

# Schizophrenic Treaty Law

DAVID SLOSS\*

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## I. INTRODUCTION

The Military Commissions Act of 2006 (MCA)<sup>1</sup> imposes substantial restrictions on the judicial enforcement of the Geneva Conventions in U.S. courts. First, the MCA specifies that “no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”<sup>2</sup> The MCA also stipulates: “No person may invoke the Geneva Conventions . . . in any habeas corpus or other civil action or proceeding to which the United States, or . . . agent of the United States is a party as a source of right in any court of the United States or its States or territories.”<sup>3</sup>

These statutory provisions are likely to face constitutional challenges in U.S. courts.<sup>4</sup> The resolution of those constitutional issues will probably depend, in part, on whether the reviewing court applies the “nationalist” or “transnationalist” model of treaty enforcement.<sup>5</sup> Briefly, the transnationalist model holds: the Geneva

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\* Professor of Law, Saint Louis University School of Law. B.A., 1981, Hampshire College; M.P.P., 1983, Harvard University; J.D., 1996, Stanford Law School.

1. Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948–950) [hereinafter MCA]. The MCA adds a new chapter—47A—to Title 10 of the U.S. Code.

2. *Id.* § 948b(g).

3. *Id.* § 5(a), 120 Stat. at 2631.

4. See, e.g., Carlos M. Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT’L L. 73 (2007) (providing a detailed analysis of both constitutional and statutory interpretation questions raised by MCA provisions related to the Geneva Conventions).

5. The author discussed the distinction between the nationalist and transnationalist models of treaty enforcement in a previously published article. See David Sloss, *When Do Treaties Create Individually*

Conventions have the status of law in the United States; courts should interpret the Conventions in accordance with international law; the Conventions protect individual rights; and the judiciary is responsible for providing remedies to individuals whose treaty rights are violated.<sup>6</sup> In contrast, the nationalist model holds: the Geneva Conventions lack domestic legal force in the absence of implementing legislation; courts should interpret the Conventions in accordance with executive branch policy preferences; the Conventions do not create individually enforceable rights; and the judiciary is not responsible for providing remedies for violations of the Geneva Conventions.<sup>7</sup>

If a court applies the nationalist model, it will undoubtedly uphold the constitutionality of the MCA provisions cited above. From a nationalist perspective, these statutory provisions merely direct the courts to do what they ought to do anyway. Even if Congress had never enacted the MCA, nationalists contend, courts should refuse to enforce the Geneva Conventions on behalf of individuals who claim to be victims of treaty violations by U.S. government agents.

If a court applies the transnationalist model, though, it might well conclude that the MCA provisions quoted above are unconstitutional. From a transnationalist perspective, if a court has jurisdiction over an actual controversy, the court has a constitutional duty to decide that controversy in accordance with supreme federal law, including treaty law. The MCA is constitutionally suspect in that it appears to direct courts to disregard a specific category of supreme federal law—the Geneva Conventions—even in cases where the court has jurisdiction and the proper resolution of the controversy requires application of the Geneva Conventions.

This essay does not advocate a position for or against the constitutionality of the Military Commissions Act. Instead, the essay contends that one cannot truly appreciate the nature of the constitutional issues at stake without understanding the conflict between the nationalist and transnationalist models. Accordingly, this essay has three objectives. First, it provides a conceptual overview of the distinction between the nationalist and transnationalist models. Second, it illustrates the application of the two models by reference to recent judicial decisions implicating the Geneva Conventions. The analysis shows that U.S. courts have applied both models in Geneva Convention cases, even though the two models are mutually inconsistent. Third, the essay shows that the transnationalist model has deep historical roots, dating back to the eighteenth century, whereas the emergence of the nationalist model is largely a post-World War II development. This essay does not present original historical analysis: it merely summarizes the historical analysis developed by this author and other scholars in previous publications.

The nationalist and transnationalist models provide radically different answers to three questions: (1) do treaties have the status of law in the U.S. legal system?; (2) how should courts interpret treaties?; (3) in what circumstances can private individuals obtain judicial remedies for violations of treaty-based individual rights? Parts II through IV of this essay, respectively, address these three questions.

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*Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANS. L. 20, 29–37 (2006) [hereinafter *Individually Enforceable Rights*]. The analysis in this essay builds upon that earlier work.

