The Executive Blank Check: A look into the combined dangers of judicial restraint and legislative rubberstamping in the Global War on Terror

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Abstract: The Executive Blank Check: A look into the combined dangers of judicial restraint and legislative rubberstamping in the Global War on Terror

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Throughout the Global War on Terror, the executive branch of the United States’ government has acted well beyond its scope, but has been met with very limited judicial review and legislative action. This article shows that the ineffective state of our government’s system of checks and balances has allowed the executive branch to abuse its constitutional authority. It begins with examples of the modern state of executive power, then discusses examples of judicial restraint towards executive actions, and moves onto the dangers of broad congressional partisan grants of power. This article concludes with proposals for a better balanced system of checks and balances. The Supreme Court has the responsibility to step in when any government branch acts outside of its mandate and to uphold the Constitution. Finally, Congress must act independent of the executive branch by refusing to rubberstamp laws based solely on partisan ties.
The Executive Blank Check

A look into the combined dangers of judicial restraint and legislative rubberstamping in the
Global War on Terror

by

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…the world is like an enormous spider web and if you touch it, however lightly, at any point the vibration ripples to the remotest perimeter and the drowsy spider feels the tingle and is drowsy no more but springs out to fling the gossamer coils about you who have touched the web and then injects the black, numbing poison under your hide-Robert Penn Warren\(^1\)

I. Introduction

Imagine returning to your home country by airplane. You depart the flight and immediately are taken into custody by federal agents. This begins your three and a half year period of isolation, sensory deprivation, and abuse. For a long stretch of that period, you have no idea why you are imprisoned. For twenty-one months, your requests to speak with a lawyer are denied and there is no end in sight. When you require medical assistance, you are handcuffed, shackled, and forced to don opaque goggles and noise-blocking headphones. Just imagine what the interrogations are like.

This is the story of Jose Padilla, an alleged dirty bomb manufacturer.\(^2\) In the eyes of the executive branch, Padilla was presumed guilty the moment that he was arrested.\(^3\) Two months after being seized, President Bush designated him an “enemy combatant” thus “freeing” him from his constitutional protections.\(^4\) For the first forty-two months of his detention, Padilla was held without being charged.\(^5\) Padilla was not given a chance to plead his case before a court and,

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now that he is able, years of abuse have placed him in a debilitated state.\textsuperscript{6} The most frightening part is that Padilla is an American citizen.\textsuperscript{7} In the words of Justice Stevens, “[a]t stake in this case is nothing less than the essence of a free society.”\textsuperscript{8}

In the years since the terrorist attacks on September 11, 2001, the executive branch of the United States’ government has acted well beyond its scope, but has been met with very limited judicial review and legislative action. With his military order setting up the “enemy combatant” designation,\textsuperscript{9} President Bush made the executive branch the judge, jury, and, quite possibly, executioner. In 2006, the Supreme Court ruled the system unconstitutional, but this took five years.\textsuperscript{10} In the wake of the decision, President Bush urged Congress to legalize his system.\textsuperscript{11} When President Bush signed the Military Commissions Act of 2006 (MCA) into law, the abovementioned nightmare was prolonged indefinitely for many detainees.\textsuperscript{12}

This article will show that the ineffective state of our government’s system of checks and balances has allowed the executive branch to abuse its constitutional authority during the Global War on Terror (GWOT). The first part of this article will describe the modern state of approved, or unapproved, executive power. Then, this article will discuss the restraint exuded by the judiciary in reviewing executive action in the GWOT. Finally, this article will present the dangers of broad Congressional grants of executive power. Furthermore, this article will make proposals to better balance our system of government and eliminate the aforementioned abuses.

\textsuperscript{7} \textit{Padilla}, 524 U.S. at 430.
\textsuperscript{8} \textit{Id.} at 465 (Stevens, J., dissenting).
\textsuperscript{10} \textit{See} Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (holding that the military tribunals in Guantanamo Bay are illegal as they are in violation of the Geneva Conventions and the United States Uniform Code of Military Justice).
\textsuperscript{11} \textit{See} Rick Klein, \textit{Bush Urges Congress to Ratify Military Tribunals}, BOSTON GLOBE, July 12, 2006, at A3 (“Bush administration officials yesterday asked Congress to endorse the special military tribunals established by the president to try prisoners captured in the war on terror…”).
\textsuperscript{12} Richard B. Schmitt \& Julian E. Barnes, \textit{The Nation; Bush Signs Tough Rules on Detainees; As the controversial law on terror trials and interrogations takes effect, Justice Dept. asks that prisoners’ hearing requests be dismissed.}, L.A. TIMES, Dec. 18, 2006, at A1.
As Nancy Pelosi, newly elected Speaker of the House for the 110th Congress, said, “There’s not … a blank check for him [the president] to do whatever he wishes….”

II. Background

The power granted to the President of the United States of America is granted solely by Article II of the Constitution. Presidencial exercises of power are often rationalized by the responsibility to “take Care that the Laws be faithfully executed.” Due to the open ended nature of this power, there is no defined line at which overextended exertions of executive power can be quashed. These extensions of presidential power come primarily from Executive Orders. Executive Orders are decrees issued by a president to exercise a power granted to the executive branch. Often, these orders are given in support of congressional action. However, when an Executive Order directly conflicts with the intentions of Congress, the question arises as to the extent to which Executive Orders can be used to encroach on the responsibilities of the other two government branches.

A. Modern Foundation for Executive Power

While virtually every president has issued Executive Orders, there was no systematic method of numbering and recording them until the twentieth century. Many controversial Executive Orders are issued under the guise of executive military authority pursuant to Article II,
Section 2, which appoints the president as Commander in Chief of the armed forces.\textsuperscript{20} In order to “take care,” in the words of Article II, Section 3, that military authority is “faithfully executed,” the president often issues Executive Orders.\textsuperscript{21} The most noteworthy of this type of Executive Orders include the suspension of habeas corpus during the Civil War,\textsuperscript{22} the internment of Japanese Americans during World War II,\textsuperscript{23} and the seizure of steel during the Korean War.\textsuperscript{24}

The importance of judicial review of presidential power becomes evident from these extreme examples. This judicial review is part of the system of proper checks and balances on the executive branch.\textsuperscript{25} There is an unspoken benefit of the doubt given in regard to Executive Orders where only the most egregious decrees receive judicial review.\textsuperscript{26} Only three Executive Orders have ever been judicially overturned and, of the 1,400 Executive Orders issued over the past thirty-four years, Congress has annulled only three.\textsuperscript{27} Of those three judicially overturned orders, only two were during wartime.\textsuperscript{28} Due to the shortcomings of the current state of checks and balances, public opinion has emerged as the most likely curb on presidential power.\textsuperscript{29}

\textsuperscript{20} U.S. CONST. art. II, § 2.  
\textsuperscript{21} U.S. CONST. art. II, § 3.  
\textsuperscript{22} See Ex Parte Merryman, 17 F. Cas. 144 (1861) (holding that a President cannot suspend the writ of habeas corpus).  
\textsuperscript{24} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (limiting the authority of the President to seize private property in the absence of specific authority).  
\textsuperscript{25} See Marbury v. Madison, 5 U.S. 137 (1803) (recognizing judicial review).  
\textsuperscript{26} See e.g., Steven Ostrow, Enforcing Executive Orders: Judicial Review of Agency Action Under The Administrative Procedure Act, 55 GEO. WASH. L. REV. 659 (March 1987) (discussing the role of the courts in executive orders).  
\textsuperscript{27} Clay Risen, The Power of the Pen, Aug. 1, 2004, http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8140 (last visited Dec. 1, 2006); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that Executive Order 10340 authorizing the seizing of steel mills during wartime was unconstitutional); Chamber of Comm. v. Reich, 74 F.3d 1322 (D.C. 1996) (overturning Executive Order 12954 because the order was preempted by the National Labor Relations Act); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (holding that the military tribunals in Guantanamo Bay are illegal as they are in violation of the Geneva Conventions and the United States Uniform Code of Military Justice).  
\textsuperscript{28} Youngstown occurred during the Korean War and Hamdan occurred during the Global War on Terror.  
\textsuperscript{29} See, e.g., Peter M. Shane, Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking, 48 ARK. L. REV. 161, 197-203 (1995) (discussing a framework for executive accountability to public opinion).
Grave injustices against American citizens have occurred because of the unfortunate combination of far-reaching Executive Orders and overly deferential judicial restraint. In *Korematsu v. U.S.*, 110,000 Americans of Japanese descent were kept in prison camps during World War II on the authority of Executive Order 9066. Based on faulty intelligence from a racist general, President Roosevelt issued an executive order intended to protect the United States from espionage and terrorism on the west coast. The Executive Order was challenged in court on the basis that the executive branch went beyond their powers by restricting the rights of Japanese Americans. Rather than investigate the claim as an independent judiciary, the Court upheld the order with deference to the military’s findings. Although the Court rationalized this outwardly racist action as a response to “real military dangers,” those dangers were never proven to have existed and subsequent investigation has made the racial tone of the exclusion quite evident.

