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NORIEGA v. PASTRANA: THE SUPREME COURT TAKES A STEP BACK FROM THE TABLE

JASON E. ARMIGER*

Abstract: The Military Commissions Act of 2006 expressly removed the Geneva Conventions as a source of rights for any person litigating against the United States or its agents. For General Manuel Noriega, the Geneva Conventions provided him with his sole opportunity for relief from what is, in his opinion, a grave injustice; without it, he has no hope of returning to his home country any time in the near future. Thus, Noriega petitioned the Supreme Court and asked the Court to find this restriction to be an unconstitutional suspension of the writ of habeas corpus. To perform this analysis, the Supreme Court would have had to delve into territory previously unexplored and narrowly avoided. Ultimately, the Court declined to accept certiorari, over a strong objection by Justice Thomas, joined by Justice Scalia. This Comment argues that the Supreme Court has avoided the issue long enough, and should have settled the matter once and for all by accepting General Noriega's challenge.

INTRODUCTION

The U.S. Supreme Court's conspicuous involvement in several recent war on terror cases has led one commentator to note that "[w]hat the Supreme Court has done is carve itself a seat at the table."¹ The Court, in challenging both the executive and legislative branches, has asserted that when constitutional rights are threatened, it has a seat in the debate.² It would appear, though, that the Court has taken a step back from the table with their recent inaction in *Noriega v. Pastrana*.³

On January 25, 2010, the U.S. Supreme Court denied certiorari to a case that, in the words of Justice Thomas, "would provide much-needed guidance on . . . important issues with which the political branches and federal courts have struggled since we decided *Boumedi-*

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¹ BENJAMIN WITTES, LAW AND THE LONG WAR 15 (2008).

² *See id.* at 14–16.

³ *See* *Noriega v. Pastrana*, 130 S. Ct. 1002, 1002 (2010) (Thomas, J., dissenting).

ene.”⁴ A Supreme Court decision would “spare detainees and the Government years of unnecessary litigation,” and it is “incumbent upon [the Court] to provide . . . guidance . . . on these issues now.”⁵ *Noriega* presented the Court with the opportunity to decide the constitutionality of Section 5(a) of the Military Commissions Act of 2006 (MCA)—a provision which prevents petitioners like Manuel Noriega from invoking the Geneva Conventions in a civil suit against the United States.⁶ Noriega argued that this section of the MCA, which limits the substantive body of rights and relief available to a detained petitioner, is an unconstitutional suspension of habeas corpus in violation of Article I, § 9, cl. 2 of the United States Constitution because no judicial body is permitted to address his claim.⁷

Part I of this Comment provides a brief overview of the procedural history of General Noriega’s case, introduces the constitutional issue petitioned to the Supreme Court, and establishes the ongoing relevance of that issue. Part II discusses the texts of the federal statute in question, the Constitution, and the Geneva Conventions. The Part discusses how the issue presented by Noriega’s case is both unique and reoccurring, and introduces the competing points of view. In Part III, both sides of the issue are further extrapolated, and the significance and need for a Supreme Court decision is explained. Part III argues that while a decision may not have resolved every concern surrounding the constitutional question and the statute, it would nonetheless add a significant measure of clarity for future Congressional legislation and the decisions of the lower courts.

I. BACKGROUND

General Manuel Antonio Noriega, the leader of Panama from 1983 to 1989, was supported by several U.S. Administrations, and was a paid informant for U.S. intelligence agencies.⁸ He was a valuable asset for the U.S. government, until it became clear that he was working against U.S. drug enforcement efforts, and on February 4, 1988 a Federal grand jury in Miami indicted General Noriega for numerous con-

⁴ *Id.*

⁵ *Id.* at 1002–03.

⁶ *Id.*

⁷ See Brief for Petitioner at 2, *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (No. 09–35), 2009 WL 3052656, at *1–2.

