

The Military Commissions Act of 2006

The Last Throw in the Bush Administration's Controversial Approach to Fighting International Terrorism.

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On October 17, 2006, President Bush signed into law a bill called “The Military Commissions Act of 2006”¹ a law to “authorize trial by military commission for violations of the law of war, and for other purposes.”² The law contains several controversial provisions, in particular:

- The delegation of authority to define a person as an “unlawful enemy combatant” to the executive branch without any avenue for appeal.³
- The exemption of military commissions from several key provisions of the Uniform Code of Military Justice, including section 810, which reads, “When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.”
- The refusal to allow alien unlawful enemy combatants to invoke rights under the Geneva Conventions.⁴
- The allowance of statements obtained under “disputed” levels of coercion.⁵
- The establishment of restrictions on when the accused may be present during his trial.⁶
- The (probable) restriction of access to counsel.⁷

There also seem to be ambiguities in the law with respect to the rights of American citizens. The reason for the ambiguity is that the jurisdiction of military commissions is limited to “try any offense...by an *alien* enemy combatant...”⁸ However, the definition of an “unlawful enemy combatant” extends to:

a person [meaning any person] who before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President...

¹ 109th Congress 2d Session S.3930 (hereafter Military Commissions Act of 2006 or MCA)

² Military Commissions Act of 2006, preamble.

³ Military Commissions Act of 2006, sec. 948a. `(1)` (ii).

⁴ MCA Section 5.

⁵ MCA sec. 948r.

⁶ MCA sec. 949d.

⁷ The question of access to counsel is not directly addressed in the MCA. Section 948k states that defendants in military commissions may have military or civilian defense counsel *once they have been charged*. However, Section 7 of the MCA eliminates habeas corpus and section 948r allows for coercive interrogation (which presumably must include solitary confinement) it is difficult to see how anyone could assert a detainee’s right to access counsel until after the detainee had been charged by a military commission.

⁸ MCA Section 948d.

The Military Commissions Act of 2006 can be viewed several ways. From one point of view, the law is a practical (if controversial) way of dealing with a unique and troubling problem: how to charge and try foreign terrorists who are not true prisoners of war and who are too dangerous to be given the full protections of the Constitution. From another point of view, the MCA is a human rights disaster, at least symbolically, because it gives every regime in the world political cover to justify restrictions on liberty by citing a crisis and then pointing to the United States. Put another way, how can America hope to champion basic freedoms when we ourselves do not have the strength to preserve them through crises? But what the MCA really represents is the most recent step, and perhaps one of the final steps, in the Bush Administration's battle for autonomy and freedom from oversight in conducting the War on Terror. As such, the law is proof that the battle for power between branches of government that began in the landmark case of *Marbury v. Madison* exists today in the form of a clash over the power to fight terrorism.

The history of the Military Commissions Act (MCA) is not simple. To fully understand the purpose and implications of the law, it is necessary to place the MCA in the broader context of the Bush Administration's approach to combating terrorism since September 11, 2001. In order to examine that history, this paper is divided into four sections. Section One will provide a brief overview of some of the arguments and ideas put forth in support of the current administration's approach to fighting terror. Section Two will examine of the recent history leading up to and involving the MCA, in particular the Supreme Court's ruling in *Hamdan v. Rumsfeld*, the MCA itself, and the case of *Boumediene v. Bush* challenging the law. Section Three will then more thoroughly examine the *Hamdan* ruling and examine the MCA as a response to that

ruling. Section Three will also take a more thorough look at the majority and dissenting opinions of the D.C. Circuit Court of Appeals in *Boumediene v. Bush*, as well as several scholarly arguments for and against the MCA. The fourth section will provide a conclusion and a prediction for the future of the legal side of the Bush administration's war on terror.

