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The War on Terror, Constitutional Pathology, and United States v. Klein

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Abstract

In *The Irrepressible Myth of Klein* (UNIVERSITY OF CINCINNATI LAW REVIEW, 2010), I discuss the meaning, scope, and continued relevance of the Supreme Court's historic decision in *United States v. Klein* (1871), arguing that *Klein* is not the judicially powerful a precedent many believe it to be. In this follow-up essay, I apply the insights of my analysis and exposure of *Klein*'s myths to two major pieces of legislation enacted as part of the ongoing War on Terror: The FISA Amendments Act of 2008 (granting retroactive immunity to telecommunications companies involved in warrantless surveillance) and the Military Commissions Act of 2006 (dealing with various issues surrounding the treatment and prosecution of terrorism detainees). I conclude that both laws largely survive constitutional scrutiny under *Klein*, thus illustrating the lack of doctrinal vigor and power--the myth--of *Klein* as constitutional precedent.

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The War on Terror, Constitutional Pathology, and United States v. Klein

Introduction

Many labels have attached to *United States v. Klein*,¹ the venerable Reconstruction-Era Supreme Court decision that established some undefined limits on congressional control over federal law and federal courts. It has been called “opaque,” “deeply puzzling,” “disjointed,” “Delphic,” “generally difficult to follow,” “exaggerated,” and “dead wrong.”² As Barry Friedman said, “calling *Klein* opaque is a compliment.”³ *Klein* is a case of substantial significance, although no one really knows how or why.⁴ Nevertheless, it has achieved a cult-like following among academics, advocates, and some judges.⁵

In a recent article, I attached a new label to *Klein*—myth,⁶ in the sense of a fiction or false proposition.⁷ Actually, *Klein* is two myths. The first is the myth of opacity—the false belief that *Klein* is inscrutable, opaque, or meaninglessly indeterminate. In fact, a close reading of *Klein* and its progeny is possible and reveals a number of clear principles. But this leads inevitably to the second, more fundamental myth of vigor—the false belief that *Klein* establishes a vigorous judicially enforceable constitutional limitation on Congress. The clear principles we can identify are unexceptional, limited in scope, and of limited practical effect. Most blatantly *Klein*-violative laws never are enacted; *Klein*-vulnerable laws that have been enacted in fact raise no meaningful or serious *Klein* problems and would and should survive any separation of powers challenge.⁸ Indeed, it is significant that *Klein* never has been used to invalidate any law other than the law at issue in *Klein* itself.

I also argued that this is an appropriate time to consider and deconstruct the myth(s) of *Klein*, because the case is more judicially relevant than at any point in its 140-year history.⁹ In the past decade, Congress

¹ 80 U.S. (13 Wall.) 128 (1872).

² See William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1074 (1999); Frederic M. Bloom, *Unconstitutional Courses*, 83 WASH. U. L.Q. 1679, 1718 (2005) [hereinafter Bloom, *Unconstitutional Courses*]; Edward A. Hartnett, *Congress Clears its Throat*, 22 CONST. COMMENT. 553, 572 (2005); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 34 (2002) (“*Klein* is sufficiently impenetrable that calling it opaque is a compliment”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998) (“Much that it said in the opinion is exaggerated if not dead wrong . . .”); Lawrence G. Sager, *Klein’s First Principle*, 86 GEO. L.J. 2525, 2525 (1998) (arguing that, while not exactly Fermat’s Last Theorem, *Klein* is “deeply puzzling”); Gordon G. Young, *Congressional Regulations of Federal Courts’ Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1190, 1193, 1195 (describing opinion as “confusing” and criticizing “excessively broad and ambiguous statements” in majority opinion); *id.* at 1212 (labeling opinion “disjointed, ambiguous, and generally difficult to follow”).

³ Friedman, *supra* note ___, at 34.

⁴ *Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 437 (2006).

⁵ See Young, *supra* note ___, at 1195.

⁶ See Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. ___ (2010).

⁷ Todd Pettys argues that myth actually has two meanings in law. First, and most commonly, a myth is a fiction, a proposition or idea that is untrue or inaccurate. Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 992-93 (2009). But myth also describes a story or belief that, although false in some (or all) respects, nevertheless is accepted and celebrated in the legal community because it “encapsulate[s] a community’s perceptions of its origins, its identity, or its commitments, and thereby advance[s] the lives of its members.” *Id.* at 993. In the earlier article, I argued that both meanings were in play in any discussion of *Klein*. See Wasserman, *supra* note ___, at ___. My focus in this paper is largely on the first meaning.

⁸ Wasserman, *supra* note ___, at ___.

⁹ *Id.* at ___.

has introduced, considered, and in several cases enacted what we might call *Klein*-vulnerable legislation on a range of subjects.¹⁰

This follow-up paper explores the *Klein*-derived issues in two major pieces of national-security legislation aimed at protecting the United States from terrorism. The first is § 802 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, which granted retroactive immunity from civil liability to telecommunications providers for assisting the federal government with arguably unconstitutional warrantless domestic surveillance between late 2001 and early 2007.¹¹ The second is the Military Commissions Act of 2006, which in several provisions creates adjudicative mechanisms for dealing with terror suspects and simultaneously limits the scope and manner of judicial involvement in cases involving terror suspects.¹² I evaluate both laws in light of the identifiable principles and ideas running through *Klein* and its progeny, concluding that both largely survive constitutional scrutiny under *Klein*'s separation of powers principles. This conclusion illustrates the myth of *Klein* as vigorous, judicially enforceable precedent.

Part II outlines the understanding of *Klein* and its progeny that I discuss and develop in detail in the first paper—the three identifiable principles of *Klein* and their ultimate lack of vigor, *Klein*'s particular historical background and origins, and the problematic tendency to conflate policy preferences with constitutionality that drives many *Klein* arguments. This is an overview; I treat these issues in detail in the companion piece.¹³ Part III then analyzes two pieces of War on Terror Legislation, showing that both largely survive scrutiny under *Klein* and its principles of separation of powers; the scattered portions of the MCA that may be questionable under *Klein* are relatively insignificant. The unavailability of this doctrine to stop these laws helps demonstrate the ultimate powerlessness—the myth—of *United States v. Klein*.

I. *United States v. Klein*: An Overview

Klein famously arose out of policy debates over the handling of postbellum actions by Southerners in the United States Court of Claims to recover proceeds on real and personal property confiscated by Union agents (pursuant to congressional authorization) during the Civil War. Of particular concern were claims by those owners who had participated in the rebellion or given aide and comfort to the Confederacy but

¹⁰ See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 100-92, 119 Stat. 2095 (2005); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395-96 (2d Cir. 2008); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (as passed in the House of Representatives); An Act for the Relief of Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 25 (2005); Constitution Restoration Act of 2005, S.520, 109th Cong., § 201 (2005) (as introduced in the Senate) (prohibiting federal courts from considering foreign and international law in interpreting U.S. Constitution).