⁸ STEVE ALBERT, *THE CASE AGAINST THE GENERAL* 1–2 (1993); CHRISTINA JACQUELINE JOHNS & P. WARD JOHNSON, *STATE CRIME, THE MEDIA, AND THE INVASION OF PANAMA* 14 (Steven A. Egger ed., 1994).

piracy and narcotics-related offenses.⁹ Throughout the next two years tensions increased between Panama and the United States, until the situation erupted after the death of an American marine.¹⁰ On December 20, 1989, President George Bush ordered the invasion of Panama to “safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal Treaty.”¹¹

After several days of armed conflict and standoff, General Manuel Noriega was captured by the U.S. military in Panama City.¹² He was transported to the United States where he awaited trial in the Southern District of Florida.¹³ In April 1992, Noriega was convicted of most of the charges,¹⁴ and in December the District Court, in a unique post-sentencing decision, designated Noriega a prisoner of war under Articles 2, 4, and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III).¹⁵ Several years later, the District Court revisited General Noriega’s case and ordered a reduction of his sentence from forty to thirty years,¹⁶ and set his release on parole for September 9, 2007.¹⁷

In the absence of further developments, it is likely that Noriega would have been extradited to Panama following his release from prison in accordance with Article 118 of Geneva III.¹⁸ On July 17, 2007, however, the United States filed a complaint for the extradition of No-

⁹ Lawrence Eagleburger, Deputy Sec’y of State, U. S. Dep’t of State, *The Case Against Panama’s Noriega* 1–2 (Aug. 31, 1989), in *CURRENT POLICY SERIES*, No. 1222, (Office of Public Communication, Editorial Division ed., Nov. 1989); ALBERT, *supra* note 8, at 34–35; JOHNS & JOHNSON, *supra* note 8, at 18.

¹⁰ ALBERT, *supra* note 8, at 73–74.

¹¹ *Id.* at 74–75.

¹² *See* *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1992); ALBERT, *supra* note 8, at 85–86.

¹³ *See Noriega*, 746 F. Supp. at 1510.

¹⁴ *See Noriega v. Pastrana*, 564 F.3d 1290, 1292 (11th Cir. 2009).

¹⁵ *United States v. Noriega*, 808 F. Supp. 791, 793–96 (S.D. Fla. 1992).

¹⁶ *United States v. Noriega*, 40 F. Supp. 2d 1378, 1380–81 (S.D. Fla. 1999). Judge Hoeverer reasoned that the “nature of the . . . confinement” and the “considerable disparity between the Defendant’s sentence and the sentences actually served by his co-conspirators” justified the reduction. *Id.* at 1380.

¹⁷ *Noriega*, 564 F.3d at 1293.

¹⁸ *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. If hostilities have ended, but the prisoner was convicted for an indictable offense, he may be detained until his punishment has been completed, as was the case for Noriega in the United States. *See id.* art. 119.

riega to France pursuant to the extradition treaty between the two nations.¹⁹

In response to his pending extradition, Noriega filed several petitions for writ of habeas corpus to the U.S. District Courts.²⁰ He did not contest the validity of the extradition treaty, but instead argued that Article 118 of Geneva III, a provision that has never before been interpreted by a U.S. court, requires the immediate release and repatriation of prisoners of war back to their home country.²¹ The District Court concluded that Geneva III did not bar General Noriega's extradition to France.²² Noriega appealed the court's decision to the Eleventh Circuit Court of Appeals, which held that Section 5(a) of the MCA expressly precludes Noriega from relying on the Geneva Convention as a source of rights.²³ Noriega's final hope to avoid extradition to France was extinguished on January 25, 2010 when his petition for a writ of certiorari to the United States Supreme Court was denied, with Justices Thomas and Scalia dissenting.²⁴ He was extradited to France on April 26, 2010,²⁵ where he was sentenced to seven years in French prison after a retrial by the 11th Chamber of the Tribunal Correctionnel de Paris found him guilty.²⁶

In his appeal to the Eleventh Circuit and his petition to the Supreme Court, Noriega argued that the Geneva Convention, as "supreme Law of the Land," had become such a fundamental body of substantive rights that reducing the availability of these rights was an unconstitutional suspension of habeas corpus.²⁷ Noriega may have been the last prisoner of war in United States custody, but he is unlikely to be the last to question the relationship between Section 5(a) and the Geneva Convention.²⁸ As the dissenters to the Court's denial of Noriega's petition observed, these questions apply to cases involving noncitizen

¹⁹ *Noriega*, 564 F.3d at 1293. While General Noriega was being held in the United States, France convicted him, *in absentia*, of laundering \$3 million in illicit funds for the Medellin drug cartel. David Jolly, *French Court Sentences Noriega to 7 Years*, N.Y. TIMES, July 7, 2010, at A12.

²⁰ *See Noriega*, 564 F.3d at 1294.

²¹ *See* Brief for Petitioner at 3–4, *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (No. 09–35), 2009 WL 2173303 at *4.