6. *Id.*

7. *Id.*

## II. THE STATUS OF TREATIES AS DOMESTIC LAW

In judicial decisions related to the war on terror, several district courts have held expressly that the Geneva Conventions are self-executing treaties.<sup>8</sup> In contrast, one federal appellate court has held expressly that the POW Convention<sup>9</sup> is not self-executing.<sup>10</sup> Courts reach different conclusions on the self-execution question for two reasons. First, courts apply different definitions of the term “self-executing.” Second, they utilize different criteria to determine whether a treaty is self-executing.

Consider, first, the definitional problem. The Supreme Court has stated that, if a treaty is self-executing, “no domestic legislation is required to give [it] the force of law in the United States.”<sup>11</sup> This statement reflects a primary law concept of self-execution: a self-executing treaty has the status of primary law within the U.S. legal system; a non-self-executing treaty lacks that status (in the absence of implementing legislation). In contrast, numerous courts have employed a remedial law concept of self-execution. Under this version of the doctrine, a non-self-executing treaty has the status of primary law, but individuals cannot obtain judicial remedies for violations of non-self-executing treaties unless Congress has enacted implementing legislation.<sup>12</sup>

For the sake of clarity, this essay will define the term “self-executing” to mean that a treaty has the status of primary law within the U.S. legal system. The term “non-self-executing” means that a treaty lacks the status of primary law in the absence of implementing legislation. If a treaty has the status of primary law, then it is the “Law of the Land” under the Supremacy Clause. However, the conclusion that a treaty is self-executing, in this sense, does not necessarily mean that an individual can obtain judicial remedies for treaty violations. Questions about judicial remedies are addressed separately in Part IV below.

Having defined the term “self-executing” to mean that a treaty has the status of law in the absence of implementing legislation, it is necessary to ask what criteria courts apply to decide whether a treaty is self-executing. Nationalists and transnationalists disagree about the appropriate criteria for determining whether a treaty is self-executing.

Transnationalists maintain that the question whether a treaty has the status of law in the absence of implementing legislation is a question of constitutional law. Transnationalists recognize that a treaty provision has no domestic legal effect in the absence of implementing legislation if it purports to accomplish something that,

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8. *See, e.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–80 (D.D.C. 2005); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004); *United States v. Lindh*, 212 F. Supp. 2d 541, 553–54 (E.D. Va. 2002).

9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

10. *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *overruled on other grounds by Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see also Al Odah v. United States*, 321 F.3d 1134, 1146–47 (D.C. Cir. 2003) (Randolph, J., concurring) (contending that the Geneva Conventions are not self-executing).

11. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (reaching this conclusion specifically with regard to the Warsaw Convention).

12. *See, e.g.*, *More v. Intelcom Support Servs., Inc.*, 960 F.2d 466, 469 (5th Cir. 1992) (stating that treaties “are the law of the land . . . but if not implemented by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing . . .”).

under our constitutional system, requires legislation approved by both Houses of Congress.<sup>13</sup> The Supremacy Clause specifies that “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”<sup>14</sup> However, if implementing legislation is constitutionally required to effectuate a treaty provision, that provision is not the “Law of the Land” because it is not made “under the Authority of the United States” within the meaning of the Supremacy Clause. On the other hand, transnationalists contend, if a treaty is duly ratified by the United States,<sup>15</sup> and implementing legislation is not constitutionally required, the treaty has the status of law in the U.S. legal system because the Supremacy Clause says so.<sup>16</sup>

Nationalists claim that a treaty is not self-executing “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.”<sup>17</sup> The authors of this language understood the phrase “effective as domestic law” to refer to the status of a treaty as primary law, not the availability of judicial remedies.<sup>18</sup> Thus, under the nationalist view, even if implementing legislation is not constitutionally required to effectuate a particular treaty provision, the treaty makers (i.e., the President and Senate, acting together under Article II) can preclude a treaty from having domestic legal status in the absence of implementing legislation by manifesting their intention to do so. Since a treaty that lacks domestic legal status cannot be considered the “supreme Law of the Land,” it is evident that the nationalist model is based on an unstated premise: the treaty makers have the constitutional power to opt out of the Supremacy Clause by “manifesting an intention” that a particular treaty “shall not become effective as domestic law.”<sup>19</sup>

