historical support that one of the primary reasons the framers added treaties to the Supremacy Clause was to prevent states from undermining the United States’ international obligations. Treaty supremacy was part of the principle that the United States was a single nation, rather than a loose collection of sovereigns. Consequently, were states to retain such a “right,” the federal government simply could not


399. Jordan J. Paust discusses an important report to the Congress by John Jay, Secretary of Foreign Affairs, the year before the Constitutional Conventions. See Paust, supra note 13, at 761. Jay argued that treaties should be binding on the whole of the nation and “independent of the will and power of” state legislatures.” Id. (quoted in C. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES 268 n.4 (1902)); See also Golove, supra note 357, at 603 (observing that “the Constitution delegates [treaty] power exclusively to the federal government”).

400. See supra note 326 (discussing the framers’ desire to bind states to treaties); see also Thomas Michael McDonnell, Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents, 37 WM. & MARY L. REV. 1401, 1415–16 (1996) (recounting history of the Supremacy Clause and noting that even states’ rights advocates recognized treaty supremacy in order to avoid conflict with foreign states, establish uniform trade policy, and demonstrate respect for universal rules of law).

401. Professor Golove asserts that the framers made treaties supreme because they “were acutely aware of the need to present a united front to foreign states. The nation faced menacing perils from abroad, making a common stand against foreign powers a matter of the most urgent necessity.” Golove, supra note 398, at 1091.
be sovereign in the area of treaty making. Were Missouri v. Holland decided differently, the United States could only carry out treaty negotiations in "state" subject areas if states participated directly in treaty ratification or the President obtained binding state assurances before any treaty signing.

While federalism is the antitreaty mantra, its advocates do not explain why it would be better to have states involved in treaty negotiations, as opposed to state representatives conferring with the President over the United States' collective international stances. There does not seem to be any logical reason for this preference, save that the former course of action impedes international law making. Moreover, states' rights advocates are surely aware that states cannot negotiate treaties, meaning that no international law could ever be made regarding "state" matters. The passion behind the federalism argument is a passion, not about nebulous states' rights, but about the potential influence of international law.

Indeed, many federalism arguments are so heavily hedged that the position boils down to—if federalism matters then treaties should not preempt state law. It is hard therefore to see what dog these federalists have in the fight. When it comes down to brass tacks, however, and federalists are forced to defend their position normatively, the defense tends to boil down to an aversion to foreign values. For this reason, federalism arguments have survived in the treaty context even though the expansion of federal power via the Commerce Clause and the Fourteenth Amendment has rendered treaty-based federal power practically a moot issue. Consequently, even knowing that Congress has broad legislative ability, self-proclaimed treaty federalists continue to support non-self-execution in the hopes that Congress will not in fact legislatively implement treaties.

402. Id. at 1095 (asserting that the reversal of Holland would leave the United States in a poor negotiating posture internationally because it would "be precluded from making treaties on a range of potentially important subjects"); cf. Edward T. Swaine, Does Federalism Constrain the Treaty Power, 103 COLUM. L. REV. 403, 510 (2003) (proposing a system of hybrid treaty-state compacts under the Constitution's Compact Clause).

403. See Bradley, supra note 386, at 461 (musing that "[p]erhaps the increased globalization and interdependence of nations renders federalism obsolete").

404. See, e.g., id. (asserting that federalism may be important because increased internationalism may "actually increase the desire for local democracy and experimentation"); see also Barry Friedman, Federalism's Future in the Global Village, 47 VAND. L. REV. 1441, 1480 (1994) (predicting that aversion to foreign imposed standards will spur federalist revival).

405. Louis Henkin notes, "There is little that is not 'within the jurisdiction of the United States, i.e., within the treaty power, or within the legislative power of Congress under the Commerce Power, under its authority to implement the Fourteenth Amendment, or under its power to do what is necessary and proper to carry out its treaty obligations.'" Henkin, supra note 194, at 345.
Their concern, therefore, is not about federal power over states, but about foreign influence on the United States.  

In addition, like Bricker, modern critics of self-execution argue that the ability of treaty makers to create domestic law offsets the delicate balance of power in our constitutional structure. One of the most vocal proponents of this argument is professor and former high level Bush appointee John Yoo. He fervently asserts that allowing the President to create domestic law through treaties with only the consent of the Senate undermines the power of our democratically-elected House of Representatives and gives too much power to the President. To be sure, this argument is not simply one against self-execution, it is an argument against treaty law all together. If treaties are by their very nature antidemocratic, they are so whether they establish domestic law or only bind the government to foreign obligations. Yoo and other conservatives’ concerns over balance of power, however, boil down to merely picking the value that leads to one’s conclusion. In other words, Yoo assumes that the process by which treaties are made and ratified is “bad” and proposes a system that is “better.” The only difference one can readily ascertain from the systems, however, is that in Yoo’s proposed system it is harder to create treaty law.

