

**TALK LOUDLY AND CARRY A SMALL STICK: THE SUPREME
COURT AND ENEMY COMBATANTS**

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What a difference a year makes. In the summer of 2008, the Bush administration campaign to defend its enemy combatant policies lay in shreds. The Supreme Court had ruled against the administration's initiative in 2004, 2006, and 2008—decisions that had been characterized as “the most important decision[s] on presidential power and the rule of law ever,”¹ (Walter Dellinger), “a disaster for the war effort,”² (Robert H. Bork and David B. Rivkin, Jr.), and “a historic rebuke to the Bush administration,”³ (*The Washington Post*). The 2004 and 2006 rulings declared that Guantánamo Bay detentions were subject to federal court review and that the administration could not unilaterally pursue its enemy combatant policies. In 2008, the Court ruled in *Boumediene v. Bush* that neither Congress nor the President could strip the federal courts of jurisdiction to hear Guantánamo habeas petitions.⁴ Making matters worse, with presidential candidates Barack Obama and John McCain both agreeing that Guantánamo should be closed, the Bush administration's initiative seemed a political as well as a legal casualty.⁵

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1 Walter Dellinger, *A Supreme Court Conversation: The Most Important Decision on Presidential Power. Ever.*, SLATE, June 29, 2006, <http://www.slate.com/id/2144476/entry/2144825>.

2 Robert H. Bork & David B. Rivkin, Jr., *A War the Courts Shouldn't Manage*, WASH. POST, Jan. 21, 2005, at A17.

3 Robert Barnes, *Justices Say Detainees Can Seek Release*, WASH. POST, June 13, 2008, at A1; see also Robert S. Greenberger & Jess Bravin, *High Court Backs Detainees' Right to Challenge U.S.: In a Blow to Bush Policy, Ruling Says Terror Suspects Are Entitled to Hearings*, WALL ST. J., June 29, 2004, at A1 (indicating that the Court's Guantánamo decisions are “momentous”).

4 *Boumediene v. Bush*, 128 S. Ct. 2229, 2271–74 (2008).

5 Keith Perine, *High Court Strikes Guantánamo Laws*, CQ WEEKLY, June 16, 2008, at 1638 (“Presumed Democratic presidential nominee Sen. Barack Obama of Illinois said the [*Boumediene*] decision marked ‘an important step toward re-establishing our credibility as a nation committed to the rule of law. . . .’ His Republican counterpart, Sen. John

One year later, the landmark billing of these rulings seems suspect. Next-to-no detainees had been released from Guantánamo. Even though thirty detainees have prevailed in habeas proceedings,⁶ the Obama administration argued that these individuals do not have a “constitutional right to enter the United States.”⁷ Instead, these individuals were to remain in Guantánamo “in a non-enemy combatant status” until they or the administration could locate a country for them to return to.⁸ Further ensuring that Guantánamo detainees would remain at Guantánamo, the Democratic Congress enacted spending legislation blocking the closing of the facility.⁹ And, in a related development, the Obama administration backed Bush administration efforts to end-run *Boumediene* by bringing captured detainees to Bagram, Afghanistan—claiming that, unlike combatants held at the United States base on Guantánamo Bay, “military detainees [held] in Afghanistan have no legal right to challenge their imprisonment there.”¹⁰

Responding to these developments, lawyers for Guantánamo detainees went back to the well—returning to the Supreme Court to challenge both Obama administration practices and the federal spending law.¹¹ Having prevailed both before the Supreme Court in

McCain of Arizona . . . noted that he had ‘always favored closing . . . Guantánamo Bay.’”). Note too that Bush also wanted to close the prison at Guantánamo Bay. See Steven Lee Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16 (noting that “[d]espite his stated desire to close the American prison at Guantánamo Bay, Cuba, President Bush has decided not to do so”).

6 See David M. Herszenhorn, *In Shift, Leaders of Senate Reject Guantánamo Aid*, N.Y. TIMES, May 20, 2009, at A1 (observing that “[o]f the 240 detainees [at Guantánamo], 30 have been cleared for release”).

7 Brief for the Respondents in Opposition to Petition for Certiorari at 22, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (No. 08-1234).

8 *Id.* at 1–2.

9 See Herszenhorn, *supra* note 6 (“In an abrupt shift, Senate Democratic leaders said they would not provide the \$80 million that President Obama requested to close the detention center at Guantánamo Bay, Cuba.”).

10 Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6. See also Glenn Greenwald, *Obama and Habeas Corpus—Then and Now*, SALON.COM, Apr. 11, 2009, <http://www.salon.com/opinion/greenwald/2009/04/11/bagram/index.html> (reiterating “that military detainees [held] in Afghanistan have no legal right to challenge their imprisonment there”).

11 See Posting of Lyle Denniston to SCOTUSblog, *Detainees Challenge New Law*, <http://www.scotusblog.com/wp/detainees-challenge-new-law/> (June 25, 2009, 10:49 EST) (“Hours after President Obama signed into law a new set of restrictions on release of Guantánamo Bay detainees, lawyers for a group of prisoners told the Supreme Court . . . that the law appears to violate the Constitution.”); Posting of Lyle Denniston to SCOTUSblog, *Detainees: Habeas Right Now a Nullity*, <http://www.scotusblog.com/wp/detainees-habeas-right-now-a-nullity/> (June 5, 2009, 12:07 EST) (“One week short of the anniversary of the Supreme Court’s decision in *Boumediene v. Bush*, lawyers for 17

Boumediene and in subsequent habeas hearings, these litigants declared: “Something has gone awry. . . .”¹² “The Judicial Branch may hold hearings; it may even issue vague and unenforceable exhortations to diplomacy. But that is all. It has become the hortatory branch.”¹³ Initially, the Court did not bite. Notwithstanding the urgency of petitioners’ request, the Court held the case over for its 2009–2010 term.

In October 2009, the Court granted certiorari in the case *Kiyemba v. Obama*.¹⁴ By this time, however, the Court’s action received comparatively little attention—both in the mainstream press and in legal blogs.¹⁵ Unlike Bush-era cases (where the Court was seen as invalidating critically important presidential initiatives), *Kiyemba* was depicted as a low stakes gambit by the Court. In part, no one thought the case would meaningfully alter administration policies. The Obama administration remains committed to closing Guantánamo¹⁶ and, in September 2009, the administration reversed court on Bagram detainees—allowing detainees to see evidence, call witnesses, and much more.¹⁷ Furthermore, as several news stories noted, the case would

Guantanamo Bay detainees complained to the Court . . . that the ruling has been reduced to a mere exhortation, without legal effect.”).

12 Reply to Brief in Opposition to Petition for Certiorari at 1, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (No. 08-1234).

13 *Id.*

14 See Adam Liptak, *Justices to Hear Appeal From Uighurs Held at Guantánamo*, N.Y. TIMES, Oct. 21, 2009, at A1.

15 Major newspapers, while reporting on the cert grant, did little else. More telling, a quick look at two leading law professor blogs (Volokh Conspiracy and Balkinization) suggests that the blogosphere largely ignored the grant of certiorari. From October 20 (the day of the grant of certiorari) until October 26, 2009, there were no stories in Volokh Conspiracy about the certiorari grant—even though there were several postings on other Supreme Court developments and one posting on copyright issues tied to the playing of loud rock music at the Guantánamo facility. See Archive for October, 2009, The Volokh Conspiracy, <http://volokh.com/2009/10>. During the same period, Balkinization featured one story on the grant of certiorari—a cross post from an international law blog, OpinioJuris (which featured no other blogs about the case in the week after the granting of certiorari. See Posting of Deborah Pearlstein to Balkinization, *Kiyemba [sic] v. Obama*, <http://balkin.blogspot.com/2009/10/kiyema-v-obama.html> (Oct. 20, 2009, 14:39 EST).

16 When commenting on the Court’s decision to grant certiorari, the Obama administration noted that the President was committed to closing Guantánamo. See Posting of Lyle Denniston to SCOTUSblog, *New Detainee Case Granted*, <http://www.scotusblog.com/wp/new-detainee-case-granted/> (Oct. 20, 2009, 10:05 EST) (DOJ release provided in post).

17 See Karen De Young & Peter Finn, *U.S. Gives New Rights to Afghan Prisoners; Indefinite Detention Can Be Challenged*, WASH. POST, Sept 13, 2009, at A1. For its part, Congress has backed away efforts to prevent the administration from transferring detainees to the United States to be tried in federal courts. Peter Finn, *Key Democrats Would Let Guantánamo Detainees be Tried in U.S.*, WASH. POST, Oct. 8, 2009, at A7.

directly impact few, if any, detainees.¹⁸ By waiting until October to grant certiorari in the case, the Court deferred oral arguments (and a decision) until the end of its 2009–2010 term. By that time, the administration may seek to moot the case by either shutting down Guantánamo or relocating all petitioners.¹⁹

Without question, there are very real differences between the factual contexts of *Kiyemba* and Bush-era cases. These differences, however, do not account for the striking gap between accounts of *Kiyemba* as likely inconsequential and Bush-era cases as “the most important decisions” on presidential power “ever.”²⁰ In the pages that follow, I will argue that *Kiyemba* is cut from the same cloth as Bush-era enemy combatant decision making. Just as *Kiyemba* will be of limited reach (at most signaling the Court’s willingness to impose further limits on the government without forcing the government to meaningfully adjust its policymaking), Bush-era enemy combatant cases were modest incremental rulings. Notwithstanding claims by academics, opinion leaders, and the media, Supreme Court enemy combatant decision making did not impose significant rule of law limits on the President and Congress. Bush-era cases were certainly consequential, but they never occupied the blockbuster status that so many (on both the left and the right) attributed to them. Throughout the course of the enemy combatant dispute, the Court has never risked its institutional capital either by issuing a decision that the political branches would ignore, or by compelling the executive branch to pursue policies that created meaningful risks to national security. The Court, instead, took limited risks to protect its turf and assert its power to “say what the law is.” That was the Court’s practice during the Bush years, and it is the Court’s practice today.

18 See Jess Bravin & Evan Perez, *Court to Decide on U.S. Release of Uighurs at Gitmo*, WALL ST. J., Oct. 21, 2009, at A10; Liptak, *supra* note 14.

19 Indeed, news accounts of the grant of certiorari reveal that the administration had made arrangements to relocate all but one of the original seventeen detainee petitioners. See David G. Savage, *Supreme Court to Decide Who Can Release Guantánamo Prisoners*, L.A. TIMES, Oct. 21, 2009 (referencing letter from Obama Solicitor General Elena Kagan explaining that the administration had already found homes for all but one of the petitioners). Moreover, when announcing its decision to prosecute ten high profile Guantánamo detainees in civilian court and military commissions outside of Guantánamo, Obama Attorney General Eric Holder claimed the administration was taking a significant step forward in its efforts to close Guantánamo. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1. Of course, it is theoretically possible that some other plaintiff held at Guantánamo—assuming Guantánamo remains open—might bring a similar claim in the near future. See Posting of Lyle Denniston to SCOTUSblog, *Update on Kiyemba Case*, <http://www.scotusblog.com/wp/update-on-kiyemba-case/> (Sept. 24, 2009, 17:15 EST).