This author has argued elsewhere that the unstated premise underlying the nationalist position is incorrect.<sup>20</sup> It would be superfluous to repeat that argument here. Nevertheless, two points bear emphasis. First, courts routinely cite the Supreme Court decision in *Foster v. Neilson*<sup>21</sup> as authority for the nationalist version of the self-execution doctrine. As this author has demonstrated previously, *Foster* provides no support whatsoever for the claim that the treaty makers have the

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13. A treaty provision purporting to appropriate funds would require implementing legislation because the Constitution requires Article I legislation to authorize the expenditure of federal funds. The Constitution states: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. CONST. art. I, § 9, cl. 7. As a textual matter, one could construe the term “Law” in this provision to include treaties. Even so, it is widely agreed that legislation is constitutionally necessary to implement treaties that require an appropriation of funds. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111, n.6 (1987) [hereinafter RESTATEMENT (THIRD)].

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

15. A treaty provision obligating the United States to undertake an action that is prohibited by the Constitution would not be considered “duly ratified.” Thus, for example, a treaty provision obligating the U.S. to ban speech protected by the First Amendment would not be the Law of the Land, even if the U.S. ratified the treaty.

16. See David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 46-55 (2002) (providing a detailed textual analysis of the Supremacy Clause that supports the transnationalist view) [hereinafter *Non-Self-Executing Treaties*].

17. RESTATEMENT (THIRD) § 111(4)(a).

18. See *id.* § 111, cmt. h (“Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”).

19. *Id.* § 111(4)(a).

20. See *Non-Self-Executing Treaties*, *supra* note 16.

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

constitutional power to opt out of the Supremacy Clause.<sup>22</sup> Second, prior to 1965, when the American Law Institute published the Restatement (Second) of Foreign Relations Law,<sup>23</sup> there was only one published lower court decision that provided doctrinal support for the nationalist version of non-self-execution doctrine.<sup>24</sup> Since 1965, numerous lower courts have endorsed the nationalist version.<sup>25</sup> However, the Supreme Court has never endorsed the proposition that the treaty makers have the constitutional power to opt out of the Supremacy Clause.<sup>26</sup>

In sum, transnationalists contend that the Constitution determines whether a treaty is self-executing. Under the transnationalist model, all duly ratified treaties have the status of primary law in the domestic legal system—with or without implementing legislation—except in cases where implementing legislation is constitutionally required. In contrast, nationalists maintain that the treaty makers have the constitutional power to opt out of the Supremacy Clause on a case-by-case basis. Under the nationalist model, a duly ratified treaty will not have any domestic legal effect in the absence of implementing legislation—even in cases where such legislation is not constitutionally required—if the treaty makers manifest an intention that the treaty shall not become effective as domestic law.

### III. TREATY INTERPRETATION

The nationalist and transnationalist models emphasize different canons of treaty interpretation. For transnationalists, the canon of good faith is the primary canon of treaty interpretation. According to the canon of good faith, a treaty must “be kept in most scrupulous good faith,”<sup>27</sup> and “should be interpreted . . . in a manner to carry out its manifest purpose.”<sup>28</sup> For nationalists, the canon of deference to the executive branch is the primary canon of treaty interpretation. According to this canon, “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”<sup>29</sup>

The transnationalist canon of good faith differs from the nationalist canon of deference to the executive in two key respects. First, transnationalists tend to look to international sources for guidance on treaty interpretation questions. In contrast, nationalists tend to look to domestic sources for guidance. Second, the primary policy objective underpinning the canon of good faith is the goal of avoiding friction in relationships with U.S. treaty partners. In contrast, the primary objective of the

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22. See *Non-Self-Executing Treaties*, *supra* note 16, at 19–24, 63–67; see also *Individually Enforceable Rights*, *supra* note 5, at 78–91 (providing detailed analysis of *Foster*).

23. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 141, n.6 (1965) [hereinafter RESTATEMENT (SECOND)].

24. See *Robertson v. Gen. Elec. Co.*, 32 F.2d 495, 499–500 (4th Cir. 1929); see also *Non-Self-Executing Treaties*, *supra* note 16, at 73–75.

25. See *Non-Self-Executing Treaties*, *supra* note 16, at 76–80.

26. See *id.* at 71–73.

27. *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (quoting JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 174).

28. *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (citing HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW § 383 (1901)).

29. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

deference canon is to avoid friction between the judicial and executive branches. These distinctions between the nationalist and transnationalist models are matters of emphasis, not rigidly distinct categories. Even so, a difference in emphasis can lead to very different results in concrete cases.

