

## Essay

# Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction

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By turning a statute limiting court jurisdiction into a delegation of power by Congress to the Supreme Court, *Hamdan v. Rumsfeld*<sup>1</sup> is a political masterstroke. In the pages that follow, I explain why “the least dangerous branch” felt empowered to ignore congressional limits on its authority, repudiate presidentially created military tribunals, and conclude that the Geneva Convention applies to Guantánamo detainees. In so doing, I will use the Court’s *Hamdan* ruling to extend my contribution to last year’s Minnesota Law Review Symposium on the future of the Supreme Court. In that Essay, *Should the Supreme Court Fear Congress?*, I examined recent proposals to strip court jurisdiction on divisive social issues and concluded that the Supreme Court has little reason to fear a backlash from Congress.<sup>2</sup> For identical reasons, the *Hamdan* Court had no reason to fear Congress. Congress never challenged judicial independence when it enacted legislation limiting federal court jurisdiction over enemy combatants. In making this point, I will look at the politics both surrounding the 2005 Detainee Treat-

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1. 126 S. Ct. 2749 (2006).  
2. Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1361–62 (2006).

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ment Act (limiting court power over Guantánamo detainees)<sup>3</sup> and the 2006 Military Commissions Act (forbidding habeas filings by enemy combatants).<sup>4</sup>

This Essay does not address whether the *Hamdan* decision is correct on the merits. It may be that lawless hubris animated the Court's refusal to defer to executive branch interpretations of the Uniform Code of Military Justice and other relevant statutes.<sup>5</sup> That animation, however, is not my concern. Instead, I will look at *Hamdan* as a work of political strategy—examining why the Court would have incentive to see Bush administration initiatives as executive overreaching and, similarly, why the Court would want to see Congress as its ally.

My essay proceeds in two parts. First, I examine congressional efforts to restrict court jurisdiction over Guantánamo detainees. Specifically, I explain why Congress never saw these statutes as challenging the Court's power to decide the enemy combatant issue. More generally, I argue that Congress has no interest in challenging the Court to a knock-down fight. Second, I discuss *Hamdan*, focusing on the Court's assessment of how Congress and the Court should interface with each other. In particular, I highlight the reasons why the Court would want to protect (if not expand) its institutional turf and, in so doing, limit the executive.

## I. CONGRESS AND THE COURT

### A. BACKGROUND

A trio of June 2004 cases set into motion the Court-Congress dialogue that produced statutory restrictions on court jurisdiction both before and after *Hamdan*. The most consequential of these cases is *Rasul v. Bush*, a decision rejecting Bush administration efforts to block federal court review of habeas claims filed by Guantánamo detainees.<sup>6</sup> The Bush admini-

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3. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739.

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

5. For a condemnation of *Hamdan*, see Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 101 (2006). For a celebration of the decision, see Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

6. 542 U.S. 466, 481 (2004).

stration argued that habeas relief was inappropriate because the U.S. Naval Base at Guantánamo is under Cuban, not U.S., sovereignty.<sup>7</sup> In rejecting that argument,<sup>8</sup> the Supreme Court signaled its willingness to police the administration's handling of enemy combatants. At the same time, the Court ruled against the government in another case involving U.S. citizens detained on terrorism charges.<sup>9</sup> Rejecting the government's claim that it can detain captured al Qaeda members and Taliban indefinitely, the Court ruled that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake" and that enemy combatants must have access to a lawyer and a "fair opportunity to rebut the Government's factual assertions before a neutral decision maker."<sup>10</sup>

The results and rhetoric of these cases represent a significant break from past practice. In the fifty years since the Court rejected President Truman's seizure of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>11</sup> the Court regularly acquiesced to presidential war-making initiatives.<sup>12</sup> In its 2004 rulings, however, the Court flatly rejected the government's position that separation of powers principles "mandate a heavily circumscribed role for the courts."<sup>13</sup> A state of war, as Justice O'Connor put it, "is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>14</sup>

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7. *Id.* at 475–76.

8. *Id.* at 480–81. The Supreme Court determined that the district court needed jurisdiction over the detainee's custodian to reach the detainee, regardless of the detainee's citizenship or location. In this case, the ultimate custodian was Secretary of Defense Donald Rumsfeld. *Id.* at 478–83.

9. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). A third case, *Rumsfeld v. Padilla* also raised the question of whether the President had the power to detain a U.S. citizen militarily. 542 U.S. 426, 430 (2004). The Court, ruling 5:4, concluded that Padilla had filed his action in the wrong court. *Id.*

10. *Hamdi*, 542 U.S. at 533, 536. In her *Hamdi* opinion, Justice O'Connor suggested that a wholly executive body, including one made of military officers, could satisfy her demand for a "neutral decisionmaker." See *id.* at 532–35.

11. 343 U.S. 579, 589 (1952).

12. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 272–74 (2d ed. 2004); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 75–83 (2002); Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466, 484–88 (2005).

13. *Hamdi*, 542 U.S. at 535.

14. *Id.* at 536.

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Five interrelated phenomena—most of which were also at play in *Hamdan*—fueled the Court’s rulings in these cases.<sup>15</sup> First, the Rehnquist Court worked hard to protect its turf. In other contexts, rather than shying away from political battles, the Court has embraced the rhetoric of judicial supremacy.<sup>16</sup> Contending that Congress must adhere to the Court’s interpretations of the Constitution, for example, the Justices rejected congressional efforts to mandate state accommodations for religious minorities<sup>17</sup> and the disabled.<sup>18</sup> Second, the Bush administration staked out an extreme position in these cases (and related war on terror initiatives).<sup>19</sup> By arguing that the president has final and unreviewable authority over military detainees held outside this country, the administration claimed that it could do with Guantánamo detainees as it saw fit. Echoing the Truman administration’s claim in *Youngstown* that the only checks on presidential excess were “the ballot box and . . . impeachment,”<sup>20</sup> the administration tried to back the Court into a corner.

Third, administration efforts to assuage the Court at oral arguments backfired. Contending that the “last thing you want to do is torture somebody or try to do something along those lines,”<sup>21</sup> the administration argued that it could be trusted. The very day the Court heard oral arguments, however, the media released photographs of U.S. soldiers torturing Iraqi prisoners at Abu Ghraib prison.<sup>22</sup> Making matters worse, the press subsequently revealed that the Justice Department had crafted a

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15. See *infra* Part II.

16. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2036–37 (2003); J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1969 (2006). For additional discussion, see *infra* notes 121–27 and accompanying text.

17. *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997).

18. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

19. Linda Greenhouse, *Detention Cases Before Supreme Court Will Test Limits of Presidential Power*, N.Y. TIMES, Apr. 18, 2004, at A20 (suggesting that the administration weakened its legal position by taking extreme positions on presidential power).

20. Devins & Fisher, *supra* note 12, at 68–69 (quoting H.R. DOC. NO. 82-534, at 371 (1952)). For additional discussion linking *Hamdan* to *Youngstown*, see *infra* notes 156–59 and accompanying text.

21. Transcript of Oral Argument at 50, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

22. See Charles Lane, *Iraqi Prison Abuse May Hurt Administration in Court*, WASH. POST, May 13, 2004, at A22.

legal justification to use torture during the interrogation of suspected terrorists and that U.S. military officers in Iraq modeled their interrogation procedures after tactics used at Guantánamo.<sup>23</sup> Fourth, the Court had little reason to fear a backlash from Congress. The prison scandal and torture memo came at a political cost to the White House, weakening the administration's in Congress and with the American people.<sup>24</sup> Fifth, there was little risk of executive non-acquiescence. In ruling against the administration, the Court did not compel an overhaul of administration policies. While signaling that the Court would play some role in checking the executive and that the government must give enemy combatants an opportunity to challenge their detention, the decisions did not place hard limits on the executive.<sup>25</sup>

Congress had next to nothing to say about the Court's rulings. In the days following the Guantánamo habeas decisions, no lawmaker spoke on the House or Senate floor about the results and only a handful issued press releases about the cases.<sup>26</sup> In part, lawmaker silence reflects the modern Congress's practice of treating Supreme Court decisions as final and definitive (a topic I will return to in a few pages).<sup>27</sup> More than that, Abu Ghraib, the torture memo, and the President's slumping job-approval ratings made congressional discussion of the Court beside the point. Lawmakers instead focused their energies on an intramural squabble over the President's han-

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23. See Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.

24. See Richard W. Stevenson, *Bush Starts Out on a Five-Week Run Concerning Iraq, Much of It Apparently Uphill*, N.Y. TIMES, May 25, 2004, at A14.

25. For this reason, pro-executive lawyers were able to characterize the trio of rulings as a "significant reaffirmation of the President's constitutional authority as commander in chief in time of war." David B. Rivkin, Jr. & Lee A. Casey, *Bush's Good Day in Court*, WASH. POST, Aug. 4, 2004, at A19. For a discussion of how the Bush administration attempted to use these decisions to its advantage, see LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 220–52 (2005).

26. See Guantánamo Press Release, Congresswoman Jane Harman, Harman Welcomes Decision by Supreme Court to Provide Detainees with Access to Courts and Counsel (June 28, 2004), available at [http://www.house.gov/harman/press/releases/2004/062804PR\\_SupremeCourt.html](http://www.house.gov/harman/press/releases/2004/062804PR_SupremeCourt.html); Press Release, Senator Orrin Hatch, Hatch on Guantánamo Bay Supreme Court Decision (June 28, 2004), available at [http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=1090](http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1090).

27. See *infra* notes 99–106 and accompanying text.

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dling of the war on terror. Democrats pushed for greater oversight while Republicans sought to minimize the political damage of these scandals.