Section I

After the terrorist attacks of September 11, 2001, the Bush Administration looked for ways to assert the rights of the executive branch to as much autonomy as could possibly be defended in a legal setting. The resulting controversies over internal memos defending the use of torture, over "aggressive" or "coercive" interrogation tactics, over secret CIA prisons, and over the military detention facility at Guantanamo Bay do not need to be retold.⁹ These actions on the part of the administration were not simply indefensible power-grabs committed under the aegis of public fear, however. Several scholars have made well-reasoned arguments in defense of the Bush Administration's policies regarding the War on Terror. Two such scholars worth noting are Richard A. Posner and John Yoo. In his book, "Not a Suicide Pact,"¹⁰ Posner argues that in times of national emergency the Constitution must be flexible, and the public must accept an exchange in which personal freedoms are curtailed in order to provide increased security. As Posner says, "a national emergency may alter the *scope* of a right, and from a practical

⁹ For a comprehensive and critical look at the Administration's post-9/11 anti-terror policies, see Cole, David. *Enemy Aliens*. New York: The New Press, 2003.

¹⁰ The title of the book is a paraphrasing of a section of Supreme Court Justice Robert Jackson's dissenting opinion in *Terminiello v. City of Chicago* (1949), in which Justice Jackson wrote that "there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." The exact phrase "not a suicide pact" was used by Justice Arthur Goldberg, in reference to Jackson, in *Kennedy v. Mendoza-Martinez* (1963).

standpoint it is the scope rather than the mere existence of a right that is important.”¹¹ He also frames the debate over how to address the problem of terrorism as “the question of whether the United States is at war with terrorists or whether they are simply a particularly noxious form of political criminal.”¹² Posner goes on to argue that “the terrorist threat is *sui generis*—that it fits the legal category neither of ‘war’ nor of ‘crime.’”¹³ Posner is critical of libertarians, even going so far as to point out that civil libertarians are misguided in that they fail to understand that “the greatest danger to American civil liberties would be another terrorist attack on the United States.”¹⁴

John Yoo’s defense of the Administration’s policies focuses on inherent and (he claims) long-established executive power in matters of foreign affairs, war, and treaties. In his book *The Powers of War and Peace*, Yoo asserts that the executive branch has the authority to make and interpret treaties and take the country to war. Of particular importance here is the question of authority to interpret treaties, as will be explained later. Yoo uses a highly originalist approach to make his argument, focusing on foreign powers as they were understood in 18th century Britain rather than on American judicial precedent. In short, Yoo believes that the British (and thus the founders of the United States) viewed the powers to make and interpret treaties and to take the country to war as the exclusive realm of the executive branch. In defense of this position he quotes, among others, Thomas Jefferson and John Marshall. According to Jefferson, “[t]he constitution has divided the powers of government into three branches [and] has declared that ‘the

¹¹ Posner, 23.

¹² Posner, 11.

¹³ Posner, 11.

¹⁴ Posner, 46. Presumably Posner is referring not to the terrorist attack itself, but to the reaction thereafter. Of course, libertarians who advocate restraint in reaction to a first terror attack could respond that restrictions on civil liberties are no more justified after a second attack than they are after an initial one, and furthermore that the specter of severe illegal government action in the future does not justify moderate illegal government action in the present.

executive powers shall be vested in the president,' submitting only special articles of it to a negative by the senate...[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly."¹⁵ John Marshall appears to support Jefferson by saying that, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations...The [executive] department...is entrusted with the whole foreign intercourse of the nation."¹⁶

That Yoo can cite such examples seems to lend strong support to his position. Jefferson in particular was no advocate of interpreting the Constitution to allow extensive government power. But it is also not entirely clear that the citations above prove that Jefferson and Marshall would have agreed with Yoo. Jefferson speaks of "the transaction of business with foreign nations" and his repeated references to the Senate seem to refer to treaty powers. The exact meaning of the words "transaction of business"—i.e. whether or not they include the power to initiate hostilities—is not clarified. However, the overall body of evidence that Yoo presents in defense of the idea that the country's founders thought the Executive should be able to basically handle all foreign affairs without Congressional interference is impressive. Yoo even refers to a situation in 1798 in which France went to war with England, thus (some thought) necessitating the United States to make a similar declaration because a mutual defense clause in the 1778 Treaty of Alliance that had been signed with France. According to Yoo, President Washington elected to interpret the treaty otherwise, and subsequently issued the Neutrality

¹⁵ Yoo(a), 19, quoting from something else.

