Al-Bihani, Not So Charming

ABSTRACT

In June 2008, the Supreme Court extended the Suspension Clause to foreign detainees at Guantánamo Bay, Cuba. Since then, courts have struggled to define appropriate standards to govern detainee habeas corpus petitions. Until recently, no court questioned the relevance of international law to the development of these standards. But, in January 2010, a D.C. Circuit panel held that international law does not constrain executive detention power. That decision could devastate detainee habeas corpus petitions by preventing courts from examining the heart of the government's own claimed detention authority.

This Note evaluates the proper role of international law during ongoing Guantánamo detainee habeas corpus litigation through an examination of the D.C. Circuit panel's legal analysis in Al-Bihani v. Obama. Because international law has always played a role in U.S. jurisprudence, judges already have the necessary tools to grapple with the international legal issues that the detainee cases present. In light of the Legislature's refusal to develop appropriate standards to govern these cases, the Judiciary must use these tools to balance national security with individual liberty.

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I. INTRODUCTION

In June 2008, the Supreme Court's decision in *Boumediene v. Bush* extended the Suspension Clause to foreign nationals at Guantánamo Bay, Cuba.[1] However, the Court's analysis left crucial questions unanswered. Some of these questions—such as what to do with detainees once they are released from U.S. custody—are primarily political.[2] But at least one has been left for the courts to decide. Now that Guantánamo Bay detainees can challenge their detention in U.S. courts,[3] what is the extent of the President's authority to detain them?[4]

The President's detention power is an "important incident to the conduct of war,"[5] meant to "prevent captured individuals from returning to the field of battle and taking up arms once again."[6] After September 11, the President's detention authority derives from the 2001 Authorization for Use of Military Force (AUMF).[7] Yet, the procedural and substantive rules governing these detentions remain

1. Boumediene v. Bush, 553 U.S. 723, 723–29 (2008).
2. *See, e.g.*, Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4895 (Jan. 22, 2009) (establishing policies for transferring Guantánamo Bay detainees).
3. *See Boumediene,* 553 U.S. at 798 (holding the Military Commissions Act of 2006 to be an unconstitutional suspension of the writ of habeas corpus).
4. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004) (plurality opinion) (discussing the ability of the Executive Branch to detain enemy combatants).
5. *Ex parte* Quirin, 317 U.S. 1, 28 (1942).
6. *Hamdi*, 542 U.S. at 518.
7. *Id.*

undefined, and the Supreme Court has left this task to the lower courts.[8]

Until recently, no court questioned the relevance of international law to the development of these rules. That changed in January 2010 when, in *Al-Bihani v. Obama*, a three-judge panel of the D.C. Circuit Court of Appeals broadly held that international law does not place any constraints on the Executive's war powers, absent an explicit congressional declaration to that effect.[9] That ruling will most likely create binding precedent, preventing courts from considering international law-based challenges to the Government's asserted legal authority to detain.[10] Yet, the Executive itself partly bases its detention authority on international law.[11] For that reason, many Guantánamo detainee habeas petitions also rely on international legal principles.[12] Thus, left undisturbed, *Al-Bihani* has the potential to cripple detainee habeas corpus review.

This Note evaluates, through an examination of *Al-Bihani*, the proper role of international law during Guantánamo detainee habeas corpus litigation. Part II outlines the Supreme Court's historical treatment of international law and discusses the ramifications of the Military Commissions Act of 2006 (MCA), which precludes detainees from relying on the Geneva Conventions as a source of rights in civil actions against the U.S. government[13] and delegates authority to the President to interpret the meaning and application of the Geneva Conventions.[14] Part II also suggests a method of incorporating international law into judicial review that is both faithful to domestic constraints and familiar to most lawyers—namely, the *Chevron* doctrine. Part III examines *Al-Bihani*. Finally, Part IV revisits Al-Bihani's petition for habeas corpus and applies *Chevron* to the specific facts of the case, thus illustrating the ease and practicality with which the courts could consider the international law obligations of the United States as they develop rules to govern detainee habeas corpus challenges.

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8. *See Boumediene*, 553 U.S. at 796 ("These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.").

9. Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010).

10. *See, e.g.*, Order at 1, Al-Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. 2010) (Civil Action No. 05–280 (GK)), http://www.scotusblog.com/wp-content/uploads/2010/01/Al-Adahi-order-1-6-09.pdf (ordering another habeas proceeding to re-brief pertinent legal issues in light of the *Al-Bihani* ruling).

11. *See, e.g.*, Hamlily v. Obama, 616 F. Supp. 2d 63, 69 (2009) (discussing authority for detention "in domestic law or the laws of war").

12. *See id.* at 70–71 (asking whether the authority of the AUMF is "consistent with the law of war").

13. Military Commissions Act of 2006, Pub. L. No. 109–366, § 5, 120 Stat. 2600 (2006).

14. *Id.* § 6(a)(3).

II. INTERNATIONAL LAW IN U.S. COURTS: THE *CHARMING BETSY* DOCTRINE

Despite broad assertions in *Al-Bihani*,[15] courts have construed domestic legislation in accordance with international law for more than two hundred years.[16] Since at least 1801, the Supreme Court has consistently held that, where possible, courts should interpret U.S. law to conform to the international legal obligations of the United States.[17] Recent statutory amendments do preclude individuals from invoking the Geneva Conventions as a source of rights in certain civil actions,[18] but these provisions do not affect the use of international law as an interpretive canon.

A. *Historical Treatment of International Law in U.S. Courts Under the* Charming Betsy *Doctrine*

For more than two hundred years, the Supreme Court has held that international law informs U.S. law, particularly in the context of international humanitarian law.[19] In 1801, the Court held that "Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."[20] More famously, the Court explicitly ruled three years later, in *Murray v. Schooner Charming Betsy*, that domestic legislation "ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country."[21] This principle came to be known as the *Charming Betsy* doctrine.

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15. *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) ("There is no indication in the AUMF, the Detainee Treatment Act of 2005 . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF.").

16. *See* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (referring to "general laws of war").

17. *Id.*

18. Military Commissions Act of 2006 § 5(a).

19. *See, e.g.*, *Talbot*, 5 U.S. (1 Cranch) at 28; S. Afr. Airways v. Dole, 817 F.2d 119, 125 (D.C. Cir. 1987) ("[T]he Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States to violate 'the law of nations.'" (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804))); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

20. *Talbot*, 5 U.S. (1 Cranch) at 28.