The Supreme Court decision in *Hamdan v. Rumsfeld*<sup>30</sup> illustrates the contrast between the nationalist and transnationalist approaches to treaty interpretation. The Court in *Hamdan* confronted two key treaty interpretation issues related to the Geneva Conventions. First, the Court had to decide whether the ongoing conflict between the United States and al Qaeda is a “conflict not of an international character” within the meaning of Common Article 3 of the Geneva Conventions.<sup>31</sup> Second, the Court had to decide whether the military commission created by the Bush Administration was a “regularly constituted court,” as required by Common Article 3.<sup>32</sup> The majority and the dissent in *Hamdan* disagreed on both points.<sup>33</sup> Analysis of the main opinions demonstrates that the majority applied the transnationalist model, whereas the dissent applied the nationalist model.

Deference to the executive is the guiding principle of Justice Thomas’ analysis of the Geneva Conventions in his *Hamdan* dissent. In the context of analyzing Common Article 3, Justice Thomas refers twice to the Court’s “duty to defer to the President.”<sup>34</sup> In four pages of analysis devoted to the Geneva Conventions, Justice Thomas invokes the canon of deference to the executive no less than four times.<sup>35</sup> Remarkably, in his entire analysis of the treaty interpretation issues in *Hamdan*, Justice Thomas does not cite a single international authority, other than the text of the POW Convention itself, to support his interpretation of the treaty.<sup>36</sup> Moreover, Justice Thomas argues explicitly that the Court should refrain from deciding the

30. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

31. Geneva III, *supra* note 9, is one of four Geneva Conventions adopted on August 12, 1949. In all four Conventions, Article 3 is identical, hence the designation “Common Article 3.” Article 3 provides certain protections for individuals engaged in an “armed conflict not of an international character.” Geneva III, *supra* note 9, art. 3. Therefore, to determine whether the petitioner in *Hamdan* was entitled to the protection afforded by Common Article 3, the Court had to decide whether the U.S. conflict with al Qaeda is an “armed conflict not of an international character.”

32. Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .” Geneva III, *supra* note 9, art. 3(I)(d).

33. *See Hamdan*, 126 S. Ct. at 2795–96 (holding that Common Article 3 applies to the U.S. conflict with al Qaeda); *id.* at 2796–97 (holding that the military commission created to try Hamdan was not a regularly constituted court). *But see id.* at 2846 (Thomas, J., dissenting) (contending that Common Article 3 does not apply to the U.S. conflict with al Qaeda); *id.* at 2847 (Thomas, J., dissenting) (contending that the military commission convened to try Hamdan was a regularly constituted court).

34. *Hamdan*, 126 S. Ct. at 2846 (Thomas, J., dissenting); *see also id.* (referring to “our duty to defer to the President’s understanding of the provision at issue”).

35. *Id.* (“Under this Court’s precedents, ‘the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.’”) (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–185); *id.* at 2846 (“But where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive’s interpretation.”); *id.* at 2849 (“Accordingly, the President’s understanding of the requirements of Common Article 3 is entitled to ‘great weight.’”); *id.* at 2849 (“The President’s findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this Court is bound to respect.”).

36. *See id.* at 2846–49.

merits of Hamdan's claim to avoid friction with the executive branch.<sup>37</sup> In sum, Justice Thomas' dissent is a textbook example of the nationalist approach to treaty interpretation.

In contrast, Justice Stevens' majority opinion in *Hamdan* exemplifies the transnationalist approach. First, in contrast to the dissent, the majority cites a wide variety of international sources in support of its interpretation of Common Article 3. These include multiple citations to the ICRC Commentary on the Geneva Conventions,<sup>38</sup> as well as citations to the International Court of Justice,<sup>39</sup> the International Criminal Tribunal for Yugoslavia,<sup>40</sup> and a book published by the International Committee of the Red Cross.<sup>41</sup> Justice Stevens devotes six pages of his majority opinion to an analysis of the Geneva Conventions without once mentioning the canon of deference to the executive branch.<sup>42</sup> Moreover, the *Hamdan* majority expressly rejects an interpretation of Common Article 3 that the President personally endorsed.<sup>43</sup> Although Justice Stevens' opinion does not expressly invoke the canon of good faith, his analysis is consistent with that canon.<sup>44</sup> The international reaction to the Supreme Court decision in *Hamdan* provides further evidence of the transnationalist character of the majority opinion: the Court's opinion helped reduce friction with U.S. treaty partners by reassuring them that at least one branch of the U.S. government was prepared to honor U.S. treaty commitments under the Geneva Conventions.

