Why *Klein* (Still) Matters: Congressional Deception and the War on Terrorism

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No one seriously claims that the Supreme Court's 1872 decision in *United States* v. *Klein*[1] is a model of clarity.[2] Justice Field's opinion for the Court is as enigmatic as it is intriguing,[3] providing the only pre-2008 example of a Supreme Court decision invalidating an Act of Congress for unconstitutionally depriving the federal courts of jurisdiction.[4] The million-dollar question, of course, is *why* the Court so ruled, and no amount of scholarship, no matter the quality of the analysis or the intellectual abilities of the author, has managed to settle the issue to any meaningful degree. Indeed, even when the *Klein* "rule" has been deployed by contemporary jurists as a basis for invalidating federal legislation,[5] such efforts have,

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1. 80 U.S. (13 Wall.) 128 (1872).

2. As Barry Friedman put it, "*Klein* is sufficiently impenetrable that calling it opaque is a compliment." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 34 (2002); *see also* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States *v*. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1195 ("As with the object of most cults, the *Klein* opinion combines the clear with the delphic.").

3. For terrific discussions of *Klein* that may nevertheless prove the point, see, for example, Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437 (2006); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); Young, *supra* note 2. For the full background on *Klein*, see Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority To Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

4. *See Klein*, 80 U.S. (13 Wall.) at 146 ("[T]he denial of jurisdiction to this court . . . is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."); *see also* Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Suspension Clause applies to non-citizens detained at Guantánamo, and that the jurisdiction-stripping provision of the Military Commissions Act of 2006 violates the Clause as applied to those detainees).

5. *See, e.g.*, Schiavo *ex rel*. Schindler v. Schiavo, 404 F.3d 1270, 1271-1276 (11th Cir. 2005) (Birch, J., specially concurring in denial of rehearing en banc) (arguing that the Terri Schiavo bill, Pub. L. No. 109-3, 119 Stat. 15 (2005), violated the separation of powers under *Klein* to the extent that it overrode various preclusion doctrines).

charitably, failed to persuade.[6] Thus, although virtually all observers agree that *Klein* bars Congress from commanding the courts to rule for a particular party in a pending case, the question remains whether it stands for any broader constraint on legislative power.

Professor Howard Wasserman's response to this state of doctrinal, academic, and juridical indeterminacy is to suggest that it conclusively establishes *Klein*'s *in*significance, and that *Klein*'s importance to the modern Federal Courts canon is really a "myth," born out of a "false belief that *Klein* establishes vigorous judicially enforceable constitutional limitations on Congress."[7] To be sure, Wasserman does not believe *Klein* to be devoid of force; rather, he concludes that "[m]ost blatantly *Klein*-violative laws are never enacted; *Klein*-vulnerable laws that have been enacted raise no meaningful or serious *Klein* problems and should survive any separation of powers challenge."[8]

Instead, Wasserman sees *Klein* as a product of "constitutional pathology" – a period (in *Klein*'s case, Reconstruction) during which unusual stress is placed on traditional constitutional values, promoting judicial decisions that might over-enforce structural commitments as compared to the desirable status quo during "normal" times.[9] And although Wasserman views the war on terrorism as another potential period of such pathology,[10] he nevertheless concludes that the "*Klein*-vulnerable" provisions of the Military Commissions Act of 2006 (MCA)[11] and the FISA Amendments Act of 2008 (FAA)[12] are but further proof of his point—measures that *seem* to be irreconcilable with *Klein*, and yet must still clearly fall within Congress's well-established powers. In Wasserman's view, the conclusion that these provisions don't actually violate *Klein* only reinforces his thesis that *Klein*'s proverbial bark is far worse than its bite.[13]

In his response to Professor Wasserman, Lou Fisher suggests that Wasserman chose low-hanging fruit in considering whether the MCA and

6. *See, e.g.*, Evan Caminker, *Schiavo and Klein*, 22 CONST. COMMENT. 529 (2005); Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553 (2006).

7. Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. NAT'L SECURITY L. & POL'Y 211, 214 (2011) [hereinafter Wasserman, *Constitutional Pathology*]. Wasserman's fuller critique of *Klein* is set out in Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53 (2010) [hereinafter Wasserman, *Irrepressible Myth*].