²² *Noriega*, 564 F.3d at 1294.

²³ *Id.* at 1297.

²⁴ *Noriega*, 130 S. Ct. at 1002.

²⁵ *See* Elisabeth Malkin, *Noriega Extradited to France to Face Charges*, N.Y. TIMES, Apr. 26, 2010, available at <http://www.nytimes.com/2010/04/27/world/americas/27noriega.html>.

²⁶ Jolly, *supra* note 19.

²⁷ U.S. CONST. art. VI, § 1, cl. 2.

²⁸ *See Noriega*, 130 S. Ct. at 1009 n.15.

detainees, the war in the Middle East, and “Guantanamo or other detainee litigation arising out of the conflict with Al Qaeda.”²⁹

II. DISCUSSION

In challenging his extradition to France, General Noriega filed a writ of habeas corpus in district court under 28 U.S.C. § 2241 which, in relevant part, provides that “[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”³⁰ This section confers jurisdiction of those courts over any person held “in custody in violation of the Constitution or laws or treaties of the United States.”³¹ Noriega based his claim for relief on Geneva III, to which the United States is a signatory, arguing that Article 118 required the immediate release and repatriation of prisoners of war after the cessation of hostilities.³² The relevant wording of Article 118 states that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”³³ Noriega argued that this requires his return to Panama and *prohibits* his extradition to France.³⁴ Using an arguably controversial mode of treaty interpretation, the Eleventh Circuit held that a plain reading of Article 118 invalidated his claim.³⁵ More significant, however, is the dictum³⁶ in the court’s holding that Section 5(a) of the MCA “precludes Noriega from invoking the Geneva Conventions as a source of rights” at all.³⁷ Section 5(a) of the MCA states that:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States . . . or other agent of the

²⁹ *Id.* at 1006, 1008.

³⁰ 28 U.S.C.A. § 2241(a) (West 2010); *Noriega v. Pastrana*, 564 F.3d 1290, 1297–99 (11th Cir. 2009).

³¹ 28 U.S.C.A. § 2241(a), (c) (3).

³² See Brief for Petitioner, *supra* note 21, at 3–4.

³³ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 18.

³⁴ Brief for Petitioner, *supra* note 21, at 9.

³⁵ *Noriega*, 564 F.3d at 1297–99. The Eleventh Circuit adopted an identical method of interpreting the treaty first performed by Judge Hoeveler of the District Court of the Southern District of Florida. Compare *id.* with *United States v. Noriega*, 694 F. Supp. 2d 1268, 1270–73 (S.D. Fla. 2007). Some analysis suggests that both courts may have gotten the interpretation wrong. See Matthew Reichstein, Note, *The Extradition of General Manuel Noriega: An Application of International Criminal and Humanitarian Law to Answer the Question, “If So, Where Should He Go?”*, 22 EMORY INT’L L. REV. 857, 875–77 (2008) (concluding Judge Hoeveler misinterpreted the treaty).

³⁶ See *Noriega*, 564 F.3d at 1297–98 (“assuming arguendo”) (dictum).

³⁷ *Id.* at 1292.

United States is a party as a source of rights in any court of the United States or its States or territories.³⁸

Noriega objected to this determination, asserting that if the MCA strips him of the ability to challenge his extradition, then Section 5(a) is an unconstitutional suspension of habeas corpus.³⁹ Article I, § 9, cl. 2 of the U.S. Constitution requires that “[t]he 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.”⁴⁰

Although treaties are considered to be the supreme law of the land, a statute which comes subsequent in time and conflicts with the intent of the treaty will override the treaty.⁴¹ This has become known as the “last-in-time rule.”⁴² This rule ordinarily would permit Section 5(a) to override the protections of the Geneva Conventions, were they in force at the time it was enacted.⁴³ It makes no difference if the treaty was self-executing or not; if it was in force, a statute may nullify it.⁴⁴ However, because Section 5(a) may be limiting the availability of habeas corpus in violation of constitutional guarantees, this is arguably more than a case of a statute merely overriding a treaty.⁴⁵ Noriega argued that by excluding the Geneva Conventions as a source of rights, this statute narrows the scope of 28 U.S.C. § 2241.⁴⁶ If the Supreme Court had accepted certiorari, it would have been the first time it considered whether limiting § 2241 implicates the Suspension Clause.⁴⁷

This is not the first time in recent history that the U.S. Supreme Court has been asked to decide the constitutionality of habeas-stripping claims under the MCA.⁴⁸ In *Boumediene v. Bush*, the Court held that Sec-

³⁸ Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w and other sections of Titles 10, 18, 28, and 42).