Professor Van Alstine has documented the fact that the transnationalist canon of good faith was the dominant approach to treaty interpretation in U.S. courts during the nineteenth and early twentieth centuries.<sup>45</sup> He has also shown that judicial reliance on the canon of good faith declined in the latter half of the twentieth

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37. *Id.* at 2847 (“And premature adjudication of Hamdan’s claim is especially inappropriate here because ‘reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.’”) (quoting *Raines v. Byrd*, 521 U.S. 811 (1997)).

38. *See Hamdan*, 126 S. Ct. at 2794–97 (citing ICRC Commentary four times in the text, twice in footnote 57, three times in footnote 58, once in footnote 62, and twice in footnote 63).

39. *Id.* at 2796 n.63.

40. *Id.*

41. *Id.* at 2797.

42. *See id.* at 2793–98.

43. In a Feb. 2002 memorandum, the President determined expressly that Common Article 3 does not apply to al Qaeda detainees because the U.S. conflict with al Qaeda is “international in scope.” *See* Memorandum from the President to the Vice President et al. on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134–35 (Karen J. Greenberg and Joshua L. Dratel eds., 2005). The Hamdan majority said simply: “That reasoning is erroneous.” *Hamdan*, 126 S. Ct. at 2795.

44. The canon of good faith holds that a treaty should be interpreted in accordance with its “manifest purpose.” *Tucker*, 183 U.S. at 437. Consistent with this approach, the majority in *Hamdan* emphasized the fact that Common Article 3 is designed to afford “some minimal protection . . . to individuals associated with neither a signatory nor even a nonsignatory Power who are involved in a conflict . . . .” *Hamdan*, 126 S. Ct. at 2796. The majority also cited the official ICRC Commentary for the proposition that the scope of Common Article 3 “must be as wide as possible.” *Id.* Similarly, the majority supported its view that members of al Qaeda are protected by Common Article 3 by examining the “fundamental logic [of] the Convention’s provisions on its application.” *Id.* at 2795–96 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33 (2005)).

45. *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1907–14 (2005).

century.<sup>46</sup> Although lower courts continue to invoke the good faith canon episodically,<sup>47</sup> Professor Van Alstine claims that “the last recorded reference of any kind by the [Supreme] Court to the role of good faith in the judicial construction of international treaties was in its 1933 opinion in *Factor v. Laubenheimer*.”<sup>48</sup>

While the canon of good faith has declined, the canon of deference to the executive has ascended. In the early years of U.S. constitutional history, courts did not defer at all to executive branch treaty interpretations.<sup>49</sup> Between 1789 and 1838, the U.S. government won only three of nineteen cases decided by the Supreme Court “in which the U.S. government was a party, at least one party raised a claim or defense on the basis of a treaty, and the Court decided the merits of that claim or defense.”<sup>50</sup> These statistics contrast starkly with modern practice. Professor Chesney reviews sixty-seven published opinions in treaty interpretation cases between 1984 and 2005 “in which the court[s] engaged, more or less directly, the deference doctrine.”<sup>51</sup> He finds that “the executive’s preferred interpretation prevailed in fifty-three out of sixty-seven opinions in the set.”<sup>52</sup> Thus, there has been a fairly dramatic shift from the zero deference approach that courts applied in the early nineteenth century to the highly deferential approach that courts have applied in the past few decades.

Over the course of the twentieth century, the executive’s approach to treaty interpretation changed from a transnationalist approach that emphasized mutuality of obligation, to a nationalist approach that emphasizes unilateral advantage for the United States. This does not mean that executive treaty interpretation suddenly became a tool of foreign policy: it has undoubtedly been true since the birth of this nation that foreign policy considerations influenced the executive branch’s interpretation of treaty provisions.<sup>53</sup> However, when the U.S. was a relatively weak nation, foreign policy considerations favored an approach to treaty interpretation that emphasized mutuality of obligation because the U.S. feared retaliation if other nations believed it was not honoring its treaty obligations.<sup>54</sup> In contrast, in the post-Cold-War era there are very few countries that can cause serious harm to the United States. Since the U.S. need not fear retaliation, the foreign policy considerations

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46. *Id.* at 1914–16.