21. *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

Under *Charming Betsy*, courts deciding between different plausible interpretations of a law must presume that the text complies with the United States' obligations under binding treaties and accepted principles of customary international law.[22] Supreme Court cases have consistently followed this doctrine.[23] For example, at the turn of the last century, the Court explicitly integrated customary international law into its ruling in *Paquete Habana*.[24] In that case, the Court assessed the legality of the U.S. Navy's seizure of two coastal fishing vessels during the Spanish–American War in the absence of controlling domestic law.[25] The Court affirmed that U.S. courts should analyze the question under principles of international law.[26] Under these principles, "coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."[27] Thus, because international law did not permit the Navy's seizure of The *Paquete Habana*, the Court held that the seizure was illegal.[28]

Of course, the political branches retain the power to disregard international law, at least insofar as U.S. courts are concerned. Under *Charming Betsy*, a "controlling executive or legislative act or judicial decision" forecloses courts from considering international law.[29] Congress can thus prevent courts from considering international law by clearly stating that it intends a piece of domestic legislation to contravene international law.[30] And, to the extent the President acts pursuant to executive authority rather than congressional authorization, *Charming Betsy* is unnecessary because courts do not need to construe any law.[31] Thus, courts only employ *Charming Betsy* when the President acts pursuant to congressional authorization that does not clearly contravene international law.[32] In

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22. *See* Ingrid Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. REV. 293, 331–32 (noting that courts have cited customary international law, as well as treaties, as the basis for applying the *Charming Betsy* canon).

23. Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of* Charming Betsy, 67 OHIO ST. L.J. 1339, 1353 (2006).

24. Paquete Habana, 175 U.S. 677, 686 (1900).

25. *Id.* at 678.

26. *Id.* at 700.

27. *Id.* at 686.

28. *Id.* at 714.

29. *Id.* at 700.

30. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 375 (1998) (noting that the defendant's ability to obtain relief under international law was "subject to" a recently enacted domestic law); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (stating that "[a]n act of Congress supersedes an earlier rule of international law" if that is the purpose of the act and it is clearly stated).

31. Wuerth, *supra* note 22, at 348–49.

32. *Id.*

such cases, courts use *Charming Betsy* to say "what the law is,"[33] and courts "refuse to automatically defer to the executive, even when its views are clear and those of Congress are not."[34] This means that they will "occasionally use the canon to defeat the interpretation offered by the government."[35]

Charming Betsy remains alive in modern jurisprudence. The Supreme Court has not overruled the doctrine and has explicitly considered it as recently as 2004.[36] The Court's post-September 11 opinions have also been consistent with the doctrine.[37] For example, in *Hamdi v. Rumsfeld*, the Court determined that the AUMF permitted the government to hold a U.S. citizen captured in a foreign country as an enemy combatant, in part because international law permitted the detention.[38] Similarly, in *Hamdan v. Rumsfeld*, the Court declined to defer to the Executive's view of the Geneva Conventions and, instead, undertook its own analysis that extended the protections of Common Article 3 to those detainees.[39]

In light of the doctrine's continued viability, courts should, if possible, interpret domestic laws to comply with the United States' international law obligations.[40] Congress must intentionally deviate from international law to foreclose this method of interpretation.[41] And, though the President may authoritatively interpret international law when acting pursuant to executive authority, courts may disagree with the Executive's interpretation of international law when it acts pursuant to legislation such as the AUMF.[42]

Professor Ralph Steinhardt has distilled these principles into a general three-step process.[43] First, courts should determine the meaning and status of any relevant provision of international law.[44] Second, if "nothing in the statute explicitly repudiates [international

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33. Boumediene v. Bush, 553 U.S. 723, 727 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

34. Wuerth, *supra* note 22, at 343.

35. *Id.*

36. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (noting that *Charming Betsy* was among cases supporting the rule that Congress usually "construes statutes to avoid unreasonable interference" with other states' sovereignty).

37. *But see* Wuerth, *supra* note 22, at 295–97 (critiquing the Court's method of applying international law in *Hamdi*).

38. Hamdi v. Rumsfeld, 542 U.S. 507, 522–23 (2004) (plurality opinion); *see also* Alford, *supra* note 23, at 1367 (calling *Hamdi* a "sub silentio" application of *Charming Betsy*).

39. Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006).

40. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

41. *Id.*

42. *See, e.g.*, *Hamdan*, 548 U.S. at 634 ("The commission that the President has convened to try Hamdan does not meet those requirements [of Common Article 3].").

43. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1134 (1990).

44. *Id.*

law], or if an inconsistency between the norm and the statute can be resolved, the court should adopt the interpretation that preserves the maximum scope for both."[45] Finally, if courts face an "unavoidable and irreducible [conflict, they] should refer to the supremacy axioms such as the latter-in-time rule and doctrines of justiciability to resolve the conflict."[46] Though the last step postulates an unusually strong view of the doctrine, Steinhardt's formulation nevertheless provides a useful structural analysis of *Charming Betsy*.

B. Charming Betsy *After the Military Commissions Act*

Following the Supreme Court's decision in *Hamdan*, Congress attempted to strip jurisdiction over detainee habeas petitions from U.S. courts by passing the MCA.[47] Section 7 of the MCA purports to suspend the jurisdiction of courts to consider habeas corpus applications "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."[48] The Court found this provision unconstitutional as applied to Guantánamo Bay detainees.[49]

Other MCA provisions also limit the rights of detainees in U.S. courts. MCA § 5 provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus [proceedings] . . . in any court of the United States or its States or territories."[50] Similarly, MCA § 6 expressly grants the President authority "to interpret the meaning and application of the Geneva Conventions" and to "promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions."[51]

These provisions could cast doubt on the ability of courts to consider the Geneva Conventions. Due to the constitutional issues this might raise, however, it seems far more likely that the MCA seeks only to foreclose the rights of litigants to rely on the Geneva Conventions as a causes of action.[52] This would not affect the ability

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45. *Id.*
46. *Id.*
47. Military Commissions Act of 2006, Pub. L. No. 109–366, § 7, 120 Stat. 2600 (2006).
48. *Id.*
49. Boumediene v. Bush, 553 U.S. 723, 787–97 (2008).
50. Military Commissions Act of 2006 § 5. Though the MCA was amended in 2009, this provision was not significantly altered.
51. *Id.* § 6(a)(3).
52. *See* Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. POL'Y REV. (ONLINE) (Nov. 6, 2006), http://www.hlpronline.com/2006/11/saying_what_the_law_is.html (arguing that although the MCA means there may be no private cause of action under the Geneva Convention, courts may still consider the Geneva Convention).

of courts to look at the Geneva Conventions under the *Charming Betsy* doctrine.[53]

1. Constitutional Issues Raised by Precluding the Courts from Looking to the Geneva Conventions

Congress has the authority to pass domestic legislation that expressly violates international law.[54] Yet, the MCA does not purport to violate the Geneva Conventions or deny their applicability. Rather, it references them several times, implying that they govern the President's actions.[55]

