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Introduction

Daniel Olton[*]

As many may know, the Honorable Jane A. Restani is all about the facts of each case. Over the past 40 years, Judge Restani has published over 3,000 opinions, with over 1,100 of those here at the United States Court of International Trade ("CIT"), and the remaining scattered across district courts and circuit courts throughout the country. Judge Restani has the distinction of being amongst the most traveled federal judges due to her impressive designation work. On the Ninth Circuit alone, she has participated in over 654 opinions and memorandum dispositions. Of the approximately 150 of those reported in the Federal Register, only nine have been reversed or vacated by the Supreme Court. Twice though, the Supreme Court adopted reasoning Judge Restani used in dissenting opinions.

Judge Restani has been paving a way at the CIT as well. In the past twenty-two years, she has presided over 2,407 cases, issued over 10,000 orders, and published over 470 opinions. It is no wonder that there is nary a CIT practitioner without their own story of arguing before Judge Restani.

There is so much more, however, to Judge Restani, than the numbers. Clerks from throughout her tenure tell stories of hiking around New

York State with her and protecting Judge Restani's afternoon yoga time. Some lucky clerks, it is fabled, participated in walking status meetings going up and down the stairs of the forty-two-floor federal building while Judge Restani prepared to hike Mount Kilimanjaro. All of these clerks, however, report fond memories of tackling interesting legal issues, travelling across the country, and perhaps sampling some wine and cheese after a long day of deciding cases.

This series will feature several papers by former law clerks and practitioners surveying Judge Restani's decisions.

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HMT — A Tax, or Not a Tax? That Is But the First of Many, Many Questions

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Congress enacted the Harbor Maintenance Tax ("HMT") as part of the Water Resources Development Act of 1986.[1] In its original form, the HMT imposed a uniform charge of 0.125% of the cargo's value on shipments coming into and going out of U.S. ports. Exporters were liable for the HMT at the time of loading and importers were liable at the time of unloading. Congress intended that the funds would help finance the general maintenance and improvement of U.S. ports.[2]

Once promulgated, the HMT touched the movement of virtually all people and goods in and out of the United States and precipitated a flood of litigation that included thousands of complaints relating to constitutionality, jurisdiction, foreign trade zone ("FTZ") admissions,

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1 26 U.S.C. §§ 4461-62, as promulgated by Pub. L. No. 99-662, § 1402, 100 Stat. 4082, 4266-69 (1986).

2 Esso Standard Oil Co. v. United States, 559 F.3d 1297, 1298 (Fed. Cir. 2009).

warehouse entries, foreign military articles, shipments to the Outer Continental Shelf, and more. A customs encyclopedia could be written using the HMT jurisprudence alone.

At the helm was Judge Jane A. Restani. Judge Restani sat on the original three judge panel with Chief Judge DiCarlo and Judge Musgrave to determine the first of many challenges: did the HMT contravene the Export Clause's mandate that "[n]o Tax or Duty shall be laid on Articles exported from any State?"[3] From there, Judge Restani tackled other constitutional challenges, questions of jurisdiction, and a myriad of other issues that surfaced as the trade community worked to decipher the legal and practical ramifications of the new law. In the end, Judge Restani's legal acuity and large case management strategy resulted in an orderly and efficient resolution of the winding, lengthy, and complex HMT disputes.

PART ONE: LEGAL IMPLICATIONS

The panoply of legal challenges that Judge Restani adjudicated in the context of the promulgation of the HMT challenges could provide the foundation of any "Customs 101" class. Starting with the United States Constitution, Judge Restani's opinions parsed and determined issues of severability, interest, jurisdiction, statute of limitations, administrative process, protestability, FTZs, and more. For the purposes of this Essay, we have highlighted just a few of the challenges argued before Judge Restani.

The United States Constitution

To start, in *United States Shoe Corporation*, Judge Restani — in a three-judge panel with Chief Judge DiCarlo and Judge Musgrave — was asked to determine whether the HMT as imposed upon merchandise exported from the United States passed constitutional muster under the Export Clause.[4] Article 1, Section 9, Clause 5 of the U.S. Constitution provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." After determining that the U.S. Court of International Trade had

[3] U.S. CONST. art. 1, § 9, cl. 5.

[4] U.S. Shoe Corp. v. United States (*U.S. Shoe*), 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

jurisdiction to hear and determine constitutional issues, the court concluded that Congress's "power to regulate commerce [did] not eclipse the Export Clause."[5]

For the HMT to withstand the constitutional challenge, the court reasoned that it would need to find that the charge defrayed costs of services rendered and that the charge was not excessive.[6] Citing the *ad valorem* HMT's "little nexus" to port maintenance costs and lack of a "mechanism to ensure that the fees collected will be used only or primarily for the cost of port maintenance associated with the shipping" being taxed, the court determined that the HMT was not a permissible "user fee" imposed under Congress's Commerce Clause powers.[7] Accordingly, the court held the HMT "as it applie[d] to exports constitute[d] a tax prohibited by the Export Clause."[8] This decision was upheld by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") and, ultimately, the United States Supreme Court.[9]

Equally important to exporting parties, *U.S. Shoe* concluded by determining the jurisdictional basis upon which exporters could seek refunds of HMTs paid upon exports. Two subsections of the court's jurisdictional statute were in tension, each potentially providing parties a route for judicial review but imposing very different prerequisites and deadlines for seeking review. Under 28 U.S.C. § 1581(a), the court has jurisdiction to review the U.S. Customs Service's ("Customs") denial of a protest. At that time, a party was required to protest a Customs decision within ninety days of the date of that decision (*e.g.*, liquidation).[10] On the other hand, 28 U.S.C. § 1581(i) invests the court with broad residual jurisdiction over tariff disputes. Litigants may commence such actions "within two years after the cause of action first accrues."[11] However, jurisdiction under § 1581(i) is not available if

[5] *Id.* at 412.

[6] *Id.* at 414.

[7] *Id.* at 414-15 (internal quotation marks omitted).

[8] *Id.* at 413.

[9] *See* United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998).

[10] 19 U.S.C. § 1514(c)(3)(B). Today, the period is 180 days. *Id.*

[11] 28 U.S.C. § 2636(i).

another subsection of § 1581 could afford would-be litigants an adequate remedy.[12]

The three-judge panel held that jurisdiction lay under 28 U.S.C. § 1581(i).[13] This determination of the jurisdictional basis upon which exporters could seek HMT refunds resulted in a conversation between Judge Restani and the Federal Circuit that lasted over a decade.

Jurisdictional Basis for Seeking HMT Refunds

In one of the first cases to arise after the Supreme Court's decision affirming the unconstitutionality of export HMTs, Judge Restani addressed jurisdiction and the time period for bringing actions to recover export HMTs. In *Swisher International*, Judge Restani held — consistent with *U.S. Shoe* — that the denial of a refund request was not a protestable decision reviewable under § 1581(a).[14] Rather, the court's residual § 1581(i) jurisdiction governed.[15] The Federal Circuit reversed, holding that the Supreme Court's HMT decision did not limit other challengers to the residual jurisdiction subsection (and two-year statute of limitations) and that denial of a request to refund export HMTs was a "charge or exaction" and, therefore, a protestable decision reviewable under the Court of International Trade's § 1581(a) jurisdiction.[16] When it came to HMTs applied to imports,[17] Judge Restani reasoned in *Thomson Consumer Electronics* that the court's residual jurisdiction under § 1581(i) was only available if "jurisdiction is not available under any other provision of 28 U.S.C. § 1581, or if relief under such other

[12] Miller & Co. v. United States, 824 F.2d 961, 964 (Fed. Cir. 1987).

[13] *U.S. Shoe*, 907 F. Supp. at 421.

[14] Swisher Int'l, Inc. v. United States, 27 F. Supp. 2d 234, 239 (Ct. Int'l Trade 1998).

[15] *Id.* Consequently, some claims were time-barred by the two-year limitations period. Swisher Int'l, Inc. v. United States, 205 F.3d 1358, 1365 (Fed. Cir. 2000).

[16] *Swisher Int'l*, 205 F.3d at 1369.