Yoo’s primary critique of the treaty-making process is that it does not involve bicameralism, his apparent touchstone for democracy. He seems to presume that the default structure must be congressional action and executive veto, such that any deviation from this structure is presumptively

406. See id. at 346 (asserting that some see federalist position as “another sign that the United States is resistant to international human rights agreements, setting up obstacles to their implementation and refusing to treat human rights conventions as treaties dealing with a subject of national interest”).

407. See, e.g., Yoo, Treaties, supra note 170, at 2237 (asserting that “self-execution allows the federal government to legislate without opposition from the textual checks on congressional powers”).

408. See id.

409. Yoo argues, “Non-self-execution . . . better promotes democratic government in the lawmaking process by requiring the consent of the most directly democratic part of the government, the House of Representatives, before the nation can implement treaty obligations at home.” Id. at 2240. Then quizzically he states, “To be sure, the President provides a safeguard against an anti-majoritarian treaty.” Id. So what is the problem? The Senate?

410. See Henkin, supra note 194, at 346 (asserting that the democracy argument against self-execution “impugns the democratic character of every treaty made”).

411. Yoo, Treaties, supra note 170, at 2242 (criticizing the treaty making process for “shift[ing] the center of policymaking from Congress to a President unencumbered by bicameralism”).
invalid.\textsuperscript{412} It is quite clear, however, that our constitutional system is an imperfect democracy, with various methods, both bicameral and unilateral, for making law.\textsuperscript{413} The specific balance of power in the treaty context, as set forth by the Constitution, is that the President may create treaty law, but only with the approval of a supermajority of the Senate.\textsuperscript{414} As treaty scholar Louis Henkin explains, "Whatever might be said for amending the Constitution to require consent to a treaty by both Houses of Congress, that is not what the Constitution (unamended) provides."\textsuperscript{415} Indeed if the bicameral "default" system is so unquestionably preferable to the existing treaty ratification system, one would think that Congress would have amended the Constitution to so reflect when given the chance.\textsuperscript{416}

Moreover, conservative scholars like Yoo tend to rely solely on the characterization of treaty making as "undemocratic" to convince their audiences to favor non-self-execution, without explaining why this particular deviation from the bicameral "default" is so bad.\textsuperscript{417} Instead, they often establish this point through dramatics, that is, predicting that treaty law will take over the nation.\textsuperscript{418} Yoo, for example, warns ominously, "If the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation."\textsuperscript{419} Not only is the idea of treaty law subsuming every

\textsuperscript{412} See id. (asserting that it is a "distort[jion]" of democratic process to replace "parallel House and Senate procedures for studying and adopting legislation, in which the President exercises a final veto").

\textsuperscript{413} The President can unilaterally create law by way of executive order. Government appointments require only Senate confirmation. Administrative agencies make binding rules.

\textsuperscript{414} See Paust, supra note 13, at 762 (recounting statement by antifederalist during ratification recognizing that President had a "legislative" power through treaty making). Martin S. Flaherty observes that "democracy concerns might cut against an overly monist approach to domestic treaty enforcement. Yet, such concerns were precisely what the Founders rejected in their formal commitment to self-executing treaties and associated doctrines." Martin S. Flaherty, "External" Versus "Internal" in International Law, 29 FORDHAM INT'L L.J. 447, 453 (2006).

\textsuperscript{415} Henkin, supra note 194, at 347.

\textsuperscript{416} See supra notes 360–82 and accompanying text (discussing Bricker amendment).

\textsuperscript{417} Yoo does describe the "open[ness]" of the bicameral process. Yoo, Treaties, supra note 170, at 2241. Unless the Senate somehow closes its session or refuses to deal with interest groups, however, it is hard to see why the treaty process is the equivalent of the type of backdoor secretive politics that, ironically, the Bush Administration favors.

\textsuperscript{418} See Beth Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L. Rev. 433, 434 (2002) (characterizing arguments that private enforcement of international law will threaten balance of power among branches as "apocalyptic claims").