Justice Frankfurter’s concurring opinion epitomizes the dangers of judicial restraint. In his view, government actions during wartime are “their business, not ours.” By shirking the judiciary’s responsibility, Frankfurter plainly exposes the deficiencies of the system of checks and balances. All three dissenting justices agreed that the majority was legitimizing a racist proposal. The majority failed to look at the fact that the exclusion necessitated forced

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33 Id. at 223.
34 Id.
36 *Korematsu*, 323 U.S. at 224-25 (Frankfurter, J., concurring).
37 Id. at 225 (Frankfurter, J., concurring).
38 Id.
39 See id. at 226 (Roberts, J., dissenting) (“it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry . . . .”); see id. at 233 (Murphy, J., dissenting) (“Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism.”); see id. at 243 (Jackson, J., dissenting) (“The difference between their innocence and his
imprisonment,\textsuperscript{40} effectively legalized governmental racism,\textsuperscript{41} and ruled in a manner which would affect American citizens indefinitely.\textsuperscript{42} This blatant “blind eye” to correcting presidential mistakes effectively disabled checks and balances.

A few years later, the Court held that “the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”\textsuperscript{43} The Court drew a line between executive and legislative powers. In \textit{Youngstown}, the Court held that the President’s power must stem from either an act of Congress or from the Constitution.\textsuperscript{44} This was in response to President Truman issuing an order to have the nation’s steel mills seized in order to avoid a strike during wartime.\textsuperscript{45} Particularly of note is the Court’s opposition to adopting the executive branch’s broad definition of executive power as articulated in the Constitution.\textsuperscript{46} The Court placed a clear limit on presidential power, especially during wartime.\textsuperscript{47} Under no circumstances did the Court find it acceptable for the executive branch to circumvent the legislature.\textsuperscript{48}

Justice Jackson’s concurrence outlined the three general categories of presidential power.\textsuperscript{49} These groupings show the “situations in which a President may doubt…his powers” and question the legitimacy of his actions.\textsuperscript{50} A President’s authority is at its greatest when he is acting with express or implied authorization of Congress and at its lowest when he is acting contrary to expressed or implied will of Congress.\textsuperscript{51} When a president and Congress are in

\textsuperscript{40} Id. at 231-32 (Roberts, J., dissenting).
\textsuperscript{41} Id. at 242 (Murphy, J., dissenting).
\textsuperscript{42} Id. at 246 (Jackson, J., dissenting).
\textsuperscript{43} \textit{Youngstown}, 343 U.S. at 587.
\textsuperscript{44} Id. at 585.
\textsuperscript{45} Id. at 582-83.
\textsuperscript{46} Id. at 587.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 588-89.
\textsuperscript{49} \textit{Youngstown}, 343 U.S. at 635-38 (Jackson, J., Concurring).
\textsuperscript{50} Id. at 635 (Jackson, J., Concurring).
\textsuperscript{51} Id. at 635, 637 (Jackson, J., Concurring).
agreement on an issue, presidential power is at its peak. When they disagree, the opposite is true. There is also an intermediate “zone of twilight” in which Congress may be silent on an issue.\textsuperscript{52} In those situations, the president’s power will depend on the intricacies of the current situation, rather “than on abstract theories of law.”\textsuperscript{53}

The \textit{Youngstown} decision “helped redress the balance of power among the three branches of government and breathed new life into the proposition that the President…is ‘under the law’” rather than above it.\textsuperscript{54} While this decision began an era of activism within the Court, judicial deference to the president began to prevail in the mid 1960s.\textsuperscript{55} The next time that judicial activism took center stage was during Watergate and, even then, only occurred in the face of gross presidential misconduct.\textsuperscript{56}

In 1999, President Clinton issued Executive Order 13119, designating areas around Yugoslavia as combat zones.\textsuperscript{57} President Clinton won limited approval in Congress by giving his blessing towards otherwise unpopular budgetary issues.\textsuperscript{58} By expressing support for the troops and narrowly defeating a bill to cut off funding, Congress gave permission for the president to continue along the path to war.\textsuperscript{59} Rather than mandating an explicit declaration of war, Congress implicitly allowed the action to take place.\textsuperscript{60}

\textsuperscript{52} \textit{Id.} at 637 (Jackson, J., Concurring).
\textsuperscript{53} \textit{Id.} (Jackson, J., Concurring).
\textsuperscript{54} \textit{Maeva Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power} 228 (Columbia Univ. Press 1977).
\textsuperscript{55} \textit{Id.} at 228, 235.
\textsuperscript{56} \textit{See id.} at 235-48 (explaining the effects of \textit{Youngstown} on the Watergate proceedings).
\textsuperscript{58} Charles Tiefer, \textit{War Decisions in the Late 1990s by Partial Congressional Declaration}, 36 SAN DIEGO L. REV. 1, 12-16 (Winter 1999).
\textsuperscript{59} \textit{Id.} at 15.
\textsuperscript{60} \textit{Id.}
In *Campbell v. Clinton*, twenty-six congressmen sought a declaratory judgment stating that President Clinton’s use of the armed forces in Kosovo was illegal.\(^{61}\) Rather than adjudicate the specific constitutional issue, the Court dismissed the action for lack of standing, stating that the congressmen had other proper channels for the dispute.\(^{62}\)

A similar situation took place in 2002, leading up to the United States war with Iraq. In October 2002, Congress adopted the Authorization for Use of Military Force (AUMF), a joint resolution authorizing military force in Iraq.\(^{63}\) This authorization is clearly not a declaration of war, but it was used by the Bush administration in lieu of one. Similar to *Campbell*, the Court was again faced with a constitutional question regarding a presidential declaration of war in *Doe v. Bush*.\(^{64}\) Although he lacked a congressional declaration of war, President Bush made his own declaration of war on March 19, 2003.\(^{65}\)

**B. Executive Power in the Global War on Terror**

The GWOT has presented a great number of challenges in regards to executive exertions of power, including the designation of prisoners of war, domestic wiretapping, and the use of torture to interrogate detainees.\(^{66}\) On November 13, 2001, President Bush issued a military order that effectively designated anyone, at his discretion, an “enemy combatant” subject to off-shore

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\(^{62}\) *Id.*


\(^{64}\) 240 F. Supp. 2d 95 (2003).

\(^{65}\) See *Doe v. Bush*.

\(^{66}\) See *Doe v. Bush*.\(^{65}\) (discussing the executive prerogative in reference to the GWOT).
imprisonment and a lack of fundamental rights. The order also created a broad system of military tribunals, specifying that detainees be subject to the tribunals, and granting the Secretary of Defense broad power to detain. On the authority of that order, federal agents arrested and detained approximately 1200 foreign nationals and held hundreds for months before allowing their release. The government has conceded the innocence of many of these detainees by authorizing their release after three to four years of detention. The secret nature of the proceedings outlined in the military order received scathing criticism from some judges.

i. Detainee Cases Challenging Executive Power

Four important Supreme Court challenges to President Bush’s new system illustrate the Court’s move from extreme restraint to limited activism. Ultimately, the order was ruled unconstitutional. All of these cases emerge from similar sets of facts: an individual or groups of individuals challenges their status as detainees during the GWOT. The circumstances surrounding their enemy classification differ to some extent, but the central facts are similar and illustrate the trend of the Court towards holding this process illegal.

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68 Id.
69 Stephen J. Schulhofer, No Checks, No Balances: Discarding Bedrock Constitutional Principles, in CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST-9/11 WORLD 89, 100 (Katherine B. Darmer et al. eds., 2005).
70 Republicans heal rift, but deal on detainees falls short, U.S.A. TODAY, Sept. 25, 2006, at 21A.
71 See, e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (“The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”).
73 Hamdan, 126 S. Ct. at 2798.
74 Padilla, 542 U.S. at 430; Rasul, 542 U.S. at 471-72; Hamdi, 542 U.S. at 509; Hamdan, 126 S. Ct. at 2759-60.
75 Padilla was a United States’ citizen detained as an “enemy combatant” who was arrested in Chicago after returning from Pakistan. Padilla, 542 U.S. at 430. Petitioners in Rasul were foreign nationals captured in
In *Padilla*, the Court entirely sidestepped the original question of whether the AUMF permitted the president to detain United States’ citizens by merely classifying them as enemy combatants. The Court merely answered the question of whether the suit was properly filed. Rather than exert judiciary power, the Court answered limitedly that the suit was filed in the wrong district and named the wrong defendant, thus denying Padilla’s claim for relief.

In *Rasul*, “enemy combatants” who were captured in Afghanistan challenged their detention by filing habeas corpus petitions in the United States District Court for the District of Columbia. The lower courts dismissed the case for lack of jurisdiction. The Court held that there was sufficient jurisdiction for the detainees to challenge their detention. The Court showed restraint by avoiding the question of whether the appellants’ imprisonment was illegal and the point became moot because the military released Rasul in March of 2004, one month prior to when his case was argued.

The Court’s ruling in *Hamdi* was the first major opinion in this line of cases. According to the appellants, Hamdi, a United States’ citizen, was in Afghanistan doing relief work and was trapped in the country by unfortunate travel restrictions. The government contended that, because Hamdi was allegedly caught in an act of aggression, unrelated to his alleged relief work, against the United States, no oversight of his “enemy combatant” designation was necessary.

