The Historical and Racial Implications of Plea Bargaining

In the legal system, plea bargaining is utilized as the standard methodology for processing defendants quickly. Due to its efficiency and flexibility, it has been the standard tool for securing convictions for the last 100 years. Due in part to its predominant role in the conviction of lower-class and minority defendants\(^1\), however, it has also become the target of a great deal of scrutiny in the legal community.

Legal dilemmas often arrive wherein laws or policies are enacted with racially neutral justifications, but with a clearly racial orientation\(^2\). Discussion about these issues most often focuses on the racial motivation of the law's original form, and whether the current justification or form of these laws makes them acceptable, despite their original racial "taint"\(^3\).

In this paper, I will analyze plea bargaining from a racial perspective. In Section I, I will discuss the historical foundations of the use of plea bargaining as common practice, and whether a significant racial motivation existed in its origins. In Section II I will discuss the current state of the racially disparate impact of plea bargaining and its non-racial justifications, including whether any initial 'taint' of racial motivation in the practice's origin have been dealt with by its current implementation. Finally, I will discuss processing procedures that help relieve the racially disparate impact of plea bargains.

I. The History of the Plea Bargain in American Law

1. Guilty Pleas in Western Law

Proponents of plea bargaining often claim that the procedure has an extensive history in western law. Opponents of plea bargaining instead claim that it is a recent innovation without legal

\(^1\) William J. Stuntz, "The Political Constitution of Criminal Justice", Pg 5
\(^2\) Jeff Manza, Christopher Uggen, Locked Out. Oxford University Press, 2006, pgs. 3-94, 221-223. See also footnote 3
\(^3\) Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005)
precedent or justification. In actuality, the history of plea bargaining in American Law is not easy to track. While prosecutors have for centuries extended lenient sentencing for defendants who cooperated with them⁴, the judiciary procedurally offering lesser sentences to defendants for pleading guilty is a far more recent occurrence.

Due to a lack of substantial long term records keeping about unofficial bargains that are made in the justice system, it is difficult to identify to what degree unofficial bargaining occurred in the past. What is clearly identified in the court records of the early 1900's is the far lower number of clients willingly entering guilty pleas compared to the modern legal era, attributed to the early court's discouragement and distrust of them⁵ due to concerns over the legitimacy of self-incrimination. This distrust of guilty pleas can be traced back as far as medieval courts, where judges commonly advised self-incriminating defendants to change their pleas and receive a trial.

This is not to say that guilty pleas are in any way unheard of in early American law. There exist scattered records of time periods during which courts accepted large numbers of guilty pleas for various reasons⁶. These instances came under appellate scrutiny a number of times, with the 1892 case of Hallinger v. Davis setting a precedent in the Supreme Court allowing for the constitutionality of guilty verdicts. Hallinger plead guilty to first degree murder, and was sentenced and incarcerated without a hearing by a jury. He claimed that the New Jersey statue allowing for the processing of defendants based on guilty pleas was a violation of the Fourteenth Amendment guarantee of due process, of which he claimed the jury was an integral part. The court found that there was a number of precedents for due process not necessarily indicating a jury trial, and that guilty pleas that were followed by sentencing were an admissible form of due process.

The primary rise in plea bargaining in American law came to pass sometime before the 1920's.

⁷ Criminal Justice surveys performed in many states in the 20s showed a heavy reliance in many

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⁵ Ibid
states on the entering of guilty pleas, with an average of near 75% of all convictions being in the form of such pleas. Judging by the steep rate of increase of these guilty verdicts within short decades of time, it is reasonable to estimate that the procedural switch to plea bargaining occurred sometime around the turn of the century.

2. Racial Motivations in Plea Bargaining

The rise of plea bargaining in the American legal system appears to have no direct racial motivation in its inception. The reasoning for this argument relies on the observation that racially motivated laws tend to arise to replace discriminatory laws or practices that have been rendered unusable due to changes in the political or legal climate, and that these racially motivated laws and policies tend to be enacted during periods of legal reorganization.