¹⁶ Yoo(a), 20, again quoting some something else.

Proclamation.¹⁷ Thus Yoo purports to establish that the Bush administration's assertion of powers of treaty interpretation is actually nothing new.¹⁸

Yoo has also written about the Military Commissions Act itself. In a Wall Street Journal editorial, Yoo aggressively defended the MCA, calling it "above all, a stinging rebuke to the Supreme Court."¹⁹ Consistent with his ideas of broad executive power, Yoo applauded the bill for giving "current and future administrations, whether Democrat or Republican, the powers needed to win this war."²⁰

Both Yoo and Posner are controversial, Yoo especially so. But their arguments provide a good overview of the many problems and questions addressed in the MCA. One interesting characteristic of Mr. Yoo's and Mr. Posner's defenses of the Bush administration is that the two men take diametrically opposite approaches. John Yoo relies strongly on the original thinking of the country's founders and supports his argument with evidence that those men indeed thought that "executive" power included the right to interpret treaties and initiate hostilities. In defending his approach of "turning the clock back two hundred years,"²¹ Yoo cites the lack of judicial precedent with respect to foreign affairs and points out that established practice cannot justify itself. Posner, on the other hand, seems to be openly disdainful of basing the law on original intent when he says,

the [Supreme Court] justices are Americans, which means that they are not shrinking violets; they are not habituated to deference to authority, including the authority of an old piece of parchment written with ink drawn from a feather quill. It also means that they tend to be pragmatic (pragmatism is the American national culture), hence *forward-looking rather than historians* (emphasis added), and,

¹⁷ Yoo(a), 5.

¹⁸ Yoo(a), 5.

¹⁹ Yoo(b).

²⁰ Yoo(b).

²¹ Yoo(a), 24.

being lawyers, treat history not as a guide but as a trove of anecdotes and rhetorical flourishes. And because they are trained in the common law, which is a body of law made by judges, it comes naturally to them to make constitutional law rather than just apply preexisting rules.²²

It is at least worth noting, then, that those who support Posner (or use his arguments to justify their actions) would have a difficult time also adhering to Yoo's position.

Section II

Although Posner and Yoo did not write the MCA, the law is to some extent a vindication of their arguments and ideas. The law's sections on treaty obligations and interpretations (Sections 5 and 6) read like a set of key passages from Yoo's book, transposed into legal language. However, as pointed out by Yoo, the law is most importantly a reaction to steps taken by the Supreme Court. What follows is a brief summary of the recent history prior to and after the passage of the MCA.

For the past five years, the executive branch has been pushing the limits of its independent authority, but it has suffered several setbacks at the hands of Supreme Court opinions. One such opinion came in June 2006, in the case of *Hamdan v. Rumsfeld*. The Supreme Court's ruling in *Hamdan* reversed a decision by the D.C. Circuit holding that petitioner Hamdan was not entitled to habeas relief because "the Geneva Conventions are not judicially enforceable."²³ The court also concluded that "*Ex Parte Quirin*...foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the

²² Posner, 19. It almost certainly goes without saying that this paragraph alone merits an entire essay's worth of commentary, especially the remarkably nonchalant dismissal of what may be the most important legal document on the planet as "an old piece of parchment," as well as Posner's casual, utter rejection of *stare decisis*.

²³ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Syllabus, 2.

UCMJ nor Armed Forces regulations implementing the Geneva Conventions.”²⁴ In overturning the decision, the Supreme Court listed several key aspects of its ruling.²⁵ First, the Court denied the government’s motion to dismiss and found arguments in favor of *Councilman* abstention unpersuasive. Second, the Court objected to the fact that the military commission in question had *not been expressly authorized by any Congressional Act*. A now crucial third point was the Court’s finding that the military commission at issue *violated the UCMJ and the four Geneva Conventions signed in 1949*. Finally, the Court found that Hamdan had not been *charged with an “offense...that by the law of war may be tried by military commission,”*²⁶ and that Article 3 of the Geneva Conventions demand detainees be given “the barest of the trial protections recognized by customary international law.”²⁷

The emphasis is added above because those portions of the ruling are directly countered or addressed in the MCA. Indeed, in light of these aspects of the Hamdan ruling and the relevant language in the MCA, it is fair to say that the MCA can properly be viewed as a direct response to the Supreme Court’s ruling in *Hamdan*.