¹¹ Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, § 802, 110th Cong. (2008), codified at 50 U.S.C. § 1885a; *In re Nat'l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 956-57 (N.D. Cal. 2009); *infra* Part VI.A

¹² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 109th Cong. (2006); *infra* Part VI.B

¹³ See generally Wasserman, *supra* note ____.

received and accepted a presidential pardon in accordance with several acts of Congress.¹⁴ One such claim was brought by Klein, as executor of the estate of Victor Wilson, whose cotton had been seized and sold following the Union victory at Vicksburg.¹⁵ In February 1864, Wilson took the required oath and accepted the pardon.¹⁶ The Court of Claims held that Klein was entitled to recover proceeds; the pardon removed the consequences of any actual disloyalty; Wilson (through Klein) was legally (if not factually) loyal and thus entitled to recover proceeds on the confiscated property.¹⁷ While the government’s appeal to the Supreme Court was pending, Congress, with the obvious goal of undoing the Court of Claims decision in *Klein*, changed the legal rules governing pardons and recovery of property. An 1870 proviso established that a pardon was not admissible as evidence against the United States in the Court of Claims to show a claimant had been loyal-in-law (and thus entitled to proceeds on confiscated property); acceptance of a pardon without contesting the statement of wrongdoing was to be taken and deemed conclusive evidence that the claimant did give aid and comfort and thus was guilty of disloyalty and not entitled to recover proceeds.¹⁸

On appeal in *Klein*, the Supreme Court invalidated the proviso, citing two distinct defects. First, Congress had impermissibly “prescribed a rule for the decision of a cause in a particular way.”¹⁹ This was problematic in allowing the government, as party to the case, to decide the case in its favor, and in allowing Congress to prescribe rules of decision to the judiciary in cases pending before it.²⁰ The second, seemingly separate basis for invalidating the proviso was that it limited the effect of a presidential pardon, thus infringing on the Executive’s constitutional power; moreover, it did so by compelling the courts to act as instruments in that infringement by dictating to the courts to treat the pardon as null and void and without legal effect.²¹

My argument, presented in detail in the earlier article,²² is that *Klein*, or what we think and believe about *Klein*, is a myth—commonly understood as a fiction, a false idea or premise.²³ I identify and fully develop three keys to understanding *Klein*. I summarize those here.

A. Three Principles of Klein

Despite the well-deserved criticisms of the disjointed and often dead-wrong majority opinion, a close reading of *Klein* and its modern progeny is possible and reveals four clear, determinate principles, two of

¹⁴ See *Klein*, 80 U.S. at 130-31, 138-42; Amanda L. Tyler, *The Story of Klein: The Scope of Congress’ Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES 88-90 (Vicki C. Jackson and Judith Resnik, eds. 2009); Young, *supra* note ___, at 1197-98.

¹⁵ *Klein*, 80 U.S. at 132; Tyler, *supra* note ___, at 91-93; Young, *supra* note 1192, 1198-99.

¹⁶ *Klein*, 80 U.S. at 132; Tyler, *supra* note ___, at 91-92; Young, *supra* note ___, at 1199.

¹⁷ *Klein*, 80 U.S. at 132; Tyler, *supra* note ___, at 93; Young, *supra* note ___, at 1199.

¹⁸ *Klein*, 80 U.S. at 133-34, 143-44; Young, *supra* note ___, at 1207-08; Wasserman, *supra* note ___, at ___.

¹⁹ *Klein*, 80 U.S. at 146.

²⁰ *Id.*

²¹ *Id.* at 147; see also William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1075 (1999) (arguing that proviso made courts into Congress’ “constitutional puppet”).

²² See generally Wasserman, *supra* note ___.

²³ See Pettys, *supra* note ___, at 992-93; see *supra* note ___.

which are relevant to the current discussion. Unfortunately, these principles are unexceptional and routine, fairly limited in scope, and unlikely to have much practical effect.

1) Congress cannot dictate litigation outcomes

Congress cannot use its legislative power to predetermine specific findings or outcomes in specific litigation. Although *Klein* held that Congress had impermissibly prescribed rules of decision for the courts in causes pending, that statement could not literally be true, since Congress prescribes rules of decision whenever it enacts substantive law that controls primary conduct and establishes the legal rules that courts apply to resolve disputes under that substantive law. Recognizing this, beginning with its decision in *Robertson v. Seattle Audubon Society*,²⁴ the Supreme Court and the lower federal courts have recognized that Congress necessarily remains free to prescribe new rules of decision by amending substantive law so as to create new legal circumstances to which a set of facts can be applied.²⁵ Congress merely must change the controlling legal landscape “in some detectable way.”²⁶

Thus, Congress cannot command courts how to resolve particular factual and legal issues in a case (“In *X v. Y* pending in the Southern District of Florida, the court shall find that the statute of limitations has run”). And it cannot dictate who should prevail in a given case under existing law (“In *X v. Y* pending in the Southern District of Florida, *Y* shall prevail”). Otherwise, Congress does not impermissibly dictate outcomes under *Klein* so long as the law merely identifies the relevant legal and factual issues that control the outcome and the consequences of particular legal and factual conclusions. Courts must be left a role in resolving the particular litigation; courts must retain the power to exercise their independent best judgment to find facts, to apply the legal standard to those facts, and to decide whether the congressionally dictated rule of decision (new or old) has been satisfied and which party should prevail.²⁷

2) Congress cannot dictate constitutional meaning

Larry Sager has been the strongest proponent of this as “*Klein*’s First Principle:”

The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community. The judiciary will not permit its particular authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees.²⁸

²⁴ 503 U.S. 429 (1992).

²⁵ See *Robertson*, 503 U.S. at 438, 440-41; Araiza, *supra* note ____, at 1075 & n.97; Hartnett, *supra* note ____, at 578; Tyler, *supra* note ____, at 106.

²⁶ See *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569-70 (9th Cir. 1993).

²⁷ Wasserman, *supra* note ____, at ____.

²⁸ Sager, *supra* note ____, at 2529.

The Constitution is violated by a statute that “will implicate the judiciary in misrepresentation of matters of constitutional substance.”²⁹ Daniel Meltzer describes the principle as prohibiting Congress from compelling federal courts to speak a “constitutional untruth.”³⁰

Unfortunately, the principle as stated may be of relatively limited application. Congress does not often enact statutes redefining or reinterpreting the Constitution or telling courts what the Constitution means. To be sure, this principle clearly was violated in *Klein* itself—the 1870 proviso stripped an uncontested presidential pardon of any effect and dictated that point to the courts. But it is difficult to find other examples of Congress telling courts “The First Amendment shall mean X” or “The Equal Protection Clause is violated by Y”.

One example might be recent threatened-but-never-enacted legislation prohibiting federal courts from using foreign or international law in interpreting and applying the Constitution.³¹ Such a prohibition operates one step removed from Sager’s core principle—rather than dictate the appropriate constitutional standard, Congress dictates the legal sources and ideas that courts use in identifying, defining, elaborating on, and applying the appropriate constitutional standard. But the effect is the same. By limiting the sources to which courts might turn in elucidating constitutional ideas and meaning—sources to which judges might be inclined to turn if left to their best independent constitutional judgment—Congress limits the range of judicial constitutional understanding that courts will adopt. It compels courts to understand the Constitution in a way different than the judge might were she able to draw on all sources of authority that she, in her independent judgment, deems appropriate. And she must announce that different understanding as a constitutional rule.³²

Note, however, that this produces a gap between constitutional rules and sub-constitutional rules. The no-untruths principle limits congressional power to define for courts the meaning and interpretation of constitutional provisions; it prohibits congressional efforts to limit the Court’s interpretive authority on matters of “constitutional substance.”³³ Congress cannot tell courts what the pardon power means or what the Free Exercise Clause means and Congress cannot dictate the appropriate standard of review, method of analysis, or sources of authority.

²⁹ *Id.*; see Bloom, *Unconstitutional Courses*, *supra* note ___, at 1721-72; Tyler, *supra* note ___, at 109.

³⁰ Meltzer, *supra* note ___, at 2545; see Araiza, *supra* note ___, at 1075 (arguing that *Klein* prohibits Congress from turning courts into its “constitutional puppet”); Bloom, *supra* note ___, at 1721-22 (arguing that *Klein* means courts should not be forced to reach or validate incorrect or unconstitutional outcomes).