8. Wasserman, *Constitutional Pathology*, *supra* note 7, at 214-215.

9. *See id*. at 215.

10. *See id*. at 216.

11. Pub. L. No. 109-366, 120 Stat 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

12. Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

13. *See also* Caminker, *supra* note 6, at 529 (suggesting that, if the Schiavo bill "doesn't violate *Klein* by impermissibly dictating to the federal courts a rule of decision, then *Klein* must be virtually impossible to violate").

the FAA violate *Klein*.[14] In Fisher's view, one can hardly conclude that *Klein*'s significance is a myth simply because two recent statutes *don't* violate the rule for which the 140-year-old decision stands.[15]

I agree with Fisher as a general matter that *Klein* remains far more vital and significant than Professor Wasserman would have it, but my own view is that the separation of powers principles underlying *Klein* have not been fully appreciated, and this distorts analysis of "*Klein*-vulnerable" statutes. Instead, I agree with the reading of *Klein* offered most pointedly by Martin Redish and Christopher Pudelski in a 2006 essay in the *Northwestern University Law Review* – as standing for the principle "that the judiciary has the constitutional power and obligation to assure that Congress has not deceived the electorate as to the manner in which its legislation actually alters the preexisting legal, political, social, or economic topography."[16] As Redish and Pudelski explain, *Klein* is in reality a rare application of a far broader constitutional principle, *i.e.*, "the fear that Congress will undermine the sound operation of the representative democratic process by enlisting the judiciary in a plan to deceive the electorate."[17] Indeed, in his famous *Dialectic*, Professor Henry Hart put it even more succinctly: "the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it."[18] Thus,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its deception, the harmful consequences to that judicial integrity are far more significant.[19]

According to Redish and Pudelski, Congress might contravene this principle through either "micro" or "macro" deception. "Micro" deception "leaves the generalized substantive law intact, but legislatively directs that a

14. *See* Louis Fisher, United States v. Klein*: Judging Its Clarity and Application*, 5 J. NAT'L SECURITY L. & POL'Y 237 (2011).

15. *See id*. at 248-249.

16. Redish & Pudelski, *supra* note 3, at 438-439.

17. *Id*. at 451.

18. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953).

19. Redish & Pudelski, *supra* note 3, at 462-463.

particular litigation (or group of litigations) arising under that law be resolved in a manner inconsistent with the dictates of that pre-existing generalized law."[20] In contrast, "macro" deception "leaves substantive law unchanged on its face, but alters it in a generally applicable manner by enacting procedural or evidentiary modifications that have the effect of transforming the essence – or what can appropriately be described as the 'DNA' – of that law."[21]

Thus, in *Klein* itself, the defect was not merely the legislative command in the Act of July 12, 1870, that the Supreme Court "shall dismiss" certain cases.[22] Rather, the defect, at least according to Redish and Pudelski, was in how Congress manipulated the Abandoned and Captured Property Act of 1863 without actually *amending* it. As initially enacted, the 1863 statute created a remedy for individuals who had "never given any aid or comfort to the present rebellion," and whose property had been abandoned or captured during the war, to recover proceeds from the sale of such property.[23] In *United States v. Padelford*, the Supreme Court held that a presidential pardon was admissible as proof that the claimant did not give aid to the rebels.[24] What Congress did in the July 12 statute was to overrule *Padelford* without overruling it – "to transform the law from saying that issuance of a pardon allows the individual to recover property ('disloyalty' *before* the statute challenged in *Klein*) to one saying that issuance of a pardon conclusively prevents such property recovery ('disloyalty' *after* the challenged statute)."[25] In so providing, Congress didn't just "dramatically alter[] the political impact of that law," but it enlisted the courts in enforcing that alteration.[26] Put another way, rather than rewriting for itself what constituted loyalty under the 1863 statute, Congress effected the same result by co-opting the judicial process to dismiss cases by those Congress believed to be disloyal.

If one accepts Redish and Pudelski's conceptualization of *Klein* (as I do),[27] then the real question for Wasserman should be whether one can find comparable examples of such legislative "deception" in Congress's efforts

20. *Id*. at 439.