³⁹ See Brief for Petitioner, *supra* note 7, at 2.

⁴⁰ U.S. Const. art. I, § 9, cl. 2.

⁴¹ *Medellin v. Texas*, 552 U.S. 491, 509 n.5 (2007); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁴² Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 339 (2007).

⁴³ *Id.* at 339–40.

⁴⁴ *Medellin*, 552 U.S. at 509 n.5; see Bradley, *supra* note 42, at 339 (concluding that even if the Geneva Conventions were self-executing, it is his view that Congress had sufficiently precluded judicial enforcement).

⁴⁵ See Carlos Manuel Vázquez, *The Military Commissions Act, The Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73, 93–94 (2007).

⁴⁶ See *Noriega v. Pastrana*, 130 S. Ct. 1002, 1006 (2010).

⁴⁷ See *id.*

⁴⁸ See generally *Boumediene v. Bush*, 553 U.S. 723 (2008) (evaluating the constitutionality of MCA § 7).

tion 7 of the MCA, which prevented all federal district courts from considering habeas corpus claims by “enemy combatants” and failed to provide an adequate substitute for their claims, was an unconstitutional violation of the Suspension Clause.⁴⁹ The decision affirmed the constitutional guarantee that federal trial and appellate courts will hear claims of fundamental rights violations by noncitizen detainees.⁵⁰ The Court, however, declined to identify the specific substantive protections of habeas corpus; expressly avoiding the question of the “content of the law” embodying the protections of the writ.⁵¹

The “content of the law” embodying the protections of the writ has been notoriously difficult to identify.⁵² As a starting point, the Supreme Court has stated that the writ cannot have regressed, and “at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.”⁵³ In a subsequent case, the Court commented on the “possibility that the protections of the Suspension Clause have expanded” since then,⁵⁴ and has also held that “the Suspension Clause . . . refers to the writ as it exists today, rather than as it existed in 1789.”⁵⁵ It is clear that the writ is flexible and has expanded, at least to a small degree, since the Judiciary Act of 1789.⁵⁶ Although the force of the writ is derived from statute, its constitutional protections likely expand in a common-law fashion.⁵⁷ The Writ has grown jurisdictionally, procedurally, and substantively as our understanding of constitutional rights has evolved.⁵⁸ The “difficult and significant” task would be determining exactly to which degree it has expanded today.⁵⁹

Several recent cases have questioned—though none have articulated with precision—exactly what substantive protections are embod-

⁴⁹ *Id.* at 792.

⁵⁰ *Id.* at 732, 798.

⁵¹ *Id.* at 798.

⁵² *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001); see Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2037 (2007); Gerald R. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 (1998).

⁵³ *St. Cyr*, 533 U.S. at 301.

⁵⁴ *Boumediene*, 553 U.S. at 746.

⁵⁵ *Felker v. Tupin*, 518 U.S. 651, 664 (1996).

⁵⁶ See Fallon & Meltzer, *supra* note 52, at 2043–45, 2051, 2063.

⁵⁷ See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 687–694, 699–714 (2008).

⁵⁸ See *Rasul v. Bush*, 542 U.S. 466, 473–75 (2004) (expanding habeas corpus jurisdiction to detainees at Guantanamo Bay); *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 485–86 (1973) (relaxing limits on habeas corpus jurisdiction and preserving timely review); Fallon & Meltzer, *supra* note 52, at 2043.

⁵⁹ *St. Cyr*, 533 U.S. at 304.

ied in the writ of habeas corpus.⁶⁰ This has occurred most notably in the litigation arising out of the conflict in the Middle East, and occasionally in cases involving immigration.⁶¹

In *INS v. St. Cyr*, the Supreme Court declined to answer a question similar to the one Noriega presented: “[W]hether statutory effort to limit § 2241 implicates the Suspension Clause.”⁶² The respondent was a resident alien, facing deportation for a criminal conviction.⁶³ The Attorney General argued that a 1996 amendment to the Immigration and Nationality Act of 1952 removed his pre-existing discretion to waive deportation.⁶⁴ He also argued that the statute removed the jurisdiction of any court to use § 2241 to review deportation claims made by aliens in certain circumstances.⁶⁵ Had the Attorney General’s claims been true, the result would have been that no court would hear St. Cyr’s statutory claim, similar to the ultimate result of Noriega’s Geneva III claim.⁶⁶