Laws designed to target specific racial groups often appear in the fall of another law, to service the same discriminatory purpose. In the case of plea bargaining, the shift in legal processing style followed a subtle path with no clear policy choices being made. Until the Hallinger decision, no official legal precedent regarding plea bargaining had been set into place. Additionally, there seems to be no clear racial driving motivation for utilizing plea bargains.

Due to the non-uniformity of its usage in different states, it is difficult to ascertain a defunct law that plea bargaining would have served as a replacement for, but no clear racially discriminatory purpose is apparent. Instead, plea bargaining appears to have arisen more naturally as a consequence of its usefulness in prosecution. It is possible that a number of different cultural contexts played a part in this rise, including prosecutorial techniques used against prohibition and organized crime at the turn of the century.

II. Modern Plea Bargaining

1. The Modern Plea Bargaining Process

The modern implementation of plea bargaining is a streamlined process with a large degree of

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8 Loic Wacquant, "Deadly Symbiosis"
discretion assigned to the prosecuting district attorney, and remarkably little assigned to local judges. Something near 90%\(^{10}\) percent of defendants in the United States enter a guilty plea as a part of a bargain agreement, making it the primary tool for the administration of justice in the nation's legal system. This pervasive process is the subject of a great deal of concern and debate among modern legal scholars.

The prime justification for the plea bargaining process is that it offers an efficiency that is unparalleled by trial proceedings. Especially in clear cut cases, such as minor violations of drug laws, plea bargains can allow prosecutors to process large numbers of defendants quickly. It also allows for discretion at the hands of the local DA, whose experience with standard violations sets them in an excellent position to offer a balanced and quick process for defendants, who can then opt in or out of the bargain. This contractual freedom is similar to that at the heart of the American justice system.

2. Racial Disparities in Modern Plea Bargains

The goal of efficiency in modern plea bargaining comes with a heavy price. Due to the regular exercise of complete discretion in negotiating guilty pleas, and the secret and unbounded nature of the offers extended to defendants, the plea bargain arguably excises the trial process from the legal system. At a time when nine-tenths of the nation's convictions are carried out in such a manner, the cause for concern about justice and equality become clear. The concept of opting out of a plea bargain contract seems to be a false benefit when opting out is a rare exception, or is done in a manner that is unequal across race or class. In the case of race, there are a number of clear racial disparities in modern sentencing that exhibit a clear failing of plea bargaining to adequately enforce laws in a consistent and fair manner.

2a. Plea Bargaining in the American War on Drugs

Although race's role was small, if even detectable, in the birth of the modern plea bargaining process, it has played a large role in the disparate conviction of black defendants due to violations of drug laws. This effect is compounded by the enormous influx of defendants into the justice system.

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created by the aggressive prosecutorial nature of American drug policy.

Defendants convicted of violations of drug laws are overwhelmingly African American\(^{11}\). While this disparity is not the main subject of our attention, it does further the impact of the streamlined plea bargaining involved in drug convictions. African Americans are arrested and convicted for drug violations more regularly due to the more public nature of drugs dealt in urban, predominantly black, neighborhoods. The regularity of processing makes the plea bargaining system a standard element of the judicial system for these defendants.

Celesta Albonetti's research regarding the characteristics of defendants of drug offenses also reveals that not only are African Americans more likely to be convicted of drug convictions, once in the legal system, they are statistically more likely to enter a guilty plea than white defendants\(^{12}\). They are also receive a statistically lower reduction in their sentence once a guilty plea is entered than do white defendants\(^{13}\).

This overwhelmingly implies that in the modern legal system, Black defendants are subject to a three-fold disadvantage regarding plea bargains. They are more likely to be arrested and convicted of drug offenses, more likely to receive and accept a plea bargain, and more likely to receive less benefit from doing so than white defendants. Despite a legal origin seemingly void of racial intent, plea bargaining has become a tool in the war on drugs that aggressively discriminates against African Americans.

