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# WHEN CONGRESS PASSES AN INTENTIONALLY UNCONSTITUTIONAL LAW: THE MILITARY COMMISSIONS ACT OF 2006

*Paul A. Diller\**

*When Congress passes a law with the intent that it be invalidated or substantially altered by the courts—“intentionally unconstitutional” legislation—Congress abdicates its role as a co-equal interpreter of the Constitution. Intentionally unconstitutional legislation is particularly problematic in the national-security context, in which the Supreme Court has traditionally relied upon Congress to assist it in defining the limits of executive power. This Article argues that Section 7 of the Military Commissions Act of 2006, which attempted to strip the federal courts of jurisdiction to hear habeas petitions by alien enemy combatants held at Guantánamo and other foreign sites, was intentionally unconstitutional legislation because some key legislators supported or facilitated the Act’s passage while simultaneously arguing that Section 7 violated the Constitution. The Supreme Court’s invalidation of the MCA’s Section 7 in Boumediene v. Bush was, therefore, largely consistent with Congress’ intent and not the “activist” decision its critics have decried. On the other hand, by allowing members of Congress to expressly violate their oaths to support and defend the Constitution, the Court’s decision in Boumediene only reduces the incentive for members of Congress to take political risks to defend constitutional principles in the future. The story of the MCA’s passage and the Court’s decision in Boumediene further demonstrate that Congress does not now just tolerate—but depends upon—the Supreme Court to assert itself as the exclusive interpreter of constitutional principles, at least in the national-security context.*

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## INTRODUCTION

LIKE justices of the Supreme Court and the President, members of Congress swear an oath to uphold the Constitution.<sup>1</sup> Particularly in times of war, the constitutional design has traditionally depended upon members fulfilling their oaths when enacting legislation that affects the separation of powers. Under the approach famously articulated by Justice Robert Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (the *Steel Seizure* case),<sup>2</sup> the Supreme Court relies on Congress to provide it with a credible signal regarding how much executive power the political process endorses. The Court, using its own interpretive techniques, then makes an independent decision regarding executive power that relies on Congress' informed judgment.<sup>3</sup> Throughout, the *Steel-Seizure* model assumes that Congress intends for its legislation to survive judicial review relatively unscathed.

Congress' passage of the Military Commissions Act of 2006—particularly, its habeas-stripping Section 7—and the Supreme Court's recent invalidation of Section 7 in *Boumediene v. Bush*<sup>4</sup> represent a significant departure from the *Steel-Seizure* model. In purporting to strip habeas through the MCA's Section 7, this Article argues, Congress enacted a law that it wanted to see judicially invalidated, or at least substantially altered, by the courts. In doing so, Congress passed to the Court the sole responsibility for restraining the executive and deprived the Court of Congress' politically informed estimate as to how much executive power the Constitution permits.

1. See 5 U.S.C. § 3331 (2000) (oath of office administered to elected or appointed officials other than the president).

2. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. See Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT 215, 229, 233 (2002).

4. 128 S. Ct. 2229 (2008).

The MCA, passed in September 2006 in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*,<sup>5</sup> sought to establish a congressionally sanctioned system for detaining and trying foreign terrorist suspects. As this Article will explain, some key congressmen voted for the MCA while simultaneously arguing that its habeas-stripping Section 7 was unconstitutional. Like Senator Arlen Specter, the Pennsylvania Republican and Judiciary Committee chair who voted for the MCA while at the same time denouncing its habeas-stripping provision as "patently unconstitutional,"<sup>6</sup> many members of Congress who voted for or otherwise facilitated passage of the MCA likely did so with the intent that, as Senator Specter said, the courts would "clean it up."<sup>7</sup>

In the end, Congress got what it wanted when a five-justice majority in *Boumediene* opted for a wholesale, rather than partial, "cleanup" of Section 7 of the MCA. The majority invalidated Section 7 outright rather than aggressively interpret it to render it constitutional, as Chief Justice Roberts urged in his dissent. Thus, *Boumediene* may have been an exercise in "judicial supremacy," as Justice Scalia charged in his dissent,<sup>8</sup> but it was not inconsistent with legislative intent. In the process of Congress getting its hoped-for judicial cleanup and the Court accepting this aggrandizing role, the actions of both institutions imperiled *Steel Seizure's* dynamic, three-branch model of constitutional interpretation.

Congress' passage of the MCA and *Boumediene's* subsequent "cleanup" did not occur in a jurisprudential vacuum. Rather, as this Article will explain, the Court has for the last twenty or so years increasingly arrogated to itself the role of sole constitutional interpreter, essentially rendering meaningless the presumption of constitutionality for federal laws, a doctrine that is supposed to demonstrate the Court's respect for Congress as a co-equal constitutional interpreter.<sup>9</sup> Moreover, through its use of the "canon of avoidance," another doctrine that is supposed to demonstrate judicial respect for Congress's interpretive role, the Court has actually increased congressional dependence on aggressive judicial review. Thus, when the Court in *Hamdan* uncharacteristically attempted to "force democracy" by seemingly inviting the legislative branch to join it in crafting a constitutional system for detaining and trying terrorist suspects, it encountered a legislative branch unable and unwilling to engage seriously in upholding constitutional values.<sup>10</sup> Rather, contrary to what most scholars generally assume,<sup>11</sup> Congress responded to *Hamdan* by en-

5. 548 U.S. 557 (2006).

6. See *infra* note 243 and accompanying text.

7. Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 479 (2007).

8. *Boumediene*, 128 S. Ct. at 2302.

9. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

10. Posting of Jack M. Balkin to <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006, 13:07 EST).

11. E.g., Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1607 (2001) ("[I]t is safe to assume that government policymakers prefer, whenever possi-

acting a law that it wanted to see invalidated or substantially changed by the courts. In passing the MCA, Congress demonstrated that it does not just tolerate, but depends upon, the Court to be the primary, if not exclusive, interpreter and guardian of the Constitution, at least in the national-security context.

This Article will proceed in four parts. Part I will explain how the constitutional design envisions a strong role for Congress to play in constitutional interpretation. It will discuss the manner in which the Supreme Court of the last twenty years, however, has generally denigrated this role. Specifically, it will explore the manner in which the very doctrines that purport to show a respect for congressional constitutional interpretation—the presumption of constitutionality and the canon of avoidance—have either been rendered meaningless or have subverted the values they purport to serve. Part II will explain why members of Congress might vote for, or otherwise facilitate the passage of, legislation they want to be invalidated as unconstitutional, and deals with the tricky question of congressional intent in such circumstances. Part III analyzes the passage of the MCA and explains why its habeas-stripping provision was intentionally unconstitutional. Part IV analyzes the Court's decision in *Boumediene*, and argues that, by invalidating Section 7 of the MCA, the Court largely followed legislative intent. At the same time, however, the Court's decision arrogates ever more power over constitutional interpretation to the judiciary, further weakening the incentive for Congress to police constitutional boundaries on its own.

## I. CONGRESSIONAL CONSTITUTIONAL INTERPRETATION AND (SUPPOSED) JUDICIAL DEFERENCE THERETO

Written in broad prose rather than wordy specificity, the Constitution lends itself to a multitude of interpretations. It is less a series of fixed commands than an "invitation to struggle" among the branches of government that it establishes.<sup>12</sup> Although there is a broad consensus among legal practitioners and academics that *Marbury v. Madison* established the judiciary as the final arbiter of the Constitution's meaning,<sup>13</sup> the legislative and executive branches of government have historically played large roles in constitutional interpretation. The Supreme Court has ex-

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ble, to steer wide of constitutional danger areas."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 82 ("Congress certainly has a desire, we can assume, not to have its statutes declared unconstitutional."); *but see* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 22 (1996) (arguing that it is "questionable" whether "Congress understands the Court's constitutional precedents and tries to legislate within the[ir] boundaries").

12. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787—1957* 171 (4th rev. ed. 1957).

13. 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (*Marbury* declared it "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.").

PLICITLY stated that constitutional issues in the category of “political questions” are for the executive and/or legislature to decide, not for the judiciary.<sup>14</sup> Even when deciding justiciable matters, the Court has often looked to the other branches for assistance in constitutional interpretation, resulting in a “deeply collaborative” process of constitutional interpretation.<sup>15</sup> While some scholars have challenged the Supreme Court’s claim to ultimate authority to decide most constitutional matters,<sup>16</sup> one need not go that far to recognize that the constitutional design necessarily gives Congress an important role to play in constitutional interpretation.

In one sense, Congress has always had *more* power over the Constitution’s meaning than the judiciary: it can begin the process of amending the Constitution’s text rather than merely interpreting the existing text.<sup>17</sup> Although the amendment process provides the clearest method for Congress to register its dissatisfaction with judicial interpretations of the Constitution, it has seldom been used in American history, in part because of its supermajority requirements and the need for ratification by three-quarters of the states.<sup>18</sup> Nonetheless, even failed constitutional amendments have influenced the direction of judicial constitutional interpretation by showing the Supreme Court that Americans feel strongly about a particular constitutional subject (albeit perhaps not strongly enough to pass an amendment), and thus pushing at least some of the more politically sensitive members of the Court to chart a new interpretive course.<sup>19</sup>

Besides the amendment process, Congress has a number of other tools at its disposal to influence constitutional interpretation by the judiciary. The Constitution provides that federal judges shall be appointed by the president with the “advice and consent” of the Senate.<sup>20</sup> Senators have used their “advice and consent” role to influence significantly the direction of constitutional jurisprudence. In addition to the obvious power of confirming or denying nominees, senators have played a behind-the-scenes role in the selection of federal judges by signaling to the president whether particular types of nominees are likely to be confirmed.<sup>21</sup> Moreover, confirmation hearings allow senators to voice their views on constitutional issues, views that the sitting members of the Supreme Court may take into account in future cases.<sup>22</sup> In addition to the Senate’s confirmation powers, Congress can significantly influence the judicial branch

14. *Nixon v. United States*, 506 U.S. 224, 228 (1993).

15. Coenen, *supra* note 11, at 1590.

16. *See generally*, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch*, 83 GEO. L.J. 217 (1994).

17. U.S. CONST. art. V.

18. *Id.*

19. E.g., Michael J. Klarman, *What’s So great About Constitutionalism?*, 93 Nw. U. L. REV. 145, 161-62 (1998); Jamie Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 85 (1999).

20. U.S. CONST. art. II, § 2, cl. 2.

21. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 222 (2002).

22. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1340 (2001).

through its authority to establish and fund a system of federal courts; legislate regarding jurisdiction; prescribe rules of decision, procedure, and evidence; and impeach judges.<sup>23</sup> Although out of respect for judicial independence Congress has generally abstained from using impeachment, funding cuts, and the more egregious forms of jurisdiction-stripping to influence constitutional law,<sup>24</sup> they remain powers that are formally available to a Congress dissatisfied with the Court's constitutional pronouncements.<sup>25</sup>

In addition to influencing the judiciary's interpretations of the Constitution, Congress interprets the document itself when it enacts laws.<sup>26</sup> As compared to the executive, who has the power to veto proposed laws and exercise discretion in enforcing those which have been passed, and the judiciary, which can invalidate and interpret laws, the Constitution rests the affirmative power to make law most clearly with Congress.<sup>27</sup> The Framers understood that Congress, through its positive, lawmaking power, would play at least a critical, if not determinative, role in defining the Constitution's meaning over time.<sup>28</sup> Congress has used this power throughout American history to flesh out the bare bones of the Constitution's text in a myriad of ways, each of which establishes a baseline to which judicial review must later react, if it reacts at all. As Professor Michael Stokes Paulsen has explained, "every legislative enactment by Congress is, in a sense, an act of constitutional interpretation—an implicit assertion by Congress that it has constitutional power to do what it is doing."<sup>29</sup> To that end, the Framers and other leaders in early American history expected that Congress, consistent with its members' oaths, would police constitutional boundaries on its own when enacting legislation.<sup>30</sup>

23. U.S. CONST. art. III, §§ 1, 2; *Nixon v. United States*, 506 U.S. 224, 236 (1993); see also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2728-29 (2003).

24. Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 1-5 (2006).

25. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1205 (2006); Paulsen, *supra* note 23, at 2728-29.

26. See Francis Sejerstad, *Democracy and the Rule of Law*, in CONSTITUTIONALISM AND DEMOCRACY 142 (Jon Elster & Rune Slagstad eds., 1988).

27. To be sure, these roles have evolved and blurred greatly since the founding. The judiciary sometimes "makes law," such as when it pronounces broad new rights from relatively scant constitutional text, David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996), as does the executive branch, particularly when it exercises delegated lawmaking authority in the modern administrative state. Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 232 (1996).

28. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 777 (1994). Indeed, legislative dominance in constitutional interpretation was a natural reference point for the Framers given their background in the British legal system, which vested in Parliament the supreme authority to interpret Britain's unwritten constitution. THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* 126-27 (2000).

29. Paulsen, *supra* note 23, at 2731.

30. For instance, James Madison, as a member of the inaugural House of Representatives, called on his colleagues to exercise their "incontrovertib[e]" "duty" to preserve the

Congress' affirmative lawmaking power gives it more than just the ability to flesh out the constitutional skeleton in the absence of judicial pronouncement. Congress may also use its lawmaking power to challenge judicial constitutional interpretations by enacting statutes consistent with Congress' constitutional views but arguably inconsistent with then-current Supreme Court doctrine. In passing such statutes, Congress may hope that the statutes will either evade judicial review or, when finally reviewed, be met by a more receptive Supreme Court, whether because the Court's composition might have changed or because members of the Court, perhaps sensitive to political pressures, might have had a change of constitutional heart. Such statutes are not "intentionally unconstitutional," as I use that term in this Article, because Congress wants the judiciary to uphold them, even if the chances of that occurring are slim. Prominent instances of Congress successfully passing laws to challenge Supreme Court precedent include some of the New Deal legislation that the Court eventually upheld,<sup>31</sup> and, more recently, Congress banning the so-called "partial-birth" abortion procedure in 2003 in direct defiance of a Supreme Court decision invalidating a nearly identical state law in 2000.<sup>32</sup> The congressional ban reflected popular opinion strongly in favor of restricting "partial-birth" abortion,<sup>33</sup> despite the Court's precedent from 2000. In 2007, after the composition of the Court changed from when it last considered the matter, the Court upheld Congress's ban, weakly distinguishing its decision in the virtually identical case from 2000.<sup>34</sup>

The idea that Congress has some legitimate role to play in constitutional interpretation is not without its critics. Some commentators have focused on the frequency with which Congress passes laws that contradict then-existing Supreme Court precedent and have used this fact to argue

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Constitution in its "entire," even on matters that did not directly affect Congress. See 1 ANNALS OF CONG. 482 (Joseph Gales ed., 1789). President Andrew Jackson, in explaining his disagreement with the Supreme Court's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which upheld the creation of a national bank, proclaimed that "[i]t is as much the duty of the House of Representatives, of the Senate . . . to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision." Andrew Jackson, *Veto Message* (1832), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson, III ed., 2d ed. 1911).

31. E.g., Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Decisions*, 64 WASH. & LEE L. REV. 1011, 1023 (2007) (discussing how "Four Horsemen" during Great Depression blocked programs aimed at economic recovery despite popular support thereof).

32. 18 U.S.C. § 1531 (2000).

33. Kenneth L. Woodward, *What's in a Name? The New York Times on "Partial-Birth" Abortion*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 433 n.13 (2005) (citing Gallup polls showing that "a majority of Americans support a ban on 'partial-birth' abortions").

34. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007); see also *id.* at 1643 n.4 (Ginsburg, J., dissenting) ("The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*."); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 386-87 (2007).

that Congress is ill-suited to make constitutional judgments.<sup>35</sup> This critique, however, assumes that Congress *should* be legislating in a manner consistent with Supreme Court rulings, and implicitly assumes that the Court is always right in its interpretations of the Constitution. That the Court's constitutional interpretations are always right is a proposition that even some justices have recognized to be of dubious validity.<sup>36</sup> Moreover, even if *Cooper v. Aaron* cemented the federal judiciary's "supreme" and final authority to expound upon the meaning of the Constitution's text,<sup>37</sup> the constitutional structure, as explained above, clearly allocates to Congress an important role in influencing how the judiciary exercises this power.

The more compelling critique of congressional constitutional interpretation is that Congress is institutionally incapable of making good constitutional judgments, and should therefore refrain from engaging in constitutional interpretation altogether. Abner Mikva, for instance, writing from the unique perspective of having been both a federal judge and a member of Congress, has argued that legislators are less concerned with a law's constitutionality than with its political and practical import.<sup>38</sup> Similarly, other scholars have argued that because written constitutions are designed in part to restrain majority rule, a regularly elected branch of government like Congress is too subject to popular whims to enforce constitutional commands effectively, particularly those which protect the rights of minorities.<sup>39</sup> While Mikva and others may be correct that members of Congress care more about the practical import and popularity of laws they pass, it does not necessarily follow that there should be no congressional role in constitutional interpretation. To the contrary, Congress' views on the Constitution are valuable precisely because they are informed by practical and political considerations that a more insulated Court might ignore.<sup>40</sup>

The Framers of the Constitution, aware of the "countermajoritarian difficulty" years before that term was coined,<sup>41</sup> counted on a strong congressional role in constitutional interpretation to help ensure that judicial constitutional interpretation would not stray too far from popular legiti-

35. E.g., Paul Brest, *The Conscientious Legislator's Guide to Constitution Interpretation*, 27 STAN. L. REV. 585, 590 (1975); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 605-06 (1983).

36. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

37. 358 U.S. 1, 18 (1958).

38. Mikva, *supra* note 35, at 609-10.

39. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2-3 (1996).

40. Katyal, *supra* note 22, at 1393 ("[T]he ways in which Congress interprets the constitution can and should differ from the ways in which the court does."); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1404-05 (2001).

41. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1961).

macy.<sup>42</sup> Due to the frequency with which Congress faces the voters,<sup>43</sup> Congress' views are more capable of offering a rough reflection of popular views of constitutional interpretation, whereas the Supreme Court—due to the random timing of its members' appointments—is prone to tilting toward an unpopular or outdated political and constitutional ideology.<sup>44</sup> The legislative process is also more likely to consider a greater diversity of views on constitutional interpretation,<sup>45</sup> as legislators regularly meet with and receive input from constituents and interest groups from a variety of educational, ethnic, religious, and professional backgrounds.<sup>46</sup> The courts, by contrast, interpret the Constitution in a process involving a relatively small and cloistered number of “elites:” the justices, their law clerks, the lawyers who argue before the Court, and those who write amicus briefs.<sup>47</sup> Further, Congress enacts its laws with policymaking tools unique to the legislative process, such as large staffs, subpoena power, and the participation of the public, whereas the courts interpret the Constitution only if and when a specific constitutional question is presented properly in a lawsuit.<sup>48</sup>

In sum, one need not refute the common understanding of *Marbury* and *Cooper* as establishing the courts' final interpretive authority over the Constitution's meaning to accept simultaneously the premise that Congress has an important, even if non-final, role to play in the process of constitutional interpretation. This premise is even more well-founded in the context of deciding questions of executive power in times of armed conflict, in which the Supreme Court itself, using the *Steel-Seizure* model, has expressly relied on Congress' constitutional judgments to inform its own reading of how much executive power the Constitution permits.<sup>49</sup> Unfortunately, in passing the MCA, Congress abdicated its responsibility to interpret the Constitution by passing a law that it wanted to see invali-

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42. See THE FEDERALIST NO. 81, at 411 (Alexander Hamilton) (Garry Wills ed., 1982) (arguing that Congress, through power of impeachment, would be able to prevent “deliberate usurpations” of authority by judiciary); see also Letter from James Madison to Spencer Roane (May 6, 1821), in 9 WRITINGS OF JAMES MADISON 1819-1836, at 55, 59 (Gaillard Hunt ed., 1910) (noting that if members of Congress make bad constitutional decisions, “their Constituents . . . can certainly under the forms of the Constitution effectuate a compliance with their deliberate judgments and settled determination”).