For its part, the Bush administration tried to make lemonade from the lemon the Supreme Court handed it. The Justice Department press release did not mention that the Court rejected the administration's arguments.<sup>28</sup> Instead, the Department emphasized that the Court's decision validated the President's power to detain enemy combatants and that the Court tempered its demand that enemy combatants be afforded procedural protections by recognizing that these protections "must reflect the unique context of the detention . . . and the need of the executive to prosecute the war."<sup>29</sup> Two weeks later, the administration put some of its new policies into place. Most significant, in anticipation of using military commissions to try enemy combatants, it created Combatant Status Review Tribunals to determine whether detainees were lawful soldiers or unlawful enemy combatants.<sup>30</sup> The administration also sought to limit judicial review of its decisions through favorable interpretations of the Geneva Convention and other treaties.<sup>31</sup>

It did not take long for things to change. Within six months of the Court's decisions, the District Court of the District of Columbia rejected the Bush administration's decision to use military commissions that operated outside the court martial procedures contemplated by the Uniform Code of Military Justice.<sup>32</sup> That decision was overturned by the D.C. Circuit in July 2005.<sup>33</sup> When the Supreme Court agreed to review this decision on November 7, 2005,<sup>34</sup> Congress got into the act.

Just three days after the Court granted certiorari, Congress appeared ready to go for the Court's jugular. On Novem-

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28. See Press Release, Dep't of Justice, Statement of Mark Corallo, Dir. of Pub. Affairs, Regarding the Enemy Combatant Cases (June 28, 2004), available at [http://www.usdoj.gov/opa/pr/2004/June/04\\_opa\\_455.htm](http://www.usdoj.gov/opa/pr/2004/June/04_opa_455.htm).

29. *Id.*

30. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

31. See R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, WASH. POST, July 4, 2004, at A12.

32. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168–70 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

33. *Hamdan*, 415 F.3d at 44.

34. *Hamdan*, 126 S. Ct. at 622–23.

ber 10, the Senate approved, by a 49:42 vote,<sup>35</sup> legislation denying jurisdiction to *any* “court, justice, or judge” to consider a habeas petition brought by a Guantánamo detainee.<sup>36</sup> The legislation, moreover, applied both prospectively and retroactively to any case “pending on or after the date of the enactment of this Act.”<sup>37</sup> And while the amendment allowed the D.C. Circuit to review whether the Combatant Status Review Tribunal followed its own procedures, there is no doubt that this amendment was both a rebuke of the Court’s *Rasul* decision and a clear attempt to short-circuit the *Hamdan* litigation. Most notably, bill sponsor Senator Lindsey Graham (R-S.C.) took direct aim at *Rasul*, arguing that enemy combatants should not have meaningful access to civilian courts.<sup>38</sup>

Three days later, however, the Graham amendment was modified in a deal brokered by a bipartisan group of Senators.<sup>39</sup> The new version of the bill changed the effective date provision (eliminating any explicit reference to “pending” cases), granted automatic appeals to any detainee sentenced by a military commission to death or at least ten years of prison, and formally linked the bill to efforts by Senator John McCain (R-Ariz.) to ban torture and abuse of terrorism suspects held in U.S. facilities.<sup>40</sup> This bill, enacted as the Detainee Treatment Act (DTA), was approved by a vote of 84:14.<sup>41</sup>

Two weeks after the President signed the bill, the Justice Department asked the Supreme Court to dismiss *Hamdan*.<sup>42</sup>

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35. 151 CONG. REC. S12,667–68 (daily ed. Nov. 10, 2005).

36. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1405, 119 Stat. 3136, 3477.

37. § 1405, 119 Stat. at 3479.

38. See Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1; Press Release, Senator Lindsey Graham, Senate Passes Graham Detainee Plan (Nov. 10, 2005), available at <http://lgraham.senate.gov/index.cfm?mode=presspage&id=248690>.

39. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739, 2739–44.

40. See Jonathan Weisman, *Senators Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1.

41. 151 CONG. REC. S12,803 (daily ed. Nov. 15, 2005).

42. Respondents’ Motion to Dismiss for Lack of Jurisdiction, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184). The Justice Department motion adhered to comments made by President Bush. When signing the DTA, the President claimed that the bill applied retroactively and that “the executive branch shall construe [the DTA] to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus.” Press Release, President George W. Bush, President’s Statement on Signing of H.R. 2863, the “Department of Defense,

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Pointing to statutory language that “no court, justice, or judge shall have jurisdiction to hear or consider” any action filed by a Guantánamo detainee, the government argued that the DTA “clearly evinces Congress’s intent” both to respond to *Rasul* and to “strictly . . . limit the judicial review available to aliens detained at Guantánamo.”<sup>43</sup>

The Supreme Court was not fazed by the DTA or the government’s motion to dismiss. It deferred consideration of the issue until it heard oral arguments in *Hamdan*.<sup>44</sup> And when the Court decided *Hamdan* in June 2006, the Court ruled five to three that the DTA did not apply retroactively to Hamdan’s habeas petition.<sup>45</sup> The Court then turned to the merits, ruling that the Bush administration needed explicit congressional authorization before it could constitute military commissions.<sup>46</sup> The Court also concluded that, until Congress said otherwise, the Geneva Conventions apply to Guantánamo detainees and the Conventions are enforceable in federal court.<sup>47</sup>

Over the next three months, Congress and the Bush administration crafted a legislative response to *Hamdan*. Approved by Congress in September 2006, the Military Commissions Act (MCA) both authorizes military commission trials of enemy combatants and prohibits federal court consideration of habeas petitions filed by detainees.<sup>48</sup> Also, while placing limits on CIA interrogation techniques and declaring the United States obligated to abide by existing treaty obligations, the MCA gives the administration substantial leeway to sort out how to apply the Geneva Conventions and other treaties.<sup>49</sup>

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Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

43. Respondents’ Motion to Dismiss for Lack of Jurisdiction, *supra* note 42, at 8–9, 20.

44. See United States Supreme Court, Docket for 05-184, <http://www.supremecourtus.gov/docket/05-184.htm> (last visited Apr. 9, 2007).

45. *Hamdan*, 126 S. Ct. at 2764–69.

46. *Id.* at 2774–81.

47. *Id.* at 2793–96.

48. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. Under the MCA, moreover, enemy combatant status extends both to Guantánamo detainees (who had been found to be “unlawful enemy combatants”) and to anyone who has “purposefully and materially” supported hostility against the United States (including people who provided support off the battlefield). *Id.* § 948a, 120 Stat. at 2601.

49. See Scott Shane & Adam Liptak, *Shifting Power to a President*, N.Y. TIMES, Sept. 30, 2006, at A1.



## B. ANALYSIS

Against this backdrop, how can I argue that Congress did not see its jurisdiction stripping statutes as rebukes to the Court? After all, Congress enacted the DTA only weeks after the Court granted certiorari in *Hamdan*, and the MCA followed in the immediate wake of the Court's decision. Congress, in other words, made clear that it wanted to circumscribe judicial review of claims by enemy combatants—both in anticipation of and in response to the Court's *Hamdan* decision. At the same time, for reasons I will now detail, Congress never saw its handiwork as challenging the Court's power to sort out the legality of presidentially created military commissions, the applicability of the Geneva Convention to Guantánamo detainees, and the availability of habeas corpus relief to enemy combatants. For this very reason, Congress did not question *Hamdan*'s rulings on military commissions and the Geneva Convention.<sup>50</sup> Likewise, Congress would be quite accepting of a Court decision invalidating MCA provisions prohibiting federal court consideration of habeas corpus filings by Guantánamo detainees.

To start, Congress did not intend the DTA to short-circuit Supreme Court review in *Hamdan*. Even though congressional debates began three days after the grant of certiorari, the bill had been filed before the Court's decision to hear the case.<sup>51</sup> Even more, Congress ultimately deleted language in the original bill precluding federal court review of pending cases.<sup>52</sup> And while lawmakers did not explicitly embrace Supreme Court review of pending challenges (like *Hamdan*'s), no supporter of the bill challenged bill cosponsor Carl Levin's (D-Mich.) claim that the bill "would apply only to new habeas cases filed after the date of enactment."<sup>53</sup> Some opponents of the bill argued that their opposition to the measure was tied to their belief that the bill would apply retroactively and, consequently, prevent the Supreme Court from assessing the legality of military tribunals

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50. Some lawmakers, of course, were deeply disappointed by *Hamdan*. But these lawmakers—even those who might have resented what the Court did—did not challenge the Court. See *infra* notes 72–75 and accompanying text.

51. See 151 CONG. REC. S14,263–64 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl) (noting that the amendment was introduced before the grant of certiorari and, consequently, that it is "hard to argue that the amendment was motivated by a desire to strip the court of its jurisdiction in [*Hamdan*]").

52. See *supra* notes 39–41 and accompanying text.

53. 151 CONG. REC. S12,802 (daily ed. Nov. 15, 2005) (statement of Sen. Levin); *id.* at S12,754–55 (daily ed. Nov. 14, 2005).

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in *Hamdan*.<sup>54</sup> Indeed, the fact that eighty-four Senators voted for the amended bill provides strong evidence that the Senate did not intend to foreclose Supreme Court review in *Hamdan*.

None of this is to say that Congress formally embraced Supreme Court consideration of military tribunals in *Hamdan*. The statutory language is silent on that question.<sup>55</sup> Furthermore, even though the bill's other cosponsors (Lindsey Graham and John Kyl (R-Ariz.)) never responded to Senator Levin,<sup>56</sup> they both made clear that they wanted their bill to block the *Hamdan* litigation. Minutes before the Senate gave final approval to the bill, they inserted into the *Congressional Record* a colloquy stating their belief that the bill should apply retroactively.<sup>57</sup> Graham and Kyl also filed an amicus brief in *Hamdan*, arguing that the DTA should be applied retroactively.<sup>58</sup> Nevertheless, the insertion of a conversation that never took place into the *Congressional Record* seems an end run—hardly the stuff to convince a Supreme Court Justice (or anyone) that Congress intended to snuff out Supreme Court review in *Hamdan*.<sup>59</sup> Put another way: whether or not the Congress wanted

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54. See Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents at 17, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) [hereinafter *Kyl and Graham Amicus Brief*] (listing Senators who commented that the amendment would strip the Court of jurisdiction).

55. The majority and dissenting opinions in *Hamdan* endorsed competing, diametrically opposed approaches to the statutory interpretation question—the majority concluding that jurisdiction should be preserved unless Congress says otherwise, the dissent arguing that the plain language of the statute eliminated jurisdiction. *Hamdan*, 126 S. Ct. at 2769 n.15, 2810; see also *infra* notes 137–38 and accompanying text (elaborating upon the difference in approaches).