[17] Judge Restani determined in *Amoco Oil Co. v. United States*, 63 F. Supp. 2d 1332 (Ct. Int'l. Trade 1999), that the export provision of the HMT was severable and thus that the HMT could be applied to imports and did not violate the Uniformity Clause or Port Preference Clause of the U.S. Constitution. Judge Restani also determined a separate constitutional issue and held that the HMT did not violate the Export Clause as it applied to interstate shipments. Fla. Sugar Mktg. & Terminal Ass'n v. United States, 40 F. Supp. 2d 479, 480 (Ct. Int'l Trade 1999).

provision would be manifestly inadequate."[18] Applying this standard, Judge Restani held that judicial review was available only under § 1581(a) because challenges to the liquidation of entries assessed HMTs were to be made by way of protest pursuant to 19 U.S.C. § 1514(a).[19] As such, the failure to protest the entries made the liquidation of those entries final and judicial review unavailable.[20] The Federal Circuit reversed, however, finding that to protest the constitutionality of the HMT as it applied to imports before Customs "would be an utter futility."[21] Importers were not required to do so before seeking judicial review and, accordingly, the Court of International Trade had jurisdiction to hear the challenge under § 1581(i).[22]

Judge Restani recognized the tension created by this jurisdictional back and forth, noting that the Federal Circuit did not explain "why § 1581(i) could be utilized in *U.S. Shoe*, even though in *Swisher* the court found that § 1581(a) was available to parties who filed or could file refund requests."[23] Ultimately, in *M.G. Maher*, Judge Restani swept the conversation between the two courts into as neat a pile as possible, elucidating as follows: the HMT saga having finally reached a point wherein the courts and Customs had made the availability of HMT export refunds "very clear" to would-be claimants, "HMT refund seekers must pursue claims through Customs" and "rejection of such refund requests will lead to § 1581(a) jurisdiction."[24] In that case, the *M.G. Maher* plaintiffs had not done so.[25] Rather than dismiss the action for failure to complete a statutorily required administrative process, Judge Restani recognized that "jurisdiction in this area is unsettled," considered the merits "in the interest of judicial economy," and

[18] Thomson Consumer Elecs., Inc. v. United States, 62 F. Supp. 2d 1182, 1184 (Ct. Int'l Trade 1999) (internal quotation marks omitted).

[19] *Id.*

[20] *Id.* at 1185.

[21] Thomson Consumer Elecs., Inc. v. United States, 247 F.3d 1210, 1212 (Fed. Cir. 2001).

[22] *Id.*

[23] M.G. Maher & Co. v. United States (*M.G. Maher*), 26 Ct. Int'l Trade 1040, 1041 (2002).

[24] *Id.*

[25] *See id.* at 1041-42.

dismissed the claim,[26] thus resolving another group of HMT-related disputes implicating a substantial class of plaintiffs.

Issues Abound

Determining the jurisdictional basis under which the court could preside over HMT claims was just the tip of the iceberg of issues that Judge Restani was required to resolve.[27] Judge Restani presided over issues regarding interest,[28] FTZ admissions,[29] insular possessions,[30] the Outer Continental Shelf,[31] and many more.

One of the most tumultuous issues was whether the HMT was a "tax" at all. Congress instructed that the HMT be administered and enforced as if it were a customs duty.[32] For purposes of the Export Clause, the

[26] *Id.* Plaintiffs' substantive claim challenged Customs' creation of a regulatory deadline for filing HMT refund claims. *See generally id.*

[27] Given the sheer quantity and variety of HMT disputes, many other HMT cases were handled by other judges. For example, Judge Musgrave generally handled the line of cases reviewing drawback issues, see, for example, Texport Oil Co. v. United States, 1 F. Supp. 2d 1393 (Ct. Int'l Trade 1998), and resolved issues of HMT application to cruise line passengers, see, for example, Princess Cruises, Inc. v. United States, 15 F. Supp. 2d 801 (Ct. Int'l Trade 1998).

[28] *See, e.g.*, Int'l Bus. Machs. Corp. v. United States, 22 Ct. Int'l Trade 519 (1998), *rev'd*, 201 F.3d 1367 (Fed. Cir. 2000) (finding that Congress had not waived sovereign immunity by expressly consenting to such interest payments on export HMT refunds).

[29] *See, e.g.*, BMW Mfg. Corp. v. United States, 23 Ct. Int'l Trade 700 (1999) (determining HMT on FTZ admissions were legal because the HMT was not a customs duty for purposes of the statute providing that customs duties are not paid on FTZ admissions), *aff'd*, 241 F.3d 1357 (Fed. Cir. 2001).

[30] *See, e.g.*, Esso Standard Oil Co. v. United States, 31 Ct. Int'l Trade 1848 (2007) (holding that Customs should have refunded HMT paid on shipments between insular possessions because Esso's payment was a correctable inadvertence stemming from Customs' decades-long failure to amend its regulations to reflect that HMT was not owed), *rev'd in part*, 559 F.3d 1297 (Fed. Cir. 2009) (holding that erroneously paid HMT was not a correctable error because it was a mistake of law that did not qualify as a correctable inadvertence).

[31] *See, e.g.*, Aker Gulf Marine v. United States, 138 F. Supp. 2d 1304 (Ct. Int'l Trade 2000) (holding, with regard to shipments to offshore oil platforms on the Outer Continental Shelf, that because the shipment was not an export as it was not to a foreign country, the HMT applied, and the governing regulations did not exempt the shipments from the HMT).

[32] 26 U.S.C. § 4462(f)(1).

HMT was determined to be a violative tax.[33] For purposes of imports, however, the HMT was determined to be a user fee.[34] As Judge Restani clarified, "[i]n these areas of constitutional jurisprudence, a revenue measure may be discussed as a tax and yet still be considered a constitutionally-valid user fee."[35]

When exempting imports of foreign military articles, however, the HMT was considered an internal revenue tax.[36] Likewise, for purposes of statutory provisions relating to jet fuel imported into bonded warehouses, the HMT was an internal revenue tax.[37] And, notwithstanding Congress's instructions concerning how the HMT was to be administered,[38] in substance the HMT was not a customs duty for purposes of FTZs.[39]

There were over a thousand claims filed challenging different aspects of Congress's promulgation of the HMT as it related to the administration of customs laws. Judge Restani paired her ability to parse and analyze the issues with her ability to organize an efficient and comprehensive system by which to methodically address the claims filed.

PART TWO: LARGE CASE MANAGEMENT

Then and now, Rule 1 of the Rules of the U.S. Court of International Trade has provided that judges of the court should administer matters

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[33] *U.S. Shoe*, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

[34] Thomson Multimedia Inc. v. United States, 219 F. Supp. 2d 1322, 1332 (Ct. Int'l Trade 2002) (holding HMT is a constitutional tax based on *U.S. Shoe*), *aff'd*, 340 F.3d 1355 (Fed. Cir. 2003) (holding HMT was constitutional as applied to imports but was a user fee rather than a tax).

[35] Nippon Express USA, Inc. v. United States, 28 Ct. Int'l Trade 1845, 1854 (2004).

[36] *Id.* at 1855.

[37] Citgo Petroleum Corp. v. United States, 104 F. Supp. 2d 106, 110 (Ct. Int'l Trade 2000) (holding that the HMT paid upon jet fuel imported into bonded warehouses and later withdrawn as supplies for aircraft fit within the meaning of an internal revenue tax for purposes of 19 U.S.C. § 1309, which provides that supplies for aircraft registered in the United States and engaged in foreign trade may be withdrawn from any customs bonded warehouse free of duty and such taxes).

[38] *See* 26 U.S.C. § 4462(f)(1).

[39] BMW Mfg. Corp. v. United States, 23 Ct. Int'l Trade 700, 700 (1999); *see also supra* note 29.

according to its rules in order to "secure the just, speedy, and inexpensive determination of every action and proceeding." This is an extremely tall order when managing litigation implicating over $730 million in refundable taxes and as many as 100,000 potential claimants whose claims "range from less than one hundred dollars to hundreds of thousands of dollars."[40] No less than Judge Restani's substantive legal analysis, the Judge's efforts to ensure that justice delayed (or unnecessarily complicated) did not become justice denied are a testament to her clarity of thought.