20 Dellinger, *supra* note 1.

My argument will proceed in three parts. First, I will argue that Bush-era enemy combatant decisions were anything but counter-majoritarian. These decisions tracked larger social and political forces. These decisions, moreover, were hugely popular with newspapers, academics, and other elite audiences (audiences that matter a great deal to centrist Justices). Second, contrary to media and academic portrayals of these cases as bold, decisive, and consequential, Bush-era decisions were truly incremental. The 2004 and 2006 decisions placed few meaningful demands on the administration; *Boumediene* was decided at a moment in time when the Court had good reason to think that the political process was well on its way to closing Guantánamo (so that constitutionally mandated habeas hearings would be symbolically consequential but of little practical import). Third, I will extend my analysis of Bush-era cases to the Obama era. In particular, I will explain why today's Court has no institutional incentive to place meaningful limits on Obama administration policy-making. Even though the Court may rule against the government in *Kiyemba*, there is no reason to think that it will check the President in ways that will severely constrain elected branch priorities (priorities, incidentally, that include the closing of Guantánamo and the imposition of some rule of law norms in detainee cases).²¹ In making this point, I will draw a fairly obvious connection between Bush administration missteps in advancing an overly aggressive view of inherent presidential war-making power and the Court's efforts to expand power by speaking loudly but, ultimately, asking for very little.

I. THE ENEMY COMBATANT DECISIONS: SIGNS OF THE TIMES

Supreme Court enemy combatant decisions very much track larger social and political forces. First, the Bush administration overplayed its hand—harming itself with the American people as well as media and academic elites. Second, separate and apart from legal arguments, the administration did great damage to itself through its

²¹ Indeed, given Obama administration opposition to Bush-era policies (including the nomination of vociferous Bush critics to high-ranking Justice Department positions), it may be the case that the administration would quietly welcome a Court ruling that would be seen as another rebuke to the Bush Justice Department. Indeed, the Obama administration's decision to try key Al Qaeda figures in federal civilian court was widely depicted as a "symbolic break with the most controversial policies of President George W. Bush." Barton Gellman, *9/11 Trial Could Become a Parable of Right and Wrong*, WASH. POST, Nov. 15, 2009, at A1. For a discussion of how it is that the government sometimes welcomes judicial invalidations of disfavored policies, see Neal Devins, *Is Judicial Policymaking Counter-majoritarian?*, in *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 189 (Mark C. Miller & Jeb Barnes eds. 2004). For additional discussion, see *infra* note 182.

mishandling of the war on terror, Hurricane Katrina, and much more. Third, Congress, while authorizing military tribunals and the suspension of habeas corpus, nonetheless signaled to the Court that it would support anti-administration rulings.

This Part will explain how Court decisions in 2004, 2006, and 2008 track larger social and political forces. In so doing, I think it important to note at the outset that the social and political forces surrounding Supreme Court enemy combatant decisions were dynamic. When the Supreme Court decided *Boumediene*, for example, the tide of public and elite opinion against the administration had peaked.²² Relatedly, the Republican Congress that had enacted the Military Commission Act (MCA) had been replaced by a Democratic Congress that did not support the habeas-stripping provisions in the MCA.²³ However, when the Court first entered this fray in 2004, there was no reason to think that the Republican Congress or the American people would support a sweeping denunciation of administration policies. For this very reason, it is critically important to track the trajectory of anti-administration Supreme Court decision making with changes in public, elite, and lawmaker opinion. In this Part, I will highlight academic, media, public, and lawmaker opinion—showing that Court decisions were not out-of-step with prevailing social and political forces. In Part II, I will highlight the incremental nature of Court decision making, showing that the Court initially gave Congress and the President significant breathing room to advance their preferred policies.²⁴

A. *Justices and Their Audiences*²⁵

Supreme Court decision making rarely deviates from dominant social and political forces.²⁶ Nominated by the President and confirmed by the Senate, Supreme Court Justices are part of the social

22 See *infra* notes 66–71 and accompanying text (discussing dozens of job rating polls which indicate disapproval of President Bush).

23 See *infra* note 106 and accompanying text.

24 See *infra* notes 123–34 and accompanying text.

25 The title to this subpart plays off of LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006). The analysis in this subsection generally tracks Baum's book.

26 See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); cf. NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 3–5 (2004) (noting that “Justices pay attention to public opinion when crafting their decisions”).

and political forces at the time of their nomination.²⁷ Lacking the power of the purse and the sword, moreover, the Court is well aware of its need to enlist elected officials to implement its decisions.²⁸ Finally, judges—like other people—care about the “esteem of other people.”²⁹ “[O]verwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation’s more elite universities,” economic and social leaders’ views matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections).³⁰ In particular, since the Justices’ reputations are shaped by the media, law professors, lawyers groups, and other judges and justices, they maximize their status by taking opinions of the elite into account.³¹

Supreme Court enemy combatant rulings track this familiar pattern. The administration and its legal arguments were held in disrepute—initially by academics and other elites, but increasingly by voters and members of Congress. The result of all this was a Supreme

27 Political scientists who subscribe to the attitudinal model contend that Supreme Court Justices simply vote their policy preferences—but that the appointments and confirmation process ensures that their policy preferences generally conform with elected government preferences. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (noting that the attitudinal model “holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices”).

28 Proponents of strategic models of judicial decision making argue that Supreme Court Justices take into account the likely reactions of elected officials to advance their policy and/or legal agenda. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* xiii (1998) (“[J]ustices may be primarily seekers of legal policy . . . [J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others . . . and of the institutional context in which they act.”); Howard Gillman, *The Court as an Idea, Not a Building, (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 65 (Cornell W. Clayton & Howard Gillman eds., 1999).

29 BAUM, *supra* note 25, at 32–33 (explaining why judges are likely to have “an especially strong interest in the esteem of other people”).

30 Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189 (1998).

31 See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 627–30 (2000) (indicating the possibility that “Justices . . . have a desire to conform their attitudes to the attitudes of the social and professional circles in which they travel, and thus to the attitudes of the intellectual elite in general”); see also Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. (forthcoming 2010). On the issue of military tribunals, there was a striking disjunction between elite views (wildly opposed) and public opinion (strongly in favor) on President Bush’s 2002 proposal to make use of military commissions. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 271–74 (2002) (noting that Congress reacted in vehement, and sometimes strident, opposition to President Bush’s Order to establish Military Commissions). For additional discussion, see *infra* Part I.B.

Court more and more willing to impose checks on presidential war making. In the balance of this Part, and throughout this Essay, I will call attention to the ways in which the Court's enemy combatant cases are attentive to social and political forces.

To start, the Bush administration staked out counter-productive hard line positions. Uninterested in narrow, technical victories, the administration sought to negate any judicial role in policing presidential war making. Consider, for example, 2004 arguments made by the administration in *Rasul v. Bush*—where the Court took up the threshold question of whether to recognize federal court jurisdiction over Guantánamo Bay (a military base that the United States leased from Cuba). Rather than limit itself to the propriety of the Court ruling on the legal rights of detainees captured abroad and held at Guantánamo, the administration claimed that “[t]he Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation’s foreign affairs and military operations.”³² The government, moreover, warned the Court that “[e]xercising jurisdiction” over Guantánamo detainees would “strike a serious blow” to the war effort by placing the judiciary in the “unprecedented position of micromanaging the Executive’s handling of captured enemy combatants.”³³ The Bush administration sounded a similar note in another 2004 case—*Hamdi v. Rumsfeld*—concerning the government’s power to detain American citizens.³⁴ Noting both that “the responsibility for waging war is [constitutionally] committed to the political branches” and that the “President, as Commander in Chief, has the authority to capture and detain enemy combatants [including American citizens] for the duration of hostilities,”³⁵ the administration made clear that neither the courts nor Congress could police presidential war making. The fact that Congress had enacted legislation that may well have authorized the presidential initiative did not matter; the Bush administration made unilateral presidential authority the focus of their argument.³⁶

³² Brief for the Respondents at 15–16, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343).

³³ *Id.* at 16.

³⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁵ Brief for the Respondents at 9, *Hamdi*, 542 U.S. 507 (No. 03-6696).

³⁶ The administration brief did note that their action was statutorily authorized—but did so as a backup argument to the primary argument of inherent presidential authority. *See id.* at 21–22. The government also cautioned against judicial micromanagement in a third 2004 case, *Rumsfeld v. Padilla* (also involving the detention of an American citizen). *See Rumsfeld v. Padilla*, 542 U.S. 426, 463 (2004) (Stevens, J., dissenting) (stating that “[t]he Government purports to exercise complete control, free from judicial surveillance”).

The Supreme Court ruled against the Bush administration in 2004, holding that “a state of war is not a blank check for the President” and that the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake.”³⁷ Undeterred, the Bush administration continued to aggressively advance a sweeping vision of presidential war making power in subsequent cases. In 2006, the government argued in *Hamdan v. Rumsfeld* that the President had inherent authority to establish military tribunals and that the decision of whether the Geneva Conventions apply to enemy combatants is “solely for the Executive.”³⁸ At a minimum, “[e]ven if some judicial review of the President’s determination were appropriate . . . the standard of review would surely be extraordinarily deferential to the President.”³⁹

In 2008, after the Court rejected its inherent authority claim in *Hamdan*, the Bush administration continued to make the broadest arguments available. In defending its military tribunal system and, with it, the Military Commission Act, the administration contended both that “aliens held outside the sovereign territory of the United States” do not enjoy any habeas protections, and that Guantánamo Bay was outside the sovereign territory of the U.S. (a notion that the Court had seemingly rejected in *Rasul*).⁴⁰ By this time, however, the administration’s legal arguments had been overwhelmingly rebuked by law professors, historians, and the media—not just left-leaning academics and newspapers but also by a broad cross-section that included leading conservative academics and journalists.

Amicus filings before the Supreme Court are especially instructive here. Two hundred amicus briefs were filed in enemy combatant cases—many by the very types of individuals and groups that judges care most about.⁴¹ Over the course of the litigation, academics as well as professional organizations, including bar groups and former federal judges, filed scores of briefs defending the Court’s power to check presidential war making. And while some amici backed the administration, their numbers diminished over time—so that the ratio of anti- to pro-administration briefs became more and more lop-

37 *Hamdi*, 542 U.S. at 536.

38 Brief for Respondents at 38, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

39 *Id.* The government did not simply rely on these broad claims of power. It also argued that Congress had authorized military commissions, and that the language of the Geneva Convention suggested that it did not apply to Al Qaeda. *Id.* at 15–20, 38.

40 Brief for the Respondents in Opposition at 12, 23, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195 & 06-1196).

41 See BAUM, *supra* note 25, at 77–78 (discussing the factors important to judges in their rulings); see also Baum & Devins, *supra* note 31.

sided. In *Hamdi* and *Rasul*, the ratio of anti- to pro-administration briefs was two to one and three to one, respectively.⁴² *Hamdan* and *Boumediene* had respectively a seven to one and six to one ratio.⁴³ Opposition to the administration, moreover, was not limited to the academic left or left-leaning interest groups. The Cato Institute and Rutherford Foundation, for example, filed briefs against the administration in many of these cases.⁴⁴ Briefs were also filed by bar groups, formal federal judges (some of whom were Republican appointees), and members of the United Kingdom and European Union parliaments (175 signatories in *Rasul*, and 422 signatories in *Hamdan*).⁴⁵

A closer look at academic briefs provides a revealing look at growing opposition to Bush administration arguments. In *Rasul*, while the overwhelming number of academic briefs rejected administration arguments, a distinguished group of academics—including John McGinnis and Abraham Sofaer—filed a brief in support of the administration.⁴⁶ In sharp contrast, no academics filed briefs in support of the administration in either *Hamdan* or *Boumediene*. In *Hamdan*, a staggering sixteen briefs were filed by groups of historians and law professors (including briefs by military historians and international law professors).⁴⁷ Some of these briefs featured high profile conserva-

⁴² Memorandum from Nick Miller to Neal Devins (March 3, 2009) (on file with author).

⁴³ *Id.*; see also *infra* notes 170–72 and accompanying text (discussing the *al Marri* litigation that commenced with President Bush, but was mooted by the actions of the Obama administration).