47. *See, e.g.,* Benitez v. Garcia, 476 F.3d 676, 681 (9th Cir. 2007) (stating that “it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith.”) (quoting Johnson v. Browne, 205 U.S. 309, 321 (1907)).

48. Van Alstine, *supra* note 45, at 1915. Since Professor Van Alstine published his article, the Supreme Court has invoked the canon of good faith in one case. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679 (2006).

49. *See* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 505–22 (2007) (surveying judicial decisions in the area of treaty interpretation from 1789 to 1838).

50. *Id.* at 506.

51. Robert Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1754 (2007).

52. *Id.* at 1755.

53. *See, e.g.,* CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793 (1967) (providing a detailed account of the interplay between foreign policy and treaty interpretation in the Washington Administration’s response to the war between France and England).

54. *See* Van Alstine, *supra* note 45, at 1907–09. Additionally, during the nineteenth century, many U.S. government leaders were heavily influenced by a natural law perspective; they believed that good faith performance of U.S. treaty obligations was the right and honorable thing to do, regardless of the practical consequences.

that guide the executive branch favor an approach to treaty interpretation that is driven largely by an effort to maximize unilateral policy interests. Thus, when courts defer to executive treaty interpretations, the result nowadays is often a unilateralist approach, rather than a transnationalist approach that emphasizes mutuality of obligations. Whereas judicial application of the transnationalist canon of good faith promotes harmony with U.S. treaty partners, application of the nationalist canon of judicial deference to executive treaty interpretation frequently generates friction with U.S. treaty partners.<sup>55</sup>

#### IV. TREATIES, INDIVIDUAL RIGHTS, AND JUDICIAL REMEDIES

The nationalist and transnationalist models also apply starkly different approaches to the question whether, and in what circumstances, treaties create judicially enforceable individual rights. Judge Robert Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*<sup>56</sup> exemplifies the nationalist approach. In that case, Judge Bork stated: "[t]reaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty . . . expressly or impliedly provides a private right of action."<sup>57</sup> In contrast, the following statement, written by Chief Justice Marshall in 1809, exemplifies the transnationalist model: "[e]ach treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected."<sup>58</sup>

Nationalists assert that there is a "long-established presumption . . . that treaties and other international agreements do not create judicially enforceable rights."<sup>59</sup> From a nationalist perspective, the question whether a treaty creates individual rights is inextricably linked to the question whether private parties can enforce treaty obligations in domestic courts. Nationalists would endorse Justice Holmes' famous statement that it puts "the cart before the horse . . . to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward."<sup>60</sup> Thus, under the nationalist model, if the political branches have not authorized private enforcement of a treaty in domestic courts, the question whether the treaty creates individual rights is simply irrelevant.<sup>61</sup>

Transnationalists, on the other hand, distinguish between primary rights and judicial remedies. From a transnationalist perspective, a primary right is "the mere obverse of" a primary duty.<sup>62</sup> Moreover, a primary duty is "an authoritatively

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55. *See id.* at 1926–27.

56. 726 F.2d 774 (D.C. Cir. 1984).

57. *Id.* at 808 (Bork, J., concurring) (citations omitted).

58. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809).

59. Brief for Respondents at 30, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), 2006 WL 460875.

60. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

61. *See Individually Enforceable Rights*, *supra* note 5, at 33–37.

62. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 136–37 (1994).

recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way.”<sup>63</sup> Thus, a treaty creates primary rights for a particular individual if the treaty imposes a primary duty on the state party not to do something to the detriment of that individual, or to do something for the benefit of that individual.<sup>64</sup>

In addressing questions involving primary rights, transnationalists apply the traditional canon of liberal interpretation. As expressed by Justice Story, that canon states: “[i]f the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?”<sup>65</sup> Transnationalists recognize that there are numerous treaty provisions that do not create primary rights for individuals. However, in cases where an individual asserts rights under a treaty, and the treaty text is ambiguous, transnationalists apply the canon of liberal interpretation as a “tiebreaker” to help resolve ambiguity in the treaty text.