The Supreme Court ruling in *Hamdan* was a setback for the Bush Administration in that the ruling again delayed the executive’s plans for dealing with the Guantanamo Bay prisoners. However, the ruling was narrowly decided, 5-3, with Chief Justice Roberts taking no part in the consideration or decision of the case. Furthermore, as shown by examination of Justice Kennedy’s concurring opinion below, the majority only really held solid on the grounds that the President did not have proper congressional

²⁴ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Syllabus, 2.

²⁵ See the Syllabus of the ruling, section written by Justice Stevens.

²⁶ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Syllabus, 7.

²⁷ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Syllabus, 8.

authorization for his military commissions, as opposed to whether the commissions or their procedures violated the constitutional rights of the defendants. As pointed out in Justice Stevens' opinion for the court, "Four of us also conclude...that the offense with which Hamdan has been charged is not an 'offens[e] that by...the law of war may be tried by military commissions.' 10 U.S.C. §821."²⁸ It is important to underline that only four of the Justices agreed on this part of the ruling.

The primary basis for the Court's ruling in *Hamdan* (that the President needed congressional authorization to carry out the military commissions) was based on a complex and highly technical reading of the Detainee Treatment Act of 2005 (DTA). Essentially, the decision rested on the idea that Congress had intentionally exempted all pending habeas corpus cases from the DTA, a contention aggressively argued against in Justice Scalia's dissenting opinion.²⁹ The Court refused to reach questions raised by the defendant regarding the authority of Congress to "impinge upon this Court's appellate jurisdiction, particularly in habeas cases,"³⁰ and whether or not Congress had unconstitutionally suspended the writ of habeas corpus. The Court simply held that because Congress had not expressly stripped the Court of jurisdiction over pending habeas corpus cases, there was no reason to read the statute as applying to those cases.

The MCA directly addresses most of the majority's reasoning in the *Hamdan* ruling. As already mentioned, the MCA particularly either responds to the concerns of or seeks to overrule the opinion of the Court with respect to Congressional authorization, interpretation of Geneva Conventions, the UCMJ, and defining various crimes as within the law of war. With regard to Congressional authorization for military commissions, the

²⁸ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Opinion by Justice Stevens, 2

²⁹ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Dissenting opinion by Justice Scalia, 1-15.

³⁰ Page 10 of the ruling.

MCA itself is the response, and in this context is not really a “stinging rebuke” of the Court (to quote Yoo). The Court demanded a Congressional act, and a Congressional act was passed. With respect to the Geneva Conventions and the Uniform Code of Military Justice, the MCA seeks to remove any obstacles to trying detainees like Hamdan.

Regarding the UCMJ, the MCA simply changes the relevant portions of the Code:

‘Sec. 948b. Military Commissions Generally

‘(c)...The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. *The judicial construction and application of that chapter are not binding on military commissions established under this chapter* (emphasis added).

‘(d)...The following provisions of this title *shall not apply to trial by military commission under this chapter* (emphasis added):

‘(A) ... (article 10 of the [UCMJ]), relating to speedy trial, including any rule of courts-martial to speedy trial.

‘(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the [UCMJ]), relating to compulsory self-incrimination.

‘(C) Section 832 (article 32 of the [UCMJ]), relating to pretrial investigation.

The MCA also addresses the Supreme Court’s Geneva Conventions objections:

‘Sec. 948b. Military commissions generally...

‘(g)...No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

The MCA also goes even further with respect to the Geneva Conventions, explicitly denying the judicial system the authority to enforce the Geneva Conventions and granting the President the (perhaps exclusive) power to interpret the Conventions:

Sec. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) Implementation of Treaty Obligations-

(2)...No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions

enumerated in subsections (d) of such section 2441 [pertaining to the Geneva Conventions].