\textsuperscript{419} Yoo, Treaties, supra note 170, at 2236; see Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867, 1893 (2005) (asserting that under internationalist
area of domestic law unlikely as a matter of politics, it is practically impossible given the last-in-time rule. If a treaty so gravely diverges from the law Congress would have made, one could expect Congress to respond quickly by passing legislation overriding the treaty. Professor Jed Rubenfeld, however, ups the stakes by asserting that, according to some internationalists, treaty law should be on the level of nearly immutable Constitutional law, a principle at which even treaty defenders might balk.

Yet all debate is a matter of degree. Of course, there will always be a tension between guaranteed rights and incompatible “democratic” legislation. Constitutional provisions cannot be overturned by legislation precisely because they are a check on majoritarianism. We are comfortable with that check on majority rule because constitutional law is in other ways limited. This is the “balance” at which we have arrived, although it is not purely democratic or majoritarian. The question, when it comes to treaties, is not whether they are products of fully “democratic” processes, but whether the slight deviation from bicameral structure is warranted or defensible. This question can only be answered by balancing the value of majoritarianism against the value of international law. Of interpretations of treaty power “legislative powers are not merely somewhat expandable by treaty; they are expandable virtually without limit”).

420. See supra notes 313–14 and accompanying text (discussing last-in-time rule).

421. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (asserting that, under the Constitution, treaties are on same footing as federal legislation).

422. Rubenfeld, supra note 345, at 2010.


424. The classic response, however, is that constitutional provisions are permitted to be a check on majoritarianism because they are supermajoritarian. See Rubenfeld, supra note 345, at 2008 (noting that constitutional superiority over legislation renders constitutional provisions “of special concern in democratic countries, demanding specially heightened forms of democratic mobilization and participation if they are to claim legitimate authority”). However, one can think of treaties as representing “world” majoritarianism.

425. Amendments are very difficult to pass, and constitutional jurisprudence is controlled by various legal mechanisms like Supreme Court structure, language, stare decisis, presumptions, logic, and more recently, originalism. One can certainly argue that this is not much of a check. First, the original Bill of Rights, many argue, was a product of specific political horse trading rather than democratic processes. Moreover, some see the various controls on the Supreme Court to be little more than instruments for political ends. See supra notes 395–406 (discussing federalism and instrumentalism).

426. See Damrosch, supra note 239, at 527 (“The Senate’s power to withhold consent to treaties is part of the Framers’ carefully designed system of checks and balances.”).

427. The “form over substance” tactic is a favor of legal positivists and conservative theorists. They choose a default structure and illustrate through their own revisionist historical accounts how this structure is the “true” constitutional structure. Liberal Supreme Court decisions that deviate from the structure are criticized as anomalous or unwarranted and
course, that balance is affected by how much one values majoritarianism and international law, and how much majoritarianism or treaty power stands to be sacrificed.\(^{428}\) The problem is that because many conservative scholars employ structural arguments as a mask for an aversion to international law, rather than balancing relative values, they rely on the mere fact that treaties are not the product of “democracy” as the primary reason for their rejection.\(^{429}\) As a result, the separation of powers argument reduces to little more than a tricky way of defining treaty law as \textit{a priori} illegitimate, without having to admit that one does not value international law. One expert notes that the “underlying notion” of such arguments “seems to be that the United States is better off to the extent that the Constitution can be made to limit and frustrate full United States’ participation in the burgeoning institutions and regimes of international society.”\(^{430}\)

Moreover, extending the relevant temporal span reveals that non-self-execution tends to enlarge rather than contract executive power. A treaty becomes law after negotiation among several parties and consent of the President and a supermajority of the Senate.\(^{431}\) Thereafter, the government is bound by the treaty. The treaty, however, outlasts administrations, and a future President may desire to violate the terms of the treaty. Non-self-execution permits the President to unilaterally abrogate the treaty without the check of judicial review. This is poignantly illustrated by the Bush administration’s position on the Geneva Conventions.\(^{432}\) In 1949, the President negotiated and ratified the Geneva Conventions, with the assent of two-thirds of the Senate. Now, over fifty years later, the President has

\begin{quote}
decisions that adhere to that structure are glorified. \textit{See}, \textit{e.g.}, Nelson Lund & John O. McGinnis, \textit{Lawrence v. Texas and Judicial Hubris}, 102 MICH. L. REV. 1555, 1571–72 (2004) (noting homophobic undertones of \textit{Bowers} but lauding opinion as the Court’s decision to “sin no more” and leave “existing due process precedents in place”).

d.\(^{428}\) \textit{See Sloss, supra} note 23, at 4 (“The doctrine of non-self-executing treaties, as developed by the Supreme Court in the nineteenth century, struck an appropriate balance between competing rule of law and separation of powers principles. However, the modern doctrine of non-self-executing treaties, created by courts and commentators in the latter half of the twentieth century, distorts that balance.”).