Interpreting the MCA to preclude the courts from considering the Geneva Conventions is therefore constitutionally dubious for at least two reasons. First, the Constitution grants the Judicial Branch, not the Executive Branch, the power to interpret the law.[56] As the Supreme Court recently confirmed in *Hamdan*, the Judiciary's power to interpret the law in a manner contrary to executive interpretation extends to international law, insofar as international law informs domestic legislation.[57] Reading the MCA to assert that the Geneva Conventions govern the Executive, while also granting the Executive unreviewable power to interpret the Geneva Conventions, thus runs counter to the long-established principle of judicial review established by *Marbury v. Madison*.[58]

Second, permitting Congress simultaneously to assert that the Geneva Conventions govern and to deny any judicial oversight of this assertion destroys Congress's own political accountability.[59] As international law scholar Deborah Pearlstein points out, "Congress cannot simply ask the courts to ignore certain laws just because it is too afraid to bear the political consequences of taking them off the books."[60] Instead, principles of accountability and transparency require that Congress write laws as it intends them to be enforced by the courts.[61] These concerns strongly suggest that courts should avoid interpreting the MCA as precluding them from considering the Geneva Conventions.

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53. For a detailed analysis relevant to *Al-Bihani*, see *infra* Part IV.

54. Paquete Habana, 175 U.S. 677, 700 (1900).

55. *See generally* Military Commissions Act of 2006 § 6 (discussing presidential interpretation of treaty provisions).

56. U.S. CONST. art. III, § 1.

57. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (disagreeing with the Government's assertion that Common Article 3 did not apply to the complainant).

58. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168 (1803).

59. Pearlstein, *supra* note 52.

60. *Id.*

61. *Id.*

2. Issues Raised by the Military Commissions Act § 5

Neither text nor legislative history supports interpreting MCA § 5 as preventing courts from considering the Geneva Conventions. The section forbids an individual from "invok[ing]" the Geneva Conventions.[62] It does not mention judicial interpretation.[63] Furthermore, the Act's sponsor, Senator John McCain, stated that Congress intended § 5(a) to "eliminate any private right of action against our personnel based on a violation of the Geneva Conventions."[64] Congress also passed the MCA in the wake of *Hamdan v. Rumsfeld*, in which the Supreme Court came close to addressing whether the Geneva Conventions are self-executing,[65] raising a strong inference that Congress wished to assert its view on the matter.[66]

In *Hamdan,* a divided Supreme Court held that the military commissions established by the President in 2001 to try enemy combatants were illegal.[67] The President created the commissions through military order, relying on the AUMF, his power as commander in chief, and §§ 821 and 826 of the Uniform Code of Military Justice (UCMJ).[68] The Court found, however, that the commissions had not been authorized by the AUMF and that they in fact violated embedded congressional restrictions on the use of military commissions under the UCMJ.[69]

First, the Court found that the military commissions were not authorized under UCMJ Article 31 because their rules deviated from the rules used for courts-martial.[70] Next, the Court determined that UCMJ Article 21 required any commission convened under its authority to comply with international humanitarian law.[71] The

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62. Military Commissions Act of 2006, Pub. L. No. 109–366, § 5(a), 120 Stat. 2600 (2006).

63. *Id.*

64. 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement of Sen. John McCain) ("The intent of this provision is to protect officers, employees, members of the Armed Forces, and other agents of the United States from suits for money damages or any other lawsuits that could harm the financial well-being of our personnel who were engaged in lawful—I emphasize 'lawful'—activities.").

65. Hamdan v. Rumsfeld, 548 U.S. 557, 627–28 (2006) (noting that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), left the government procedural discretion in hearing detainee detention challenges).

66. *See* 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement of Sen. John McCain); *see also* H.R. REP. NO. 109–664, at 3 (2006) (asserting that the MCA would "clarify that the Geneva Conventions are not judicially enforceable in United States courts").

67. *Hamdan*, 548 U.S. at 634.

68. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2001).

69. *Hamdan*, 548 U.S. at 567.

70. *Id.* at 620.

71. *Id.* at 600 n.31.

Court found that international humanitarian law necessarily included the Geneva Conventions and that the procedures utilized by the military commissions were deficient by those standards.[72] Therefore, the Court held that the UCMJ did not authorize the government to try Hamdan by military commission.[73]

By relying on the Geneva Conventions, the Supreme Court overruled the lower court's assertion that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."[74] However, the Court expressly based its determination on the statutory provision of UCMJ Article 21 and declined to determine whether the Geneva Conventions in and of themselves conferred any enforceable rights.[75] The self-executing nature of the Geneva Conventions therefore remained an open question.[76] MCA § 5(a) most likely constitutes an attempt to ensure that the Conventions are not treated as self-executing by the courts.[77]

Leaving aside questions over whether the MCA would actually have the power to turn a potentially self-executing treaty into a non-self-executing one,[78] the provision does not affect the ability of the courts to consider the Geneva Conventions under *Charming Betsy*.[79] The *Charming Betsy* doctrine treats international law as an interpretive tool, not as source of enforceable rights.[80] Whether an individual can invoke the Conventions in courts is irrelevant to the doctrine's application.

Moreover, the Supreme Court has never suggested that the doctrine distinguishes between self-executing and non-self-executing treaties.[81] Though the Court has arguably exhibited some reluctance regarding principles derived from newer, non-self-executing treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[82] this reluctance does not always extend to international

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72. *Id.* at 633.

73. *Id.* at 634.

74. *Id.* at 627.

75. See *id.* at 613 (Breyer, J., concurring) ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations.'" (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942))).

76. *Id.* at 633.

77. *See supra* text accompanying note 66.

78. *See, e.g.*, Carlos Manuel Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 91 (2007) (arguing that some provisions of the Geneva Conventions are self-executing).

79. *See* Wuerth, *supra* note 22, at 353.

80. *Id.*

81. *Id.* at 354.

82. *E.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (discounting the evidentiary value of non-self-executing treaties like the ICCPR in identifying actionable norms).

humanitarian law.[83] This may be because international humanitarian law "offers a particularly well-defined body of treaty and custom-based norms," which "has the dual advantage of providing a clearer background norm against which Congress can authorize the use of force as well as providing some limits on the scope of relevant norms that courts can employ."[84] Indeed, the *Charming Betsy* case itself involved the laws of war.[85] It thus seems unlikely that the Supreme Court would develop a sudden aversion to looking at these laws as an interpretive guide.