⁴⁴ See Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195 & 06-1196); Brief of the Cato Institute as Amicus Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); Brief of The American Jewish Committee et al. as Amici Curiae in Support of Petitioner, *Hamdan*, 548 U.S. 557 (No. 05-184); Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

⁴⁵ See Amicus Curiae Brief of 422 Current and Former Members of the United Kingdom and European Union Parliaments in Support of Petitioner, *Hamdan*, 548 U.S. 557 (No. 05-184); Brief of Amici Curiae Certain Former Federal Judges in Support of Petitioner, *Hamdan*, 548 U.S. 557 (No. 05-184); Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae on Behalf of Former Federal Judges Shirley M. Hufstедler and William A. Norris in Opposition to Respondents' Motion to Dismiss for Want of Jurisdiction, *Hamdan*, 548 U.S. 557 (No. 05-184); Brief of Amici Curiae Hon. Nathaniel R. Jones et al. in Support of Petitioners, *Hamdi*, 542 U.S. 507 (No. 03-6696); Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2003) (Nos. 03-343 & 03-334).

⁴⁶ Brief Amicus Curiae of Law Professors et al. in Support of Respondents at 2–3, *Rasul*, 542 U.S. 466 (Nos. 03-334 & 03-343) (stating that the bright line rule limiting the “statutory remedy of habeas corpus to matters affecting American citizens and matters occurring on American sovereign territory” should not be overthrown).

⁴⁷ Brief for Richard A. Epstein et al. as Amici Curiae in Support of Petitioner at 2, *Hamdan*, 548 U.S. 557 (No. 05-184) (citing four law professors who joined the brief in support of

tives (such as Richard A. Epstein and Randy E. Barnett) and individuals who had earlier sided with the government (such as Abraham Sofaer).⁴⁸

Academics, including leading conservatives, expressed their disapproval with the administration in other ways. Law review commentary typically backed the Court (or suggested that the Court should have gone even further in rejecting the administration). Based on a search of articles on *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, my research assistant identified thirty-one articles that backed the Court's position, and seven that backed that of the administration.⁴⁹ More striking, conservative academics John McGinnis (who signed the pro-Bush *Rasul* brief) and Jack Goldsmith (who headed the Office of Legal Counsel from October 2003 to June 2004) openly questioned the administration's legal tactics. In the wake of the Court's *Hamdan* ruling, McGinnis wrote that "[f]ar from strengthening executive power, the administration's policies generated a series of Supreme Court defeats that have weakened it."⁵⁰ Goldsmith likewise attacked the administration's "go-it-alone" view of executive power. "They embraced this vision," he said, "because they wanted to leave the presidency stronger than when they assumed office, but the approach they took achieved exactly the opposite effect. The central irony is that people whose explicit goal was to expand presidential power have diminished it."⁵¹

Administration legal arguments were also savaged in a slew of books as well as newspaper editorials backing the Supreme Court decision making. Nearly all books about the administration's enemy combatant campaign were highly critical of administration unilateralism. These included books by left-leaning journalists such as Charlie

petitioner and argued that the "Constitution will serve as an enduring charter of government only if all branches of government act in accordance with its central principles").

48 See *id.* at 1; Brief of Amici Curiae Certain Former Federal Judges in Support of Petitioner at 1, *Hamdan*, 548 U.S. 557 (No. 05-184). The legal issue raised in *Hamdan* was, of course, fundamentally different than the legal issue raised in *Rasul*. At the same time, by shifting sides and signing the *Hamdan* brief, Judge Sofaer knowingly and publicly signaled his disagreement with the administration.

49 See Memorandum from Ryan Millett to Neal Devins (July 15, 2009) (on file with author).

50 John O. McGinnis, *Executive Power in The War on Terror*, POL'Y REV. Dec. 2007-Jan. 2008 63, 64-65.

51 See Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, § 6 (Magazine), at 40 (discussing Goldsmith's view in *The Terror Presidency* that the Bush administration went about answering questions regarding the legal limits of executive power in the wrong way); see also JACK GOLDSMITH, *THE TERROR PRESIDENCY* 29-42 (2007) (detailing the fights Goldsmith had against the expansive view of executive power championed by the White House).

Savage (who wrote *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*)⁵² and Jane Mayer (*The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*).⁵³ But the administration was also subject to criticism from moderates and conservatives. For example, in books that otherwise advanced either a robust view of presidential power (Jack Goldsmith's *The Terror Presidency*)⁵⁴ or a narrow view of judicial authority (Benjamin Wittes' *Law and the Long War: The Future of Justice in the Age of Terror*),⁵⁵ the administration was criticized for only asking Congress to create new laws after its claims of presidential unilateralism were rejected.

Newspaper editorials are even more revealing. Over the course of its legal campaign over enemy combatants, the administration had next to no defenders among leading newspapers. I surveyed fifteen top newspapers (*Los Angeles Times*, *San Diego Union*, *San Francisco Examiner*, *New York Times*, *Washington Post*, *Washington Times*, *Dallas Morning News*, *Seattle Post-Intelligencer*, *Miami Herald*, *Christian Science Monitor*, *Wall Street Journal*, *Boston Globe*, *Atlanta Journal-Constitution*, *Chicago Tribune*, and *Philadelphia Inquirer*). Most, but not all, of these have left-leaning reputations. With the exception of the *Wall Street Journal*,⁵⁶ however, all of these papers either criticized the administration's handling of Guantánamo,⁵⁷ called for the Supreme Court to re-

52 CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

53 JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

54 GOLDSMITH, *supra* note 51, at 28 (agreeing with and supporting the "President's general wartime authority to detain enemy combatants and try them by military commission").

55 BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 103-04 (2008) (arguing that "[t]he risks of a big judicial footprint in the war on terrorism are significant").

56 See, e.g., Douglas W. Kmiec, Editorial, *Citizen Hamdi*, WALL ST. J., Jan. 13, 2004, at A14 (describing the decision as a potentially "positive development").

57 See *The American Way: Guantánamo Detainees Deserve Day in Court*, SAN DIEGO UNION TRIB., Dec. 8, 2007, at B6; Ben Ehrenreich, *Not on Our Best Behavior: Former Detainees from the War on Terrorism are Speaking Out, Claiming Abuse by the U.S.*, L.A. TIMES, Apr. 11, 2004, at M3; Martha Ezzard, Editorial, *Detainees Entitled to Be Heard*, ATLANTA J.-CONST., Sept. 16, 2003, at A15; James O. Goldsborough, *Abandoning Human Rights Principles*, SAN DIEGO UNION-TRIB., Oct. 20, 2003, at B7; Nat Hentoff, *Eroding Detainees Rights: Administration Shows Disregard for Prisoners' Attorneys*, WASH. TIMES, Oct. 30, 2006, at A19; Melissa Hoffer, Editorial, *Trapped at Guantánamo*, BOSTON GLOBE, Jan. 11, 2007, at A11; Clarence Page, Editorial, *Rights Matter in Circus Trials*, CHI. TRIB., Aug. 14, 2002, at N23; *Six Years, No Charges*, USA TODAY, Dec. 4, 2007, at 10A; Avi Stadler & John Chandler, *Look to Israel to Learn How to Handle Guantánamo Detainees*, ATLANTA J.-CONST., Oct. 21, 2007, at B1.

ject the Bush administration's legal arguments,⁵⁸ or applauded the Supreme Court for ruling against the administration.⁵⁹

Against this backdrop, it is hard to describe Supreme Court enemy combatant rulings as truly counter-majoritarian. With each round of decisions, the Supreme Court understood that its decisions reflected the views of newspapers, academics, bar groups, the international community, and many others. More than that, conservatives became increasingly frustrated with the administration's hard line positions—so that opposition to the administration came from the right as well as the left.

B. *Bush, the American People, and Congress*

Separate and apart from its legal arguments, the Court's willingness to check the administration was facilitated by other administration missteps—some but not all of which were tied to its running of the war on terror. Over time, these missteps resulted in the American people losing confidence in the President. For its part, the 2001–2006 Republican Congress initially backed the President while simultaneously signaling to the Court that it would support judicial invalidations of the President's enemy combatant initiative. Needless to say, the 2007–2008 Democratic Congress (whose election was very much tied to voter disapproval of the President) strongly supported anti-administration Court rulings.

In the next part of this Essay, I will link growing dissatisfaction with the administration to the types of restrictions that the Court placed on the administration. For the balance of this section, I will highlight how majoritarian forces (public and legislative opinion) never stood as a roadblock to the Court placing some limits on presidential power. Indeed, by the time that the Court issued its *Boumediene* decision, the American people and Congress strongly disapproved of the President.

58 Robert Barnes, *Justices Weigh Courts' Role in Detainee Cases*, WASH. POST, Dec. 5, 2007, at A20; David Bowker & David Kaye, *Guantánamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, at A15; James Carroll, *Guantánamo's Day in Court*, BOSTON GLOBE, May 26, 2008, at A11; Editorial, *Enemy Combatants' in Court*, N.Y. TIMES, April 26, 2004, at A18; Anthony Lewis, *In Times of War, Courts Can and Do Abdicate Their Function*, SEATTLE POST-INTELLIGENCER, Feb. 26, 2003, at B7; Anthony Lewis, *The Justices Take on the President*, N.Y. TIMES, Jan. 16, 2004, at A21; Editorial, *War vs. Rights: Bush Bends*, CHRISTIAN SCI. MONITOR, Dec. 4, 2003, at 8.

59 Editorial, *A Strong Stand Against U.S. Detention Policy*, MIAMI HERALD, June 15, 2008, at L4; Doug Cassel, *'Enemy Combatants' Get Their Day in Court*, CHI. TRIB., June 29, 2004, at 15; Editorial, *Tools of Shame: Supreme Court Blots a Stain*, PHILA. INQUIRER, June 13, 2008, at A22.

*Public Opinion.*⁶⁰ In the immediate aftermath of the September 11, 2001 attacks, President Bush's approval rating stood at 90%, "the highest Gallup has ever measured for a president."⁶¹ In 2002, the public supported President Bush's military commission initiative by more than a two to one margin.⁶² Up until the March 2003 invasion of Iraq, the President's approval ratings remained strong (averaging around 70% throughout this period).⁶³ By 2004, however, the President's approval rating fell below 50% for the first time.⁶⁴ At that time, the nation was split on the President's handling of the war on terror. One poll (taken just before the *Hamdi* and *Rasul* cases were argued) found that 56% of Americans thought that the United States was doing all it reasonably could do to prevent terrorism.⁶⁵ Another poll found that 46% of Americans thought the President was doing a "good" job handling the war on terror, and 47% thought he was doing a "poor" job.⁶⁶

Two years later (around the time of the *Hamdan* decision), approval ratings for the President hovered around 40% that year,⁶⁷ and a CBS-*New York Times* opinion poll reported that Bush's approval rating had sunk to a historic low of 31% in May 2006 (one month before

60 For reasons Larry Baum and I have detailed elsewhere, there is little reason to think that public opinion directly influences Supreme Court decision making. See Baum & Devins, *supra* note 31. At the same time, public opinion indirectly influences Court decision making in two important ways. First, public opinion has an impact on which party controls the White House and Congress; correspondingly, to the extent that the Court is shaped by elected government decision making, public opinion indirectly influences Court decision making. See *id.* Second, public opinion (along with elite opinion, elected government decision making, and much more) helps shape prevailing social norms—norms which may influence judicial decision making. See *id.*

61 Jeffrey M. Jones, *Despite Recent Lows, Bush Approval Average is Midrange*, GALLUP, Jan. 5, 2009, <http://gallup.com/poll/113641/Despite-Recent-Lows-Bush-Approval-Average-Midrange.aspx>.

62 See Goldsmith & Sunstein, *supra* note 31, at 271 (describing how the public reaction to President Bush's establishment of Military Commissions differed from the public reaction to Roosevelt's).