(3) INTERPRETATION BY THE PRESIDENT-

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

Finally, lest there be any confusion regarding the ability of Guantanamo Bay detainees or other “alien unlawful enemy combatants” to seek relief in the federal judicial system, an entire section of the MCA is devoted to habeas corpus. In particular, Section 7 rewrites relevant sections of the United States Code to read that:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

In other words, the authors of the Military Commissions Act seem to have left no doubt of their intent to prevent any court of the United States from seeking support from the *Hamdan* decision in favor of Guantanamo Bay detainees. Similarly, the MCA deals in an open and direct way with the Court’s finding that Hamdan had not been charged with an offense that could be tried by a military commission. At the time of the Supreme Court’s ruling in *Hamdan v. Rumsfeld*, Mr. Hamdan stood accused of conspiracy, which the Court said was not a punishable offense under the laws of war. Enter ‘Sec. 950q and ‘Sec. 950t. of the MCA, which reads in part:

Any person is punishable as a principal under this chapter who—
 ‘(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
 ‘(2) causes an act to be done which if directly performed by him would be punishable by this chapter..

‘(a) In General- Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

‘(b) Scope of Offense- An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

And, most importantly:

‘Sec. 950v. Crimes triable by military commissions...

‘(28) CONSPIRACY- Any person subject to this chapter who conspired to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished...

Thus the MCA carefully, methodically, and directly either addresses the requirements set forth by the Supreme Court in *Hamdan*, or defies the Court’s position.³¹

So is the MCA an example of Congress trying to overrule the Supreme Court?

The members of the U.S. Circuit Court of Appeals for the District of Columbia seem to think so, including those who have already found in favor of the Bush administration.

After its passage, the MCA was quickly challenged in the U.S. court system, in the case of *Boumediene v. Bush*. The Boumediene case was decided by the U.S. Court of Appeals for the District of Columbia, in favor of the government. In a 2-1 ruling written by *Circuit Judge* Randolph, the Court of Appeals held that the MCA did indeed apply to the petitioners’ habeas claims, and that the MCA did not violate the Suspension Clause of the Constitution.³² In question was Section 7 of the MCA (above), which eliminates all habeas corpus jurisdiction for U.S. Courts over Guantanamo detainees. Furthermore, the Appeals Court opinion plainly states that, “Everyone who has followed the interaction

³¹ The authorization for the commissions is not an act of defying the Supreme Court; it merely meets the Court’s requirement that such commissions be authorized by Congress. However, the MCA’s sections on the Geneva Conventions could perhaps be construed as an act of defiance towards the Court, a question which is taken up in the analysis below.

³² Article I, Section 9, Clause 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.”³³

An overview of the events surrounding the MCA would be incomplete without mentioning one final piece of (extremely) recent history. On April 2, 2007, the Supreme Court declined to grant petitions for writs of certiorari to the D.C. Circuit Court of Appeals in the *Boumediene* case. The Justices voted 6-3 to deny certiorari, and two statements were issued, one explaining the decision but stating that the petitioners’ appeal could be reheard at a later date,³⁴ and a dissenting opinion arguing that certiorari should have been granted and the case heard right away.³⁵ In his dissent, Justice Breyer, joined by Justice Souter and Justice Ginsburg in part, indicated that the Court of Appeals for the District of Columbia may have been ruled in violation of principles already established by the Supreme Court: “...petitioners plausibly argue that the lower court’s reasoning is contrary to this Court’s precedent.”³⁶

Section III

Although the Military Commissions Act is a complex piece of legislation, its central purpose can be seen as challenging the authority of the Supreme Court to intervene in the war on terror. As mentioned above, the first shot in this historical turf battle between the Supreme Court, the Executive, and Congress, was fired in the case of *Marbury v. Madison* in 1803. *Marbury* involved the right of an appointed judge to receive his commission, whereas the MCA involves how to address the threat of international terrorism. However, although the specifics are different, the fundamental

³³ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Opinion by Randolph (9).

³⁴ *Boumediene et. al. v. United States et. al.* 549 U.S. (2007). Opinion by Justices Stevens and Kennedy denying writ of certiorari (1-2).