\textit{429.} Professor Rubenfeld contrasts America’s “democratic constitutionalism” with Europe’s “international constitutionalism” and concludes that broad treaty power conflicts with America’s self-perception as a democratic institution. Rubenfeld, \textit{supra} note 345, at 2000–13. However, the question that must be answered is what is the overriding value of this defense of democracy in the face of the associated costs to international relations and human rights. \textit{See supra} note 427 (discussing problem of elevating form over substance in constitutional law).

\textit{430.} Golove, \textit{supra} note 398, at 1314.

\textit{431.} \textit{See supra} notes 407–17 describing this “nondemocratic” system.

\textit{432.} \textit{See supra} notes 26–41 and accompanying text (discussing Bush’s position on Geneva Conventions).
decided alone that he is not bound by the Geneva Conventions’ dictates. Were the Geneva Conventions presumptively self-executing, the President would have to either negotiate a new treaty and get Senate approval or convince Congress to pass rescinding legislation. Instead, the President acted unilaterally in violation of Geneva and relied on the self-execution doctrine to make his actions immune from judicial scrutiny. Consequently, in the war on terror, the self-execution doctrine has enhanced executive power and minimized Congress’s role.

The above analysis may explain why the most fervent supporters of non-self-execution are elsewhere the greatest advocates of unfettered executive discretion in foreign affairs. It is extremely difficult to accept that conservative critics of self-execution are really concerned about executive power or bicameral procedure in the abstract. Yoo, who elsewhere argues that the President possesses the sole discretion to interpret treaties, may act in the prosecution of the war on terror without “democratic” congressional approval, and may engage in torture in violation of international law, appears patently hypocritical when he states in the treaty context, “As a matter of accountability, when the government imposes rules of conduct on individuals, those rules ought to be made by members of the legislature who directly represent the people.”

To be sure, these formalist conservative scholars take offense at any attempt to deconstruct their structural arguments. Yoo, for example, decrying such criticism as nonacademic personal attack:

---

433. See supra notes 30–31 and accompanying text.
434. Of course, Congress ended up passing legislation, but only after the Supreme Court constrained the President’s actions through statutory interpretation. See supra notes 80–85 and accompanying text.
435. See supra notes 26–29 and accompanying text (examining Bush’s stance on executive unilateralism).
436. Indeed, Yoo, one of the foremost proponents of state secrecy, takes the amazing position that because treaties no longer largely involve sensitive foreign matters, there is no reason that they should be kept in “secrecy” from Congress during negotiation and ratification. Yoo, Treaties, supra note 170, at 2241.
437. See Ku & Yoo, supra note 168, at 180 (criticizing Hamdan opinion for its lack of deference to the President’s construction of Geneva); Yoo, supra note 159, at 106 (criticizing Hamdan for rejecting “usual judicial deference to presidential interpretation of treaties”).
438. Yoo states, “Even if Congress had not authorized military commissions in the UCMJ, President Bush would still have authority to establish them under his constitutional authority as commander-in-chief.” Yoo, supra note 164, at 97. He even compares Bush’s unilateral actions in setting up Guantánamo bay to Abraham Lincoln freeing the slaves and Franklin Delano Roosevelt’s making the United States an “arsenal of democracy.” Id. at 83.
439. See supra notes 31–33 and accompanying text (discussing “torture memos” authored in part by Yoo, which advise President Bush that he has authority to violate Geneva).
440. Yoo, Treaties, supra note 170, at 2240.
The foreign relations law community seems to have a tendency to accept certain conclusions of law with the slightest of scrutiny. Sometimes utter unanimity surrounds certain conclusions, such as whether treaties should be self-executing, with a minimum of debate. When those propositions are later challenged by sincere intellectual criticism, the international law community often responds by claiming that these conclusions are motivated either by "isolationism" or by an almost senseless desire to roil what are peaceful waters, rather than by engaging the arguments on the merits.  

There is, however, a trick to Yoo's arguments. Addressing his claims "on the merits" means playing with a stacked deck where bicameralism is a default and treaty law will always lose. Engaging the liberal legal forms, what Yoo characterizes as the only legitimate way to debate, is to forfeit the debate. The deeper issues involve, not how to play the game, but why the deck should be stacked in such a manner.