21. *Id*. (footnote omitted); *see also id.* ("In the former situation, the legislature has altered the reach of the substantive law in specific applications; in the latter, it has sought to alter preexisting controlling law generally but has done so through the use of indirect procedural or evidentiary manipulation. In both situations, the legislature has purported to leave controlling law unchanged but in reality has manipulated the application of that law, either in specified instances or more generally.").

22. Act of July 12, 1870, ch. 251, §1, 16 Stat. 230, 235.

23. Abandoned and Captured Property Act of 1863, ch. 120, §3, 12 Stat. 820, 820.

24. 76 U.S. (9 Wall.) 531 (1870).

25. Redish & Pudelski, *supra* note 3, at 461.

26. *See id.*

27. To be sure, there are counterarguments to Redish and Pudelski's reading of *Klein*. But I leave to the authors (and the interested reader) the defense of their position. *See id*. at 457-461.

thus far in the war on terrorism. To be sure, Congress's approach to most major questions of counterterrorism policy over the past decade has been to avoid providing substantive answers on the merits, and to instead vest most major policy responsibility in the executive branch – either directly, as in the case of the FISA Amendments Act of 2008, or indirectly, as in the case of the MCA – which, like the Detainee Treatment Act of 2005 (DTA)[28] before it, purported to cut the courts out of the Guantánamo habeas litigation.

Thus, Wasserman is quite correct that the past decade may itself represent a period of constitutional pathology at least superficially analogous to that which marked the era in which *Klein* was decided. But it is one that has been marked by congressional fecklessness, in marked contrast to the legislative activism at the expense of the other branches of the federal government that dominated Reconstruction and precipitated *Klein* and a host of other canonical Supreme Court decisions. Reasonable people may well disagree about the appropriateness of such legislative indolence in the post-September 11 context or even with regard to specific episodes, but as Part I concludes, this particular kind of congressional maneuvering may in fact exert unique pressure on the *Klein* principle, because it attempts to achieve substantive policy results through the manipulation of external processes rather than through direct enactments – arguably reflecting the very deception that Redish and Pudelski see *Klein* as forbidding.[29]

In light of this context, I turn in Part II to one of Wasserman's two examples, the Military Commissions Act of 2006. In particular, Part II suggests that, against this backdrop, at least some of the MCA appears far more "*Klein*-vulnerable" than Wasserman appreciates. As just one example, *Klein* when properly understood calls into serious question section 5 of the MCA, which provides 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 a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."[30] Wasserman suggests that section 5 merely "unexecutes" the Geneva Conventions,[31] having the same effect as a later-enacted statute that supersedes an earlier-ratified treaty. As Part II

28. Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739-46 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

29. *See, e.g.*, Redish & Pudelski, *supra* note 3, at 438-439 (arguing that *Klein* stands for the proposition "that the judiciary has the constitutional power and obligation to assure that Congress has not deceived the electorate as to the manner in which its legislation actually alters the preexisting legal, political, social, or economic topography").

30. MCA §5(a), 120 Stat. at 2631.

31. *See* Wasserman, *Constitutional Pathology*, *supra* note 7, at 230.

concludes, though, even if Congress *can* "unexecute" the Geneva Conventions, there is compelling evidence that the MCA did *not* mean to so provide.[32] Instead, Section 5 leaves the Geneva Conventions intact, and simply renders them unenforceable in civil litigation against the United States or its officers. But so long as the Geneva Conventions remain the law of the land through the plain language of the Supremacy Clause, Section 5 has the same effect as a law that purported to bar the courts from considering particular sources in interpreting federal law – and runs into the same separation-of-powers hurdle, *i.e.*, *Klein*.

I. CONGRESS AND THE WAR ON TERRORISM

At least thus far, Congress's track record in the major policy debates arising out of the war on terrorism has been uneven, at best. By far, the most significant legislative enactment over the past decade came one week after the September 11 attacks, when Congress passed the Authorization for Use of Military Force (AUMF), which, in sweeping language, empowered the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[33]

Six weeks later, Congress enacted the USA PATRIOT Act, which included a series of controversial revisions to immigration, surveillance, and other law enforcement authorities.[34] But it would be over four years before Congress would again pass a key counterterrorism initiative, enacting the Detainee Treatment Act of 2005 (DTA)[35] after – and largely in response to – the Supreme Court's grant of certiorari in *Hamdan* v. *Rumsfeld*.[36] In the five years since, Congress had enacted a handful of additional antiterrorism measures, including the Military Commissions Act (MCA) of 2006,[37] as amended in 2009,[38] the Protect America Act of 2007,[39]

32. For example, the very next section of the MCA amends the War Crimes Act, which imposes criminal liability for certain violations *of* the Geneva Conventions. *See* MCA §6, 120 Stat. at 2632-35 (codified at 18 U.S.C. §2441).

33. Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. §1541 note).

34. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 18, 22, 28, 31, 47, and 50 U.S.C.).

35. Pub. L. No. 109-148, div. X, 119 Stat. 2680, 2739-44 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

36. *See* 546 U.S. 1002 (2005) (mem.).

37. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of

and the 2008 amendments[40] to the Foreign Intelligence Surveillance Act of 1978, known in shorthand as the FAA.[41] And yet, although Congress has spoken in these statutes both to the substantive authority for military commissions and to the scope of the government's wiretapping and other surveillance powers, it has otherwise left some of the central debates in the war on terrorism completely unaddressed.[42] Thus, Congress has not revisited the scope of the AUMF since September 18, 2001, even as substantial questions have been raised about whether the conflict has extended beyond that which Congress could reasonably be said to have authorized a decade ago.[43] Nor has Congress intervened, despite repeated requests that it do so, to provide substantive, procedural, or evidentiary rules in the habeas litigation arising out of the military detention of non-citizen terrorism suspects at Guantánamo.[44]

As significantly, at the same time as Congress has left some of these key questions unanswered, it has also attempted to keep courts from answering them. Thus, the DTA and the MCA purported to divest the federal courts of jurisdiction over habeas petitions brought by individuals detained at Guantánamo and elsewhere.[45] Moreover, the 2006 MCA precluded any lawsuit seeking collaterally to attack the proceedings of military commissions,[46] along with "any other action against the United

10, 18, 28, and 42 U.S.C.).

38. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574-614 (codified in scattered sections of 10 U.S.C.)

39. Pub. L. No. 110-55, 121 Stat. 552 (codified as amended in scattered sections of 50 U.S.C.).

40. Pub. L. No. 110-261, 122 Stat. 2468 (codified in scattered sections of 18 and 50 U.S.C.).

41. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.).

42. *See, e.g.*, Editorial, *Congress Awakens*, WASH. POST, June 18, 2005, at A18; Editorial, *A New Approach*, WASH. POST, Nov. 30, 2003, at B6 ("One of the great problems with the legal response to 9/11 has been Congress's unwillingness to do its job and write law. . . . By inaction, it has left the resolution of such issues to a dialogue between the executive branch and the courts, one based on laws and precedents that simply are inadequate for an untraditional conflict against a shadowy, non-state enemy."); *see also* Editorial, *The Moussaoui Law*, WASH. POST, Aug. 4, 2003, at A14 ("Congress has sat on the sidelines far too long as important decisions were made concerning the legal response to 9/11.").

43. *See, e.g.*, John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, WASH. POST, Nov. 26, 2010, at A21.

44. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (arguing that congressional action is necessary to provide clearer guidance to courts concerning how they should handle Guantánamo detainee cases after and in light of *Boumediene*).

45. *See* 28 U.S.C. §2241(e)(1) (2006).

46. *See* 10 U.S.C. §950j(b) (2006) ("Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other

States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[47] And although the Supreme Court in *Boumediene* invalidated the habeas-stripping provision as applied to the Guantánamo detainees,[48] the same language has been upheld as applied elsewhere,[49] and the more general non-habeas jurisdiction-stripping section has been repeatedly enforced by the federal courts in other cases.[50]

Such legislative efforts to forestall judicial resolution of the merits can also be found in the telecom immunity provisions of the FAA,[51] which provided that telecom companies could not be held liable for violations of the Telecommunications Act committed in conjunction with certain governmental surveillance programs.[52] Thus, in addition to changing the underlying substantive law going forward, the FAA pretermitted a series of then-pending lawsuits against the telecom companies.[53]

Analogously, Congress has attempted to assert itself in the debate over civilian trials versus military commissions by barring the use of appropriated funds to try individuals held at Guantánamo in civilian courts,[54] and by also barring the President from using such funds to transfer detainees into the United States for continuing detention or to other countries, as well.[55] Rather than enact specific policies governing criteria for detention, treatment, and trial, Congress's *modus operandi* throughout the past decade has been to effectuate policy indirectly by barring (or attempting to bar) other governmental actors from exercising their core authority, be it judicial review or executive discretion.

habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter."). This provision was omitted from the MCA of 2009, and was thereby deleted.