³¹ See, e.g., Constitution Restoration Act of 2005, S.520, 109th Cong., § 201 (2005) (as introduced in the Senate). The proposal was motivated by several decisions in which the Court looked to principles of international law and the law of other nations in defining constitutional meaning. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (death penalty for juveniles); *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (criminalization of same-sex sodomy); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to foreign nations views of executing mentally handicapped).

³² Wasserman, *supra* note ___, at ___.

³³ Sager, *supra* note ___, at 2533.

Congress, however, remains master of the meaning (within the parameters of internal and external constraints on its prescriptive jurisdiction) of statutes and statutory legal rules.³⁴ As I argue in detail in the first piece, there is no such thing as Congress compelling a court to speak a “statutory untruth”—no such thing as limiting or controlling judicial interpretive authority or independent judgment on matters of statutory substance and meaning. The “truth” of the statutory rule, and what the court always is bound to wield its independent judgment to find, is whatever Congress deems the rule to be. Courts alone wield power to apply a legal rule (as written and interpreted by any and all possible interpreters) to a particular set of facts and circumstances to resolve a specific dispute between specific parties. Congress has free reign (within constitutional bounds) to define those sub-constitutional legal rules and their truth.³⁵ Congress can define and dictate to courts everything about statutory meaning, how a statute should be understood, and how it should be applied in reaching decisions—including definitions of terms,³⁶ legal standards, interpretive instructions, interpretive and constructive rules, permissible sources of legislative history and interpretive guidance, and even interpretive methodology.³⁷ Congress could, for example, prevent courts from looking to foreign and international law as guides in interpreting and understanding a statutory rule. The point is that courts in statutory cases are bound to respect Congress’ lawmaking supremacy, however Congress chooses to exercise and express that authority.³⁸

What Congress cannot dictate is the application of those sub-constitutional legal rules to those particular facts or the outcome of a particular case on those facts; that must remain within the court’s independent judgment. But this collapses the no-untruths principle into the no-dictating outcomes principle. Congress can control the meaning of sub-constitutional rules, so long as the application of those rules in a given case remains the court’s domain.

B. Constitutionalizing Policy Preferences

Second, *Klein* arguments ultimately reduce to a visceral sense that Congress overstepped its bounds. The contours of *Klein*-centered cases often are quite similar.³⁹ Congress appears to have attempted to control the rules governing an issue, likely with the hope of achieving particular outcomes, including in identified pending cases. These laws seek to affect or control the judicial function, threatening the vaunted, if undefined, judicial independence and rule of law.⁴⁰ Congress appears to be manipulating the

³⁴ **Brudney, supra note** ___, at (m. 33-34); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Existent Rights*, 56 U. KAN. L. REV. 227, 243, 270 (2008); Widiss, *supra* note ___, at 518; *see* W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 115 (1991), (Stevens, J., dissenting) (“In the domain of statutory interpretation, Congress is the master.”), *superseded by statute*, 42 U.S.C. § 1988.

³⁵ Wasserman, *supra* note ___, at ___.

³⁶ Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2127 (2002).

³⁷ *Id.* at 2108, 2140, 2152; *see* Elhauge, *supra* note ___, at 2040-41 (“[T]he legislature can also try to reestablish the supremacy of democratic choice by enacting statutes that specify statutory default rules that maximize political satisfaction.”).

³⁸ **Brudney, supra note** ___, at (m.23).

³⁹ *See* Wasserman, *supra* note ___, at ___.

⁴⁰ *See* Caminker, *supra* note ___, at 542 (grounding strong *Klein* principle in need to “generate sufficient norms of independence and, frankly, essentiality, to safeguard long-term fidelity to the rule of law”); *but see* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 979 (2003) (arguing for narrow understanding to keep *Klein* from “turning it into a Frankenstein of judicial independence”).

rules to achieve certain outcomes in identifiable pending or anticipated cases. The laws are presumed to disadvantage plaintiffs, particularly plaintiffs seeking to vindicate rights against government or against big business. They are strange-looking laws, politically distasteful to many commentators and advocates.

With its broad language, apparent indeterminacy, purportedly empty core, and historical perception as a separation-of-powers, judicial-independence trump card, *Klein* takes on an all-things-to-all-people quality.⁴¹ It becomes an ideal vehicle for constitutionalizing those ordinary policy preferences against certain laws. The twin myths of opacity and vigor together cause commentators and advocates to identify and assert constitutional defects far more frequently than *Klein*'s principles (properly and narrowly understood) would otherwise suggest. To many, any strange-looking, judiciary-affecting law must violate the Constitution and should be invalidated under *Klein*.

But morphing political distaste into unconstitutionality blurs a central distinction between the unwise and the unconstitutional, confusing “what the Constitution authorizes” with “sound constitutional statesmanship.”⁴² We must take care to recognize that laws (proposed or enacted) may be unwise, but *Klein* is not so broad or powerful as precedent to render merely unwise laws constitutionally defective. *Klein* places narrow constitutional limits on Congress; it says nothing about what Congress should do with its power, within those limits. *Klein* (or *Klein*-derived arguments) should not and cannot be wielded as a talisman to convert normative policy objections into constitutional defects.

C. The Pathology of Klein

Finally, *Klein* is a product of its unique and tumultuous time—the Reconstruction Era from 1869-71 that produced the controversy over claims by pardoned disloyal Southern property owners and congressional efforts to defeat those claims.⁴³ The Thirteenth and (especially) Fourteenth Amendments were being considered or had just been enacted and their effect on congressional power and on federal-state balance remained unclear.⁴⁴ Tension between the Republican-dominated Congress and Democratic President Andrew Johnson (who had left office a few months before the Court of Claims awarded proceeds to Wilson's Estate) began as early as 1867 and bubbled over into Johnson's 1868 impeachment and near-removal from office.⁴⁵ And a series of Supreme Court decisions, of which *Klein* was but one example, had rejected, narrowed, or otherwise interfered with the Republicans' Reconstruction agenda, angering the legislative majority.⁴⁶

⁴¹ Wasserman, *supra* note ___, at ___; Young, *supra* note ___, at 1195.

⁴² *Id.* at 898.

⁴³ See *supra* notes ___ and accompanying text.

⁴⁴ See ACKERMAN, VOL. 2, *supra* note ___, at 100-19; 122-24; FONER, *supra* note ___, at 257-58; Edwards, *supra* note ___, at 327-28.

⁴⁵ See ACKERMAN, VOL. 2, *supra* note ___, at 18-20; FONER, *supra* note ___, at 333-35; Edwards, *supra* note ___, at 329-30. For example, Congress had statutorily removed the invitation/authorization for presidential pardon (to the extent it could do so) in confiscated-property cases to prevent Johnson from exercising that power. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141-42 (1872); Tyler, *supra* note ___, at 90.

⁴⁶ See ACKERMAN, VOL. 1, *supra* note ___, at 101; FONER, *supra* note ___, at 529; Edwards, *supra* note ___, at 335; see also, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872); *Padelford v. United States*, 76 U.S. (9 Wall.) 531 (1870).