Whereas the canon of liberal interpretation governs questions of primary rights, transnationalists maintain that questions involving judicial remedies should be decided in accordance with the traditional maxim “that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded.”<sup>66</sup> From a transnationalist perspective, the judiciary’s primary mission in our system of divided government is to provide remedies for individuals whose rights are violated. This principle applies to treaty-based individual rights, just as it applies to rights protected by other types of laws. Hence, Alexander Hamilton wrote: “Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.”<sup>67</sup>

Two recent decisions by different judges on the D.C. District Court illustrate the tension between the nationalist and transnationalist approaches to issues involving judicial enforcement of treaty-based individual rights. Judge Robertson’s opinion in *Hamdan v. Rumsfeld*<sup>68</sup> illustrates the transnationalist approach. The petitioner in that case asserted rights under the Third Geneva Convention. Judge Robertson cited *Head Money Cases*<sup>69</sup> for the “proposition that a ‘treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.’”<sup>70</sup> Applying this test, he had no difficulty concluding that the Geneva Conventions “are all about prescribing rules by which the rights of individuals may be determined.”<sup>71</sup> Moreover, finding that trial by military commission would violate Hamdan’s rights under the POW Convention, Judge Robertson granted Hamdan’s habeas petition in part and

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63. *Id.* at 130.

64. *See Individually Enforceable Rights*, *supra* note 5, at 29–30.

65. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830); *see also Van Alstine*, *supra* note 45, at 1911–14 (providing detailed documentation of the Supreme Court’s application of the liberal interpretation canon during the nineteenth and twentieth centuries).

66. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES \*23).

67. THE FEDERALIST NO. 22, at 182 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

68. *Hamdan*, 344 F. Supp. 2d at 164.

69. *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580 (1884).

70. *Hamdan*, 344 F. Supp. 2d at 164 (quoting *Head Money Cases*, 112 U.S. at 598).

71. *Id.*

issued an order precluding trial by military commission.<sup>72</sup> Judge Robertson referenced Judge Bork's concurring opinion in *Tel-Oren* (quoted above), but concluded that Judge Bork's opinion "is not Circuit precedent and it is, I respectfully suggest, erroneous."<sup>73</sup>

In contrast, Judge Hogan's opinion in *In re Iraq and Afghanistan Detainees Litigation*<sup>74</sup> illustrates the nationalist approach. The plaintiffs in that case asserted rights under the Fourth Geneva Convention.<sup>75</sup> Judge Hogan tacitly conceded that the treaty created primary rights for the individual plaintiffs.<sup>76</sup> Even so, from his (nationalist) perspective, the key question was not whether the treaty created primary individual rights, but whether the treaty authorized domestic judicial remedies for violations of those rights. Thus, Judge Hogan cited Judge Bork's concurring opinion in *Tel-Oren* for the following proposition: "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty . . . expressly or impliedly provides a private right of action."<sup>77</sup> Applying this test, Judge Hogan concluded: "None of the provisions of Geneva Convention IV contain any such express or implied language indicating that persons have individual 'rights' that may be enforced under the treaty."<sup>78</sup> In short, even if the plaintiffs had rights under Geneva IV, and even if those rights were violated, the plaintiffs were not entitled to judicial remedies because the treaty does not authorize them to enforce their putative rights in U.S. courts.

The two district judges reached different results because they applied different tests, not because there are significant differences between Geneva III and Geneva IV. Applying the transnationalist model, Judge Robertson examined the text of Geneva III to ascertain whether the treaty protects primary individual rights—i.e., whether it prescribes "a rule by which the rights of the private citizen or subject may be determined."<sup>79</sup> Finding that the treaty does protect Hamdan's primary rights and that trial by military commission would violate those rights, Judge Robertson granted Hamdan a remedy, consistent with the well-settled principle that "where there is a right, there is a remedy." In contrast, Judge Hogan, applying the nationalist model, examined the text of Geneva IV to ascertain whether the treaty creates domestic remedial rights—i.e., whether it authorizes private individuals to

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72. *See id.* at 173–74.

73. *Id.* at 165.

74. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).

75. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. Geneva IV provides broad protections for civilians detained during armed conflict. To a large extent, the rights granted to civilians under Geneva IV parallel the rights granted to prisoners of war under Geneva III. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 380–99 (2004) (comparing the scope of protection available under Geneva IV versus Geneva III).

76. *See Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 116 (stating that "the provisions of Geneva Convention IV state general obligations with regard to the treatment of protected persons that are imposed on signatory States"). Although Judge Hogan does not use the rhetoric of "rights," the statement that the treaty imposes obligations on states "with regard to the treatment of protected persons" is semantically equivalent to the statement that those protected persons have primary rights under the treaty.