56. This lack of response is particularly noteworthy because Graham spoke immediately after Levin on two of the three occasions in which Levin contended that the Act was prospective in application. See 151 CONG. REC. S12,802 (Nov. 15, 2005); 151 CONG. REC. S12,754–56 (Nov. 14, 2005); 151 CONG. REC. S12,664 (Nov. 10, 2005).

57. 151 CONG. REC. S14,260–68 (daily ed. Dec. 21, 2005).

58. See *Kyl and Graham Amicus Brief*, *supra* note 54, at 9–22; Dan Egen, *Record Shows Senators' 'Debate' That Wasn't*, WASH. POST, Mar. 29, 2006, at A6 (noting that the colloquy never took place, notwithstanding efforts by Graham and Kyl to contend in their amicus brief that comments in the *Congressional Record* are “presumed to reflect live debate except when the statements therein are followed by a bullet . . . or are underlined”).

59. In suggesting that a Justice might discount the Graham-Kyl colloquy, I am not arguing that the Court should look to lawmaker comments when sorting out the meaning of statutory language. My point, instead, is that the failure of Senators Graham and Kyl to rebut Senator Levin (the third cosponsor of the amendment—and the cosponsor who pushed for the deletion of the language establishing retroactivity) suggests that those lawmakers who fa-

the Supreme Court to decide the fate of military tribunals in *Hamdan*, it is almost certain that Congress understood that the Court might ultimately make that decision.

Beyond removing language governing the retroactive application of the bill, Congress modified the DTA in ways that make clear that it did not see the bill as a rebuke to the courts. For example, by providing for D.C. Circuit and Supreme Court review of military commission sentences exceeding ten years,<sup>60</sup> lawmakers intended to preserve independent judicial review of significant military commission verdicts. Correspondingly, lawmakers depicted the bill as both recognizing the need for “federal court oversight” of military operations and advancing military effectiveness by allowing the military to prosecute the war on terror without being unduly burdened by frivolous lawsuits.<sup>61</sup> Senator Graham echoed these remarks, noting that the DTA prevented “lawsuit abuse” by prohibiting habeas filings<sup>62</sup> while, at the same time, conceding that the original bill was “flawed” because it did not allow for court review of military commission appeals.<sup>63</sup>

In other significant ways, lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary. Lawmakers depicted themselves as work-

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vored retroactive application of the statute did not feel that they could successfully fight this fight on the Senate floor. For a Justice interested in sorting out whether the Court’s assertion of jurisdiction in *Hamdan* might provoke a congressional backlash, the failure of Senators Graham and Kyl to fight this fight is telling.

60. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2742 (“[T]he U.S. Court of Appeals for the D.C. Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”). The statute did not explicitly mention Supreme Court review of the D.C. Circuit judgments. However, the sponsors of the Act, Lindsey Graham and John Kyl, made it clear that they anticipated judicial review. See 151 CONG. REC. S14,268 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl); *id.* at S12,801 (daily ed. Nov. 15, 2005) (statement of Sen. Graham). Senator Arlen Specter (R-P.A.) provided a competing perspective. See *id.* at S12,801 (statement of Sen. Specter) (“[The amendment] means what it says—the Supreme Court has no jurisdiction.”).

61. See 151 CONG. REC. S12,754–55 (daily ed. Nov. 14, 2005) (statement of Sen. Levin).

62. *Id.* at S12,755 (statement of Sen. Graham).

63. *Id.* at S12,754. Even Senator Hillary Clinton (D-N.Y.), who voted against the bill, recognized that, after *Rasul*, “the present level of accessibility to our courts by individuals who would do us harm is unprecedented in our nation’s history.” *Id.* at S14,271 (daily ed. Dec. 21, 2005) (statement of Sen. Clinton).

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ing collegially with the Court; several Senators, for example, contended that the “Supreme Court has been shouting to us in Congress: Get involved,” and thereby depicted *Rasul* as a “challenge” to Congress,<sup>64</sup> “asking the Senate and the House, do you intend for . . . enemy combatants . . . to challenge their detention [in federal courts] as if they were American citizens?”<sup>65</sup> Lawmakers also spoke of detainee habeas petitions as an “abuse”<sup>66</sup> of the federal courts, and warned that such petitions might unduly clog the courts,<sup>67</sup> thus “swamping the system”<sup>68</sup> with “frivolous” complaints.<sup>69</sup> Under this view, the DTA’s cabin-ing of federal court jurisdiction “respects” the Court’s independence and its role in the detainee process.<sup>70</sup>

Not all lawmakers saw the DTA as a model of Court-Congress cooperation. Opponents of the bill depicted the measure as undermining the rule of law and unduly limiting the courts’ jurisdiction.<sup>71</sup> With that said, it is telling that supporters of the measure both embraced judicial independence and claimed to follow the Court’s instructions in *Rasul*. Correspondingly, by removing the retroactivity provision from the DTA, lawmakers signaled to the Supreme Court that it could (without risking a legislative backlash) use *Hamdan* to invalidate the Bush administration’s military commission initiative.

Congress’s response to *Hamdan* backs up these claims, notwithstanding the fact that the MCA eliminates the federal

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64. *Id.* at S12,753 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

65. *Id.* at S12,732; *see also id.* at S12,659 (daily ed. Nov. 10, 2005) (statement of Sen. Specter) (“The Supreme Court finally took the bull by the horns . . . because the Congress had not acted.”); *id.* (statement of Sen. Kyl) (noting that *Rasul* was a statutory ruling and, consequently, that Congress could clarify its intent without contradicting the Court). Senators similarly characterized Justice O’Connor’s *Hamdi* opinion as an invitation for Congress to narrow detainee rights legislatively. *See id.* at S12,656 (statement of Sen. Graham).

66. *See id.* at S14,262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham).

67. *See id.* at S12,659 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl).

68. *See id.* at S12,732 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

69. *See id.* at S14,262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) (arguing that his amendment was designed to prevent detainees from abusing the federal courts by flooding them with frivolous lawsuits).

70. *See id.* at S14,263 (statement of Sen. Graham) (“[W]e wanted to respect the courts’ role . . .”).

71. *See id.* at S14,271 (statement of Sen. Clinton); *id.* at S12,803 (daily ed. Nov. 15, 2005) (statement of Sen. Reid) (“[H]abeas corpus protects all of us—it is the way we ensure that the Executive Branch acts within the bounds of the law.”).

courts' jurisdiction over enemy combatants' habeas corpus petitions. To start, lawmakers did not challenge the Court's ruling in *Hamdan*. Republicans who were instrumental in passing the DTA depicted *Hamdan* as a rallying call for Congress "to do our job, to clarify the law."<sup>72</sup> Representative Duncan Hunter (R-Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the "mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists."<sup>73</sup> And DTA sponsor Lindsey Graham stated: "The Supreme Court has set the rules of the road and the Congress and the president can drive to the destination together."<sup>74</sup> Even lawmakers who expressed disappointment in the Court's ruling did not criticize the Court. Senator John Cornyn (R-Tex.), for example, blamed *Hamdan*'s lawyers for misleading the Court about the legislative history of the DTA.<sup>75</sup>

Needless to say, Democratic opponents of the DTA celebrated *Hamdan* as a "triumph for the rule of law"<sup>76</sup> and our system of "checks and balances," where Congress has a vital role in defining detainee rights.<sup>77</sup> For his part, President Bush promised to "protect the people and, at the same time, conform with the findings of the Supreme Court."<sup>78</sup> White House Press Secretary Tony Snow echoed the President's comments at a press briefing. Snow remarked that the President will "figure

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72. Press Release, Senator Jim Inhofe, Inhofe Statement on Terrorist-Detainee Treatment Bill, CONG. Q. (Sept. 15, 2006).

73. 152 CONG. REC. H7535 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter).

74. David E. Sanger & Scott Shane, *Court's Ruling Is Likely to Force Negotiations over Presidential Power*, N.Y. TIMES, June 30, 2006, at A21; see also *Congressional Hearings on Guantánamo Set*, USA TODAY, June 30, 2006, [http://www.usatoday.com/news/washington/2006-06-30-gitmo-hearings\\_x.htm](http://www.usatoday.com/news/washington/2006-06-30-gitmo-hearings_x.htm) (quoting Senator John McCain as saying, "I'm confident that we can come up with a framework that guarantees we comply with the Court's order").

75. See 152 CONG. REC. S10,404 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn).

76. *Rep. Pelosi Responds to Supreme Court Decision on Guantánamo Military Commissions*, U.S. FED. NEWS, June 29, 2006, available at 2006 WLNR 11334427.

77. Press Release, Senator Patrick Leahy, Reaction to Supreme Court's Decision in *Hamdan* Case (June 29, 2006), <http://leahy.senate.gov/press/200606/062906.html>; Press Release, Senator Carl Levin, Statement on the Supreme Court's Decision in the Case of *Hamdan v. United States*, CONG. Q. (June 29, 2006).

78. The President's News Conference with Prime Minister Junichiro Koizumi of Japan, 42 WEEKLY COMP. PRES. DOC. 1242, 1244 (June 29, 2006).

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out precisely what the Court is saying here, and how to proceed in a way that comports with it.”<sup>79</sup> Furthermore, Snow stated that it is “now the obligation of the administration . . . to execute laws that are consistent with the Supreme Court’s holding.”<sup>80</sup>

When crafting the MCA, lawmakers uniformly agreed that “whatever the Congress does, the legislation [it] produce[s] must be able to withstand further security review and scrutiny of the federal court system, particularly the Supreme Court.”<sup>81</sup> For Representative Susan Davis (D-Cal.), fidelity to the Court’s understanding of the Constitution was especially important because the Court in *Hamdan* “entrusted this Congress with the duty to reform military tribunals in a manner consistent with the Constitution and international treaty obligations.”<sup>82</sup> At the same time, most lawmakers treated *Hamdan* as simply a call for Congress to set policy in this area—to formally authorize military commissions and to place constraints on the operation of those commissions. Under this view, lawmakers went about balancing the Geneva Conventions, habeas corpus filings, judicial review, and executive branch discretion. Their solution was a bill that authorized military commissions, limited interrogation techniques, embraced the Geneva Conventions (while giving the executive branch discretion in interpreting the Conventions), allowed judicial review of Combatant Status Review Tribunal determinations that an individual was an enemy combatant, permitted judicial review of commission judgments, and prohibited federal court consideration of habeas filings by enemy combatants.<sup>83</sup>

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79. Press Briefing by Tony Snow, White House Press Sec’y (June 29, 2006), <http://www.whitehouse.gov/news/releases/2006/06/20060629-6.html>.

