March 23, 2008

Hamdan v. Rumsfeld: A Legislative History
Smorgasbord

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There has been considerable debate regarding the use of legislative history in statutory interpretation.¹ The reliability and usefulness of extrinsic legislative materials is an important aspect of this debate. This Note analyzes both sides of the legislative history debate, using the recent Supreme Court decision in Hamdan v. Rumsfeld² as an analytical tool.

The legislative history of the jurisdiction stripping provision of the Detainee Treatment Act (DTA) was a key point of contention in Hamdan. In particular, the Court had to decide whether DTA required the dismissal of Hamdan’s habeas appeal. Justice Stevens’ majority opinion and Justice Scalia’s dissenting opinion regarding this provision highlight the two sides of the legislative history debate. This Note focuses on the legislative history surrounding the provision of the DTA that eliminated federal court jurisdiction over habeas corpus claims from detainees held at Guantanamo Bay and the application of this history to the Supreme Court’s decision to deny the government’s motion to dismiss Hamdan’s appeal.

Part I will provide a brief overview of some of the arguments against and supporting the use of legislative history. Part II will discuss the legislative history of the DTA, namely the Graham and Graham-Levin amendments, which contains the provision eliminating federal court jurisdiction over Guantanamo detainee habeas petitions. This Part will also rely on the Senate debate over the provision to present the arguments for and against interpreting the provision to apply to pending cases, like Hamdan.

Following the discussion of the DTA, Part III will give an overview of the Court’s use of the history of the Graham Amendment in deciding whether to grant the government’s motion to dismiss for lack of jurisdiction in *Hamdan v. Rumsfeld.* Part IV places the majority’s use of legislative history within the broader debate over the use of extrinsic legislative materials. The purpose of this Part is to determine whether the *Hamdan* majority’s reliance on legislative history was reliable and helpful in correctly determining the wishes of Congress. The discussion will show that, given the full picture of the Graham-Levin Amendment, including subsequent developments, the majority erred in finding that Congress did not intend the jurisdiction stripping provision of the DTA to apply to pending cases. Consequently, the majority’s reliance on legislative history to support their erroneous decision exemplifies the reasons why courts should not use legislative history to interpret statutes.

I. Overview of the Legislative History Debate

The interpretation of statutes is an important part of the role judges play in our legal system. Statutory interpretation has been described as the federal courts’ “daily bread.” As the need for federal courts to interpret statutes has increased, the statutes themselves have become more complex and detailed. Unfortunately, many courts do not have the expertise to dissect the complicated and technical statutes they confront.

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3 The success of the government’s motion to dismiss rested largely on whether the DTA provision removing habeas jurisdiction from the courts applied to pending cases.
6 *Eskridge,* *supra* note 4, at 2; Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts,* 80
Additionally, the concept of “legislative supremacy” further restrains the federal courts in interpreting statutes. In order for federal courts to meet the demands of the concept of legislative supremacy, the courts must determine the will of Congress as expressed in statutes. The debate over the use of extrinsic legislative materials takes place within the broader confines of legislative supremacy.

Courts have turned to the use of legislative history in order to determine the “will” of Congress. American courts generally did not use extrinsic materials to interpret statutes until the 20th century; the use of legislative history did not gain general acceptance until around 1940. The federal court’s developed reliance on extrinsic legislative materials was not without

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8 See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4 (1997) (“All judicial approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command.”).

9 See MIKVA, supra note 8, at 4-5. One judge observed that “[p]ersonal experience has revealed that the nearly universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators’ collective intention, however discerned, trumps the will of the court.” Id. (quoting Wald, supra note 6, at 281).

10 See MIKVA, supra note 8, at 4-5; see also Lori L. Outzs, Note, A Principled Use of Congressional Floor Speeches in Statutory Interpretation, 28 Colum. J.L. & SOC. PROBS. 297, 313-14 (1995) (arguing that “legislative history is necessary to maintain the separation of powers implicit in the U.S. [Constitution]”).


12 See ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-30 (1997) (quoting Chief Justice Taney describing the traditional English and American views); see also ESKRIDGE, supra note 4, at 208 (identifying Holy Trinity v. United States, 143 U.S. 457 (1892), as the turning point in the Supreme Court’s use of extrinsic materials); Vermeule, supra note 1 at 1835-36 (stating that Holy Trinity breached the traditional rule against using legislative history).

13 See ESKRIDGE, supra note 4, at 209 (declaring a general consensus among academics and federal judges that the use of legislative history was “the dominant feature of the interpretive
its detractors. The debate can be separated into two camps: the American rule and the English rule. The American rule generally supports the use of extrinsic materials if they are logically relevant to interpreting the statute in question. To the contrary, the English rule does not allow the court to consider legislative materials in matters of statutory construction. Today, the debate over the use of extrinsic legislative materials has been mainly between text-based formalism, the English Rule, and pragmatic functionalism, the American Rule.

A. Critiques of Using Legislative History

Criticisms of the use of legislative history have increased greatly over the past few decades. The increased use of legislative history has been connected to the increased criticism. The federal courts’ increased reliance on extrinsic legislative materials has even
caused some to quip that “‘in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute.’”

Today, many of the opponents of the use of legislative history in statutory interpretation adhere to what has been described as “new textualism.” Judge Frank Easterbrook and Justice Antonin Scalia have been two of the standard bearers of the modern textualist movement. The cornerstone principle of textualism is that the courts should look for an objective intent, rather than a subjective intent. Objective intent is defined as “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”

Because textualists only recognize a statute’s text as authoritative, the use of extrinsic legislative materials is shunned. It is helpful to break the textualists’ critiques of the use of extrinsic legislative materials into three categories: practical concerns, democratic theory concerns, and constitutional concerns.

1. Practical Concerns

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21 Starr, supra note 4, at 374 (quoting R. Dickerson, The Interpretation and Application of Statutes 164 (1975)).
22 See Eskridge, supra note 4, at 226.

23 See id.; see also Scalia, supra, note 12 (criticizing the application of common law principles to statutory interpretation and recommending a more objective text-based standard).
24 Scalia, supra note 12, at 17; see Tiefer, supra note 1, at 209, 217-20.
25 Scalia, supra note 12, at 17; see also Wald, supra note 6, at 282-83 (describing Scalia’s approach to finding congressional intent). Justice Scalia differentiates between new textualism and strict constructionism by describing strict construction as “a degraded form of textualism that brings the whole philosophy into disrepute.” Scalia, supra note 12, at 23.
26 See Eskridge, supra note 4, at 226; Spence, supra note 1, at 586; Outzs, supra note 10, at 307.
27 Kenneth Starr divides his concerns on the use of legislative history into democratic theory concerns and practical concerns. See Starr, supra note 4, at 375. The division here into three categories is based on Starr’s division.
The use of legislative history in statutory interpretation raises two practical concerns. First, legislative history can be easily abused or manipulated. In fact, the more a court relies on legislative history, the greater potential there is for abuse. Lobbyists are well known for attempting to protect their clients’ interests by inserting comments into the legislative history that purport to support a favorable interpretation of the statute. There is also concern that the legislators’ staffers will use their position to insert statements into the legislative record supporting the staffer’s own preferences. Some observe that, unlike in the past when the legislative history was actually used to influence a vote, extrinsic legislative materials are more focused on influencing future court decisions.

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28 Starr, supra note 4, at 376-77; see Dortzbach, supra note 6, at 163; Vermeule, supra note 1, at 1834. But see Spence, supra note 1, at 599 (admitting that the potential for abuse exists, but arguing that both Congress and the courts should decide how to deal with potential or actual abuses).

29 SCALIA, supra note 12, at 34; see also Note, Why Learned Hand Would Never Consult Legislative History Today, 105 HARV. L. REV. 1005, 1015 (1992) [hereinafter Learned Hand] (observing that when people notice that judges are using legislative history to interpret statutes, the record becomes corrupted). Corruption, in this context, has been defined as “the creation of a legislative record under circumstances in which it is no longer reasonable to rely on the floor speakers and committees that generate the legislative record as proxies for congressional intent.” Id. at 1016.