43. Of course, as originally designed, senators did not face the voters directly but were elected by state legislatures until that practice was changed by constitutional amendment in 1913. U.S. CONST. amend. XVII.

44. See *supra* note 31.

45. Katyal, *supra* note 22, at 1339-40.

46. See Bd. Of Trs. Of Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (describing Congress' superior ability, as compared to courts, to find facts and understand “public attitudes and beliefs”).

47. Klarman, *supra* note 19, at 189-90. A small, elite group of lawyers dominates the argument of cases before the Supreme Court like no other time since the late nineteenth century. See generally Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

48. See Garrett, 531 U.S. at 384 (Breyer, J., dissenting); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551-52 (1988).

49. Paulsen, *supra* note 3, at 233 (Under *Steel Seizure*, “courts accord substantial deference to a common constitutional view embraced by both Congress and the President.”).

dated or substantially altered by the courts. Understanding how and why Congress might pass an intentionally unconstitutional law such as the MCA's Section 7 requires briefly reviewing the two doctrines that the Supreme Court has used to affirm, however emptily, the essentiality of Congress' role in the process of constitutional interpretation: the presumption of constitutionality and the canon of avoidance.

#### A. THE PRESUMPTION OF CONSTITUTIONALITY

The Supreme Court routinely declares it axiomatic that laws passed by Congress are entitled to a presumption of constitutionality.<sup>50</sup> The Court justifies this supposedly deferential approach on the basis of its "respect" for the product of a "coordinate branch of government,"<sup>51</sup> its hesitation to invalidate the work of democratically elected representatives,<sup>52</sup> and its belief that Congress "believe[s] its statutes to be consistent with the constitutional commands."<sup>53</sup> The presumption of constitutionality thus purports to reflect the notion that congressional constitutional interpretation is entitled to respect even where it produces results that differ from the Court's beliefs about the Constitution's meaning.<sup>54</sup>

As a matter of theory, the presumption of constitutionality has generated relatively little controversy. Most scholars seem to agree with the abstract idea that enactments of Congress are due a presumption of validity,<sup>55</sup> even if they disagree as to how strongly this presumption should apply in any particular case.<sup>56</sup> More controversial than the theoretical justifications for the presumption of constitutionality has been the manner in which it has been applied in recent years. Particularly in the areas of federalism and civil rights, the Supreme Court of the last two decades has dutifully repeated the axiom that congressional acts receive a pre-

50. See *United States v. Booker*, 543 U.S. 220, 274 (2005) (Stevens, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 607 (2000); *Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 272 (1977).

51. *Morrison*, 529 U.S. at 607.

52. *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

53. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 604 n.3 (1998) (Souter, J., dissenting); see also *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution."); Mikva, *supra* note 35, at 590-91.

54. *Boerne v. Flores*, 521 U.S. 507, 535 (1997) (Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

55. *E.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 121 (2001).

56. Although Mikva does not say so expressly, it seems that the logical conclusion of his argument is that acts of Congress do not "deserve" a presumption of constitutionality. See Mikva, *supra* note 35, at 609-10. Justice Antonin Scalia has actually stated this position publicly in a speech at a conference, noting that "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps th[e] presumption [of constitutionality] is unwarranted." Colker & Brudney, *supra* note 55, at 80. Despite expressing these views in a speech, however, Justice Scalia has never articulated such a view from the bench; rather, he has joined, without objection, opinions that invoke the notion that congressional enactments are entitled to a presumption of constitutionality. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 235 (2003).

sumption of validity while seeming to give them little deference at all.<sup>57</sup> Between 1994 and 2004, the Supreme Court under Chief Justice William Rehnquist struck down thirty federal statutes, ten more than the Court of Chief Justice Earl Warren invalidated in a decade, more than the *Lochner*-era Court,<sup>58</sup> and far more than the one federal statute that the Court invalidated during John Marshall's thirty-four-year chief justiceship.<sup>59</sup> Nowhere was the Rehnquist Court's jealous guardianship of its constitu-

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57. See Colker & Brudney, *supra* note 55, at 105 ("Beginning in 1995, a longstanding presumption of deference toward the work of Congress has been peeled away."). In its federalism jurisprudence, the Court under Chief Justice Rehnquist backtracked significantly from post-New Deal precedents such as *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), that showed significant deference to Congress' exercise of its Commerce Clause powers. In prominent cases like *United States v. Lopez*, 514 U.S. 549 (1995), and *Morrison v. United States*, 529 U.S. 598 (2000), a majority of the Rehnquist Court cast aside Congress' judgment about whether a particular activity affected interstate commerce sufficiently to justify federal legislation. Although the Court has more recently upheld congressional action justified under the Commerce Clause in *Gonzales v. Raich*, 545 U.S. 1 (2005), it is too soon to say whether *Raich* indicates a return to pre-*Lopez* deference to Congress in the Commerce Clause realm. Compare JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 129 (2007) (declaring the federalism "revolution" dead), with David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 *FORDHAM L. REV.* 2081, 2094 (2006) ("[F]ederalism revival is still very much alive" despite *Raich*).

In the civil rights realm, the Court's 1997 decision in *Boerne v. Flores*, 521 U.S. 507 (1997), emphatically rejected Congress' attempt to protect religious liberty through the Religious Freedom Restoration Act ("RFRA"). Congress had justified RFRA on the basis of its powers under Section 5 of the Fourteenth Amendment to not just protect but also identify constitutional violations. *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966). The *Boerne* Court made clear, however, that identifying constitutional violations was its exclusive turf. 521 U.S. at 520; Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 *HARV. L. REV.* 4, 143 (2001); see also *Morrison v. United States*, 529 U.S. 598, 601-02 (2000) (invalidating the private-remedy provision of the 1994 Violence Against Women Act despite Congress' determination that such a remedy was necessary to vindicate more effectively the constitutional rights of women).

At the crossroads of individual rights and federalism, the Rehnquist Court took a restrictive view of Congress' ability to exercise its Fourteenth Amendment Section 5 powers to override state sovereign immunity. In a trio of cases on the topic—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001)—the Court invalidated three different federal statutory provisions predicated on those powers. In *Garrett*, for instance, the Court invalidated a provision of the Americans with Disabilities Act ("ADA") of 1990 that allowed employees of state institutions to recover money damages against noncompliant state institutions, despite elaborate legislative history detailing the discrimination faced by disabled state employees. 531 U.S. at 380-82. The *Garrett* majority, following *Boerne*, insisted that it was the Court's responsibility, and not Congress', "to define the substance of constitutional guarantees." *Id.* at 365. Although more recently, in 2003 and 2004, a divided Court upheld laws premised on Congress' Section 5 powers against sovereign immunity challenges in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), neither case likely indicates a full-scale turn towards more deference to Congress. Justice Stevens's majority opinion in *Lane*, for instance, made clear that, per *Boerne*, the ultimate authority for determining the Fourteenth Amendment's contours lay squarely with the Supreme Court. *Lane*, 541 U.S. at 520-21.

58. See generally *The Rehnquist Court*, 72 *STANFORD LAW.* 33 (2005) (comments of Larry Kramer).

59. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 *WM. & MARY L. REV.* 1733, 1788 n.217 (2005).

tional supremacy on display more than in *Bush v. Gore*, in which the Court took the unprecedented step of effectively deciding a presidential election, despite the prior understanding that Congress, rather than the Supreme Court, had the final authority to resolve disputed presidential elections.<sup>60</sup>

In its dismissive attitude toward Congress, the Rehnquist Court succeeded in making the presumption of constitutionality a ritualistic recitation of respect rather than a canon with any interpretive weight.<sup>61</sup> As Larry Kramer has explained, the Rehnquist Court “disowned the notion of popular constitutionalism altogether, staking its claim to be the only body empowered to interpret fundamental law with authority.”<sup>62</sup> “What Congress thinks about the Constitution,” Kramer observed, “carries no formal legal weight in the eyes of the Rehnquist Court, and has only so much practical weight as the Justices think it deserves (which typically turns out to be not much).”<sup>63</sup> Although it is too soon to say,<sup>64</sup> the Roberts Court does not appear especially inclined to loosen the grip on interpretive supremacy that the Rehnquist Court so aggressively claimed in areas like federalism and the First Amendment.<sup>65</sup>

In many of the prominent cases in which the Rehnquist and Roberts Courts have rejected Congress’ constitutional judgment, the Court’s more liberal justices—Stevens, Souter, Ginsburg, and Breyer—have dissented. While these same justices often assailed the Rehnquist Court’s five-justice majority for disrespecting Congress’ constitutional judgment,<sup>66</sup> they too have voted to overturn federal statutes, demonstrating their own lack of deference to Congress’ views on different constitutional issues, such as

60. 531 U.S. 98 (2000); see generally ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); see also Laurence H. Tribe, *eroG v. hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 178 (2001).

61. TOOBIN, *supra* note 57, at 83 (noting that aside from Justice Breyer, the other members of the Supreme Court had very little respect for Congress and the legislative process).

62. Kramer, *supra* note 57, at 128.

63. *Id.*

64. In Chief Justice Roberts’ first two years, the Supreme Court has upheld some high-profile statutes against constitutional challenges, such as the Solomon Amendment, which required law schools receiving federal funds to allow access to military recruiters, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and the so-called “partial-birth” abortion ban enacted by Congress in 2003. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

65. By votes of five-to-four, the Roberts Court has struck down two important provisions of the McCain-Feingold campaign finance reform legislation (the Bipartisan Campaign Reform Act of 2002) on First Amendment grounds in the last two years. See *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759 (2008) (invalidating the BCRA’s “millionaire’s amendment”); *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (invalidating the BCRA’s ban on “issue advertisements” shortly before an election). In its federalism jurisprudence, the Roberts Court took a constricted view of the Clean Water Act’s definition of “navigable waters” in light of concerns that a broader reading of the definition might violate the Commerce Clause. *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006).

66. *E.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 380–82 (2001) (Breyer, J., dissenting).

in the case of so-called “partial-birth” abortion,<sup>67</sup> and, as discussed below, in *Boumediene*.<sup>68</sup> Disrespect for Congress’ constitutional judgment, therefore, has not been the exclusive province of the judicial right in recent years, with the particular alignment of justices in any case involving Congress’ constitutional judgment varying based on the specific issue presented. Nonetheless, the numbers speak for themselves, and the Rehnquist Court’s—particularly, the conservative five-justice bloc’s—relatively high rate of invalidating federal laws has likely had some effect on Congress over time, decreasing Congress’ constitutional self-confidence and further cementing judicial supremacy, whether to be asserted by the Court’s right or left in any particular case.

## B. THE ASHWANDER CANON OF AVOIDANCE

Also rooted in a purported respect for Congress’ role in constitutional interpretation is the so-called “canon of avoidance” or “canon of constitutional doubt,” a doctrine most commonly traced to Justice Louis Brandeis’s concurring opinion in *Ashwander*,<sup>69</sup> but with roots stretching back to the earliest days of the Republic.<sup>70</sup> The canon requires a court faced with more than one plausible interpretation of a statute to choose the interpretation that raises no doubt as to the statute’s constitutionality,<sup>71</sup> even if other interpretations might be otherwise more appealing.<sup>72</sup> The canon has been justified in part by a supposed respect for Congress’s intent not to pass unconstitutional laws.<sup>73</sup> The Court has said that because Congress “is bound by and swears an oath to uphold the Constitution,” the Court will “not lightly assume that Congress intend[s] to infringe constitutionally protected liberties or usurp power constitutionally forbidden [to] it.”<sup>74</sup> Thus, the Court assumes that Congress intends for its acts to be

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67. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007).

68. See *infra* section IV.

69. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341-56 (1936). More specifically, the “canon of avoidance” discussed in this section stems from the last of the seven “rules” articulated by Justice Brandeis in his *Ashwander* concurrence, all of which identified ways in which the federal courts have avoided deciding constitutional questions. *Id.* at 348 (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”). The seventh rule is distinct from the fourth rule cited by Brandeis that is sometimes also referred to as the “canon of avoidance”: that “the Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.” *Id.* at 347.

70. *Id.* at 354-55.

71. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Although they stand for the same principle, *DeBartolo* is now cited as often as *Ashwander*. Schauer, *supra* note 11, at 72.

72. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 263 (1991) (Marshall, J., dissenting) (*Ashwander* requires Court to “select less plausible candidates from within the range of permissible constructions.”).

73. The Court has also cited its desire to avoid the “delicate process of constitutional adjudication” and its countermajoritarian consequences. *United States v. UAW-CIO*, 352 U.S. 567, 590 (1957).

74. *DeBartolo*, 485 U.S. at 575.

construed as passing constitutional muster—i.e., surviving judicial review—even if other signs of legislative intent indicate otherwise.<sup>75</sup> When it invokes *Ashwander*, the Court essentially recognizes two simultaneous “intents” of Congress that can lead to different interpretations of a single statute: a specific intent with respect to what the particular statute might mean based on the normal indicia thereof (such as text and legislative history), and an over-arching meta-intent of Congress to legislate in a manner that will survive judicial review. When the Court invokes *Ashwander*, the meta-intent of Congress to act constitutionally (i.e., survive judicial review) is presumed to trump the more specific intent Congress evinced when passing the legislation.

Many scholars have criticized the intent-based justification for *Ashwander*, arguing that Congress intends for all of its statutes to be interpreted based on the usual indicia of legislative meaning (text, history, purpose, etc.), and does not intend for certain statutes to be interpreted in a more twisted manner just to survive judicial review.<sup>76</sup> This criticism alleges that when *Ashwander* is a factor in a court’s interpretation of a particular statute, the court necessarily chooses an interpretation that is less optimal than that which would have resulted from an application of the standard, non-*Ashwander* rules of statutory construction.<sup>77</sup> Professor Frederick Schauer has speculated that Congress might even prefer its statutes to be interpreted more “naturally” and struck down as unconstitutional than to be transmogrified per *Ashwander* and upheld.<sup>78</sup> Indeed, as explained in more depth below, the *Boumediene* majority refused to apply *Ashwander* to remedy the constitutional flaws in Section 7 of the MCA, asserting that “[t]he canon of constitutional avoidance does not supplant traditional modes of statutory interpretation.”<sup>79</sup> To some of *Ashwander*’s critics, *Boumediene*’s outright invalidation of the MCA’s Section 7 may have been a better result than an aggressive judicial transmogrification of the legislation’s meaning, as proposed by the Solicitor General at oral argument and Chief Justice Roberts in his dissent.<sup>80</sup>

A stronger critique of the *Ashwander* canon is that it does not demonstrate any respect for an independent congressional role in constitutional interpretation. The Court’s intent-based justification for the *Ashwander* canon assumes that when Congress legislates, it adheres to the Court’s

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75. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991); *Yates v. United States*, 354 U.S. 298, 319 (1957); *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-07 (1924); see also Coenen, *supra* note 11, at 1607.

76. A separate, common criticism of the *Ashwander* canon is that it leads to half-baked judicial consideration of constitutional issues. In determining whether there is a constitutional question to avoid, a court per *Ashwander* necessarily engages in some—but not full-fledged—consideration of the potential constitutional question to be avoided. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1581-82 (2000).

77. Schauer, *supra* note 11, at 83; Lisa A. Kloppenberg, *The Avoidance Canon: From the Cold War to the War on Terror*, 32 U. DAYTON L. REV. 349, 351 (2007).

78. Schauer, *supra* note 11, at 95.

79. *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008).

80. See *infra* note 295-99 and accompanying text.

vision of the Constitution. It is in this sense that there can be considerable tension between the presumption of constitutionality and the *Ashwander* canon.<sup>81</sup> Per *Ashwander*, the Court simply assumes that Congress, above all, does not want its statutes invalidated.<sup>82</sup> The Court does not, at least as *Ashwander* has been applied in recent years, consider the possibility that Congress interprets the Constitution in a different manner and then afford that different interpretation a level of respect, an approach that a meaningful presumption of constitutionality would seem to require.<sup>83</sup> However, as demonstrated by the passage of the MCA, explained below, many members of Congress now depend upon the Court's use of *Ashwander* as an additional option—besides outright judicial invalidation—to “clean up” bills that they find objectionable for constitutional reasons. In a sense, this congressional dependence on post-enactment judicial transmogrification of a statute's meaning provides an intent-based justification for *Ashwander* that is somewhat different from that espoused by the Supreme Court.<sup>84</sup>

## II. WHY MEMBERS OF CONGRESS VOTE FOR INTENTIONALLY UNCONSTITUTIONAL LEGISLATION AND THE PROBLEM OF INTENT

That members of Congress would vote for legislation they want to be either invalidated or substantially altered may strike some readers as surprising and others as obvious. The idea may surprise people because it is inconsistent with the traditional narrative of legislators as public servants who swear oaths to uphold the Constitution.<sup>85</sup> Moreover, constituents, at least at an abstract level, likely expect their elected representatives to abide by the Constitution. Further, despite the Supreme Court's recent evident disrespect for an independent congressional role in constitutional interpretation, the Court's opinions nonetheless dutifully repeat the notion (or fiction) that Congress legislates within constitutional bounds.<sup>86</sup> On the other hand, one might expect that an abstract concern for the Constitution ranks quite low for the average member of Congress. One might expect that members are more likely to be motivated by concerns like representing constituent preferences, effecting good public policy, securing re-election, gaining influence in Congress, and ensuring a remu-

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81. Michelle R. Slack, *Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence—A Response to Lisa Kloppenberg*, 56 CASE W. RES. L. REV. 1057, 1065-66 (2006).

82. See Schauer, *supra* note 11, at 82 (“Congress certainly has a desire, we can assume, not to have its statutes declared unconstitutional.”).

83. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 250.

84. Kloppenberg, *supra* note 11, at 19-20.

85. See *supra* note 1.

86. *Finley v. NEA*, 524 U.S. 569, 604 n.3 (1998) (Souter, J., dissenting); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

nerative post-congressional career, some or all of which may take precedence over a member's more abstract constitutional principles, if any.<sup>87</sup>

To some degree, however, the dichotomy between an abstract concern for the Constitution and at least some of the political pressures that influence a legislator's stand on constitutional issues is a false one, for the political accountability of Congress is much of what makes its role in constitutional interpretation so valuable.<sup>88</sup> To the extent, therefore, that a legislator articulates a stand on a constitutional issue that is informed by his constituents' preferences, re-election concerns, or views of good public policy—rather than his personal views on abstract constitutional theory—he is not necessarily abdicating his role as a constitutional interpreter. Indeed, it is important to be clear that my discussion of intent does not concern itself with the privately held constitutional views of a legislator. If, for instance, a legislator takes a public stand on a particular constitutional issue but tells her husband in private that she really does not agree with that stance, that legislator's "true" beliefs about the issue, if discoverable, would be irrelevant to the question of legislative intent, for such views were not aired in the public realm that gives legislative intent its legitimacy as an interpretive tool.<sup>89</sup> As discussed here, therefore, "intent" includes only the publicly revealed views of members of Congress, as reflected through votes on statutes that affect constitutional interpretation, through statements made on the floor of the legislature, in correspondence with constituents, in statements to the media, etc.<sup>90</sup>

The constitutional design, and the *Steel-Seizure* model in particular, assume that whatever political benefits and costs are associated with voting for or against a particular statute will be roughly internalized by members of Congress. By political benefits, I mean support from constituents in the form of votes for a member in his next general election, as well as support from organizations that help a member obtain votes, such as campaign contributions and praise from the media. Conversely, political costs include votes against a candidate in the next election, as well as opposition from organizations designed to oust a candidate or hurt his re-election chances, which may take the form of contributions to the member's next general election opponent, "issue advertisements" run against the member, and critical editorials in local newspapers. In theory, when Congress considers legislation, each member keeps an eye on the political costs and benefits of his potential support for or opposition to such legislation. In the *Steel-Seizure* context, members of Congress weigh the polit-

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87. John A. Clark & Kevin T. McGuire, *Congress, the Supreme Court, and the Flag*, 49 POL. RES. Q. 771, 773-74 (1996); Timothy Noah, *Why Congressmen Want to Be Lobbyists*, SLATE, June 30, 2003, <http://www.slate.com/id/2085071/>.