80. *See id.* Two weeks after the Court’s decision, the President extended basic Geneva Convention protections to Guantánamo detainees. *See* Scott Shane, *Terror and Presidential Power: Bush Takes a Step Back*, N.Y. TIMES, July 12, 2006, at A20. The administration later retreated from this position. *See* Kate Zernike, *Administration Prods Congress to Curb the Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1 (discussing the Bush administration’s changed position, especially its decision to urge Congress to “narrowly define the rights granted to detainees” under Common Article Three of the Geneva Conventions).

81. 152 CONG. REC. S10,245–46 (daily ed. Sept. 27, 2006) (statement of Sen. Warner).

82. 152 CONG. REC. H7944 (daily ed. Sept. 29, 2006) (statement of Rep. Davis).

83. Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948b, 948r, 120 Stat. 2600, 2602, 2607, 2637. For discussion of the compromise reached on

In eliminating habeas filings,<sup>84</sup> Congress did not intend to pick a knock-down fight with the courts. Just as the DTA recognized an important judicial role while eliminating habeas filings,<sup>85</sup> the MCA likewise was premised on the view that habeas filings both clogged the courts and “hampered the war effort.”<sup>86</sup> Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for ultimately determining the meaning of habeas protections.<sup>87</sup> Specifically, lawmakers argued that they were operating within

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the bill, see Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 29, 2006, at A1. See also John W. Warner et al., *Look Past the Tortured Distortions*, WALL ST. J., Oct. 2, 2006, at A10 (explaining the key provisions of the MCA as understood by the bill’s architects). For news stories detailing political battles between the White House and Senate Republicans as well as squabbles between Democrats and Republicans in Congress, see Charles Babington & Jonathan Weisman, *G.O.P. Upbeat on Terror-Trial Bill: House Leaders Satisfied with Bush-Senate Compromise*, WASH. POST, Sept. 23, 2006, at A6; Carl Hulse et al., *How 3 G.O.P. Veterans Stalled Bush Detainee Bill*, N.Y. TIMES, Sept. 17, 2006, sec. 1, at 1; Jonathan Weisman & Peter Baker, *White House Offers New Proposal on Interrogations*, WASH. POST, Sept. 19, 2006, at A4; Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Tribunal Proposal*, N.Y. TIMES, Sept. 8, 2006, at A1.

84. Unlike the DTA (which limited federal court review of sentences exceeding ten years), the MCA authorizes federal court review of *all* sentences. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d, 120 Stat. 2600, 2603. Nonetheless, enemy combatants are not entitled to a trial de novo and, consequently, federal appellate courts must rely on a record which may include hearsay evidence as well as evidence obtained through aggressive interrogation techniques. See *id.* § 949a, 120 Stat. at 2608; Julian E. Barnes & Richard B. Schmitt, *Tribunal Bill Sets Up an Ironic Legal Limbo*, L.A. TIMES, Sept. 30, 2006, at A14. The law, moreover, does not address whether limits on the executive’s power to hold enemy combatants are necessary. In this way, the law places no limits on the power of government to hold enemy combatants indefinitely. See 152 CONG. REC. S10,262 (daily ed. Sept. 27, 2006) (letter from John Hutson et al. to Senator Warner and Senator Levin) (noting that high-ranking al Qaeda members may enjoy more procedural protections through military commission trials than low-level suspects who have never been charged). In its 2004 rulings and again in *Hamdan*, the Supreme Court likewise placed no limits on the government’s power to hold enemy combatants. See Rivkin & Casey, *supra* note 25 (noting that *Hamdi* and *Padilla* “mark a significant reaffirmation of the President’s constitutional authority as commander in chief in a time of war”).

85. See *supra* notes 60–70 and accompanying text.

86. Neil A. Lewis & Kate Zernike, *Measures Seek to Restrict Detainees’ Access to Courts*, N.Y. TIMES, Sept. 21, 2006, at A22 (quoting Senator Lindsey Graham).

87. For an insightful accounting of the MCA habeas provision focusing on Republican Party politics, see Jeffrey Toobin, *Killing Habeas Corpus*, NEW YORKER, Dec. 4, 2006, at 46.

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parameters set by the Court and, if not, that the Court could eviscerate the MCA's habeas provision.

Fifty-one Senators voted against a proposed amendment to provide habeas protections to Guantánamo detainees.<sup>88</sup> These lawmakers (50 Republicans and 1 Democrat) argued that the Constitution did not afford habeas protections to enemy combatants.<sup>89</sup> In other words, enemy combatants were only entitled to habeas protections afforded to them by Congress—statutory rights that Congress could modify as it saw fit.<sup>90</sup> Lawmakers backed up this claim by citing Supreme Court decisions.<sup>91</sup> No supporter of the statute argued that Congress was challenging the Court by stripping the Court's jurisdiction to hear constitutionally guaranteed habeas claims. Congress simply followed *Hamdan's* directive by stating its policy preferences. Specifically, if the Supreme Court were to conclude, in a challenge to the MCA, that enemy combatants possessed constitutional habeas rights, the Court could neuter that statutory provision without invalidating the statute on constitutional grounds. For instance, the Court could conclude that Congress sought only to nullify statutory habeas rights—so that the MCA did not seek to strip the Court of jurisdiction to hear constitutionally guaranteed habeas claims.<sup>92</sup>

Forty-eight Senators (43 Democrats, 4 Republicans, and 1 Independent) supported the habeas amendment.<sup>93</sup> These Sena-

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88. 152 CONG. REC. S10,369 (daily ed. Sept. 28, 2006).

89. The Senate debate took place on September 27 and 28, 2006. *See id.* at S10,354–69 (daily ed. Sept. 28, 2006); *id.* at S10,263–74 (daily ed. Sept. 27, 2006).

90. One of the principal architects of the MCA, Senator Graham, stated: “It is a statutory right of habeas that has been granted to enemy combatants. And if there is a constitutional right of habeas corpus given to enemy combatants, that is a totally different endeavor, and it would change in many ways what I have said.” 151 CONG. REC. S10,267 (daily ed. Sept. 27, 2006) (statement of Sen. Graham).

91. *See id.* at S10,268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) (proposing that aliens held at home or abroad do not have authority to invoke the Constitution (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950))).

92. Statements made by Senator Graham and others make clear that lawmakers intended to eliminate only statutory habeas corpus rights. *See* 152 CONG. REC. S10,267 (daily ed. Sept. 27, 2006) (statement of Sen. Graham); *id.* at S10,265 (statement of Sen. Warner) (arguing that Supreme Court precedents establish statutory, not constitutional, habeas rights for enemy combatants); *id.* at S10,267 (statement of Sen. Kyl) (refuting the argument that enemy combatants maintain a “constitutional right to habeas”).

93. 152 CONG. REC. S10,369 (daily ed. Sept. 28, 2006).



tors argued that enemy combatants possessed constitutional habeas rights, that Congress could not constitutionally strip the courts of jurisdiction, and that the courts would strike down the language limiting the courts' jurisdiction.<sup>94</sup> Lawmakers also spoke about the need for Congress and the courts to check executive branch excess, including a military commission system that puts the President in charge of enemy combatant trials. Senator Patrick Leahy (D-Vt.), for example, said that the habeas provision "will remove the checks in our legal system that provide against arbitrarily detaining people for life without charge."<sup>95</sup> These lawmakers hope and expect that the Court will invalidate the MCA language prohibiting judicial consideration of habeas claims.

In summary, legislation that strips the courts of habeas jurisdiction in enemy combatant cases is anything but a rebuke to the Court's rulings in *Rasul* and *Hamdan*. Lawmakers did not criticize the Court for these rulings. Rather, when enacting the MCA, lawmakers claimed that they were following Court interpretations of the Constitution by codifying the provisions of the *Hamdan* decision while respecting the Court's habeas corpus jurisprudence. Lawmakers likewise recognized that the Court would pass judgment on their handiwork and that they would support a Court ruling that nullified the habeas corpus provision of the MCA,<sup>96</sup> just as they backed the Court's interpretation of the DTA in *Hamdan*.<sup>97</sup> Finally, when enacting the DTA, lawmakers signaled the Supreme Court that they would

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94. 151 CONG. REC. S10,356–57 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy) (describing the provision as inconsistent with two hundred years of jurisprudence and "a betrayal of the most basic values of freedom for which America stands"); *id.* at S10,366 (statement of Sen. Levin) (noting that the courts will strike down court-stripping legislation and arguing that Congress therefore must fulfill its responsibility to protect "that great writ of habeas corpus which is in the Constitution"); *id.* at S10,367 (statement of Sen. Specter) ("[T]he Constitution is explicit in the statement that habeas corpus may be suspended only with rebellion or invasion . . . . We do not have a rebellion or invasion.").

95. 152 CONG. REC. S10,357 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy). Senator Leahy also asked for unanimous consent to have printed in the Record a letter from more than sixty law school deans and professors who "state that the Congress would gravely disserve our global reputation by [abolishing habeas corpus]." *Id.* (letter from law school deans and professors to U.S. Senators and members of Congress) ("[T]he [MCA] ignores the importance of shared institutional powers and checks and balances in crafting lawful and sustainable responses to the war on terror.").

96. *See supra* notes 82–95.

97. *See supra* notes 72–80.

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support a Court ruling invalidating the President's military commission initiative.