30 See, e.g., SCALIA, supra note 12, at 34 (“One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten ‘floor debate’—or, even better, insert into a committee report.”); Starr, supra note 4, at 366-67 (“It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.”); Outzs, supra note 10, at 318 n.106.

31 See Learned Hand, supra note 28, at 1017; see also Wald, supra note 6, at 284 (“Justice Scalia’s statements ... reflect ... a mistrust, perhaps not altogether unfounded, of those staffers to whom our elected legislators have delegated authority for certain parts of the process.”). One scholar, however, has argued that “[t]extualism also underestimates and undermines the legitimate assistance that staff and interest groups give Congress as it engages in the fact gathering and deliberation crucial to legislative enactments.” See Spence, supra note 1, at 604-07 (“There is little evidence of negative effects from legislative reliance on lobbyists and staff.”).

32 See SCALIA, supra note 12, at 34; Vermeule, supra note 1, at 1892; Outzs, supra note 10, at 318-19.
Second, the use of legislative history in statutory interpretation creates high transaction costs. A significant amount of time and resources go into producing the legislative history. Transaction costs are even higher after legislation is passed. Attorneys have to pour through legislative history in order to anticipate a client’s potential problems. The courts’ reliance and use of legislative history makes it necessary for lawyers to examine a statute’s extrinsic materials to prepare for litigation. Last, judges must allocate a portion of their scarce resources to reviewing legislative materials.

2. Democratic Theory Concerns

Democratic theory requires that the text of legitimately passed legislation should govern, rather than extrinsic materials. The courts’ reliance on legislative history creates the potential that extrinsic materials will be treated as authoritative, thus overriding the text of the statute.

Proponents of the use of legislative history often argue that the use of extrinsic materials is necessary to fulfill the legislature’s intent. Even if legislative intent exists and can be

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33 See Starr, supra note 4, at 377-378; Vermeule, supra note 1, at 1867-71; see also SCALIA, supra note 11, at 36-37 (“The most immediate and tangible change from the abandonment of legislative history would effect this: Judges, lawyers, and clients will be saved an enormous amount of time and expense.”).
34 See Starr, supra note 4, at 377.
35 See id.
36 See id. at 377-378 (“It is vastly harder and impracticable to search all aspects of the legislative history as they relate to the myriad of potentially troublesome problems that the lawyer would like to anticipate,” (quoting DICKERSON, supra note 21, at 164).
37 Id. at 377; see Vermeule, supra note 1, at 1869.
38 Id. at 378 (arguing that a judicial research of legislative history “increases the already well-publicized concerns over an unduly bureaucratized judiciary that leans too heavily upon its staff”); see Vermeule, supra note 1, at 1869-70.
39 See MIKVA, supra note 8, at 30; Starr, supra note 4, at 375.
40 See Starr, supra note 4, at 375.
determined, extrinsic legislative resources will have little, if any, probative value.  

Furthermore, the justices will often disagree on the meaning of legislative history.  It is not surprising that judges cannot agree on the meaning of legislative history because the politicians themselves rarely agree on the meaning of the statute’s history. If judges and politicians cannot agree on the meaning of a statute’s legislative history, the use of extrinsic materials will be of little use in deciphering the text of a statute.

3. Constitutional Concerns

In addition to the practical and democratic process concerns from using legislative history, there are also constitutional concerns. Perhaps the biggest constitutional concern is that the courts’ use of legislative history will insert the judicial branch into the legislative process. By treating legislative history as authoritative, the courts elevate these extrinsic materials to the

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41 See Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 6 (1998); Outzs, supra note 10, at 309-11.
42 See SCALIA, supra note 12, at 32; see also Starr, supra note 4, at 378 (noting that “the notion of ‘legislative intent’ may in itself be fictitious”); Vermeule, supra note 1, at 1834 (arguing that “[l]egislative intent is a meaningless concept”).
43 See SCALIA, supra note 12, at 32; Starr, supra note 4, at 375-76 (“[Legislative records] ... lack the ‘holistic’ intent found in the statute itself”); Vermeule, supra note 1, at 1834. Although many believe that committee reports are the most reliable source for legislative intent, see Schacter, supra note 41, at 15 (noting that committee reports are the most widely cited and considered the most reliable source of legislative history), Starr argues that “only the record of speeches on the floor of either chamber should be considered even minimally probative of Congress’s intent.” Starr, supra note 4, at 375.
44 See Starr, supra note 4, at 378-79.
45 See Starr, supra note 4, at 375.
46 See Dortzbach, supra note 6, at 193-94, 196-97; Starr, supra note 4, at 376.
same level as legislation, without going through the legislative process.\textsuperscript{47} The court chooses which view of a statute’s meaning that it finds authoritative, consequently “creating winners and losers in the legislative process.”\textsuperscript{48} Furthermore, when judges decide to support a particular “intent,” the court potentially creates a statute that was not signed by the President.\textsuperscript{49} In addition, the use of legislative history can invite a judge to abrogate his judicial responsibilities by either avoiding “the hard work of actual judging”\textsuperscript{50} or manipulating legislative history to implement the judge’s policy preferences.\textsuperscript{51}

B. Defenses of Using Legislative History

\textsuperscript{47} See ESKRIDGE, supra note 4, at 226; Spence, supra note 1, at 591-92; Learned Hand, supra note 29, at 1007.

\textsuperscript{48} Starr, supra note 4, at 376 (“Reflecting this concern, Justice Jackson, stated that ’political controversies which are quite proper in the enactment of a bill ... should have no place in its interpretation.’”).

\textsuperscript{49} See Starr, supra note 4, at 376. The President only signs the text of a statute, not the legislative history.

\textsuperscript{50} Starr, supra note 4, at 376-77.

\textsuperscript{51} See SCALIA, supra note 12, at 36 (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.”); see also Spence, supra note 1, at 593 (“Textualists also assert that legislative history can permit judges to impose their own values and policy preferences on unclear statutory provisions.”); Starr, supra note 4, at 376 (“It is often said that one generally finds in legislative history only that for which one is looking.”); Outzs supra note 10, at 338 (observing “that it is easy for judges to engage in an improper use of floor statements—a mining of the record—to support their personal viewpoints”). But see Outzs, supra note 10, at 316 (arguing that the failure to use legislative history gives judges too much discretion, which could allow the judge to elevate his views over the wishes of the legislature).
The use of legislative history has many defenders. Justice Breyer has argued that “[t]he ‘problem’ of legislative history is its ‘abuse,’ not its use.” Some argue that extrinsic legislative materials are especially helpful if the statute to be interpreted is ambiguous. Even Justice Scalia supports the use of legislative history if adhering to the text of a statute would lead to an absurd result. To counter the argument that the use of legislative history elevates extrinsic materials to the same level as a statute, some argue that the legislative history is only used as a guide to the statute’s meaning.

In addition, several practical matters are argued to support the use of legislative history. First, reference to legislative history is necessary to correct drafting errors. Second, scholars argue that forbidding a court to refer to legislative history would make it more difficult to facilitate the compromise necessary to pass legislation. Last, some say that there is no good

52 See, e.g., ESKRIDGE, supra note 4, at 238 (“The debate over the new textualism which raged in the 1980s should be ended with a concession that the new textualists were right to focus attention on the meaning of statutory language in the context of the whole statute ... but were wrong to dismiss legislative discussions as irrelevant.”); Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 847 (1991); Spence, supra note 1, at 588; Tiefer, supra note 1, at 206 n.1; Wald, supra note 6, at 301 (arguing that it is necessary to consult legislative history to enforce congressional intent).

53 Breyer, supra note 52, at 874; see Spence, supra note 1, at 597; Outzs, supra note 10, at 317. But see Vermeule, supra note 1, at 1877-79.

54 Breyer, supra note 52, at 848 (“Using legislative history to help interpret unclear statutory language seems natural.”); see Spence, supra note 1, at 600-01. But see Vermeule, supra note 1, at 1882.