³⁵ *Boumediene et. al. v. United States et. al.* 549 U.S. (2007). Dissenting opinion by Justice Breyer.

³⁶ *Boumediene et. al. v. United States et. al.* 549 U.S. (2007). Dissenting opinion by Justice Breyer (2).

nature of the contest between the branches of government is not. To the extent that the MCA is a challenge to the authority of the Supreme Court, the viability of the challenge has already begun to be tested.

As mentioned above, the Supreme Court's opinion in *Hamdan* largely bypassed the issues of habeas corpus, instead focusing first on the failure of Congress to strip the Court of jurisdiction over pending habeas cases and then on the lack of congressional authority for the military commissions. The Court outlines the history of military commissions and also states that "exigency alone, of course, will not justify the establishment and use of the penal tribunals."³⁷ More specifically, in ruling against the government, the Court stated that "Neither [the Authorization for the Use of Military Force nor the Detainee Treatment Act], however, expands the President's authority to convene military commissions."³⁸ Furthermore, the Court stated that "the UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself...The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws."³⁹ The Court then proceeds to outline the many shortcomings of the proposed commissions compared with the procedural laws of courts-martial and criminal trials.

Again, the MCA rips the foundation out from under this line of reasoning. The UCMJ can no longer be cited as an objection to the military commissions, because the UCMJ has been carefully retailored, by the very same law authorizing those commissions, to permit their use. So does that leave those who would challenge the use and structure of the military commissions defeated at last? As the Court pointed out in

³⁷ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (26).

³⁸ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (29).

³⁹ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (49).

Hamdan, “The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”⁴⁰ It seems a stretch to think that the procedures for military commissions outlined in the MCA could be seen as unconstitutional when there is no mention of the tribunals anywhere in that document.

However, there still remains the question of the Geneva Conventions. After its discussion of the UCMJ and the shortcomings of the military commissions, the Court states that “The procedures adopted to try Hamdan also violate the Geneva Conventions.”⁴¹ In so ruling, the Supreme Court overturned the ruling by the Court of Appeals, which had stated that:

- (1) the Geneva Conventions are not judicially enforceable;
- (2) Hamdan in any event is not entitled to their protections;
- (3) Even if he is entitled to their protections, *Councilman* abstention is appropriate.⁴²

More specifically, the Supreme Court disagreed with the Government’s assertion that American’s war with al Qaeda is beyond the reach of the Geneva Conventions.⁴³ This section of the opinion, when read in conjunction with those sections of the MCA pertaining to the Geneva Conventions and the “Implementation of Treaty Obligations” raises at least two intriguing constitutional questions. First, who has final authority to interpret treaties? Second, if treaties such as the Geneva Conventions are judicially enforceable, does Congress have the authority to limit the scope of that enforcement? The question of treaty interpretation is especially interesting, and leads back to John Yoo’s argument regarding original understanding of executive powers over foreign

⁴⁰ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (25).

⁴¹ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (62).

⁴² *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (64).

⁴³ *Hamdan v. Rumsfeld*, 548 U.S. (2006). Majority opinion by Justice Stevens (65).

affairs. It seems almost certain that if the case of *Boumediene v. Bush* is ever heard before the Supreme Court, these questions will be addressed.

However, *Boumediene* has already gone before the D.C. Circuit Court of Appeals. In a 2-1 ruling, that court held that, inter alia, the MCA stripped the federal court system of any jurisdiction over habeas corpus claims by Guantanamo Bay detainees. One aspect of the law on which the Court of Appeals ruling focused was the section eliminating the crucial loophole in the DTA on which much of the *Hamdan* reasoning rested. As the Court states,

Section 7(b) could not be clearer. It states that ‘the amendment made by subsection (a)’ – which repeals habeas jurisdiction – applies to ‘all cases, without exception’ relating to any aspect of detention. It is almost as if the proponents of these words were slamming their fists on the table shouting “When we say ‘all,’ we mean all – **without exception!**” (emphasis in original).⁴⁴