The Appropriateness of Class Certification

After the three-judge panel of Chief Judge DiCarlo, Judge Musgrave, and Judge Restani issued its opinion in *U.S. Shoe* and stayed execution of the panel's judgment pending appeal,[41] Chief Judge DiCarlo assigned Judge Restani to guide the sweeping litigation through to an orderly conclusion.[42] Importantly, *U.S. Shoe* represented a "test case" procedure, similar to how the court has thus far handled adjudication of the well over 3,000 Section 301 tariff assessment challenges.[43] Out of "[m]ore than one thousand cases" challenging the constitutionality of export HMTs, only *U.S. Shoe* was taken up to "test" those arguments while the remainder were stayed.[44]

[40] *See* Baxter Healthcare Corp. v. United States, 925 F. Supp. 794, 796 (Ct. Int'l Trade 1996) (noting the number of potential claimants and range in claim size); Heather M. Pichelman, Note, *It's Pay-Up Time for the Government on the Harbor Maintenance Tax: Exporters Are Receiving Their Tax Refunds, but What About Interest?*, 11 FED. CIR. B.J. 427, 427 (2001) (stating that the government had refunded approximately $732 million dollars to exporters as of October 2000).

[41] *See* U.S. Shoe Corp. v. United States, 19 Ct. Int'l Trade 1413 (1995) (Judgment); U.S. Shoe Corp. v. United States, 19 Ct. Int'l Trade 1419 (1995) (Order staying Judgment).

[42] *See Baxter Healthcare*, 925 F. Supp. at 798. As acknowledged in *Baxter Healthcare* and noted *supra* in note 27, certain specific disputes were adjudicated by Judge Musgrave.

[43] *See generally In re* Section 301 Cases, 524 F. Supp. 3d 1355 (Ct. Int'l Trade 2021).

[44] *Baxter Healthcare*, 925 F. Supp. at 796. To permit the "test case" panel to address as many relevant legal arguments as feasible, amicus parties were invited to submit papers in *U.S. Shoe*.

However, insofar as the HMT only amounted to a 0.125% *ad valorem* assessment on exports, certain would-be claimants stood to recover only a relatively small dollar amount. Seeing the potential for class certification under these circumstances, a motion was put to the court. As appellate proceedings wore on, Judge Restani turned to this issue. In *Baxter Healthcare*, Judge Restani recognized that "[r]epresentative plaintiffs' claims are substantial; no conflicts appear; and counsel are experienced. The real point of debate is whether, as a discretionary matter, a class action should be maintained . . . ."[45]

Judge Restani concluded that it should not, holding that the test case procedure was adequate.[46] While recognizing that small claimants faced a "proportionally heavier burden" in having to file their own case,[47] Judge Restani correctly observed that HMT refunds "cannot be paid out without appropriate documentation" such that "[t]he claims resolution process will be cumbersome, but manageable, whether or not a class is certified."[48] The case had been well-publicized, and all HMT refund litigation would be concentrated at the U.S. Court of International Trade regardless, given its unique jurisdictional statute.[49] Judge Restani did not cite Rule 1 of the Rules of the U.S. Court of International Trade, but in essence the Judge concluded that class certification would not result in "just, speedy, and inexpensive determination" of the mega-litigation.

Getting Refunds to Successful Plaintiffs

When on March 31, 1998, the U.S. Supreme Court issued its opinion affirming the unconstitutionality of the export HMT,[50] it fell to Judge Restani to devise an orderly process for administering refunds of the unconstitutional tax.[51] After receiving parties' suggestions concerning

[45] *Id.* at 797.

[46] *Id.* at 800.

[47] *Id.*

[48] *Id.* at 799.

[49] *See id.* at 798, 800; *see also* 28 U.S.C. § 1581.

[50] United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998).

[51] The question of interest, and how much due, occasioned additional litigation not discussed in detail herein. *See, e.g.*, U.S. Shoe Corp. v. United States, 22 Ct. Int'l Trade 613 (1998) (awarding interest from the date of payment of the HMT calculated under 28

available administrative resources and proposed approaches,[52] Judge Restani entered a proposed order on July 23, 1998, and thereafter held oral argument on the proposal.[53] The Judge's final Order Establishing Claims Resolution Procedure (the "Order") governing cases brought under § 1581(i) of the U.S. Court of International Trade's jurisdictional statute was entered on August 28, 1998.[54]

In essence, claimants were required to submit a standard form and a copy of their complaint to Customs, which would then query its computer records for information on the claimant's export HMT payments made prior to the two-year limitations period,[55] and provide that to the claimant.[56] If satisfied with Customs' tally, the claimant would fill out and sign a judgment form and transmit it to the Department of Justice to be countersigned and filed with the court.[57] Judge Restani prescribed a minimum pace for Customs to work through claims and required periodic reports to the court.[58] The majority of claimants utilized this process, though alternative avenues existed, *e.g.*, for plaintiffs who brought cases under § 1581(a) of the U.S. Court of International Trade's jurisdictional statute.[59] Given that over $730 million dollars had been refunded to exporters only two years after

U.S.C. § 2411); U.S. Shoe Corp. v. United States, 296 F.3d 1378 (Fed. Cir. 2002) (reversing judgment).

[52] *See* U.S. Shoe Corp. v. United States, 22 Ct. Int'l Trade 460 (1998) (noting openness to receive proposals).

[53] U.S. Shoe Corp. v. United States, 22 Ct. Int'l Trade 737 (1998) (detailing the proposed plan).

[54] U.S. Shoe Corp. v. United States (*Claims Resolution Order*), 22 Ct. Int'l Trade 880 (1998).

[55] *See* 28 U.S.C. § 2636(i) (limitations statute).

[56] *See Claims Resolution Order*, 22 Ct. Int'l Trade at 880-81.

[57] *Id.* at 881. Additional procedures were prescribed to adjudicate disputed claims. *See id.* at 882-84.

[58] *See id.* at 881-82 ("Customs will build up its response speed so that after December 15, 1998, Customs shall process no fewer than 500 claims per month.").

[59] The court approved claims resolution procedures put in place by Judge Restani for litigants who had protested the export HMT before Customs and established § 1581(a) jurisdiction before the Court were similar to those set forth in *Claims Resolution Order*. *See* Swisher Int'l, Inc. v. United States, 25 Ct. Int'l Trade 183, 183-85 (2001). In addition, an administrative avenue for relief ultimately came into being. *See M.G. Maher*, 26 Ct. Int'l Trade 1040, 1040 (2002).

entry of Judge Restani's Order,[60] the Judge's approach was undoubtedly a success.

It is without question that the road map for large case management laid down by Judge Restani in the HMT cases provided useful lessons for the Judges of the U.S. Court of International Trade when the trade bar launched the next high-volume litigation — challenges to Section 301 duties that began in September 2020 and quickly numbered in the thousands. On the plaintiffs' side, Judge Restani's analysis in *Baxter Healthcare* likely informed deliberations as to whether the class certification framework would be an appropriate tool for managing the sprawling Section 301 actions. Indeed, irrespective of the angle from which an interested party might approach such cases — as Judge, plaintiff(s), or the government defendant — Judge Restani's opinions remain as instructive today as they were when they were originally published.

CONCLUSION

While the HMT was promulgated in the 1980s, the lessons of Judge Restani's analysis of plaintiffs' challenges remain instructive today. In particular, the question of when one may properly invoke the U.S. Court of International Trade's § 1581(i) jurisdiction continues to be a flashpoint among litigants, with the tension recognized by Judge Restani in *M.G. Maher* forming a critical part of the analysis. Likewise, the Judge's steady management of the thousand-plus actions before her provides a model blueprint for both Judges and litigants in managing the largest trade disputes. As demonstrated by the filing of over 3,000 actions challenging the U.S. Trade Representative's Section 301 tariffs in 2020 and 2021, such practical lessons continue to be relevant to the U.S. Court of International Trade's administration of "just, speedy, and inexpensive" results.

[60] *Compare Claims Resolution Order*, 22 Ct. Int'l Trade at 880, *with* Pichelman, *supra* note 40, at 427 (noting the $732 million refunded by October 2020).

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General Manuel Noriega and the Application of the Geneva Conventions in U.S. Courts

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In 2008, when sitting by designation[1] with the U.S. Court of Appeals for the Eleventh Circuit, Judge Jane A. Restani of the U.S. Court of International Trade had the opportunity to write on the applicability and interpretation of the Geneva Conventions[2] in federal court. The Eleventh Circuit opinion resolved multiple constitutional challenges to a wartime statute, evaluated a European country's commitment to international standards, and allowed a notorious Central American dictator and prisoner of war to be extradited. Her decision remains the most recent and on point case on the application of the Geneva Conventions in domestic litigation.