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76 542 U.S. at 430.
77 Id.
78 Id. at 450-51.
79 *Rasul*, 542 U.S. at 471-72.
80 Id. at 472-73.
81 Id. at 484-85.
83 *Hamdi*, 542 U.S. at 511-12.
84 Id. at 510-11.
Although the Court found that the AUMF provided the government authority to detain Hamdi,\(^{85}\) it held that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”\(^{86}\) In other words, even “enemy combatants” should be afforded due process. The Court discounted the president’s entire reasoning behind the use of the term “enemy combatants” and the military tribunals at Guantanamo Bay.\(^{87}\)

The government argued that there should be a limited role for the judiciary in oversight of executive positions and that separation of powers would, in fact, dictate that the executive domain should not be checked by any other branch.\(^{88}\) The Court made it very clear that this conduct was precisely why the Constitution dictated a system of checks and balances.\(^{89}\) With reference to Youngstown, the Court declared that “a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”\(^{90}\) By refusing to grant the president a blank check on wartime power, the Court finally expressed its willingness to step in wherever the president may exceed his Constitutional grant.

In late December of 2005, Congress passed, and the president signed into law, the Detainee Treatment Act of 2005 (DTA).\(^{91}\) This law prohibits the “cruel, inhuman, or degrading treatment or punishment” of those in the custody of the United States.\(^{92}\) The limitations on

\(^{85}\) Id. at 517.  
^{86}\) Id. at 533.  
^{87}\) Id. at 533-34.  
^{88}\) Hamdi, 542 U.S. at 535.  
^{89}\) Id. at 536.  
^{90}\) Id.  
^{92}\) In addition, the act also protects interrogators from prosecution, limits the habeas corpus rights of detainees, and their ability to challenge government rulings. Id. at §§ 1003-1005.
torture were initially introduced as a total ban, but were reduced after months of compromising. The act exhibits great deference to outside sources for its definition of torture, thus leaving the provisions open to interpretation and effectively eliminating the act’s original purpose by legitimizing some methods of torture.

Although the DTA specifically eliminates federal jurisdiction over federal habeas corpus petitions, courts have retained jurisdiction over certain aspects of detainee rights based on ancillary jurisdiction. \textit{Hamdan} previously cast doubt on the DTA’s definition of jurisdiction by denying the government’s motion to dismiss on the basis of the DTA. When President Bush signed the act, he included a signing statement which created a loophole in the DTA for executive discretion. The signing statement has raised considerable question as to whether the law, specifically the provisions regarding torture, will be followed at all.

President Bush’s use of signing statements has been another area of contention for legal theorists. The American Bar Association issued a report that Bush’s use of signing statements

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96 See, e.g., Hicks v. Bush, 2006 U.S. Dist. LEXIS 65973 at p. 5, 15-16 (“District courts retain jurisdiction over aspects of the case that are not involved in the appeal.”).
97 \textit{Hamdan}, 126 S. Ct. at 2769.
99 Charlie Savage, \textit{Bush Could Bypass New Torture Ban}, \textit{BOSTON GLOBE}, Jan. 4, 2006, at A1 (“The executive branch shall construe [the law] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief,” Bush wrote, adding that this approach “will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.”)
101 See e.g., Bruce Moyer, \textit{Signing Statements Spark Controversy}, 53 FED. LAWYER 10 (July 2006) (criticizing Bush’s use of signing statements); see Christopher S. Kelley, \textit{The Significance of the Presidential Signing Statement, in EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION} 73, 74 (Christopher S. Kelley ed., 2006) (“A constitutional signing statement is [an addition to a bill accompanying a President’s signature] that addresses a constitutional defect in a bill, ranging from an infringement on presidential prerogative to violations of the principles of federalism...”).
severely undermines the separation of powers. A prime example of one of the contested signing statements is the following one attached to the DTA: "[The president reserves the right to interpret this part] in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on judicial power." Bush’s lack of exercising his veto power has been attributed to his use of signing statements. The problem, however, is that they are not identical, nor interchangeable. Pennsylvania Senator Arlen Specter introduced legislation to restrict the use of signing statements, but the proposal was met with limited support.

In Hamdan, the Court countered executive action by holding that the military tribunals being used to try “enemy combatants” were illegal under the Geneva Conventions and the Uniform Code of Military Justice (UCMJ). The case differs from Hamdi in that Hamdan was a citizen of Yemen. The Court went far beyond the ruling in Hamdi to determine that the entire system of tribunals is illegal. Even with the power granted to the president by Congress in the AUMF, the tribunals would still have to conform to the UCMJ. Furthermore, the tribunals violate the UCMJ by allowing hearsay, withholding evidence from defense counsel,

106 See Charlie Savage, Specter Takes Step to Halt Bush Signing Statements, BOSTON GLOBE, July 27, 2006, at A3 (“It was unclear, however, whether the political will exists in the GOP-controlled Congress to pass the bill in an election year.”).
107 Hamdan, 126 S. Ct. at 2759-60.
108 Id. at 2759.
109 Id. at 2798.
110 Id. at 2775.
and the lack of a fair appeals system.111 Furthermore, Common Article 3 of the Geneva Convention guaranteed Hamdan a trial in a “regularly constituted court.”112

This is not the first time that the Court has invalidated the use of military tribunals.113 The Court in *Milligan* explained that military tribunals were an unconstitutional means of trying individuals because they were enacted under executive authority.114 Because *Milligan* was a United States’ citizen, he was protected and governed by the Constitution.115 The Court reasoned that the president does not have the authority to create military tribunals because it is outside of his sphere of duty.116 Furthermore, the Constitution guaranteed *Milligan* a trial by jury.117

The same rights have not been guaranteed for foreign nationals.118 *Quirin* draws a distinction between lawful and unlawful combatants.119 The defendants were German soldiers who entered the United States covertly with the intention to commit acts of destruction and espionage.120 The Court upheld the use of an executive order, by President Franklin Roosevelt, directing the defendants to be tried by a military commission on the following basis:

[A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.121

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111 *Id.* at 2785-87.
112 *Id.* at 2796.
113 *Ex Parte Milligan*, 71 U.S. 2, 131 (1866) (invalidating the use of military tribunals to try United States’ citizens).
114 *Id.* at 121-22.
115 *Id.* at 121.
116 *Id.*
117 *Id.* at 122-23.
118 *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that the President had the right to try unlawful combatants by military tribunal).
119 *Id.* at 30-31.
120 *Id.* at 21.
121 *Id.* at 22-23.
The Court upheld the order because it was a necessary device to “repel and defeat the enemy” when they “have violated the law of war.”\textsuperscript{122} The Court purposely left out any decision addressing whether the president had the constitutional authority to enact military commissions absent congressional approval because, in this instance, there was specific congressional approval.\textsuperscript{123}

Although the Constitution gives the president the role of Commander-in-Chief,\textsuperscript{124} he must nevertheless follow laws passed by Congress in the waging of the war.\textsuperscript{125} In his concurrence in \textit{Hamdan}, Justice Breyer reiterates the denial of blank check from the \textit{Hamdi} opinion, but follows it up with an interesting caveat: “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”\textsuperscript{126} Breyer contested that there would be an appropriate way to circumvent the rule of law, this just was not it.\textsuperscript{127} The Supreme Court has the duty of striking down presidential actions and acts of Congress as unconstitutional to ensure that neither the executive or legislative branch becomes dominant.\textsuperscript{128} While the Court does so here, Breyer suggested that the president should go to Congress and have them pass a law legalizing his actions.\textsuperscript{129} Such an act would force additional judicial review and perpetuate an arbitrary cycle.

\textsuperscript{122} \textit{Id.} at 28-29.
\textsuperscript{123} \textit{Id.} at 29.
\textsuperscript{124} U.S. \textsc{const.} art. II, § 1.
\textsuperscript{125} \textit{Quirin}, 317 U.S. at 26.
\textsuperscript{126} \textit{Hamdan}, 126 S. Ct. at 2799 (Breyer, J., concurring).
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{See, e.g.}, The National Constitution Center, \textit{Separation of Powers and a System of Checks and Balances}, http://www.constitutioncenter.org/explore/BasicGoverningPrinciples/SeparationofPowersandaSystemofChecksandBalances.shtml (last visited Oct. 17, 2006) (“[T]he Supreme Court has final authority to strike down both legislative and presidential acts as unconstitutional. This balancing of power is intended to ensure that no one branch grows too powerful and dominates the national government.”).
\textsuperscript{129} \textit{Hamdan}, 126 S. Ct. at 2799 (Breyer, J., concurring).
ii. Domestic Wiretapping

Lower courts have begun to assume their judicial responsibility and strike down illegal government programs no matter how high-reaching they are. In December of 2005, reports emerged stating that the National Security Agency (NSA) had been listening in on domestic phone calls in an attempt to curb terrorist attacks.¹³⁰ Soon after, civil rights groups began litigation holding the government accountable for the violation of civil liberties, culminating in the case of *A.C.L.U. v. N.S.A.*¹³¹ The plaintiffs alleged that the domestic wiretapping program violated their privacy rights, the president overstepped his authority granted in the Constitution, and that the program violated statutory limitations enacted by the Foreign Intelligence Surveillance Act (FISA).¹³² The government’s defense was based on the privilege of state secrets and the plaintiffs’ lack of standing, not on the basis that their actions were legal.¹³³

The court rejected the government’s defense that a state secrets privilege applied and allowed the plaintiffs to continue on the claim regarding domestic wiretapping.¹³⁴ The state secrets claim was rejected by the court because the plaintiffs’ case could be built entirely on the government’s public admissions.¹³⁵ The court also upheld the plaintiffs’ standing because there was actual harm suffered and because the plaintiffs have conducted the type of communications that the government said would be targeted.¹³⁶