63 See Jones, *supra* note 61 (detailing President George W. Bush's job approval ratings during various periods of his presidency).

64 See *Kerry Leads Bush in New Poll*, CNN, Feb. 3, 2004, <http://www.cnn.com/2004/ALLPOLITICS/02/02/elec04.poll.prez/> (describing how, at the time of the article's publication, Senator John Kerry, the Democratic presidential nominee, was leading President Bush according to a newly released poll).

65 ABC NEWS, ABC NEWS POLL OF SEPT. 5–7, 2006, available at <http://www.pollingreport.com/terror3.htm> (last visited Jan. 29, 2010).

66 See TIME/CNN, TIME/CNN POLL OF MAY 12–13, 2004, available at <http://www.pollingreport.com/terror6.htm> (last visited Jan. 29, 2010) (detailing the results of the poll).

67 See *infra* note 69 (showing President George W. Bush's overall job ratings in a variety of national polls on various dates).

the ruling).⁶⁸ At that time, 55% of Americans disapproved of the administration's handling of the war on terror,⁶⁹ and only 38% of Americans thought the United States was doing all it could to prevent terrorism.⁷⁰ In 2008, Bush's approval rating dropped to a historic low of 24%.⁷¹

The sharp decline in President Bush's approval ratings spurred on a corresponding decline in public attitudes towards the executive branch. Trust in the executive dropped below 50% for the last three years of the Bush presidency. In 2008, "[j]ust 42% of Americans sa[id] they ha[d] a great deal or fair amount of trust in the executive branch . . . the lowest [reading] since a 40% [Watergate-era] reading in April 1974."⁷² Likewise, public attitudes towards "the way the nation is being governed" dropped dramatically during the last four years of the Bush presidency—from 56% in 2003, to 49% in 2004, to 41% in 2006, and to 26% in 2008.⁷³

Administration Missteps. The precipitous decline in President Bush's popularity over the course of the enemy combatant litigation corresponds to a series of policy-making missteps by the administration.⁷⁴ Court rulings in 2004 occurred in the backdrop of the Abu Ghraib prison abuse scandal and the conflagration over the Justice Department's torture memo. Indeed, on the very day that the Court heard oral arguments in *Hamdi v. Rumsfeld*, the media released photographs of U.S. soldiers torturing Iraqi prisoners at Abu Ghraib.⁷⁵ Making matters worse, the administration had argued in Court on that very day that the "last thing you want to do is torture somebody

68 See Adam Nagourney & Megan Thee, *Poll Gives Bush Worst Marks Yet on Major Issues*, N.Y. TIMES, May 10, 2006, at A1 (describing public perceptions of President George W. Bush and the Republican party over major issues).

69 POLLINGREPORT.COM, PRESIDENT BUSH—OVERALL JOB RATING, <http://www.pollingreport.com/BushJob.htm> (last visited Jan. 29, 2010) (indicating public opinion of President George W. Bush on various survey days).

70 See ABC NEWS, *supra* note 65.

71 See POLLINGREPORT.COM, *supra* note 69 (showing public perception of President George W. Bush on various survey days).

72 Jeffrey M. Jones, *Trust in Government Remains Low*, GALLUP, Sept. 18, 2008, <http://www.gallup.com/poll/110458/Trust-Government-Remains-Low.aspx>.

73 See *id.* (describing how the public's confidence in U.S. government institutions has continued to decline).

74 These missteps contributed to public opinion, media coverage, academic commentary, elections and elected government action, and prevailing social norms. All of these factors either directly or indirectly contributed to the Court's decision making. See also Baum & Devins, *supra* note 31 (identifying different ways that social and political forces may contribute to Supreme Court decision making).

75 See Charles Lane, *Iraq Prison Abuse May Hurt Administration in Court*, WASH. POST, May 13, 2004, at A22 (explaining how abuse of terrorism detainees at Guantánamo may undercut the rationale for anti-terrorism policies).

or try to do something along those lines.”⁷⁶ Six weeks later, the press revealed that the Justice Department had crafted a legal justification to use torture during the interrogation of suspected terrorists and that U.S. military officers in Iraq modeled their interrogation procedures after tactics used at Guantánamo.⁷⁷

Administration missteps may have also contributed to the Court’s 2006 ruling in *Hamdan*. In the winter and spring of 2006—when the Court was crafting its opinion in *Hamdan*—the administration’s handling of Hurricane Katrina and the War in Iraq, among other things, contributed to ever-increasing voter disapproval of President Bush.⁷⁸ By the time of the Court’s ruling in *Hamdan*, moreover, the crisis atmosphere following the September 11 attacks had abated. For this reason, increasing skepticism greeted claims of inherent presidential authority to both detain enemy combatants and to make use of a military commission system.⁷⁹

By March 2007, when certiorari petitions had been filed in *Boumediene*, Democrats had seized control of both houses of Congress. Petitioners in *Boumediene*, however, were not successful in capitalizing on Bush administration policy failures. On April 2, 2007, the Court turned their petition down—calling for petitioners to exhaust all available remedies or, alternatively, come forward with evidence that the government had “unreasonably delayed [enemy combatant] proceedings” or otherwise acted improperly.⁸⁰ But two months later, the Court reversed course and agreed to hear Boumediene’s challenge to the Military Commission Act.⁸¹

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

77 See Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn’t Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (explaining why lawyers determined that the President was not bound by bans on torture); Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1 (explaining how, according to the Justice Department, arguments such as necessity and self-defense could justify the torture of Al Qaeda terrorists in captivity abroad and eliminate any criminal liability later).

78 See Michael A. Fletcher, *President May Be Running Out of Time to Rebound*, WASH. POST, Apr. 9, 2006, at A6 (indicating that President George W. Bush’s approval ratings were at an all-time low).

79 See Robert J. Pushaw, Jr., *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1075–76 (2007) (describing why the Supreme Court, despite a history of judicial deference to presidential determinations regarding security in times of war, agreed to hear *Hamdan* and ruled against the U.S. President).

80 See *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (providing further information regarding why the Supreme Court chose to deny the petitions).

81 *Boumediene v. Bush*, 551 U.S. 1160 (2007) (indicating that the petition for rehearing was granted).

The precipitating event: The filing of a declaration by Lieutenant Colonel Stephen Abraham about hearings in which the military determines whether a detainee should be held indefinitely as an enemy combatant.⁸² Abraham, who had participated as a hearing officer in this process, claimed that the process was fundamentally flawed with considerable pressure from commanders for officers participating in hearings to rubber-stamp their decisions.⁸³ Along with this declaration, the Justices also became aware—through widespread media coverage—of suicides and suicide attempts by Guantánamo detainees.⁸⁴ By June 2008, when the Court issued its ruling in *Boumediene*, the administration had suffered additional policy embarrassments. In particular, Barack Obama and John McCain both pledged to close Guantánamo and, more tellingly, both campaigns called for change from the fundamentally flawed policies of the Bush administration.

Congress, the President, and the Court. Throughout the enemy combatant litigation, Congress signaled to the Court that it would go along with whatever ruling the Court made in these cases. In other words, contrary to the portrayal by academics and the news media of the Supreme Court's willingness to stand up to Congress and the executive branch, lawmakers repeatedly stood behind Court rulings limiting elected branch power. At the same time, as I will detail in the next Part, the Court pursued an incremental strategy—declining to test the boundaries of lawmaker acquiescence and, instead, issuing decisions that it knew would be acceptable to lawmakers.⁸⁵

The 2004 rulings in *Hamdi* and *Rasul* triggered anything but a backlash. In the days following the decisions, no lawmaker spoke on the House or Senate floor about the decision, and only a handful is-

82 See William Glaberson, *Military Insider Becomes Critic of Hearings at Guantánamo*, N.Y. TIMES, July 23, 2007, at A1 (detailing the role of Colonel Abraham, the first military insider to criticize publicly the hearings to determine whether Guantánamo detainees may be held indefinitely as enemy combatants, in the Guantánamo hearings). In Part II, I will detail why the Court's initial decision to deny certiorari and its subsequent about-face typify the Court's incremental approach to the enemy combatant issue. See *infra* Part II.

83 See generally Declaration of Stephen Abraham, Appendix to Reply to Opposition to Petition for Rehearing, *Al Odah v. United States*, No. 06-1196 (U.S. June 22, 2007) (describing his experience participating on a Combatant Status Review Tribunal). Abraham also noted that hearings relied on evidence that lacked specificity and that exculpatory information about the detainees was unavailable and possibly withheld. *Id.*

84 See William Glaberson, *Detainee Found Dead in Guantánamo Cell*, N.Y. TIMES, May 31, 2007, at A15 (describing how an unidentified Guantánamo detainee had committed suicide); Josh White, *Death of Guantánamo Detainee is Apparent Suicide, Military Says*, WASH. POST, May 31, 2007, at A8 (providing details regarding the death of a Saudi detainee at Guantánamo).

85 See *infra* Part II (detailing how the Supreme Court's incremental approach to enemy combatant litigation helped to ensure acceptance of the Court's decisions by lawmakers).

sued press releases about the cases.⁸⁶ And while eight members of Congress signed onto amicus briefs backing administration policy,⁸⁷ Congress did not seriously pursue legislative reform on this issue until the Supreme Court had agreed to hear the *Hamdan* case.⁸⁸

When Congress enacted the Detainee Treatment Act (DTA) in December 2005, “lawmakers made clear that they did not see the DTA as an attack on either the Court or an independent judiciary.”⁸⁹ Most significant, even though the DTA placed limits on federal court consideration of enemy combatant habeas petitions, lawmakers nevertheless anticipated that the Supreme Court would decide the fate of the President’s military tribunal initiative. Lawmakers deleted language in the original bill precluding federal court review of *Hamdan* and other pending cases.⁹⁰ Lawmakers, moreover, depicted themselves as working collegially with the Court; several Senators, for example, contended that the “Supreme Court has been shouting to us in Congress: Get involved,”⁹¹ and thereby depicted *Rasul* as a chal-

86 See Press Release, Congresswoman Jane Harman, Harman Welcomes Decision by Supreme Court to Provide Detainees with Access to Courts and Counsel (June 28, 2004), http://www.house.gov/harman/press/releases/2004/062804PR_SupremeCourt.html (indicating Harman’s support for the Supreme Court’s ruling that Guantánamo Bay detainees are legally entitled to challenge their detention in courts and obtain counsel); Press Release, Senator Orrin Hatch, Hatch on Guantánamo Bay Supreme Court Decision (June 28, 2004), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Print&PressRelease_id=19b60330-4863-4fcc-9023-08ccb87ac21f&suppresslayouts=true (expressing concern that the Supreme Court’s decision to allow Guantánamo Bay detainees access to the United States court system could hamper the war on terrorism).

87 See Brief of the Center for American Unity et al. as Amici Curiae Supporting Affirmance, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (urging affirmation of the lower court’s decision in support of the administration); Brief for United States Senators John Cornyn and Larry E. Craig as Amicus Curiae in Support of Donald H. Rumsfeld, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) and *Hamdi*, 542 U.S. 507 (No. 03-6696) (indicating that Senators Cornyn and Craig support the Authorization for Use of Military Force joint resolution and their belief that the resolution provides authorization for the detainment of two American citizens as enemy combatants).

88 Congressional debates on the Detainee Treatment Act began three days after the granting of certiorari in *Hamdan*; the bill, however, had been filed before the certiorari grant. See 151 CONG. REC. S14,263–64 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl) (discussing a bill that would potentially strip the Supreme Court of jurisdiction to hear claims from detainees held in Guantánamo Bay).

89 The balance of this paragraph is drawn from 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, 1572–73 (2007) (detailing the ways in which Congress sought to convey that they did not view the DTA as attacking the Supreme Court or an independent judiciary).