47. 28 U.S.C. §2241(e)(2) (2006).

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

49. Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

50. *See, e.g.*, *In re* Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay, 700 F. Supp. 2d 119 (D.D.C. 2010); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103 (D.D.C. 2010).

51. Pub. L. No. 110-261, 122 Stat. 2468 (codified in scattered sections of 18 and 50 U.S.C.).

52. *See, e.g.*, 50 U.S.C. §1885a.

53. *See In re* Nat'l Sec. Agency Telecommunications Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009).

54. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§1032-1034, 124 Stat. 4137, 4351-4354.

55. *See id.*

Wasserman views these developments as a period of what Professor Blasi described as "constitutional pathology," typified by "an unusually serious challenge to one or more of the central norms of the constitutional regime." Nevertheless, part of how Wasserman defends the "*Klein*-vulnerable" provisions of the MCA and FAA is by concluding that the specific substantive results they effectuate *can* be achieved by Congress, and so *Klein* does not stand in the way. But if Redish and Pudelski's reading of *Klein* is correct, then the fact that Congress *could* reach the same substantive results through other means is not dispositive of the validity of these measures. To the contrary, the question is whether any of these initiatives were impermissibly "deceptive," such that Congress sought to "vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate."[56]

II. *KLEIN*, THE MCA, AND THE SEPARATION OF POWERS

If the question is whether Congress has deceptively granted jurisdiction to the courts, we can quickly dispatch with any *Klein*-based challenges to most of Congress's post-September 11 counterterrorism efforts. Whatever else may be said about the jurisdiction-stripping provisions of the DTA and MCA, or of the telecom immunity provisions of the FAA, it cannot be gainsaid that Congress's goal in each of these cases was to foreclose judicial review, rather than enlist the courts in indirectly working a substantive change in laws that Congress otherwise left untouched. Such legislation may well raise *other* constitutional questions, but *Klein* simply isn't offended by them. Complaints that Congress hasn't legislated *enough* also fail – it can hardly violate the *Klein* principle for Congress to do nothing.

Instead, the real focus of any post-September 11 *Klein* discussion must be the 2006 MCA, and Wasserman rightly seizes on several of its most "*Klein*-vulnerable" provisions. Excluding from the discussion numerous provisions in which Congress purported to state what the *effect* of particular laws is,[57] consider the following four sections:

1. Section 3(a)(1), codified at 10 U.S.C. §948b(e): "The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or

56. Redish & Pudelski, *supra* note 3, at 462.

57. Consider, for example, 10 U.S.C. §950p(b): "Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."

> considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter."

2. Section 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 as a source of rights."

3. Section 5(a): "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 a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."

4. Section 6(a)(2): "No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of [18 U.S.C. §]2441."

At first blush, it bears noting that all four provisions relate to what courts (that otherwise presumably have jurisdiction) may *not* do. Two of the provisions effectively bar courts from looking to the Geneva Conventions as a "source of rights"; the other two directly bar courts from relying on particular sources in interpreting federal law (be they the military commission proceedings themselves, or "foreign or international sources").

In explaining why these provisions don't run afoul of *Klein*, Wasserman focuses on the notion that they all deal with subconstitutional law, and are therefore open to legislative modification. In his words, "*Klein* does not limit congressional authority over statutory meaning, including controlling the sources that courts use in deciding statutory meaning. Unlike with the Constitution, Congress has the power to define how courts understand and interpret congressional enactments, including defining permissible analytical rules, sources, methods, and techniques."[58] But the question that Redish and Pudelski would ask is not *whether* Congress could change the underlying substantive law, but whether Congress is in fact doing so through legislative deception.