3. Delegated Interpretations

Section 6(a)(3) of the MCA expressly authorizes the President, pursuant to an executive order published in the Federal Register, to interpret the Geneva Conventions.[86] A Congressional Research Service (CRS) report interprets this to mean that "Presidential interpretations of the Conventions are deemed authoritative (if published and concerning non-grave breaches) as a matter of U.S. law to the same degree as other administrative regulations, though judicial review of such interpretations might be more limited."[87] Though the President has thus far defined his detention authority in a court brief, rather than an executive order,[88] § 6(a)(3) seems to indicate Congress's desire as to who should interpret the Conventions.[89]

The CRS report further asserts that § 6(a)(3) precludes "any judicial challenge to the interpretation and application of the Conventions except in criminal proceedings."[90] As discussed above, interpreting the MCA to block judicial oversight of the President's interpretation and application of the Geneva Conventions raises serious concerns over accountability.[91] This is particularly true when

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83. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 537–38 (2004) (plurality opinion) (noting the deficiencies in the process received by Guantánamo detainees).

84. Wuerth, *supra* note 22, at 332–33.

85. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

86. Military Commissions Act of 2006, Pub. L. No. 109–366, § 6(a)(3)(A), 120 Stat. 2600 (2006).

87. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33655, INTERROGATION OF DETAINEES: REQUIREMENTS OF THE DETAINEE TREATMENT ACT 8 (2009).

88. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, In re: Guantánamo Bay Detainee Litigation (D.D.C. 2009) (Misc. No. 08–442 (TFH)) [hereinafter Respondents' Memorandum], http://www.justice.gov/opa/documents/memo-re-det-auth.pdf .

89. *See* Military Commissions Act of 2006 § 6(a) ("[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.").

90. GARCIA, *supra* note 87, at 8 n.38.

91. *See supra* Part II.B.1.

the President acts pursuant to congressional legislation that requires compliance with the Geneva Conventions.[92]

More fundamentally, although the Judiciary should defer to the Executive in matters of national security in most instances,[93] habeas corpus petitions raise issues of individual liberty that weigh against absolute deference to executive legal interpretation, even when the petitions intersect with national security concerns.[94]

Courts naturally defer to the Executive on issues of national security when these decisions "respect the nation, not individual rights."[95] Such questions are "entrusted to the executive, [and] the decision of the executive is conclusive."[96] Yet, to the extent that individual liberty is at stake, and the Supreme Court has already recognized that this is the case at Guantánamo Bay,[97] it is the constitutional prerogative of the courts to say what the law is.[98] These cases fall into what Professors Derek Jinks and Neal Katyal refer to as the "executive-constraining zone"[99] precisely because they involve the law, not policy. As the "[l]aw must regulate the executive,"[100] courts hearing detainee habeas corpus petitions should evaluate the viability of the Executive's interpretation of the Geneva Conventions, particularly when Congress purports to require that the President comply with them.

The *Chevron*[101] doctrine presents a natural solution. Courts use *Chevron* to determine the authority of administrative regulations when Congress delegates lawmaking power to the Executive.[102] Section 6(a)(3) of the MCA is an obvious delegation of lawmaking power.[103] In combination with constitutional concerns over entirely stripping interpretive jurisdiction from the courts, this makes applying *Chevron* to presidential interpretations of the Geneva Conventions logical. As Curtis Bradley notes, "Congress stated expressly in the MCA that it is delegating authority to the executive 'to interpret the meaning and application of the Geneva Conventions,'

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92. *Id.*

93. *See, e.g.*, Munaf v. Geren, 553 U.S. 674, 689 (2008) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

94. Boumediene v. Bush, 553 U.S. 723, 739 (2008).

95. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

96. *Id.*

97. *Boumediene*, 553 U.S. at 739.

98. *Id.* at 732 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

99. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1239 (2007).

100. *Id.* at 1244.

101. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

102. *See id.* at 865 (providing a process by which courts gauge whether a particular interpretation is within an agency's statutory authority).

103. *See, e.g.*, *supra* text accompanying note 89.

and courts give *Chevron* deference in the analogous situation in which Congress delegates interpretive authority to administrative agencies."[104]

The *Chevron* doctrine derives from the 1984 case *Chevron v. Natural Resources Defense Council,* in which an environmental group challenged an Environmental Protection Agency (EPA) rule interpreting the Clean Air Act.[105] The EPA had interpreted the term "stationary source" in the Clean Air Act to apply to entire plants, rather than to a single smokestack.[106] Termed a "bubble concept," this allowed companies to measure pollution levels based on an entire plant's emissions rather than individual emissions from each smokestack.[107] The Natural Resources Defense Council challenged the interpretation, and the lower court held that the bubble concept was "inappropriate" in light of the Clean Air Act's purpose of improving air quality.[108]

The Supreme Court disagreed.[109] Instead, it held that the court should have deferred to the EPA's interpretation.[110] It then established the basic tenets of the *Chevron* doctrine.[111] Under *Chevron*, when an agency promulgates regulations, courts must apply a multipart test to determine whether it will defer to the agency's statutory interpretation.[112] First, courts must determine "whether Congress has directly spoken to the precise question at issue."[113] If the intent of Congress is clear, that is the end of the matter.[114] But, if Congress's intent is unclear, courts still may not "simply impose [their] own construction on the statute."[115] Instead, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[116] Courts must give an agency's interpretation of a statute "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary" to terms of that statute.[117]

Applying *Chevron* to interpretations of detainee habeas corpus proceedings would require courts to examine international law. Courts would defer to the Executive's interpretation of these

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104. Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 343 (2007).
105. *Chevron*, 467 U.S. at 842.
106. *Id.* at 840.
107. *Id.*
108. *Id.* at 842.
109. *Id.* at 845.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 842.
114. *Id.*
115. *Id.* at 843.
116. *Id.*
117. *Id.* at 844.

principles if no general consensus existed regarding their meaning and the Executive's interpretation was reasonable.[118] Thus, the Executive would not be able to circumvent international law, but would be accorded judicial deference in areas of the law that remain unresolved. Assuming that the relevant principle of international law was well-agreed upon, courts would not need to independently interpret international law.[119] However, if the law was in dispute, courts would have to interpret the law on their own in order to evaluate the Executive's compliance with the AUMF.[120] In the context of general foreign relations law, some scholars argue that courts should apply *Chevron* "to allow the executive branch to resolve issues of international comity, at least when the underlying statute is unclear,"[121] and to permit the Executive to interpret ambiguous laws in ways that "defeat the international relations principles."[122] By contrast, *Chevron* deference in the instant situation requires the Executive to follow international law.

Chevron-style deference to executive interpretation of international law, which encompasses both written treaties and unwritten principles, may challenge courts. However, international humanitarian law, which is the body of law at issue in the detainee hearings, "offers a particularly well-defined body of treaty and custom-based norms"[123]—norms to which the Supreme Court has repeatedly referred.[124] It thus seems unlikely that lower courts would be unable to adequately apply a *Chevron*-style test in these cases.