90 For additional discussion, see *id.* at 1570–72 (explaining why Congress did not believe its jurisdiction-stripping statutes challenged the Supreme Court’s power).

91 151 CONG. REC. S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham).

lenge to Congress,⁹² “asking the Senate and the House, do you intend for . . . enemy combatants . . . to challenge their detention [in federal courts] as if they were American citizens?”⁹³ Lawmakers also spoke of detainee habeas petitions as an “abuse[]”⁹⁴ of the federal courts, and warned that such petitions might unduly clog the courts,⁹⁵ thus “swamping the system”⁹⁶ with frivolous complaints.⁹⁷ Under this view, the DTA’s cabining of federal court jurisdiction “respect[s]” the Court’s independence and its role in the detainee process.⁹⁸

Following *Hamdan*, lawmakers likewise did not challenge the Court’s conclusions that the DTA did not retrospectively bar the *Hamdan* litigation and that the President could not unilaterally pursue his military tribunal policy.⁹⁹ Even though the Military Commissions Act (MCA) eliminates federal court jurisdiction over enemy combatant habeas petitions, lawmakers depicted themselves as working in tandem with the Court. Representative Duncan Hunter (R. Cal.), who introduced the legislation on the House floor, said during the debates that the bill was a response to the “mandate of the Supreme Court that Congress involve itself in producing this new structure to prosecute terrorists.”¹⁰⁰ And DTA sponsor Lindsey Graham stated: “The Supreme Court has set the rules of the road and the

92 See 151 CONG. REC. S12,753 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (explaining why the *Rasul* case should be viewed as a challenge to Congress).

93 See *id.* at S12,732; see also 151 CONG. REC. S12,659 (daily ed. Nov. 10, 2005) (statement of Sen. Specter) (noting that “[t]he Supreme Court finally took the bull by the horns . . . because the Congress had not acted”); *id.* (statement of Sen. Kyl) (noting that *Rasul* was a statutory ruling and, consequently, that Congress could clarify its intent without contradicting the Court). Senators similarly characterized Justice O’Connor’s *Hamdi* opinion as an invitation for Congress to narrow detainee rights legislatively. See *id.* at S12,656 (statement of Sen. Graham).

94 See 151 CONG. REC. S14,262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) (providing multiple examples of how detainees are abusing the federal courts with their habeas petitions).

95 See 151 CONG. REC. S12,659 (daily ed. Nov. 10, 2005) (statement of Sen. Kyl) (describing how detainee habeas corpus petitions burden the federal courts).

96 See 151 CONG. REC. S12,732 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (expressing concern that “Americans are losing their day in court because somehow we have allowed enemy combatants, people who have signed up to kill us all, to take us into Federal court and sue us about everything”).

97 See 151 CONG. REC. S14,262 (daily ed. Dec. 21, 2005) (statement of Sen. Graham) (arguing that his amendment was designed to prevent detainees from abusing the federal courts by flooding them with frivolous lawsuits).

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

99 The balance of this paragraph and the following paragraph are drawn from Devins, *supra* note 89, at 1574–78 (describing the reaction of lawmakers to the Court’s ruling in *Hamdan*).

100 152 CONG. REC. H7535 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter).

Congress and the president can drive to the destination together.”¹⁰¹ Even lawmakers who expressed disappointment in the Court’s ruling did not criticize the Court. Senator Sessions (R. Ala.), for example, blamed Hamdan’s lawyers for misleading the Court about the legislative history of the DTA.¹⁰²

Debates over the MCA habeas provision, moreover, reveal that lawmakers thought that the Supreme Court was responsible for assessing the reach of habeas protections. Fifty-one Senators (fifty Republicans and one Democrat) voted against a proposed amendment to provide habeas protections to Guantánamo detainees. Arguing that enemy combatants possessed no constitutional habeas rights,¹⁰³ these lawmakers contended that they could eliminate habeas claims without undermining judicial authority. One of the principal architects of the MCA, Senator Lindsey Graham, put it this way: Enemy combatants have “a statutory right of habeas And if [the Supreme Court finds] there is a constitutional right of habeas corpus given to enemy combatants, that is . . . totally different . . . and it would change in many ways what I have said.”¹⁰⁴ Forty-eight Senators (forty-three Democrats, four Republicans, and one Independent) argued that the habeas-stripping provision was unconstitutional, that the courts would “clean it up,”¹⁰⁵ and that Congress therefore should fulfill its responsibility to protect “that great writ.”¹⁰⁶

When the Supreme Court agreed to rule on the constitutionality of the MCA, the Congress no longer supported the MCA’s habeas-stripping provisions. Democrats had gained control of both Houses of Congress. Not surprisingly, there was next-to-no lawmaker criticism of *Boumediene*. In the week following the decision, no member

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

102 See 152 CONG. REC. S10,403–04 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions) (describing the way in which Hamdan’s lawyers misled the Supreme Court about the legislative history of the DTA).

103 See Devins, *supra* note 89, at 1577 (collecting lawmaker comments suggesting that the Constitution does not afford habeas protections to enemy combatants).

104 152 CONG. REC. S10,267 (daily ed. Sept. 27, 2006).

105 See Paul A. Duller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 323 (providing comments made by Senator Specter justifying the habeas stripping provision).

106 See 152 CONG. REC. S10,365–66 (daily ed. Sept. 28, 2006) (statement of Sen. Levin) (recommending that an amendment be made to the habeas-stripping provision).

of the House, and only two Senators, made critical comments about the decision on the House or the Senate floor.¹⁰⁷

* * *

Supreme Court enemy combatant decisions were not out-of-step with prevailing social and political forces. Academics (including prominent conservatives), the media (again including conservative newspapers), former judges, and bar groups had all lined up against the administration. Interest groups too opposed the administration (including some conservative groups). Over the course of the enemy combatant litigation, the American people increasingly opposed the Bush administration. This opposition, in part, was tied to policy missteps (some of which implicated enemy combatant policy-making). These missteps were highly visible and contributed to widespread opposition to the Bush administration. For its part, Congress did not question the Court's role in policing the administration's enemy combatant initiative. By the time the Court decided *Boumediene*, voter disapproval of the President had translated into widespread opposition to the administration's enemy combatant initiative; a Democratic Congress supported habeas protections for enemy combatants and presidential candidates John McCain and Barack Obama called for the closing of Guantánamo Bay.

In the next part of this Essay, I will discuss the incremental nature of the Court's decision making. This discussion will provide additional support for the claims made in this section. Specifically, I will show that each of the Court's decisions was in sync with changing attitudes towards the Bush administration. More than that, Part II will belie the myth that Court enemy combatant decisions were especially consequential. Unlike newspaper and academic commentary about these cases, Court decision making had only a modest impact. Correspondingly, the Court never issued a decision that risked its institutional capital; the Court knew that its decisions would be followed by elected officials and that its decisions would not ask elected officials to take actions that posed some national security risk.

¹⁰⁷ See 154 CONG. REC. S5733 (daily ed. June 18, 2008) (remarks of Sen. Cornyn) (criticizing the decision by offering it as a recent example of judges imposing their own views into their rulings); 154 CONG. REC. S5575 (daily ed. June 12, 2008) (remarks of Sen. Hatch) (declaring that he does not believe the Supreme Court ruled correctly in this case). During this same period, Democrats praised *Boumediene*. See *id.* at S5548–75 (detailing how Senators Bingaman, Dorgan, Leahy, and Feinstein made comments on the Senate floor supporting the Court's ruling).

II. JUDICIAL MODESTY OR JUDICIAL HUBRIS: MAKING SENSE OF THE ENEMY COMBATANT CASES

From 1952 (when the Supreme Court slapped down President Truman's war-time seizure of the steel mills)¹⁰⁸ until 2004 (when the Court reasserted itself in the first wave of enemy combatant cases), the judiciary largely steered clear of war powers disputes.¹⁰⁹ In part, the Court deferred to presidential desires and expertise. The President sees the "rights of governance in the foreign affairs and war powers areas" as core executive powers.¹¹⁰ Correspondingly, the President has strong incentives to expand his war-making prerogatives.¹¹¹ For its part, the Court has limited expertise in this area, and, as such, is extremely reluctant to stake out positions that may pose significant national security risks.¹¹² The Court, moreover, is extremely reluctant to risk elected branch opprobrium. Lacking the powers of purse and sword, the Court cannot ignore the risks of elected branch non-acquiescence.¹¹³

Against this backdrop, the Court's repudiation of the Bush administration's enemy combatant initiative appears a dramatic break from past practice. Academic and newspaper commentary back up this claim—with these decisions being labeled "stunning" (Harold

108 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President's Executive Order directing seizure of steel mills to protect the national defense during wartime was unconstitutional).

109 See Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63 (2002) (detailing why the modern Supreme Court has generally refrained from ruling on constitutional issues regarding wartime power allocation between Congress and the President).

110 See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306 (1993) (describing how the Supreme Court does not have significant interest in exercising such rights).

111 See *id.* (explaining how the Supreme Court has little incentive to become involved in governance in foreign affairs and war powers areas); see also Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65, 66–67 (2000) (explaining why Presidents have both the incentive and ability to expand war-making power); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997) (detailing Founders' fears that Presidents would seek fame by expanding their war making role).

112 See McGinnis, *supra* note 110, at 306 (explaining why the Supreme Court prefers not to be involved in issues of foreign affairs and war powers).

113 See EPSTEIN & KNIGHT, *supra* note 28 (providing a detailed explanation of how the Court takes potential backlash into account when deciding a case). For studies suggesting that the Court is attentive to the implementation of its decisions, see Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219, 225 (2006).

Koh),¹¹⁴ “unprecedented” (John Yoo),¹¹⁵ “breathtaking” (Charles Krauthammer),¹¹⁶ “astounding” (Neal Katyal),¹¹⁷ “sweeping and categorical” (*New York Times*),¹¹⁸ and “historic” (*Washington Post* and *Wall Street Journal*).¹¹⁹ Upon closer inspection, however, the Court’s decisions are anything but a dramatic break from past practice. Part I detailed how Court rulings tracked larger social and political forces. In this Part, I will show how the Court risked neither the nation’s security nor elected branch non-acquiescence.¹²⁰ The Court’s initial rulings placed few meaningful checks on the executive; over time, the Court—reflecting increasing public disapproval of the President—imposed additional constraints but never issued a ruling that was out-of-sync with elected government preferences. Separate and apart from reflecting growing public and elected government disapproval of Bush administration policies, the Court had strong incentives to intervene in these cases. The Bush administration had challenged the Court’s authority to play *any* role in national security matters.¹²¹ This frontal assault on judicial power prompted the Court to stand up for its authority to “say what the law is.” In Part III, I will talk about the Court’s interest in protecting its turf—especially in cases implicating individual rights.

114 See Greenberger & Bravin, *supra* note 3. For additional discussion, see *infra* notes 151–55 and accompanying text.

115 John Yoo, Op-Ed, *The Supreme Court Goes to War*, WALL ST. J., June 30, 2004, at A8 (stating that the decisions represent “unprecedented expansion into what had always been considered the ultimate preserve of the political branches”).

116 Charles Krauthammer, *Emergency Over, Saith the Court*, WASH. POST, July 7, 2006, at A17 (“The court’s wanton overriding of Congress and the president [in *Hamdan*] is another in a long string of breathtaking acts of judicial arrogance.”).

117 Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK 3 (quoting Neal Katyal commenting on *Boumediene*).