88. See *supra* notes 40 to 48 and accompanying text.

89. See *infra* notes 103 to 109 and accompanying text.

90. For discussion of the relative weight afforded to some of the different sources of legislative history, see *infra* note 96.

ical costs and benefits of voting for or against legislation that might expand executive power during a time of armed conflict. The political costs associated with a vote in favor of expanding executive power traditionally include the possibility that the legislator will be accused of increasing presidential power at the expense of some other value like civil liberties. The political costs associated with voting against expanded executive power traditionally include the risk that a political opponent will attack the legislator as weak on national security.

When, however, members of Congress rely on potential judicial review—rather than their own votes—to kill legislation that they would otherwise oppose, they seek to externalize onto the judiciary more of the political costs of invalidating a law. For example, a member of Congress seeking re-election may have serious, publicly stated constitutional concerns about a particular piece of legislation, but when faced with the possibility of a bruising re-election campaign in which his potential opponent might use a vote against the constitutionally questionable legislation to attack him, he may vote for the legislation. The incumbent member will feel more comfortable voting for the legislation if he knows—or at least feels reasonably confident—that the judiciary will clean up the legislation by striking it down or substantially altering its meaning per *Ashwander*. The legislator may, therefore, vote for the bill while at the same time publicly declaring it to be unconstitutional in the hopes that his comments serve as a signal to the courts to clean up the bill. If the legislator is correct in counting on an impending judicial cleanup to invalidate the law, he has nonetheless insulated himself from the traditional costs of voting for more executive power because he can tell his potentially angry constituents: “I voted for the law, but that didn’t matter because the courts struck it down.” To be sure, it is possible that the member may receive criticism for his apparent hypocrisy in voting for legislation that he publicly declares to be unconstitutional. Because the member nonetheless voted for the bill, however, any attack along such lines will necessarily be subtle and might not translate well to the kind of thirty-second television advertisement that is a staple of modern political campaigns.

If enough legislators emulate this hypothetical member, Congress would produce a statute that is less helpful to a court applying the *Steel-Seizure* model, in which the Court relies on Congress’ constitutional judgment to inform the Court’s own judgment regarding executive power.<sup>91</sup> Rather than represent the best bill that the democratic process can produce, to which the Court can react based on its own, different set of constitutional interpretive tools, Congress would send to the courts a law passed with the intent of being invalidated or altered by the courts, imposing upon the courts, rather than Congress, the lion’s share of political costs involved in remedying constitutional flaws. While the judiciary may

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91. Paulsen, *supra* note 3, at 224-25. I assume for now that the unconstitutional intent can be imputed to the entire Congress, a problem which I address more extensively below. See *infra* Section II.B.

be more than able to bear such costs in light of its members' life tenure and its perceived institutional legitimacy,<sup>92</sup> the interpretive process is weakened because Congress merely passes to the courts the task of constitutional interpretation, rather than playing the integral role in the process that *Steel Seizure* envisions.

The phenomenon of legislative logrolling only increases the possibility that a member of Congress will vote for legislation that he publicly decries as unconstitutional. So long as constitutional concerns are subject to bargaining like other legislative goods (and it would be unrealistic to assume that they are not, despite legislators' oaths to the contrary), a member of Congress may vote for an omnibus bill that benefits a pet project in his district even if the bill contains a provision which, if considered on its own, he would publicly oppose as unconstitutional and vote against.<sup>93</sup> The degree to which a particular member will sacrifice constitutional concerns depends upon the intensity of those concerns and the benefits received in exchange for sacrificing them.<sup>94</sup> While the incentive for members of Congress to logroll constitutional concerns would exist even in the absence of judicial review, the prospect of judicial invalidation and *Ashwander* transmogrification increases it significantly. A member's proclivity to bargain away constitutional qualms increases if he can simultaneously argue against the constitutionality of the dubious part of the legislation and if he believes that this publicly stated opposition might influence the courts' subsequent consideration of this potentially unconstitutional provision.<sup>95</sup>

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92. Indeed, Dean Lisa Kloppenberg has asserted that the courts enjoy sufficient political legitimacy to support their shouldering constitutional burdens alone. Kloppenberg, *supra* note 11, at 15, 92.

93. Cf. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 85-86 (1989) (explaining that "[l]ogrolling and vote tradeoffs are accepted parts of the legislative process," whereas courts' treat constitutional issues "as a matter of principle").

94. Members of Congress representing constituents who care deeply about particular constitutional issues may be highly unlikely to bargain away constitutional concerns touching those issues. Pro-gun members of Congress who describe themselves as committed to "Second Amendment rights," see, for example, Larry Craig, United States Senator for Idaho, Second Amendment Rights, [http://craig.senate.gov/l\\_secamend.cfm](http://craig.senate.gov/l_secamend.cfm) (last visited June 8, 2008) ("[O]ne of the strongest safeguards of our republic is the Constitution's protection of the right to keep and bear arms."), and liberal Democrats who describe themselves as committed to protecting constitutional freedom of speech, see for example, Representative Jerrold Nadler, New York's Eighth Congressional District, Biography, <http://www.house.gov/nadler/biography.shtml> (last visited July 27, 2008) ("Nadler has . . . been a consistent champion of freedom of expression, fighting countless efforts to restrict speech and quell dissent."), would probably be much less likely to bargain away those concerns. Similarly, some members of Congress may be less likely to bargain away certain constitutional concerns because they have developed a reputation for being "principled," a reputation which may help them politically even if they take constitutional stands unpopular with their constituents.

95. The presence of severability clauses in legislation also can lower the price of bargaining away constitutional concerns. If a congressman is particularly concerned about the constitutionality of one specific provision of a larger legislative package, but supports the rest of the package, he can more easily vote in favor of the entire legislative package knowing that the constitutionally problematic provision may be judicially invalidated but the remainder of the legislation will survive.

A member of Congress can communicate his opposition to the constitutionality of a bill for which he votes by helping to establish the bill's legislative history. A member may make committee or floor statements to the effect that he believes the bill is unconstitutional but will vote for it anyway.<sup>96</sup> A member may also make statements to constituents and the media, either personally or through his surrogates, indicating his motives in voting for the bill, although such statements are generally not afforded the same interpretive weight as floor statements by courts even if they are an essential part of how a member of Congress justifies his vote to his constituents.<sup>97</sup> A member may also directly communicate with the courts by filing an amicus brief with the Supreme Court arguing for invalidation of the very legislation for which he voted.<sup>98</sup>

#### A. OBJECTIONS TO THE CONCEPT OF LEGISLATIVE INTENT AND ITS RELEVANCE

One might argue that the mixed motives of members of Congress are irrelevant to statutory interpretation because courts should concern themselves only with the purported final product of the legislative process—a law's text. There is a long line of academic and judicial opposition to courts' use of legislative intent, viewing intent as shrouded in subjectivity and ripe for manipulation by lawmakers.<sup>99</sup> Scholars like Max Radin have savaged legislative intent as a "transparent and absurd fiction," the search for which by courts is likely to be futile, given the impossibility of knowing what was on the minds of hundreds of legislators at

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96. Specifically, courts use the floor and committee statements of individual legislators, as well as committee reports and testimony from the committees that draft legislation to discern legislative intent. Some commentators have asserted that, as an empirical matter, courts afford statements of individual lawmakers less weight than committee reports. George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 51. Other commentators have argued that individual statements *should* be afforded little weight because they shed scant light on the legislature's overall intent. Laurence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 447-48 (2005). While it is true that an individual legislator's comments might not reflect the views of any other member of the legislature, committee reports are often drafted by unelected congressional staffers and are not always even read by the legislators who vote on the bill. *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). Moreover, insofar as the search for legislative intent, however foolhardy, is an attempt to discern "what the voting Members of Congress actually had in mind," statements of the legislators who vote for a bill are likely to be some of the best evidence of their intentions. *Id.* Finally, even if it is correct that, as an empirical matter, courts afford less weight to individual statements than to committee reports, the Supreme Court nonetheless routinely looks to the statements of individual lawmakers to help it interpret laws. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006).

97. *See* Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1254, 1330-33 (2000) (arguing that "public justification" is the reason why courts should look to legislative history).

98. This is what Arlen Specter did after, as discussed below, voting for the Military Commissions Act while simultaneously arguing that its Section 7 was unconstitutional. *See* Brief Amicus Curiae of Senator Arlen Specter in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196).

99. To be sure, being anti-intent and a textualist are not necessarily the same thing.

the time at which they voted.<sup>100</sup> Radin and others have argued that even if legislative intent were knowable, there is no reason why it should bind courts, as the legislature's job is only to pass legislation, not tell society what it means, a task which appropriately falls to the courts.<sup>101</sup> Among the justices of the Supreme Court, Justice Antonin Scalia has most famously urged his colleagues not to consider legislative intent, at least in instances where the statute's text is sufficiently clear.<sup>102</sup>

There is undoubtedly some merit to the objections that have been raised by the anti-intent crowd. Nonetheless, this Article assumes that legislative intent is and should be relevant to statutory interpretation. While it is beyond this Article's purview to offer a full-throated defense of the relevance of legislative intent, and many others have already done so,<sup>103</sup> a brief explanation of the utility and relevance of legislative intent to statutory interpretation should suffice. Judicial consideration of legislative intent imbues the interpretive process with additional democratic legitimacy.<sup>104</sup> One need not view courts as the mere interpretive "agents" of the legislature<sup>105</sup> to believe that it is appropriate for courts to attempt broadly to effectuate the goals of the legislature, and, thus, that it is appropriate for courts to rely on more than just the statutory text to discern such goals. Bare reference to statutory text is often unhelpful and indeterminate.<sup>106</sup> A court that ignores legislative intent—which is usually derived from legislative history—when interpreting indeterminate text is more likely to reach conclusions that reflect the judges' own policy preferences rather than the legislature's. As Professor Bernard Bell has argued, legislative history—particularly, individual members' statements—comprises the public justifications legislators give their constituents for their votes.<sup>107</sup> Ignoring these justifications in interpreting a statute unmoors the statute from its democratic foundation. In part due to these concerns, while intent need not be determinative of a statute's meaning, a broad consensus exists that it—and legislative history in particular—

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100. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

101. *Id.*

102. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) (observing that "statements of individual Members of Congress" are not reliable indicators of legislative intent); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

103. See generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Carol Chomsky, *Unlocking the Mysteries of the Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); Solan, *supra* note 96.

104. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 18-19 (1998).

105. See generally, e.g., Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

106. Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 89 (1984).

107. Bell, *supra* note 97, at 1330-33.

should at least be part of judges' interpretive method.<sup>108</sup> Indeed, Justice Scalia has found few other federal judges, much less fellow justices of the Supreme Court, who subscribe to his so-called "textualist" approach to statutory interpretation.<sup>109</sup>

Nonetheless, one might argue that even if legislative intent should *generally* be relevant to statutory interpretation, it should not be considered relevant by courts when it reveals that a legislator voted for a law that he wants to be invalidated or transmogrified by the courts. In other words, one might argue that a specific exception to the general reliance on intent is required to eliminate the legislative incentive to pass intentionally unconstitutional laws. The problem with such an approach, as illustrated by the Supreme Court's consideration of the MCA, discussed below, is that it might require the Court to approve—or at least give more deference to—legislation that both members of Congress and the Court would rather invalidate. While such an approach might discourage members of Congress in the future from so heavily relying on the courts to invalidate or transmogrify the legislation per *Ashwander*, the interim costs of approving the legislation—in terms of validating a scheme that members of both Congress and the Court consider objectionable on policy, constitutional, and normative grounds—may be too high to bear.<sup>110</sup>

## B. AMALGAMATING INDIVIDUAL LEGISLATORS' INTENTS

Even accepting that there will be circumstances in which one particular legislator votes for legislation that she wants invalidated by the courts, one might consider it highly unlikely that a legislature as a whole would ever pass an intentionally unconstitutional law. Overcoming legislative inertia requires significant effort and resources by members of Congress and their staffs, as well as lobbying by interest groups. Why would a sufficient number of members ever expend large amounts of their limited time and energy to pass a bill that they want to see judicially invalidated? Moreover, even if some members of the enacting coalition publicly express doubts about the constitutionality of a bill for which they vote in favor, it is not clear how or why those individuals' doubts should be relevant to the *collective* intent of the legislative body regarding the bill's constitutionality. Indeed, the difficulty of amalgamating the various intents of individual legislators is a major reason why textualists and other scholars have questioned the value of courts searching for legislative intent when interpreting statutes.<sup>111</sup>

In some instances, pressure for a bill from outside interest groups or from the executive branch may be so great that many legislators in the

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108. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:05 (2005).

109. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1513 (1998).

110. Cf. Elhauge, *Preference-Eliciting Statutory Default Rules*, *supra* note 105, at 2179.

111. Radin, *supra* note 100, at 870-71; see generally Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

enacting coalition—theoretically, even every single member—decide to expend the necessary energy to pass a bill to avoid what they fear will be severe political consequences of not acting.<sup>112</sup> The more probable judicial invalidation (or substantial alteration) of an otherwise politically popular bill, the less members risk in passing it, even if they expend time and energy going through the motions of the legislative process. If the enacting coalition can signal clearly its preference for invalidation or substantial alteration to the judiciary through public statements and believes that the judiciary will respond accordingly, its members will see less risk in passing an intentionally unconstitutional bill.

The more likely scenario, however, involves a bill that passes with the support of at least some members who intend for the law to be upheld by the courts, along with the support of others who intend for the law to be invalidated or substantially altered per *Ashwander*.<sup>113</sup> Assume that some members, called the “Pros,” support a bill and want it to be validated by the courts. The Pros are likely to provide the impetus for the bill’s passage by sponsoring the legislation, pushing it through committee, etc. On their own, however, the Pros might not comprise enough members to pass the legislation. To ensure the bill’s passage, the Pros must attract the support of other members who have varying degrees of qualms about the bill’s constitutionality. Some of these others, whom I call the “Tepid Antis,” may even dislike the bill altogether, believing it to be unconstitutional, but will vote for the bill if the political pressure or other benefits of voting “yea” are great enough *and* if the possibility of judicial invalidation or transmogrification is sufficiently certain. Thus, the Tepid Antis, who would likely not have expended the energy and political capital to push the bill through the legislative process, may nonetheless provide the votes or assistance necessary to ensure the bill’s passage, but with the specific intent, evidenced by their public statements, that the law be invalidated as unconstitutional or substantially altered per *Ashwander*.<sup>114</sup>

In attempting to impute to a multi-member legislative body a single, collective intent, courts should afford especial interpretive weight to the views of marginal legislators, like the Tepid Antis, without whose support the bill would not have passed. The political scientists Matthew McCubbins, Roger Noll, and Barry Weingast—collectively known as McNollgast—have argued persuasively why it is essential, when interpreting a statute, to examine the role of “veto players” in the legislative process. McNollgast define a “veto player” as an “individual . . . or group of individuals . . . whose consent is needed for legislation to pass.”<sup>115</sup> In most

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112. Indeed, when outside pressure is great, it is likely that the outside groups supplying the pressure will be happy to do much of the work involved in passing legislation, such as writing the initial draft of the bill.

113. There may also be some members of Congress in the middle who are ambivalent about the bill’s constitutionality.

114. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L. J. 705, 713 (1992).

115. *Id.* at 707 n.5.

instances, veto players are those particularly powerful legislators—for example, committee chairman or party leaders—who let a bill proceed past procedural hurdles or “veto gates” that might have killed it. Because “veto players” are crucial to a law’s passage, McNollgast argue, their individual intents are particularly relevant to determining the collective intent of the legislative body.<sup>116</sup> In the case of intentionally unconstitutional legislation, the “veto players” may be the Tepid Antis whose support provides the crucial marginal votes to pass the legislation. The Tepid Antis may share the ultimate goal of those Antis who vote against the legislation. They want the legislation either to be invalidated or go into effect only in a manner drastically different, per *Ashwander* transmogrification, from the manner in which the Pros envision, but they rely on judicial action to accomplish this end rather than their own votes. Table 1, which borrows somewhat from a similar formulation used by political theorist Jon Elster,<sup>117</sup> illustrates the dynamic:<sup>118</sup>

| Group       | Goal                               | Means                                      | Vote on Bill |
|-------------|------------------------------------|--|--------------|
| Pros        | Bill becomes operative law.        | Vote for and courts uphold.                | Yea          |
| Tepid Antis | Bill does not become operative law | Vote for and rely on courts to invalidate. | Yea          |
| Antis       | Bill does not become operative law | Vote against                               | Nay          |

Even members who vote against final passage can nonetheless provide crucial support to the passage of a constitutionally dubious bill by facilitating the bill’s clearance of “veto gates” along the way. In the Senate, for instance, the procedural hurdle of the filibuster requires sixty votes to circumvent, rather than a mere majority.<sup>119</sup> In some instances, senators who intend to vote against a bill on its merits nonetheless vote to cut off debate and move the bill forward to an “up-or-down” vote.<sup>120</sup> These senators’ votes *not* to filibuster are, therefore, crucial to the bill’s moving forward. Even if these senators—whom I call the Moderate Antis (as opposed to the Fervent Antis, who vote to filibuster *and* against the bill’s final passage)—ultimately vote against the bill on its merits, their intent in letting the bill move forward is relevant to determining the intent of Congress as a whole, as illustrated by Table 2.

116. Paul G. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1284 n.85 (2005).

117. Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 101 (Jon Elster ed., 1998).

118. For the sake of simplicity, the table excludes the possibility of *Ashwander* transmogrification as well as members expressing only ambivalence about—as opposed to support for or opposition to—the bill on constitutional grounds.

119. Standing Rules of the Senate, Rule 22.2, available at <http://rules.senate.gov/senaterules/rule22.php> (last visited June 8, 2008).