Moreover, applying *Chevron*-style deference to debated principles of international law would in fact ease any putative burdens *Charming Betsy* might place on courts, because it permits the Executive to choose between plausible interpretations. This balances the need to "generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and

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118. *See id.* ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

119. The logical extension within the second step of *Chevron* analysis is that interpretation of international law is incorporated into the Executive's proffered meaning, which alone receives consideration by the court. *Cf. id.* (noting that deference is given to executive interpretations partly for their technical expertise).

120. *See, e.g.*, *id.* ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

121. Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1177 (2007).

122. *Id.* at 1193.

123. Wuerth, *supra* note 22, at 332.

124. Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

the fact that the foreign policy expertise of the executive places it in the best position to make those judgments,"[125] with the need to check the Executive's power over individuals.[126]

Like Steinhardt's three-part approach to *Charming Betsy*,[127] a *Chevron*-style approach to *Charming Betsy* should also proceed in three steps. First, courts should look at binding domestic sources of law, such as Supreme Court precedent and the language of the AUMF, to determine issues that remain open to interpretation. For example, binding precedent interpreting the AUMF authorizes the President to detain "pursuant to the laws of war"[128] and confirms that the conflict between United States and al-Qaeda is a non-international armed conflict governed by international humanitarian law.[129] Regardless of disputes over the accuracy of these decisions,[130] Court precedent binds the lower courts and the Executive.

Second, lower courts should examine the Geneva Conventions and other principles of international law. Rather than making their own pronouncements as to the nature of these laws, courts should only examine them for their clarity or ambiguity, which could be determined by the strength of international consensus regarding their meaning. To the extent the laws are clear, the legality of the President's actions should also be clear. Third, to the extent that the laws are ambiguous, courts should analyze them to decide whether the President's interpretation is reasonably permissible. Courts should defer to a reasonable interpretation, but overrule an arbitrary one.

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125. Posner & Sunstein, *supra* note 121, at 1176.

126. *See* Jinks & Katyal, *supra* note 99, at 1232.

> On the one hand, the executive has both unique institutional virtues and substantial constitutional authority when it comes to foreign affairs. On the other hand, this sphere of government activity is increasingly governed by law—law that both purports to regulate the actions of the executive and that is made at least in part outside the executive. The upshot is that although some deference is almost certainly often warranted, too much deference risks precluding effective regulation of executive action.

Id.

127. *See* Steinhardt, *supra* note 43, at 1134.

128. *Hamdi*, 542 U.S. at 548. *But see* Al-Bihani v. Obama, 590 F.3d 866, 884 (D.C. Cir. 2010).

129. *See, e.g.*, *Hamdan*, 548 U.S. at 629 (noting that while the detainee trials do not involve members of an armed conflict between signatories to the Geneva Convention, such a fact holds no analytical significance in this case).

130. *See, e.g.*, Marko Milanovic, *The Obama Administration's Total Misinterpretation of IHL Regarding the Authority to Detain Suspected Terrorists*, EUR. J. INT'L L. BLOG (Mar. 14, 2009), http://www.ejiltalk.org/the-obama-administrations-total-misinterpretation-of-ihl-regarding-the-authority-to-detain-suspected-terrorists/ ("[I]t totally elides the distinction between international and non-international armed conflicts as a matter of IHL . . . . [B]ecause AUMF is seen as the statutory authority for detention, also at work is an elision between the jus ad bellum and jus in bello.").

III. *AL-BIHANI V. OBAMA*

The President currently claims "authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks," as well as those "who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."[131] This authority is expressly pursuant to the AUMF, as construed "in light of law-of-war principles that inform the understanding of what is 'necessary and appropriate.'"[132]

Courts disagree on the legality of the President's claimed authority.[133] A key point of dispute has been whether the President has authority to detain those who have "substantially supported the Taliban, al-Qaida, or associated forces."[134] Some courts have accepted this authority as consistent with international law.[135] Others have rejected it.[136] But, prior to *Al-Bihani*, no district court had questioned the relevance of international law itself to the decision.[137] That will probably change after *Al-Bihani*, with potentially devastating consequences for detainee habeas petitions relying on those well-established principles.

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131. Respondents' Memorandum, *supra* note 88, at 2.

132. Brief for Appellees at 16, Al-Bihani v. Obama, 590 F.3d 866 (2010) (No. 09–5051).

133. *See* Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: Habeas Cases as Lawmaking* 17–21 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 165, 2010) ("Several distinct, or at least apparently distinct, positions have emerged regarding the scope of the government's authority, raising the possibility that it currently varies from courtroom to courtroom.").

134. Hamlily v. Obama, 616 F. Supp. 2d 63, 67 (2009). "Regardless of the reasonableness of this approach from a policy perspective [it] is simply beyond what the law of war will support." *Id.* at 76.

135. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 71 (D.D.C. 2009) (holding as a matter of law "the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States").

136. *See, e.g.*, *Hamlily*, 616 F. Supp. 2d at 77 (finding "the government's detention authority does not extend to those individuals who have only 'directly supported hostilities'").

137. *See, e.g.*, *id.* at 74 ("Even though this portion of the government's position cannot be said to reflect customary international law because, candidly, none exists on the issue."); *Gherebi*, 609 F. Supp. 2d at 61 ("Thus, regarding the 'authority' to detain individuals in an armed conflict, the laws of war are silent with respect to both international and non-international armed conflicts.").

A. *Background and Facts*

Ghaleb Nassar Al-Bihani is a Yemeni citizen who has been held by the U.S. government at Guantánamo Bay since 2002.[138] Prior to his detention, Al-Bihani was a member of the 55th Arab Brigade, a paramilitary group allied with the Taliban that fought against the Northern Alliance,[139] a loosely allied group of Taliban opposition fighters.[140] Al-Bihani worked as a cook and carried a Brigade-issued weapon that he never fired in combat.[141] Following the October 2001 invasion of Afghanistan, Al-Bihani and the 55th Brigade retreated and eventually surrendered to the Northern Alliance.[142] The Alliance handed Al-Bihani over to U.S. forces in 2002.[143] The United States subsequently transferred Al-Bihani to Guantánamo Bay for detention and interrogation.[144]

Al-Bihani first petitioned for habeas corpus in 2004.[145] However, the district court lacked jurisdiction to hear his claim until 2006, when the Supreme Court decided *Boumediene*.[146] Soon after that ruling, the district court reviewed and denied Al-Bihani's petition, holding that the government had authority to detain an individual "who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[147] The court found that, based on Al-Bihani's own admissions, it was "more probable than not" that he was "part of or supporting" Taliban forces.[148] The court thus held that the government had lawfully detained Al-Bihani.[149]

Al-Bihani appealed.[150] On appeal, Al-Bihani advanced several international law-based arguments. First, he argued that international humanitarian law did not authorize his initial detention because he belonged to a volunteer militia, not a state

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138. Al-Bihani v. Obama, 590 F.3d 869 (D.C. Cir. 2010).