2b. The Selective Justice of Plea Bargains

Plea bargaining has a clear regressive tendency regarding its application across economic and social classes. Plea bargaining is an alternative to trial for all defendants in the legal system. However, it is only an appealing option for those defendants for whom trial appears an unattractive option.

Access to non publicly appointed legal counsel, degree of education regarding one's rights, and

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11 William J. Stuntz, Race, Class and Drugs, Columbia Law Review, November 1998
13 Ibid, page 815
general biases in the legal system all have strong effects on a defendant’s decision to take a plea bargain.

The fundamental goal of plea bargaining is, from an economic perspective, to clear space in the legal system for cases “worth” a trial. Although defendants who chose to insist on a trial are often successful in defending themselves\(^\text{14}\), those whose person or crime fit a general profile of a 'standard' offender are set up in the legal system to perceive a plea as the most attractive option.

Public defenders most often press their clients to take plea bargains, and negotiate these rather than push them to go for a trial. A defendant’s low level of understanding about his rights prevents him from striving for a jury trial. Finally, and perhaps most importantly, defendants who are pushed into the plea bargain process by threats of being charged with worse crimes if they do not take the deals presented are programmed to think of these deals as the fundamental mechanism of the criminal justice system.

The statistical profile of this 'standard' offender is perceived as a young male of low economic status. As such, the legal process of plea bargains focus around the idea of this 'standard' offender, who is to be processed by a plea bargain, and 'nonstandard' offenders whose case is 'worthy' of the system's trial resources. This distinction is at odds with the fundamental concept of due process that the constitution requires for all defendants.

By setting up a distinction between worthy and unworthy prosecutions, the process of plea bargaining insists upon the unrealistic assumption that prosecutors have a clear understanding of what kind of 'slot' each defendant and their crime fit into, which easily extends to an unacceptable level of racial profiling regarding what kind of defendants fit this standard profile.

### III. Alternatives to Plea Bargaining

A number of alternatives to plea bargaining have been proposed by legal scholars to relieve the large degree of discretion present in modern sentencing and convictions. Many of these

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alternatives provide methods of processing defendants without allowing for decisions regarding sentencing to be made in a way that allows for undue discretion or lack of due process, relieving some of the bias in the system regarding minority defendants.

The first, and in someways most straightforward, alternative to plea bargaining is to simply cease and disallow the aggressive procurement of guilty pleas. Because plea bargains are not subject to legislation and only subject to limited federal judicial oversight, there is no real way to control the arbitrary execution of the law than to prevent prosecutors from deciding which sentences apply.

The primary concern with this solution is of course the increase in cost associated with the full trials that would be held for those defendants who before would have simply pleaded guilty. It is often argued that the legal system could deal with this increased burden, especially if the trial process was in some way made ore efficient. We'll assume for argument's sake that it cannot deal with it adequately, and that the lack of resources will result in discretion simply being redistributed to other positions.

One often proposed alternative is that of criminal screening. The goal of a screening process is to identify general categories of prosecution in the DA's office. Screening classifies general crimes and categories of crime along standards as to how they are to be prosecuted. These classifications are a matter of solid policy, and not merely discretionary standards. The main goals are consistency, and the removal of negotiating guilty pleas outside of earshot of the court. Through the use of screening, efficiency is improved by setting a prosecutorial standard to streamline common offenses. In addition, forcing prosecutors to follow the same standard eliminates the racial bias of 'standard' defendants, and the usage of threatening overly-severe charges to force compliance with an arbitrary sentence.

IV. Conclusion

My analysis fails to show a racial motivation behind the advent of plea bargaining as the standard mode of criminal prosecution. However, a clear bias can be seen in the impact of modern

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plea bargaining on the distribution of state resources towards African American defendants. The profiling nature of the plea bargaining system helps to perpetuate a profile of Black criminals who are 'standard offenders' to be dealt with in a formulaic manner, devoid of the due process of trial. Incentives are presented to make a deal with the DA's office more appealing than a jury trial. This impact is especially clear in drug prosecutions, where African American defendants are more likely to be negatively impacted by plea bargaining in three separate manners, in a manner set forth as a standard prosecution style. This racial impact gives strong credence to the abolition of plea bargaining in lieu of a process that allows for equal resources to be utilized for African American defendants.
Rehabilitation or Discrimination?