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Legislative consideration of the DTA and the MCA reveal that Congress accepts the Court's power to define the Constitution's meaning and invalidate or limit federal statutes. The fact that these bills restrict federal court jurisdiction over Guantánamo detainee filings reflects Congress's policy preferences, not Congress's attitudes about the Supreme Court. Specifically, lawmakers look to the courts to settle constitutional questions. Indeed, the legislative debates surrounding jurisdiction-limiting bills—like the DTA and the MCA—acquiesce to the courts' power to say what the law is.<sup>98</sup>

Unlike the Warren Court era, when legislative proposals reflected intense lawmaker disapproval of Supreme Court decisions, today's Congress is not interested in challenging the Court.<sup>99</sup> For example, Congress acquiesced to a spate of Rehnquist Court rulings that invalidated all or part of thirty-one federal statutes.<sup>100</sup> Congress did not care that the Court both depicted itself as the supreme expositor of the Constitution and invalidated more federal statutes than any of its predecessor Courts. Likewise, lawmakers did not object to the Court's reinvigoration of federalism constraints on Congress.<sup>101</sup> Rather, lawmakers treated the Court's rulings as final and authoritative. Lawmakers did not hold hearings on the rulings, they entered virtually no comments about the rulings in the *Congressional Record*, and their legislative responses to the Court's decisions never questioned the Court but, instead, sought to conform to the Court's rulings.<sup>102</sup>

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98. Lawmakers have not always looked to the courts to settle constitutional issues. See generally NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); Devins, *supra* note 2, at 1342–46, 1349–55 (comparing the Warren Court to today's Congress).

99. See Devins, *supra* note 2, at 1352.

100. See *supra* note 16 (citing articles arguing that the Rehnquist Court embraced the rhetoric of judicial supremacy); *infra* notes 120–27 and accompanying text.

101. See generally Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 *DUKE L.J.* 435, 435–37 (2001).

102. See Neal Devins, *The Majoritarian Rehnquist Court?*, 67 *LAW & CONTEMP. PROBS.* 63, 72–74 (2004).

Perhaps more striking, recent proposals to strip the courts of jurisdiction over same-sex marriage, the pledge of allegiance, and other social issues were rhetorical moves in which Republican lawmakers sought to strengthen ties with their social-conservative base.<sup>103</sup> Congress had no interest in passing those measures. In the 2003–04 Congress, legislators voted on only two of those measures—same sex marriage and the pledge of allegiance—and they cast those votes in the House shortly before the November elections, making it impossible for the Senate to consider the bills before the end of the legislative session.<sup>104</sup> In the 2005–06 session, the House voted on only one such measure, addressing the pledge of allegiance.<sup>105</sup>

When lawmakers did advocate jurisdiction-stripping proposals on social issues, they often made fiery speeches about “activist” judges and the need for Congress to assert its supremacy on such issues.<sup>106</sup> In stark contrast, legislative consideration of a jurisdiction-limiting proposal on enemy combatants was extremely deferential to the courts and the supremacy of Supreme Court interpretations of federal statutes and the Constitution. This mismatch between rhetoric and reality suggests that Congress has little desire to pressure the Court into adhering to Congress’s preferred vision of constitutional truth. Rhetorical attacks on the Court are addressed to social conservatives, not the Court. When Congress does address the Court, such as through legislation restricting the court’s jurisdiction, Congress leaves it to the Court to sort out whether to give effect to the legislation.

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103. Devins, *supra* note 2, at 1355–57.

104. See Neal Devins, *Smoke, Not Fire*, 65 MD. L. REV. 197, 202–04 (2006).

105. See 152 CONG. REC. H5396 (daily ed. July 19, 2006) (reporting the votes cast on the Pledge Protection Act of 2005). The Pledge Protection Act of 2005 was referred to the Senate Judiciary Committee in August of 2006. 152 CONG. REC. S8795 (daily ed. Aug. 3, 2006). The Senate did not take action before the end of the legislative session on October 2, 2006. Senators introduced several other bills that sought to strip the federal courts of jurisdiction in the 2005–06 Congress, including legislation on same-sex marriage, the sanctity of life, and the Ten Commandments. See Devins, *supra* note 2, at 1356–57. Aside from a judicial review provision in a massive bill dealing with the legal rights of undocumented immigrants, however, none of these jurisdiction-altering bills was discussed in congressional hearings or on the floor of either the Senate or the House. See Memorandum from Svetlana Khvalina to Neal Devins, *Court-Stripping Bills in the 109th Congress* (Sept. 17, 2006) (on file with the author).

106. See Devins, *supra* note 104, at 201–02; Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT, July 3, 2005, at 24, 26.

## II. A POSITIVE POLITICAL THEORY READING OF *HAMDAN V. RUMSFELD*

In agreeing to review *Hamdan*—after the D.C. Circuit had backed the Bush administration—the Supreme Court signaled its willingness to check the President’s prosecution of the war on terror.<sup>107</sup> When deciding *Hamdan* in light of the DTA language restricting court jurisdiction, the Court had to sort out whether it wanted to do battle with Congress and the executive. The Court, for example, could have passed judgment on the constitutionality of DTA restrictions on court jurisdiction. Instead, the Court depicted the DTA as a delegation of power from Congress to the Supreme Court—so that the Court acted at Congress’s behest when determining the legality of military commissions and the relevance of the Geneva Conventions to enemy combatant trials.

The remainder of this Essay explains why the Justices decided both to frame the DTA as they did and to repudiate the Bush administration’s claims about military commissions. This explanation focuses on institutional incentives; specifically, the Court’s desire to protect its turf and maximize its influence over the other branches. I will not assess relevant Supreme Court precedent to determine whether the Court’s interpretation of the DTA, the Uniform Code of Military Justice, and other statutes was sound.<sup>108</sup> Likewise, I will not assess whether the Bush administration’s legal interpretations regarding military commissions served the national interest.<sup>109</sup> Rather, this Part provides a positive political account of the *Hamdan* opinion, assuming that Supreme Court Justices have “institutional preferences that may enhance or weaken the strength of [their]

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107. The Court’s grant of certiorari in *Rasul* likewise spoke to the Court’s willingness to defend its turf by checking the President’s power. See Linda Greenhouse, *It’s a Question of Federal Turf*, N.Y. TIMES, Nov. 12, 2003, at A1.

108. The fact that the Court divided five to three on these issues suggests that there were two plausible interpretations of the relevant statutes and related constitutional provisions. Indeed, the Court would have likely divided five to four if Chief Justice Roberts had not recused himself from the case. After all, Roberts ruled for the administration on these issues when sitting on the D.C. Circuit. See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

109. Compare JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR *passim* (2006) (defending the Bush administration’s stance on military commissions), with Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L. J. 1199, 1234–44 (2006) (attacking executive supremacy in war making and the scholarly writings of John Yoo).

ideological preferences”<sup>110</sup> and that “[t]he pivotal Justices have repeatedly submerged their immediate substantive preferences to serve long-term procedural values.”<sup>111</sup>

Throughout its prosecution of the war on terror, the Bush administration has sought to limit, if not nullify, judicial checks on the executive. For Justices interested in preserving their own authority, these arguments were too much. “It seems rather contrary to an idea of a Constitution with three branches,” as Justice Breyer put it, “that the executive would be free to do whatever they want. . . without a check.”<sup>112</sup> Similarly, with respect to the administration’s ability to win in court, the swing Justices on the Rehnquist and Roberts Courts—Sandra Day O’Connor and Anthony Kennedy, respectively—worried openly about the executive’s “blank check” view of presidential war-making power.<sup>113</sup>

Let me make this point more concretely, starting with Bush administration claims about executive branch supremacy in war making. The administration was not interested in narrow, technical victories. It sought to fence the courts out and it was very assertive in its rhetoric. In *Rasul*, the government did not simply argue that the Court was without jurisdiction to rule on the legal rights of detainees captured abroad and held in Guantánamo Bay (a military base that the United States leased from Cuba).<sup>114</sup> It claimed that “[t]he Constitution commits to the political branches and, in particular, the president, the responsibility for conducting the Nation’s foreign affairs and military operations.”<sup>115</sup> The government, moreover, warned the Court that “exercising jurisdiction” over Guantánamo detainees would “strike a serious blow” to the war effort by placing the judiciary in the “unprecedented position of micro-

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110. Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 783 (1996).

111. Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: A Theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1491 (1995).

112. Transcript of Oral Argument at 42, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

113. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799–805 (2006) (Kennedy, J., concurring in part); *Hamdi v. Rumsfeld*, 542 U.S. 509, 535–36 (2004) (O’Connor, J., plurality opinion).

114. The brief did make narrow claims about past precedent governing the rights of enemy combatants captured and held abroad. See Brief for the Respondents at 13, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343).

115. *Id.* at 12.

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managing the Executive's handling of captured enemy combatants."<sup>116</sup>

The government's arguments in *Hamdan* were cut from the same cloth. It asked the Court to moot the case, arguing that the DTA applied retroactively and thereby stripped the Court of jurisdiction.<sup>117</sup> On the merits, the government argued that the President had inherent authority to establish military tribunals and that the decision of whether the Geneva Conventions apply to enemy combatants is "solely for the executive."<sup>118</sup> At a minimum, "[e]ven if some judicial review of the President's determination were appropriate . . . the standard of review would surely be extraordinarily deferential to the President."<sup>119</sup>

Needless to say, the government's absolutism would be an anathema to a Court interested in protecting its turf. For a Court interested in asserting its supremacy on constitutional questions, the government's claim would be—if you will—a call to arms. The Rehnquist Court was certainly such a Court, and there is good reason to think that the Roberts Court (at least for now) will follow suit.<sup>120</sup> Before turning to the Roberts Court's repudiation of executive branch unilateralism in *Ham-*

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116. *Id.* at 12–13. The government also cautioned against judicial micro-management in a pair of 2004 cases challenging the government's power to detain American citizens designated as enemy combatants. *See Hamdi*, 542 U.S. at 514; *Rumsfeld v. Padilla*, 542 U.S. 426, 428 (2004). Most striking, as already noted, is that the government rebuffed questions about military officers torturing enemy combatants by stating there were real world and legal limits on "the method[s] of interrogation that may be employed" and citing treaty obligations and the inherent unreliability of information gained through overly aggressive interrogation techniques. Transcript of Oral Argument at 48–50, *Hamdi*, 542 U.S. 507 (No. 03-6696); *see also* Stevenson, *supra* note 24 (noting that the government's claims were misleading and that those claims contradicted the Justice Department's torture memo and the Abu Ghraib prison scandal).