118 Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees: Military Panels Found to Lack Authority—New Law Possible*, N.Y. TIMES, June 30, 2006, at A1 (commenting on *Hamdan*, noting that “[t]he decision was such a sweeping and categorical defeat for the administration that it left human rights lawyers . . . almost speechless with surprise and delight”). The *New York Times* also depicted *Boumediene* as “categorical in its rejection of the administration’s basic arguments.” Linda Greenhouse, *Justices, 5–4, Back Detainee Appeals for Guantánamo: In a Rebuff to Bush, Court Says Inmates Can Use Habeas Corpus Petitions*, N.Y. TIMES, June 13, 2008, at A1.

119 See Barnes, *supra* note 3 (commenting on *Boumediene*); Greenberger & Bravin, *supra* note 3 (same).

120 For a somewhat analogous argument, see Pushaw, *supra* note 79, at 1014–15. Professor Pushaw argues that the 2004 and 2006 enemy combatant decisions reflect the Court’s penchant to balance national security, executive branch non-acquiescence, and the gravity of the alleged infringement on individual rights.

121 See *supra* notes 38–39 and accompanying text.

Small Steps: Hamdi and Rasul. These decisions were a minimalist opening volley in Court efforts to place judicial limits on the Bush administration. While rejecting claims of executive branch unilateralism in national security matters, the Court said next-to-nothing about how it would police the President's enemy combatant initiative. *Rasul* simply held that Guantánamo Bay was a "territory over which the United States exercises exclusive jurisdiction and control," and, consequently, that the President's enemy combatant initiative is subject to existing habeas corpus legislation.¹²² This ruling "avoided any constitutional judgment" and offered no guidance on "what further proceedings may become necessary" after enemy combatants filed habeas corpus petitions.¹²³ *Hamdi*, although ruling that United States citizens have a constitutional right to challenge their detention as an enemy combatant, placed few meaningful limits on executive branch detentions. Noting that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive," the Court ruled both that hearsay evidence was admissible, and that "the Constitution would not be offended by a presumption in favor of the Government's evidence."¹²⁴

The Bush administration, as John Yoo put it, saw the limited reach of *Hamdi* and *Rasul* as creating an "opportunity" for the administration to regain control over its detention policy.¹²⁵ In particular, the administration asked Congress to enact legislation that would limit federal court review of enemy combatant claims. The administration also launched Combatant Status Review Tribunals (CSRT) as a more formal substitute for unilateral executive determinations of a detainee's enemy combatant status.¹²⁶ Capitalizing on *Rasul's* failure to consider the constitutional dimensions of enemy combatant claims, CSRTs largely operated as a rubber stamp of administration determinations. In 2006, ninety-nine out of 102 detainees brought before CSRTs were designated as enemy combatants.¹²⁷ The Justice Department reconvened CSRTs to reconsider the remaining three cases

122 *Rasul v. Bush*, 542 U.S. 466, 467 (2004).

123 Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT'L L. 1, 9–10 (2009) (quoting *Rasul*, 542 U.S. at 468).

124 *Rasul*, 542 U.S. at 533–34.

125 Yoo, *supra* note 115.

126 Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) (on file with author).

127 A. Wallace Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AM. L.J. 245, 254 (2008) (discussing CSRT procedures and noting that "[a] review of the available records of CSRT proceedings shows that, in at least three of 102 full proceedings, detainees were not found to be enemy combatants").

and, ultimately, the remaining three were determined to be enemy combatants.¹²⁸

Hamdi and *Rasul* were both “narrow, incompletely theorized [minimalist] decisions.”¹²⁹ And while newspapers and academics focused their attention on the Court’s open-ended declaration that “a state of war is not a blank check for the President,”¹³⁰ the decisions did not meaningfully limit the executive. Well aware that Congress and the American people supported the President’s military commission initiative,¹³¹ the Court understood that a sweeping denunciation of administration policies might trigger a fierce backlash.¹³² Moreover, by ruling that Congress had authorized the President’s power to detain enemy combatants (through its post-9/11 Authorization for the Use of Military Force Resolution), and by suggesting that the Court would make use of pro-government presumptions when reviewing military commission decision making, the Court formally took national security interests into account.¹³³ Actions taken by the executive in response to these rulings underscore that the Court’s *de minimis* demands neither risked national security nor executive branch non-acquiescence.

None of this is to say that the 2004 decisions were without impact. Following *Rasul*, for example, the administration understood that it needed to make use of some type of military court review—a requirement that may have impacted the military’s handling of enemy combatants. At the same time, the Court did not issue a potentially debilitating blow to the Bush administration by decisively and resoundingly rejecting key elements of the administration’s legal policy.¹³⁴ Instead, the Court simply carved out space for itself to review administration policy-making—without setting meaningful boundaries on what the administration could or could not do.

*Talking A Lot But Not Saying Anything: Hamdan v. Rumsfeld.*¹³⁵ Although decisively rejecting Bush administration claims that it had inherent authority to establish military tribunals, *Hamdan* did little more than return the military tribunal issue to the political process.

128 *Id.* at 254–55.

129 Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 54 (2004).

130 *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

131 See Goldsmith & Sunstein, *supra* note 31 (discussing 9/11 and public support for the Bush Military Commission proposal by a greater than 2-1 margin).

132 See EPSTEIN & KNIGHT, *supra* note 28 (providing a detailed explanation of how the Court takes potential backlash into account when deciding a case).

133 See *Hamdi*, 542 U.S. at 518.

134 See Greenberger & Bravin, *supra* note 3 (commenting on *Rasul*).

135 Portions of this subpart are drawn from Devins, *supra* note 89.

Three months after the decision, a Republican Congress authorized the administration's military tribunal policy—including the rejection of federal court review of the habeas filings of enemy combatants.¹³⁶ For reasons I will now detail, *Hamdan* imposed few real world limits on the Bush administration's enemy combatant policies.

Newspaper and academic commentary on *Hamdan* largely focused on the Court's dual determinations that the President could not unilaterally establish military tribunals and that Congress had not authorized the administration's initiative.¹³⁷ For the administration, however, *Hamdan* was a setback with a "sterling silver lining."¹³⁸ President Bush emphasized that the Court accepted both "his use of the detention center at Guantanamo Bay, Cuba" and that statutorily authorized "military commissions are an appropriate venue for trying terrorists."¹³⁹ For White House Press Secretary Tony Snow, the administration was focusing on what the Court had not said: "[I]t has not said, you can't hold them; it hasn't said, you can't try them; it hasn't said, you have to send them back."¹⁴⁰

In understanding administration efforts to use *Hamdan* to catapult its military tribunal initiative, two features of the Court's ruling stand out. First, the Court worked hard to partner itself with Congress—so that its decision would be understood as an effort to buoy legislative power. Four of the five Justices who rejected the administration's claim of inherent executive power wrote separately to state that the "Court's conclusion ultimately rests upon a single ground: . . . Congress has denied the President the legislative authority to create military commissions."¹⁴¹ These Justices, moreover, charted a course for the President, suggesting that he return "to Congress to seek the authority he believes necessary."¹⁴² Second (and

136 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). In *Boumediene v. Bush*, the Supreme Court invalidated the Military Commission Act. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). See *infra* notes 151–56 and accompanying text.

137 See, e.g., Greenhouse, *supra* note 123, at 13; Krauthammer, *supra* note 116; Lane, *supra* note 75; McGinnis, *supra* note 110, at 294. See also Posting of Marty Lederman to Balkanization, *Hamdan Is a Big Deal Regardless of What Congress Does*, <http://balkin.blogspot.com/2006/06/hamdan-is-big-deal-regardless-of-what.html> (June 30, 2006, 5:23 EST) (discussing the dual determinations by the Court).

138 David B. Rivkin, Jr. & Lee A. Casey, *Hamdan*, WALL ST. J., June 30, 2006, at A12.

139 President's Remarks on the War on Terror, 42 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1553, 1573 (2006); see also Sheryl Gay Stolberg, *Justices Tacitly Backed Use of Guantánamo, Bush Says*, N.Y. TIMES, July 8, 2006, at A14.

140 Tony Snow, White House Press Sec'y, Press Briefing (June 29, 2006), 2006 WL 1782179, at *7.

141 *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

142 *Id.*

relatedly), the Court did not speak to Congress's power either to statutorily authorize military tribunals or to limit federal court consideration of enemy combatant habeas petitions. Indeed, the Court skirted such a controversy in *Hamdan*. It interpreted a December 2005 statute limiting federal court review of enemy combatant habeas petitions¹⁴³ as having only prospective application (so that the Court would have to consider whether Congress could strip it of jurisdiction to hear the *Hamdan* case).¹⁴⁴

At bottom, the *Hamdan* decision returned the military tribunal issue to the political branches. Rather than foreclose democratic outlets, the Court signaled Congress and the administration that they might well back a statutorily authorized military tribunal program. The administration, of course, followed the Court's lead and the Republican Congress largely complied with administration policy preferences—enacting a Military Commissions Act that generally tracked administration preferences.¹⁴⁵ Furthermore, when the Court issued its ruling in *Hamdan*, not a single Guantánamo prisoner had been tried by a military commission. The ruling, in other words, did not impact extant cases. Indeed, with the President and Congress returning to the drawing board to sort out a legislative solution, the immediate effect of the ruling was only to further delay future trials. All the while, the administration continued to freely detain enemy combatants at Guantánamo.

In highlighting the limited reach of *Hamdan*, I am not arguing that the case was inconsequential. Aside from the embarrassment of yet another high court defeat, the administration was forced to cut a deal acceptable to Congress.¹⁴⁶ And while a Republican Congress was likely to back the administration (especially since Congress had enacted legislation supportive of the administration's enemy combatant initiative six months earlier), the administration nevertheless had to expend time and political capital in pushing through legislation that varied, ultimately, from the administration's initial bill. In particular,

143 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2742 (2005).

144 For a detailed analysis of the Court's decision to cast the Detainee Treatment Act this way, see Devins, *supra* note 89, at 1583.

145 Richard B. Schmitt & Julian E. Barnes, *Bush Signs Tough Rules on Detainees*, L.A. TIMES, Oct. 18, 2006, at A1 (reporting that President Bush signed allowing for the detention and prosecution of terrorism suspects).

146 Correspondingly, by rejecting inherent presidential power to establish military tribunals, the Court imposed a cost on Congress—forcing it to take a formal position on the necessity of military tribunals.

Republican Senators John McCain, Lindsey Graham, and John Warner insisted on the addition of anti-torture provisions to the bill.¹⁴⁷

At the same time, it is clear that *Hamdan* was far less consequential than academic or media commentary would suggest. Without minimizing the Court's repudiation of the Bush administration's inherent power argument, *Hamdan* was anything but (as Walter Dellinger put it) "the most important decision on presidential power and the rule of law ever. Ever."¹⁴⁸ *Hamdan*, instead, reflected the Court's penchant for sidestepping knotty issues involving the scope of presidential war making by focusing, instead, on the second-order question of whether the right processes were used to make the decisions at issue.¹⁴⁹ Correspondingly, with Congress already having enacted legislation supporting the administration's enemy combatant initiative, the Court—notwithstanding the President's ever diminishing support¹⁵⁰—did not want to risk legislative branch opprobrium by issuing a more decisive ruling in *Hamdan*.

By returning the enemy combatant issue to the political process, the Court neither risked the nation's security nor executive non-acquiescence. The decision did not order the release of any enemy combatant; indeed, the decision did not rule out that Congress could authorize a military tribunal system that mimicked the system that the

147 Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES, Nov. 9, 2008, § 6 (Magazine), at 45 (citing that Senator Graham, along with Republican Senators John McCain and John Warner, drafted a bill with the goal of preventing torture of enemy fighters).

148 Dellinger, *supra* note 1; see also *supra* notes 50–51, 57 (sampling other media and academic commentary about *Hamdan*). In calling attention to academic and media hyperbole, I do not mean to suggest that academics were unaware of the potentially limited practical reach of decisions like *Hamdan*, *Rasul*, and *Hamdi*. See, e.g., Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1014–15 (2008) (framing her article as an "answer" to the question: "Why is it that litigation concerning the alleged enemy combatants . . . has been going on for more than six years and almost nothing seems to have actually been decided?").