In *St. Cyr*, the Supreme Court ruled that Congress neither intended to remove the habeas jurisdiction of the federal courts, nor to apply the statute retroactively, thus allowing St. Cyr to achieve his desired result.⁶⁷ With this holding, the Court narrowly avoided answering the “content of the law” question, which they admitted would be “difficult and significant.”⁶⁸ Justice Scalia, in his dissent, faced the question head on, pointing out that Congress “permanently altered [the writ’s] content.”⁶⁹ He continued by stating that, in his opinion, Congress can certainly act as it did, but the important question is “[w]hat habeas relief” is alterable?⁷⁰ He proposed two answers to the question: (1) Habeas relief is never alterable, and the Suspension Clause is a “one-way ratchet” that can only add rights and never subtract them; or (2) “the Suspension Clause guarantees the common-law right to habeas corpus, as it was understood when the Constitution was ratified.”⁷¹ The ques-

⁶⁰ See, e.g., *Boumediene*, 553 U.S. at 798; *St. Cyr*, 533 U.S. at 301 n.13.

⁶¹ See, e.g., *Boumediene*, 553 U.S. at 798; *St. Cyr*, 533 U.S. at 301 n.13.

⁶² *Noriega*, 130 S. Ct. at 1006–07; *St. Cyr*, 533 U.S. at 301 n.13.

⁶³ See *St. Cyr*, 533 U.S. at 293.

⁶⁴ *Id.* at 294–95.

⁶⁵ See *id.* at 327–29 (Scalia, J., dissenting).

⁶⁶ See *St. Cyr*, 533 U.S. at 297.

⁶⁷ *Id.* at 314, 326.

⁶⁸ *Id.* at 304.

⁶⁹ *St. Cyr*, 533 U.S. at 338 (Scalia, J., dissenting).

⁷⁰ *Id.* at 341.

⁷¹ *Id.* at 341–42. Justice Scalia remarks that the first result is absurd, and if the second were correct, then the common-law understanding of the Writ at the time of ratification “did not include the right to obtain discretionary release.” *Id.* at 342.

tion of what relief is alterable is what Justices Thomas and Scalia wanted to answer in *Noriega v. Pastrana*.⁷²

III. ANALYSIS

The denial of certiorari is significant because the Supreme Court has continued to leave two important questions unanswered: (1) To what extent can Congress restrict access to substantive rights once they have been made available under § 2241; and (2) if the Geneva Conventions are not protected by the Suspension Clause, then to what extent have they been restricted by the MCA? Answering these questions would have provided much-needed guidance for lower courts, the U.S. legislature, and for the international community in understanding U.S. application of the Conventions.⁷³

In considering the first question, it is possible that as understanding of the guarantees of the Constitution evolves over time, an understanding of the rights it protects evolves as well.⁷⁴ Most of these rights come from the Constitution, but some may also come from statutes and treaties, because all three of these sources of rights are “the supreme Law of the Land.”⁷⁵ As Justice Scalia mentioned in his dissent in *INS v. St. Cyr*, it is unlikely that every statute or treaty that could be relied on as a source of rights is un-retractable through future legislation.⁷⁶ It is plausible, however, that some sources of rights, in this case the Geneva Conventions, confer protections so important that limiting one’s access to the judiciary by removing the Convention’s protections is an unconstitutional suspension of access to the courts.⁷⁷

The Geneva Conventions have long been recognized as an important and indispensable source of rights in U.S. courts.⁷⁸ The United States signed the original 1864 Geneva Convention in 1882, and has remained a signatory since, currently as a member of the 1949 Geneva Conventions.⁷⁹ To date, over 190 sovereigns have ratified the Conven-

⁷² See *Noriega*, 130 S. Ct. at 1006–07.

⁷³ *Noriega v. Pastrana*, 130 S. Ct. 1002, 1006–07 (2010); see Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. & POL’Y REV. (Online) (Nov. 6, 2006), <http://hlpronline.com/2006/11/saying-what-the-law-is/>.

⁷⁴ See Fallon & Meltzer, *supra* note 52, at 2043.

⁷⁵ U.S. Const. art. VI, § 1, cl. 2.

⁷⁶ *INS v. St. Cyr*, 533 U.S. 289, 341–42 (11th Cir. 2001) (Scalia J., dissenting).