120. The minority party allowing straight “up-or-down” votes has become increasingly rare, with filibusters currently being used more than ever in recent history. David Herzhorn, *How the Filibuster Became the Rule*, N.Y. TIMES, Dec. 2, 2007, at 5.

| Group          | Goal                                | Means  | Vote to End Filibuster | Vote on Bill |
|----------------|-------------------------------------|--|------------------------|--------------|
| Pros           | Bill becomes operative law.         | Vote for and courts uphold.                              | Yea                    | Yea          |
| Tepid Antis    | Bill does not become operative law. | Vote for but rely on courts to invalidate.               | Yea                    | Yea          |
| Moderate Antis | Bill does not become operative law. | Vote against on merits but rely on courts to invalidate. | Yea                    | Nay          |
| Fervent Antis  | Bill does not become operative law. | Filibuster and vote against.                             | Nay                    | Nay          |

In some instances, party leaders will reach agreement early in the legislative process that a particular piece of legislation will be allowed an up-or-down vote on the Senate floor, effectively withdrawing the threat of a filibuster from members of either party. In such instances, understanding why a party leader takes the filibuster off the table is also particularly crucial to understanding the legislature's intent in passing the law. Even in instances where more than sixty members of the Senate ultimately vote for a proposed bill on its merits, some of the marginal members of the coalition of sixty or more senators may vote for the legislation because they view it as a *fait accompli* once the leaders have withdrawn the threat of a filibuster. In other words, members who may have been Fervent or Moderate Anti will switch to Tepid Anti once the filibuster threat has been removed and the bill's moving forward has been assured. The chances of members switching from Fervent Anti to Moderate Anti or Tepid Anti likely increase in relation to members' understanding that the courts are likely to invalidate the constitutionally dubious bill or transmogrify it per *Ashwander*.

One might object to the above application of the McNollgast theory of statutory intent for giving too much weight to the individual intents of the legislators who provide the marginal votes. If, for instance, forty-nine senators publicly articulate their support for a bill's constitutionality, yet eleven other senators who have publicly articulated opposition on constitutional grounds join them to end a filibuster, and two of those eleven join the forty-nine in voting for final passage, should the constitutional reservations of just two or eleven members of only one house of Congress sully the entire bill? While this is an objection not without some merit, the legislation would not have passed without the support of the eleven or two senators, making their votes proximate causes of the bill's passage. The causal influence of these marginal supporters makes their intent, when knowable, at least highly relevant to the legislature's collective intent.

Moreover, in most legislative debates, it is a small subset—say, ten or twenty percent—of members who explain their support for or opposition to a bill. Despite this small sample, courts frequently extrapolate from the statements of this subset to impute a collective intent to the cham-

ber.<sup>121</sup> Such extrapolation is justified in part because when it is impossible to know what every legislator was thinking, courts impute to the collective the publicly stated intents of the few.<sup>122</sup> Relatedly, under the theory that legislators offer comments in an attempt to influence colleagues, courts assume that the final result reflects a collective understanding that the majority is voting for the bill as it has been described by its supporters.<sup>123</sup> Hence, it is similarly justifiable to extrapolate intent from a small number of legislators who publicly proclaim the unconstitutionality of a law for which they nonetheless vote, particularly if such members provide support essential to the law's passage.<sup>124</sup>

### III. SECTION 7 OF THE MILITARY COMMISSIONS ACT AS INTENTIONALLY UNCONSTITUTIONAL LAW

The Military Commissions Act of 2006—specifically, its habeas-stripping provision—is the most prominent recent example of an intentionally unconstitutional law.<sup>125</sup> The MCA's intentional unconstitutionality is particularly disturbing because of the context in which the law was passed: in response to a Supreme Court decision that sought to prod a reticent Congress to involve itself in the formation of detainee policy in the “war on terror.” Before September 11, 2001, the United States generally detained and tried the captured perpetrators of terrorist attacks against Americans through the federal civilian criminal justice system, which affords a panoply of constitutional and statutory protections to the accused.<sup>126</sup> September 11, however, “changed everything,” or at least changed much, with respect to terrorist suspects. Seven days after September 11, Congress overwhelmingly passed the Authorization for the Use of Military Force (“AUMF”), which authorized the President to “use all necessary and appropriate force” against those who “planned, author-

121. Bell, *supra* note 97, at 1332.

122. *Id.*

123. *Id.* at 1332, 1335; James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 54 (2007).

124. It is important to point out that McNollgast themselves appear to disagree with affording any interpretive weight to the individual statements of members of Congress because “talk is cheap.” McNollgast, *supra* note 114, at 726. They fear that according interpretive weight to such individual statements “can change the policy bargain struck by the enacting coalition.” *Id.* at 717. What McNollgast ignore, however, is that the legislative bargain itself may include provisions that many members intend to be subsequently judicially invalidated or transmogrified.

125. I cannot say whether any other laws passed by Congress can fairly be described as “intentionally unconstitutional” under the approach articulated in this Article. While I am not aware of any to which I would apply that label, I have not delved into the legislative history of every other statute passed by Congress in its 220-year history.

126. Criminal prosecutions were pursued successfully against the perpetrators and co-conspirators of the first World Trade Center bombing of 1993, the Oklahoma City federal building bombing of 1995, the Khobar Tower bombings in Saudi Arabia of 1996, and the 1998 East Africa embassy bombings. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 116-17 (2004). The United States also investigated the October 2000 attack on the USS Cole off the coast of Yemen with an eye toward criminal prosecution. *Id.* at 192-97.

ized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”<sup>127</sup> In passing the AUMF, Congress gave its unequivocal green light to President George W. Bush to invade Afghanistan and root out the Taliban, the regime that had harbored al Qaeda, the international terrorist organization responsible for the September 11 attacks. A month later, United States military forces began their invasion of Afghanistan.<sup>128</sup>

As in any armed struggle, the United States captured enemy prisoners in Afghanistan, some of whom were handed over to the United States by the Northern Alliance, a friendly coalition of military groups also opposed to the Taliban. The United States housed most of these prisoners at detention camps in Afghanistan, but beginning in January 2002, the United States began exporting “high-value detainees”—those prisoners considered especially dangerous or possessing particularly useful information—from Afghanistan to detention facilities at the United States Naval Base in Guantánamo Bay, Cuba,<sup>129</sup> a location chosen by government officials because of its ambiguous legal status.<sup>130</sup> While the base was under United States control, it was not sovereign United States territory and, therefore, the administration thought that the federal courts would not have jurisdiction to hear habeas petitions brought by Guantánamo detainees.<sup>131</sup> The United States eventually transported terrorist suspects and alleged al Qaeda affiliates captured in other nations, such as Pakistan, Bosnia, and the Philippines, to Guantánamo.

Whereas in prior armed conflicts the United States had treated most captured enemy combatants as prisoners of war,<sup>132</sup> the detainees held at Guantánamo were not accorded that status and its attendant protections. Rather, alleged members of al Qaeda, whether rounded up in Afghanistan or elsewhere, were considered members of a rogue, stateless international terrorist organization that did not obey the laws of war, and, thus, were “unlawful combatants” not protected by the Geneva Conventions.<sup>133</sup> Even fighters for the Taliban, the regime which had ruled most of Afghanistan from 1996 to 2001, were classified as non-POW unlawful combatants, under the theory that Afghanistan under Taliban rule was a failed state and the Taliban was functionally indistinguishable from al

127. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

128. Eric Schmitt & Steven Lee Myers, *A Nation Challenged: Military; More than 100 G.I.'s in Afghan Ground Raid*, N.Y. TIMES, Oct. 20, 2001, at A1.

129. Katherine Q. Seelye, *A Nation Challenged: The Detention Camp: U.S. to Hold Taliban Detainees in 'the Least Worst Place'*, N.Y. TIMES, Dec. 28, 2001, at B6.

130. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142-43 (2006) (“[N]o location was perfect,” but Guantánamo “seemed to fit the bill . . . . [T]he federal courts probably wouldn't consider Gitmo as falling within their habeas jurisdiction.”).

131. *Id.*

132. See *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

133. Memorandum from John Yoo to William J. Haynes II, Jan. 9, 2002, in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

Qaeda.<sup>134</sup> As unlawful combatants, the Guantánamo detainees were deemed not entitled to the customary determination of combatant status by a “competent tribunal” of the capturing nation,<sup>135</sup> which meant that they had no formal, legal method by which to protest their detention as enemy combatants. Furthermore, the determination that the Geneva Conventions did not apply to al Qaeda detainees deprived those detainees of the Conventions’ protections of humane treatment. Although the United States asserted that it would treat the Guantánamo detainees “humanely” and, “to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of” the Geneva Conventions,<sup>136</sup> the lack of clear legal protection for the detainees undoubtedly facilitated their subsequent inhumane treatment by guards and interrogators.<sup>137</sup> The executive branch alone—with no express input from Congress—made all of these important initial decisions regarding the treatment of “war-on-terror” detainees.

The executive branch also determined that the inapplicability of the Geneva Conventions to Guantánamo detainees allowed those detainees to be eligible for trial by military commission for war crimes, rather than by court-martial,<sup>138</sup> which had been the standard method for trying enemy combatants since World War II.<sup>139</sup> To that end, in November 2001, President Bush decreed by executive order that noncitizens suspected of terrorist activity were eligible for trial by military commission for war crimes.<sup>140</sup> These commissions would provide significantly fewer protections for defendants than those afforded by courts-martial under the Uniform Code of Military Justice.<sup>141</sup> Within just a few months after September 11, therefore, the executive branch had unilaterally and dramatically shifted the paradigm for detaining and trying terrorists from a

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134. Memorandum from Jay S. Bybee to Alberto R. Gonzales and William J. Haynes II, Jan. 22, 2002, in *TORTURE PAPERS*, *supra* note 133, at 82.

135. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Feb. 7, 2002, in *TORTURE PAPERS*, *supra* note 133, at 136, 143; Memorandum from George W. Bush to the Vice President et al., Feb. 7, 2002, in *TORTURE PAPERS*, *supra* note 133, at 134-35 [hereinafter “Bush Memo”]. Although the White House had initially said that the Geneva Conventions would not apply to either the Taliban or al Qaeda, *see* Memorandum from Alberto R. Gonzales to George W. Bush, Jan. 25, 2002, in *TORTURE PAPERS*, *supra* note 133, at 118, it partly switched course by agreeing to apply the Geneva Conventions to the Taliban, Bush Memo, *supra*, at 134-35, although not in a manner that recognized Taliban fighters as enjoying the full protections as prisoners of war entitled to status determination tribunals.

136. Bush Memo, *supra* note 135, at 135.

137. *E.g.*, AMERICAN BAR ASS’N REPORT TO THE HOUSE OF DELEGATES, Aug. 9, 2004, in *TORTURE PAPERS*, *supra* note 133, at 1132, 1161-62.

138. Geneva Convention Relative to the Treatment of Prisoners of War art. 88, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

139. Capt. Brian C. Baldrate, *The Supreme Court’s Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 69-71 (2005).

140. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Exactly which crimes would be tried by military commission would be determined by subsequent Department of Defense regulations. *Id.*; *see also* Draft Military Commission Instruction, Feb. 28, 2003, available at <http://www.au.af.mil/am/awcawcgate/law/d20030228dmci.pdf>.

141. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

civilian criminal model to one that lay outside the civilian—and even the regular military—justice systems. Although Congress held some hearings on detention issues<sup>142</sup> and some members of Congress were briefed by the Bush administration on specific aspects of detention policy from time to time,<sup>143</sup> Congress remained largely on the sidelines while the executive branch implemented these dramatic changes.<sup>144</sup>

In contrast to, and perhaps because of, Congress's initial lack of involvement in formulating detainee policy, the federal courts quickly found themselves in the middle of the issue when, in February 2002, a large number of Guantánamo detainees sued to contest their detention.<sup>145</sup> The detainees alleged that their confinement violated the Constitution, federal laws, and treaties to which the United States was a signatory.<sup>146</sup> They argued that they had a right to contest their detention in federal court under the federal habeas statute—28 U.S.C. §§ 2241-43—which granted the federal courts the authority to hear petitions for writs of habeas corpus “within their respective jurisdictions” challenging unlawful detention.<sup>147</sup> The detainee cases wound their way through the federal courts<sup>148</sup> until June 2004, when the Supreme Court decided in *Rasul v. Bush* that the Guantánamo detainees had a right to contest their detention in federal court.<sup>149</sup> Although *Rasul*, decided by a vote of six to three, concluded that Guantánamo detainees had a statutory right to file habeas petitions, the Court did not address whether this right was merely statutory rather than constitutional and, therefore, subject to valid elimination by Congress.<sup>150</sup>

142. See Congressional Hearings on Military Commissions, available at <http://www.cnss.org/militarytribunals.htm>.

143. Robin Toner, *Political Memo; Few in Congress Questioning President Over Civil Liberties*, N.Y. TIMES, Dec. 5, 2001, at A1.

144. A few members of Congress claimed to have expressed interest in crafting legislation to govern post-September 11 detention issues. Senator Specter, for instance, stated that he broached the idea of introducing legislation governing detainee treatment in conversations with the Bush administration in early 2002 but was rebuffed. Kate Zernike, *A Top Senate Republican is Uncertain on Legislation for Military Tribunals for Terror Suspects*, N.Y. TIMES, July 1, 2006, at A10.

145. Philip Shenon, *A Nation Challenged: Captives; Suit to be Filed on Behalf of Three Detainees in Cuba*, N.Y. TIMES, Feb. 19, 2002, at A1.

146. *Rasul v. Bush*, 542 U.S. 466, 472 (2004).

147. 28 U.S.C. §§ 2241(a), (c)(3) (2000); see also *Rasul*, 542 U.S. at 473.

148. See *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003), *rev'd*, 352 F.3d 1278 (9th Cir. 2003), *vacated*, 542 U.S. 952 (2004); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

149. *Rasul*, 542 U.S. at 466.

150. *Id.* at 478. In his *Boumediene* concurrence, Justice Souter, joined by Justices Breyer and Ginsburg, argued that *Rasul* was not ambiguous as regards the applicability of constitutional—not just statutory—habeas jurisdiction to detainees at Guantánamo. *Boumediene v. Bush*, 128 S. Ct. 2229, 2278 (2008) (Souter, J., concurring) (“[N]o one who reads the Court’s opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases. . . .”). As Justice Scalia correctly pointed out in his *Boumediene* dissent, however, *Rasul* was devoted primarily to explaining why the statutory predicate for the *Johnson v. Eisentrager*, 339 U.S. 763 (1950), decision was no longer valid, and did not expressly focus on the question of constitutional habeas jurisdiction over enemy combatants held abroad. *Id.* at 2300 n.4 (Scalia, J., dissenting).

The *Rasul* Court also did not explain the extent of review and relief to which detainees were entitled by virtue of their habeas petitions. As Professors Richard Fallon and Daniel Meltzer have explained, habeas jurisdiction functions like an “on-off” switch: while “[t]he meaning of the ‘off’ position is clear: the petition must be dismissed,” “the meaning of the ‘on’ position can vary greatly: review can range from de novo judicial decision of all pertinent questions of fact and law to a highly deferential inquiry into only some aspects of [detention].”<sup>151</sup> *Rasul* simply decided that the habeas switch was “on” for Guantanamo detainees in federal court based on a federal statute. *Rasul* distinguished the Court’s 1950 decision in *Johnson v. Eisentrager*,<sup>152</sup> which held that federal courts’ habeas jurisdiction did not extend to twenty-one Germans accused of war crimes held at a United States military prison in Germany after World War II, primarily on the basis of intervening decisions changing the Court’s interpretation of the federal habeas statute.<sup>153</sup> Notwithstanding one cryptic footnote that some observers read as supporting the validity of the detainees’ substantive—as opposed to jurisdictional—claims,<sup>154</sup> the *Rasul* majority opinion did not clearly articulate the scope of habeas review in which the lower courts should engage, or whether the detainees could validly assert rights under the U.S. Constitution, federal statutes, or treaties.

As a result of *Rasul*’s ambiguity, lower courts subsequently disagreed as to what, exactly, *Rasul* guaranteed the Guantánamo detainees.<sup>155</sup> Some courts looked to the Supreme Court’s decision in *Hamdi v. Rumsfeld*,<sup>156</sup> a case decided the same day as *Rasul*, for help.<sup>157</sup> Like *Rasul*, *Hamdi* addressed the question of whether a detainee caught in Afghanistan—Yaser Hamdi, an alleged affiliate of the Taliban—could challenge his detention by petitioning a federal court for a writ of habeas corpus. Unlike the *Rasul* detainees, however, Hamdi was an American citizen. Despite his citizenship, the Bush administration sought to dismiss Hamdi’s habeas petition, arguing that President Bush had the authority to detain even an American citizen who was caught engaging in hostilities against the United States in Afghanistan.<sup>158</sup> Eight justices of the Supreme Court disagreed with the Bush administration, with the controlling

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151. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2049 (2007).

152. 339 U.S. 763 (1950).

153. 542 U.S. at 475-79.

154. *Id.* at 483 n.15.

155. Compare *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-21 (D.D.C. 2005) (*Rasul* as “on” switch to nothing), with *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463 (D.D.C. 2005) (*Rasul* as “on” switch to meaningful review of custody).

156. 542 U.S. 507 (2004).

157. *E.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465 (D.D.C. 2005).

158. Although it sought to have Hamdi’s petition dismissed on the merits, the Bush administration conceded that the federal courts had jurisdiction to hear Hamdi’s habeas petition. *Hamdi*, 542 U.S. at 541 (Souter, J., concurring in part and dissenting in part).

majority of six justices<sup>159</sup> concluding that Hamdi was entitled under the Fifth Amendment to “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>160</sup> Although Justices Scalia and Stevens argued in dissent that, in the absence of a suspension of habeas corpus by Congress, which had not occurred, the government was compelled either to try Hamdi in the criminal courts or release him,<sup>161</sup> the controlling majority required only that Hamdi be given “some system” for refuting his classification as an “enemy combatant” before a neutral decisionmaker,<sup>162</sup> even if that system, unlike the criminal justice system, were to rely on hearsay evidence and a rebuttable presumption in favor of the government’s allegations.<sup>163</sup>

By its own language, the holding in *Hamdi* applied only to “citizen detainee[s].”<sup>164</sup> Nonetheless, the Bush administration sought to comply with what it perceived to be *Hamdi*’s dictates by establishing a formal legal process for assessing whether *all* detainees at Guantánamo, citizens or not, were “enemy combatants.”<sup>165</sup> Through executive order and administrative regulations, the Bush administration created the military-run Combatant Status Review Tribunals (“CSRTs”), which offered Guantánamo detainees the chance to contest their designation as “enemy combatants” before a supposedly neutral decisionmaker.<sup>166</sup> Despite purporting to comply with *Hamdi*’s notions of what minimum due process must be afforded to detainees, many lawyers and legal scholars harshly criticized the CSRTs as not even meeting that rather low bar.<sup>167</sup> Specifically, the CSRTs were attacked as shrouded in secrecy, denying detainees the ability to hear and contest much of the evidence against them.<sup>168</sup> Most detainees did not have legal counsel during their proceedings.<sup>169</sup> Moreover, the government frequently sought rehearings for detainees who were initially found not to be “enemy combatants,” submitting the determination to a differently constituted panel of hearing officers in order to obtain a favorable result.<sup>170</sup>

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159. Justices Souter and Ginsburg largely disagreed with the approach taken in Justice O’Connor’s plurality opinion, which carried four Justices including O’Connor, but nonetheless signed on to the plurality’s judgment in order to give the Court a majority. *Id.* at 553-54.

160. *Id.* at 533.

161. *Id.* at 563-69 (Scalia, J., dissenting).

162. *Id.* at 535, 537.

163. *Id.* at 533-34.

164. *Id.* at 533.

165. 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>.

166. *Id.*

167. Fallon & Meltzer, *supra* note 151, at 2100 & n.286.

168. *Id.* at 2100 n.286 (explaining that only the Tribunal has access to the evidence used as a basis for determining enemy combatant status and that although the detainee may call witnesses, the Tribunal determines whether they are “reasonably available”).

169. *Id.* at 2 (explaining that detainees are provided only with a nonlawyer “personal representative” as of right).