117. *See supra* notes 42–43 and accompanying text.

118. Brief for Respondents at 38, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

119. *Id.* The government did not simply rely on these broad claims of power. It also argued that Congress had authorized military commissions and that the language of the Geneva Conventions and relevant judicial precedent suggest that the Conventions do not apply to al Qaeda. *Id.* at 15–20, 38.

120. *See supra* notes 16–18 and accompanying text (discussing the Rehnquist Court's juricentric view of its role). In saying that the Rehnquist Court embraced judicial supremacy, I am not arguing that the Court either operated outside of the political mainstream or was insensitive to social and political forces. *See* Devins, *supra* note 102 (explaining how Rehnquist Court decisions—even decisions invalidating federal statutes—reflect majoritarian social and political forces).

*dan*, a few words about the Rehnquist Court will illustrate this point.

The Rehnquist Court left a legacy of judicial supremacy through words and deeds. It invalidated more federal statutes than any Court before it<sup>121</sup> and, in so doing, reinvigorated federalism-based limits on Congress.<sup>122</sup> Depicting *Bush v. Gore* as an “unsought responsibility,” the Court did not blink when resolving the 2000 presidential election.<sup>123</sup> In reaffirming abortion rights, it condemned state and federal efforts to pressure the Court to revisit *Roe v. Wade*,<sup>124</sup> saying that it was the Court’s job to bring “the contending sides of a national controversy [together] to end their national division by accepting a common mandate rooted in the Constitution.”<sup>125</sup> Likewise, when rejecting federal efforts to override Supreme Court standards governing religious liberty, the Court made clear that it “will treat its precedents with the respect due them,” and that Congress and the President should also “respect . . . the proper actions and determinations of the [Court].”<sup>126</sup> The list goes on—there is near universal agreement about the modern Court’s embrace of the rhetoric of judicial supremacy.<sup>127</sup>

That the Court had strong incentives to slap down the executive in *Hamdan* cannot be denied. Beyond executive branch unilateralism and the modern Court’s view that the resolution of all constitutional matters lies within its jurisdiction, the specific facts of *Hamdan* also contributed to the Court’s decision. In particular, the Court is more likely to see the elaboration of

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121. See *supra* notes 16–18.

122. See *supra* note 16 and accompanying text.

123. 531 U.S. 98, 111 (2000). For arguments that judicial hubris underlies the Court’s very participation in *Bush v. Gore*, see David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 *passim* (2001); John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775 *passim* (2001); Gerald Gunther, Op-Ed., *A Risky Moment for the Court*, N.Y. TIMES, Dec. 1, 2000, at A37.

124. 410 U.S. 113 (1973).

125. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992). This contention was largely rhetorical. The Court retreated in *Casey* by jettisoning *Roe*’s trimester framework. See *id.* at 858.

126. *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997); see also Linda Greenhouse, *Steady Rationale at Court Despite Apparent Bend*, N.Y. TIMES, May 29, 2003, at A22 (noting that the Rehnquist Court embraced judicial supremacy even when upholding congressional efforts to expand rights).

127. See, e.g., Greenhouse, *supra* note 107; Post & Siegal, *supra* note 16, at 2037; Wilkinson, *supra* note 16, at 1969; Yoo, *supra* note 123, at 787–88.

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individual rights as being at the Court's "core power."<sup>128</sup> This factor is especially important for habeas corpus claims, for—as the Court proclaimed in 2001—"the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."<sup>129</sup> Indeed, at oral arguments in *Hamdan*, Justice Kennedy emphasized the importance of habeas corpus relief,<sup>130</sup> suggesting that limitations on habeas relief would "threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive."<sup>131</sup>

Against this backdrop, the Court's repudiation of military tribunals in *Hamdan* was anything but surprising. At the same time, *Hamdan* was not simply an individual rights case; it also presented a basic challenge to a key component of the President's war on terror.<sup>132</sup> The Court is unlikely to stand alone in such a case, even if the case does raise fundamental individual rights issues. The President sees the "rights of governance in foreign affairs and war powers areas" as core executive powers and has strong incentives to expand his war-making prerogatives.<sup>133</sup> Moreover, the stakes are extremely high and the Court's capacity to second guess military judgments is questionable.<sup>134</sup> Without the backing of Congress, courts typically turn down challenges to presidential war making.<sup>135</sup> Even with

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128. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306–08 (1993).

129. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

130. Transcript of Oral Argument at 42–44, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

131. Alison Holland, Note, *Across the Border and over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 AM. J. CRIM. L. 385, 398 (2000). Justice Kennedy's comments at oral arguments emphasized the need for enemy combatants to be "tried by a lawful tribunal" and suggested that the denial of habeas relief raised a "structural," not "procedural," question. Transcript of Oral Argument at 43, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). Accordingly, there is reason to think that Justice Kennedy will be skeptical of Congress's prohibition of habeas claims in the MCA.

132. See *supra* notes 7–10, 28–31.

133. McGinnis, *supra* note 128, at 306; see also William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 *passim* (1997) (outlining the debate surrounding the President's power under the War Powers Clause).

134. McGinnis, *supra* note 128, at 306.

135. As then appellate judge Ruth Bader Ginsburg put it: "Congress has formidable weapons at its disposal . . . . If the Congress chooses not to con-



the backing of Congress, the Court would not want to assert its supremacy through a holding on the constitutionality of presidential war powers, which would be difficult to reverse.<sup>136</sup>

The challenge for the *Hamdan* Court, therefore, was to somehow depict the conflict as one between Congress and the President. The Court did not want to rule that the DTA, in fact, applied retroactively and that Congress could not strip the courts of jurisdiction to rule on the legality of presidentially created military commissions and the applicability of the Geneva Conventions to enemy combatant trials. Likewise, the Court did not want to rule on the constitutional status of enemy combatants, including the authority of Congress to restrict habeas rights.

*Hamdan* did not speak to these questions. Instead, the Court found a way to partner with Congress while, at the same time, repudiating broad claims of executive power. First, the Court ruled that the DTA did not apply retroactively, and there was no need to decide “grave questions about Congress’ [constitutional] authority to impinge upon [the] Court’s appellate jurisdiction, particularly in habeas cases.”<sup>137</sup> Additionally, the Court depicted the DTA as a statute that delegated to the Supreme Court the task of sorting out “the very legitimacy of tribunals,” while (assuming the Court approved military commissions) channeling “more routine challenges to final decisions rendered by those tribunals . . . to a particular court and through a particular lens of review.”<sup>138</sup> Second, the Court highlighted Congress’s powers to “declare War . . . and make Rules concerning Captures on Land and Water.”<sup>139</sup> As such it determined that the decision to constitute military tribunals resides

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front the President, it is not our task to do so.” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring)); see also DEVINS & FISHER, *supra* note 98, at 77–83 (discussing the incentives for all three branches to seek war powers).

136. See generally William N. Eskridge, Jr. & Phillip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26, 81 (1994) (analyzing the relationship between Congress and the Court). Unlike a statutory ruling, to which lawmakers can respond by enacting a new law, a constitutional ruling severely constrains lawmakers in their available responses. Such responses might only include extremely adversarial and costly techniques like jurisdiction stripping, constitutional amendments, and changing the composition of the Court through the appointments process. See *id.* at 42–43.

137. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006).

138. *Id.* at 2769.

139. U.S. CONST. art. I, § 8, cl. 11.

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with Congress.<sup>140</sup> By contrast, the President has the “power to execute,” and thereby his inherent authority is limited to the “conduct of campaigns.”<sup>141</sup> Third, the Court further constrained the President’s power by narrowly interpreting the Uniform Code of Military Justice (UCMJ) and two post-9/11 statutes, the Authorization for the Use of Military Force<sup>142</sup> and the DTA. For the Court, none of these statutes gave the President the power to convene military commissions or to act outside of his obligations to adhere to the law of war, including the Geneva Conventions.<sup>143</sup> It did not matter that Congress implicitly backed and explicitly recognized the existence of military commissions when enacting the DTA.<sup>144</sup> Instead, the Court resolved ambiguities in relevant statutes and Court precedents against the executive.<sup>145</sup>

In ruling against the executive and trumpeting Congress’s role, the Court depicted itself as a policeman—possessing jurisdiction to make sure that the executive was acting under congressional authorization but lacking the power to set military policy. *Hamdan* contains no mention of the Court’s past narrow readings of its own precedents and appears to minimize recent congressional efforts to empower the executive.<sup>146</sup> Instead, for reasons mentioned above, the Court wanted to shield its decision by framing *Hamdan* as a fight between a power hungry executive—willing to make policy inconsistent with lawmaker preferences while, at the same time seeking to prevent the federal courts from reviewing this unauthorized power grab—and a vulnerable Congress—the branch authorized to make policy on military commissions, the Geneva Conventions, and the like. To further insulate itself, the Court grounded its decision in

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140. Similarly, the Court cast doubt on the President’s power to unilaterally convene military tribunals except in cases of “controlling necessity.” *Hamdan*, 126 S. Ct. at 2774. In this way, the Court sought to limit, without actually revisiting, its “controversial” approval of military commissions in World War II in *Ex parte Quirin*. See 317 U.S. 1, 1 (1942).

141. See *Hamdan*, 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. 2, 139 (1866)).

142. *Id.* at 2772–75.

143. *Id.*

144. *Id.*

145. This is the chief complaint of Julian Ku and John Yoo in their critique of *Hamdan*. See *supra* note 5; see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) (positing that deference to executive agencies’ interpretations of ambiguous statutes is inappropriate in certain contexts).