139. *Id.*

140. *Id.*; *see also* Jim Garamone, *U.S. Advisors Aid Northern Alliance, Build Cohesion*, AM. FORCES PRESS SERV., Nov. 6, 2001, *available at* http://www.defense.gov/news/newsarticle.aspx?id=44481 ("U.S. advisors are helping the Northern Alliance [and other Taliban opposition groups] become more cohesive . . . .").

141. *Al-Bihani,* 590 F.3d at 869.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Al-Bihani v. Obama, 594 F. Supp. 2d 35, 38 (D.D.C. 2009) (citing Boumediene v. Bush, 583 F. Supp. 2d 133, 135 (D.D.C. 2008)), *aff'd*, 590 F.3d 866 (D.C. Cir. 2010).

148. *Id.* at 40.

149. *Id.*

150. *Al-Bihani*, 590 F.3d at 868.

military.[151] He argued that, under international law, civilians who do not directly participate in hostilities cannot be detained.[152]

Second, Al-Bihani argued that the 55th Arab Brigade lacked any opportunity to declare its neutrality in the fight against the United States.[153] Therefore, he argued, the United States could not continue to detain him.[154] Third, Al-Bihani argued that, even assuming international law permitted his initial detention, the United States must now free him unless it had evidence that he remained dangerous, because the conflict in which he had participated had ended.[155] Finally, as the majority opinion characterized the argument, Al-Bihani presented "a type of 'clean hands' theory,"[156] asserting that any authority the government might have had to detain him "is undermined by its failure to accord him the prisoner-of-war status to which he believes he is entitled by international law."[157]

The Government responded that the AUMF authorized the President to detain al-Qaeda and Taliban-affiliated forces and that "each of the acts Al-Bihani performed was part of a course of conduct in which Al-Bihani traveled to Afghanistan to engage in *jihad,* joined an enemy brigade, and provided services to the brigade on the front lines under the command of Al-Qaida and Taliban leaders."[158] It argued that "Al-Bihani did not simply participate in a war between the United States and the country of Afghanistan," but in a conflict between the United States and "the joint forces of al-Qaeida, the Taliban, and associated forces."[159] Furthermore, the Government asserted its continued power to detain Al-Bihani, as the "conflict in which Al-Bihani was captured has not ended."[160] It noted that whether hostilities have ended is a political question, and provided a country report detailing the state of war in Afghanistan.[161] Finally, it criticized Al-Bihani's "clean hands" theory, pointing out that it was based solely on the dissenting opinion of Justice Souter in *Hamdi*.[162]

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151. *Id.* at 871 ("Al-Bihani interprets international law to mean anyone not belonging to an official state military is a civilian, and civilians, he says, must commit a direct hostile act, such as firing a weapon in combat, before they can be lawfully detained.").
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. Brief for Appellees, *supra* note 132, at 17.
159. *Id.* at 36–37.
160. *Id.* at 32.
161. *Id.* at 34.
162. *Id.* at 39.

B. *The Court's Legal Reasoning*

First, the appeals court panel found that international law could not limit the President's power to detain Al-Bihani.[163] Noting that Al-Bihani's claims "rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war," the court flatly asserted that "[t]his premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005 . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF."[164]

According to the court, because Congress has not domestically implemented it, international law is "not a source of authority for U.S. courts."[165] The court also noted that Congress could authorize the President to violate international law, and asserted that the AUMF and subsequent statutes may have done so.[166] Thus, the court concluded that it had "no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles,"[167] and that it would look solely to "the sources courts always look to": domestic statutes and controlling case law.[168]

The court determined that the proper domestic source of the President's detention authority lay in the AUMF.[169] The court properly interpreted this provision, in light of the Supreme Court's decision in *Hamdi*, as activating the President's war powers.[170]

The court also examined several provisions of the MCA for guidance.[171] It determined that the provisions authorized the President to establish military tribunals to try aliens accused of supporting terrorism.[172] The court concluded that, "the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority"[173] because "any person subject to a military commission trial is also subject to detention."[174] It therefore found that the MCA and the AUMF authorized the detention of Al-Bihani because, based on his own

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163. Al-Bihani v. Obama, 590 F.3d 869, 873 (D.C. Cir. 2010).
164. *Id.* at 871.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 871–72.
169. *Id.* at 872.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

admissions, "Al-Bihani was both part of and substantially supported enemy forces."[175]

Second, the court dismissed Al-Bihani's claim that the United States had to release him even if he had been initially detainable. It again asserted that international law was irrelevant,[176] and, thus, that the President was authorized by domestic law to detain Al-Bihani.[177] The court also stated that international laws "affording notice of war and the choice to remain neutral have only applied to nation states."[178] In the court's view, even if international humanitarian law governed Al-Bihani's claim, the government could detain him.[179] Third, the court rejected Al-Bihani's argument that he should be released because the United States' conflict with the Taliban had ended.[180] The court disagreed with Al-Bihani factually, citing the troops on the ground in Afghanistan.[181] It also found that, based on Supreme Court precedent, the question of whether a conflict is "ongoing" is committed to the Executive Branch.[182] Finally, the court rejected Al-Bihani's clean-hands argument, because the theory lacked authority under any domestic statute, and its only case law precedent was Justice Souter's dissent in *Hamdi*.[183]

C. *Al-Bihani* v. *Betsy*

The majority's legal reasoning in *Al-Bihani* reverses *Charming Betsy*. Rather than assuming that Congress intends ambiguous laws to comply with the international legal obligations of the United States,[184] the court wrongly asserted that Congress must expressly state its intent to comply with international law.[185] Not finding an express statement, the court found international humanitarian law was irrelevant to its ruling.[186]

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175. *Id.* at 873–74.
176. *Id.* at 873.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 874.
181. *Id.*
182. *Id.* at 874–75 (citing Ludecke v. Watkins, 335 U.S. 160, 168–70 (1948)).
183. *Id.* at 875 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (Souter, J., concurring in part, dissenting in part)).
184. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
185. *See Al-Bihani*, 590 F.3d at 871 (noting that "[e]ven assuming Congress had at some earlier point implemented the laws of war as domestic law through appropriate legislation, Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds" but did not do so in the AUMF).
186. *Id.*