170. William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. TIMES, July 23, 2007, at A1.

Even if the CSRTs were hardly a paradigm of “due process,” *Hamdi*, perhaps backhandedly, nonetheless spurred the executive to provide some process to noncitizen detainees held at Guantánamo.<sup>171</sup> *Hamdi*, however, spurred only the executive to act unilaterally; the Court did not require Congress and the executive to work together to pass legislation establishing a new regime for detaining terrorist suspects. Although *Hamdi* and *Rasul* were nominal defeats for the Bush administration, neither of the decisions, at least initially, spurred any action by Congress.<sup>172</sup> Rather, the result of *Hamdi* was, paradoxically, even more power in executive hands, at least as compared to Congress.<sup>173</sup>

In the wake of *Rasul*, the number of Guantánamo detainees filing petitions for habeas corpus review of their detentions soared.<sup>174</sup> Although *Rasul* had left undecided the scope of the detainees’ habeas review, it at least offered the detainees some chance for review of their detentions in federal court, a forum more likely to be neutral than a CSRT convened by the military.<sup>175</sup> The Bush administration fought back vigorously against the flood of post-*Rasul* habeas petitions on two fronts: in the courts and on Capitol Hill. In the courts, the Bush administration argued that *Rasul* was simply an “on” switch to nothing, since the detainees had no constitutional, statutory, or treaty rights upon which to rely.<sup>176</sup> On Capitol Hill, the administration and its allies sought to take advantage of

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171. Even before *Hamdi*, the government had ceased sending citizen-detainees to Guantánamo. Nonetheless, the Bush administration did not relent from the position that it had the authority to label American citizens as “enemy combatants” and detain them outside of the criminal justice system, even when captured on American soil, as in the case of Jose Padilla. The Supreme Court ducked answering squarely the question of whether Padilla’s detention was authorized in its initial consideration of his habeas petition, deciding instead that Padilla had filed his petition in the wrong district court. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Although the Fourth Circuit subsequently held that Padilla’s detention was legal, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), the government’s ultimate decision to prosecute Padilla in the civilian criminal courts while his petition for certiorari was pending allowed the Supreme Court to avoid deciding the question of the President’s authority to detain American citizens apprehended in the United States as “enemy combatants.” See *Hanft v. Padilla*, 546 U.S. 1084 (2006) (granting United States’ application to transfer Padilla from military custody to the federal prisons), *rev’g Padilla v. Hanft*, 432 F.3d 583, 585 (4th Cir. 2005) (refusing to grant government permission to transfer Padilla from military to civilian custody because of “appearance that” the government was trying “to avoid consideration of [Fourth Circuit’s *Padilla*] decision by the Supreme Court”).

172. In her plurality opinion in *Hamdi*, Justice O’Connor did note that “when individual liberties are at stake,” the Constitution “assuredly envisions a role for all three branches” of the federal government. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Some commentators read into this line a clear invitation to Congress to collaborate with the President on a plan for detainees. See Jeffrey Toobin, *Killing Habeas Corpus*, THE NEW YORKER, Dec. 4, 2007, at 46. If Justice O’Connor meant her comment as an invitation to Congress, Congress was slow to respond.

173. Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 384 (2006).

174. By November 2005, nearly 200 of the 500 detainees at Guantánamo had filed habeas petitions. Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1.

175. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2260 (2008).

176. E.g., Brief of Respondents at 10, *Rasul v. Bush*, 592 U.S. 466 (2004) (Nos. 03-334, 03-343).

*Rasul*'s apparent statutory—rather than constitutional—basis by amending the habeas statute to strip the federal courts of jurisdiction to hear habeas petitions brought by “enemy combatants.”<sup>177</sup> This effort culminated in the Detainee Treatment Act of 2005 (“DTA”).<sup>178</sup>

In addition to addressing a number of other issues regarding detainee treatment,<sup>179</sup> the DTA sought to establish judicial procedures by which the CSRT determinations could be reviewed. In particular, the Act gave the United States Court of Appeals for the District of Columbia Circuit “exclusive jurisdiction to determine the validity of any final determination of” a CSRT regarding an alien’s designation as an “enemy combatant.”<sup>180</sup> After much legislative wrangling,<sup>181</sup> the Act also amended the general habeas statute—28 U.S.C. § 2241—in a manner that appeared to at least restrict, if not eliminate, the availability of habeas relief to alien detainees at Guantánamo.<sup>182</sup> Specifically, the DTA amended the general habeas statute to require that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.”<sup>183</sup> While it appeared reasonably clear from this language that the Act prevented Guantánamo detainees from filing new habeas petitions, it was less clear whether the DTA eliminated the federal courts’ jurisdiction over the nearly 200 habeas claims of detainees then pending. Some senators who voted for the DTA—namely, Lindsey Graham and John Kyl—firmly believed that they were voting for a complete elimination of habeas for Guantánamo detainees,<sup>184</sup> while others,

177. Schmitt, *supra* note 174.

178. Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739 (codified in scattered sections of 10, 28 and 42 U.S.C.).

179. For instance, the DTA included the “McCain Amendment,” so named for Senator John McCain of Arizona, which required that all prisoners in Department of Defense custody be treated uniformly according to the Army Field Manual. DTA § 1002 (codified at 10 U.S.C. § 801). The Act banned cruel, inhumane, and degrading treatment of detainees, DTA § 1003 (codified at 42 U.S.C. § 2000dd), while also immunizing military and other governmental personnel from lawsuits and criminal prosecution for acts performed while interrogating detainees pursuant to official orders. DTA § 1004 (codified at 42 U.S.C. § 2000dd-1).

180. DTA § 1005(e)(2)(A), 119 Stat. at 2742. In reviewing CSRT determinations, the DTA required that the D.C. Circuit limit its consideration to whether the CSRT abided by Department of Defense regulations and whether the determination is “consistent with the Constitution and laws of the United States,” “to the extent . . . applicable.” DTA § 1005(e)(2)(C), 119 Stat. at 2742.

181. Senator Lindsey Graham’s initial proposal, which was passed by the Senate, but not the House, on November 10, 2005, would have amended the general habeas statute to read: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States . . . who is detained by the Department of Defense at Guantanamo Bay, Cuba.” *Graham Amendment on Detainee Judicial Review*, JURIST-GAZETTE, NOV. 10, 2005, <http://jurist.law.pitt.edu/gazette/2005/11/graham-amendment-on-detainee-judicial.php>.

182. DTA § 1005(e), 119 Stat. at 2742.

183. *Id.*

184. *E.g.*, 151 Cong. Rec. S14256-01, S14262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham); *see also* Brief of Senators Graham and Kyl as Amicus Curiae in Support of Respondents at 16-20, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Ad-

such as Carl Levin, voted for the DTA with the belief that it did not apply to pending claims.<sup>185</sup> Perhaps because of its ambiguity on this point,<sup>186</sup> this compromise version of the DTA's habeas-limiting provision passed the Senate by a vote of 84 to 14 before being incorporated into the DTA's final version.<sup>187</sup>

#### A. *HAMDAN* AND ITS AFTERMATH

Within seven months, the Supreme Court settled the question of the DTA's habeas-stripping scope in *Hamdan*, with the majority siding with Senator Levin's view that the Act did not strip the federal courts of jurisdiction over pending claims of Guantánamo detainees.<sup>188</sup> *Hamdan* involved a habeas petition brought by Salim Ahmed Hamdan, a Yemeni national held at Guantánamo since June 2002. The military accused Hamdan of being the personal driver to al Qaeda leader Osama bin Laden<sup>189</sup> and sought to try him through the system of military commissions that President Bush established in November 2001.<sup>190</sup> Hamdan contested the legality of the military commissions system through his habeas action. In deciding Hamdan's case, the Supreme Court ruled, five to three, that the President did not have the authority to unilaterally establish a military commissions system to try detainees.<sup>191</sup> Hamdan did not raise, and the Court did not consider, whether Hamdan's continued detention—even in the absence of trial by military commission—was legally justified.<sup>192</sup>

In rejecting the Bush administration's claims of authority to establish military commissions, the majority and concurring opinions in *Hamdan* highlighted the lack of clear congressional authorization for such a system.<sup>193</sup> For instance, in his brief concurrence, Justice Breyer noted that although "Congress has denied the President the legislative authority to create military commissions," "[n]othing prevents the President from returning to Congress to seek the authority he believes is necessary."<sup>194</sup> Justice Breyer stressed that the Court was "plac[ing] its faith" in

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dress Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 Weekly Comp. Pres. Doc. 1918 (Dec. 30, 2005) (indicating that the President believed that the DTA cut off all detainee habeas cases, pending or not, in federal court).

185. 151 Cong. Rec. S14257 (daily ed. Dec. 21, 2005) (statement of Sen. Levin) (citing "effective date" provision of statute, § 1005(h), as support for habeas limitations not applying to pending claims).

186. See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002) (arguing that legislators use ambiguous statutory language susceptible to inconsistent interpretations to gain support for the statute).

187. 151 Cong. Rec. S.12777-02, S12803 (daily ed. November 15, 2005).

188. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The Court did not decide the question of whether the Act applied to future habeas petitions. *Id.* at 2764.

189. *Id.* at 2761.

190. 66 Fed. Reg. 57,833 (Nov. 13, 2001).

191. *Hamdan*, 126 S. Ct. at 2793.

192. *Id.* at 2798.

193. *Id.* at 2775, 2779, 2798.

194. *Id.* at 2799.

America's democratic institutions to fashion a system for trying detainees that would comport with constitutional standards.<sup>195</sup> Similarly, Justice Kennedy, relying heavily on Justice Jackson's concurrence in the *Steel Seizure* case, noted that the President had acted "in a field with a history of congressional participation and regulation" that limited the President's powers.<sup>196</sup> While the President lacked authority to establish military commissions through executive order in the face of this congressional action, Congress nonetheless had the "power and prerogative" to "change the controlling statutes" to authorize what the President had done, Justice Kennedy wrote.<sup>197</sup>

The Court's decision in *Hamdan* elicited a flurry of reactions from politicians, lawyers, and legal scholars. Opponents of the Bush administration's detention policies hailed the Court's decision as a complete repudiation.<sup>198</sup> Senator Patrick Leahy, for instance, a vocal critic of the Bush administration's detention policies, praised the ruling as a "triumph for our constitutional system of checks and balances."<sup>199</sup> While many commentators focused on the fact that the Court had ruled against the Bush administration's aggressive assertions of power in the "war on terror," other commentators specifically praised the Court for its "democracy-forcing" approach.<sup>200</sup> Rather than foreclose any options to the political branches for dealing with terrorist suspects, as a ruling based more on substantive constitutional rights would have done, the Court's *Hamdan* decision "place[d] its faith" in the country's democratic institutions—namely, the President and Congress—to fashion a system for trying terrorist suspects.<sup>201</sup>

The Court's apparent invitation to Congress in *Hamdan* was uncharacteristic for a Court that had so jealously guarded its authority over constitutional interpretation, particularly under Chief Justice Rehnquist.<sup>202</sup> Moreover, the Court, seemingly aware of what it had long recognized as its decreased institutional legitimacy in the national-security context and likely frustrated by Congress' relative docility in the face of an extremely aggressive executive branch, appeared to embrace the idea that the best way to restrain an aggressive executive was to remind Congress of its important role in defining the limits of executive power. In

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195. *Id.* ("The Constitution places its faith in . . . democratic means. Our Court today simply does the same.")

196. *Id.* at 2800-01.

197. *Id.* at 2800. Justice Kennedy did note that whatever system Congress and the President ultimately adopted after "due consideration" would have to be "in conformance with Constitution and other laws." *Id.*

198. See Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

199. Press Release, Office of U.S. Senator Patrick Leahy, Reaction of Sen. Patrick Leahy on Supreme Court's Decision in *Hamdan* Case, June 30, 2006, <http://leahy.senate.gov/press/200606/062906.html> (calling decision a "triumph for our constitutional system of checks and balances").

200. *E.g.*, Balkin, *supra* note 10.

201. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

202. See *supra* notes 57-61 and accompanying text.

this sense, *Hamdan* represented a marked shift even from *Hamdi*, which just two years earlier had not called for increased legislative involvement in setting rules for detaining terrorist suspects. Whereas *Hamdi* had simply imposed judicially bounded mandates on the executive, *Hamdan* appeared to be an invitation—if not a prod—to Congress to involve itself in setting the rules for detainees.

The Supreme Court decided *Hamdan* a little more than four months before the November 2006 midterm congressional elections. The impending elections placed additional pressure on Congress to address the detainee issues *Hamdan* placed squarely in the political sphere. By the summer of 2006, Democrats, the minority party in both the House and Senate, sensed a chance to make substantial gains, and perhaps even take over one or both houses of Congress, in the November 2006 elections in light of public dissatisfaction with the Bush administration's handling of the war in Iraq and Hurricane Katrina.<sup>203</sup> Nonetheless, Democrats feared that Republicans would paint them as “soft” on terrorism, as Republicans had done so successfully in the two national elections after the September 11 attacks. In 2002, Republicans used national security issues to pad their majority in the House of Representatives and retake control of the Senate, overcoming historical odds against a president's party gaining seats midway through his first term.<sup>204</sup> In 2004, President Bush, en route to re-election, and his surrogates ruthlessly attacked the Democratic nominee, Senator John Kerry, as weak on national security.<sup>205</sup> Republicans also gained seats in both the House and Senate in the 2004 elections, in part due to a campaign focused on national security.<sup>206</sup> The Congress in which the *Hamdan* Court “place[d] its faith,” therefore, comprised a majority of the same party as the President and a minority terrified of doing anything that might be characterized as “soft” on terrorism.<sup>207</sup>

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203. Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. 1562, 1589 (2007).

204. Robin Toner & Carl Hulse, *The 2002 Election: Congress; By Acquiring Full Control of the Congress, Republicans Gained New Responsibility*, N.Y. TIMES, Nov. 10, 2002, at A28. Specifically, Republican candidates attacked Democrats on two national security-related issues: the looming invasion of Iraq, which Democrats were accused of opposing or not supporting with sufficient zeal, see Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 928-29 (2007), and the creation of a Department of Homeland Security, which Democrats were accused of obstructing in order to ensure union and civil-service protections for its employees. Carl Hulse & David Firestone, *Senate Follows House on the Road Out of Washington and Plans to Return on Nov. 12*, N.Y. TIMES, Oct. 18, 2002, at A29.

205. Mark Danner, *How Bush Really Won*, N.Y. REV. OF BOOKS, Jan. 13, 2005, at 48.

206. Carl Hulse, *Bigger Republican Majority Plans to Push Bush Agenda*, N.Y. TIMES, Jan. 2, 2005, at A16.

207. See *infra* note 219.

## B. LEGISLATIVE HISTORY OF THE MCA

If the *Hamdan* majority's process-based objections to the presidentially established military commission system were merely cover for more substantive objections, the Bush administration sought to call the Court's bluff, and quickly. Soon after *Hamdan*, administration officials began urging Congress to provide the President with the very authority that the Court in *Hamdan* said he lacked—but could obtain from Congress—to establish a military commission system that would differ only slightly from the system established by executive order in 2001.<sup>208</sup> Despite the initial objections of some Republicans, many Democrats,<sup>209</sup> and top career military lawyers<sup>210</sup> to approving a military commission, rather than court-martial, system for trying terrorist suspects, the Bush administration's Republican allies in the House of Representatives quickly introduced legislation similar to the President's proposal in the summer months of 2006.<sup>211</sup> In addition to establishing military commissions, the House bill, consistent with Bush administration desires, stripped federal courts of jurisdiction to hear habeas claims of all Guantánamo detainees, allowed the commissions to use classified evidence not disclosed to defendants, and weakened Geneva Convention protections.<sup>212</sup> Republican Representative Duncan Hunter of California, the chairman of the Armed Services Committee that was responsible for drafting the military commissions bill in the House, accurately summed up House Republicans' reaction to *Hamdan* when he stated flatly that they would “do what the President wants.”<sup>213</sup>

Despite also being under Republican control, the Senate, by contrast, opposed some aspects of the President's proposal. In particular, three prominent Republican senators with reputations for expertise and credi-

208. Kate Zernike, *Administration Prods Congress to Curb Detainee Rights*, N.Y. TIMES, July 13, 2006, at A1.

209. David S. Cloud & Sheryl Gay Stolberg, *Rules Debated for Trials of Detainees*, N.Y. TIMES, July 27, 2006, at A20; Zernike, *supra* note 208, at A1; Kate Zernike & Sheryl Gay Stolberg, *Detainee Rights Create a Divide on Capitol Hill*, N.Y. TIMES, July 10, 2006, at A1.

210. David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. TIMES, July 26, 2006, at A1.

211. The House Armed Services Committee approved military commissions legislation similar to President Bush's proposal on September 13, 2006, by vote of 52 to 8. Alexis Unkovic, *Conflicting Military Commissions Bills Moving Through Congressional Committees*, JURIST, Sept. 13, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/09/conflicting-military-commissions-bills.php>; Press Release, Office of the Press Secretary, President Meets with House Republican Conference at the U.S. Capitol (Sept. 14, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060914-4.html> (thanking the House for moving President Bush's legislation forward). The House Judiciary Committee approved the same bill by a much closer vote, 20 to 19, with all seventeen Democrats who took part in the voting opposing the bill, along with two Republicans. Katerina Ossenova, *House Judiciary Committee Approves Military Commissions Bill after Killing It*, JURIST, Sept. 21, 2006, available at [http://jurist.law.pitt.edu/paperchase/2006\\_09\\_21\\_indexarch.php#115885112651242297](http://jurist.law.pitt.edu/paperchase/2006_09_21_indexarch.php#115885112651242297).

212. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 28, and 42 U.S.C.).

213. Kate Zernike, *Rebuff for Bush on How to Treat Terror Suspects*, N.Y. TIMES, Sept. 15, 2006, at A1.

bility on military matters—Senators John Warner, John McCain, and Lindsey Graham (“the Warner group”)—pushed a rival military commissions bill that provided stronger protections for detainees than the administration’s and House’s proposals, although it too eliminated habeas jurisdiction for detainees.<sup>214</sup> On September 14, 2006, the Senate Armed Services Committee, chaired by Senator Warner, passed the rival bill.<sup>215</sup> Despite objecting to its elimination of habeas jurisdiction, some Armed Services Committee Democrats voted for the bill in committee with the hopes that the habeas-stripping provision could be altered or deleted later on the Senate floor.<sup>216</sup> The committee’s passage of the rival bill precipitated contentious negotiations between the administration and the Warner group regarding the differences between the two camps.<sup>217</sup> Although Democrats constituted a filibuster-worthy caucus of forty-five in the Senate<sup>218</sup> and had provided most of the votes to push the Warner bill out of committee, they were more than happy to let prominent Republican senators lead the fight for greater detainee rights rather than do so themselves and risk appearing soft on terrorism. Even though some prominent Democrats had expressed major concerns about the potential habeas-stripping provision, the Democratic leadership, in the words of Minority Leader Reid, “[s]at on the sidelines” watching the “catfight” between the Warner group and the Bush administration.<sup>219</sup> On September 22, the administration and the Warner group agreed to a compromise bill that provided some increased protections for military commission defendants, including allowing them to see all of the evidence used against them.<sup>220</sup> The compromise, however, retained the provision that stripped federal courts of their jurisdiction to hear habeas claims of noncitizen enemy combatants.<sup>221</sup>

It was not only Senate Democrats who expressed concern about the stripping of habeas jurisdiction. Senator Arlen Specter, Republican of Pennsylvania and chair of the Senate Judiciary Committee, made clear to

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214. *Id.*

215. *Id.*; S. 3901, 109th Cong. (2006) [hereinafter “Warner Bill”]. In moving the bill out of committee, Warner, Graham, and McCain were joined by one moderate Republican Senator, Susan Collins of Maine, as well as the entire slate of the committee’s Democrats for a 15-9 vote. Zernike, *supra* note 213.