Vincent Blasi labels such a period one of constitutional pathology, a period reflecting “an unusually serious challenge to one or more of the central norms of the constitutional regime.”⁴⁷ Pathological periods are marked by a “sense of urgency stemming from societal disorientation if not panic.”⁴⁸ Their defining feature is “a shift in basic attitudes, among certain influential actors if not the public at large,” about central constitutional commitments.⁴⁹ That panic affects structural features and arrangements, such as formal and informal separation of powers and checks and balances, causing them to “exert much less of a restraining influence” on the political branches and the public.⁵⁰

Constitutionalism and constitutional judicial review, Blasi argues, is designed to handle and enable the system to survive pathological periods. Constitutionalism “derives from a view regarding the various objectives that are served by constraining representative institutions by means of the device of constitutional limitations.”⁵¹ It depends “on the existence of a considerable measure of continuity and stability regarding the most basic structural arrangements and value commitments of the constitutional regime.”⁵² Blasi’s theory is that constitutional rules and rigorous constitutional judicial review must be reserved for extreme cases challenging pathological laws and actions—the “worst of times” in which other structural barriers have broken down and only the courts and the Constitution remain as a bulwark against overreaching officials and citizens.⁵³

The *Klein* Court thus did precisely what Blasi’s constitutionalism expects the judiciary to do with a pathological law enacted in pathological times. Faced with a law that likely was enacted only because of “the reduced effectiveness of traditional checks” on the political branches, the Court invalidated it, recognizing the need for rigorous judicial action in those worst times of “increased urgency.”⁵⁴ The Court responded strongly to the unique period and circumstances of Reconstruction and the sense that Congress was manipulating the law in a time of uniquely sharp three-way inter-branch conflict to achieve its desired result.⁵⁵

III. *Klein* and the Global War on Terror

With the underpinnings of *Klein* and its modern progeny in mind, we turn to its modern application. In particular, Blasi’s pathological perspective is important to understanding *Klein*’s continued vitality (or lack of vitality) because we arguably find ourselves in a new pathological period, triggered by the terrorist attacks of September 11 and the subsequent Global War on Terror. The period has been defined by two

⁴⁷ Blasi, *supra* note ____, at 459; *id.* at 456 (“In pathological periods, at least some of the central norms of the constitutional regime are indeed scrutinized and challenged.”).

⁴⁸ Blasi, *supra* note ____, at 468.

⁴⁹ *Id.* at 467.

⁵⁰ *Id.* at 467-68.

⁵¹ *Id.* at 453.

⁵² *Id.*

⁵³ Blasi, *supra* note ____, at 468; *id.* at 453.

⁵⁴ *Id.* Of course, it arguably was for one of the rare times in history. See generally Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 THE REV. OF POLITICS 369, 378-79, 383-86 (1992).

⁵⁵ See Bloom, *Unconstitutional Courses*, *supra* note ____, at 1720 (“*Klein* may now seem almost trifling, a relic of zealous postbellum politicking.”).

foreign wars, ongoing efforts against terrorism, and a host of controversial domestic and foreign measures by the federal government, especially the executive, on matters related to terrorism and national security.

Our current historical period exemplifies Blasi's conception of a period of "unusually serious challenge to one or more of the central norms of the constitutional regime."⁵⁶ We have seen a significant shock to, and arguably a breakdown of, structural and individual-rights features of the constitutional and political system.⁵⁷ President George W. Bush claimed for the executive broad powers to act in the interest of national security, often to the exclusion of Congress and the courts.⁵⁸ There has been a renewed three-way dance among the branches vying to assert power for themselves and to limit or eliminate the power of the other branches, particularly the courts.⁵⁹ At issue in all of this was the nation's and government's fundamental approach to an existential crisis and the balance between security and individual liberty.

This dynamic is remarkably similar to the one during Reconstruction that produced the 1870 proviso and *Klein*. If there is a pathological historical period likely to produce genuinely *Klein*-violative legislation, this is it. And if *Klein* is ever to exert meaningful judicial doctrinal force, it is precisely in these worst of times that it would.

Yet exploring two major pieces of War on Terror/national security legislation demonstrates that *Klein* has little to say even in our current constitutional pathology. Significantly, both statutes largely survive challenge under any relevant *Klein*-derived principles, again demonstrating the narrowness and weakness of *Klein* as constitutional doctrine. One global explanation could be differences in the relationship between Congress and the President. In both pieces of War-on-Terror legislation, Congress supported and sought to bolster the asserted presidential power, rather than undermining it, as did the 1870 proviso. The conflict pitted a unified legislature and executive against the courts.

The better explanation is that *Klein* simply lacks significant judicial force. Whether the threat comes from Congress, the executive, or both in combination, even in pathological times, *Klein* does not undo any significant action by the political branches.

A. Telecommunications Immunity and the Foreign Intelligence Surveillance Act Amendments Act

⁵⁶ Blasi, *supra* note ___, at 459.

⁵⁷ See, e.g., GOLDSMITH, *supra* note ___, at 114-15; LICHTBLAU, *supra* note ___, at 4, 137-39; MAYER, *supra* note ___, at 52; Schwartz, *supra* note ___, at 412-13; *In re Nat'l Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D.Cal. 2009); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (rejecting limitations on habeas corpus for enemy combatants); *Padilla v. Yoo*, C. 08-35, 2009 WL 1651273, *4 (N.D. Cal. 2009) (permitting claim by detainee against government lawyer who promulgated detention and interrogation policies leading to alleged constitutional violations).

⁵⁸ GOLDSMITH, *supra* note ___, at 124; LICHTBLAU, *supra* note ___, at 7-9; MAYER, *supra* note ___, at 49-51; Schwartz, *supra* note ___, at 423-26; see also GOLDSMITH, *supra* note ___, at 123 (describing Bush Administration's "go-it-alone route").

⁵⁹ See GOLDSMITH, *supra* note ___, at 123, 205-07 (discussing consequences of Bush Administration's decision to pursue anti-terrorism policies unilaterally); compare *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that presidentially established military commissions for terror suspects violate federal law) with Military Commissions Act of 2006, Pub. L. No. 109-366, 109th Cong. (2006); see Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1839 (2009) [hereinafter Paulsen, *Constitutional Power*] (arguing that Congress repudiated the Court's understanding and reinstated the executive view); *id.* at 1847; see also *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (arguing that President must consult with Congress, absent an emergency); Paulsen, *Constitutional Power, supra*, at 1835; cf. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

Sometime after the 9/11 attacks, the Bush Administration established a secret intelligence-gathering program involving wiretapping overseas calls to and from U.S. residents, without a warrant and outside procedures established in the Foreign Intelligence Surveillance Act (FISA) of 1978.⁶⁰ All but one major telecommunications company (Qwest) assisted the NSA with the program; the companies allowed the government to install surveillance equipment in their calling stations, agreed to route overseas calls through domestic switching stations, and helped the NSA pore through the vast communications flowing between the United States and certain countries in the Middle East.⁶¹ *The New York Times* broke the story of the program in late 2005, after sitting on it for approximately a year.⁶² President Bush quickly acknowledged the existence of the program and defended it as necessary for national security and preventing a repeat of 9/11.⁶³

Lawsuits followed against the NSA and various government agencies and officials, as well as against the telecom companies.⁶⁴ The claims against the telecoms alleged that they had conspired with the government to operate a surveillance program that violated the Fourth Amendment prohibition on unreasonable searches and seizures and the First Amendment freedom of speech, as well as various federal statutory provisions.⁶⁵

While defending the domestic surveillance program, President Bush and administration officials also argued that warrant requirements and FISA procedures were outdated and ill-suited to the threats of modern terrorism and that the wiretap program was necessary to prevent new terrorist attacks.⁶⁶ The administration sought to codify (and legalize) the program already pursued and generally to broaden executive surveillance powers.⁶⁷ As part of the codification, the Administration sought retroactive immunity from liability for the telecoms for their role in assisting the NSA with the (arguably unlawful-at-the-time) program.⁶⁸ The final measure, the FISA Amendments Act of 2008,⁶⁹ included a retroactive immunity provision,⁷⁰ along with legislative history showing that Congress specifically targeted the then-pending lawsuits against the telecoms.⁷¹

The law was sharply criticized as capitulation by the Democratic congressional majority to an unpopular and politically weak President Bush.⁷² Debate over the legislation in spring and summer 2008

⁶⁰ LICHTBLAU, *supra* note ___, at 9; Schwartz, *supra* note ___, at 412.