Not only does this analysis ignore *Charming Betsy*,[187] but, as Judge Stephen Williams points out in his concurrence,[188] it is also difficult to reconcile with the Supreme Court's analysis of the AUMF in *Hamdi*. The majority cited *Hamdi* for the proposition that the "international laws of war are helpful to courts when identifying the general set of war powers" that the AUMF has authorized.[189] But, the Supreme Court did not use international humanitarian law merely to identify the President's war powers.[190] Rather, the Court used international humanitarian law to define the President's war powers, including its implicit limitations.[191] For example, the Court relied on international law when it held that the President could detain individuals during ongoing active hostilities, in order to prevent combatants from returning to battle.[192] The circuit court accepted this interpretation in *Al-Bihani*,[193] which appears nowhere in the domestic legislation that the Supreme Court examined.[194] Rather, this holding came directly from international law.[195]

By repudiating any international constraints, *Al-Bihani* "goes well beyond what even the government . . . argued."[196] The Government expressly conceded that "[t]he authority conferred by the AUMF is informed by the laws of war."[197] But, *Al-Bihani* ignores the Government's assertion that it can detain only those who have "substantially" supported enemy forces.[198] Instead, the majority adopted the Government's previous, more permissive AUMF

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187. *See Charming Betsy*, 6 U.S. (2 Cranch) at 118 ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

188. *Al-Bihani*, 590 F.3d at 885 (Williams, J., concurring) ("[W]e understand Congress's grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles." (quoting *Hamdi*, 542 U.S. at 521)).

189. *Id.* at 875 (citing *Hamdi*, 542 U.S. at 520).

190. *See Hamdi*, 542 U.S. at 520 (limiting Congress's grant of authority to detain prisoners as limited to the duration of the conflict pursuant to "longstanding law-of-war principles").

191. *Id.*

192. *Id.*

193. *See Al-Bihani*, 590 F.3d at 874–75 (analyzing whether the conflict in Afghanistan is still ongoing so as to determine whether the President has the authority to detain the petitioner pursuant to the AUMF and "longstanding law-of-war principles").

194. *See* Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

195. *See Hamdi*, 542 U.S. at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities.")

196. *Al-Bihani*, 590 F.3d at 885 (Williams, J., concurring).

197. Brief for Appellees, *supra* note 132, at 35.

198. *Al-Bihani*, 590 F.3d at 870 n.1 (citing Brief for Appellees, *supra* note 132, at 21–22).

interpretation, which permits the President to detain anyone who had merely "supported" enemy forces.[199]

IV. WHAT IS A "REASONABLE" INTERPRETATION OF INTERNATIONAL HUMANITARIAN LAW DURING THE GUANTÁNAMO HABEAS HEARINGS?

Ironically, the D.C. Circuit panel could have upheld Al-Bihani's detention even if it had followed *Charming Betsy*. Al-Bihani admitted that he had been part of an armed unit allied with the Taliban and that he had carried a weapon as part of his duties.[200] Under the AUMF and international law, a judge might reasonably have found him detainable as an enemy combatant.[201]

The section below illustrates how *Al-Bihani* might have looked had it followed *Charming Betsy*. It applies the *Chevron* framework established in Part III. First, it examines established Supreme Court precedent and the language of the AUMF and notes areas that have not been foreclosed, either by Congress or, judicial precedent, from judicial interpretation. Second, it surveys international law and notes areas of significant disagreement over how that law should apply to detainee cases. Finally, it turns to the specific facts of Al-Bihani's case.

A. *Binding Domestic Authorities*

Two primary domestic authorities govern the President's power to detain: the AUMF and Supreme Court cases. The AUMF permits the President to use force against "nations, organizations [and] persons" who "planned, authorized, committed, or aided" the September 11 attacks or who "harbored" such persons, so long as that force is "necessary and appropriate" and his purpose is to prevent future attacks.[202]

Supreme Court precedent both confirms and limits this authority. It permits the President to claim AUMF-authorized power

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199. *Id.* at 873–74 (recognizing that both "substantially" and "merely" supported are valid criteria and independently sufficient to satisfy the standard for detainment); *see, e.g.*, Memorandum from the Deputy Sec'y of Def. on Order Establishing Combatant Status Review Tribunal to the Sec'y of the Navy (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

200. *Al-Bihani*, 590 F.3d at 869.

201. *See, e.g.*, *id.* at 884 (Williams, J., concurring) (stating that regardless of the analysis used to determine the defendant's role within al–Qaeda or the Taliban, defendant's support was sufficient to find his detention lawful).

202. Authorization for Use of Military Force, Pub. L. No. 107–40, § 2, 115 Stat. 224 (2001).

to detain.[203] It also confirms that at least some aspects of the conflict between the United States and al-Qaeda represent a non-international armed conflict.[204] This sets the stage for subsequent decisions addressing the contours of the President's detention authority.

B. *General Principles of International Humanitarian Law*

International law governs who states may detain during an international armed conflict. Generally, states can detain combatants and "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, [and] supply contractors . . . ."[205] States may only detain other civilians if they are a security threat.[206]

By contrast, international humanitarian law is silent as to who states can detain during a non-international armed conflict.[207] Thus, some scholars assert that domestic law and international human rights law, which prohibit "prolonged and arbitrary detention,"[208] govern the conflict. Others, including the government, argue that international humanitarian law displaces domestic and international human rights law during non-international armed conflict.[209] According to this view, international humanitarian law merely acknowledges that parties to a non-international armed conflict will inevitably detain their enemies, while also imposing minimum humane conditions on those detentions.[210]

The Government asserts that international humanitarian law displaces domestic and international human rights law during non-international armed conflicts and, thus, that it governs detentions at

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203. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

204. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

205. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. This provision may be viewed as a constraint rather than an authorization—in other words, that the Conventions do not *permit* states to detain combatants, but, rather, *require* states to detain combatants instead of summarily executing them or convicting them in a criminal trial.

206. *Id.* art. 5.

207. Laura M. Olson & Marco Sassòli, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 621 (2008).

208. *Id.* The basis of this union is partly founded upon the landmark human rights treaty, the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

209. *See, e.g.*, Respondents' Memorandum, *supra* note 88, at 1 (arguing that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized").