216. See, e.g., Press Release, Press Office of Senator Carl Levin, Statement of Senator Carl Levin Regarding Mark-up of Military Commissions Bill (Sept. 14, 2006), available at <http://www.senate.gov/~levin/newsroom/release.cfm?id=263067>.

217. Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal Over Detainee Treatment*, N.Y. TIMES, Sept. 23, 2006, at A9.

218. The forty-five included Senator James Jeffords of Vermont, an Independent who caucused with the Democratic minority.

219. Charles Hurt, *McConnell: Democrats AWOL in Terror War*, WASH. TIMES, Sept. 25, 2006, at A4; see also Zernike & Stolberg, *supra* note 217.

220. *Id.*; David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 175-76 (2008) (“Overall the MCA brings the commission process much closer to the judicial form of a court-martial.”)

221. Military Commissions Act of 2006, § 7, 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241(e) (Supp. 2007)).

his fellow senators that he considered any military commissions bill with a habeas-stripping provision to be unconstitutional. Although the Senate leadership did not refer the compromise bill to the Judiciary Committee, as Senator Specter had requested,<sup>222</sup> Specter nonetheless held hearings on the constitutionality of the proposed habeas-stripping language soon after the Warner-Bush compromise had been brokered. At the hearings, numerous witnesses testified that the bill's elimination of habeas rights for detainees would exceed Congress's constitutional powers, and would likely be invalidated by the Supreme Court.<sup>223</sup> Senator Specter himself observed during the hearing that if the compromise bill passed without amendment, "the Supreme Court will teach Congress another lesson" by invalidating the habeas-stripping provision.<sup>224</sup> Specter and the ranking Democrat on the Judiciary Committee, Senator Leahy, indicated at the hearing that they would seek to repeal the habeas-stripping provision from the compromise bill when it reached the Senate floor.<sup>225</sup>

Meanwhile, the House of Representatives passed an altered version of the Senate's compromise legislation on September 27, entitled the Military Commissions Act. Just a couple of days before, House Republicans, at the behest of the White House, re-drafted their version of the compromise bill so as to make it easier for the executive to label noncitizens "enemy combatants" subject to the military commission's jurisdiction.<sup>226</sup> In passing the Act, House Republican leadership beat back Democratic attempts to preserve habeas corpus rights for Guantánamo detainees.<sup>227</sup> During the floor debates regarding the Act, House Republicans made it clear that they understood the Supreme Court's decision in *Hamdan* to be an invitation to Congress to establish a system for detaining and trying detainees, and they believed that this legislation responded to the invita-

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222. Press Release, Senator Arlen Specter, Senator Specter Speaks on the Senate Floor Regarding Habeas Corpus (Sept. 20, 2006), available at [http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.ArlenSpecterSpeaks&ContentRecord\\_id=647f90af-71bf-4daa-ba00-d23e1002c9e3&Region\\_id=&Issue\\_Id](http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.ArlenSpecterSpeaks&ContentRecord_id=647f90af-71bf-4daa-ba00-d23e1002c9e3&Region_id=&Issue_Id).

223. E.g., *Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 76-77 (2006) (written testimony of Jonathan Hafetz).

224. Kate Zernike & Carl Hulse, *Security and War Take Center Stage as Campaign Break Nears*, N.Y. TIMES, Sept. 26, 2006, at A16.

225. *Examining Proposals to Limit Guantanamo Detainee's Access to Habeas Corpus Review: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 109-113 (2006), available at <http://bulk.resource.org/gpo.gov/hearings/109s/30633.pdf> (statements of Sens. Leahy and Specter).

226. Specifically, the bill, which would become the final version of the MCA, defined "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," 10 U.S.C. § 948a, whereas the Senate Armed Services Committee bill had defined the term more narrowly to include only those "engaged in hostilities against the United States." Warner Bill § 948(a), *supra* note 215. The revised House bill made other changes to the Armed Services Committee bill, such as not allowing detainees to "examine and respond to" all evidence against them and loosening the language restricting the use of evidence obtained without a search warrant. Carl Hulse & Kate Zernike, *Deal Is Likely on Detainees but Not on Eavesdropping*, N.Y. TIMES, Sept. 27, 2006, at A20.

227. See 152 Cong. Rec. H7517 (daily ed. Sept. 27, 2008) (statement of Rep. Slaughter).

tion.<sup>228</sup> Moreover, despite Democrats' repeated objections that the bill's stripping of detainees' habeas rights was unconstitutional and would invite judicial invalidation,<sup>229</sup> those House Republicans who spoke on the floor indicated that they believed that the bill was constitutional and would withstand court scrutiny.<sup>230</sup> The bill passed the House 253-168, with Republicans supporting it 219-7 and Democrats opposing it 160-

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228. See, e.g., *id.* at H7511 (statement of Rep. Dreier) ("We are here working on this legislation because . . . [t]he judicial branch directed Congress to establish procedures for military commissions."); *id.* at H7514 (statement of Rep. Hunter) ("[The Supreme Court] said that the President couldn't [set up military commissions] himself, that it had to be participated in by Congress . . .").

229. See, e.g., *id.* at H7513 (statement of Rep. Skelton) ("[I]f you want to be tough on terrorists, pass a statute that will meet the scrutiny of the Supreme Court . . ."); *id.* at H7514 (statement of Rep. Tauscher) ("We need a bill that is not going to be turned over by the Supreme Court . . ."); *id.* at H7515 (statement of Rep. Pelosi) ("[T]his bill . . . does violence to the Constitution of the United States . . ."); see also 152 Cong. Rec. H7539 (daily ed. Sept. 27, 2006) (statement of Rep. Reyes); *id.* at H7541; *id.* at H7548 (statement of Rep. Lofgren); *id.* at H7553 (statement of Rep. Levin) ("This [bill] will not pass constitutional muster."); *id.* at H7555 (statement of Rep. Nadler) ("This bill is flatly unconstitutional . . ."); *id.* (statement of Rep. Lantos) ("I . . . fully expect to be back debating these issues when the Supreme Court overturns this ill-advised legislation."). All of the above-cited objections to the bill were raised by *opponents* of the MCA; the Supreme Court has largely ignored statements made by opponents when attempting to discern legislative intent. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); but see *Costello*, *supra* note 96, at 54.

230. Specifically, House Republican supporters of the MCA argued that any constitutional right to habeas corpus was not available to noncitizen detainees held overseas (including Guantánamo Bay) and that Congress, therefore, had the authority to constrict the statutory habeas corpus right. In making this argument, Republicans stressed that they understood the holding of the Supreme Court's opinion in *Rasul* to be purely statutory. See, e.g., 152 Cong. Rec. H7513 (daily ed. Sept. 27, 2006) (statement of Rep. Lungren) ("We are not talking about the great writ that is found in the Constitution, the great writ of habeas corpus. We are talking about a statutory writ, which the Supreme Court has said time and time again Congress has the right to create, Congress has the right to restrict, Congress has the right to eliminate."); 152 Cong. Rec. H7545 (statement of Rep. Sensenbrenner) ("The Supreme Court has never, never held that the Constitution's protections, including habeas corpus, extend to non-citizens held outside the United States."). Supporters of the MCA also argued that even if habeas were constitutionally required for noncitizen detainees held outside the United States, detainees already received an adequate substitute for habeas through the judicial review provisions the DTA established for CSRT determinations of "enemy combatant" status, which were preserved in the MCA. See *id.* at H7540 (statement of Rep. Hunter) ("Every single person held in Guantanamo has the right and will have the right under this legislation to contest whether or not they are . . . enemy combatants . . . . That, in my estimation, is an important type of habeas corpus . . . preserved in this bill."); *id.* at H7545 (statement of Rep. Sensenbrenner) ("[T]his bill reflects Congress's statutory determination that [detainees] are entitled to . . . a full and fair review of the government's core decisions authorizing their detention by the D.C. Circuit, a respected article 3 court."); 152 Cong. Rec. H7937 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter).

34.<sup>231</sup> In their zeal to “do what the President wants,”<sup>232</sup> the House of Representatives, dominated by the same party as the President, hardly functioned as the check on executive power that the *Hamdan* Court might have envisioned.<sup>233</sup> Nonetheless, it is fair to say that the Republican-led House passed the MCA with the intent that it survive judicial scrutiny; in other words, for the vast majority of House members who voted in its favor, the MCA was *not* an intentionally unconstitutional law.<sup>234</sup>

The story in the Senate was quite different. Unlike the House, whose procedural rules make it easy for the majority party to push through its legislative priorities, the Senate’s rules—particularly its filibuster rule—give the minority party, or a minority on any particular legislative issue, substantial power to thwart legislation.<sup>235</sup> In late September 2006, it appeared that a substantial minority of the Senate had major constitutional concerns regarding the stripping of habeas jurisdiction for detainees’ claims. As noted above, Senator Specter flatly stated that Section 7 of the MCA, the habeas-stripping provision, was unconstitutional.<sup>236</sup> Other Democrats and some Republicans expressed similar reservations before the bill reached the Senate floor on September 28, 2006.<sup>237</sup> Given these articulated concerns, one might have expected a credible filibuster threat from the senators who believed that stripping habeas violated the Consti-

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231. Final Vote Results for Roll Call 491, Sept. 27, 2006, <http://clerk.house.gov/evs/2006/roll491.xml> [hereinafter, “Roll Call 491”]. Two days later, on September 29, 2006, the House, for technical reasons, re-voted on the bill passed by the Senate on September 28, despite the fact that the Senate’s version of the bill was identical to the version voted on by the House on September 27. 152 Cong. Rec. H7925-02, H-7949 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner). The September 29 House vote was 250-170, with two Democrats—Representatives Charlie Melancon of Louisiana and Michael Michaud of Maine—switching their votes from “yeas” to “nays.” Compare 152 Cong. Rec. H7959-01, H7959 (daily ed. Sept. 29, 2006), with Roll Call 491, *supra*.

232. See Zernike, *supra* note 213.

233. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties Not Powers*, 119 HARV. L. REV. 2311 (2006).

234. Among the 253 supporters of the bill in the House, only one, Democratic Representative Rob Andrews of New Jersey, publicly expressed “severe reservations” about the habeas-stripping provision, which he considered constitutionally “ambiguous” and “not very wise.” 152 Cong. Rec. H7522-03, H7540 (daily ed. Sept. 27, 2006). Representative Andrews expressed hope that the Senate would amend the bill to restore detainees’ habeas rights before final passage. *Id.* Despite the Senate’s failure to restore such rights, Representative Andrews still voted for the MCA when it returned to the House for a final, *pro forma* vote on September 29. See Roll Call 491, *supra* note 231. At least one other Democratic Representative who voted for the Act—Sherrod Brown of Ohio, who was in the midst of a hotly contested campaign for Senate—would later say that his vote for the MCA was “wrong,” a “bad vote,” and a “mistake” due to the “heat of the campaign” that he would “correct . . . when [the time] comes.” Interview by Cenk Uygur with Sherrod Brown (June 18, 2007), <http://www.theyoungturks.com/story/2007/6/18/203319/396>; Progressive Senators’ Townhall—Take Back America 2007, June 19, 2007, available at <http://video.google.com/videoplay?docid=350640067067836268>. After ultimately winning his Senate election, Senator Brown voted in favor of restoring habeas rights to detainees when the Senate reconsidered the issue in 2007. See 153 Cong. Rec. S11688-03, S11697 (daily ed. Sept. 17, 2007).

235. Levinson & Pildes, *supra* note 233, at 2372.

236. See *supra* note 224 and accompanying text.

237. Zernike & Stolberg, *supra* note 217, at A9.

tution. No filibuster threat emerged, however. Rather, despite decrying the MCA on the Senate floor as “authoriz[ing] a vast expansion of the President’s power to detain people, even U.S. citizens, indefinitely and without charge,”<sup>238</sup> Senator Reid, the leader of the forty-five senate Democrats, did nothing to stop its passage.<sup>239</sup> Indeed, although he stated that he “personally believe[d]” that the MCA “is unconstitutional” and would “certainly be struck down by the Supreme Court in the years ahead,”<sup>240</sup> Reid had just a few days earlier ensured the Senate Republican leadership that he would allow an up-or-down floor vote on the MCA without the threat of a filibuster.<sup>241</sup> As leader of a party with forty-five votes, Reid stood as a potential “veto gate” to the MCA’s passage. Rather than attempt to pull together the forty-plus votes necessary to stop the passage of legislation that he had publicly assailed as unconstitutional, Reid let the bill proceed to an up-or-down vote.<sup>242</sup>

Reid was not alone in facilitating the MCA’s passage despite grave constitutional reservations. During the Senate’s floor debate of the MCA, Senator Specter, as promised, offered an amendment to strike Section 7.<sup>243</sup> Specter argued forcefully for his amendment, claiming that its passage was necessary to “retain[ing] the constitutional right of habeas corpus” and preventing the rolling back of “basic rights by some 900 years.”<sup>244</sup> Specter further warned that if his amendment did not pass and the bill proceeded as written with its habeas-stripping clause, the Supreme Court would strike the provision down and Congress would have to revisit the issue yet again.<sup>245</sup> Numerous Democrats also argued that

238. 152 Cong. Rec. S10354-02, S10419 (daily ed. Sept. 28, 2006) (statement of Sen. Reid).

239. See Sebastian Mallaby, *A Party Without Principles*, WASH. POST, Oct. 2, 2006, at A19 (“[I]f the Democrats had made common cause with the [MCA’s] Republican opponents, they could have filibustered the president’s bill. Why vote against something and simultaneously allow it through?”).

240. 152 Cong. Rec. S10354-02, S10419 (daily ed. Sept. 28, 2006).

241. *U.S. Congress Passes President’s Bill on Treatment and Trial of Terrorism Suspects; Habeas Corpus Amendment Defeated*, WORLD NEWS DIG., Sept. 28, 2006, at 741A1. In exchange for the promise of no filibuster, the Democrats received from the Senate’s Republican leadership a promise that they would be allowed to offer four amendments on the Senate floor, including an amendment to restore habeas rights to detainees. *Id.*

242. One might assert that Reid committed to an up-or-down vote gambling that the Specter habeas-preserving amendment would pass, and that once the amendment failed, he was obliged to keep his word. If so, this simply demonstrates that constitutional concerns—even those of grave magnitude—are subject to legislative logrolling. See *supra* text accompanying notes 93-95.

243. 152 Cong. Rec. S10263 (daily ed. Sept. 27, 2006) (statement of Sen. Specter).

244. *Id.* at S10264.

245. *Id.* at S10267. Shortly after the MCA’s passage, the Washington Post reported that Senator Specter had initially considered offering a more limited habeas-preserving amendment that would have allowed Guantánamo detainees to file only one habeas petition after a year of detention but was pressured to pull that amendment in favor of a broader habeas-preserving amendment because the Senate Republican leadership feared that the more limited version might pass. Jeffrey Smith, *Specter’s Role in Passage of Detainee Bill Disputed*, WASH. POST, Oct. 16, 2006, at A19. Specter denied that he was pressured into abandoning the more limited amendment. *Id.* The Post reported that some Democratic lobbyists and detainee lawyers were relieved that Specter’s limited amendment was not

Section 7 would be unconstitutional if enacted.<sup>246</sup> In addition to Senator Specter, one other Republican, Senator Gordon Smith of Oregon, publicly expressed constitutional concerns about the habeas-stripping provision, calling it “a frontal attack on our judiciary . . . and civil-rights laws” that “ought to trouble us all.”<sup>247</sup> Despite these concerns, the Specter amendment failed 51-48, with all but one of the Senate’s forty-five Democrats, Ben Nelson of Nebraska, voting in favor, joined by four Republicans, including Smith and Specter.<sup>248</sup> Of the forty-eight senators who voted in favor of Specter’s amendment, a total of fourteen (eleven Democrats and three of the four Republicans who voted for the amendment) would later vote for the MCA’s final version. That final version of the MCA, which stripped habeas, passed the Senate 65-34 on September 28, 2006, with fifty-three Republicans joined by twelve Democrats voting “yea.” Only one Republican—Senator Lincoln Chafee of Rhode Island—voted against the MCA.<sup>249</sup> The group of fourteen senators who voted *against* the stripping of habeas but *for* the final bill included Senators Smith and Specter, both of whom had expressed grave doubts about the constitutionality of Section 7 of the MCA.<sup>250</sup> Indeed, Specter, just

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offered and did not pass because a more limited habeas remedy would have been harder for the Supreme Court ultimately to invalidate. *Id.*

246. 152 Cong. Rec. S10354-02, S10357, S10359 (daily ed. Sept. 28, 2006) (statements of Sen. Leahy) (decrying bill as “wrong” and “flagrantly unconstitutional” in part because of its habeas-stripping provision); *id.* at S10360 (statement of Sen. Feingold) (The elimination of habeas “for any alien detained by the United States, anywhere in the world . . . almost surely violates our Constitution.”); *id.* at S10363 (statement of Sen. Feinstein) (“I do not believe the bill before us is constitutional.”); *id.* at S10365-66 (statement of Sen. Levin) (“If we don’t strike this court-stripping language in the bill before us . . . our expectation is that the courts will find this provision to be a legislative excess and strike it down as unconstitutional.”); *id.* at S10366 (statement of Sen. Byrd) (“How can we, the U.S. Senate, in this bill abolish habeas corpus by approving a provision that so clearly contravenes the text of the Constitution?”).

247. *Id.* at S10364.

248. *Id.* at S10369.