⁶¹ LICHTBLAU, *supra* note ___, at 149-50, 153-54.

⁶² *In re National Security Agency Telecommunications Records Litig.*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009); LICHTBLAU, *supra* note ___, at 193-94, 209-11, 212-13; Schwartz, *supra* note ___, at 413.

⁶³ LICHTBLAU, *supra* note ___, at 212-13; Schwartz, *supra* note ___, at 412-13.

⁶⁴ *See Telecommunications Records Litig.*, 633 F. Supp. 2d at 955; Schwartz, *supra* note ___, at 413.

⁶⁵ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955.

⁶⁶ LICHTBLAU, *supra* note ___, at 308.

⁶⁷ *Id.* at 307-08; Schwartz, *supra* note ___, at 414-15.

⁶⁸ Schwartz, *supra* note ___, at 417.

⁶⁹ Pub. L. No. 110-261, 122 Stat. 2436 (2008).

⁷⁰ *Id.* § 802, codified at 50 U.S.C. § 1885a; *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note ___, at 417.

⁷¹ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 959.

⁷² Schwartz, *supra* note ___, at 426; cf. Julian Sanchez, *Fear, Frenzy, and FISA*, REASON ONLINE, Aug. 7, 2007, at <http://www.reason.com/news/show/121797.html>.

took on electoral dimensions, as well. Then-Senator Barack Obama, at the time the presumptive Democratic presidential nominee, voted for the bill with the immunity provision; he argued that, although he disagreed with the immunity grant and might seek to rescind it if elected, the full legislation was necessary, even if flawed.⁷³ Liberal activists criticized Obama for failing to stand up against the immunity provision.⁷⁴

Section 802 prohibits civil actions in federal or state court against the telecoms arising from their providing “assistance to an element of the intelligence community.”⁷⁵ Any civil action filed or pending at the time of enactment must be dismissed if the United States Attorney General certifies to the court that the defendant telecom provider acted in connection with a presidentially authorized surveillance program in place between September 11, 2001 and January 17, 2007⁷⁶ designed to prevent or protect against a terrorist attack on the United States, and that the defendant provider acted on a written guarantee from the Attorney General or head of a portion of the intelligence community that the surveillance had been authorized by the President and had been determined by the President to be lawful.⁷⁷ Courts must give effect to the AG certification (meaning the case must be dismissed) unless it finds the certification not supported by “substantial evidence” provided to the court.⁷⁸ Orders granting or denying motions to dismiss or for summary judgment under § 802 are deemed final and immediately appealable.⁷⁹ In June 2009, the district court handling all the telecom lawsuits through Multi-District Litigation⁸⁰ upheld § 802 against a variety of constitutional arguments, including *Klein*, and dismissed the constitutional claims against the telecoms.⁸¹

The primary *Klein* objection (and the one made to the district court) is that § 802 dictates findings and litigation outcomes and cannot be saved as an amendment to substantive law⁸² because it did not truly amend substantive law. If the Attorney General were to decline to present the certification to the court, the argument goes, the telecom defendants’ conduct would remain unlawful under the Fourth Amendment. Thus, it only becomes lawful when the AG certification commands the court to deem it lawful.

⁷³ Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, http://www.nytimes.com/2008/07/10/washington/10fisa.html?_r=1.

⁷⁴ Michael Falcone, *Blogtalk: Obama’s FISA Vote*, N.Y. Times: The Caucus, July 9, 2008, <http://thecaucus.blogs.nytimes.com/2008/07/09/blogtalk-obamas-fisa-vote/>; Chris Cillizza, *Wag the Blog: FISA Problems for Obama?*, THE FIX: WASHINGTON POST, July 1, 2008, at <http://voices.washingtonpost.com/thefix/wag-the-blog/wag-the-blog-fisa-problems-for.html>.

⁷⁵ 50 U.S.C. § 1885a(a).

⁷⁶ The temporal limitation is significant to the conclusion that Congress targeted pending litigation. The covered period begins at the event that triggered President Bush’s original authorization of the surveillance program and request to the telecoms for assistance and ends when Congress initially, if temporarily, codified and ratified the Administrations’ program. See Schwartz, *supra* note ____, at 417.

⁷⁷ 50 U.S.C. § 1885a(a)(4).

⁷⁸ *Id.* § 1885a(b).

⁷⁹ *Id.* § 1885a(f).

⁸⁰ 28 U.S.C. § 1407.

⁸¹ See *Telecommunications Records Litig.*, 633 F. Supp. 2d at 955. The case is pending in the Ninth Circuit as of this writing.

⁸² See *supra* notes ____, and accompanying text.

It is true that Section 802 is unusual in form and operation. Congress did not attempt to alter the claim-creating substantive law, which still arguably prohibits or makes actionable defendants' underlying conduct. Instead, Congress established a statutory immunity from liability, an affirmative defense that the government and the telecoms could interpose to bar liability notwithstanding the claim-creating law, although it is on the government to raise the defense.⁸³

For *Klein* purposes, however, it should be immaterial whether the amendment to substantive law targets the claim-creating law or creates a defense that acts as an outside shield against that law. Changing applicable substantive law means changing the overall legal circumstances applicable to a case—all the legal rules of decision governing some set of facts and circumstances. We get that change from establishing an affirmative defense as much as by altering the claim-creating law. The end result in either situation is that defendants owe no legal duties and plaintiffs have no existing legal rights against those defendants under all applicable law.⁸⁴ Claims that might (depending on the facts the court found) have succeeded under the old legal landscape (which did not include immunity) no longer succeed under the new legal landscape (because of immunity). That plainly qualifies as a “detectable” change in substantive law. And here, of course, Congress had to leave some claim-creating law untouched—namely, the First and Fourth Amendments—because to legislatively redefine constitutional meaning to legalize the telecoms' conduct would violate the no-compelled-constitutional-untruths principle.⁸⁵

A related argument is that, by requiring the court to accept the Attorney General certification so long as it is supported by substantial evidence, Congress has delegated to the Executive the power to find facts and to determine whether statutory requirements have been satisfied in a given case. This strips the judiciary of its independent authority to find facts and make legal determinations based on those facts and applicable law.⁸⁶

But this argument over-emphasizes the formal procedures for the immunity defense while ignoring its practical operation. The AG certification introduces immunity into the case and serves as initial proof of the defense. The court then must decide whether there is substantial evidence supporting the facts certified. In other words, the court determines whether there is substantial evidence establishing the

⁸³ *Id.* at 963. The *Telecom Litigation* district court labeled § 802 “*sui generis*,” in part because the defense only could be asserted by the government as a third-party intervenor, not by the telecom defendant that is the beneficiary of the defense. *Id.* at 959. But this may not be so. Section 802(a) prohibits the defined civil actions and while the ordinary means of establishing the immunity is the AG certification, there is nothing that prevents a telecom or the government from proving entitlement to immunity without such a certification. Moreover, it is difficult to imagine a case in which the Attorney General would refuse to provide the certification for a meritorious immunity defense.

The district court insisted that § 802 is not an affirmative defense but an immunity, in part because of this structure. *Id.* at 963. But the two are not mutually exclusive. An immunity simply is one type of affirmative defense. What makes something an affirmative defense is not who asserts it, but that it involves a separate legal rule that bars liability notwithstanding the claim-creating legal rule; an affirmative defense involves a separate rule that is introduced into the case other than by the plaintiff's statement of the claim and that must be proven by someone other than the plaintiff. Section 802 is unique in that the government, not the telecom defendant invokes and introduces it. But that should not alter the characterization. It also is noteworthy that § 802 is titled “Procedures for Introducing Statutory Defenses,” 50 U.S.C. § 1885a, suggesting that Congress understood immunity as a defense.