The American criminal justice system has for decades spurned the use of rehabilitation over extended sentencing mandates for criminals - creating a stereotype that there exists no need to mend the root causes of crime and the idea that “once a criminal, always a criminal.” This notion has seeped into the American secondary education system, where punishment for small disciplinary issues seeks to reprimand students by the full extent possible – removal from the educational environment. Mandatory “zero tolerance” policies remove students from the classroom without providing a means of rehabilitation and solutions for disciplinary issues. Studies show that suspended students are more likely to be retained a grade, drop out, commit a crime and/or end up incarcerated as an adult. Considering all of its negatives, why do zero tolerance policies exist? First, under-resourced public education systems don’t allow for extensive, thereby expensive, rehabilitation programs. Secondly, race discrimination – African-American males are the most affected by this school-to-prison route – contributes to the zero tolerance issue. Lastly, achievement markers such as standardized testing and standards set by the No Child Left Behind Act seek to remove those from the classroom who may “drag down” test scores. If these three issues were addressed in the American public education system, the school-to-prison pipeline could be resolved over time.
The term zero-tolerance was taken from the war on drugs, where law enforcement are trained to act quickly and harshly upon drug offenders. These discipline policies were initiated in education during a juvenile crime wave of the late 1980s and early 1990s. As of recent, between 1992 and 2002 nationwide violent crimes at school against students aged 12 to 18 dropped by 50% and schools are considered one of the safest environments for children. (Advancement Project, Education on Lockdown) In addition, from 1994 from 2002, the youth arrest rate for violent crimes has declined nationwide by 47%. During the crime wave, Congress enacted the Gun-Free Act of 1994 which required states to enact laws expelling students found with firearms on school property. Many states and school districts went beyond the mandate and passed law expelling students found with other types of weapons, drugs on school grounds and for serious crimes committed on or off campus. When first enacted, zero-tolerance policies were meant solely for serious offenses, however the policies have become an overarching approach to disciplining students. Zero-tolerance penalties are now received for spitballs, imaginary weapons, smart mouth, trash talk and tardiness. Punishment by exclusion from the classroom has become the standard in American education. According to leading child psychologists, strict discipline policies can hinder a child’s development of two major needs of school aged youths: “the development of strong and trusting relationships with key adults in their lives,
particularly those in their schools (teachers) and the formation of positive attitudes toward fairness and justice.” (Skiba, Zero Tolerance)

From 1974 to 2000, the amount of suspended students rose from 1.7 million to 3.1 million. Research over the past few years has determined the increased use of suspensions is due to seemingly trivial conduct and doesn’t mandate such harsh punishment. The number of student arrests have also risen – for example student arrests in Philadelphia County schools increased from 1,632 in the 1999-2000 school year to 2,194 in the 2002-2003 year. In the Houston Independent School District during the year 2002, a large number of arrests were for minor offenses. For example, of the 4,002 arrests that year, 17% or 660 of them were for disruption of class or disruption of transportation. Approximately 1,040 of the 2002 arrests in Houston were for disorderly conduct.

Some examples of suspensions and/or expulsions:

- A six year-old African-American child was suspended for ten days for bringing a toenail clipper to school. A school board member said, “This is not about a toenail clipper! This is about the attachments on the toenail clipper!” (Harrisburg, PA)
• A 14-year-old boy mistakenly left a pocketknife in his book bag after a Boy Scout camping trip. At his hearing, the boy’s Scout Master testified on the boy’s behalf. The student was expelled under the district’s Zero Tolerance Policy, which requires expulsion for possession of knives. As a result of an appeal by Legal Aid Society of Greater Cincinnati, the student was readmitted to school, but had already missed 80 days of school. (OH)

• An African-American ninth grader was expelled for one year from a predominantly white school district and sent to an alternative school because she had sparklers in her book bag. She had used them over the weekend and forgot they were in her bag. (East Baton Rouge Parish, LA)