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¹³² *Id.* at 758.
¹³³ *Id.*
¹³⁴ *Id.*
¹³⁵ *Id.* at 764-65.
¹³⁶ *Id.* at 770.
FISA requires that a prior warrant be acquired in order for the government to listen in on communications between an international caller and a domestic citizen.\textsuperscript{137} The warrants necessary are to be obtained from a secret court created by the FISA and only require probable cause that the target is a foreign entity.\textsuperscript{138} Under Jackson’s test in \textit{Youngstown}, President Bush has acted in opposition to Congress’s expressed will, codified in the FISA, which places his power at its lowest and, therefore, it should not be upheld.\textsuperscript{139}

Like in \textit{Hamdan}, and the other detainee cases, the government further argued that the AUMF granted them the extra power necessary to enact the domestic wiretapping program.\textsuperscript{140} Even if that act of Congress were to replace the FISA as the authority for wiretapping, the program would still be in violation of various parts of the Constitution.\textsuperscript{141} The court granted the plaintiff’s request for a preliminary injunction, but stayed the injunction until further hearings could take place.\textsuperscript{142}

The Court of Appeals for the 6th Circuit granted a stay pending appeal in early October of 2006.\textsuperscript{143} The court weighed the traditional factors for injunctive relief and concluded that the government met the standard of a strong possibility of success of appeal.\textsuperscript{144} This issue is currently awaiting appeal. In the meantime, due to the stay, the government can continue its conduct.\textsuperscript{145} The Supreme Court has previously held that warrantless, unlawful searches cannot

\begin{itemize}
\item \textsuperscript{137} A.C.L.U., 438 F.Supp. 2d at 772.
\item \textsuperscript{138} \textit{Id.} at 773.
\item \textsuperscript{139} \textit{Id.} at 778.
\item \textsuperscript{140} \textit{Id.} at 779.
\item \textsuperscript{141} \textit{Id.} at 780.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} A.C.L.U v. N.S.A., 467 F.3d 590 (6th Cir. 2006).
\item \textsuperscript{144} “[T]he traditional factors governing injunctive relief [are]: (1) whether the applicant has demonstrated a substantial likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and (4) where the public interest lies.” \textit{Id.}
\item \textsuperscript{145} \textit{Id.}
\end{itemize}
form the basis for search warrants. When compared to the actions of the government at issue in *A.C.L.U.*, the question was raised as to whether illegal government wiretaps can form the basis for continued investigation.

**iii. The Military Commissions Act of 2006**

In order for the executive branch to overcome a judicial decision, Congress must create a law specifically addressing the situation. This has begun to happen with domestic wiretapping and has already happened with the passage of the MCA, regarding the treatment of detainees in the GWOT. In order to circumvent the ruling in *Hamdan*, the president requested, and received, congressional authorization for his plan.

The MCA altered many previously held notions regarding military commissions by specifically dictating their every aspect. The military commissions prescribed in the MCA do not apply to United States’ citizens, only to “unlawful enemy combatants as determined by the Combatant Status Review Tribunal.” The law would eliminate all existing detainee cases regardless of the issue or time of filing.

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146 See *Kyllo v. United States*, 533 U.S. 27, 40-41 (2001) (holding that the use of a thermovision device to gather information in order to obtain a search warrant constituted an illegal search).

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

148 See Eric Lichtblau, *With Power Set to be Split, Wiretaps Re-Emerge as Issue*, Nov. 10, 2006, at A28 (discussing executive attempts to urge Congress to pass a law permit domestic wiretapping, albeit with the inclusion of minor additional safeguards).


150 10 U.S.C. §§ 948a-950w.


152 10 U.S.C. § 948d.
Although the MCA is intended to apply to alien unlawful enemy combatants, United States’ citizens can still be classified as unlawful enemy combatants. The MCA does create some measure of accountability as the Secretary of Defense must submit a report to both Committees on Armed Services of Congress by the end of each year. Military commissions can be made up of any commissioned officer of the Armed Forces on active duty as long as they are not involved in the investigation or accusation in any way.

In terms of charges levied against the accused, they need only be manifested and signed by one who has reason to believe that the accusations are true. The accused must be informed of the charges as soon as practicable. The MCA takes into account some protections against self-incrimination and limited review of statements obtained during torture. Service must be sufficiently in advance for the defendant to prepare a defense.

As for the trial procedure of the commissions, evidence may be admitted with any probative value, search warrants are unnecessary, self-incriminating statements are admitted as long as they were not obtained through torture, there are relaxed standards to the authenticity of evidence, and hearsay is admissible with advance notice as long as it has some probative value. Defense counsel can either be a judge advocate or civilian counsel that has obtained Secret level security clearance and has agreed, in writing, to comply with all regulations of the commissions. If civilian counsel is used, there must be associate military counsel as well.

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153 Id. at § 948b(a).
154 Id. at § 948a(1).
155 Id. at § 948e(a).
156 Id. at § 948i.
157 Id. at § 948q(a).
158 10 U.S.C. § 948q(b).
159 Id. at § 948r.
160 Id. at § 948s.
161 Id. at § 949a(b)(2).
162 Id. at § 948k(c)(1).
163 Id. at § 949c(b)(3).
Civilian defense counsel may not divulge any classified information to anyone without the proper security clearance.\textsuperscript{165}

The military judge has the authority to close the proceedings from the public in order to protect classified information.\textsuperscript{166} Classified information will be introduced at trial in such a way that it will not be sufficiently divulged to harm national security.\textsuperscript{167} Furthermore, objections may be made in assertion of a national security privilege in refusal to divulge classified information.\textsuperscript{168} Defense counsel may obtain their own witnesses as long as the witnesses conform to procedures set forth by the Secretary of Defense outside of this section.\textsuperscript{169} In order for the accused to be found guilty, two thirds of the present commission members must agree.\textsuperscript{170} For consideration of the death penalty to take place, the commission must be made up of at least twelve members.\textsuperscript{171} The president and Secretary of Defense have the authority to prescribe the maximum punishments for each offense.\textsuperscript{172}

A convening authority\textsuperscript{173} has the sole discretion to review commission findings.\textsuperscript{174} The Court of Military Commission Review handles appeals.\textsuperscript{175} After all appeals in the military commissions occur, the accused can appeal to the United States Court of Appeals for the District of Columbia, but the Court’s scope is limited to the question of whether the final decision is in

\begin{footnotes}{
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\textsuperscript{164} 10 U.S.C. § 949c(b)(5).
\textsuperscript{165} Id. at § 949c(b)(4).
\textsuperscript{166} Id. at § 949d(d)(2).
\textsuperscript{167} Id. at § 949d(f).
\textsuperscript{168} Id. at § 949d(f)(2)(C).
\textsuperscript{169} Id. at § 949j.
\textsuperscript{170} 10 U.S.C. § 949m(a).
\textsuperscript{171} Id. at § 949m(c).
\textsuperscript{172} Id. at § 949t.
\textsuperscript{174} Id. at § 950b.
\textsuperscript{175} Id. at § 950e-f.
\end{footnotes}
line with the standards and procedures in the MCA and, to a certain extent, federal laws and the Constitution. Many offenses are subject to these provisions.

Finally, the MCA amended the UCMJ and permits discretion in following the Geneva Conventions to permit the military commissions to take place as defined. The MCA also overruled Rasul and Hamdan by eliminating federal jurisdiction for habeas corpus petitions. In summary, the MCA legalized military commissions, amended the UCMJ to provide authority for the commissions, negated the United States’ obligation to the Geneva Conventions, broadened the definition of allowable torture, and suspended habeas corpus for enemy combatants. The MCA has already served the function of defeating Hamdan’s challenge due to its retrospective applicability to habeas corpus matters.

The new law has already received challenges in the D.C. District Court. The issue in the suits is “[w]hether [the MCA] retroactively strips the courts of jurisdiction to hear detainee cases, and if so, would that amount to an unconstitutional suspension of the writ of habeas

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176 Id. at § 950g.
177 Id. at § 950v(b) (Crimes triable by military commissions include murder of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or similar weapons, using protected persons as a shield, torture, cruel or inhuman treatment, intentionally causing serious bodily injury, mutilating or maiming, murder in violation of the law of war, destruction of property in violation of the law of war, using treachery or perfidy, improperly using a flag of truce, improperly using a distinctive emblem, intentionally mistreating a dead body, rape, sexual assault or abuse, hijacking or hazardizing a vessel or aircraft, terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy).
180 Id. at § 3.
181 Id. at § 4.
182 Id. at §§ 5-6.
183 Id. at § 6.
184 Id. at § 7.
185 The judge also ruled that the MCA was unconstitutional due its stripping of habeas corpus from foreigners living within the United States. Return to the rule of law; Legislation to restore ancient habeas corpus protections to ‘enemy combatants’ is overdue, L.A. TIMES, Dec. 18, 2006, at A20.
The final outcome of that litigation should answer the question of whether the MCA is unconstitutional on its face, in certain parts, or at all. Lower court rulings have held that the MCA removes their jurisdiction in the matter, effectively stating that this will become a matter for the Supreme Court to decide.