General Manuel Noriega was the head of the Panamanian Defense Forces and the authoritarian leader of Panama from 1983 until his capture by the United States in 1989 during a brief military intervention.[3] A grand jury indicted him on federal drug-related conspiracy charges, of which he was eventually convicted and sentenced to thirty years' imprisonment.[4] He sought a declaration in federal court that he was a prisoner of war ("POW") under the Geneva Conventions, which the Southern District of Florida granted him along with specified conditions that he must be granted while in custody.[5] And when his

[1] Federal judges may sit by designation under 28 U.S.C. § 292 "whenever the business of that court so requires." 28 U.S.C. § 292 (2018). For a brief history of the practice of designation work by federal judges, see generally Marin K. Levy, *Visiting Judges: Riding Circuit and Beyond*, 106 JUDICATURE 21 (2023).

[2] The Geneva Conventions are comprised of four separate multilateral treaties: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; 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 Third Geneva Convention]; and 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 Fourth Geneva Convention]. This Essay will primarily discuss the Third and Fourth Geneva Conventions.

[3] Randal C. Archibold, *Manuel Noriega, Dictator Ousted by U.S. in Panama, Dies at 83*, N.Y. TIMES (May 30, 2017), https://www.nytimes.com/2017/05/30/world/americas/manuel-antonio-noriega-dead-panama.html [https://perma.cc/XLD9-S7WW].

[4] *See id.*

[5] *See* United States v. Noriega (*Noriega I*), 808 F. Supp. 791, 803 (S.D. Fla. 1992), *aff'd*, 117 F.3d 1206 (11th Cir. 1997).

sentence was ending, he sought to rely on the Geneva Conventions once more to control his release, and in the determination of whether he could face further criminal charges in other countries.[6] Judge Restani sat on the Eleventh Circuit panel that heard General Noriega's final habeas challenge.[7]

This Essay will first present the legal background relevant to Judge Restani's opinion. Then, the Essay will discuss the factual circumstances surrounding Judge Restani's opinion; how General Noriega attempted to avoid extradition to France based on his POW status. Finally, the Essay will reflect on remaining ambiguities in the application of the Geneva Convention in federal habeas law and whether the opportunity to meaningfully challenge its constitutionality has passed.

I. LEGAL BACKGROUND ON HABEAS PETITIONS FILED BY COMBATANTS IN THE UNITED STATES

In 2006, in *Hamdan v. Rumsfeld*, the United States Supreme Court held that military commissions established by President George W. Bush, in order to try detainees at Guantanamo Bay during the War on Terror, violated the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions.[8] As noted by a concurring opinion, though, "Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[9] The Bush administration did just that, securing congressional passage of the Military Commissions Act of 2006 ("MCA").[10]

The MCA had two provisions that are relevant to this Essay's topic and the Geneva Conventions. The first is section 5 of the MCA, which provides:

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[6] Noriega v. Pastrana (*Noriega II*), 564 F.3d 1290, 1293 (11th Cir. 2009).

[7] *Id.*

[8] Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006). Specifically, the Court held that the Commissions were established under the UCMJ and that the UCMJ itself guaranteed a certain level of process to any commissions established under its authority. That level of process required that the Commissions comply with Geneva Convention rules. The Court did not reach the question of whether the Geneva Conventions in themselves established a judicially cognizable right.

[9] *Id.* at 636 (Breyer, J., concurring).

[10] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or . . . [an] agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[11]

This clause, which applied to all U.S. courts, encompassed actions filed by any person in the United States for habeas corpus or civil suits from invoking the Geneva Conventions as a source of rights.[12] The legislative history of this section shows that eliminating the Geneva Conventions as a source of legal rights was the goal.[13]

The other relevant clause, section 7 of the MCA, is referred to as the restriction on habeas corpus review section, and provided:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[14]

The MCA specified that section 7 applied to all pending or subsequent cases brought by "an alien detained by the United States since September 11, 2001."[15]

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[11] Military Commissions Act § 5(a) (codified at 28 U.S.C. § 2241 note).

[12] *See id.*; *see also* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 328 & n.41 (2007) (noting that the MCA would preclude reliance on the Geneva Conventions for suits under the Alien Torts Statute in addition to other civil suits).

[13] *See, e.g.*, H.R. REP. NO. 109-731, at 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); H.R. REP. NO. 109-664, pt. 2, at 17 (2006) (noting that the section "would prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States"); 152 CONG. REC. S10354, S10400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights."); *id.* at S10414 (statement of Sen. McCain) ("[This legislation] would eliminate any private right of action against our personnel based on a violation of the Geneva Conventions.").

[14] Military Commissions Act § 7(a).

[15] *Id.* § 7(b).

During the litigation of Noriega's habeas corpus petition, the Supreme Court in *Boumediene v. Bush* held that section 7 of the MCA was unconstitutional.[16] The Court held that detainees could not be prevented from seeking habeas relief regardless of their status as an enemy combatant.[17] Specifically, the Court stated that section 7 of the MCA was a breach of the Suspension Clause[18] and did not provide an adequate remedy to substitute habeas relief.[19] Before *Boumediene*, detainees could have status reviews under the Detainee Treatment Act of 2005,[20] but the Supreme Court determined those procedures failed to be an adequate substitute.[21] The Supreme Court did not determine the "content of the law that governs petitioners' detention."[22] With this statutory framework in mind, the Essay will explore how Judge Restani interpreted the MCA and any issues with the statute.

Additionally relevant is the status of the Geneva Conventions in United States law, specifically, whether the Geneva Conventions is a self-executing treaty. Ratified treaties in the United States are divided into "self-executing treaties," which provide immediate, legally enforceable rights in U.S. courts, and "non-self-executing treaties," which have no domestic application without implementation from Congress.[23] In *Hamdan*, the Supreme Court did not decide whether the Geneva Conventions were self-executing, instead relying on congressional incorporation of the laws of war, which include the Geneva Conventions.[24] In *Noriega I*, the Southern District of Florida held that it believed that "Geneva III is self-executing and provides

[16] Boumediene v. Bush, 553 U.S. 723, 795 (2008).

[17] *Id.* at 771.

[18] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[19] *Boumediene*, 553 U.S. at 792.

[20] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740-44 (codified at 10 U.S.C. § 801 note).

[21] *Boumediene*, 553 U.S. at 792.

[22] *Id.* at 798.

[23] Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 YALE L.J. 1784, 1786 (2011).

[24] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628 (2006).

General Noriega with a right of action in a U.S. court for violation of its provisions."[25]

II. NORIEGA'S LEGAL BATTLES

Out of concern over the type of care Noriega would receive in federal custody, in 1992, the U.S. District Court for the Southern District of Florida designated him a POW, entitling him to the protections of the Third Geneva Convention, after he filed for its protections.[26]

Shortly before Noriega was scheduled to be released on parole in 2007, the United States filed a complaint for the extradition of Noriega pursuant to a treaty[27] with the French Government.[28] In response, Noriega filed a habeas corpus petition,[29] alleging that the United States violated the Geneva Conventions by acquiescing to the French Government's extradition request.[30] The Southern District of Florida

[25] *Noriega I*, 808 F. Supp. 791, 794 (S.D. Fla. 1992).

[26] *See Noriega I*, 808 F. Supp. at 791. This was the first time an individual detained in the United States asked for a judicial determination of POW status. *See* Geoffrey S. Corn & Sharon G. Finegan, *America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 LA. L. REV. 1111, 1115 (2011). In *Noriega I*, the district court found that the United States' actions in Panama constituted an "armed conflict" under article 2 of the Third Geneva Convention, that Noriega was a member of the armed forces under article 4, and that a district court was a "competent tribunal" to determine POW status under article 5. *See Noriega I*, 808 F. Supp. at 795-96. Thus, the district court concluded that Noriega was a POW and identified specific Geneva Convention rights it believed he was entitled to receive in federal custody. *Id.* at 799-803. The decision was not challenged on appeal.

[27] Extradition Treaty, U.S.-Fr., art. 1, Apr. 23, 1996, S. TREATY DOC. No. 105-13 (2002).

[28] *Noriega II*, 564 F.3d 1290, 1293 (11th Cir. 2009).

[29] Noriega originally filed his habeas petition under 28 U.S.C. § 2255. *See* United States v. Noriega, 694 F. Supp. 2d 1268, 1269 (S.D. Fla. 2007). Section 2255 is the mechanism for a federal prisoner to launch a collateral attack on an imposed sentence, which involves "mov[ing] the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). The district court dismissed the § 2255 petition as not cognizable because Noriega did not challenge a defect in his sentence. *See Noriega*, *supra*, at 1270 . The district court accepted Noriega filing the same claims under 28 U.S.C. § 2241. *See* Noriega v. Pastrana, No. 07-CV-22816-PCH, 2008 WL 331394, at *3 (S.D. Fla. Jan. 31, 2008).