55 Learned Hand, supra note 29, at 1023. But see id. (arguing that “[l]egislative history is a poor tool for analyzing apparently absurd directives”).

56 See, e.g., Schacter, supra note 41, at 30-40 (“[L]egislative history] appears in the opinions not as a substitute for the legislation itself, but as one among many sources of guidance about meaning.”). Some argue that legislative history is important to ascertain the context surrounding a statute. See Wald, supra note 6, at 301-03; Outzs, supra note 10, at 313.

57 See Breyer, supra note 52, at 850.

58 See Breyer, supra note 52, at 860 (“An institutional device that facilitates compromise and helps develop the consensus needed to pass important legislation has at least that much to be said in its favor.”). Why it is a benefit to pass legislation with an ambiguous meaning is unclear, especially considering the costs associated with the litigation needed to ascertain a clear
alternative to the use of legislative history and that it would be unfair to change from a system that used legislative history.60

Finally, some argue that not referring to legislative history to interpret statutes raises constitutional concerns.61 Textualism, it is argued, violates separation of powers principles by challenging Congress’s procedural choices and diminishing Congress’s power.62 A judge’s policy preferences can override those of Congress if the judge fails to refer to the legislative history of an ambiguous statute.63

II. The Graham Amendment to the Detainee Treatment Act

The Court in *Hamdan v. Rumsfeld*64 had to determine whether the DTA’s provision prohibiting federal courts from hearing habeas corpus claims from detainees at Guantanamo Bay applied to cases pending at the time the DTA was enacted.65 As this Note deals with the use of the legislative history of this provision, it is helpful to analyze the floor statements regarding whether the provision was intended to be retroactive. This section begins with a brief history of the Graham Amendment. Following this historical overview, sections (B) and (C) will discuss,
respectively, the floor statements supporting the position that the habeas provision did not and did apply to pending cases in general, and *Hamdan v. Rumsfeld* in particular.

A. History of the Graham Amendment

United States Senator Lindsey Graham offered an amendment (Graham Amendment) to the DTA “clarifying that non-citizen terrorists do not have unlimited access to U.S courts.”\(^{66}\)

The amendment was passed on November 11, 2005 by a vote of 49-42.\(^ {67}\)


(d) Judicial Review of Detention of Enemy Combatants.
   (1) In general. Section 2241 of title 28, United States Code, is amended by adding at the end the following:
   “(e) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States ... who is detained by the Department of Defense at Guantanamo Bay, Cuba.”.
   (2) Certain decisions.
   (A) In general. Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any decision of a Designated Civilian Official described in subsection (b)(2) that an alien is properly detained as an enemy combatant.
   (B) Limitations on claims. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien
   (i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and
   (ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.
   (C) Scope of review. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of whether the status determination of the Combat Status Review Tribunal with regard such alien was consistent with the procedures and standards specified by the Secretary of Defense ....
   (D) Termination on release from custody. The jurisdiction of the United States Court of Appeals for the District of Columbia with respect to claims of an alien under this
Senator Bingaman offered an amendment to the Graham Amendment on November 14, 2005. The Bingaman Amendment gave the D.C. Circuit Court of Appeals exclusive jurisdiction over habeas corpus claims by Guantanamo Bay detainees who have had a Combat Status Review Tribunal (CSRT). The amendment provided exceptions for detainees charged before a military commission and individuals not designated as enemy combatants but still held at Guantanamo Bay. Additionally, habeas petitions were not allowed for claims based on living conditions, but claims were allowed for: whether a detainee’s status determination was consistent with the standards and procedures established by CSRTs, whether the status determination was supported by sufficient evidence and consistent with due process, and the lawfulness of the detention. Bingaman’s amendment failed on a 44-54 vote on November 15.

Paragraph (3) Effective date. The amendment made by paragraph (1) shall apply to any action that is pending on or after the date of enactment of this Act. Paragraph (2) shall apply with respect to any claim regarding a decision covered by that paragraph that is pending on or after such date.


Democrats Landrieu and Lieberman voted for the amendment. Republicans Chafee, Smith, and Specter voted against the amendment. Id. Senators Alexander, Corzine, Domenici, Enzi, Hagel, Inouye, Lugar, Santorum, and Thomas did not vote. 151 Cong. Rec. S12, 667 (2005). Senator Alexander would have voted for the amendment if he was present to vote. Id. (statement of Senator McConnell).


Senator Graham, joined by Senators Carl Levin and Jon Kyl, offered an amendment (Graham-Levin Amendment) to the original Graham Amendment on November 14, 2005. The relevant portion of the Graham-Levin Amendment reads:

In lieu of the matter proposed to be inserted, insert the following:

....

(d) Judicial Review of Detention of Enemy Combatants.

(1) In General. Section 2241 of title 28, United States Code, is amended by adding at the end the following:

“(e) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States ... who is detained ... at Guantanamo Bay, Cuba.”.


(A) In General. Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any decision of a Designated Civilian Official ... that an alien is properly detained as an enemy combatant.

(B) Limitation on Claims. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien

(i) who is, at the time a request for review is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combat Status Review Tribunal has been conducted, pursuant to applicable procedures ....

(C) Scope of Review. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an claims with respect to an alien under this paragraph shall be limited to the consideration of

(i) whether the status determination of the Combat Status Review Tribunal with regard to such alien applied the correct standards and was consistent with the procedures specified by the Secretary of Defense ...; and

(ii) whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and laws of the United States.

(D) Termination on Release from Custody. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) Review of Final Decisions of Military Commissions.

(A) In General. Subject to subparagraphs (C) and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1 ... (or any successor military order).

(B) Grant of Review. Review under this paragraph...
new Graham-Levin Amendment made substantive changes to the original Graham Amendment as to what the D.C. Circuit could review. For example, the Graham-Levin Amendment allowed the court not only to review whether a CSRT decision on a detainee’s status was consistent with the Secretary of Defense’s procedures and standards and supported by a preponderance of evidence, but also whether the standards used were consistent with the Constitution and laws of the United States.\footnote{78}{The D.C. Circuit could also review final decisions of military commissions under the Graham-Levin Amendment.\footnote{79}{Guantanamo detainees were given a right to judicial review of any military commission decision that carried a capital sentence or a sentence of ten or more years.}}

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right;

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) Limitation on Appeals. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained ... at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) Scope of Review. The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of

(i) whether the final decision applied the correct standards and was consistent with the procedures specified in the military order referred to in subparagraph (A); and

(ii) whether subjecting an alien enemy combatant to such order is consistent with the Constitution and laws of the United States.

(e) Effective Date.

(1) In General. Except as provided in paragraph (2), this section shall take effect on the day after the date of the enactment of this Act.

(2) Review of Combatant Status Tribunal and Military Commission Decisions. Paragraphs (2) and (3) of subsection (d) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.


\footnote{77}{See supra note 77 at § (d)(2)(C)(i)-(ii).  Compare to the Graham Amendment. See supra note 66 (limiting judicial review to CSRT determinations).}

\footnote{79}{See supra note 77 at § (d)(3)(A).}
more years.\textsuperscript{80} Review of all other military commission decisions was discretionary.\textsuperscript{81} The scope of review was limited to whether the commission’s final decision was consistent with the standards in the Military Commission Order No. 1\textsuperscript{82} and whether subjecting the detainee to the order was consistent with the Constitution and laws of the United States.\textsuperscript{83} The wording of the effective date provision of the Graham-Levin Amendment was also different from the Graham Amendment.\textsuperscript{84} The Graham-Levin Amendment to the Graham Amendment passed with overwhelming support on November 15, 2005.\textsuperscript{85} Next, the Senate approved by voice vote the Graham Amendment as amended by the Graham-Levin Amendment.\textsuperscript{86} The Conference Report largely left intact the Graham-Levin Amendment,\textsuperscript{87} which was included in the final version of the bill signed by President Bush.\textsuperscript{88}