In short, strong judicial review of executive power has decreased in the past few decades and recently began a reemergence during the GWOT. President Bush’s unorthodox manner in which he wields executive orders and signing statements has created numerous Supreme Court challenges without any definitive end in sight. By wielding partisan influence, the executive branch has held control over the legislative branch during the GWOT creating new legislation threatening to circumvent judicial review and constitutional due process. It will take a strong judiciary to remedy the problems of this depleted system of checks and balances.

III. Analysis

Not only must the Court refrain from letting any “blank check” assertions of executive power go unnoticed, it must also invalidate any attempts by the president, regardless of whether there is Congressional approval. This comment will expand on that “blank check” analogy. In many situations, the Executive’s “account” does not have sufficient political capital. The Judicial branch has a responsibility to recognize “overdrafting.” And finally, Congress should refrain from any large “deposits” of power which render the idea of separation of powers meaningless.

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187 Id.
189 Although generally defined as the degree of a President’s popularity (Chris Suellentrop, America’s New Political Capital, SLATE, Nov. 30, 2004, http://www.slate.com/id/2110256/ (last visited Nov. 9, 2006)), in terms of this analogy, it is being used to refer to, quite literally, the amount of political power that the President is permitted to “spend.”
A dangerous situation is created when the president is able to overzealously influence Congressional legislation. Contrary to Jackson’s concurrence in Youngstown, executive action in concert with Congressional approval should not warrant an increased presumption of constitutionality. It is too likely that such a presumption would turn into an assumption. Because Congress has no authority to enact unconstitutional legislation, it is immaterial whether the president is in agreement. After all, illegal is illegal, regardless of our president’s opinion on the issue.

Judicial review has often lacked the potency with which it was introduced. Judicial review began with a bang, and has since lacked much in its execution. During World War II, judicial restraint and deference denied 110,000 Japanese Americans their basic civil rights and freedom. Before Hamdan, the last time the courts spoke so strongly against an executive overreach was during the Korean War, and, before that, the 1860s. In Youngstown, the Court stated that “[t]he President’s power…must stem from an act of Congress or from the Constitution itself.” Furthermore, Justice Jackson’s concurrence in Youngstown is often regarded as a model for presidential allowances of power. This model creates a dangerous system in which Congress can rubberstamp presidential initiatives and grant the president a limitless amount of power. In such a system, the Court gives unwarranted deference to the

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190 See Youngstown, 343 U.S. at 635-37 (Jackson, J., concurring) (“A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”).
191 See Marbury, 5 U.S. at 137 (invalidating an executive action).
192 Korematsu, 323 U.S. at 214 (upholding the exclusion and internment of Japanese Americans during World War II).
193 Youngstown, 343 U.S. at 582.
194 See Merryman, 17 F. Cas. at 144 (invalidating an executive suspension of habeas corpus).
195 See Adam J. White, Justice Jackson’s Draft Opinions in the Steel Seizure Case, 69 ALB. L. REV. 1107, 1107 (2006) (“As the nation debates the Constitution’s limits on executive action in the global war on terror, Justice Jackson’s opinion has grown ubiquitous in legal discourse.”).
cooperation of the other two branches. An effective system of checks and balances requires the
diligence of all three branches.

Vague congressional grants of authority have become the basis under which wars are
fought and lives are lost. The Court has decidedly restrained itself from making any rulings
regarding such a basis.\textsuperscript{197} The GWOT has presented the Court with a whole new set of
challenges regarding civil liberties and the rights of those designated enemy combatants.
President Bush’s military order outlining the manner in which the enemy would be treated was
ruled unconstitutional only after four Supreme Court challenges. In those cases, the Court’s
approach ranged from that of restraint to limited activism. The Court finally ruled the
president’s order unconstitutional in \textit{Hamdan}. Unfortunately, it took over four years for the
Court to rule against such a plainly unconstitutional order.

As illustrated in \textit{A.C.L.U. v. N.S.A.} and our nation’s entire history of separation of
powers, courts have the responsibility to overturn executive overexertions of power. Whenever
the president takes the liberty of interpreting laws in too favorable a manner, it is the courts’
responsibility to stop the illegal activity. President Bush’s overzealous use of signing statements
has not faced any judicial challenges. Senator Arlen Spector has only recently introduced
legislation in hopes of curbing this unchecked executive power.\textsuperscript{198} However, regardless of
legislation on the issue, this is precisely the domain of the courts. It remains unfathomable that
this type of executive abuse is so largely disregarded.

Even in cases where the president is acting with Congressional authorization, it remains
the court’s responsibility to review that authorization for its constitutionality. In the case of the
MCA, the Supreme Court should review the legislation with a similar approach to that of their

\textsuperscript{197} \textit{Doe}, 240 F. Supp. 2d at 95.
decision in *Hamdan*. Such a rationale would result in a finding that the MCA is unconstitutional on various grounds.

**A. Executive “blank checks” with or without sufficient political capital**

The Executive Branch was created with the intention of creating a strong method for enforcing laws.\(^{199}\) The founders intentionally separated the creation and the enforcement of the law.\(^{200}\) This creates a clear distinction between what the president is and is not allowed to do. Unfortunately, this clear distinction is often ignored. Unconstitutional executive orders have often gone unchecked due to faulty judicial rationale and deference to the executive branch. This has gone on for far too long.

Executive Order 9066 validated the wide scale racial prejudice against Japanese Americans that was already occurring due to World War II hysteria.\(^{201}\) 110,000 Japanese Americans lost their jobs, their property, and their homes because a racist general had a nefarious agenda.\(^{202}\) Of course, in hindsight, there is no rational basis for this exclusion. Had the Court in *Korematsu* reviewed the issue with some sincerity, they may have realized this then.

By evaluating *Korematsu* without taking the race factors into great account, thus discounting the idea of strict scrutiny, the Court served a great injustice upon a section of American citizenry. When the Court adopted a position of restraint, rather than a progressive, or even unbiased, stance upholding the rights of American citizens, the Court essentially granted the president a blank check of power. In this situation, this blank check was backed by the


\(^{200}\) *Id.* at 49.


\(^{202}\) *Id.*
president’s political capital. This extension of the executive branch’s power was made possible by the climate at the time. But regardless of the climate, the Court had, and still has, the last word on the constitutionality of Executive Orders. It is never constitutional to imprison any human being based on race and the Court should not have deferred to the executive branch no matter what the circumstances are.

Although the power to declare war is granted specifically to Congress by the Constitution,\(^{203}\) wars have nonetheless been fought by presidential decree. While the president has the power to wage war,\(^ {204}\) war should not commence without congressional approval, but it often does. When President Clinton engaged in military actions in Kosovo, he did so by his own decree.\(^ {205}\) Congressional consent for the war in Kosovo is often inferred from the House’s vote against removing the troops, but consent should not be implied by negative implication.\(^ {206}\)

The only instance in which the president should initiate hostilities absent congressional approval is in the instance of a sudden attack on the United States, when obtaining congressional approval would be impossible for a sufficient national defense.\(^ {207}\) War must be defined before the permissibility of executive action can be determined.\(^ {208}\) Depending upon the level of the conflict, either a declaration of war or some other type of authorization is necessary from Congress.\(^ {209}\) In *Campbell*, Clinton’s actions were challenged, but the case was dismissed.\(^ {210}\)

\(^{203}\) U.S. CONST. art. I, § 8.

\(^{204}\) U.S. CONST. art. II, § 2.

\(^{205}\) Michael Hahn, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2353 (July 2001) (This article also presents a pro-executive war power view.).

\(^{206}\) *Id.* at 2373.

\(^{207}\) *Id.* at 2355-59.

\(^{208}\) *Id.* at 2359-60.

\(^{209}\) “…one must classify the conflict as a war or something less in order to assess the constitutionality of the President’s initiation of the military action in Kosovo. If a conflict is a total or perfect war, then the Constitution requires that Congress authorize it through a declaration of war. If a conflict is a limited or imperfect war, then a declaration of war or some other type of congressional authorization is required as a predicate for action. If a military conflict does not exist, but a dangerous situation does, then the President’s Commander-in-Chief power instills him with full authority to position United States troops.” *Id.*

\(^{210}\) *Campbell*, 203 F.3d at 20.
Although the Court raises the proper opinion that the congressmen\textsuperscript{211} that raised the action did indeed have an official avenue of protest, the more important issue at stake was the authority of the president to wage war under the authority of the executive branch.\textsuperscript{212} By refusing to perform its role as judiciary to check and balance the other two branches, the Court ignored the important question at hand and refused to limit presidential war powers.\textsuperscript{213}

The president can also exert an excess of power via political capital, dependent upon his popularity. This makes particular sense in light of President Bush’s passion for unitary executive theory.\textsuperscript{214} Such an example is the president’s use of signing statements. As one scholar suggests, “[e]ssentially, the unitary executive theory instructs us that aside from political accountability, presidential power must remain unrestrained by the niceties of the law.”\textsuperscript{215} From Presidents Monroe through Carter, only seventy-five signing statements were issued.\textsuperscript{216} In his first six years in office, President Bush issued 130 signing statements and only one veto.\textsuperscript{217}

This is not to say that all signing statements are per se unconstitutional;\textsuperscript{218} they are only improper where the administration has first-hand knowledge of the legislation in question.\textsuperscript{219} In other circumstances, a signing statement is tantamount to the president rewriting the legislation,