149 See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 2 (2004) (arguing that during times of war the judiciary has focused on whether the correct institutional processes have been used to make a decision rather than substantive rights). See also Sunstein, *supra* note 129, at 50–51; Posting of Jack Balkin to Balkinization, *Hamdan as a Democracy-Forcing Decision*, <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006, 13:07 EST) (arguing that what the *Hamdan* Court has done is to limit "the President by forcing him to go back to Congress" and, in so doing, the Court has used "the democratic process as a lever to discipline and constrain the President's possible overreaching"). For a related argument, see Martinez, *supra* note 148, at 1018 (contending that the Court typically focuses on process in war-on-terror cases but that the line between process and substance is somewhat illusory).

150 See POLLINGREPORT.COM, *supra* note 69.

administration had in place. Correspondingly, by preserving democratic outlets for the administration to bargain with a generally supportive Republican Congress, there was next-to-no risk of executive branch non-acquiescence. More than anything, *Hamdan* delayed the ultimate showdown between the Supreme Court and the Bush administration over the constitutionality of foreclosing habeas corpus review of military commission decision making.

A Marked Departure or the Inevitable Next Step: Making Sense of Boumediene v. Bush. In March 2007, the first wave of constitutional challenges to the Military Commission Act made their way to the Supreme Court.¹⁵¹ At that time, the Justices did not want to reenter this fray and, in April 2007, the Court denied certiorari. Justices Stevens and Kennedy attached a written explanation to the certiorari denial—stating that the Court ought to steer clear of this dispute until enemy combatants had made use of all legal remedies available to them under the congressionally approved military tribunal scheme.¹⁵² This decision is very much consistent with prior Court rulings. The Court preserved a role for itself without formally entering the dispute and second-guessing the adequacy of Military Commission Act procedures.

Two months later, the Court reversed course and agreed to rehear the case.¹⁵³ This reversal was a marked departure from normal Supreme Court practice. “[I]n the absence of an intervening court decision or some other landscape-changing development,” as Linda Greenhouse reported, the Court had only granted such rehearings on two occasions—“one [in] 1930 and the other [in] 1947.”¹⁵⁴ In understanding the Court’s about-face, there is little question that revelations about the inner-workings of Combatant Status Review Tribunals played a significant role. As discussed in Part I, the Court was presented with documents suggesting that CSRT proceedings were a sham.¹⁵⁵

The question remains: Did the Court break from its practice of issuing incremental decisions that did not fundamentally challenge the

151 Greenhouse, *supra* note 123, at 17.

152 *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (stating that Supreme Court would follow traditional rules in requiring exhaustion of available legal remedies before granting writ of certiorari).

153 *Boumediene v. Bush*, 551 U.S. 1160, 1160 (2007) (granting petition for rehearing).

154 Greenhouse, *supra* note 123, at 17 (citing EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 821 (9th ed. 2007)).

155 *See* Declaration of Stephen Abraham, *supra* note 83, at 4 (discussing Lieutenant Colonel Abraham’s assertions that the CSRT process was influenced by command and was largely a deception).

President's enemy combatant initiative? Did *Boumediene*, unlike earlier rulings, risk national security or elected branch backlash? After all, the Court ruling—unlike earlier decisions—did speak to the constitutional merits of a military tribunal system that denied habeas corpus review to enemy combatants. Concluding that the writ of habeas corpus is an “essential mechanism in the separation-of-powers scheme,” an “essential design of the Constitution,” and a writ that generally “protects persons [not just] citizens,” the *Boumediene* Court decisively repudiated the Military Commission Act's habeas-stripping provisions.¹⁵⁶

For this very reason, *Boumediene* was seen as “historic”¹⁵⁷ and “among the Court's most important modern statements on the separation of powers.”¹⁵⁸ At a minimum, it was seen as the death knell to the military tribunal system championed by President Bush and the Congress that enacted the MCA. Upon closer inspection, however, *Boumediene* is a far less dramatic, far less consequential decision. While the Court certainly made broad pronouncements about the centrality of habeas corpus and the illegitimacy of the Bush administration campaign to substitute military tribunals for judicial review, the Justices had no reason to think that the practical consequences of their handiwork would meaningfully impede elected officials from pursuing their preferred policy on enemy combatants. Instead, *Boumediene* seemed more a rebuke of the policies and practices of the outgoing Bush administration, than an effect to fundamentally retool future executive branch practices.

When the Court agreed to hear the case, Democrats (who were nearly unanimous in voting against the habeas-stripping provision in the MCA) controlled the Congress. More significant, when the Court decided the case, presumptive presidential candidates Barack Obama and John McCain had both promised to close Guantánamo Bay.¹⁵⁹ In commenting about the decision, Senator McCain—who had voted for the habeas-stripping provision—said the decision “obviously concerns me . . . [but I have] always favored closing . . . Guantánamo Bay.”¹⁶⁰ Needless to say, congressional Democrats, including Senator Barack

156 *Boumediene v. Bush*, 128 S. Ct. 2229, 2246–47 (2008).

157 *See Barnes*, *supra* note 3.

158 *See Greenhouse*, *supra* note 123, at 18; Greenberger & Bravin, *supra* note 3 (describing the Supreme Court's rulings as “landmark decisions” and “momentous”).

159 At this time, the Bush administration had also said that it thought Guantánamo should be closed. *See Myers*, *supra* note 5.

160 Perine, *supra* note 5, at 1638 (quoting Senator John McCain).

Obama, expressed support for the Court's ruling.¹⁶¹ Against this backdrop, the Court understood that its decision (issued less than five months before the presidential elections) would not trigger any type of political backlash.

For much the same reason, the Court understood that its decision posed few national security risks. The Court said nothing about the President's power to indefinitely detain enemy combatants, nor did the Court detail how habeas proceedings were to be conducted.¹⁶² The Court, moreover, said nothing about the availability of *habeas corpus* by enemy combatants held outside U.S. soil or at facilities (like Guantánamo) that were under the control of the United States.¹⁶³ Assuming that the next administration would close Guantánamo, the decision would only impact governmental practices for a short time.¹⁶⁴ More than that, the Court had been told by the Bush administration that "any reopening of the prisoners' right to habeas would not be swift, but would face a variety of 'fundamental and unprecedented issues' complicating that process."¹⁶⁵ In other words, the Court understood that the Bush administration would do everything in its power to slow down the release of enemy combatants during its final months in office.¹⁶⁶ For all these reasons, *Boumediene* should not be seen as an attempt by the Court to meaningfully transform U.S. policy towards enemy combatants (a decision that might risk national security or prompt an elected government backlash). Instead, *Boumediene* principally served as a vehicle for the Court to make strong symbolic statements about the judicial power to "say what the law is" and, cor-

161 *See id.* (quoting Senator Barack Obama as saying that the decision marked "an important step toward re-establishing our credibility as a nation committed to the rule of law").

162 *See* Michael B. Mukasey, Att'y Gen., Remarks at the American Enterprise Institute for Public Policy Research (July 21, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/July/08-opa-633.html> (discussing the institutional challenges the Department will continue to face following the decision).

163 *See* Brief for Respondents in Opposition, *supra* note 40, at 23 (arguing that it is sovereignty and not control which dictates the availability of habeas corpus).

164 The MCA was not formally limited to Guantánamo, applying instead to all cases involving the detention of enemy combatants. *See* Military Commissions Act of 2006, *supra* note 136. With that said, there was only one enemy combatant held on U.S. soil at the time of *Boumediene*.

165 Posting of Lyle Denniston to SCOTUSblog, U.S.: Detainee Habeas Cases Would Be Slow, <http://scotusblog.com/wp/us-detainee-habeas-cases-would-be-slow/> (April 2, 2008, 10:06 EST).

166 Following the Supreme Court's ruling in *Boumediene* and until Barack Obama was sworn in as President, twenty-three detainees had succeeded in post-*Boumediene* habeas corpus proceedings but only three had been released from Guantánamo. *See* AMNESTY INTERNATIONAL, USA: DETAINEES CONTINUE TO BEAR COSTS OF DELAY AND LACK OF REMEDY 82 (2009), <http://www.amnesty.org/en/library/asset/AMR51/050/2009/en/dfccba17-8b5a-430a-9059-af374d5d8c2d/amr510502009eng.pdf>.

respondingly, the necessity of the political branches to respect the centrality of habeas corpus limits on governmental power.

* * *

In November 2008, *Boumediene's* limited reach seemed secure. Barack Obama (who voted against the MCA and embraced *Boumediene*) won the presidency and the Democratic party expanded their control of Congress. By the summer of 2009, however, there was reason to question whether Guantánamo would be closed and whether the Obama administration would fully disavow the practices of its predecessor.¹⁶⁷ For its part, the Supreme Court initially steered clear of Obama-era practices. In the spring of 2009, they agreed to moot an ongoing dispute between the executive and an enemy combatant held at a U.S. army base; in the summer of 2009, they refused to act on a certiorari petition by fourteen Chinese Muslim Uighurs (parties to the original *Boumediene* litigation who had successfully filed a habeas petition but nevertheless remained at Guantánamo).¹⁶⁸ In the fall of 2009, the Court agreed to hear the Uighur petition but delayed oral argument until March 2010 (thereby allowing the Obama administration time to either close Guantánamo or relocate the Uighur petitioners).¹⁶⁹

In Part III of this Essay, I will argue that the Court's actions in the first year of the Obama administration are cut from the same cloth as its decision to intervene in Bush-era disputes. As this section has suggested, the Court has never risked national security or executive branch non-acquiescence in its enemy combatant decision making. Moreover, as I argued in Part I, Court decision making in this area has largely tracked social and political forces. For reasons I will now detail, the Court's decisions both to steer clear of this issue in the spring and summer of 2009 and its fall 2009 decision to hear the Uighur petition match past Court practices. Throughout the enemy combatant dispute, the Court has found ways to expand its authority without risking an institutionally costly backlash.

III. CONCLUSION: THE PAST IS PROLOGUE

Supreme Court interventions in the enemy combatant disputes never pushed the limits of what was acceptable to the political

¹⁶⁷ See *supra* notes 6–10 and accompanying text.

¹⁶⁸ See *infra* notes 171–81 and accompanying text.

¹⁶⁹ See *supra* notes 17–19.

branches of government. The Court, instead, maximized its authority by moving incrementally and expanding judicial power in ways generally acceptable to the political branches. This was true of Bush-era decision making and there is no reason to think that the Court will depart from past practices during the Obama administration.

Consider, for example, the Court's March 2009 decision to back away from a case involving Bush administration efforts to detain a legal resident without charges. After agreeing—in December 2008—to hear a challenge to the Bush administration's detention of Ali Saleh Kahlah al-Marri at a South Carolina Navy brig, the Court sided with the Obama administration and removed the case from its docket.¹⁷⁰ The administration had claimed the case was moot because—in February 2009—it formally filed federal criminal charges against al-Marri (so that he would be tried in federal court and not held indefinitely at a military base).¹⁷¹ Mr. Marri's lawyers objected, arguing (unsuccessfully) that the administration could subsequently relocate him to a military base and, consequently, the Court should still resolve his legal challenge.¹⁷²

The Court's decisions to hear and then moot *al-Marri* are readily understandable. The Fourth Circuit had upheld the Bush administration in *al-Marri* and—when agreeing to hear the case—the Justices had good reason to slap down the Bush administration for their continuing efforts to sidestep federal court review over enemy combatant policy-making. Not only had the Court taken a strong stand in favor of judicial review in *Boumediene* and other decisions, but the November 2008 election of Barack Obama and the Democratic Congress further solidified the Court's position with elected officials and the American people. And, with none of the eighteen amicus briefs in the case supporting the Bush administration,¹⁷³ a Court ruling against

170 See Posting of Lyle Denniston to SCOTUSblog, *Al-Marri Detention Case Ended*, <http://www.scotusblog.com/wp/al-marri-overruled/> (Mar. 6, 2009, 13:13 EST) (“The Court’s action ended the Qatari national’s case.”).