B. Congress Did Not Intend the Graham Amendment to Apply Retroactively

\textsuperscript{80} Id. at § (d)(3)(i).
\textsuperscript{81} Id. at § (d)(3)(ii).
\textsuperscript{83} See supra note 77 at § (d)(3)(D)(i)-(ii).
\textsuperscript{84} See id. at § (e)(1)-(2). Section (e) read that “this section shall take effect on the day after the date of the enactment of this Act,” except for claims under the provisions regarding review of CSRT and military commission decisions, in which case this section would apply to all claims “pending on or after the date of the enactment of this Act.” Id.
\textsuperscript{85} 151 Cong. Rec. S12, 803 (2005) (Rollcall Vote No. 325 Leg.). The Graham-Levin Amendment passed 84-14. Id. The senators who voted against the amendment were: Baucus, Biden, Bingaman, Byrd, Dayton, Durbin, Feingold, Harkin, Kennedy, Lautenberg, Leahy, Rockefeller, Sarbanes, and Specter. Id.
\textsuperscript{86} 151 Cong. Rec. S12, 813 (2005).
\textsuperscript{87} Although the Conference Report made a couple substantive changes to the DTA, see 151 Cong. Rec. S14, 258 (2005) (statement of Sen. Levin) (explaining that the Conference Report changed the Graham-Levin Amendment by dropping “undue” from before “undue coercion and eliminating federal court jurisdiction for “any other action against the United States or its agents”), the effective date language at question in \textit{Hamdan} remained unchanged.
The original Graham Amendment clearly was designed to apply both prospectively and retroactively. Senator Levin criticized both the jurisdiction stripping and the retroactive application of the Graham Amendment, specifically saying that the Supreme Court would be prohibited from deciding *Hamdan v. Rumsfeld*. The Graham-Levin Amendment to the original Graham Amendment, however, changed the language of the effective date.

Senator Levin, a co-sponsor of the Graham-Levin Amendment, was of the opinion that the new amendment did not apply retroactively, thus preserving the Supreme Court’s jurisdiction in *Hamdan v. Rumsfeld*. Levin trumpeted the change in language of the effective date of the act as one of the three improvements on the original Graham Amendment. In a press release, Senator Levin pointed out that nobody refuted his understanding that the Graham-Levin Amendment did not apply to pending cases following his floor testimony. Levin also claimed that the Bush Administration pushed to change the language of the Graham-Levin Amendment.

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89 *See* 151 Cong. Rec. S12, 655 (2005) (making the effective date apply to any action “pending on or after” the date of enactment).

90 151 Cong. Rec. S12, 663-64 (2005) (“[T]here is a pending decision at the Supreme Court which would be retroactively prohibited. ... [The Graham Amendment] would eliminate the jurisdiction already accepted by the Supreme Court in Hamdan [v. Rumsfeld].”).

91 Compare the language of the Graham-Levin Amendment, *see supra* note 77, with the language of the Graham Amendment, *see supra* note 66.

92 151 Cong. Rec. S12, 754 (2005) (statement of Sen. Levin) (“The other problem ... with the first Graham amendment was that it would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases.... [The Graham-Levin Amendment] will not strip the courts of jurisdiction over [pending] cases. For instance, the Supreme Court jurisdiction in Hamdan is not affected.”).

93 Levin said the other two improvements the Graham-Levin amendment provided were judicial review of convictions by military commissions in addition to the review of CSRT status determinations and whether the standards and procedures of a tribunal were consistent with the Constitution and laws of the United States. *See, e.g.*, 151 Cong. Rec. S12, 754-55, 802 (2005); 151 Cong. Rec. S14, 257-58 (2005).

in order to specify retroactive application of the jurisdiction stripping provision of the
amendment.  

Other senators also clearly expressed their belief that the Graham-Levin Amendment was
not intended to apply retroactively. Senate Minority Leader Harry Reid supported the Graham-
Levin Amendment because it improved the original Graham Amendment, including his
understanding that the pending cases would not be affected. Reid, however, opposed the final
Graham Amendment due to the court-stripping provision. Senator John Kerry also voted for
the Graham-Levin Amendment after he opposed the original Graham Amendment. Quoting
Senator Levin, Kerry also claimed that he believed that the Graham-Levin Amendment would
not apply to pending cases.

Interestingly, some senators who claimed to understand that the Graham-Levin
Amendment did not apply retroactively, voted against the amendment. During floor debate on
the Graham-Levin Amendment, Senator Durbin argued that the amendment would apply
retroactively and would probably strip the Supreme Court of jurisdiction in the Hamdan case.
Durbin, however, during the Conference Report debate, commented that the Graham-Levin-Kyl

95 Press Release, Senator Carl Levin, Levin Statement on the Department of Justice Motion to
Dismiss the Hamdan Case in the Supreme Court (Jan. 12, 2006); see also 152 Cong. Rec. S1,
96 151 Cong. Rec. S12, 803 (2005). Senator Reid specifically mentioned his understanding that
the Graham-Levin Amendment would not apply to Hamdan v. Rumsfeld. Id.
99 Id.
100 151 Cong. Rec. S12, 799 (2005) (stating during debate on the Graham-Levin Amendment that
“[i]t applies retroactively, and therefore would also likely prevent the Supreme Court from ruling
on the merits of the Hamdan case”).
Amendment would apply retroactively. In addition to Senator Durbin, Senators Leahy and Feingold also voted against the Graham-Levin Amendment and later argued that the amendment would not apply retroactively.

C. Congress Intended the Graham Amendment to Eliminate All Habeas Claims, Including Pending Claims

The only comments from proponents of the Graham-Levin Amendment demonstrating the amendment was to apply retroactively were in a colloquy between Senators Graham and Kyl, two of the three main sponsors of the amendment, which was added to the Senate record after the debate, but before the Senate adopted the Conference Report. In response to “a considerable amount of post-enactment commentary,” however, Senator Kyl commented on the

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102 See supra note 85.
103 See 151 Cong. Rec. S14, 245 (2005) (comment of Sen. Leahy) (“Since the Graham-Levin amendment would not retroactively apply to pending cases, the Supreme Court will still have the opportunity to [decide] ... Hamdan v. Rumsfeld.”); 151 Cong. Rec. S14, 272 (2005) (comment of Sen. Feingold) (“[I]t is my understanding that this provision will not affect the ongoing litigation in Hamdan v. Rumsfeld before the Supreme Court ....”).
105 Brief of Senators Graham & Kyl as Amicus Curiae in Support of Respondents, Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (No. 05-184), 2006 WL 467689, *16. See 151 Cong. Rec. S14, 263 (2005) (comment of Sen. Kyl) (“[I]n my opinion, the court should dismiss Hamdan for want of jurisdiction.”); id. (comment of Sen. Graham) (“[R]egarding the modification of the jurisdiction of those courts currently hearing individual habeas or other actions that have been filed by the detainees, we wanted those cases to be recast as appeals of their CSRT determinations.”); id. (comment of Sen. Kyl) (“[The bill] strips every court of jurisdiction to hear claims from detainees held in Guantanamo Bay. The courts rule of construction for these types of statutes is that legislation ousting the courts of jurisdiction is applied to pending cases.... [T]here is no exception anywhere in this bill....”); id. at S14, 268 (2005) (statement of Sen. Kyl) (“All habeas actions are terminated by this bill.”).
meaning of the Graham Amendment and placed a letter to Attorney General into the congressional record.\textsuperscript{106} Senator Kyl complained that the critics were “paint[ing] a revisionist history” of the DTA.\textsuperscript{107} Stressing that the DTA eliminated all pending habeas claims, Kyl argued that nothing in the legislative record suggested that pending habeas claims were to be exempt under the Graham-Levin Amendment.\textsuperscript{108}

Significantly, Senators Graham and Kyl jointly filed the only amicus brief from Congress with the Supreme Court in \textit{Hamdan v. Rumsfeld}.\textsuperscript{109} The Senators’ brief stated that federal court jurisdiction was withdrawn immediately, except for claims allowed under the DTA.\textsuperscript{110} The brief argued that the Graham-Levin Amendment’s modification to the wording of the effective date did not make it inapplicable to pending cases, but rather clarified that pending cases could continue under the standards established by the amendment.\textsuperscript{111} Furthermore, Graham and Kyl claimed that exempting pending cases from the Graham-Levin Amendment would “eviscerate Congress’s purpose in passing [the] statute” and “transform the DTA into a virtually pointless piece of legislation with no practical effect” because of the hundreds of habeas corpus claims already filed on behalf of the inmates at Guantanamo Bay, which was the exact litigation the


\textsuperscript{108} \textit{See} 151 Cong. Rec. S, 970-72 (2006) (“[T]he legislative record is utterly devoid of any evidence that Senators were led to believe that the Graham/Levin/Kyl amendment would carve out pending cases.”).