249. Chafee also voted *for* the Specter amendment. *Id.*

250. The other twelve senators included Democrats Thomas Carper, Tim Johnson, Mary Landrieu, Frank Lautenberg, Joseph Lieberman, Robert Menendez, Bill Nelson, Mark Pryor, Jay Rockefeller, Ken Salazar, Debbie Stabenow, and Republican John Sununu. *Id.* Of the eleven Democrats who voted for habeas preservation and for the bill, five—Carper, Lieberman, Menendez, Nelson, and Stabenow—were up for re-election in 2006, and at least four of the five may have feared that a “nay” vote on the final version of the bill would have been used against them in their campaigns by Republican opponents attempting to paint them as soft on terror. *See supra* text accompanying notes 204 to 207. Joe Lieberman is the one Democrat who likely did not fear this attack, as the main challenge to his incumbency came from the left in the guise of Ned Lamont, a Democrat who had beaten Lieberman in the primary in August. Jennifer Medina, *The Second Round Begins for Lieberman and Lamont*, N.Y. TIMES, Sept. 5, 2006, at B5. Indeed, among the Democratic senators who were up for re-election in 2006, six of fourteen—or 43%—voted in favor of the MCA, as opposed to just six of the thirty-one—or 19%—of Democratic senators who were either in the middle of a term or retiring in 2006. *Supra* note 248. All six of the Democratic senators who voted for the MCA and were up for re-election in 2006 won, as did all nine of the Democratic senators who voted against the MCA (Akaka, Bingaman, Byrd, Cantwell, Clinton, Conrad, Feinstein, Kennedy, and Kohl). *Id.* Of the six who voted for the MCA, five later voted, in September 2007 in the Democratic-controlled Senate (and Congress), in favor of a filibustered bill that would have restored habeas corpus to detainees. 153 Cong. Rec. S11688-03, S11697 (daily ed. Sept. 17, 2007). The one

before the vote on final passage of the bill, called the habeas-stripping section “patently unconstitutional,” yet he voted for the ultimate passage of the MCA regardless.<sup>251</sup> Shortly after casting his vote, Senator Specter expressed confidence to reporters that despite what he saw as the MCA’s grievous constitutional flaws, the courts would “clean it up.”<sup>252</sup> Senator Specter would later aid his hoped-for judicial cleanup by filing an amicus brief arguing that the MCA’s Section 7 was unconstitutional in the ensuing *Boumediene* litigation before the Supreme Court.<sup>253</sup>

Senators Specter and Smith were the only two among the group of fourteen to publicly articulate their belief that at least the habeas-stripping provision of the MCA was unconstitutional. Indeed, of the fourteen, Specter and Smith were the only Senators to speak at all about the MCA on the Senate floor. Nonetheless, it is highly likely that many, if not most, of the other twelve senators shared Specter’s and Smith’s constitutional doubt.<sup>254</sup> Indeed, of the twelve senators who voted for the MCA despite also voting for the failed Specter amendment, eleven later voted in favor of a failed attempt to restore habeas rights to detainees during the next session of Congress. Indeed, eight of those eleven—in addition to Senator Specter—also sponsored the habeas restoration bill.<sup>255</sup> It is reasonable to conclude, therefore, that of the sixty-five “yea” votes for the MCA, at least six—if not ten or more—cast their votes with the intent that the MCA’s habeas-stripping provision would be judicially invalidated or transmogrified per *Ashwander*. As more than sixty votes are normally required to clear the filibuster hurdle in the Senate, the failure of the thirty-four “nay” votes to join forces with the six or more Senators who

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exception was Senator Joe Lieberman, who by 2007 had become an “Independent Democrat” after losing the Democratic primary nomination for Senate to Lamont. *Id.* Indeed, all eleven of the remaining Democrats who voted in favor of the MCA later voted to restore habeas to detainees; eight of them (Carper, Lautenberg, Menendez, Bill Nelson, Pryor, Rockefeller, Salazar, and Stabenow) sponsored the legislation that would do so. *See Habeas Corpus Restoration Act of 2007*, S.185, 110th Cong. (2007).

251. Toobin, *supra* note 172, at 46.

252. *See supra* note 7.

253. *See supra* note 98.

254. On the other hand, it is clear that many of the proponents of the MCA voted in favor of the bill with the hope and expectation that it would be upheld by the courts. *E.g.*, 152 Cong. Rec. S10243-01, S10245 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) (“The goal of this legislation . . . is first and foremost to meet the challenge for withstanding review by the Supreme Court.”); *id.* at S10252 (statement of Sen. Graham) (“I bet you dollars to doughnuts when the Supreme Court gets hold of our work product they are going to approve it.”); *see also id.* at S10268 (statement of Sen. Kyl). In defending the bill, many of its Republican supporters argued that the elimination of habeas rights for noncitizen “enemy combatant” detainees was and ought to be constitutional, since noncitizens had no constitutional habeas rights, *see, e.g., id.* at S10265 (statement of Sen. Warner); *id.* at S10267 (statement of Sen. Kyl); 152 Cong. Rec. S10354-02, S10359 (Sept. 28, 2006) (statement of Sen. Sessions), and the detainees nonetheless received some judicial review of their detention through the DTA’s CSRT review provisions. *See* 152 Cong. Rec. S10243-01, S10266 (Sept. 27, 2006) (statement of Sen. Graham) (“[U]nder the Detainee Treatment Act . . . every detainee at Guantanamo Bay will have their day in Federal Court.”); *id.* at S10268 (statement of Sen. Kyl); *see also* 152 Cong. Rec. S10354-02, S10361 (Sept. 28, 2006) (statement of Sen. Cornyn); *id.* at S10394 (statement of Sen. Graham).

255. *See supra* note 250.

likely considered the habeas-stripping provision unconstitutional indicates that at least Section 7 of the MCA was intentionally unconstitutional. Applying the analysis discussed in Part II, the passage of the MCA can be illustrated through the following chart, which excludes reference to filibustering since neither Minority Leader Reid, nor any individual senator, attempted to filibuster:

| Group                      | Goal                            | Means                              | Vote on MCA |
|----------------------------|---------------------------------|------------------------------------|-------------|
| 51-59 senators             | Strip Gitmo detainees of habeas | Vote for MCA and courts uphold     | Yea         |
| 6-14 senators              | Preserve habeas for detainees   | Vote for MCA but courts invalidate | Yea         |
| 34 senators <sup>256</sup> | Preserve habeas for detainees   | Vote against MCA                   | Nay         |

Additional evidence of the MCA's intentional unconstitutionality is the failure of Senator Reid and other Democratic leaders who considered the MCA unconstitutional to call for a filibuster on the bill, which allowed the MCA to clear a crucial "veto gate." Indeed, Senator Reid's promise not to filibuster likely increased the number of Democratic senators who ultimately voted in favor of the MCA. Knowing that there was no filibuster to sustain and that the Republicans could guarantee the fifty votes needed for passage,<sup>257</sup> many Democrats likely viewed a "yea" vote for the MCA as relatively low-cost.<sup>258</sup> These senators' confidence in the Supreme Court's eventual invalidation or transmogrification of the MCA's habeas-stripping provision further lowered the cost they attached to a "yea" vote. Indeed, in an article written shortly after the MCA's passage, journalist Jeffrey Toobin quoted a Democratic Senate staffer as saying, "[W]e make fun of Specter" for voting for the MCA despite objecting to its habeas-stripping provision, "but we're basically leaving it up to the Courts, too."<sup>259</sup> Although some commentators have described the MCA as an example of the legislative process gone awry when the legislature is controlled by the same party as the President,<sup>260</sup> the Senate's filibuster procedure gave the minority Democrats a tool by which to block undesirable legislation that enhanced the President's power. Reid's and the Democrats' choice not to use this tool, therefore, is crucial to discerning Congress' intent in passing the MCA.

256. The number of senators adds up to 99, rather than 100, because one senator, Olympia Snowe of Maine, did not vote. 152 Cong. Rec. S10354-02, S10369 (daily ed. Sept. 28, 2006).

257. Because one Senator, Olympia Snowe of Maine, did not vote, only fifty votes were required to pass. *Id.*

258. Cf. Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 906 (2007).

259. See Toobin, *supra* note 172, at 46.

260. See, e.g., Tung Yin, *Tom and Jerry (and Spike): A Metaphor for Hamdan v. Rumsfeld, the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV. 505, 535 (2007) (citing Levinson & Pildes, *supra* note 233).

As discussed in Part II, a likely objection to this article's depiction of the MCA as an intentionally unconstitutional act is that the views of senators like Specter and Smith should not trump the views of all the other members of Congress who voted for the MCA with the publicly stated belief that it is constitutional and should be upheld by the courts.<sup>261</sup> While this objection has some validity, at most it proves that Congress' intent regarding the constitutionality of the MCA was ambiguous. Insofar as legislative intent always rests upon the extrapolation to a larger group of the publicly stated views of some subset thereof, attributing to the entire Congress opposition to the constitutionality of the MCA due to the publicly stated concerns of a few key members of Congress is no different.<sup>262</sup>

#### IV. THE SUPREME COURT'S REVIEW OF THE MCA'S SECTION 7 IN *BOUMEDIENE*

If *Hamdan* succeeded in "forcing democracy," the outcome of that democratic process disappointed those who hoped for a terrorist detention system that might better restrain executive discretion and protect human rights. Despite *Hamdan*'s apparent invitation, Congress appeared eager to pass the task of constitutional interpretation right back to the Supreme Court, and the Court is where the issue quickly went. Shortly after the MCA's passage, Guantánamo detainees challenged Section 7 as a violation of the Constitution's Suspension Clause.<sup>263</sup> Because there was no "rebellion or invasion," the detainees argued, Congress was without power to suspend their right to seek habeas relief in federal court, as the MCA purported to do.<sup>264</sup> Further, the detainees argued that insofar as the DTA and MCA provided them with an opportunity to challenge CSRT determinations in federal court,<sup>265</sup> this review procedure did not amount to the constitutionally required "adequate substitute" for the habeas review that the MCA had withdrawn.<sup>266</sup> As compared to traditional habeas review, the detainees argued that the CSRTs and judicial review thereof did not allow detainees to present their own evidence, did not provide neutral and plenary review of the authority for detention, unduly restricted the attorney-client relationship, were not speedy, and did not specifically authorize the remedy of release.<sup>267</sup> The government, on the other hand, responded that the detainees, as noncitizens held in a territory over which the United States was not formally sovereign, had no constitutional right to habeas. Even if the detainees had a right to

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261. See *supra* note 230 and 254.

262. See *supra* notes 121 to 124 and accompanying text.

263. The detainees also argued that their indefinite detention facilitated by the MCA violated their due process rights under the Fifth Amendment. Brief for the Petitioners at 44, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1196) [hereinafter *Boumediene* Petitioners' Brief].

264. *Id.* at 9.

265. See *supra* note 180 and accompanying text.

266. *Swain v. Pressley*, 430 U.S. 372 (1977).

267. *Boumediene* Petitioners' Brief, *supra* note 263, at 27-32.

habeas—the government argued, the CSRT’s and judicial review thereof through the DTA constituted an “adequate substitute” for habeas review.<sup>268</sup>

The first two rulings on the MCA’s constitutionality—one from a federal district court in the remand of Hamdan’s case and the other from the United States Court of Appeals for the D.C. Circuit, in *Boumediene v. Bush*—upheld Section 7.<sup>269</sup> After initially declining to grant certiorari in

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268. Brief for the Respondents at 14, 40, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195 and 06-1196).

269. The first ruling on the MCA came from Judge James Robertson of the United States District Court for the District of Columbia in December 2006 when considering Hamdan’s remanded habeas petition. Judge Robertson concluded that although the MCA’s stripping of habeas jurisdiction might be invalid as applied to those with a constitutional right to habeas (such as American citizens), Hamdan, as a nonresident enemy alien during a time of war, had no constitutional right to habeas corpus, and the MCA was therefore valid as applied to him. Accordingly, Judge Robertson dismissed Hamdan’s petition. *Id.* at 19. Two months later, in February 2007, the United States Court of Appeals for the D.C. Circuit ruled on the constitutionality of the MCA’s Section 7 in an appeal of habeas petitions filed by other Guantánamo detainees. By a vote of two to one, the D.C. Circuit concluded, in *Boumediene v. Bush*, that the MCA had validly repealed habeas jurisdiction from the federal courts over the detainees’ claims. 476 F.3d 981 (D.C. Cir. 2007). The majority rejected as “nonsense” the detainees’ semantics-based argument that the MCA’s habeas-stripping language was not sufficiently clear to strip the courts of jurisdiction over their claims. *Id.* at 987. Rather, the majority stated that to accept the detainees’ arguments regarding habeas would be to “defy the will of Congress,” *id.*, citing numerous members’ statements supporting the proposition that the MCA intended to repeal habeas rights from Guantánamo detainees. *Id.* at 986 n.2. The majority further concluded, like Judge Robertson, that because the petitioners were nonresident aliens held outside of sovereign United States territory, they had no constitutional right to habeas, and Congress’ alteration of the habeas statute was therefore valid. *Id.* at 991-94. Judge Judith Rogers, in dissent, agreed with the majority that Congress, through the MCA, had intended to deprive the courts of jurisdiction to hear habeas claims of Guantánamo detainees. *Id.* at 999. Unlike the majority, however, Judge Rogers asserted that the detainees need not show a personal, constitutional “right” to habeas to prove a constitutional violation. According to Judge Rogers, the Suspension Clause, unlike the Bill of Rights, did not provide rights to a class of persons; rather, it operated as a limitation on Congress’ powers. *Id.* at 997-98. Further, Judge Rogers read the limited historical evidence and *Rasul* as indicating that the constitutional writ of habeas extended to Guantánamo detainees. *Id.* at 1002-04. Because Congress had withdrawn jurisdiction over the detainees’ habeas claims through the MCA without providing “an adequate alternative procedure for challenging detention” (Judge Rogers viewed the CSRTs and judicial review thereof as inadequate, *id.* at 1004-07), and not during a “rebellion” or “invasion,” the MCA exceeded the powers of Congress. *Id.* at 1007.

One other federal court addressed the MCA’s Section 7 before the Supreme Court decided *Boumediene*, but not in a manner that required addressing the statute’s constitutionality. In *al-Marri v. Wright*, a three-judge panel of the United States Court of Appeals for the Fourth Circuit reviewed the dismissal of a petition for a writ of habeas corpus brought by a resident alien who had been declared an “enemy combatant” by President Bush and placed in military custody on a naval brig in South Carolina. 487 F.3d 160, 163-64 (4th Cir. 2007). Although the government argued that the MCA proscribed jurisdiction over al-Marri’s petition, the panel disagreed, ruling that the MCA was inapplicable to the petitioner because he was not “awaiting” a determination of combatant status by a CSRT. *Id.* at 169. The Fourth Circuit subsequently heard the case *en banc* and issued its ruling shortly after the Supreme Court decided *Boumediene*. *Boumediene*’s invalidation of the MCA’s Section 7 negated the government’s argument that the federal courts lacked jurisdiction over al-Marri’s claim. *Al-Marri v. Pucciarelli*, No. 06-7427, 2008 WL 2736787, at \*1 n.\* (4th Cir. July 15, 2008) (per curiam). In a highly fractured ruling, the Fourth Circuit held that if the government’s allegations were true regarding al-Marri’s terrorist plans and affili-

*Boumediene*,<sup>270</sup> the Supreme Court reversed course and heard the case at the beginning of its October 2007 term.<sup>271</sup> As expected due to the case's significance, the Court did not issue its decision until near the end of its term on June 12, 2008. In a five-to-four ruling, the Court invalidated the MCA's Section 7, holding that the detainees at Guantánamo have a constitutional right to habeas corpus that Congress cannot take away without providing an "adequate substitute," at least in the absence of a formal suspension of the writ, which the Court said the MCA was not.<sup>272</sup>

Writing for the majority, Justice Kennedy recognized that the question of whether aliens held as alleged enemy combatants at Guantánamo Bay, Cuba, an area over which the United States does not exercise formal sovereignty, had a constitutional right to habeas corpus was a novel one with no clear answer in the common-law tradition.<sup>273</sup> Rather than recognize this question as a constitutional gray area or quasi-political question in which the input of Congress might be useful, however, Justice Kennedy firmly rejected the notion that the case presented a "political question"<sup>274</sup> and emphatically re-asserted the Court's ultimate—and seemingly exclusive—prerogative to "say 'what the law is.'"<sup>275</sup> To that end, the majority retroactively limited *Hamdan*'s seemingly broad invitation to Congress to craft a constitutional system for detaining and trying terrorists,<sup>276</sup> re-reading it as inviting Congress only to provide authority for military commissions and expressly rejecting the idea that *Hamdan* had authorized or encouraged Congress to tinker with habeas as well.<sup>277</sup> In their dissents, Chief Justice Roberts and Justice Scalia sharply criticized the majority for this revisionist view of *Hamdan*.<sup>278</sup>

Proceeding from the standpoint that the case presented an issue best left to the judiciary to decide, the *Boumediene* majority drew heavily on the *Insular Cases*, a series of opinions from the early twentieth century holding that the Constitution applied at least in part to territories the

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ation with al Qaeda, the President had authority to detain him as an enemy combatant. *Id.* at \*1. The court also held, however, that al-Marri was entitled to further process on remand to the district court to contest the government's allegations. *Id.*

270. 127 S. Ct. 1478 (2007) (denying cert.).

271. 127 S. Ct. 3067 (2007) (vacating order denying cert., granting cert.).

272. *Boumediene v. Bush*, 128 S. Ct. 2229, 2272 (2008).

273. *Id.* at 2248-49 (noting that "[d]iligent search by all parties [regarding whether, at common law, the writ of habeas corpus ran to territories over which the British monarch was not sovereign] reveals no certain conclusions" and that historical evidence as to geographic scope of the writ at common law is "informative, but not dispositive"); *id.* at 2251 ("We decline . . . to infer too much, one way or the other, from the lack of historical evidence on point."); *id.* at 2262 ("[T]he cases before us lack any precise historical parallel.").

274. *Id.* at 2253.

275. *Id.* at 2259 (citing *Marbury v. Madison*, 5 U.S. 131, 1 Cranch 137, 177 (1803)).

276. See *supra* notes 193 to 195 and accompanying text.

277. *Id.* at 2242.

278. *Id.* at 2293 (Roberts, C.J., dissenting) ("Congress . . . has been unceremoniously brushed aside.") (citing Breyer's *Hamdan* concurrence); *id.* at 2295-96 (Scalia, J., dissenting) (quoting extensively from Justice Breyer's *Hamdan* concurrence and then concluding that the members of the Court who joined that opinion as well as the *Boumediene* majority "were just kidding").

United States had acquired after the Spanish-American War.<sup>279</sup> Relying on the *Insular Cases*, the majority rejected a “categorical or formal conception of sovereignty” in favor of a more functional, “de facto” test for whether aliens detained at Guantánamo might enjoy constitutional rights.<sup>280</sup> Using this functional, fact-based test, the Court concluded that the Suspension Clause “has full effect at Guantanamo Bay” due to the United States’ “absolute,” “constant,” and “indefinite” control of the area.<sup>281</sup>

Having concluded that the Suspension Clause applies at Guantánamo, the majority proceeded to address whether the CSRT review procedure established by the DTA amounted to an “adequate substitute” for the statutory habeas rights Congress sought to eliminate through the MCA’s Section 7. The Court’s precedents indicated that Congress’ removal of habeas jurisdiction did not necessarily present a Suspension Clause problem so long as Congress provided an “adequate substitute” therefor.<sup>282</sup> The majority, however, ruled that the procedure provided under the DTA was an inadequate substitute for habeas for a variety of reasons. Justice Kennedy’s opinion faulted the CSRTs for “constrain[ing] . . . the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant” because the detainee is not represented by counsel.<sup>283</sup> It also criticized the CSRTs for not allowing detainees to see the classified evidence used against them and allowing detainees to remain imprisoned on the basis of hearsay evidence that need only be “relevant and helpful” to be admitted.<sup>284</sup> The majority then concluded that the DTA’s provision of D.C. Circuit review of CSRT determinations failed to cure these defects in large part because the DTA did not expressly provide any mechanism for a detainee to present exculpatory evidence to the D.C. Circuit that had not yet been presented

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279. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

280. *Boumediene*, 128 S. Ct. at 2253.

281. *Id.* at 2260. The Court distinguished Guantánamo from the Landsberg Prison at which the petitioners in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were held by United States forces after World War II on a number of bases, including the fact that the latter was a “transient possession” under the jurisdiction of the combined Allied Forces, not just the United States. *Id.* Moreover, the Court noted that whereas the naval base at Guantánamo Bay is “isolated and heavily fortified,” Landsberg Prison was a less secure location in the midst of “an occupation zone encompassing over 57,000 square miles with a population of 18 million.” *Id.* at 2261. Further, the Court distinguished *Eisentrager* on the basis that the petitioners there had apparently conceded their enemy combatant status and had received a trial by military commission shortly after their capture, *id.* at 2259; in contrast, many of the Guantánamo detainees had been imprisoned for more than six years and none had yet been tried for, much less charged with, war crimes. *Id.*

282. *Id.* at 2264 (citing *Swain v. Presley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952)).