171 See David Johnston & Neil A. Lewis, *U.S. Will Give Qaeda Suspect A Civilian Trial*, N.Y. TIMES, Feb. 27, 2009, at A1 (considering the changes in policy by the Justice Department and the Obama administration); see also Robert Barnes & Carrie Johnson, *Court Puts Off Decision On Indefinite Detention*, WASH. POST, Mar. 7, 2009, at A5 (discussing the Supreme Court’s ruling that a President may indefinitely detain a legal U.S. resident as a terror suspect).

172 See Johnston & Lewis, *supra* note 171. The *al-Marri* case never went to trial; a plea deal was struck between the government and Mr. Al-Marri. See John Schwartz, *Plea Agreement Reached With Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16 (“Mr. Marri reached a deal with the government to plead guilty to conspiracy to provide material support to Al Qaeda.”).

173 See Jane Meyer, *The Hard Cases*, NEW YORKER, Feb. 23, 2009, at 38.

Bush administration actions would have further buoyed the Court's status with academics and other interest groups. By March 2009, however, there was no good reason to ask the new administration to sort out its views on the al-Marri detention. Candidate Obama had campaigned against the Bush administration efforts to fence out federal courts from war-on-terror litigation. Indeed, when asking the Court to moot the case, the Obama administration told the Justices that it was willing to have the Fourth Circuit ruling vacated (showing "that the government is not attempting to preserve its victory while evading review").¹⁷⁴ Against this backdrop, there was simply no reason for the Justices to force the Obama administration to formally disavow or embrace Bush administration legal arguments. An Obama administration decision disavowing Bush administration arguments would not strengthen the Court's position vis-à-vis the executive (as the Obama Justice Department had already conceded the Court's authority to vacate the lower court ruling); an administration decision supporting Bush administration arguments would set the stage for a costly battle between the Court and the new administration. A decision on the merits, moreover, would have opened the Court up to charges of judicial over-reaching. In its brief seeking to moot *al-Marri*, the government argued that keeping the case alive "would lead only to an advisory opinion with no real-world impact on any individual" and that the Court should not reach out to decide "in a hypothetical posture" "complex constitutional questions" about the line where "national security policy and the Constitution intersect."¹⁷⁵

The Court's participation in *Kiyemba* likewise displays the Court's sensitivity to its status vis-à-vis the other branches and to the risks of unnecessarily interjecting itself in national security policy. This was true of both the June 2009 decision to hold over the appeal of the Uighur petitioners and the October 2009 decision to hear the case (but to schedule oral arguments so as to delay any decision until the summer of 2010).¹⁷⁶

June 2009 was too early for the Court to enter this dispute. Even though petitioners cast the case as an opportunity for the Court to defend its turf (suggesting that *Boumediene* had become an empty shell and it was up to the Court to give meaning to the decision),¹⁷⁷

174 Denniston, *supra* note 170.

175 *Id.*

176 *See supra* notes 11–19 for additional discussion.

177 *See Reply to Brief in Opposition, supra* note 168, at 1 ("As we approach *Boumediene's* anniversary, many prisoners have 'won' their *habeas* cases, but few have been released. . . . It has become the hortatory branch.")

the Court well understood the costs of entering this dispute. At that time, the Obama administration and Democratic Congress were sorting out their policy priorities on Guantánamo, Bagram detainees, and much more. Correspondingly, the Court had reason to think that a ruling demanding the relocation of Uighur detainees to the United States would not sit well with either the administration or Congress. Not only did the Obama administration oppose the relocation of the Uighurs to the United States,¹⁷⁸ Congress enacted legislation in June 2009 that severely limited the President's power to move Guantánamo detainees to the United States or resettle them in another country.¹⁷⁹

By holding the issue over, however, the Court gave the Obama administration time both to sort out its policy priorities and to relocate the Uighur detainees (and, in so doing, to try to moot the case).¹⁸⁰ In its brief opposing certiorari, the Obama administration made clear that it was trying both to close Guantánamo and to relocate the Uighur petitioners and asked the Court to respect the “efforts of the political Branches to resolve issues relating to petitioners and other individuals located at Guantanamo Bay.”¹⁸¹ Furthermore, the decision to hold the case over bought the Court time to see how the enemy combatant issue would play out among politicians, interest groups, the media, and the American people. As Part I reveals, Court enemy combatant decisions track social and political forces. As Part II reveals, the Court has moved incrementally—advancing its authority to say “what the law is” without risking backlash or national security.

The Court's October 2009 decision to hear *Kiyemba* does not break from this pattern. By scheduling oral arguments for spring 2009, the Court both provided elected government with additional time to settle this issue and provided itself with an opportunity to calibrate its decision making against the backdrop of elected government action and other subsequent developments.¹⁸² More than that,

178 *Id.* at 6.

179 *See* Herszenhorn, *supra* note 6 (discussing the political opposition to moving any Guantánamo prisoners to U.S. soil).

180 *See* Denniston, *supra* note 170 (“The order also approved transfer of [Al-Marri] from military custody to civilian custody . . .”).

181 Brief for the Respondents in Opposition at 26, *Kiyemba v. Obama*, No. 08-1234 (U.S. May 29, 2009).

182 Indeed, for reasons noted in the introduction, it is possible that the Obama administration might welcome a ruling against the government. *See supra* note 21 and accompanying text. Aside from further discrediting Bush-era policies, it may be that a Court ruling is the only way to break up the political logjam that—as of December 2009—is preventing

since *Boumediene* only decided the threshold issue that enemy combatants were entitled to habeas corpus relief, *Kiyemba* is a good vehicle for the Court to provide some details on how habeas proceedings should be conducted. In particular, there is little prospect that the decision will impact the rights on many Guantánamo detainees. By the summer of 2010, Guantánamo may be closed; if not, most detainees who prevail in habeas proceedings are likely to have been relocated to another country. Moreover, *Kiyemba* raises a quite narrow issue, namely, whether federal courts can mandate that Guantánamo detainees be relocated to the United States if no foreign nation will take them.¹⁸³ In other words, there is next to no prospect that *Kiyemba* will result in the type of scrutinizing judicial review that might raise national security risks (assuming, of course, that the Court will rule against the administration). Instead, *Kiyemba* seems likely to further tighten judicial control over the executive—but only in a very modest way.

Throughout the course of its enemy combatant decision making, the Court has moved incrementally. In so doing, the Court has expanded its authority vis-à-vis the President. Obama administration efforts to moot *al-Marri* and to relocate Uighur detainees (thereby mooting that litigation) speak to the administration's desire to avoid Supreme Court rulings that might limit the scope of presidential power. Unlike the Bush administration (whose politically tone deaf arguments paved the way for anti-administration rulings),¹⁸⁴ the Obama administration understands that the Court has become a player in the enemy combatant issue.

What is striking here, is that the Court never took more than it could get—it carved out space for itself without risking the nation's security or political backlash. Its 2004 and 2006 rulings provided ample opportunity for the President to pursue his enemy combatant initiative. Its 2008 ruling in *Boumediene*, while clearly constraining the political branches, reflected the views of the new Democratic majority in Congress and (to a lesser extent) the views of presidential candidates Obama and McCain.¹⁸⁵ Its decision to steer clear of early Ob-

the Obama administration from closing Guantánamo. For additional discussion of how judicial invalidations sometimes further elected government priorities, see Devins, *supra* note 21; Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deferences to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993); Keith E. Whittington, "Interpose Your Friendly Hand": *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 *AM. POL. SCI. REV.* 583 (2005).

183 See Finn, *supra* note 17.

184 See *supra* Part I.A.

185 See *supra* Part II.

ama-era disputes likewise avoids the risks of a costly backlash while creating incentives for the Obama administration to take judicial authority into account (by settling these cases outside of court).¹⁸⁶ Put another way, by taking prevailing social and political forces into account, the Court was able to flex its muscles without meaningfully undermining the policy preferences of the President and Congress.

I, of course, recognize that the Court's willingness to engage the executive and, in so doing, to nullify a signature campaign of the Bush administration, is a significant break from the judiciary's recent practice of steering clear of disputes tied to unilateral presidential war making.¹⁸⁷ At the same time, I see the Court's willingness to challenge, and not defer, as not at all surprising. The Bush administration made arguments that backed the Court into a corner. The Court could either bow at the altar of presidential power, or it could find a way to slap the President down. It is to be expected that the Court chose to find a way to preserve its authority to "say what the law is."¹⁸⁸ The Justices, after all, have incentives to preserve the Court's role in our system of checks and balances—especially when their decisions enhance their reputations with media and academic elites.¹⁸⁹ This is true of the Supreme Court in general, and arguably more true of the current Court—given its penchant to claim judicial supremacy and given the importance of these institutional concerns to the Court's so-called swing Justices.¹⁹⁰ It is also noteworthy that the enemy combatant cases were at the very core of the judicial function. At oral arguments in *Hamdan*, Justice Kennedy emphasized the importance of habeas corpus relief,¹⁹¹ suggesting that limitations on habeas relief would "threaten[] the status of the judiciary as a co-equal partner of the legislature and the executive."¹⁹²

186 See *supra* notes 170–81 and accompanying text.

187 See Devins & Fisher, *supra* note 109 (discussing the Court's practice of ducking war powers disputes).

188 Supreme Court Justices, as positive political theory predicts, have "institutional preferences that may enhance or weaken the strength of [their] ideological preferences." Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 783 (1996); see also Gillman, *supra* note 28.

189 See BAUM, *supra* note 25.

190 See Devins, *supra* note 89, at 1584 ("Beyond executive branch unilateralism and the modern Court's view that the resolution of all constitutional matters lies within its jurisdiction, the specific facts of *Hamdan* also contributed to the Court's decision.").

191 See Transcript of Oral Argument at 42–44, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

192 Alison Holland, Note, *Across the Border and Over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 AM. J. CRIM. L. 385, 398 (2000). Justice Kennedy's comments at oral arguments emphasized the need for enemy combatants to be "tried by a lawful tribunal" and suggested that the denial of

One final comment on the nature of the dialogue that took and is taking place between the three branches on the enemy combatant issue: Throughout the Bush-era, these cases were anything but a constitutional dialogue. The executive persisted in making the same argument, and, as its political fortunes diminished, the Court carved over more and more issue space for itself. For its part, the Bush-era Congress played no meaningful role—it simultaneously backed the executive while signaling to the Court that it would support judicial invalidation of executive initiatives. With a new administration in place, there is reason to think that the inter-branch dynamic will change. The Obama administration has advanced its policies while pursuing a less confrontational course; avoiding absolutist arguments and trying to steer clear of an adverse Supreme Court ruling. In so doing, the administration has yet to launch the type of broadsides that challenge the foundations of judicial authority. Up until now, the Court has responded in kind, leaving the administration breathing room to pursue its policies without a Supreme Court pronouncement on the scope of presidential power. It is a matter of pure speculation whether this pattern will continue. At the same time, there is good reason to think that the Court will follow the path it has laid down in Bush-era cases, taking social and political forces into account so as to protect its turf without risking national security or elected government backlash.

habeas relief raised a “structural,” not “procedural,” question. See Transcript of Oral Argument, *supra* note 191, at 43. Accordingly, there is reason to think that Justice Kennedy will be skeptical of Congress’s prohibition on habeas claims in the MCA.