\textsuperscript{110} Brief of Senators Graham & Kyl, \textit{supra} note 105, at *4 (“[The DTA] by its clear terms withdraws federal jurisdiction over Guantanamo detainee cases effective immediately, except those claims assertable under [the bill] itself.”). For example, the D.C. Circuit Court of Appeals could still hear cases reviewing CSRT status determinations or military commission convictions.

\textsuperscript{111} \textit{See id.} at *7 (“The notion that Congress specifically amended the DTA to make it inapplicable to pending cases is incorrect. It was revamped to provide for review of military commission decisions that otherwise would have been wholly unreviewable.”).
amendment sought to avoid. The Senators insisted that *Hamdan v. Rumsfeld* could not proceed under the habeas corpus statute.

In addition to Senators Graham and Kyl, opponents of the Graham-Levin Amendment were concerned that the amendment stripped the Supreme Court of jurisdiction in *Hamdan*. Senator Specter complained that the amendment was “blatant court stripping in the most confusing way possible,” and that the “Supreme Court would not have jurisdiction to hear the Hamdan case.” Senator Durbin also protested that the amendment applied retroactively and would likely strip the Court from hearing *Hamdan*.

**D. Summary of the DTA’s Legislative History**

The legislative history of the Graham-Levin Amendment to the DTA is, at best, inconclusive as to whether the provision was to apply to pending cases. The floor statements support both sides of the issue. Granted, the majority of the statements regarding the retroactive affect of the Graham-Levin Amendment made before the vote indicated a desire to allow pending cases to continue. On the other hand, both Senators Graham and Kyl, two of the main sponsors of the bill, obviously expressed their desire for provision to apply to pending cases in the Congressional Record and as amici in *Hamdan*. Opponents of the provision also expressed

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112 *Id.* at *21-22.
113 *Id.* at *20 (“This case can no longer proceed under the habeas statute....”).
114 *See id.* at *17 (listing senators who made comments that the amendment would strip the courts of jurisdiction, including those who opposed the amendment).
115 151 Cong. Rec. S12, 796 (2005); *see also id.* at 799 (opposing the Graham Amendment because it “is sophisticated court stripping”).
116 *See supra* note 100 and accompanying text. *But see supra* note 101 and accompanying text (discussing how Senator Durbin later claimed that the Graham-Levin Amendment would not stop the Court from deciding *Hamdan v. Rumsfeld*).
opinions on both sides of the debate. The jurisdiction stripping aspect of the Graham-Levin Amendment was very controversial. Consequently, the legislative history has little, if any, probative value and is an unreliable yardstick for discovering any congressional intent.

IV. Legislative History in *Hamdan v. Rumsfeld*\(^\text{117}\)

After the President signed the DTA, the United States filed a motion with the Supreme Court to dismiss Hamdan’s appeal.\(^\text{118}\) The government argued that the DTA “in plain terms remove[d] the Court’s jurisdiction to hear” the case, and thus asked the Court to “dismiss [the] case for want of jurisdiction or vacate with instructions for the lower court to dismiss, or, at a minimum, dismiss the writ as improvidently granted.”\(^\text{119}\) The Court postponed ruling on the motion to dismiss and heard oral arguments on both the motion to dismiss and the merits of Hamdan’s claim.\(^\text{120}\) Consequently, the Court first needed to decide was whether the DTA required the Court to dismiss Hamdan’s case.\(^\text{121}\)

A. The Majority Opinion

\(^\text{117}\) 126 S. Ct. 2749 (2006).
\(^\text{119}\) Id. at *3.
\(^\text{121}\) See *Hamdan*, 126 S. Ct. at 2762.
Justice Stevens, writing for the majority,\textsuperscript{122} denied the government’s motion to dismiss.\textsuperscript{123} Stevens claimed to rely on principles of statutory construction to reject the government’s motion to dismiss.\textsuperscript{124} The majority drew a “negative inference” from the fact that the subsection eliminating federal courts’ habeas jurisdiction did not specify that the provision was to apply to pending cases, unlike the other two subsections that granted detainees substantive review rights.\textsuperscript{125}

Stevens turned to the legislative history of the DTA to support his construction of the statute.\textsuperscript{126} First, the majority examined the drafting history of the DTA and argued that Congress specifically rejected stripping the courts of habeas jurisdiction over pending cases.\textsuperscript{127} In a footnote, Stevens referred to the Senate’s debate over the Graham and Graham-Levin amendments to the DTA.\textsuperscript{128} In this footnote, the majority relied heavily on the statements of Senator Levin to support their interpretation of the DTA.\textsuperscript{129} The statements of Senators Graham

\textsuperscript{122} Id. at 2759. Stevens was joined by Justices Souter, Ginsberg, Breyer, and Kennedy. See id. Justice Kennedy did not join the majority in Parts V and VI-D-iv, see id. at 2800 (Kennedy, J. concurring in part), which are not related to this discussion.
\textsuperscript{123} Id. at 2762.
\textsuperscript{124} Id. at 2764.
\textsuperscript{125} See id. at 2765-66 (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). It is important to remember that the jurisdiction stripping provision of the DTA falls under the general enactment date, section (e)(1) of the Graham-Levin amendment, as opposed to review of CSRT or military commission decision, which are governed by section (e)(2). See supra note 77.
\textsuperscript{126} See id. at 2766-69.
\textsuperscript{127} See id. at 2766. In comparing the different versions of the Graham Amendment, the majority discarded the plain language of the jurisdiction stripping provision that it was to “take effect on the date of enactment,” DTA §1005(h)(1), by declaring the language “not dispositive.” See id. at 2766, n.9.
\textsuperscript{128} See id. at 2766, n.10 (“We note that statements made by Senators preceding passage of the Act lend further support to what the text of the DTA and its drafting history already make plain.”).
\textsuperscript{129} See id.
and Kyl, which contradicted Senator Levin’s contention that the Graham-Levin Amendment did not apply to pending cases, were largely ignored.\textsuperscript{130}

Next, Stevens rejected the government’s contention that Congress understood that different presumptions applied to jurisdiction stripping and jurisdiction conferring provisions and thus did not need to specify that the habeas jurisdiction stripping provision applied to pending cases.\textsuperscript{131} Third, the majority declared that finding the jurisdiction stripping provision did not apply to pending cases was not absurd.\textsuperscript{132} Stevens again resorted to the legislative history of the DTA to support his position.\textsuperscript{133} Finally, the majority used the DTA’s legislative history to reject the plain meaning of the statute.\textsuperscript{134}

B. The Dissenting Opinion

\textsuperscript{130} See id. Stevens, giving so little weight to Graham and Kyl, wrote that the senators’ statements “arguably contradict Senator Levin’s contention that the final version of the Act preserved jurisdiction over pending habeas cases.” See id. (emphasis added). The comments of Graham and Kyl clearly contradicted Levin’s contention. The unpersuasive reason the majority gave for disregarding the statements of Graham and Kyl was that they were added “after the Senate debate.” Id. (emphasis in original) (“All statements made during the debate itself support Senator Levin’s understanding ....”). It is not clear why timing of the Graham’s and Kyl’s statements would change the fact that it directly opposes Levin’s position.\textsuperscript{131} See id. at 2768 (arguing that the government’s theory was “insupportable” and “strained credibility”).