210. Olson & Sassòli, *supra* note 207, at 627.

Guantánamo Bay. Furthermore, because international humanitarian law contains few standards for how the government should treat Guantánamo detainees, the government has decided to apply standards found in the law governing international armed conflict by analogy.[211] Some scholars have criticized this approach,[212] but it is currently accepted by at least some traditional authorities, notably the International Committee of the Red Cross.[213]

The Government's approach looks at an individual's membership in a particular group, analogizing members to combatants and non-members to civilians.[214] Thus, the United States deems civilians with a strong nexus to an armed group detainable by analogy to the law governing international armed conflict.[215] However, because such civilians are not affiliated with a state, they are not entitled to the privileges traditionally granted to prisoners of war, such as immunity from criminal prosecution for their participation in the conflict.[216]

Until *Al-Bihani*, courts accepted the Government's analogy approach but split over how to define membership in a particular group and whether support of that group justified detention.[217] Some courts held that the government could detain civilians "accompanying the armed forces without actually being members thereof."[218] Others disagreed.[219] This ambiguity remains a significant source of disagreement among the lower courts. The Government itself declined "to attempt to identify, in the abstract, the precise nature and degree of 'substantial support,'"[220] beyond noting that it would

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211. Respondents' Memorandum, *supra* note 88, at 5–6; *see* Olson & Sassòli, *supra* note 207, at 623–24.

212. *See* Milanovic, *supra* note 130. Because international humanitarian law is built on the principal of reciprocity between states, one argument against analogizing in this way is it would give non-state actors the right to detain members of state armies. *Id.*

213. Int'l Comm. for the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (May 2009) (Nils Melzer), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf.

214. Respondents' Memorandum, *supra* note 88, at 7.

215. *Id.*

216. *Id.*

217. Wittes, Chesney & Benhalim, *supra* note 133, at 16.

218. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 69 (D.D.C. 2009) (finding that "an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself").

219. *See, e.g.*, Hamlily v. Obama, 616 F. Supp. 2d 63, 73–74 (D.D.C. 2009) (rejecting the holding of the *Gherebi* court that "substantial support" could be used as an independent basis for detention).

220. Respondents' Memorandum, *supra* note 88, at 2.

not "justify the detention at Guantánamo Bay of those who provide unwitting or insignificant support . . . ."[221]

C. *The Detention of Al-Bihani*

The *Chevron*-style deference delineated in Part III easily can be illustrated using Al-Bihani's case. First, as noted above, Supreme Court precedent confirms that the government's authority is governed by international law.[222] Court precedent also supports the Government's assertion that it is engaged in a non-international armed conflict in Afghanistan, where Al-Bihani was captured.[223] Second, the Government's analogy approach to its detention authority is contested,[224] but, in light of acceptance by the ICRC,[225] seems reasonable under *Chevron* deference.

A court ruling on the merits of Al-Bihani's detention need not reach the Government's claimed authority to detain individuals who substantially support enemy forces.

The circuit court and the district court explicitly found that, by his own admissions, Al-Bihani carried a weapon while working under a Taliban-affiliated militia.[226] Other evidence existed that Al-Bihani had intentionally joined the militia with the purpose of supporting the Taliban.[227] Thus, a court deferring to the President's analogy approach could, accepting these facts, find Al-Bihani detainable as "analogous to a member of a State's armed forces, who may serve as a cook but is also trained for combat."[228] Finally, though this ruling would require Al-Bihani's release when ongoing hostilities ceased,[229] the Government presented facts that the hostilities had not ended.[230] If the court accepted this factual argument, it could find Al-Bihani's continued detention legal.[231]

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221. *Id.*

222. Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004).

223. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

224. *See*, *e.g.*, Milanovic, *supra* note 130 (arguing that authority under the AUMF is not necessarily informed by principles of the laws of war).

225. *See* ICRC, *supra* note 213 (applying international humanitarian law to determine the rights of civilians taking part in armed international conflicts).

226. Al-Bihani v. Obama, 590 F.3d 866, 869 (D.C. Cir. 2010).

227. *See* Brief for Appellees, *supra* note 132, at 15 (noting that Al-Bihani was subject to the command structure of the 55th Brigade, which included key Taliban and al-Qaeda officers; he retreated with the 55th brigade when the U.S. began bombing, and surrendered with the 55th brigade to the Northern Alliance).

228. Laura Marie Olson, *Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*, 42 CASE W. RES. J. INT'L L. 197 (2009).

229. *See* Third Geneva Convention, *supra* note 205, art. 4 (requiring release and repatriation at the "cessation of active hostilities").

230. Brief for Appellees, *supra* note 132, at 32.

231. *See* Third Geneva Convention, *supra* note 205, art. 4.

This simple analysis, while not exhaustive, demonstrates that the D.C. Circuit panel's ultimate holding was not necessarily wrong under international law. Under the *Charming Betsy* doctrine, however, the court should have reached that conclusion by construing the AUMF in light of international laws, not by asserting that the President is completely unconstrained by them.[232] Because the detainee habeas corpus litigation concerns fundamental individual rights, the court has a duty to oversee the Executive's actions at Guantánamo. For the reasons discussed above, it cannot perform that duty without examining international law.

V. CONCLUSION

In September 2009, President Obama declined to seek additional legislative authority for detentions at Guantánamo Bay.[233] Thus, for the time being,[234] it is beyond question that the lower courts must develop rules and procedures to govern the habeas corpus cases that the Supreme Court has charged them with overseeing.[235] Though these courts may believe that this process would be better left to the political branches,[236] the political branches have, through silence, delegated the job to them.

The courts are up to the task. Because international law has always played a role in U.S. jurisprudence, judges already have the necessary tools to grapple with the international legal issues that the detainee cases present.[237] The Judiciary's traditional role of protecting individual liberty from executive overreach[238] necessitates

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232. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

233. Wittes, Chesney & Benhalim, *supra* note 133, at 1.

234. *See* Noriega v. Pastrana, 130 S. Ct. 1002, 1002 (2010) (cert. denied) (Thomas, J., dissenting) ("Answering just the first of these questions would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since we decided *Boumediene*."); Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 8 (Brookings Inst., Georgetown Univ. Law Ctr. & Hoover Inst. Working Paper Series on Counterterrorism and American Statutory Law, 2009), http://www.brookings.edu/%7E/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf ("Congress must . . . get involved to provide the court with rules and institutional structure to create better organization and greater legitimacy and effectiveness for the long haul.").

235. *See* Boumediene v. Bush, 553 U.S. 723, 785 (2008) (extending the Suspension Clause to foreign detainees at Guantánamo Bay, but failing to provide standards to govern detainee habeas corpus petitions).

236. *See* Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (arguing that because of Congress's policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution, it is particularly situated to determine habeas standards).

237. *See Charming Betsy*, 6 U.S. (2 Cranch) at 118.

238. *See Boumediene*, 553 U.S. at 725 (noting that the Suspension Clause is necessary to protect against "cyclical abuses" of power).

that court utilize these tools to examine the Executive's interpretation of its authority over the Guantánamo Bay detainees and strike the appropriate balance between individual liberty and national security.

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