⁷⁷ See *Noriega*, 130 S. Ct. at 1006 (“Only we can determine if the Eleventh Circuit correctly rejected that argument.”).

⁷⁸ See *Hamdan v. Rumsfeld*, 548 U.S. 577, 633 (2006).

⁷⁹ Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 9 & n.38 (2002).

tions.⁸⁰ When the Report of the Senate Committee on Foreign Relations submitted the Geneva Conventions for Senate approval, it remarked that the Conventions “may rightly be regarded as a landmark in the struggle to obtain . . . humane treatment in accordance with the most approved international usage.”⁸¹ It also commented that “[t]he United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man,” thus “[a]pproval of these conventions . . . would be fully in conformity with this great tradition.”⁸² When the Constitution was drafted, neither the framers nor the world could have envisioned that a document as important in scope as the Geneva Conventions would have developed over time to protect the rights of soldiers, military personnel, prisoners of war, civilians, and many others involved in armed conflict throughout the world.⁸³ Philip Spoerri, Director of International Law for the International Committee of the Red Cross, writes that “[t]he real value of the Conventions lies not alone in the good they help to achieve, but . . . in the yet greater evil they have helped to prevent. . . . [W]ithout the rules contained in the Conventions the situation would be far worse.”⁸⁴

Recent Supreme Court cases, especially those involving the conflict in the Middle East, frequently reference the Geneva Conventions as an indispensable source of rights for litigants, and a check on executive power.⁸⁵ Decided prior to the enactment of Section 5(a), *Hamdan v. Rumsfeld* expressly determined that the Geneva Conventions are very relevant to determining the types of protections guaranteed to enemy combatants captured abroad.⁸⁶ The Court found that the Conventions required that Hamdan be “tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensi-

⁸⁰ Philip Spoerri, Director of International Law, ICRC, The Geneva Conventions of 1949: Origins and Current Significance (Aug. 12, 2009) (transcript available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-120809>).

⁸¹ *Geneva Conventions for the Protection of War Victims, Report of the Comm. on Foreign Relations*, 84th Cong., 1st Sess, Exec. Rept. No.9, at 32 (1955).

⁸² *Id.*

⁸³ See Jakob Kellenberger, President of the ICRC, Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Aug. 12, 2009) (transcript available at <http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm>).

⁸⁴ Spoerri, *supra* note 80.

⁸⁵ *Hamdan*, 548 U.S. at 633; *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004).

⁸⁶ *Hamdan*, 548 U.S. at 629–35; see also Jason W. Hobbes, Note, *To Boldly Go Where No Signatory Has Gone Before: How the Military Commissions Act of 2006 Has Rewritten the United States’ Obligations Under the Geneva Conventions*, 26 PENN ST. INT’L L. REV. 489, 495–96 (2007) (“This decision affirmed the relevance of . . . the Geneva Conventions.”).

ble by civilized peoples.”⁸⁷ In *Hamdi v. Rumsfeld*, the Supreme Court similarly found the Geneva Conventions, specifically Article 118 of Geneva III, very relevant to its analysis of whether or not the executive was permitted to detain the petitioner for an indefinite or perpetual period of time.⁸⁸ The Court noted that Geneva III reflected a “clearly established principle of the law of war.”⁸⁹ A violation thereof was “apparently at odds” with the government’s own military regulations, and the “authority” they claimed to be “acting in accordance with.”⁹⁰

It is also plausible that if the Supreme Court had taken the case, it would have ruled that a narrowing of § 2241 to preclude claims based on the Geneva Conventions is *not* an unconstitutional suspension of the writ of habeas corpus.⁹¹ Justice Scalia made a persuasive argument in his dissent in *St. Cyr* that the Constitution only mandates protection of the writ as understood in 1789.⁹² If this were the case, the Geneva Conventions would most certainly be excluded from the protection of the Suspension Clause.⁹³ It is also unclear whether the Geneva Conventions are self-executing.⁹⁴ If they require additional legislation to be implemented domestically, the argument that they should be guaranteed as a source of rights would be weakened.⁹⁵ While Noriega argues that Section 5(a) acts as a complete repudiation of the treaty, others see the MCA as consistently upholding the treaty internationally, but refraining from implementing it fully domestically.⁹⁶

Clarification on this issue would have provided the political branches and the courts with “much-needed guidance” on the question of whether or not petitioners like Noriega are permitted to bring habeas suits based on provisions of the Geneva Conventions.⁹⁷ Both the judiciary and the legislature appear uncertain as to the extent Section 5(a) has affected claims involving the Geneva Conventions.⁹⁸ In some federal cases, for instance *Al-Bihani v. Obama*, the court has held that Section 5(a) “explicitly precludes detainees from claiming the Geneva

⁸⁷ *Hamdan*, 548 U.S. at 630, 631–32 (quoting Geneva III art. 3).