\textsuperscript{132} Id. at 2768-69 (“There is nothing absurd about a scheme under which pending habeas actions ... are preserved ....

\textsuperscript{133} See id. at 2769 (“The Government’s more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, ... but is otherwise without merit.”).

\textsuperscript{134} Justice Stevens admits that if one considered only the text of the provision that eliminated all habeas jurisdiction for federal courts, a plain meaning could be discerned. See id. (“The omission is an integral part of the statutory scheme that muddies whatever ‘plain meaning’ may be discerned from blinkered study of [the] subsection ... alone.”). Stevens, however, used the DTA’s legislative history to “muddy” this plain meaning. See id.
Justice Scalia, writing in dissent for Justices Thomas and Alito, rejected the majority’s conclusion that the DTA did not remove federal court jurisdiction over pending cases. First, Scalia began by observing that the language of the DTA was an “unambiguous[... plain directive.” Continuing, Scalia explained that “as of [the date the DTA was signed], then, no court had jurisdiction to ‘hear or consider’ the merits of petitioner’s habeas application.” Scalia then argued that jurisdiction stripping provisions generally become effective when the statute is enacted, not because of any presumption used by the court, but because the court recognizes the plain directive of the statute. A statute, Scalia wrote, must explicitly reserve court jurisdiction to alter the “plain meaning” of statutes removing jurisdiction.

Second, the dissent rebutted the majority’s “negative inference” argument. Scalia argued that, even though a negative inference might be helpful for ambiguous statutes, the DTA’s language, by contrast, was clear. Furthermore, the dissent continued, the default presumption found in the Bruner line of cases created a powerful presumption against

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135 See id. at 2810 (Scalia, J. dissenting).
136 See id. (“[The majority’s] conclusion is patently erroneous.”). Scalia went further saying that “the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.” Id.
137 See id.
138 See id. (emphasis in original) (stressing that the statute unambiguously prohibits the court from hearing any cases after December 30, 2005).
139 Id. (citing and discussing Bruner v. United States, 343 U.S. 112 (1952), and Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (“An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.”)).
140 Id. at 2810-11. “‘Without jurisdiction the court cannot proceed at all in any cause.... And this is not less clear upon authority than upon principle.’” Id. at 2811 (quoting Ex Parte McCardle, 74 U.S. 506, 514 (1868)) (emphasis in original).
141 Hamdan, 126 S. Ct. at 2811 (citing and discussing Bruner, 343 U.S. at 116-17; Hallowell v. Commons, 239 U.S. 506 (1916); Ins. Co. v. Ritchie, 72 U.S. 541 (1867)).
142 See id. at 2812-15.
143 Id. at 2812-13. Scalia found that the “omitted language ... would have been redundant.” Id. at 2813.
justice.\textsuperscript{144} Justice Scalia then offered possible reasons why Congress may have treated the DTA’s jurisdiction stripping provision and jurisdiction conferring provisions differently.\textsuperscript{145} For example, the dissent argued that the provisions of the DTA granting jurisdiction were not as clear that they pertained to pending cases as the jurisdiction stripping provision.\textsuperscript{146}

Third, Justice Scalia issued a stern rebuke of the majority’s use of legislative history.\textsuperscript{147} This portion began by pointing out that legislative history should not be used unless the statute is ambiguous.\textsuperscript{148} Scalia then accused Justice Stevens of selective use of legislative history.\textsuperscript{149} After noting that the majority discounted floor statements by sponsors of the DTA that contradicted the majority’s view because the comments were added after the debate, Scalia commented that “this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended ... by throngs of eager listeners.”\textsuperscript{150} Furthermore, Scalia wrote that the majority abused the use of legislative history by “greatly exaggerat[ing] the one-sidedness ... of the debate ... before the DTA’s enactment.”\textsuperscript{151}

\textsuperscript{144} Id. at 2813.
\textsuperscript{145} See id. at 2813-15 (“Here ... there is ample reason for the different treatment.”).
\textsuperscript{146} See id. 2814. This reason “alone [was] enough to explain the difference in treatment.” Id. Scalia also says that another reason for the different treatment of the DTA sections could be caused by Congress’s attempt to deal with any Suspension Clause problems from the jurisdiction stripping provision. See id. at 2814-15.
\textsuperscript{147} See id. at 2815-17 (“Worst of all is the Court’s reliance on the legislative history of the DTA to buttress its implausible reading of [the statute].”).
\textsuperscript{148} Id. at 2815.
\textsuperscript{149} Id. at 2815-16 (“But selectivity is not the greatest vice in the court’s use of floor statements to resolve today’s case.”).
\textsuperscript{150} Id. Scalia continued his attack on the use of floor statements by commenting “[w]hether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.” Id.
\textsuperscript{151} Id. at 2816. To support his point, Scalia argued that some of Senator Graham’s comments implied an understanding that jurisdiction would be stripped in pending cases, including Hamdan. See id. Scalia also refers to the President’s signing statement. See id. (noting that Stevens ignored that the President understood the DTA to eliminate jurisdiction over pending habeas claims). Although Presidential signing statements are outside of the scope of this note,
Scalia, however, seemed most disturbed by the majority’s apparent opportunistic use of legislative history. Scalia criticized Justice Stevens for rewarding partisan comments designed to create a statute that would not have survived the constitutionally mandated legislative process. The dissent further argued that legislative drafting history is just as unreliable as legislative floor debate. Last, Scalia concluded that Stevens’ interpretation of the provision would lead to an absurd result.

V. Analysis of the Court’s Use of Legislative History in Hamdan.

Although Justice Scalia did a thorough job of discussing the *Hamdan* majority’s use of legislative history, the debate over the use of legislative history will be advanced by further analyzing the Court’s reference to extrinsic legislative materials. This discussion will look at the use of legislative history in *Hamdan* in light of the more general debate over the use of extrinsic

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see William D. Poplin, *Judicial Use of Presidential Legislative History: A Critique*, 66 Ind. L.J. 699 (1991), for a perspective on the reliability and use of Presidential signing statements. Poplin observes that the courts increased use of legislative history made it inevitable that the President would begin trying to create legislative history. *Id.* at 703.

152 *See Hamdan*, 126 S. Ct. at 2816-17 (Scalia, J. dissenting).

153 *See id.*

154 *See id.* at 2817 (arguing that “drafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history”). Scalia noted that the majority “show[ed] some semblance of seemly shame, tucking away its reference to [the floor statements] in a half-hearted footnote.” *Id.*

155 *See id.* at 2817-18 (“The court’s interpretation transforms a provision abolishing jurisdiction over all Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.” (emphasis in original)).

156 *See Hamdan*, 126 S. Ct. at 2810-18 (Scalia, J. dissenting); *supra* Part III.B.
materials. Finally, this section shows that recent developments strengthen the arguments of the critics of legislative history, in general, and the dissent in *Hamdan* in particular.

A. The *Hamdan* Majority’s Use of Legislative History Supports Critiques of Legislative History

In *Hamdan*, the majority’s reliance on the DTA’s legislative history is a superb example of many of the arguments offered against the use of legislative history. For example, opponents of legislative history argue that extrinsic materials easily can be manipulated. Both sides of the Senate debate over whether the DTA was to apply to pending cases were attempting to influence future court decisions. Given the contentious nature of the statute provision in

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157 Although Stevens argued that the decision to deny the government’s motion to dismiss was based on principles of statutory construction, see *supra* notes 124-25 and accompanying text, the “negative inference” the court relied on only has relevance if the plain meaning of the text is ignored. *See Hamdan*, 126 S. Ct. at 2812-13, 15 (Scalia, J. dissenting); *see also supra* note 134 and accompanying text. Furthermore, without the majority’s use of the DTA’s legislative history to support their statutory interpretation representing Congress’s “intent,” there is little left to Stevens’ arguments. *See Hamdan*, 126 S. Ct. at 2817, n.6. Consequently, if Stevens misinterpreted, or even worse misused, the DTA’s legislative history, the Court’s denial of the government’s motion to dismiss was, at a minimum, erroneous and possibly motivated by other considerations.