146. See *supra* notes 139–45.

congressional statutes and not the Constitution.<sup>147</sup> In this way, the Court simultaneously rebuffed the executive and returned the enemy combatant issue to elected government. To drive this point home, four of the five Justices in the *Hamdan* majority remarked (in a two-paragraph concurring opinion) that “[t]he Constitution places its faith in democratic means [rather than the unilateral assertions of any one branch]” and that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.”<sup>148</sup>

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For reasons articulated in Part I, the Court could have gone much further in *Hamdan* without risking a political backlash from Congress. It could have ruled that the DTA unconstitutionally sought to limit the law’s jurisdiction or that the Constitution guarantees that enemy combatants have access to file habeas petitions in federal court. Congress almost certainly would have acquiesced to such a ruling. My review of the MCA’s prohibition of habeas corpus filings has revealed that surprising conclusion. There was, however, no need for the Court to assert itself so forcefully.<sup>149</sup> *Hamdan* still eviscerated the Bush administration’s military commission policy and guaranteed Geneva Conventions protections to enemy combatants.<sup>150</sup> And while Congress responded to the decision by enacting legislation authorizing military commissions and granting the executive discretion in interpreting the Geneva Conventions, Congress’s actions were hardly predetermined.<sup>151</sup> The

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147. For additional discussion, see *infra* note 151 and accompanying text.

148. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (Justices Kennedy, Souter, and Ginsburg joined this opinion.). In returning this issue to Congress, the Court rejected the government’s claim that the President had inherent authority to create military tribunals.

149. On the other hand, it is possible that a majority of the Justices thought that Congress could strip the Court of jurisdiction or that the Constitution does not guarantee habeas rights to enemy combatants. In other words, it is possible that the *Hamdan* Court went as far as it could in cabining the executive’s military commission policy.

150. See *supra* notes 45–47.

151. Early objections to some MCA provisions by Republican Senators Warner, McCain, and Graham, for example, could have prompted legislation that placed far more limits on the executive than did the final version of the MCA. See R. Jeffrey Smith & Charles Babington, *Detainee Bill in Final Stages*, WASH. POST, Sept. 27, 2006, at A4; Kate Zernike, *Crucial Senator Says a Few Problems Remain in Bill on Terror Tribunals*, N.Y. TIMES, Sept. 9, 2006, at A10.

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Court remains positioned to strike down the MCA by issuing a constitutional ruling on habeas corpus rights.

From the vantage of positive political theory, the Court acted quite sensibly in using *Hamdan* as a vehicle to protect its turf. All constitutional options remain open to the Court. By returning the issue to elected government, the Court's decision was hard to condemn as judicial overreaching. Correspondingly, by inviting a democratic response to its decision, the opinion gave the White House incentives to accept the Court's decision and pursue explicit legislative authorization for its policies. By ruling against the executive without explicitly expanding the Judiciary's power (by limiting Congress's power to restrict court jurisdiction over pending cases or habeas filings), the Court protected itself against executive encroachments without exposing itself to political risk.

Finally, this Essay addresses two related comments—one about public disapproval of the Bush administration and the other about parallels between *Hamdan* and *Youngstown*, especially the Court's power to check an unpopular President. In the winter and spring of 2006—when the Court was crafting its opinion in *Hamdan*—the administration's handling of Hurricane Katrina and the War in Iraq, among other things, contributed to voter disapproval of President Bush.<sup>152</sup> With a forty percent overall job approval rating,<sup>153</sup> the President did not enjoy the backing of the American people. Academics and media elites likewise did not back the President and they vociferously attacked contemporary presidential unilateralism.<sup>154</sup> In *Ham-*

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152. See Michael A. Fletcher, *President May Be Running Out of Time to Rebound*, WASH. POST, Apr. 9, 2006, at A6.

153. See President Bush—Overall Job Rating in Recent National Polls, <http://www.pollingreport.com/BushJob.htm> (last visited Apr. 9, 2007).

154. Academics voiced their opinions in writings and amicus briefs. For criticism of executive unilateralism in legal publications, see Erwin Chemerinsky, *In Guantánamo Case, Justices Rein in Executive Power*, TRIAL, Sept. 2006, at 60, 60 (2006); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 702 (2006); Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2082 (2006). For academics opposing the President in *Hamdan*, see Amicus Brief of Law Professor Louis Henkin et al., *Hamdan*, 126 S. Ct. 2749 (No. 05-148); Amicus Curiae Brief of Louis Fisher in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief of Law Professors Supporting Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184); Brief of Military Law Historians, Scholars, and Practitioners, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief for Richard A. Epstein, et al., as Amici Curiae in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). In a sampling of seven leading newspapers in-

*dan*, academics as well as professional organizations, including bar groups and former federal judges, filed briefs defending the Court's power to check presidential war making.<sup>155</sup>

Against the backdrop of widespread disapproval of the President and his policies, the Court had even greater reason to rule against the administration. Specifically, the Court often takes social and political forces into account, especially the views of elites and lawyer groups.<sup>156</sup> This is precisely what happened in *Youngstown*: an unpopular president waging an unpopular war prompted media outrage by advancing arguments of executive branch supremacy to justify an unpopular act.<sup>157</sup> In

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cluding the New York Times, Los Angeles Times, Miami Herald, Wall Street Journal, Philadelphia Inquirer, Chicago Tribune and Boston Globe, the Wall Street Journal was the only one to back the President's position in *Hamdan*. See, e.g., Editorial, *After Hamdan*, WALL ST. J., July 3, 2006, at A10.

155. For a sampling of academic briefs, see *supra* note 154. Briefs filed by professional organizations (opposing the Bush administration) included: Brief of Amici Curiae Certain Former Federal Judges in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief of the Association of the Bar of the City of New York and the Human Rights Institute of the International Bar Association as Amici Curiae in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief for the National Institute of Military Justice and the Bar Association of the District of Columbia as Amici Curiae in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of the Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). In addition to lawyer interests, briefs supporting Hamdan were filed by former senior U.S. diplomats, retired generals and admirals, and current and former members of the U.K. and European Union parliaments. See, e.g., Brief of Amici Curiae Madeline K. Albright and 21 Former Senior U.S. Diplomats in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Amicus Curiae Brief of 422 Current and Former Members of the United Kingdom and European Union Parliaments in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). A group of former attorneys general (all Republican), however, did file a brief defending the President. Brief Amicus Curiae of Former Attorneys General of the United States, Retired and former Military Officers, and Former Assistant Attorney General in Support of Respondents, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

156. See LARENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR *passim* (2006) (arguing that Supreme Court Justices are influenced by different constituents, including the public, media elites, and professional organizations, especially bar organizations); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 351–52, 366–69 (2003) (noting the lopsided amicus filings in the University of Michigan affirmative action case and arguing that the Supreme Court takes into account the views of elites, elected officials, and other opinion leaders); see also Devins, *supra* note 98, at 1340–42 (noting how social and political forces shape Court decision making, especially the decisions of the Court's swing Justices).

157. See Devins & Fisher, *supra* note 12, at 77–78.

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describing *Youngstown*, Chief Justice Rehnquist (who had clerked for Justice Jackson the year the Court decided the case) acknowledged that the Court operates against the backdrop of social and political forces. For Rehnquist, “[*Youngstown*] is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and . . . this tide of public opinion had a considerable influence on the Court.”<sup>158</sup> Much the same can be said of *Hamdan*. The Court had a strong incentive to protect its turf, and the prevailing social and political forces contributed to the Court’s willingness to stand behind Congress when checking perceived presidential excess, as the Court did in *Youngstown*.<sup>159</sup>

## CONCLUSION: PREDICTIONS AND FINAL THOUGHTS

Let me be clear: Congress (or at least the Congresses that enacted the MCA and DTA) does not want the federal courts to second guess the military and almost certainly would have preferred for the Supreme Court to have come out the other way in both *Rasul* and *Hamdan*. But that desire does not mean that Congress is truly upset with the Court, willing to use court-stripping and other devices to compel the Court to preserve Congress’s preferred policies. Congress, for reasons detailed in this Essay, supports judicial independence and treats Court interpretations of the Constitution as final and authoritative. More generally, today’s Congress is not especially interested in interpreting the Constitution.

My analysis of the DTA and MCA supports this conclusion. Congress certainly sought to limit the judicial role, but it never threatened to challenge the *Hamdan* Court’s authority to assert its institutional prerogatives. For this very reason, the Court had incentive to hide behind Congress while attacking the executive. Unlike Congress, the executive did want to shift to itself power that would otherwise reside in the courts. Moreover, even though the DTA backed military commissions and called for a limited judicial role, the Court could nonetheless

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158. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 95 (1987).

159. The fact that today’s Congress, unlike the *Youngstown* Congress, tacitly backed the President did not matter. The Court needed to find a way to isolate the executive from other parts of the government. *See supra* notes 133–45.

claim that the executive branch was thumbing its nose at Congress without fear that Congress would call its bluff.<sup>160</sup>

The question then becomes: What's next? The MCA will soon make its way to the Supreme Court.<sup>161</sup> I expect the Court to agree to hear a legal challenge to the MCA, and I predict that the Justices will neuter the MCA's habeas provision on statutory grounds. The Court passing judgment on the MCA is to be expected; after addressing the legal status of enemy combatants in *Rasul* and *Hamdan*, the Court is too involved in this dialogue to step aside at this time (especially considering the Court's embrace of the rhetoric of judicial supremacy).<sup>162</sup>

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160. For these and other reasons, the DTA and MCA are not at all inconsistent with my earlier claims that the Court should not fear Congress. See Devins, *supra* note 2, at 1347. Just as recent legislative proposals to strip the courts of jurisdiction on social issues are largely rhetorical endeavors, the MCA and DTA are not threats to judicial independence. The courts can interpret these statutes as they see fit and may invalidate key provisions without fearing a congressional backlash. See *supra* notes 81–95.