[30] *See Noriega*, 694 F. Supp. 2d at 1270. Noriega's challenge was based on article 87 of the Third Geneva Convention, which prohibits a country from transferring a POW to

agreed that Noriega's POW status continued to apply, protecting him until his final release, but eventually denied the petition.[31] The district court, however, stayed the extradition pending appeal due to the "credible arguments . . . , particularly with regard to the interpretation of certain provisions of the Geneva Convention[s]," on which "no other federal court has ruled."[32] Noriega appealed to the U.S. Court of Appeals for the Eleventh Circuit, where Judge Restani was sitting by designation.[33]

III. JUDGE RESTANI'S OPINION IN *NORIEGA V. PASTRANA*, 564 F.3D 1290 (11TH CIR. 2008)

When analyzing Noriega's claim, Judge Restani started by stating that the parties agreed that "the issues present in [*Boumediene v. Bush*], concerning the constitutionality of § 7 of the MCA, are not presented by § 5 of the MCA."[34] She held, instead, that:

> Section 5, in contrast, as discussed more fully, *infra*, at most changes one substantive provision of law upon which a party might rely in seeking habeas relief. We are [thus] not presented with a situation in which potential petitioners are effectively banned from seeking habeas relief because any constitutional rights or claims are made unavailable.[35]

Thus, Judge Restani rejected any Suspension Clause argument that Noriega could have raised for his habeas petition.[36]

another country if that country does not recognize the detained person's POW status. Third Geneva Convention, *supra* note 2, at art. 87.

[31] *Noriega*, 694 F. Supp. 2d at 1274.

[32] *See* Noriega v. Pastrana, 2008 WL 331394, at *3.

[33] *See Noriega II*, 564 F.3d at 1292.

[34] *Id.* at 1294. Both of the parties conceded this point in the Eleventh Circuit. *See id.* Noriega maintained that MCA section 5 somehow did not bar his reliance on Geneva III. *Id.* It reemerged in Noriega's petition for a writ of certiorari, however, as recognized by Justice Thomas in his dissent of denial of the petition. Noriega v. Pastrana (*Noriega III*), 559 U.S. 917, 1005-06 (2010).

[35] *Noriega II*, 564 F.3d at 1294.

[36] *Id.*

Next, Judge Restani found it unnecessary to decide whether the Geneva Conventions are self-executing treaties.[37] Relying on *Medellin v. Texas*,[38] she reasoned that, although treaties are part of the supreme law of the land, "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty."[39] Congress is able to pass statutes that supersede the domestic effect of treaties.[40] This brought Judge Restani to the other component of the MCA at issue: whether, despite section 5's declaration that "no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or [. . .] civil action or proceeding" in which the United States is a party, the Geneva Conventions could be relied upon by a party.[41]

Noriega argued to the Eleventh Circuit that, although section 5 prevented him from invoking the Third Geneva Convention as a source of rights through a habeas petition, he maintained the right "to enforce the provisions" of the Treaty against the Secretary of State, Bureau of Prisons, and the Department of Justice.[42] He asserted that article 118 of the Third Geneva Convention required that, as a POW, he be repatriated to Panama after his criminal sentence ended.[43] In response, the Government argued that Noriega's Geneva Convention claims were outside the scope of a habeas petition, that the Geneva Conventions was not self-executing, and that it made no guarantee against the extradition that Noriega sought to avoid.[44] Noriega subsequently argued that the

[37] *Id.* at 1295-96.

[38] 552 U.S. 491 (2008).

[39] *Noriega II*, 564 F.3d at 1295-96.

[40] *Id.* at 1296; *see also, e.g.*, Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (quoting Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion)) (finding that petitioner's claim for relief based on violations of the Vienna Convention on Consular Relations was subject to the later enacted Antiterrorism and Effective Death Penalty Act); *Medellín*, 552 U.S. at 509 n.5 ("Indeed, a later-in-time federal statute supersedes inconsistent treaty provisions."). Professor Bradley refers to this as the "last-in-time rule." Bradley, *supra* note 12, at 339.

[41] *Noriega II*, 564 F.3d at 1296 (citing Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631).

[42] *Id.* at 1296.

[43] *Id.* at 1296-97; *see* Third Geneva Convention, *supra* note 2, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

[44] *Noriega II*, 564 F.3d at 1297-98.

Geneva Conventions were indeed self-executing, and the United States was unable to argue otherwise since it had not argued or appealed this particular issue in Noriega's first case, when the Southern District of Florida ruled the treaty to be self-executing.[45]

Considering Noriega's argument, Judge Restani decided that Noriega was still relying on the Third Geneva Convention as a source of rights for his habeas claim, despite his arguments to the contrary.[46] She highlighted that section 5 is not limited to habeas corpus petitions, and instead "attempts to remove entirely the protections of the Convention from any person, even a citizen of the United States, in any American courtroom whenever the United States is involved."[47] Analyzing the legislative history, Judge Restani stated that the plain text of section 5 made it unambiguous and was clearly intended to preclude any court from treating the Geneva Conventions as "a source of rights, directly or indirectly," that was "judicially enforceable in any court of the United States."[48] She concluded, accordingly, that section 5 plainly prohibited Noriega from making any Geneva Convention claim. As all of Noriega's requests for relief were based in the Geneva Conventions and thus plainly barred, Judge Restani held that Noriega failed to state any valid claim for habeas relief.[49]

In the alternative, however, Judge Restani proceeded to address the merits of the extradition question as though "the Third Geneva Convention [were] self-executing and that § 5 of the MCA does not preclude Noriega's claim."[50] Considering the Third Geneva Convention, she relied on article 119 to state that the United States was authorized to prolong Noriega's detention and POW status for the duration of his criminal sentence.[51] Next, she cited article 12 for "the principle that

[45] *Id.*

[46] *Id.* at 1297.

[47] *Id.* at 1296.

[48] *Id.*; *see also* Boumediene v. Bush, 476 F.3d 981, 988 n.5 (D.C. Cir. 2007) (concluding that "[s]ection 7 [of the MCA] is unambiguous, as is section 5(a)"), *rev'd*, 553 U.S. 723, 795 (2008) (holding that section 7 unambiguously eliminates habeas jurisdiction but is unconstitutional, but not discussing section 5).

[49] *Noriega II*, 564 F.3d at 1297.

[50] *Id.*

[51] *Id.* Article 119 states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings,

repatriation is not automatic."[52] She stated that article 12 imposed the requirement that POWs may only be transferred to a country that is a party to the Third Geneva Convention and would apply it.[53] Accordingly, because France was also a party to the Third Geneva Convention and the United States obtained specific information from the Republic of France that Noriega would receive the same rights and protections the United States provided Noriega, Judge Restani concluded that the extradition would satisfy article 12.[54]

Noriega contended that article 12 did not apply to extradition as it omitted any reference to extradition.[55] Judge Restani looked to the "parallel" article 45 to the Fourth Geneva Convention, which specifically noted that it did not prohibit extradition.[56] She emphasized that both article 12 of the Third Geneva Convention and article 45 of the Fourth Geneva Convention were about transfer, and found it compelling that the same convening parties expressed an understanding that "transfer" included extradition.[57] She discussed that reading the articles differently would obligate a country "to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges."[58] She declined to endorse "such an inconsistent result, particularly when both articles permit the transfer of prisoners of war or civilians under the same limited restraints."[59] As a result, Judge Restani and the Eleventh Circuit

and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." Third Geneva Convention, *supra* note 2, at art. 119. This modifies article 118's requirement that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.* at art. 118.

[52] *Noriega II*, 564 F.3d at 1298. Article 12 provides that "[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." Third Geneva Convention, *supra* note 2, at art. 12.

[53] *Noriega II*, 564 F.3d at 1298.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1298-99.

[57] *Id.* at 1299.