⁸⁸ *Hamdi*, 542 U.S. at 520–21.

⁸⁹ *Id.* at 520.

⁹⁰ *Id.* at 550–51.

⁹¹ See *St. Cyr*, 533 U.S. at 342–44.

⁹² See *id.*

⁹³ See *id.* at 342.

⁹⁴ See *Noriega*, 130 S. Ct. at 1004; Reichstein, *supra* note 35, at 878–79.

⁹⁵ See Reichstein, *supra* note 35, at 878–79.

⁹⁶ Brief for Petitioner, *supra* note 21, at 3–4; see Bradley, *supra* note 42.

⁹⁷ *Noriega*, 130 S. Ct. at 1002.

⁹⁸ See *id.* at 1007–08.

Conventions . . . as a source of rights.”⁹⁹ In other decisions, such as *Al Rabiah v. United States*, the court granted habeas corpus review while consulting the Geneva Conventions in its analysis of the issue.¹⁰⁰ These conflicting interpretations over the exact relationship between the MCA and the Conventions will only propagate confusion in the lower courts.¹⁰¹ Authors of a Congressional Research Service report regarding pending legislation have commented that “[t]he Supreme Court decision in *Boumediene* . . . leaves open a number of Constitutional questions regarding the scope of the Writ of Habeas Corpus and options open to Congress. . . . Accordingly, it remains unclear whether statutory enhancements of *habeas* review can ever be rolled back without implicating the Suspension Clause.”¹⁰²

Answering the question of whether Section 5(a) implicates the Suspension Clause would be a significant step toward clarifying the issue plaguing the courts and the legislature. Even if the Court found that Section 5(a) was constitutional, however, unresolved questions regarding the extent of its application would remain.¹⁰³ The statute could mean that a litigant does not have a right of access to federal courts if his only claim is based on the Geneva Conventions.¹⁰⁴ Nevertheless, if he has multiple claims, it might be possible that a final decision could reference the Conventions in the holding.¹⁰⁵ Another interpretation of that statute could be that the Conventions can *never* be referenced or used in *any* federal decision involving the United States or its agents.¹⁰⁶ The court in *Al Rabiah* may have taken the former view, finding that Section 5(a) does not prohibit the judiciary from referencing the Conventions as one of many sources of rights guaranteed to the petitioner.¹⁰⁷ These issues will remain unclear until the Supreme Court takes the first step and addresses the Suspension Clause argument.

⁹⁹ *Al-Bihani v. Obama*, 590 F.3d 866, 875 (D.C. Cir. 2010); *see also* *Noriega v. Pastrana*, 564 F.3d 1290, 1291 (11th Cir. 2009).

¹⁰⁰ *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 33, 39, 42 (D.D.C. 2009). It is unclear as to the extent the court relied upon the Conventions in its decision to grant habeas review of the case. *See id.*

¹⁰¹ *See Noriega*, 130 S. Ct. at 1007–08.

¹⁰² JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33180, ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 42–43 (2010).

¹⁰³ Pearlstein, *supra* note 73.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See Al Rabiah*, 658 F. Supp. 2d at 39, 42.

CONCLUSION

The Supreme Court had an opportunity with *Noriega v. Pastrana* to make significant progress toward resolving confusion in the lower courts and in Congress over the constitutionality of MCA Section 5(a). When Congress removed the Geneva Conventions as a source of rights for litigants in suits against the United States in the 2006 MCA, it removed a substantive body of rights that had been available to petitioners since 1882. Even though the Geneva Conventions were not part of U.S. law in 1789, the Supreme Court has recognized the potential for expanding the writ's protections beyond its initial scope. The Court has never directly addressed whether the writ has expanded in this way, and if so, how far its coverage extends. Though resolving this issue is unlikely to end all of the confusion over the application of Section 5(a), it would nonetheless provide a tremendous amount of clarification. For these reasons, the Supreme Court should have accepted certiorari in *Noriega*.