161. On February 20, 2007, the D.C. Circuit Court of Appeals upheld MCA limitations on habeas relief by a 2:1 vote. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), and *application denied*, No. 06A1001, 2007 WL 1225368 (U.S. Apr. 26, 2007); see Stephen Labaton, *Court Endorses Curbs on Appeal by U.S. Detainees*, N.Y. TIMES, Feb. 21, 2007, at A1. In upholding the MCA, the two-judge majority concluded that Congress could suspend the writ of habeas corpus for “aliens held outside the territory of the sovereign.” *Boumediene*, 476 F.3d at 990 (quoting *Rasul v. Bush*, 542 U.S. 466, 502–05 & n.5 (2004) (Scalia, J., dissenting)). In so ruling, the majority did not consider whether MCA procedures provided an adequate alternative to federal court consideration of habeas filings. The dissenting judge did reach this issue, concluding both that Congress could not suspend the writ without providing adequate alternatives and that the MCA did not provide an adequate alternative. See *id.* at 1007 (Rogers, J., dissenting). Following this ruling, lawyers for Guantánamo Bay detainees announced their plans to ask the Supreme Court to hear an immediate appeal to the ruling. See Posting of Lyle Denniston to SCOTUSblog, *Detainees to Seek Fast-Track Appeal*, [http://www.scotusblog.com/movabletype/archives/2007/02/detainees\\_to\\_se.html](http://www.scotusblog.com/movabletype/archives/2007/02/detainees_to_se.html) (Feb. 20, 2007, 08:00 PM).

On April 2, 2007, the Supreme Court declined to hear this petition for expedited review. *Boumediene*, 127 S. Ct. at 1478. Roughly three weeks later, on April 27, 2007, Chief Justice Roberts (ruling in his capacity as supervisory Justice of the D.C. Circuit) turned down an appeal for a rehearing of the April 2 certiorari denial. *Boumediene*, No. 06A1001, 2007 WL 1225368, at \*1. Later that very same day, lawyers representing Guantánamo detainees filed petitions for rehearing before the entire Court. See Posting of Lyle Denniston to SCOTUSblog, *Detainees Seek Rehearing*, [http://www.scotusblog.com/movabletype/archives/2007/04/detainees\\_seek\\_2.html](http://www.scotusblog.com/movabletype/archives/2007/04/detainees_seek_2.html) (Apr. 29, 2007, 04:51PM). For additional discussion, see *infra* note 162.

162. See *supra* notes 16–18, 120–27 and accompanying text (discussing the Court's practice of asserting its authority to pass judgment on constitutional questions).

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I also think that the Court is too committed to protecting its institutional turf, especially habeas corpus jurisdiction, to validate the MCA. Indeed, the very factors that animated the Court's ruling in *Hamdan* point to the Court's statutory nullification of the MCA's habeas corpus prohibition.<sup>163</sup> The Court continues to have an incentive to limit executive branch control over enemy combatants and, more generally, the war on terror. Moreover, Congress would certainly support such a ruling. That, for reasons detailed in Part I, was true of the Congress that enacted the MCA.<sup>164</sup> It is even more true today; after the

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What then of the Court's April 2, 2007 refusal to hear an expedited appeal of a Guantánamo detainee challenge to the Military Commission Act? *See infra* note 161 (detailing recent Supreme Court action in Guantánamo detainee appeals). No doubt, the Court is not looking to quickly and decisively intervene in this dispute. Justices Kennedy and Stevens (in an opinion concurring in the denial of certiorari) concluded that the Court should follow its usual practice for ordinary prison inmates and require "the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Boumediene*, 127 S. Ct. at 1478 (citing *Ex parte Hawk*, 321 U.S. 114 (1944) (per curiam)). The more difficult question, of course, is whether the Court's refusal to hear these appeals signals that Justice Kennedy (the fifth vote in *Hamdan*) is not prepared to overturn the D.C. Circuit decision upholding Military Commission Act restrictions on habeas relief. *See* Linda Greenhouse, *Supreme Court Turns Down Detainees' Habeas Corpus Case*, N.Y. TIMES, Apr. 3, 2007, at A18 (speculating that Justice Kennedy is not yet ready to overturn the Military Commission Act). My guess is that Justice Kennedy is prepared to issue such a ruling but sees no reason to do so at this time. Congress might moot the case by invalidating the habeas provisions of the Military Commission Act. *See infra* note 168. More than that, the Court might not want to open itself to charges of judicial activism and supremacy by expediting review of the D.C. Circuit decision. In *Hamdan*, the Court took pains to protect itself from such charges—returning the issue to Congress by ruling that the military commissions were not statutorily authorized. 126 S. Ct. 2749, 2754 (2006). Before overturning (or severely limiting Congress's handiwork), the Court has good reason to adhere to its normal procedures in habeas cases. Indeed, for reasons detailed *infra*, the Court—even if it were to hear the case—might bifurcate its ruling in such a way as to delay ultimate consideration of the legality of military commission procedures. *See infra* note 168. To summarize: While it is hard to know precisely why the Supreme Court refused to expedite review of the D.C. Circuit decision, the Court's refusal to quickly and decisively determine the legality of MCA restrictions on habeas relief hardly means that the Court will not decide this issue at a later date.

163. *See infra* notes 169–70.

164. Today's Congress, of course, would be even more supportive of a Court decision invalidating the MCA than the Congress that enacted the statute. By shifting control of both the House and the Senate, the November 2006 elections suggest that Congress and the American people would be even more accepting of judicial rulings limiting executive branch power. *See* Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003) (suggesting that the Court—before striking down a federal statute—pays close



2006 Democratic takeover of Congress, a majority of lawmakers would welcome judicial invalidation of the MCA's habeas provision.<sup>165</sup> Correspondingly, since the ruling in *Hamdan* the President's popularity has dipped even further<sup>166</sup>—so that the Court has additional slack to check the White House without fearing political reprisals. As further support for the Court's backing of habeas filings, elites and lawyers' groups oppose the MCA.<sup>167</sup>

A statutory, not constitutional, ruling seems likely because the Court can rule that enemy combatants possess constitutional habeas rights without invalidating the MCA. Rather than engage in open battle with Congress, the Court can conclude, as it did in *Hamdan*, that Congress delegated to it the power to determine the reach of statutory habeas corpus.<sup>168</sup>

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attention to the Congress in power, not the Congress that enacted a law).

165. See *supra* notes 87, 93–95 (noting Democratic opposition to the MCA's habeas provision); see also Toobin, *supra* note 87, at 54 (noting that a Democratic Congress would not try to countermand a Supreme Court decision invalidating the MCA's habeas provision and, as such, “the Court now has plenty of running room to do the right thing.” (quoting Professor Akhil Reed Amar) (internal quotation marks omitted)).

166. See Peter Baker & Jon Cohen, *Doubt Shrouds Bush's Speech; President's Approval Rating Is at Its Lowest Since He Took Office*, HOUS. CHRON., Jan. 23, 2007, at A3.

167. For example, a brief filed with the D.C. Circuit by seven former federal court judges, appointed by both Democratic and Republican administrations, argues that the MCA cannot be squared with constitutional habeas corpus, because the “military tribunals may accept evidence obtained by torture.” Neil A. Lewis, *Appeals Court Weighs Prisoners' Rights to Fight Detention*, N.Y. TIMES, Nov. 7, 2006, at A15 (discussing ongoing litigation in the D.C. Circuit challenging the legality of MCA restrictions on habeas filings). For a sampling of similar arguments in the *Hamdan* litigation, see *supra* note 155.

168. Alternatively, the Court could avoid (at least temporarily) a ruling on the constitutionality of MCA limits on habeas relief by overturning on narrow grounds the D.C. Circuit decision upholding the MCA. As discussed above, the D.C. Circuit concluded that Congress could suspend habeas relief for aliens held outside the United States. *Supra* note 161. In so ruling the D.C. Circuit did not consider whether MCA provisions could serve as an adequate alternative to federal court consideration of habeas filings. See *id.* Consequently, the Supreme Court could overrule the D.C. Circuit on the applicability of habeas rights to federal habeas filings. Such a ruling would send the MCA case back to the D.C. Circuit. Such a ruling would also provide Congress with an opportunity to moot the habeas question by passing legislation overturning the MCA's limits on habeas filings. Legislation was introduced before the D.C. Circuit Court's February 20, 2007 ruling, and the D.C. Circuit may well prod Congress to enact this legislation (subject, of course, to a presidential veto). See Labaton, *supra* note 161; Josh White, *Bill Would Restore Detainees' Rights, Define 'Combatant'*, WASH. POST, Feb. 14, 2007, at A8. This legislation could be enacted before any Supreme Court consideration of the D.C. Circuit deci-

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Specifically, the Court can hold that the MCA applies only to statutory habeas filings and that enemy combatant habeas filings, in fact, are protected by the Constitution.<sup>169</sup> Congress, for reasons discussed in Part I, would certainly acquiesce to such a ruling.<sup>170</sup>

Whether my prediction proves correct, my bottom line remains the same: the Supreme Court need not fear Congress. Lawmakers have little interest in asserting their power to independently interpret the Constitution. Attacks on the Court, as I argued in these pages last year, are largely rhetorical—not heartfelt. And when lawmakers have acted to limit court jurisdiction, they have done so in ways that support judicial independence—including the power of courts to nullify jurisdiction-limiting statutes. That, as this Essay has shown, is the lesson of the MCA and DTA.

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sion—especially because the Court has refused to hear the case on a fast track basis. See *Boumediene v. Bush*, 127 S. Ct. 1478, 1478, *denying cert. to* 476 F.3d 981 (D.C. Cir. 2007), and *application denied*, No. 06A1001, 2007 WL 1225368 (U.S. Apr. 26, 2007). Moreover, if congressional efforts to pass this legislation would be frustrated by a presidential veto, a Court decision invalidating the MCA would have the formal backing of Congress.

169. In rendering such a decision, the Court would not need to invoke the canon of constitutional avoidance. Instead, the Court could rule that the MCA is clearly limited to statutory habeas filings, so that the statute does not call upon the Court to sort out Congress's power to restrict constitutional habeas corpus. This is precisely what happened in *Hamdan*. In concluding that Congress did not intend to restrict Supreme Court jurisdiction over the Hamdan dispute, the Court did not invoke the constitutional avoidance canon. Instead, the Court concluded that the DTA statute applied prospectively, and, consequently, there was no need to decide "the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006).

170. The November 2006 elections provide further support for this conclusion, as today's Congress is more likely to back judicial invalidation of the habeas provision than the 2006 Congress.