\textsuperscript{211} Id. at 19 (“A number of congressmen, led by Tom Campbell of California…”).
\textsuperscript{212} Id. at 20-21.
\textsuperscript{213} Michael Hahn, The Conflict in Kosovo: A Constitutional War?, 89 GEO. L.J. 2351, 2391-92 (July 2001) (This article also presents a pro-executive war power view).
\textsuperscript{214} Karl Manheim et al., The Unitary Executive, 29 LOS ANGELES LAWYER 24, 25 (Sept. 2006) (“One reason for this is President Bush’s advocacy of a ‘unitary executive’ theory, which posits that all national executive and administrative powers reside with the president.”).
\textsuperscript{215} Id. at 28.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} See Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV. 1189, 1250 (Oct. 2006) (“In circumstances where no executive official was especially involved in the framing of a particular provision or where a particular interpretive issue never arose until the signing stage, the President may not be in a position to supplement the bill’s bare text with contextual understanding of its purpose. And if the text otherwise meets the criteria for avoidance - that is, textual ambiguity and serious constitutional concerns attending the otherwise preferred reading - it may be perfectly appropriate for the President to invoke the avoidance canon in a signing statement, in order to clarify his own good faith understanding of the bill he is signing.”).
\textsuperscript{219} Id.
which he obviously has no constitutional authority to do.\textsuperscript{220} Signing statements are useful in addressing legitimate concerns about a bill,\textsuperscript{221} not for broad grabs of power. The president’s signing statements are similar to line item vetoes,\textsuperscript{222} which the president has no authority to issue.\textsuperscript{223} Signing statements allow the president to circumvent aspects of the law which he might find disagreeable. The remedy given to the president in such a situation is for him to veto the entire act. The president does not have the authority to pick and choose which parts of legislation become substantive law. That is the domain of Congress and, barring a legislative move towards prohibiting overreaching signing statements, the Court should step in to remedy the situation.

\textit{B. Judicial responsibility to recognize “overdrafting”}

The Court has a responsibility to step in when a president oversteps his bounds. This point was illustrated particularly well in \textit{Youngstown}. The president’s power may only come from an act of Congress or from the Constitution.\textsuperscript{224} In \textit{Youngstown}, the Court made it clear that the president could not enforce a law in any way he chooses.\textsuperscript{225} If Congress intends an act to be enforced in a certain way, the act will provide for that method of enforcement. The president

\begin{thebibliography}{99}
\bibitem{}\textit{Id.}
\bibitem{}\textit{Id.}
\bibitem{}See Christopher S. Kelley, \textit{The Significance of the Presidential Signing Statement, in EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION} 73, 74 (Christopher S. Kelley ed., 2006) ("A constitutional signing statement is [an addition to a bill accompanying a President’s signature] that addresses a constitutional defect in a bill, ranging from an infringement on presidential prerogative to violations of the principles of federalism...”).
\bibitem{}"The executive's power to veto some provisions in a legislative bill without affecting other provisions.” Black’s Law Dictionary 748 (2d pocket ed. 2001).
\bibitem{}\textit{Youngstown}, 343 U.S. at 585.
\bibitem{}\textit{Id.}
\end{thebibliography}
does not have the power to make or interpret a law in a manner inconsistent with the text of the law.\footnote{See David Gray Adler, The Steel Seizure Case and Inherent Presidential Power, 19 CONST. COMMENTARY 155, 199 (Spring 2002) ("The executive is a creature of the Constitution and has only that power granted to it by the Constitution; it may not undertake actions which it is not authorized to undertake and it must not do what it is forbidden to do.")}

In \textit{Youngstown}, the Court specifically rejected the executive branch’s broad definition of executive power.\footnote{Youngstown, 343 U.S. at 587.} They rejected the idea because that definition clearly went beyond the scope of the executive’s constitutional authority. This judicial inclination towards limiting the law making power of the executive created good governance and is a shining example of how checks and balances are supposed to work. Even in wartime, the president is unable to overextend his grant of power. Later, in \textit{Hamdi}, the Court summed up that argument: "[w]e have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the Nation's citizens."\footnote{Hamdi, 542 U.S. at 536.}

When President Lincoln suspended the writ of habeas corpus during the Civil War, he was met by strong judicial opposition by then Chief Justice Roger Taney.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.\footnote{Merryman, 17 F. Cas. at 152.}

While that admonition may seem melodramatic, it has a strong rationale. The power to suspend habeas corpus is located in the Constitution with the powers of Congress, not that of the
executive. Allowing the president to circumvent the Constitution and make law of his own decree would be to remove the rule of law from American society.

Executive action in the GWOT has presented a new set of issues. To what end can the president act absent congressional approval and should the Court restrict such action when it offends the Constitution? The Court answered the first question in Hamdi and Hamdan, but has yet to address the second. The answer to the second question is, of course, yes. Unfortunately, it took the Court three years after the start of the war to begin to address the problems associated with broad executive military power.

When President Bush issued the military order defining the term “enemy combatants” and which set up military tribunals, he did so without congressional or judicial review. When the Court finally reviewed the order in Padilla, it did not answer the main question in the suit. Though not explicit in the opinion, the Court’s deference to the military order is obvious. The Court ignored the broader claim and, instead, dismissed the suit because it was improperly filed. The Court should not look for excuses to avoid an important issue. This case should not have been treated like any other in a number of habeas challenges. As Justice Stevens pointed out in his dissent, “[o]n the contrary, this case is singular not only because it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen.”

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232 Padilla, 542 U.S. at 430.
233 Id. at 449.
234 See id. at 455 (Stevens, J., dissenting) (“The petition for a writ of habeas corpus filed in this case raises questions of profound importance to the Nation. The arguments set forth by the Court do not justify avoidance of our duty to answer those questions. . . . This is an exceptional case that we clearly have jurisdiction to decide.”).
235 Id. at 461 (Stevens, J., dissenting).
In *Rasul*, the Court held that United States courts have jurisdiction over foreign detainees held at Guantanamo.\(^{236}\) The Court did not answer the broader questions of the legality of the appellants’ detention, and that question will not be answered on remand because Rasul was freed prior to the decision. “[T]here are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.”\(^{237}\) Although the Court expresses an obvious difference between the treatment guaranteed to foreign nationals and that guaranteed to United States’ citizens, the rationale expresses a clear protection of human rights.

In a plurality opinion in *Hamdi*, the Court held that citizen detainees must be afforded a fair chance to challenge their detention.\(^{238}\) Unfortunately, the plurality opinion upholds rules that are fairly offensive to the rights of the accused.\(^{239}\) The reasoning given is that the executive branch should not be burdened during an ongoing conflict.\(^{240}\) These rules include alleviating the government’s burden of proof and allowing hearsay if it is the only available evidence against someone.\(^{241}\) The opinion also fails in its protections by only guaranteeing a hearing in front of a neutral decision-maker instead of a judge.\(^{242}\)

The purpose of due process is so that people whose rights are to be affected have a right to be heard.\(^{243}\) The Court set its goal high and did not meet it here. Restricting due process, so as to permit the introduction of hearsay and by lowering the government’s burden of proof, is to offend it entirely. Due process cannot be protected by a limitation on a number of rights.

\(^{236}\) *Rasul*, 542 U.S. at 484-85.
\(^{237}\) Id. at 487 (Kennedy, J., concurring).
\(^{238}\) *Hamdi*, 542 U.S. at 509.
\(^{239}\) Id. at 528-29.
\(^{240}\) *Hamdi*, 542 U.S. at 525.
\(^{241}\) *Hamdi*, 542 U.S. at 533-34.
\(^{242}\) Id. at 509.
\(^{243}\) Id. at 533.
Thankfully, the Court based their rationale on an application of the Geneva Convention.\textsuperscript{244} Under this rationale, the same limited protections would extend to non-citizen detainees as well. In a terrifying aspect of the opinion, Justice Thomas, in his dissent, shows an unprecedented level of deference to the executive branch; “I do not think that the Federal Government's war powers can be balanced away by this Court.”\textsuperscript{245} Under that rationale, Thomas grants the executive branch unlimited power in the waging of war. Thomas goes on further to explain that the judiciary has absolutely no basis on which to adjudicate any similar claims.\textsuperscript{246} That is not the mark of an independent judiciary.

In June of 2006, the Court finally did what it should have done in the first place and held the president’s system of tribunals illegal because they violated the Uniform Code of Military Justice and the Geneva Conventions.\textsuperscript{247} In \textit{Hamdan}, the Court clearly rebuked overzealous executive action. It is not at the president’s discretion to administer military tribunals at his own decree.\textsuperscript{248} Absent a Congressional grant of power, the president had no authority to act.\textsuperscript{249} Although the statutory analysis may be questionable, the common-law analysis in the opinion refutes the president’s asserted common-law defense of his design.\textsuperscript{250}

As two Justices point out in concurring opinions, because the issue here was the president’s legislative authority to set up military commissions, the president could always go

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\item\textsuperscript{244} \textit{Id.} at 538 (“Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”)
\item\textsuperscript{245} \textit{Id.} (Thomas, J., dissenting).
\item\textsuperscript{246} \textit{Id.} at 585 (Thomas, J., dissenting).
\item\textsuperscript{247} \textit{Hamdan}, 126 S.Ct. at 2759.
\item\textsuperscript{248} \textit{See id.} at 2773 (“Exigency alone, of course, will not justify the establishment and use of penal tribunals…unless some other part of [the Constitution] authorizes a response to the felt need.”).
\item\textsuperscript{249} \textit{Id.} at 2775 (“Neither of these congressional Acts [the AUMF or the Detainee Treatment Act] …expands the President’s authority to convene military commissions.”).
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back to Congress and get that authority. In fact, the president did just that by putting pressure on Congress to approve his set of rules. When Congress approved the MCA, which will be discussed in depth in the following section, it gave the president the authority to continue along his path. The MCA effectively superseded *Hamdan*. Even though the president is now acting under congressional authority, the Court still has many questions to answer regarding the application of law. The Court should not approach these questions with deference to the other two branches.