⁸⁴ See Wasserman, *Non-Extant*, *supra* note ___, at ___.

⁸⁵ Sager, *supra* note ___, at 2529.

⁸⁶ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 963-641 *supra* notes ___ and accompanying text.

elements of the statutory immunity reflected in the AG certification—that the telecom gave assistance to an element of the intelligence community within the time frame; that it did so in connection with the presidentially authorized national-security program; and that it acted on presidential request and assurances of the program’s legality. But nothing in § 802(b) tells courts how to resolve these issues in any given case. It remains with the court to exercise its independent decisionmaking authority to determine whether the certification has sufficient independent evidentiary support by looking at evidence and information presented and to dismiss only if it finds sufficient support for the elements of the legal rule establishing immunity.⁸⁷ The court retains the independent judicial role that avoids the no-dictating-outcomes principle.

It is true that § 802 establishes a lower evidentiary standard for the immunity—the telecom company and government must prove the immunity defense only by substantial evidence, rather than the typical civil requirement of preponderance of evidence. But Congress can establish and alter evidentiary standards applicable to claims and defenses created by federal statute.⁸⁸ *Klein* only prohibits Congress (or the Executive, via delegation) from dictating when that evidentiary standard has been satisfied on some facts in a given case, which § 802 does not do.

Nor does § 802 violate Sager’s no-constitutional-untruths principle. The immunity provision does not affect the scope or meaning of the underlying constitutional rights allegedly violated and does not purport to redefine constitutional rights or dictate constitutional meaning to the courts. Rather, it establishes a statutory affirmative defense that protects telecoms from liability, notwithstanding whether their conduct violated the Constitution. In fact, § 802 obviates the need for any constitutional interpretation, because the sub-constitutional immunity defense makes any violation irrelevant. Alternatively, a court might determine that the Constitution was violated, but that recovery still is barred by § 802. In either situation, the new law does not restrict or affect the court’s constitutional analysis and pronouncements, only the subsequent question of whether judicial relief is available as a result of those pronouncements.⁸⁹

Section 802 immunity is analogous to official immunities that limit or entirely prevent damages against government officials for constitutional violations under § 1983 and *Bivens*,⁹⁰ despite, and regardless of, whether constitutional rights had been violated.⁹¹ These immunities are a generally accepted part of the scheme of constitutional litigation. Formally, of course, official immunities under § 1983 are not congressional creations, but common law rules that *sub silentio* survived passage and were

⁸⁷ *Id.* at 964.

⁸⁸ *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

⁸⁹ *Cf. Crater v. Galaza*, 491 F.3d at 1127 (9th Cir. 2007) (upholding limits on federal habeas corpus relief, finding that the law “did not instruct courts to discern or deny a constitutional violation,” but “simply sets additional standards for granting relief in cases”).

⁹⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁹¹ *See, e.g., Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859-60 (2009) (absolute prosecutorial immunity); *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (qualified executive immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (absolute legislative immunity); *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (absolute judicial immunity).

incorporated into the statutory litigation scheme.⁹² And *Bivens* is not a statutory creation at all, but a judicially devised common law cause of action meant to do the same work as § 1983⁹³ that also incorporates common law defenses.⁹⁴

But Congress can override common law rules by statute,⁹⁵ no less for immunities and defenses than for other common law rules. Congress thus should have power to eliminate all existing immunities, statutorily narrow or expand existing immunities,⁹⁶ or, as here, create entirely new immunities beyond those recognized at common law.⁹⁷ Congress has similar authority to statutorily alter common law immunities in *Bivens* actions. It is true that *Bivens* presumes that some adequate alternative statutory remedy is available to remedy a plaintiff's injuries in the absence of a constitutional claim.⁹⁸ But any *Bivens* action already can be defeated by official immunity, so this new defense does nothing new. Moreover, § 802 does not leave plaintiffs without remedy; it only shifts the target of that remedy away from the telecom providers. *Bivens* claims may still be available against current and former government officers who promulgated and executed the warrantless surveillance program—subject, of course, to the official's defense of qualified immunity.⁹⁹ To define § 802 as impermissible congressional dictation of constitutional meaning ignores the wide acceptance of these existing sub-constitutional defenses to constitutional liability under § 1983 and *Bivens*.¹⁰⁰

A final criticism is that Congress is trying to dictate case outcomes because it enacted § 802 against the backdrop of pending lawsuits against the telecoms and because it did so specifically to achieve a specific result (dismissal of the claims) in those pending actions. Congress and the President clearly wanted to protect the telecom companies from liability, presumably so the intelligence community and

⁹² See *Bogan*, 523 U.S. at 49.

⁹³ *Ashcroft v. Iqbal*, 192 S. Ct. 1937, 1948-49 (2009) (describing *Bivens* as “federal analog” to § 1983).

⁹⁴ Fallon & Meltzer, *supra* note ___, at 1749-50; see e.g., *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (qualified immunity in *Bivens* action).

⁹⁵ See Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 769 (2004); Wasserman, *supra* note ___, at 247; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (“[L]egislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.”).

⁹⁶ In 1996, Congress amended § 1983 to extend the scope of absolute judicial immunity beyond the common law rule recognized in *Pulliam v. Allen*, 466 U.S. 522 (1984). See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853, § 309 (1996).

⁹⁷ For example, the Supreme Court generally has held that private persons and entities are not entitled to common law official immunities under § 1983 and *Bivens*. See *Richardson v. McKnight*, 521 U.S. 399, 401 (1997). But again, Congress can expand common law rules by statute, so nothing precludes Congress from establishing immunities to protect private parties who engage in joint conduct with government officials.

⁹⁸ See *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

⁹⁹ See, e.g., *Iqbal*, 129 S. Ct. at 1947; *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1030-31 (N.D. Cal. 2009); but see Alexander Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 Stan. L. Rev. 802, ___ (2010) (showing that qualified immunity does not play a major role in most *Bivens* litigation).

¹⁰⁰ Tracy Thomas argues that there is a fundamental right, grounded in due process, to a remedy for a violation of a right and Congress can limit or deny remedy for such violation only to serve a compelling interest. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1643 (2004). Because official immunities do limit remedies even if the plaintiff has established a violation of a right, the question becomes whether official immunities are supported by compelling policy concerns, and perhaps they are not. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1820-21 (1991); Thomas, *supra*, at 1645. But this argument sounds in Due Process, not in *Klein*'s separation-of-powers concerns. Thus, even if there were a constitutional argument against official immunities (which also might invalidate § 802's immunity), *Klein* still would not be doing any meaningful constitutional work.

the President could call on them for technical assistance and cooperation for future War-on-Terror concerns.¹⁰¹

But this is what legal rulemakers always do with substantive law—establish liability rules to protect and incentivize conduct deemed socially beneficial and to punish or deter conduct deemed socially destructive.¹⁰² That is true of every piece of legislation ever considered, and upheld, under *Klein*.¹⁰³ Congress viewed it as socially beneficial for telecoms to aid the federal government in its national-security and domestic-surveillance efforts, so Congress altered legal rules to remove liability for providing such aid, eliminating a possible deterrent to future telecom assistance with government efforts. Again, so long as Congress is merely hoping for that outcome under its newly created legal circumstances and not statutorily dictating it in a particular case (“In *In re Telecommunications Litigation*, the telecom defendants shall prevail”), we remain at the core of what legislatures must be able to do and what *Klein* cannot be read to prohibit.

Criticism of § 802 inescapably returns to bottom-line policy preferences and disagreement with the congressionally hoped-for outcome of protecting telecoms from liability, at the expense of individuals whose constitutional rights were violated by the surveillance program. One can object (not unreasonably so) to allowing telecoms to get away with helping the government engage in an obviously at-the-time unlawful conduct simply because the President asked them to do so.¹⁰⁴ But policy preferences cannot be recast in constitutional terms. Calling the grant of telecom immunity unwise says nothing about its constitutionality; *Klein*, properly understood, has nothing to say about its validity or Congress’ hoped-for outcome.