By that logic, these four provisions may well present much closer cases under *Klein*. Consider §948b(e), which, while it was in effect, would have

58. Wasserman, *Constitutional Pathology*, *supra* note 7, at 232-233.

prevented courts-martial from relying on judgments or legal interpretations reached by military commissions and, presumably, appellate courts reviewing those commissions, including the Court of Military Commission Review, D.C. Circuit, as well as perhaps even the Supreme Court. To similar effect, Section 6(a)(2) prevents courts from relying on foreign or international sources in determining whether particular acts are violations of Common Article 3 of the Geneva Conventions subject to prosecution under the War Crimes Act. Both are emblematic of the "micro" deception that Redish and Pudelski identified – where Congress "leaves the generalized substantive law intact, but legislatively directs that a particular litigation (or group of litigations) arising under that law be resolved in a manner inconsistent with the dictates of that pre-existing generalized law."[59]

To be sure, Congress could have purported to define with particularity the offenses punishable under the War Crimes Act. But that would have required a substantive policy decision to either embrace or depart from prevailing international understandings of Common Article 3. In contrast, Section 6(a)(2) accomplishes the latter result, but only by co-opting the courts, and without *any* meaningful legislative accountability. That, according to Redish and Pudelski, is what *Klein* forbids. Indeed, such analysis may explain Justice Scalia's widely reported remark that "No one is more opposed to using foreign law than I am, but I'm darned if I think it's up to Congress to direct the Supreme Court how to make its decisions."[60]

As for the provisions purporting to bar invocation of the Geneva Conventions as a "source of rights," these embody the "macro" deception to which Redish and Pudelski referred, for they "leave[] substantive law unchanged on its face, but alter[] it in a generally applicable manner by enacting procedural or evidentiary modifications that have the effect of transforming the essence – or what can appropriately be described as the 'DNA – of that law."[61] Again, Congress could have accomplished such a result directly by "un-executing" the Geneva Conventions. But (1) the Supreme Court has required a clear statement from Congress for such a maneuver;[62] and (2) in any event, the rest of the MCA – section 6, in particular – provides powerful countervailing evidence to the effect that the Geneva Conventions are still the law of the land.

59. Redish & Pudelski, *supra* note 3, at 439.

60. *See* David G. Savage, *Scalia to Congress: Butt Out of Court's Use of Foreign Law*, L.A. TIMES, May 19, 2006, at 9.

61. *Id*. (footnote omitted).

62. *See, e.g*., Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("There is . . . a firm and obviously sound canon of construction against finding an implicit repeal of a treaty in ambiguous congressional action.").

To be sure, courts might still find ways to interpret the two anti-Geneva provisions so as to avoid the constitutional questions they might otherwise raise. But that is precisely the point: one of those questions is whether they run afoul of *Klein*.[63] And if Redish and Pudelski's view of *Klein* is correct, then it is at least a *colorable* argument that these provisions offend the separation of powers.[64]

Ultimately, as Redish and Pudelski explained in 2006, "The key theoretical insight that may be gleaned from *Klein* is that the judiciary . . . provides the only effective means of assuring that the democratic process operates in the manner necessary to the attainment of the normative goals that underlie the nation's chosen form of representative government. It does so by policing the legislative process to eliminate both micro and macro legislative deception."[65] To be sure, such deception should be a rarity, as we should both hope and expect. Nevertheless, we must be most on guard for such deception during periods of "constitutional pathology," for it is then that Congress is likely to feel the strongest impulse to alter the status quo.

And, in any event, there is a world of difference between rarities and myths.

63. Indeed, Section 5 may also raise Suspension Clause concerns, at least to the extent that it bars a detainee from pursuing an otherwise viable claim that his detention is unlawful. *See* Noriega v. Pastrana, 130 S. Ct. 1002, 1002-1010 (2010) (Thomas, J., dissenting from the denial of certiorari); *see also* Brief of Federal Courts and International Law Professors as *Amici Curiae* in Support of Petitioners (Geneva Enforceability), Boumediene v. Bush, 553 U.S. 723 (2008).

64. To be sure, some of our most important constitutional rules are only typically invoked in this manner – as justifying reading a statute so as not to implicate the (seldom-addressed) rule. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").

65. Redish & Pudelski, *supra* note 3, at 440.