*Hamdan* also began to pave the way towards restricting domestic dangers to civil liberties. In response to the highly controversial domestic wiretapping program instituted by the Bush administration, civil rights groups successfully sued the government to cease all domestic wiretapping operations. The spying program highlighted the gray area of FISA meant to protect United States’ citizens and satisfy law enforcements’ investigation

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251 “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.” *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring). “If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.” *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring).

252 See Rick Klein, *Bush Urges Congress to Ratify Military Tribunals*, BOSTON GLOBE, July 12, 2006, at A3 (“Bush administration officials yesterday asked Congress to endorse the special military tribunals established by the president to try prisoners captured in the war on terror….”).

253 Green, at 170-71 (“[T]he Court would have to determine whether…detainees have constitutional rights and, if so, whether such rights apply in military commissions.”).

254 See *id.* at 173 (“[C]ongressional blessing should not necessarily displace judicial authority to stop serious abuse.”).

255 See Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2367 (2006) (“In short, *Hamdan* goes a long way toward restoring the constitutional vision that the last five years had turned upside down. By rejecting the President's supposed freedom to try military terrorist suspects before commissions that do not meet the standards of the UCMJ or Common Article 3, it also calls into question the President's supposed freedom to authorize torture and cruel treatment in the face of the McCain Amendment and to authorize warrantless domestic surveillance in the face of FISA.”).


257 A.C.L.U., 438 F. Supp. 2d at 758, 782.
requirements. Similar to the detainee line of cases, the president assumes that the authority for this program was granted by Congress via the AUMF. This is simply not true.

The government bases its argument on a broad reading of the AUMF and claims that the broad grant of executive power in the GWOT implicitly permits domestic wiretapping. The limited grant of power in FISA overrides the utterly broad and general grant in the AUMF for the specific act for which the FISA controls. “To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.”

The court in A.C.L.U. mirrors the denial of a “blank check” to the executive branch.

The president cannot encroach on rights specifically guaranteed to United States’ citizens using methods not prescribed by the Constitution or the legislature. Unfortunately, the ruling in A.C.L.U. can not be celebrated quite yet. The decision faces an astoundingly uphill appeals

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258 See David Alan Jordan, Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol, 47 B.C. L. Rev. 505, 507-09 (May 2006) (“FISA was passed in order to provide the executive branch with a quick and secure means of satisfying the Fourth Amendment’s warrant requirement for domestic investigations related to foreign intelligence and counterterrorism. The Act primarily controls the government’s surveillance of domestic communications involving U.S. citizens or permanent residents; it does not limit electronic surveillance of any communications between aliens outside the United States. The NSA may freely surveil such conversations with virtually no limitations under U.S. law.

FISA maintains a strict distinction between purely domestic calls between U.S. persons, and purely foreign communications between non-U.S. persons outside the United States. Surveillance of the former always requires approval from the Foreign Intelligence Surveillance Court, whereas surveillance of the latter never requires such approval. A substantial gray area exists when calls are placed from within the United States to non-U.S. persons abroad. Non-U.S. persons outside the United States may be freely surveilled by the NSA without even a FISA warrant; therefore, when an unidentified U.S. person places a call to an alien outside the United States who is being surveilled by the NSA lawfully without a warrant, the NSA then automatically and inadvertently surveils that U.S. person. In such a situation, serious questions arise as to the extent to which information gained from such efforts may be used subsequently against that U.S. person.”).

259 A.C.L.U., 438 F. Supp. 2d at 765.
260 Id. at 779.
261 Id.
262 Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring).
263 438 F. Supp. 2d at 781 (“We must first note that the Office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution. So all ‘inherent powers’ must derive from that Constitution.”)
battle. The Court of Appeals for the 6th Circuit already granted a stay and the harsh language of the opinion makes it extremely susceptible to criticism from both sides of the political spectrum. Additionally, like the MCA that superseded Hamdan, the Bush administration attempted to lobby the Republican-controlled Congress to pass legislation legalizing his domestic spying program. This pressure was unsuccessful as the 109th Congress departed without passing any legislation on domestic wiretapping. In response to the lack of partisan pressures that the executive branch would have over the Democratic-controlled 110th Congress, the administration ceded authority over the domestic wiretapping to a FISA court. While this may come across as the administration recognizing its overreaching, it is quite probable that the FISA court in question is merely rubberstamping executive requests, thus ignoring the balancing duty of the court.

C. Congressional “deposits” of power

Besides the Constitution, the executive branch can also exercise specific powers granted by Act of Congress. In fact, those two grants are the only sources from which the president has power. Because the constitutional grant of power is specifically enumerated in the Constitution, this discussion will largely focus on congressional grants of executive power and the independence with which they should be bestowed. The idea of separation of powers and

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264 A.C.L.U., 467 F.3d at 590.
265 See Eric Lichtblau, With Power Set to be Split, Wiretaps Re-Emerge as Issue, Nov. 10, 2006, at A28 (discussing executive attempts to urge Congress to pass a law permit domestic wiretapping, albeit with the inclusion of minor additional safeguards).
267 See generally Youngstown, 343 U.S. at 585 (“The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).
268 U.S. CONST. art. II.
checks and balances relies heavily on the idea that each branch be independently responsible for its own tasks.\textsuperscript{269} Separation of powers is what separates the United States’ form of democracy from the possibility of a dictatorship.\textsuperscript{270} In our society, “the legislative authority necessarily predominates” because it has the power to make laws.\textsuperscript{271} Congress should never become subordinate to the executive branch’s legislative agenda. This is exactly what was occurring prior to the Democratic takeover of Congress in November, 2006. The executive and legislative branches had merged to the point where they exerted de facto control over the judicial branch.

\textit{i. Congress’ Lost Independence}

Jackson’s famous concurrence in \textit{Youngstown} threatens that separation framework. Jackson’s first category of presidential power states that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”\textsuperscript{272} His concurrence goes on to state that if an act were to be found unconstitutional under these circumstances, it would mean that the federal government lacked power.\textsuperscript{273} Furthermore, he also says that actions under these circumstances should be awarded great judicial deference and challenges should

\textsuperscript{269} \textit{See} \textsc{The Federalist} No. 51 (James Madison) (“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own.”).

\textsuperscript{270} \textit{See} Evelyn T. Schneider, \textit{The Feeney Amendment: Handcuffing our Federal Judges}, 27 Hamline L. Rev. 536, 538 (Summer 2004) (“The three branches each have separate powers and were designed to create a system of checks and balances intended to lessen the chance of a tyrannical rule.”).

\textsuperscript{271} \textsc{The Federalist} No. 51 (James Madison).

\textsuperscript{272} \textit{Youngstown}, 343 U.S. at 635 (Jackson, J., concurring).

\textsuperscript{273} \textit{Id.} at 636-37 (Jackson, J., concurring).
have to overcome a large burden of persuasion.\footnote{Id. at 637 (Jackson, J., concurring).} This is wrong. Independent judicial review is essential to maintaining the integrity of the Constitution.\footnote{See generally Randolph J. May, Independent Judicial Review: An Appreciation of Its Origins and Some Contemporary Musings About Its Role Two Hundred Years Later, 2 GEO. MASON IND. L. REV. 195, 207 (Winter 1993) ("Independent judicial review necessarily means that the most fundamental issues confronting society at least will be further aired by the branch least subject to the political pressures of the moment.").}

Modern partisan politics have created a bond between the branches of the government that did not exist at the time of \textit{Youngstown}, at least not to the same extent. When Congress is willing to enact legislation recommended by the president based on party ties, it should receive greater judicial scrutiny, not less. The MCA was pushed through Congress because of Congress’ deference to the executive branch’s military effort in the Middle East. This Act creates such an infringement on fundamental rights that its very enactment showcases the limitations and dangers of a powerful executive in the United States’ system of checks and balances.

The primary area of MCA criticism is that it denies habeas corpus to detainees.\footnote{See e.g., Bill Goodman, Challenging the Military Commissions Act (Oct. 4, 2006), http://jurist.law.pitt.edu/hotline/2006/10/challenging-military-commissions-act.php (last visited Dec. 1, 2006) ("Habeas corpus is suspended for any non-citizen who is ‘detained as an enemy combatant or is awaiting such determination.’").} The MCA denies habeas corpus to be “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.”\footnote{Military Commissions Act of 2006, Pub. L. No. 109-366, §7(a).} The Constitution is very clear on the matter of suspending writs of habeas corpus.\footnote{U.S. CONST. art. 1, § 9 (“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.”).} Now is neither a time of rebellion or invasion that would warrant suspension of the writ, which raises a strong argument that that part of the MCA is unconstitutional. An argument could be made that the very act of terrorism involves invasion, but the Constitution should be read as meaning a large-scale invasion, not merely the presence of
an alleged terrorist on United States’ soil. If that argument were to prevail, it would only go to show the sad state of integration between the branches of government.