[58] *Id.*

[59] *Id.*

concluded that Noriega could be extradited under U.S. law and the Third Geneva Convention.[60]

Following his loss at the Eleventh Circuit, Noriega petitioned for a writ of certiorari to the Supreme Court, and was subsequently denied.[61] Notably, though, Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented from the denial of certiorari.[62] Noriega sought Supreme Court review in order to argue that section 5 of the MCA "affect[s] 28 U.S.C. § 2241 in a manner that implicates the constitutional guarantee of habeas corpus" under the Suspension Clause similar to the Supreme Court's holding in *Boumediene*.[63] Noriega also asserted that section 5 implicated the Supremacy Clause of the U.S. Constitution,[64] calling into question whether a statute can "[effects] a complete repudiation of the treaty."[65]

In his dissent, Justice Thomas did not take a position on the merits of Noriega's petition, instead imploring that the Supreme Court should have taken the case in order to "help the political branches and the courts discharge their responsibilities over detainee cases."[66] Justice Thomas stated that Noriega's case addressed an open question regarding "whether statutory efforts to limit § 2241 implicate the Suspension Clause" as section 5 of the MCA did here.[67] Although he noted that Noriega was at the time the only POW held in prison by the United States, he argued that the case would be an effective vehicle to clarify the law for Guantanamo Bay detainees as well.[68] He highlighted the unique opportunity presented to the Court to review a Geneva Convention question arising from a conviction from a federal court (as

[60] *Id.*

[61] *Noriega III*, 559 U.S. 917, 1002 (2010).

[62] *Id.*

[63] *Id.*

[64] U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

[65] *Noriega III*, 559 U.S. at 1005 (quotation marks omitted). Interestingly, Judge Restani stated in *Noriega II* that Noriega conceded this argument at the Eleventh Circuit. *Noriega II*, 564 F.3d 1290, 1294 (11th Cir. 2009). Noriega likely imprecisely conceded only that *Boumediene* was not directly on point precedent but maintained that the MCA somehow did not bar his claim.

[66] *Noriega III*, 559 U.S. at 1002.

[67] *Id.* at 1006.

[68] *Id.* at 1008-09.

opposed to a military tribunal) and lacking classified information or extraterritorial detention issues. Justice Thomas saw an opportunity to reach four issues: first, whether or not MCA section 5(a) could validly remove Geneva Convention habeas claims from federal court; second, whether the Geneva Conventions were self-executing and judicially enforceable; third, if the Geneva Conventions are self-executing and judicially enforceable, whether federal courts have the authority to classify detainees as POWs; and fourth, whether any of the Geneva Conventions required the United States to repatriate detainees released from United States custody.[69]

Upon denial of the certiorari petition, the United States extradited Noriega to France.[70] He would eventually be convicted and sentenced to seven years' imprisonment.[71]

IV. LEGACY OF *NORIEGA*

As illustrated by Justice Thomas's dissenting opinion, the legacy of *Noriega* II implicates two provisions of the Constitution: the Supremacy Clause and the Suspension Clause. There have been few attempts since Judge Restani's opinion in *Noriega* II to seek any civil relief based on the Geneva Conventions in a U.S. court.[72] In a concurring opinion for a denial of rehearing en banc for the rejection of habeas claims of a Guantanamo Bay detainee, then-Judge Brett Kavanaugh cited *Noriega* II to suggest that, "[i]n other words, to the extent the Conventions were once self-executing, Congress has effectively unexecuted them, at least

[69] *Id.* at 1007-09.

[70] Elisabeth Malkin, *Noriega Extradited to France to Face Charges*, N.Y. TIMES (Apr. 26, 2010), https://www.nytimes.com/2010/04/27/world/americas/27noriega.html [https://perma.cc/3WQP-DBR7].

[71] David Jolly, *French Court Sentences Noriega to 7 Years*, N.Y. TIMES (July 7, 2010), https://www.nytimes.com/2010/07/08/world/americas/08noriega.html [https://perma.cc/REH4-LX2Z].

[72] Geoffrey S. Corn & Dru Brenner-Beck, *Exploring U.S. Treaty Practice Through a Military Lens*, 38 HARV. J.L. & PUB. POL'Y 547, 589 (2015) ("[A]s the result of section 5 of the MCA, the issue of self-execution of the Geneva Conventions will not likely be tackled by U.S. courts, as future litigants are likely to run into the same obstacle that prevented Noriega from invoking the treaty to bar his extradition.").

for habeas matters of this kind."[73] Similar to *Noriega* II, he declined to entertain any challenge based on the Supremacy Clause.[74] Then-Judge Kavanaugh's concurrence also agreed with Judge Restani's analysis of section 5 of the MCA, that it did not implicate the Suspension Clause because it only addressed "the substantive law that courts may apply to resolve habeas petitions," and is not a complete bar to habeas relief.[75]

In full the Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[76]

A plain reading of the text appears to put the U.S. Constitution, congressional statutes, and treaties made under "the Authority of the United States" as "the supreme Law of the Land."[77] In the *Head Money Cases*, the Supreme Court confirmed this reading, placing treaties equivalent with the authority of congressional statute.[78]

In the *Head Money Cases*, the Supreme Court faced cases brought by recently arrived immigrants who had to pay fifty cents per person at Customs under an act of Congress regulating immigration.[79] When plaintiffs argued that the tax violated treaties between the United States and their home countries, the Supreme Court described treaties as "primarily a compact between independent nations," and depend on those nations "for the enforcement of its provisions."[80] When a treaty confers private rights to subjects, though, the Supreme Court stated that the Supremacy Clause puts those treaties as "a law of the land as an

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[73] Al-Bihani v. Obama, 619 F.3d 1, 22 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (quotation marks omitted).

[74] *Id.*

[75] *Id.*

[76] U.S. CONST. art. VI, cl. 2.

[77] *Id.*

[78] Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 598-99 (1884).

[79] *Id.* at 586-87.

[80] *Id.*at 598.

act of congress is."[81] From there, the Supreme Court held that treaties have "no superiority over an act of congress in this respect, which may be repealed or modified by an act of a later date."[82] Thus, even if there had been no obvious repudiation of these treaties, Congress could modify them by a later statute placing the immigration tax.[83]

There is a minority view, however, that Congress cannot "unexecute" a previously self-executing treaty, and, thus, section 5 may not be constitutional under the Supremacy Clause.[84] Professor Carlos Vázquez has written that at least one purpose of the Supremacy Clause was "to avoid the international friction that could be expected to result from violations of treaties by the United States."[85] He reasoned that, if a treaty is ratified with the international understanding that it would be binding law within the United States, a later statute "making the treaty judicially unenforceable" would result in international friction.[86] He distinguishes this friction, which he asserts the Supremacy Clause is designed against, from a clear congressional "outright repudiation of a treaty," which he claims sends a clear signal even if it might be internationally unpopular and allowed under the Constitution.[87] This view appears to elevate treaties above Congress's statutes.[88]

Functionally, there is no difference between section 5 of the MCA and the taxes at issue in the *Head Money Cases*. To the extent that the Geneva Conventions conferred private rights to a person within the United

[81] *Id.*

[82] *Id.* at 599.

[83] *See id.*

[84] Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 91-93 (2007).

[85] *Id.* at 91.

[86] *Id.* Professor Bradley characterizes this as "an overly broad view" of the Supremacy Clause, which he asserts was designed to prevent international friction caused by treaty violations of the many U.S. states. Bradley, *supra* note 12, at 340, 340 n.117 (noting that, under the Articles of Confederation, "[t]he treaties of the United States . . . are liable to the infractions of thirteen different legislatures"); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911) (noting concern by James Madison regarding "the tendency of the States to these violations" of the law of nations and treaties).

[87] Vázquez, *supra* note 84, at 91.

[88] *Id.*

States, Congress would be free to "repeal[] or modif[y]" those rights by a later statute.[89] This is essentially what Judge Restani held what section 5 of the MCA did to the Geneva Conventions in *Noriega* II.[90] This appears to be a clear application of Supremacy Clause precedent, which is perhaps why Justice Thomas's dissent in *Noriega* III did not address any of Noriega's arguments based on it.[91]

Turning to the second point of constitutional legacy left by Noriega, Justice Thomas's *Noriega* III dissent focused on the opportunity the certiorari petition presented for the Supreme Court to answer whether section 5 of the MCA was constitutional under the Suspension Clause.[92] The closest case to such question would be *Boumediene*, where the Supreme Court held that section 7 of the MCA violated the Suspension Clause.[93] *Boumediene*, ultimately, however, was only a case requiring detainees to have a "meaningful opportunity" to challenge their detention before a court.[94] The Supreme Court declined to "address the content of the law that governs petitioners' detention."[95]

Another Suspension Clause case, *I.N.S. v. St. Cyr*, [96] interpreted immigration statutes in order to allow continued habeas review.

[89] *Head Money Cases*, 112 U.S. 580, 599 (1884).