77. *Id.* at 115 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)).

78. *Id.* at 116.

79. *Hamdan*, 344 F. Supp. 2d at 164 (quoting *Head Money Cases*, 112 U.S. at 598).

file lawsuits in U.S. courts to obtain remedies for treaty violations. Since the Geneva Conventions do not expressly authorize private lawsuits in U.S. courts, Judge Hogan concluded that Geneva IV does not establish “individual rights that may be judicially enforced via private lawsuits in federal courts.”<sup>80</sup>

Judge Robertson’s application of the transnationalist model in *Hamdan* is consistent with Supreme Court precedent dating back to the 18th century. Indeed, this author previously performed a comprehensive study of Supreme Court decisions between 1789 and 1838 in cases where an individual litigant raised a claim or defense on the basis of a treaty.<sup>81</sup> The Court decided fifty-eight such cases during that time frame.<sup>82</sup> All fifty-eight cases are consistent with the transnationalist principle that “where there is a right, there is a remedy.” In contrast, none of the fifty-eight cases endorse the nationalist presumption against individually enforceable rights. Moreover, at least fifteen of the fifty-eight cases are inconsistent with the nationalist presumption; in those fifteen cases, the Court awarded a remedy to an individual victim of a treaty violation, even though there was no statutory or treaty provision that authorized domestic judicial remedies for treaty violations.<sup>83</sup> In sum, the transnationalist model has deep historical roots.

In contrast, the nationalist presumption that treaties do not create individually enforceable rights is a fairly new doctrinal innovation. As this author has documented elsewhere, this presumption first emerged in a set of lower federal court decisions in the 1970s and 1980s.<sup>84</sup> Although the federal executive branch has repeatedly urged the Supreme Court to endorse this presumption,<sup>85</sup> the Court, as of this writing, has declined to do so.<sup>86</sup>

## V. CONCLUSION

Key provisions in the Military Commissions Act of 2006 are designed to restrict judicial application of the Geneva Conventions.<sup>87</sup> These provisions raise important constitutional questions about the scope of Congress’ power to limit judicial enforcement of treaties that are the supreme Law of the Land. Any serious effort to resolve those constitutional questions must confront the persistent conflict between the nationalist and transnationalist models of treaty enforcement. If the Supreme Court endorses the nationalist model, then the MCA provisions restricting judicial

80. *Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 115.

81. *See Individually Enforceable Rights*, *supra* note 5, at 51–91.

82. This number includes only published Supreme Court decisions. In the period from 1789 to 1800, before John Marshall became Chief Justice, the Supreme Court handed down numerous unpublished decisions in treaty cases. *Id.* at 52 n.146.

83. *See id.* at 57–70.

84. *Id.* at 106–07.

85. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 11, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (nos. 05-51 and 04-10566), 2006 WL 271823; Brief for Respondents at 30, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 460875.

86. In both *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court had the opportunity to establish criteria for determining when individuals can enforce treaty-based rights in domestic courts. However, the Court ducked the issue in both cases. *See Individually Enforceable Rights*, *supra* note 5, at 37–51. The Court will have another opportunity to address this issue in the term beginning October 2007. *See Medellin v. Texas*, No. 06-984, Questions Presented, available at <http://www.supremecourtus.gov/docket/06-984.htm>.

87. *See supra* notes 1–3 and accompanying text.

application of the Geneva Conventions would easily pass constitutional muster. But if the Supreme Court endorses the transnationalist model, those MCA provisions would be vulnerable to a constitutional challenge.

In recent cases involving the judicial enforcement of treaties, U.S. courts have been sharply divided between those who apply the nationalist model, and those who apply the transnationalist model. This division is manifested in lower court opinions implicating the Geneva Conventions.<sup>88</sup> Within the Supreme Court, the division between nationalist and transnationalist camps is evidenced by the split between the majority and the dissent in *Hamdan v. Rumsfeld*.<sup>89</sup> At present, it is difficult to predict the outcome of the ongoing conflict between the nationalist and transnationalist models. The most likely outcome, though, is that the Supreme Court will attempt to chart a middle course, and in the process will create further confusion and ambiguity in existing doctrines related to the judicial enforcement of treaties in U.S. courts.

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88. See *supra* notes 8–10 and accompanying text.

89. 126 S. Ct. 2749 (2006). See *supra* notes 30–33 and accompanying text.