158 *See supra* notes 28-32 and accompanying text.

159 *See, e.g., Hamdan*, 126 S. Ct. at 2816 (Scalia, J. dissenting) (“The question was divisive, and the floor statements made on both sides were undoubtedly opportunistic and crafted solely for use in the briefs of this very litigation.” (emphasis in original)); 151 Cong. Rec. S14, 257 (2005) (statement of Sen. Levin) (stating that Lindh v. Murphy, 521 U.S. 320 (1997) required the Court to apply a negative inference to argue that the Graham-Levin Amendment did not apply to pending cases); 151 Cong. Rec. S14, 263 (2005) (statement of Sen. Kyl) (listing a string of cases to back up the proposition that the Graham-Levin Amendment removed habeas jurisdiction over pending cases). Furthermore, the statements of the senators who argued that the Graham-Levin Amendment would not apply to pending cases were so similar that they clearly appear to be talking points. *See* 151 Cong. Rec. S14, 257-58 (2005) (statement of Se. Levin); 151 Cong. Rec. S14, 272 (2005) (statement of Sen. Feingold); 151 Cong. Rec. S14, 274-75 (2005) (statement of Sen. Durbin); 151 Cong. Rec. S14, 275 (2005) (statement of Sen. Reid); *see also* 151 Cong. Rec. S14, 257 (2005) (statement of Sen. Levin) (citing *Lindh* for the proposition that courts maintain
question and the obvious pandering to the Court, the majority’s use of legislative history seems especially egregious.\(^{160}\)

The Court’s use of extrinsic legislative materials also raises democratic theory concerns. Legislative history opponents fear that if a court relies on extrinsic materials, these materials will be treated as authoritative at the expense of the actual text of the statute.\(^{161}\) In *Hamdan*, Stevens looked past the language of the DTA that the jurisdiction stripping “section shall take effect on the date of the enactment of [the] Act,”\(^{162}\) based significantly on his reliance on legislative history.\(^{163}\) The concern that the use of legislative history can be used to override the text of a statute, again, seems to be well founded.\(^{164}\)

The majority decision in *Hamdan* also is a textbook example of the argument that legislative history has little probative value.\(^{165}\) The disagreement between the members of Congress,\(^{166}\) the President,\(^{167}\) and the justices of the Supreme Court\(^{168}\) exemplifies, not only the unreliability of legislative history, but also the lack of any actual probative value in many, if not

\(^{160}\) See *Hamdan*, 126 S. Ct. at 2816-17 (Scalia, J. dissenting). Scalia points out that in a previous decision, Justice Stevens rejected floor statements regarding the effective date provision of a statute because the statements were obviously partisan. See id. at 2816 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 262 (1994)). In *Hamdan*, however, Stevens blindly, or worse—willfully, ignores the highly partisan nature of jurisdiction stripping provision of the DTA. See supra note 159.

\(^{161}\) See supra notes 39-40 and accompanying text.


\(^{163}\) See supra note 157.

\(^{164}\) For another infamous example of the Supreme Court ignoring the plain text of a statute in light of legislative history, see *Holy Trinity v. United States*, 143 U.S. 457 (1892). See also Vermeule, supra note 1 (arguing that the Court *Holy Trinity* misapplied legislative history and discussing the ramifications of this mistake on the broader legislative history debate).

\(^{165}\) See supra notes 43-45 and accompanying text.

\(^{166}\) Compare supra Part II.B, with supra Part II.C.

\(^{167}\) See supra note 151.

\(^{168}\) Compare supra Part III.A, with supra Part III.B.
nearly all cases. If legislative history has little probative value, there seems to be little reason to use it.

The majority’s use of legislative history also raises constitutional concerns. Stevens validates the argument that the use of legislative history creates a statute that was not passed and signed into law in the constitutionally proscribed method. By selectively relying on one side of the DTA’s legislative history, the majority “transforms a provision abolishing jurisdiction over all Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.”

Finally, the majority’s decision in Hamdan epitomizes the concern that judges will use the buffet of legislative history to pick-and-choose the items the judge wishes to digest. Stevens’ a la carte use of legislative history exceeds the Court’s constitutional role as the interpreter of laws, thus intruding into the respective realms of the legislature and the executive in approving laws.

B. Majori ty’s Use of Legislative History Contradicts Legislative History Opponents’ Arguments

Supporters of the use of legislative history have offered two defenses to the critiques put forward. These arguments, however, can be tested against the use of legislative history in Hamdan in order to ascertain their viability in practice. First, Justice Breyer, who joined the

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169 See supra Part I.A.3.
170 See supra note 49 and accompanying text.
171 See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2817-18 (2006) (Scalia, J. dissenting) (emphasis on original); see also infra notes 177-78 (discussing the probable intent of the jurisdiction stripping provision).
172 See supra note 51 and accompanying text.
173 For a discussion on the majority’s selective use of legislative history, see supra notes 149-51 and infra notes 187-88.
majority opinion, has argued that legislative history is useful if the statute is ambiguous. In *Hamdan*, the text of the DTA was quite clear, yet the majority chose to continue their so-called statutory construction by examining the legislative history. Even if one assumes, *arguendo*, that the DTA was ambiguous, legislative history, it is argued, should be used only if helpful. The legislative history of the DTA, by contrast, only creates more confusion as to the “intended” meaning to the jurisdiction stripping provision.

Second, it is fairly uncontroversial that legislative history may be used to interpret a statute to avoid reaching an absurd result. Justice Scalia correctly observes that the majority’s interpretation would still allow hundreds of habeas petitions from detainees that are already filed to continue, even though the Congress specifically did not want federal courts hearing these claims. Stevens, however, inexplicably argued that this point was “without merit. In attempting to support this incredulous argument, Stevens completely ignores the provision in question. The DTA clearly requires that “no court, justice, or judge shall have jurisdiction to

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174 See supra note 122.
175 See supra note 54 and accompanying text.
176 See supra note 157.
177 See supra note 56 and accompanying text. Additionally, a determination that statutory text is ambiguous may also invite abuse.
178 See supra Part I. But see infra notes 186-90.
179 See note 55 and accompanying text.
181 See id. at 2769 (Stevens, J. writing for the majority).
182 See id. (‘‘There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review.’’). This statement ignores the habeas stripping provision by focusing on the substantive review provisions. The majority’s reasoning that although Congress intended to eliminate all habeas claims from detainees at Guantanamo but allow habeas claims already filed to continue is extremely unpersuasive. Allowing some habeas claims to continue is incompatible with the purpose of eliminating all habeas claims. See infra notes 186-90 (discussing probable intent).
hear or consider ... an application for a writ of habeas corpus filed by or on behalf of” a detainee at Guantanamo Bay.\(^{183}\) What part of “no” does Justice Stevens not understand?\(^{184}\)

Surprisingly, the majority again turned to legislative history to support their assertion that there is no absurd result as a result of their holding.\(^{185}\) Interestingly, one of the main arguments in favor of using legislative history is that it allows the court to adhere to congressional will or intent.\(^{186}\) Even a cursory examination of the Senate debate reveals that Senator Graham wanted the DTA to overturn the Supreme Court’s 2004 ruling in *Rasul v. Bush*.\(^{187}\) Graham, the main sponsor of the bill, repeatedly said that he did not want detainees filing habeas petitions in federal court.\(^{188}\) Although the Graham Amendment was changed by the Graham-Levin Amendment, the text and legislative background of the DTA strongly indicate that a central purpose of the amendment seemed to be a desire to keep detainees from filing habeas claims in federal courts.\(^{189}\)

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\(^{185}\) *Hamdan*, 126 S. Ct. at 2769.

\(^{186}\) See supra note 41 and accompanying text.


\(^{189}\) See 151 Cong. Rec. S12, 664 (2005) (statement of Sen. Graham) (“[The Graham Amendment] says that no illegal, no foreign alien who is being detained as an enemy combatant
the DTA, it defies all logic and common sense to argue, as Stevens did, after reviewing the legislative history that Congress intended to keep detainees’ habeas claims out of federal court by allowing hundreds of already filed habeas claims to continue.