[90] *See Noriega II*, 564 F.3d 1290, 1296-97 (11th Cir. 2009). There is a similar parallel in another area of law that Judge Restani is also familiar with: trade remedies law. In *Suramerica de Aleaciones Laminadas, C.A. v. United States*, the U.S. Court of Appeals for the Federal Circuit considered whether a specific domestic producer's petitions for antidumping and countervailing duty investigations "should be considered to be filed 'on behalf of' the domestic industry." 966 F.2d 660, 665 (Fed. Cir. 1992); *see also* 19 U.S.C. §§ 1671a(b), 1673a(b). When interpreting the meaning of "on behalf of" in the statute, the Federal Circuit refused to consider international law norms. *Suramerica de Aleaciones Laminadas*, 966 F.2d at 667 ("[E]ven if we were convinced that Commerce's interpretation conflicts with the [General Agreement on Tariffs and Trade ("GATT")], which we are not, the GATT is not controlling."). The Federal Circuit held that "[t]he GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.* at 668

[91] *See Noriega III*, 559 U.S. 917, 1005 (2010).

[92] *Id.* at 1005-06.

[93] Boumediene v. Bush, 553 U.S. 723, 795 (2008).

[94] *Id.* at 779.

[95] *Id.* at 798.

[96] I.N.S. v. St. Cyr, 533 U.S. 289, 310-11 (2001), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-11.

Following congressional action that limited "judicial review" of detention orders in the immigration context, the Supreme Court held that habeas review under 28 U.S.C. § 2241 must continue in order to avoid a conflict with the Suspension Clause.[97] Specifically, the Supreme Court stated that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."[98] And in *Boumediene*, the Supreme Court relied on *St. Cyr* for the principle that habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."[99]

How does section 5 of the MCA's prohibition on the use of the Geneva Conventions, as a source of a private right, fit into this Suspension Clause precedent? It is a question that has largely gone unanswered since Justice Thomas's dissent. Still, section 5 does seem to prohibit review of a question of law and refuse to grant a prisoner an opportunity to demonstrate the erroneous application of relevant law.[100] As noted earlier, one current Supreme Court justice, while a circuit court judge, has written that he does not believe section 5 implicates the Suspension Clause.[101] The answer may be that section 5 demonstrates sufficient congressional intent to render the Geneva Conventions as no longer "relevant law."[102] This part of *Noriega* II fails to fully address why section 5 does not implicate the Suspension Clause in the same way that *St. Cyr* did.[103]

Regardless, because Judge Restani addressed Noriega's claims through the MCA and also applied the Geneva Conventions alternatively, and still denied relief, the decision is insulated from any deficiency in the MCA. Still, the unambiguous language of section 5, as well as the dwindling number of Guantanamo detainees and absence of

[97] *Id.* at 312-13.

[98] *Id.* at 300.

[99] *Boumediene*, 553 U.S. at 779 (citing *St. Cyr*, 533 U.S. at 302) (quotation marks omitted).

[100] *Id.*; *St. Cyr*, 533 U.S. at 300.

[101] Al-Bihani v. Obama, 619 F.3d 1, 22 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

[102] *Boumediene*, 553 U.S. at 779.

[103] *See Noriega II*, 564 F.3d 1290, 1294 (11th Cir. 2009).

POWs make it increasingly unlikely there will ever be as good of a case to address the constitutionality of the statute as Noriega's. Further, given the distinctions present in the Geneva Conventions themselves between the rights of POWs and detainees, the reluctance of the United States government to refer to detained individuals as POWs, and (as Justice Thomas highlights) the relative uncertainty (and certainly rarity) surrounding court authority to declare a detained individual to be a POW, it is unlikely any future case will implicate as clearly as Noriega's case the ability of a petitioner to claim whichever Geneva Convention rights do indeed apply to a POW. As Justice Thomas's dissent highlighted, *Hamdan*, which is often cited to stand for the principle that Geneva Convention rights to apply to detainees, rested upon the role of the Uniform Code of Military Justice in setting up the Military Commissions.[104]

It is unlikely another case with the facts necessary to challenge section 5 of the MCA for a POW will arise because section 5 of the MCA likely prohibits a judicial determination that someone is a POW.[105] The Southern District of Florida's decision only came after Noriega sought the declaration by asserting his rights under the Geneva Conventions.[106] Now section 5 would likely prevent someone from filing a civil motion seeking a similar determination through habeas or similar relief. Thus, the statute has substantially strengthened the barrier to find a case similar to Noriega's to challenge the statute.

CONCLUSION

Judge Restani's opinion in *Noriega II* provided a nuanced and complete analysis of a rare topic of the application of international law norms and treaties in U.S. domestic law. Section 5 of the MCA still exists as note to 28 U.S.C. § 2241, and will continue to limit habeas petitions as long as it is part of the law. Given the rarity of POW litigation and the gradual decline of detainee-related litigation, though, it is increasingly

[104] *Noriega III*, 559 U.S. 917, 1009 (2010) (citing Hamdan v. Rumsfeld, 548 U.S. 557, 627-628 (2006)).

[105] Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631.

[106] *Noriega I*, 808 F. Supp. 791, 793 (S.D. Fla. 1992).

unlikely that another litigant will have the opportunity to present a Suspension Clause challenge to section 5 of the MCA, and one of the least-litigated clauses in the U.S. Constitution will continue to go undefined.

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Judge Restani and the Erroneous Computer-Generated Liquidation Notices

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In the 1993 Customs Modernization Act,[1] Congress amended the statutes governing administrative procedures of the U.S. Customs Service ("Customs") "by substituting 'Customs' for 'the appropriate customs officer' to reflect automation and computerization realities . . . ."[2] These "automation and computerization realities" were, of course, that computers were replacing customs officials in many

 J.D. (Columbia); M.A.L.D. & Ph.D. (Fletcher School, Tufts). Of Counsel, Simons & Wiskin; President, The Historical Society of the United States Court of International Trade; Adjunct Professor, St. John's University School of Law and Zicklin School of Business, Baruch College, City University of New York. It is a privilege to contribute this paper to the symposium in recognition of Judge Jane A. Restani's forty years of judicial service. In the litigation discussed in this paper, my colleague Yong Hak Kim and I represented the plaintiff.

[1] Pub. L. No. 103-182, title VI, 107 Stat. 2057, 2170 (1993).

[2] H.R. REP. NO. 103-361, pt. 1, at 137 (1993). The amendments include Pub. L. No. 103-182, § 638, 107 Stat. at 2203 (amending 19 U.S.C. § 1500) and § 645, 107 Stat. at 2206 (amending 19 U.S.C. § 1514). The U.S. Customs Service has been renamed U.S. Customs and Border Protection.

important tasks and would continue to do so. *LG Electronics U.S.A., Inc. v. United States*,[3] which applied the pre-1993 law, illustrates the legal problems that resulted from using computers in import entry procedures before Congress modernized the statutes. Judge Jane A. Restani ruled that, under the statute in effect at the time, an importer facing a potential loss of refunds as a result of erroneous computer-generated notices was entitled to relief on a substantial part of its claim. The importer would not have received this relief if customs officials had taken the same action or if the 1993 amendments already applied.

The case involved imported color televisions subject to an antidumping duty order. The importer, LG Electronics U.S.A. (the "importer" or "plaintiff"), deposited estimated antidumping duties with Customs at the time of entry, and the U.S. Commerce Department ("Commerce") suspended liquidation ("the final computation or ascertainment of the duties . . . accruing on an entry"[4]) pending its determination of the proper antidumping duty rate. The final antidumping duties were lower than the estimates deposited at entry. Commerce issued liquidation instructions to Customs directing it to liquidate the entries at the lower rate and refund the difference between the liquidation rate and the deposit rate.

Customs declined to issue refunds on fifty-seven of the importer's entries. According to Customs, these fifty-seven entries had already been liquidated at the deposit rate, even though these liquidations were premature and contrary to the Commerce instructions to suspend liquidation, as well as the ultimate liquidation instructions. Customs records showed that during the period in which liquidation was supposed to be suspended, the Customs computer system had generated notices of liquidation at the deposit rate for the fifty-seven entries.

The importer had not filed protests with Customs against the purported liquidations promptly after the liquidation notices were issued. Upon learning that Customs would not pay the expected refunds in accordance with the Commerce instructions, it sued in the U.S. Court

[3] LG Elecs. U.S.A., Inc. v. United States, 991 F. Supp. 668 (Ct. Int'l Trade 1997) (before Restani, J.). Although the case was decided in 1997, pre-1993 law applied because the merchandise was imported before 1993.