It is difficult to ignore the isolationist beliefs of non-self-execution proponents when they lie so close to the surface. Yoo, for example, has not made his distaste for foreign law and international actors a secret. He decries the influence of international law as heralding "the emergence of what can be called a deterritorialized, 'cosmopolitan' moral sensibility, generally shared by governing elites of the advanced nations." Moreover, Yoo criticizes the increasing awareness of contemporary European law by stating:

Europe has been given to fluctuations of ideological extremes. . . . In the Twentieth Century, monarchy was followed by fascism, socialism, and communism. As history has demonstrated, the performance of these regimes has been less than exemplary. In particular, fascism and communism, which were once viewed by

441. Id. at 2258.
442. Flaherty and Vázquez do engage the forms by seeking to demonstrate that Yoo's account of history is flawed. See generally Flaherty, supra note 324 (arguing that "careful examination of the self-execution assumption only confirms it"); Carlos Manuel Vázquez, Laughing at Treaties, 99 COLUM. L. REV. 2154 (1999) (arguing that "constitutional texts, doctrine, and structure—to say nothing of the Founders' intent—rule out Yoo's claim"). Even then, however, Yoo responds that his revisionism is not simply instrumental to defeating international law, it is part of the "structure" of academic debate. He states, "Revisionism, particularly the constant re-evaluation of the correctness of scholarly consensus, can only be healthy for the study of law." Yoo, Treaties, supra note 170, at 2258.
444. Id. at 330.
some as advanced, modern ideologies, were adopted by regimes that murdered millions.\textsuperscript{445}

Consequently, the appeal to formalist “neutral” values does not succeed in divesting the modern self-execution doctrine of its isolationist character. Therefore, the Supreme Court’s choice to avoid the self-execution issue because of a belief in the validity of this doctrine is, at its core, an isolationist choice inconsistent with the Court’s self-proclaimed new internationalism.\textsuperscript{446}

\section*{VI. CONCLUSION}

Internationalists and civil libertarians have widely praised Hamdi and Hamdan for creating a new era of rights, and at least one commentator has stated that the MCA, following Hamdan, “put the final nail in the coffin” of unbridled executive discretion.\textsuperscript{447} Yet reports of the demise of executive overreaching and American isolationism are greatly exaggerated. To this day, the Guantánamo detentions continue, and the United States remains a consistent subject of criticism from international actors, the press, and the public. A finding that the Geneva Conventions are self-executing, in addition to possibly affording real and effective relief to detainees who continue to be treated in inhumane ways, would truly set the United States on a path toward reversing the sad history of the last six years. It would permit the United States to step out of the dark era of Bricker, racism, and isolation into a new light of taking international law seriously. Holding the Geneva Conventions self-executing could demonstrate that the United States is a country of laws that can proudly occupy the position of a global defender of human rights.

Unfortunately, although the Supreme Court was well poised to take up the issue of treaty self-execution, it did not do so, evidencing an unfortunate

\textsuperscript{445} Id. at 326. Similarly Professor, John McGinnis is a critic of incorporation of international and foreign law into constitutional law on democracy grounds. Professor McGinnis accepts the argument, however, that a “justice-seeking view of the Constitution accepts many nondemocratic sources of law, like moral theory, or efficiency considerations.” John O. McGinnis, Foreign to Our Constitution, 100 NW. U. L. REV. 303, 317 (2006). The difference with treaty law, however, is that these other “nondemocratic” sources of law have redeeming value, whereas international law has none. He states, “The difficulty for international law is that nothing about its process of generation should lead us to believe that it should be used as a trumping factor over our own domestic processes, nor is there anything about international or indeed foreign law that should make us consider it intrinsically good.” \textit{Id.} at 317–18.

\textsuperscript{446} See generally Ginsburg, supra note 7 (discussing the changing Court).

\textsuperscript{447} Katyal, supra note 58, at 70.
internalization of treaty law fear created by lower court activism and conservative scholarship. This fear is neither justified by the Supreme Courts’ own history nor compelled by the structure of the Constitution. Because the modern self-execution doctrine, particularly the intent analysis, is essentially isolationist, the Court can only be truly internationalist when it finally puts an end to recent treaty law hostility. Consequently, now is not the time for civil libertarians and internationalists to be complacent. They must be vigilant in their advocacy of the rule of law and judicial review. If the Supreme Court is willing to once again exercise jurisdiction over cases like Hamdan, it may well have the opportunity to assess whether the procedures set forth in the MCA violate the Geneva Conventions. This time, the Court will not be able to avoid the issue of self-execution by relying on congressional intent. Thus, internationalists and civil libertarians yet have a role to play in urging the Supreme Court to be an international team player rather than a “lone ranger.”