B. Military Commissions Act of 2006

Post-9/11 hostilities in Afghanistan and Iraq, along with broader efforts against terrorism, necessitated procedures for dealing with individuals captured and detained in those conflicts, both within the United States and abroad.¹⁰⁵ On the strength of Congress’ 2001 Authorization for the Use of Military Force (AUMF) empowering him to use “all necessary and appropriate force” against nations and groups that had perpetrated or supported the 9/11 attacks “in order to prevent any future attacks,” President Bush issued a comprehensive military order authorizing the use of military commissions for trying certain classes of individuals for terror-related activities.¹⁰⁶ He relied for authority on the AUMF, provisions of the Uniform Code of Military Justice, and, ultimately, his constitutional authority as commander-in-

¹⁰¹ *Telecommunications Records Litig.*, 633 F. Supp. 2d at 956; Schwartz, *supra* note ___, at 417.

¹⁰² See Plager, *supra* note ___, at 70; Epstein, *supra* note ___, at 4; *supra* notes ___ and accompanying text.

¹⁰³ Wasserman, *supra* note ___, at ___; *supra* notes ___.

¹⁰⁴ See Posting of Michael Dorf to Dorf on Law, <http://michaeldorf.org/2007/12/immunity-for-phone-companies.html> (Dec. 18, 2007, 3:30 p.m.).

¹⁰⁵ GOLDSMITH, *supra* note ___, at 106-08

¹⁰⁶ *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); Authorization for Use of Military Force (AUMF), § 2(a), 115 Stat. 224 (2001); GOLDSMITH, *supra* note ___, at 109-10.

chief.¹⁰⁷ He did not seek or obtain congressional approval for military commissions or for the adjudicative processes.¹⁰⁸

The Supreme Court pushed back in *Hamdan v. Rumsfeld*,¹⁰⁹ holding that the administration-established military commissions were unlawful because not congressionally authorized¹¹⁰ and that they actually conflicted with existing congressional enactments, notably the UCMJ.¹¹¹ The UCMJ, in turn, incorporated provisions of the four Geneva Conventions, particularly Common Article 3, which required that any proceeding be by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹¹² *Hamdan* was, at bottom, a decision about the relationship between the political branches and the President’s obligation to act within the existing statutory regime or to get Congress to alter that regime.¹¹³ Importantly, such structural questions and conflicts about the relative powers of the different branches and their relationship to one another often are part of pathological periods, just as during the time of *Klein*.¹¹⁴

Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006, authorizing and ratifying the President’s military commissions regime, as well as resolving various objections raised by the Court, while also seeking to remove the federal courts from all detainee cases going forward.¹¹⁵ The MCA contains a number of provisions relevant to our discussion of *Klein*.¹¹⁶ Alien unlawful enemy combatants are prohibited from invoking the Geneva Conventions as a source of rights before military commissions.¹¹⁷ All persons are prohibited from invoking the Geneva Conventions in habeas proceedings or in civil actions in federal court against the United States or one of its officers or agents.¹¹⁸ Military commissions are declared to be “regularly constituted court[s], affording all necessary judicial guarantees which are ‘recognized as indispensable by civilized people’ for purposes of common Article 3 of the Geneva Conventions.”¹¹⁹ The MCA then defines how United States obligations under the Geneva

¹⁰⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006); Paulsen, *Constitutional Power*, *supra* note ___, at 1837.

¹⁰⁸ GOLDSMITH, *supra* note ___, at 123-24.

¹⁰⁹ 128 S. Ct. 1229 (2008).

¹¹⁰ *Id.* at 567; *id.* at 636 (Breyer, J., concurring); GOLDSMITH, *supra* note ___, at 136.

¹¹¹ *Hamdan*, 548 U.S. at 613.

¹¹² *Id.* at 631-32.

¹¹³ *Id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”); Paulsen, *Constitutional Power*, *supra* note ___, at 1835 (“[T]he ultimate upshot of the Court’s decision—as emphasized by the very narrow, far-more-succinct concurrence of four Justices—was that the President lacked authority, in the Court’s view, to take such actions alone. If Congress authorized military commissions, however, that was a different matter.”).

¹¹⁴ See Blasi, *supra* note ___, at 467-68 (arguing that pathological periods often affect structural relationships); *supra* notes ___ and accompanying text.

¹¹⁵ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see GOLDSMITH, *supra* note ___, at 138-39; Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 104 AM. J. INT’L L. 322, 327 (2007); see also Paulsen, *Constitutional Power*, *supra* note ___, at 1839 (discussing the back-and-forth among the three branches on the question of military commissions and the Geneva Convention as an example of how separation of powers functions).

¹¹⁶ Again, the validity of military commissions or the MCA on other constitutional grounds is beyond the scope of this paper.

¹¹⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 948b (2006).

¹¹⁸ *Id.* § 5(a), *codified* at note to 28 U.S.C. § 2241

¹¹⁹ *Id.* § 948b(f); Bradley, *supra* note ___, at 341 & n.125.

Convention are to be implemented as domestic law. Section 6 amends the War Crimes Act¹²⁰ to provide that only “grave breaches” of Common Article 3 violate domestic law, then defines what constitutes grave breaches, omitting from the definition some recognized Convention rights.¹²¹ The MCA then declares that the War Crimes Act (as amended) fully satisfies the United States’ obligations under the Geneva Convention to provide effective penal sanctions for grave breaches.¹²² Finally, the legislation provides that “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 domestic prohibitions of the War Crimes Act.¹²³

These provisions all draw possible fire under *Klein*’s principles and one potentially even violates *Klein*. Perhaps this is not unexpected from pathological legislation that attempts to control and limit one branch (the courts) in favor of another (the executive). But this does not change *Klein*’s true narrowness. However pathological current times and however politically controversial the MCA, only one small part of the MCA could possibly be invalidated and even that small provision may not be, in the end, legally significant.

The obvious *Klein* attacks focus on Sager’s no-constitutional-untruths principle. Consider § 5. The argument is that, by prohibiting parties from raising and courts from considering the Geneva Conventions as a source of substantive rights in federal court, even while leaving unchanged U.S. treaty obligations under the Conventions, Congress has dictated the judicial analysis and principles courts can apply, stripping them of their independent judgment.¹²⁴ Critics might invoke the same argument against the prohibition on courts relying on foreign decisions in interpreting the Geneva Conventions—it compels them to tell an untruth by determining legal issues (about the meaning and application of the Conventions) differently than they might if left to their independent analytical judgment about appropriate legal sources, guides, and analysis.

The answer depends on how we understand treaties as judicially enforceable domestic law.¹²⁵ On the “nationalist” view of treaties (which the Supreme Court most recently accepted¹²⁶), treaties are not judicially enforceable federal domestic law unless either the treaty itself is self-executing and the Senate ratifies it on that understanding or Congress enacts implementing legislation.¹²⁷ Domestic judicial enforceability of treaty obligations thus is up to the Senate and the President in the treaty-creation process

¹²⁰ 18 U.S.C. § 2441

¹²¹ Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(1), (b)(1)(B); note to 18 U.S.C. § 2441; Bradley, *supra* note ____, at 329.

¹²² Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(2); Bradley, *supra* note ____, at 329.

¹²³ Pub. L. No. 109-306, 120 Stat. at 2632, § 6(a)(2).

¹²⁴ Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1239-40 (2007).