[4] 19 C.F.R. § 159.1 (1997) (quoted in *LG Elecs. U.S.A.*, 991 F. Supp. at 672).

of International Trade. The Government argued that the entries had been liquidated and that the Court lacked jurisdiction because the importer had not filed timely protests within the required period after liquidation (at the time, ninety days) as specified by statute in 19 U.S.C § 1514(a).

The importer presented the novel argument that fifty-four of the entries had not been liquidated at all.[5] Instead, according to the importer, the only thing that happened was that the Customs computer system had generated erroneous liquidation notices, without any actual "decision" to liquidate the entries having been made. This argument focused on the then-existing statutory language stating that a protest is used to challenge "*decisions* of the appropriate customs officer . . . as to . . . liquidation . . . of an entry . . . ."[6] Thus, the importer claimed that the entries were still unliquidated and asked the court to order Customs to liquidate them in accordance with the Commerce instructions and pay the appropriate refunds.

In response, Judge Restani began by accepting the importer's threshold premise that "the court must consider whether a liquidation

[5] On three of the original fifty-seven entries, the importer could not show that it had ever deposited estimated duties, so no claim on these entries was available. *LG Elecs. U.S.A.*, 991 F. Supp. at 670 n.2. In developing the importer's legal arguments on the other fifty-four entries, we (the importer's lawyers) concluded that there would be little or no chance of success if we conceded that the entries had been liquidated, since appellate precedents had previously rejected the potentially available arguments such as "void liquidation" or equitable tolling of the ninety-day protest period. *See* Juice Farms, Inc. v. United States, 68 F.3d 1344, 1346 (Fed. Cir. 1995); United States v. A.N. Deringer, Inc., 593 F.2d 1015, 1021 (C.C.P.A. 1979); *see also* US JVC Corp. v. United States, 15 F. Supp. 2d 906, 915 (Ct. Int'l Trade 1998) (similar and approximately contemporaneous case to *LG Electronics*, also discussed in note 22, *infra*).

[6] 19 U.S.C. § 1514(a) (1988) (italics added) (prior to 1993 amendment). My colleague Yong Hak Kim deserves the credit for devising the "no decision" argument. As we were developing the importer's case, this theory seemed promising in that it had not been rejected in appellate precedent (*cf. supra* note 5) and was firmly based on the statutory language. At this point, I said we shouldn't just rely on a promising theory; we also needed to find legal authority that arguably supported our idea that no "decision" had been made in our case. We found *Pagoda Trading Co. v. United States*, 617 F. Supp. 96 (Ct. Int'l Trade 1985), *aff'd*, 804 F.2d 665 (Fed. Cir. 1986), which held that an erroneous computer-generated notice of extension of liquidation was invalid to extend liquidation. We noted the serendipity that Judge Restani herself had decided *Pagoda* in the Court of International Trade.

has in fact occurred such as to trigger the 90 day period."[7] She ruled that "Customs decisions are 'substantive determinations involving the application of pertinent law and precedent to a set of facts . . . .'"[8] The case involved three different types of liquidation notices to which this legal standard would be applied: notices of "no change" liquidation of twenty-five entries; notices of "automatic" liquidation of twenty-seven entries; and notices of "deemed" liquidation of two entries.

On the "no change" liquidations, Judge Restani determined based on an examination of agency procedures that "Customs decided for each 'no change' entry that the rate of duty imposed at the time of deposit was correct and that the entry should be liquidated at that rate."[9] Being actual decisions, "Customs' actions satisfy the test for liquidation."[10] Judge Restani recognized that "[t]he liquidations were illegal, however, because there were suspensions of liquidation in place at the time."[11] Nevertheless, "whether legal or illegal, a liquidation not protested within 90 days becomes final as to all parties."[12] Judge Restani granted summary judgment for the Government on the "no change" entries "because of plaintiff's failure to timely protest the liquidations and the resulting lack of jurisdiction under 28 U.S.C. § 1581(a)."[13]

Turning to the "automatic" liquidations, Judge Restani determined that this type of liquidation was performed by the Customs computer system, which is programmed so that "[i]f not suspended or extended, the automated system would automatically liquidate the entries on the 50th week [after entry] . . . ."[14] She concluded that the notices of

[7] *LG Elecs. U.S.A.*, 991 F. Supp. at 672. The importer invoked the court's grant of residual jurisdiction in 28 U.S.C. § 1581(i), under which the action was timely because it was commenced within two years (the allowed period) after Commerce issued its liquidation instructions to Customs. *LG Elecs. U.S.A.*, 991 F. Supp. at 672 n.5.

[8] *Id.* at 673 (citing U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1569-70 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998) (the Harbor Maintenance Tax litigation)). When *LG Electronics* was decided, the Supreme Court had granted certiorari in *U.S. Shoe* but had not yet rendered its decision.

[9] *LG Elecs. U.S.A.*, 991 F. Supp. at 673.

[10] *Id.* at 674.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* (quoting a Customs administrative directive).

automatic liquidation of the television set entries had been issued because of a "programming error" and found "no evidence that anyone at Customs decided to liquidate these entries."[15] Therefore, "[a]ll that occurred here was the triggering of a notice without any individualized decision of any Customs officer to act on the entries," and "[t]his is not a liquidation under the statute . . . ."[16]

As for the two notices of "deemed" liquidation, Judge Restani explained that "[l]iquidation is deemed to have occurred by operation of law one year after entry,"[17] but the statute expressly provides exceptions "in cases of extension, suspension or court order."[18] She ruled that since liquidation was suspended when the notices were issued, "as a matter of law, no deemed liquidation ... occurred."[19]

In sum, the court found that "each party [was] correct as to certain entries and therefore grant[ed] summary judgment in part to plaintiff and in part to defendant."[20] The importer won on the purported "automatic" and "deemed" liquidations: Customs was ordered to liquidate the entries in accordance with the Commerce liquidation instructions and refund the excess deposits to the importer.[21] But "[i]n the case of the 'no change liquidations,' the liquidations, while illegal, were not timely protested," and the court "lack[ed] jurisdiction over such entries."[22]

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[15] *Id.*

[16] *Id.* at 674-75. Three "automatic" liquidation notices presented the additional wrinkle that the notices had been issued at a time when liquidation was preliminarily enjoined by court order during judicial review of the Commerce determination. Judge Restani ruled that even if there had been an actual Customs decision to liquidate these entries, the liquidation need not have been protested because "[a]n importer is entitled to rely on a preliminary injunction." *Id.* at 675. In a footnote, Judge Restani decided that "the court will not begin the unwieldly process of determining whether the violations of the court order involved contempt." *Id.* at 676 n.14.

[17] *Id.* at 676.

[18] *Id.*

[19] *Id.*; *see also id.* (noting that "[a]n erroneous, computer-generated notice . . . has no effect").

[20] *Id.* at 670.

[21] *Id.* at 677.

[22] *Id.* Neither party appealed. In an approximately contemporaneous lawsuit by a different importer of color televisions whose entries had been prematurely and erroneously liquidated as entered, there were no "automatic" or "deemed" liquidations,

In hindsight, the lesson of *LG Electronics* is that Customs started using computers in its procedures before it had a statutory framework that allowed computer-generated actions to replace human decisions. Judge Restani decided the case before her by scrupulously interpreting and applying the existing statutory language "decisions of the appropriate customs officer" that had not yet been amended to reflect the needs of computerization and automation in customs transactions.[23] The case also, I believe, illustrates how Judge Restani has sought to achieve fairness for the parties in the cases before her.

and the court denied the importer's argument for equitable tolling of the protest period. *See* US JVC Corp. v. United States, 15 F. Supp. 2d 906, 915 (Ct. Int'l Trade 1998).

[23] The principle that automatic liquidations are not decisions of customs officers remains consistent with current law under which automatic liquidations are given no weight in determining whether Customs has adopted a precedential administrative "treatment" of a series of transactions because automatic liquidations do not represent an actual determination by a customs official. See 19 U.S.C. § 1625(c) (giving statutory protection to an administrative "treatment previously accorded" in a series of customs transactions); 19 C.F.R. § 177.12(c)(1)(ii) (2023) (providing that in determining whether a treatment existed, "Customs will give no weight whatsoever to . . . entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review."). In *Kent Int'l, Inc. v. United States*, 17 F.4th 1104 (Fed. Cir. 2021), the court held that under this regulation, no weight is given to automatic liquidations, also known as bypass liquidations.