That the Hamdan majority, supposedly relying on legislative history to determine congressional intent, erroneously ignored an abundance of contradictory legislative history is also evidenced in other ways. First, had Stevens fully considered the drafting and legislative history, he would have discovered that Senator Graham changed his original amendment in order to create federal court review of the final decisions made by military commissions and the constitutionality of both the CSRT and military commission decisions. Senator Graham engaged in a debate with Senator Levin regarding whether the Graham Amendment would allow appeals of the sentences issued by military commissions. Although Graham seemed to indicate that detainees would be able to appeal the final decisions of military commissions under the Graham Amendment, he later offered the Graham-Levin Amendment to clarify that these appeals were allowed. Considering that the habeas stripping provision was a major aspect of

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190 See Hamdan, 126 S. Ct. at 2769.
194 See id.
195 See 151 Cong. Rec. S12, 732 (2005) (statement of Sen. Graham) (“I am working with Senator Levin and others to try and find a way to get a Federal court appeal right.”); 151 Cong. Rec. S12, 754-56 (2005) (statement of Sen. Graham) (“The flaw in my amendment is it did not have a right of appeal from a military commission verdict to a Federal court.... What we have done, working with Senators Levin, Kyl, and others, we have created that same type of appeal process for all military commission decisions.”).
both the Graham and Graham-Levin Amendments, it is likely that either Graham or Kyl would have made some comment had the effective date provision had changed. Senator Graham had no reason to compromise on any aspect of his amendment because the original amendment already had been approved by the Senate.

Second, Stevens relied almost exclusively on the statements of Senator Levin. It is odd that the majority decision would practically ignore two of the original sponsors of the amendment, in favor of a party who actually opposed the amendment he was co-sponsoring!

C. Recent Developments Demonstrate that Majority in Hamdan was Wrong

Recent developments in Congress demonstrate that the majority’s determination of congressional intent in passing the DTA was incorrect. In response to Hamdan v. Rumsfeld, Congress passed the Military Commissions Act of 2006 (MCA).

\[\text{Section 7 of the MCA}\]

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197 See supra note 67 and accompanying text. Graham, therefore, had nothing to gain from compromising his desire for the DTA to remove jurisdiction from pending cases, as the Graham amendment clearly expressed. In this context, Graham’s argument that the reason for the change in language from the two versions was due to a desire to allow the claims specifically allowed by the DTA to continue is at least as plausible as any other explanation, and, given that Graham was the lead sponsor of the amendment, probably more persuasive than the arguments offered by Senator Levin and Justice Stevens. See also 151 Cong. Rec. S12, 803 (2005) (statement of Sen. Reid) (stating that the original Graham Amendment “would have passed the Senate with or without improvements”).
200 126 S. Ct. 2749 (2006) (holding that the President was not authorized to use military commissions at Guantanamo Bay).
specifically addresses habeas corpus for detainees.\footnote{202} Subsection (a) reiterated Congress’s desire to keep detainees out of federal court.\footnote{203} Despite the efforts of opponents of the DTA and MCA to preserve the erroneous finding that the DTA did not apply to pending cases,\footnote{204} multiple members of congress testified that the majority was wrong in \textit{Hamdan}.\footnote{205} With the MCA, however, Congress made sure to specify that the habeas stripping provision was to apply to pending cases.\footnote{206} Given the extreme measures that Congress went to specify that no habeas claims were to continue,\footnote{207} Stevens’ claim that the DTA was not meant to apply to pending

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\begin{itemize}
\item \textit{Hamdan}, 126 S. Ct at 2799.
\item See Military Commission Act of 2006 §7.
\item Military Commission Act of 2006 §7(a). In fact, Congress expanded the language from applying to detainees at Guantanamo Bay, see Defense Appropriations Act of 2006, Pub. L. No. 109-148, §1005(e)(1), 119 Stat. 2680 (2005), to applying to any “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.” Military Commissions Act of 2006 §7(a).
\item See Military Commissions Act of 2006 §7(b). The effective date provision begins with the same wording as the habeas provision in the DTA. \textit{Compare} Defense Appropriations Act of 2006 §1005(h)(1), with Military Commissions Act of 2006 §7(b) (“The amendment ... shall take effect on the date of the enactment of this Act....”). The MCA, most likely with \textit{Hamdan} in mind, see supra note 205, continued: “and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act.” Military Commissions Act §7(b). Congress reiterated its desire to eliminate every habeas claim \textit{three times}: (1) all cases (2) without exception (3) pending on or after!
\item See supra note 206.
\end{itemize}
cases, in retrospect, seems ludicrous.\textsuperscript{208} The majority’s conclusion that Congress intended the habeas jurisdiction stripping provision of the DTA to only apply to future cases becomes almost laughable when one considers that the decision was “supported” by the legislative history.

VII. Conclusion

The majority’s decision in \textit{Hamdan v. Rumsfeld}\textsuperscript{209} to deny the government’s motion to dismiss was clearly erroneous. The use of legislative history in \textit{Hamdan} aptly demonstrates many critiques on the use of legislative history in court opinions. Despite the relatively plain language of the statute, Stevens turned to the history of the DTA to determine whether Congress intended to allow pending habeas cases to continue. A full review of the legislative history of the Graham-Levin amendment to the Detainee Treatment Act, however, only exacerbated any ambiguity with the statute. Much of the Senate debate on the DTA was clearly designed to manipulate future court decisions. That fact, coupled with the contentious nature of the provision should have been strong evidence to the Court that the legislative history was not reliable. Yet, Stevens relied heavily on this material.

Actually, Stevens did not completely rely on the legislative history; he only relied on selected portions of the legislative history. The majority discounted the statements of major sponsors of the provision, like Senator Graham, and entirely ignored a major purpose of the provision—elimination of \textit{all} habeas corpus petitions filed by detainees in the wake of the

\textsuperscript{208} The Senate passed the MCA on a 65-34 vote. See 152 Cong. Rec. S10, 354 (2006) (rollcall vote no. 259 leg.); \textit{Cf. supra} note 67 (showing even more support for the MCA than the original Graham Amendment). The overwhelming support the MCA received is highly indicative of the majority’s failure to find the intent of the DTA.

\textsuperscript{209} 126 S. Ct. 2749 (2006).
Supreme Court decision in *Rasul v. Bush*. Instead, Stevens decided to put great weight on the floor statements of a senator from the minority party who opposed eliminating federal court jurisdiction over detainee habeas claims. This selective use of legislative history, along with the majority largely ignoring the text of the statute in a misguided attempt to find the illusive legislative intent, created a completely different provision than the one passed via constitutionally approved channels. Stevens’ use of legislative history allowed the majority, in effect, to legislate from the bench. Legislative history is supposed to protect Congress from absurd results. In *Hamdan*, however, the majority used the magic of legislative history to morph a statute that eliminated federal court jurisdiction in *all* habeas cases, into a statute that allowed *hundreds* of habeas cases to continue. Arguably, Congress was trying to eliminate the absurd result of *allowing* detainees to file habeas petitions in federal court.  

The recently passed MCA provides more ammunition against the majority’s failed use of legislative history. In the MCA Congress again attempted to eliminate all detainee habeas corpus claims. This time, Congress stressed their desire that no habeas claims from detainees could go forward *three* times! Given the majority’s decision in *Hamdan*, who could blame Congress for taking this precaution? Hopefully, in the future the Court will adhere to the concept of legislative supremacy.

Justice Breyer, a member of the majority in *Hamdan*, defended the use of legislative history in court opinions by writing that “[t]he ‘problem’ of legislative history is its ‘abuse,’ not its ‘use.’” Unfortunately, in *Hamdan v. Rumsfeld*, the use of legislative history was an abuse.

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211 The D.C. Circuit Court of Appeals has recently dismissed a Guantanamo detainee’s habeas claim for lack of jurisdiction under the MCA. See Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).
212 Breyer, supra note 52, at 874.