¹²⁵ See David Sloss, *The United States, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (Derke Jinks & David Sloss, eds., 2009) (M.7) (describing “fundamental disagreement” between nationalists and transnationalists going to whether treaty creating binding international obligations, without more, binds domestic legal actors as a matter of domestic law); Ernest A. Young, *Treaties as “Part of Our Law”*, 88 Tex. L. Rev. 91, 107-08 (2009).

¹²⁶ See *Medellin v. Texas*, 128 S. Ct. 1346 (2008); Sloss, *supra* note ____, at ____ (M.7) (discussing the nationalist interpretation of *Medellin*).

¹²⁷ *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note ____, at 337; Paulsen, *Constitutional Power*, *supra* note ____, at 1789.

or to Congress and the President in the legislative process.¹²⁸ On this view, treaties are akin to statutes in being subject to congressional control as to enforceability and execution.¹²⁹ Congress may choose not to provide implementing legislation, in which case a non-self-executing treaty does not become enforceable in private domestic litigation.¹³⁰ Conversely, Congress may decide after the fact to statutorily alter a treaty's domestic enforceability by "unexecuting" it, rendering it unenforceable for purposes of domestic law going forward.¹³¹ This is effectively what § 5 of the MCA does—whatever the prior status of Common Article 3 as a matter of domestic law prior to the MCA, those treaty provisions now are unenforceable as domestic law, at least in federal court in habeas proceedings and in civil actions against the government and government officials.¹³²

If statutes and treaties are alike in the source of their enforceability, they similarly should be alike in applying the no-untruths principle. The "truth" of all subconstitutional legal rules (statutes or treaties) rests with the maker of that rule—Congress—which has free reign to determine the content of the rule, as well as how to determine that content. Any *Klein* argument as to § 5 must account for this degree of congressional control. Just as a court cannot logically be compelled to speak a "statutory untruth" because the truth of the statute's meaning is congressionally determined,¹³³ neither can a court logically be compelled to speak a "domestic-enforcement-of-a-treaty untruth," because treaty enforcement and the truth of the underlying treaty rule for enforcement purposes are congressionally determined. And that is true whether Congress directly establishes meaning of the subconstitutional rule or, as with § 5, limits the legal sources courts can use to determine meaning.

As to § 6, and its limit on the interaction between the Geneva Conventions and the War Crimes Act, it might be challenged on both no-untruths and no-dictating-outcomes principles. But both arguments fail. Congress has not dictated case outcomes here. Congress simply has defined a treaty term ("grave breach of Common Article 3") as a matter of enforceable domestic statutory law.¹³⁴ The MCA does not purport to tell courts whether a grave breach has occurred in any particular case, only what qualifies as a grave breach for purposes of domestic law and what relevant facts, if found, show a grave breach in a particular case. Courts retain independent judgment in finding those facts and applying them to the definition of grave breach.

¹²⁸ Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1798 (arguing that treaties' "force is utterly contingent on the prospective actions and decisions of U.S. constitutional actors").

¹²⁹ Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1785-86; Young, *supra* note ___, at 113, 125.

¹³⁰ *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note ___, at 340; Paulsen, *Constitutional Power*, *supra* note ___, at 1789; cf. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (discussing standards for determining congressional intent that statute to be privately judicially enforceable).

¹³¹ Bradley, *supra* note ___, at 339; see also Paulsen, *Constitutional Power*, *supra* note ___, at 1789 (arguing that a law that contradicts or interprets narrowly a treaty obligation prevails as a matter of U.S. law).

¹³² Bradley, *supra* note ___, at 340-41; Paulsen, *Constitutional Power*, *supra* note ___, at 1848.

¹³³ See *supra* notes ___ and accompanying text.

¹³⁴ And there is general agreement that Congress can define statutory terms. See Araiza, *supra* note ___, at 1131; Jellum, *supra* note ___, at 880, 882; see also Rosenkranz, *supra* note ___, at 2127 ("[D]efining terms is, in the first instance, an inherent incident of the legislative power."); *supra* notes ___ and accompanying text.

Similarly, Congress is well within its prescriptive authority in prohibiting courts from using foreign and international law in interpreting the Geneva Conventions for purposes of the War Crimes Act. Again, Congress has the power to define how courts understand and interpret congressional enactments, including defining permissible analytical rules, sources, methods, and techniques.¹³⁵ Since Congress could have eliminated all domestic judicial enforcement of the Geneva Conventions,¹³⁶ it can take the lesser step of controlling the manner of judicial interpretation, such as the interpretive rules and sources applicable to the domestic-enforcement statute, thereby narrowing that enforcement.¹³⁷ Section 6 is different, for *Klein* purposes, from an attempt to prohibit judicial use of foreign and international law in interpreting the Constitution, given the greater definitional and interpretive control that Congress has over statutes and over enforceability of treaties as domestic law.¹³⁸

The strongest *Klein* argument targets § 948b(f)'s declaration that a military commission is a regularly constituted court satisfying U.S. obligations under the Geneva Conventions. Here, Congress does seem to be dictating the conclusion on a fact—when confronted with the issue, a court is obligated to find that the commission is a regularly constituted court, a finding that automatically triggers the conclusion that the U.S. has complied with its treaty obligations. This arguably goes beyond dictating the legal consequence of a factual conclusion (again, this is what statutes do); it appears to compel courts to find in a particular case that commissions are regularly constituted courts.

Ultimately, however, it is not clear how much § 948(f) matters beyond symbolism. First, Curtis Bradley suggests Congress may not have expected the provision to be judicially enforced; it may be something akin to a sense-of-Congress provision that courts might disregard.¹³⁹ Second, Michael Paulsen argues that § 948(f) could be read as a conclusion not for purposes of domestic legal (judicial) enforcement, but only for purposes of U.S. international relations and the nation's political and international (rather than legal) obligations to comply with treaty and convention obligations.¹⁴⁰ *Klein* is concerned only with the former. It has nothing to say about Congress compelling a conclusion for political and diplomatic purposes. Neither of these represents the only way to interpret § 948(f). But it could be the view courts adopted when confronted with a *Klein* argument, if only as a savings construction to avoid separation of powers concerns.

Conclusion

¹³⁵ See *supra* notes ___ and accompanying text.

¹³⁶ See *Medellin*, 128 S. Ct. at 1356; Bradley, *supra* note ___, at 341; Paulsen, *Constitutional Power*, *supra* note ___, at 1789.

¹³⁷ Paulsen, *supra* note ___, at 1848.

¹³⁸ See *supra* notes ___ and accompanying text. Note that Justice Scalia, while a strong opponent of congressional efforts to control judicial decisionmaking in constitutional cases, *supra* notes ___ and accompanying text, joined the *Medellin* majority in recognizing broad congressional control over domestic treaty enforcement.

¹³⁹ Bradley, *supra* note ___, at 341 n.125.

¹⁴⁰ See Paulsen, *Constitutional Power*, *supra* note ___, at 1770 (“[I]nternational law is primarily a political constraint on the exercise of U.S. power, not a true legal constraint; it is chiefly a policy consideration of international relations—of international politics.”).

The FISA Amendments Act and the MCA together evidence *Klein*'s ultimately limited (if not non-existent) doctrinal power. We have two politically controversial and criticized statutes, passed in a pathological period, imposing restrictions on the courts, judicial authority, and judicial decisionmaking. Enacted with pending or threatened litigation in mind, Congress sought to achieve "hoped for" outcomes favorable to congressional policy preferences and, arguably, against individual liberties. Yet *Klein* has little to say about either piece of legislation and gives courts little ammunition to halt Congress' efforts. However worshipful the legal community wishes to be of *Klein*, however much we may want to be part of its cult, *Klein* exerts no meaningful judicially enforceable doctrinal force as to either law. The best we can say of these two laws is that they may be unwise policies; that does not render them unconstitutional or invalid under *Klein*.