It is not the president’s domain to influence the legislature to strip people of their constitutional rights. While non-citizens outside our borders are afforded the least amount of constitutional protections, it is up to the Court to determine which protections apply.\textsuperscript{279} The Court has previously held that lawful permanent alien residents receive constitutional protections.\textsuperscript{280} There is no reason to assume that those rights could be limited, but, under the MCA, they already have been.

A perfect illustration of this point is Ali Saleh Kahlah al-Marri. Al-Marri is a citizen of Qatar who was a graduate student in the United States when he was captured and detained for alleged terrorist activities.\textsuperscript{281} He is currently being held inside the United States.\textsuperscript{282} All signs would seem to point towards al-Marri receiving constitutional protections, but, under the same rationale applied to detainees at Guantanamo Bay, being designated an “enemy combatant” has denied him those protections.\textsuperscript{283} Such a rationale reveals that the cause of the denials of constitutional protections is the designation, not the location.\textsuperscript{284}

The criteria for making such a designation are also extremely flawed. Under the MCA, the designation is defined as a person who has “engaged in hostilities or who has purposefully

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\footnote{See Jay Alan Bauer, \textit{Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review}, 57 ALA. L. REV. 1081, 1083 (Summer 2006) (proposing a balancing test between executive war powers and the judiciary’s responsibility to limit or allow those powers).}
\footnote{See \textit{Kwong Hai Chew v. Colding}, 344 U.S. 590, 596 (1953) (“It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.”).}
\footnote{Farah Stockman, \textit{Legal Residents’ Rights Curbed in Detainee Bill}, \textit{BOSTON GLOBE}, Sept. 28, 2006, at A1.}
\footnote{\textit{Id.}}
\footnote{Dan Eggen, \textit{Justice Department’s Brief On Detention Policy Draws Ire; Critics Say Law Could Allow Indefinite Jail Terms}, \textit{WASH. POST}, Nov. 15, 2006, at A3.}
\footnote{\textit{Id.} (“‘Enemy combatants are not entitled to preferential treatment merely because they have succeeded in entering our borders with the intent to harm American citizens or interests,’ [Department of Justice spokesman Brian] Roehrkas said.”).}
\end{footnotes}
and materially supported hostilities against the United States or its allies.”\footnote{10 U.S.C. § 948a(1).} The determination can also be made by a CSRT or “another competent tribunal established by the President or the Secretary of Defense.”\footnote{Id.} This definition gives broad interpretation to the executive branch, to the effect that Congress has no discretion over the breadth of the legislation.

The first definition is so sweeping that it could be read to include anyone who has donated money to a charity for orphans in Afghanistan that turns out to have some connection to the Taliban or a person organizing an anti-war protest in Washington, D.C. The second definition could supersede the first entirely, granting the President shockingly wide latitude to declare anyone [an unlawful enemy combatant].\footnote{Bill Goodman, Challenging the Military Commissions Act (Oct. 4, 2006), http://jurist.law.pitt.edu/hotline/2006/10/challenging-military-commissions-act.php (last visited Dec. 1, 2006).}

The MCA leaves absolutely no room for a line to be drawn.

Once that designation is made, the ability to prepare an adequate defense is virtually impossible. There is a very low standard of proof and evidentiary hurdles are virtually nonexistent.\footnote{10 U.S.C. §§ 948q(a), 949a(b)(2).} The MCA has measures for excluding confessions obtained via torture, but that is hardly a reprieve when torture is not defined. If a universal definition of torture is not observed, such as the one in the Geneva Conventions,\footnote{Geneva Conventions Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6. U.S.T. 3316, 75 U.N.T.S. 135.} it is not a stretch of the imagination to envision the executive branch determining their own high threshold definition of torture, such as the situation with waterboarding.\footnote{The controversial practice of simulated drowning was recently endorsed by Vice President Cheney as a “no-brainer” in interrogation. Dan Eggen, Cheney Defends 'Dunk in the Water' Remark; Addressing Alarm Over the Comment, Vice President Says He Was Not Referring to Waterboarding, WASH. POST, Oct. 28, 2006, at A02.}

Furthermore, under the MCA, a defendant can be barred from parts of their own trial on the basis of a national security privilege.\footnote{10 U.S.C. § 949d(f).} While classified information may condemn a man,
he cannot even see it. On its face, such a system is a prime example of a violation of the Confrontation Clause of the Sixth Amendment.292 A man could be sentenced to death without even knowing why. While this is an extreme example, a law cannot be premised on the basis of what it normally will do. A law should be evaluated on what it has the capability of doing.

The MCA also gives overly broad discretion to the president and Secretary of Defense in deciding punishments and criteria for defense witnesses.293 Allowing the Secretary of Defense to have sole discretion over the witnesses whom the defense may produce will undoubtedly create problems and abuse. The convening authority, though appointed by the Secretary of Defense, is in a much better position to rule on witness admission on a case-by-case basis. While one would hope that equitable punishments be prescribed, it will be impossible to know as review of a tribunal’s decision in a United States’ court is virtually nonexistent.294

In the manual governing Military Commissions released in early January 2007, the Pentagon outlined its system and most of these fears became true.295 The manual permits hearsay at trials and allows for the use of the death penalty based on hearsay.296 The manual also permits the use of confessions obtained by outright torture, as long as the torture was administered prior to December of 2005.297 The only place where the manual deviates from the MCA is in its unwillingness to use evidence that the accused cannot view for national security reasons; the manual forbids this.298 While there is one positive change in the manual, it is important to remember that this manual does not have the weight of law and could be easily

292 “In all criminal prosecutions, the accused shall enjoy the right to…be confronted with the witnesses against him…..” U.S. CONST. amend. VI.
294 Id. at § 950e-g.
296 Id.
297 Id.
298 Id.
changed at the Pentagon’s discretion. It does not and should not weaken the view that the MCA is wrong and should be struck down.

\textit{ii. The Judicial Responsibility}

This leaves us with the final question of where judicial review should begin. The U.S. District Court of Appeals for the District of Columbia Circuit is allowing detainees to argue against the MCA.\textsuperscript{299} Regardless of the result at the appeals level, it is almost guaranteed that these cases will reach the Supreme Court and join \textit{Rasul, Padilla, Hamdi}, and \textit{Hamdan} in the line of detainee cases. There are many possible challenges that could be raised. With regard to the designation of enemy combatants, the Court could find those parts void for vagueness as there really is no concrete standard. The suspension of habeas corpus could be found unconstitutional on its face according to the problems discussed above.

The Congressional battle over the MCA is far from over. Preparing for their Congressional majority in the 110th Congress, Democrats have introduced a bill into the Senate to restrict the MCA.\textsuperscript{300} Changes in the MCA could render further discussion on the point moot, perhaps even large portions of this analysis. Senator Dodd’s proposal, the Effective Terrorists Prosecution Act, would reinstate the writ of habeas corpus for detainees, restrict the admission of coerced confessions, and give judges the ability to exclude hearsay evidence.\textsuperscript{301} The revision would also narrow the definition of “unlawful enemy combatant” and restructure review of tribunal decisions towards a fairer system.\textsuperscript{302}

\textsuperscript{301} Nat Hentoff, \textit{More rights for terror detainees; Dodd bill would restore habeas corpus}, \textit{WASH. TIMES}, Dec. 11, 2006, at A21.
\textsuperscript{302} Id.
An additional proposal to reestablish habeas corpus has been offered in a bipartisan effort by Senator Spector, a Republican, and Senator Leahy, a Democrat.\textsuperscript{303} The Habeas Corpus Restoration Act of 2006, though fairly self-explanatory, would serve to repeal the provisions of the MCA repealing habeas protections for enemy combatants.\textsuperscript{304} Restructuring the MCA seems like a fairly high priority in the Democratic Congressional agenda.

No matter the final outcome, the Court must look past the Congressional approval of the executive action and refuse to award unwarranted judicial deference in review of the MCA. Despite the current Court’s conservative leanings, there is hope that its respect for the rule of law will prevail.\textsuperscript{305} Regardless of Jackson’s fear that striking such a joint congressional and executive act as unconstitutional would reveal a broken nation, it is imperative for the Court to apply the rule of law and bring the MCA in line with the Constitution.

\textit{IV. Conclusion}

The ineffective state of our government’s system of checks and balances has allowed for the executive branch to abuse its constitutional authority during the GWOT. When the executive branch exceeds its authority, it is up to the Court to step in immediately and remedy the situation. Where Congress has given broad grants of power to the president, it is up to the Court to restrict that authority where it overreaches the limits of the Constitution. This is the cornerstone of an independent judiciary. Furthermore, Congress must be independent of the president. While executive input is a necessary part of the legislative process, a bill should not be rubberstamped

\textsuperscript{303} \textit{Return to the rule of law; Legislation to restore ancient habeas corpus protections to `enemy combatants' is overdue,} L.A. TIMES, Dec. 18, 2006, at A20.

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} See Neal Kumar Katyal, \textit{Hamdan v. Rumsfeld: The Legal Academy Goes To Practice}, 120 HARV. L. REV. 65 (Nov. 2006) (“The Court's profound commitment to the rule of law is a beacon for other countries around the world.”).
into law on the basis of what the executive branch deems necessity for national security.

Maintaining three separate branches of government is integral to preserving the rights granted to citizens and restricting executive overextensions of power.