283. *Id.* at 2260, 2269.

284. *Id.* at 2269 (“[G]iven that there are in effect no limits on the admission of hearsay evidence . . . the detainee’s opportunity to question witnesses is likely to be more theoretical than real.”).

before a CSRT.<sup>285</sup> Although the government had argued that a detainee in possession of new, exculpatory information could ask the military to convene a new CSRT,<sup>286</sup> the majority was unsatisfied because, Justice Kennedy wrote, the decision to convene a new CSRT was within the executive branch's unreviewable discretion.<sup>287</sup>

Pervading the *Boumediene* majority's opinion is a steadfast refusal to use *Ashwander* aggressively, much less at all, to remedy the defects in the CSRT-DTA scheme so as to find the MCA constitutional. Noting obliquely that "[t]he usual presumption is that Members of Congress, in accord with their oath of office" legislate constitutionally,<sup>288</sup> the majority then stated that "the canon of constitutional avoidance does not supplant traditional modes of statutory interpretation,"<sup>289</sup> despite the fact that on many occasions, especially in recent cases involving habeas corpus, it has.<sup>290</sup> Using non-*Ashwander*, "traditional" methods of statutory interpretation, the majority thought it abundantly clear that Congress' intent in passing the DTA and, later, the MCA, was to provide something less than the process provided by habeas corpus. Hence, the majority refused to read the DTA in a manner that would make its review procedure an "adequate substitute" for the habeas relief the MCA withdrew.<sup>291</sup> As Chief Justice Roberts noted in his dissent, the majority decided that "any interpretation of the [DTA] that would make it an adequate substitute for habeas must be rejected, because Congress could not possibly have intended to enact an adequate substitute for habeas."<sup>292</sup> Although Chief Justice Roberts intended his observation as a wry critique, the majority's decision is actually defensible from the standpoint of following Congress' intent, since Congress passed the MCA despite many crucial members' publicly stated beliefs that eliminating habeas for Guantánamo detainees

285. *Id.* at 2272-73.

286. *Id.* at 2273.

287. *Id.* at 2274 ("[W]e see no way to construe the DTA to allow a detainee to challenge the Deputy Secretary's [of Defense] decision not to open a new CSRT. . . .").

288. *Id.* at 2243 (emphasis added).

289. *Id.* at 2271 (noting that "[w]e cannot ignore the text and purpose of a statute in order to save it").

290. In *Zadvydas v. Davis*, for example, a five-to-four majority of the Court read a presumptive six-month limit on the detention of certain deportable aliens into a statute that contained no such limitation in its text, relying heavily on the *Ashwander* canon. 533 U.S. 678, 701 (2001). The Court's aggressive statutory interpretation in *Zadvydas* was criticized as inconsistent with congressional intent and "disingenuous" by Justice Scalia in his dissent. *Id.* at 707. The same five-to-four majority also used *Ashwander* in another habeas case that year, *INS v. St. Cyr*, 533 U.S. 289 (2001), to conclude that Congress had not eliminated the habeas jurisdiction of the federal courts to entertain aliens' legal claims through a recent statutory change. *Id.* at 300. The majority engaged in what Professors Fallon and Meltzer called a "disingenuous" and "tortured" reading of the relevant statute to avoid the potential Suspension Clause problems that a more straightforward reading might have raised. Fallon & Meltzer, *supra* note 151, at 2050.

291. *Boumediene*, 128 S. Ct. at 2274 ("[E]ven if it were possible, as a textual matter, to read into the [DTA] each of the necessary procedures we have identified, we could not overlook the cumulative effect of our doing so.").

292. *Id.* at 2292.

would be unconstitutional.<sup>293</sup> The *Boumediene* majority, therefore, interpreted the MCA in a manner largely consistent with Congress' intent, as this article has described it, by striking down Section 7 altogether. Indeed, the majority did what some critics of the *Ashwander* canon have argued is preferable: strike down the statute outright rather than re-write it to make it constitutional.<sup>294</sup>

Chief Justice Roberts's opinion, in contrast to the majority's, is notable for its desire to use *Ashwander* aggressively to interpret the DTA to sustain the MCA. In particular, Chief Justice Roberts focused on the DTA's catchall clause, which authorized the D.C. Circuit to decide on review whether CSRT proceedings were "consistent with 'the Constitution and laws of the United States.'"<sup>295</sup> Reading the catchall clause in conjunction with a strong application of *Ashwander*, as urged by Solicitor General Paul Clement at oral argument,<sup>296</sup> Chief Justice Roberts would have read the DTA to "permit the D.C. Circuit to remand a detainee's case for a new CSRT determination" in light of exculpatory evidence discovered after a detainee's initial CSRT.<sup>297</sup> Unlike Justice Kennedy, Chief Justice Roberts read the DTA as authorizing the D.C. Circuit to review a potential declination by the military to convene a new CSRT should the detainee obtain new evidence.<sup>298</sup> Chief Justice Roberts also invoked the *Ashwander* canon in support of his aggressive reading of the DTA to permit the D.C. Circuit to order the release of detainees, despite the statute's silence on the subject.<sup>299</sup>

Throughout his dissent, Chief Justice Roberts ignored Congress' unconstitutional intent in passing the MCA. Unlike the majority, Chief Justice Roberts viewed Congress' work as worthy of being salvaged, referring to the political branches' "good faith" in designing the CSRT-DTA detention review scheme,<sup>300</sup> as well as their justifiable (in his opinion) reliance on the Court's decision in *Hamdi* to fashion a constitutional mechanism for contesting detention.<sup>301</sup> In failing to recognize the MCA's

293. Of course, many other members of the enacting majority in both the House and Senate publicly argued for the MCA's constitutionality. See *supra* notes 230 and 254.

294. See *supra* note 19 and accompanying text.

295. *Boumediene*, 128 S. Ct. at 2280 (citing the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2742).

296. *Id.* at 2272 (citing Transcript of Oral Argument at 37, 53, *Boumediene*, 128 S. Ct. 2229) (Nos. 06-1195, 06-1196).

297. *Id.* at 2289.

298. *Id.* at 2290 n.2.

299. *Id.* at 2291 ("As the Court basically admits, the DTA can be read to permit the D.C. Circuit to order release *in light of our traditional principles of construing statutes to avoid difficult constitutional issues . . .*") (emphasis added); *id.* at 2291 ("To avoid constitutional infirmity, it is reasonable to imply more [into the DTA than just some sort of remedial authority vested in the D.C. Circuit].") (citing *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring)); *id.* at 2292 (urging reading of DTA that "avoids serious constitutional difficulty").

300. *Id.* at 2285; see also *id.* at 2284 (describing Congress' attempt to provide the accused alien combatants at Guantánamo a constitutionally adequate chance to contest their detentions as "considered").

301. *Id.* at 2285 (asserting that Congress followed *Hamdi* in establishing CSRT-DTA system, "only to find itself the victim of a constitutional bait and switch").

tainted legislative history, Chief Justice Roberts' dissent is arguably no more judicially modest than the majority opinion, since he would have aggressively construed the DTA to uphold the MCA.<sup>302</sup> Both Justice Kennedy and Chief Justice Roberts were willing to "clean up" the MCA: the majority preferred a comprehensive job—outright invalidation—to the dissent's *Ashwander* transmogrification. Which approach is more deferential to Congress is debatable, but the majority opinion was not the only one guilty of "judicial supremacy," as Justice Scalia charged in his dissent, and it was not wholly inconsistent with Congress' intent.<sup>303</sup>

While the *Boumediene* majority may have decided the case in a manner consistent with legislative intent, it nonetheless let Congress off the hook for its intentionally unconstitutional law.<sup>304</sup> The *Boumediene* decision may, therefore, only increase the incentive for members of Congress to vote for intentionally unconstitutional legislation in the future. To be fair, the Court was not faced with very good options. If it upheld the law, it would have contravened Congress' intent and validated a law that a majority of the Court, using its own interpretive tools, viewed as deeply flawed. If it either struck down the law, as it did, or followed Chief Justice Roberts and aggressively interpreted the DTA to sustain the MCA, it risked fostering further congressional dependence on judicial review. Perhaps there was a way, however, for the Court to have assuaged these competing concerns. The Court might have struck down the MCA and remanded the issue to Congress for reconsideration, with a more direct reminder to Congress of its obligation to uphold the Constitution than that which was offered by the *Boumediene* majority.<sup>305</sup> In doing so, the Court could have held the restoration of habeas in abeyance for a limited amount of time—say, 90 to 120 days—while Congress and the President crafted a new scheme that each believed to be constitutional.

Although formally unprecedented, a judicial "remand" on the basis of Congress' unconstitutional intent is not without support in the Constitution's text. As explained above, the constitutional structure envisions a role for Congress to play in interpreting the Constitution. Congress passing a law that it publicly acknowledges to be unconstitutional is a breach of Congress' proper role under the Constitution's lawmaking structure in a manner similar to a law that violates the presentment or bicameralism requirements.<sup>306</sup> The Constitution's text specifically states that members of Congress are "bound by Oath or Affirmation to support this constitution,"<sup>307</sup> just as it requires that bills be passed by two houses and

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302. See *Schauer*, *supra* note 11, at 81.

303. *Boumediene*, 128 S. Ct. at 2302 (Scalia, J., dissenting).

304. Of course, Chief Justice Roberts' approach, through its aggressive statutory interpretation, also lets Congress off the hook in its own way.

305. *Supra* text accompanying note 288.

306. U.S. CONST. art. I, § 7; *Clinton v. New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983); see also Paulsen, *supra* note 23, at 2722 (reading *Marbury* as "an argument for the personal constitutional responsibility of all who swear an oath to support the Constitution," including members of Congress).

307. U.S. CONST. art. VI.

presented to the President for his signature.<sup>308</sup> Although a full exploration of the justiciability of violations of the Congressional Oath of Office Clause is beyond the purview of this article, the Clause provides at least one textual source upon which the Court might have relied for invalidating the MCA's Section 7 on the basis of its intentionally unconstitutional nature alone.<sup>309</sup> As a general matter, it would be impractical and undesirable to require every member of Congress who votes for a law to certify in the congressional record, or testify before a court, that he believes—or believed at the time he voted—that the law's every provision is constitutional. In the case of the MCA, however, there were clear indicia of Congress' unconstitutional intent in the form of member statements and the voting patterns described above.<sup>310</sup> Further, while giving Congress a choice to legislate or face the restoration of habeas might raise separation-of-powers concerns, similar remedies are not unprecedented in state constitutional adjudication, where state supreme courts have often issued decisions allowing the legislature to establish a remedial scheme within a certain time frame.<sup>311</sup> Aside from the proposed time frame, the idea that the Court can establish a default constitutional rule that Congress may replace with an alternative scheme is unremarkable, common to habeas itself as well other constitutional rights.<sup>312</sup>

The Court's actual decision in *Boumediene* differs from the above proposal by restoring habeas immediately as a constitutional matter. It, therefore, does not "force democracy," but at least purports to leave room for the political branches to craft an "adequate substitute" for habeas in the future.<sup>313</sup> At the same time, nothing in *Boumediene* prohibits Congress from attempting to formally suspend habeas at Guantánamo in the near future, although it seems unlikely that the current Congress, now under Democratic control, would pursue such an option, as congressional Democratic leaders generally praised the *Boumediene*

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308. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 247 (1997) ("A Senator . . . would violate her oath of office by acting against the Constitution.").

309. There is some scholarship exploring the justiciability of questions involving the Presidential, rather than Congressional, Oath of Office Clause. See, e.g., Peter Raven-Hansen & William G. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 122 (1995).

310. See *supra* section III.B.

311. E.g., *Lewis v. Harris*, 188 N.J. 415, 463 (2006) (requiring state to either amend marriage statute to include same-sex couples or create "parallel statutory scheme" providing same rights and benefits within 180 days); *Baker v. State*, 170 Vt. 194, 224-26 (1999) (ruling that state legislature must provide same-sex couples with "same benefits and protections" offered to opposite-sex couples, but giving legislature "reasonable period of time" to "craft an appropriate means of addressing this constitutional mandate").

312. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (leaving open prospect that Congress or the states might devise an alternative scheme for protecting the Fifth Amendment privilege against self-incrimination besides the *Miranda* warning).

313. *Id.* at 2277 ("The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.").

decision.<sup>314</sup> Indeed, as a politically savvy institution, the Court likely felt more comfortable ruling in favor of the *Boumediene* petitioners knowing that the political winds had shifted significantly since the MCA was passed in the waning days of the Republican-controlled Congress.<sup>315</sup> Democrats won a decisive victory in the November 2006 midterm elections,<sup>316</sup> and President Bush's public approval ratings have continued to fall since then to record low levels.<sup>317</sup> Further, after taking control of Congress, Democrats attempted to restore habeas rights to detainees while the *Boumediene* litigation was proceeding. Although their attempt was stymied by a Republican filibuster in the Senate, the proposal to restore habeas to detainees at Guantánamo succeeded in attracting majorities in both houses of Congress.<sup>318</sup> The Court decided *Boumediene*, therefore, in the context of a politically weakened executive and a Congress whose leadership was likely to support the decision, even if it was incapable of repealing Section 7 of the MCA itself.

### CONCLUSION

It is tempting to interpret *Boumediene* as embodying a fundamental shift in how the executive is restrained during wartime, from a tripartite system in which Congress helps to constrain the president, as articulated by Justice Jackson in the *Steel Seizure* case and re-affirmed in *Hamdan*, to a *pas de deux* in which Congress sits idly by during—or even approves through legislation—the aggrandizement of executive power and counts on the courts to act alone in restraining the president. It is probably too

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314. Daniel W. Reilly, *Democrats Seize On Supreme Court Gitmo Ruling*, CBS NEWS, June 12, 2008, <http://www.cbsnews.com/stories/2008/06/12/politics/politico/theencrypt/main4175909.shtml>. Since *Boumediene*, the Bush administration—through Attorney General Michael Mukasey—has pressed Congress to blunt the ruling's impact by passing legislation that would, among other things, prevent detainees from being released into the United States, streamline post-*Boumediene* habeas proceedings, and “reaffirm” (in the administration's opinion) the government's authority to detain enemy combatants for the duration of the conflict with al Qaeda, the Taliban, and associated organizations. See Michael B. Mukasey, U.S. Att'y Gen., Speech Before the American Enterprise Institute (July 21, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/ag-speech-at-aei-july-21-2008.doc>. Democratic congressional leaders reacted coolly to Attorney General Mukasey's proposals. See, e.g., Press Release, Senate Democratic Communications Center, Reid Statement on Attorney General Mukasey's Remarks on 9/11 Detainees (July 21, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/sen-reid-on-mukasey-7-21-08.doc> (“It is hard to imagine that Congress can give this complex issue the attention it deserves in the closing weeks of this legislative session.”).

315. Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 830-31 (2007).

316. *Id.* at 830.

317. E.g., Paul Steinhauer, *Poll: More Disapprove of Bush than Any Other President*, CNN NEWS, May 1, 2008, <http://www.cnn.com/2008/POLITICS/05/01/bush.poll/>. It is worth noting that while President Bush's approval ratings have sunk to record lows, Congress' approval ratings also continued to fall to record-low levels even after the Democratic takeover. *Poll: Bush Approval Lower than Ever; Congress Matches All-Time Low*, FOXNEWS, Feb. 8, 2008, <http://www.foxnews.com/story/0,2933,329817,00.html>.

318. Carl Hulse, *Senate Blocks Appeals Options for Detainees*, INT'L HERALD TRIB., Sept. 21, 2007, at 4.

soon to declare *Steel Seizure* dead, however, given that *Boumediene* involved a unique set of facts and issues and was decided by a single vote on a sharply divided Court. That *Boumediene* concerned increased executive power vis-à-vis the judiciary, rather than simply vis-à-vis Congress (the more common context in which *Steel Seizure* applies), may limit its reach in other separation-of-powers cases.<sup>319</sup> Also, the *Boumediene* Court showed itself to be a particularly jealous guardian of the writ of habeas corpus, seeming to value preserving the writ because of its intrinsic, and perhaps even symbolic, rather than merely functional, value.<sup>320</sup> Finally, the *Boumediene* petitioners were particularly sympathetic plaintiffs—and candidates for habeas relief—because they had been held for a long period of time (some up to six years) without any guarantee of a trial in the near future, which clearly disturbed the majority.<sup>321</sup>

Nonetheless, the passage of the MCA demonstrates that Congress does not always intend for the laws it passes to survive judicial review intact, and sometimes relies on judicial review to “clean up” legislation it dislikes. *Boumediene* does nothing to change this dynamic, as the Court “cleaned up” the MCA’s Section 7 by invalidating it. *Boumediene* is only likely to increase the possibility of Congress passing intentionally unconstitutional legislation in the future. Further, the Court’s decision is unlikely to spur Congress to take a more forceful stand on other matters of constitutional importance about which it has also been particularly timid in challenging the executive in recent years, such as Iraq war funding,<sup>322</sup> warrantless wiretapping,<sup>323</sup> and the enforcement of congressional subpoenas against former and current executive branch officials.<sup>324</sup> Unless and

319. Paulsen, *supra* note 3, at 231.

320. See *Boumediene*, 128 S. Ct. 2229, 2292 (2008) (Roberts, C.J., dissenting) (criticizing majority for “mak[ing] no effort to elaborate how exactly” habeas “differ[s] from the procedural protections detainees enjoy under the DTA”).

321. *Id.* at 2263 (“[T]he fact that these detainees have been denied meaningful access to a judicial forum for a period of years render[s] these cases exceptional.”).

322. The Democratic Congress has repeatedly failed in its attempts to use Congress’ spending power to bring an end to the Iraq war. See Carl Hulse, *House Leaders Reach Deal on Top Spending Measure*, N.Y. TIMES, June 19, 2008, at A19; David M. Herszenhorn & Carl Hulse, *Effort to Shift Course in Iraq Fails in Senate*, N.Y. TIMES, Sept. 20, 2007, at A1; Carl Hulse, *Democrats Pull Troop Deadline from Iraq Bill*, N.Y. TIMES, May 23, 2007, at A1.

323. Despite initially raising vehement objections to the Bush administration’s warrantless wiretapping program, the Democratic Congress recently passed legislation that amplifies executive power over electronic surveillance and gives immunity from lawsuits to the telecommunications companies that cooperated with President Bush’s program. See Shailagh Murray, *Obama Joins Fellow Senators in Passing New Wiretapping Measure*, WASH. POST, July 10, 2008, at A6.

324. Former aides of President Bush, such as Joshua Bolten, Harriet Miers, and Karl Rove have ignored subpoenas to testify before Congress, claiming executive privilege. See Susan Crabtree, *Court Hears Arguments in Executive Privilege Case Involving Bolten, Miers*, THE HILL, June 23, 2007, at 6. *Rove Ignores Committee’s Subpoenas, Refuses to Testify*, CNN NEWS, July 10, 2008, available at <http://www.cnn.com/2008/POLITICS/07/10/rove.subpoena/index.html>. Rather than use some of the more direct tools available to Congress to enforce the subpoenas, such as cutting off funding to executive departments or even jailing witnesses for contempt of Congress, Crabtree, *supra*; Adam Cohen, *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES, Dec. 4, 2007, at A34, the

until voters begin to care more about whether members of Congress take seriously their obligation to support and defend the Constitution, members of Congress likely face little political risk in voting for legislation that they also proclaim to be unconstitutional.