Thus the Court of Appeals holds that the MCA clearly has revoked federal jurisdiction over all such cases. Even Judge Rogers, in her dissent, admits as much: “While I agree that Congress intended to withdraw federal jurisdiction through the Military Commission Act of 2006...the court’s holding that the MCA is consistent with the Suspension Clause of Article I, section 9, of the Constitution does not withstand analysis.”⁴⁵

The Court of Appeals also addressed the question of whether the MCA is an unconstitutional suspension of habeas corpus. This question occupies much of the majority opinion and is the foundation of Rogers’ dissent. As it is framed by the Appeals Court in *Boumediene*, the question centers on whether or not the detainees would have been granted habeas corpus under the common law. The detainees are foreign nationals who have never set foot on U.S. soil. As the Court says, “The detainees rely mainly on

⁴⁴ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Majority opinion by Randolph (11).

⁴⁵ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Dissenting opinion by Rogers (1).

three cases to claim that in 1789 the privilege of the writ [of habeas corpus] extended to aliens outside the sovereign's territory."⁴⁶ The Court of Appeals remains unconvinced, however, stating that, "None of these cases involved an alien outside the territory of the sovereign."⁴⁷ In her dissenting opinion, Rogers rejects this conclusion, asserting that "the historical record and the guidance of the Supreme Court disprove this conclusion."⁴⁸

Also central to the dispute between Randolph and Rogers is whether the privilege of the writ of habeas corpus constitutes an individual constitutional right (which, it is argued, would not apply to foreign nationals held outside U.S. territory) or a restriction on government powers. If the writ is a constitutional right, then suspending it for Guantanamo Bay detainees seems to not pose any problems, since these individuals have no rights under the U.S. constitution to violate. However, says Rogers, if the privilege of habeas corpus is viewed in its proper way as a restriction on what actions the government may and may not take, then suspension is unconstitutional, except in cases of invasion or rebellion, regardless of who the suspension affects.⁴⁹

Conclusion

The Military Commission Act of 2006 involves a number of issues, and can be viewed in several ways. It is a law that makes it easier for the Executive branch to fight terrorists. It is also (unquestionably) a significant expansion of government power, especially power over non-citizens. The MCA is probably also a serious blow to American credibility as a beacon of freedom and individual liberties. But what the MCA really represents is an attempt by the Bush administration and its supporters in Congress

⁴⁶ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Majority opinion by Randolph (14).

⁴⁷ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Majority opinion by Randolph (15).

⁴⁸ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Dissenting opinion by Rogers (2).

⁴⁹ *Boumediene v. Bush* D.C. Circuit Court of Appeals (2007). Dissenting opinion by Rogers (3).

to force the Supreme Court and the judicial system out of the war on terror. As such, the law is one of the final moves by the administration in a long fight to remove all oversight of its efforts to combat international terrorism. The MCA is an ideological victory for those who advocate trading liberty for security, such as Posner, and of expansive presidential power in foreign affairs, such as Yoo.

However, because of circumstances the MCA is also likely to be one of the last moves in the current executive power grab. In the 2006 elections the Democratic Party took control of both houses of Congress, creating a sizeable obstacle to any further efforts by a Republican administration to increase its own power. Second, the Bush administration is nearing the end of its time in power, and its leader is wildly unpopular. But although the MCA may be almost the end of the Bush quest, there is at least one more round that may still be played: the Supreme Court, in denying certiorari in *Boumediene*, did not rule out hearing the case later. If the Court does hear the case, it will almost address questions regarding the interpretation of treaties, and the constitutionality of suspending habeas corpus for foreign nationals held outside U.S. territory. How would the current Court rule? The answer is unclear, but those who look hopefully to the Supreme Court to restore habeas corpus may find an ominous relevance in a dissenting opinion from America's most infamous civil liberties case. In his dissenting opinion in the case of *Korematsu v. United States*, Justice Jackson wrote that, "If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint."⁵⁰ Faced with a wartime administration enjoying the full support of a Congressional Act, is it not worth asking just what power the Supreme Court really has?

⁵⁰ *Korematsu v. United States* 323 U.S. 1944. Dissenting opinion by Justice Jackson.

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3. Yoo, John. "Sending a Message." Editorial. Wall Street Journal. 19 Oct. 2006.