• A four-year-old African-American child was suspended for one day because he allegedly pushed and shoved his classmates on the playground. The kindergartner’s mother complained that she was not notified of this behavior and thus was not given an opportunity to correct his behavior.
An African-American honors student attending school in a predominantly white school district was suspended from school indefinitely for fighting. This was her first disciplinary referral. (SC)

An African-American male seventh grader bet a schoolmate on the outcome of a school basketball game. The schoolmate, who lost the bet, accused the boy of threatening him for payment. The school district conducted no investigation and instead notified law enforcement officials. The 7th grader was charged with felony extortion and expelled. (San Francisco, CA)

On his way to school, an African-American male (5th grader) was shown two razor blades by a classmate who stated that she planned to use the blades to hurt two girls who were bullying her. The male student took the blades from his classmate and hid them in order to prevent a potential tragedy. Another student notified school officials that the boy had hidden the blades. Although the boy took steps to ensure the safety of others, he was suspended from school for one year. The District refused a request for a due process hearing. During that year, he was provided with no alternative education. As a result, he was required to repeat the fifth grade. (Winona, MS)
(Skiba, Zero Tolerance)

Administrators in these districts believe that zero-tolerance policies are necessary because of they could potentially: “avert tragedy by cracking down on minor conduct before it becomes serious,” “deter misconduct by providing youths with a ‘wake-up call’,” “limit legal liability by treating all misbehavior as serious,” “shift youths into the juvenile justice system to give them help that schools will not or cannot provide,” and “create an environment conducive to learning by removing children who do not want to learn.” (Education on Lockdown) There exists no evidence that these zero-tolerance policies are effective in treating misbehavior or preventing violence. Suspended students have a high rate of recidivism thus proving suspension as a fairly ineffective deterrent therefore the negatives of zero-tolerance policies severely outweigh its positives.

In a study by Fordham University on the New York City public school system in 2003, it found that the New York City Department of Education distributes much of its resources “statistically associated with behavioral descriptors along race and poverty lines,” (Fordham University, Equity or Exclusion) something that is common among other American school districts. Distribution of resources very clearly affects the distribution of teachers. At every level – elementary, middle and high – higher
congregations of Whites, Asians and rich students in a school’s enrollment were correlated with more qualified faculties. In June 2003, the New York Court of Appeals ruled that the claim made in the case of the Campaign for Fiscal Equity v. State of New York that the funding formula used by the state of New York unfairly distributes money to richer districts over poorer, urban areas was a valid attempt to right this issue, however the case and verdict has been in limbo for years since. The lack of resources provide little opportunity to be involved in school outside of the classroom. Current research shows that “students who participate in extracurricular activities exhibit better behavior across a variety of measures including attendance, drug use, and study habits.” Thus, these benefits lead to the idea that participation in extracurricular activities “strengthens students’ connections to their school.” (Fordham University, Equity or Exclusion)

In most school districts across the United States, funding for schools are determined by property taxes and other variables which adds to the discrepancies against poorer school districts. In 1973, the Supreme Court of the United States upheld this financing issue in the case San Antonio Independent School District v. Rodriguez where two Texas school districts were in question as one had an inordinate amount of resources compared to the next. The Supreme Court ruled that use of property taxes to determine funding for public schools does not violate the Equal Protection Clause of the
Fourteenth Amendment. Equality of education is not mandatory and Texas had not created a suspect lower class due to this funding calculation system. This case provided the foundation for school districts to fund richer districts and provide basis against lack of funding in poorer, urban areas.

Shown by the research study at Fordham, better resources equate to better teachers and teacher qualifications affect student behavior immensely. Teacher qualifications in the study were measured by education, credentials, and experience. Suspension rates in school with qualified teachers were below the national average. Also shown by the study, regardless of the racial makeup of the school, some educational resources were associated with positive behavior among students. Unfortunately, the resources associated with positive behavior were distributed unequally among racial and socioeconomic lines. To provide a means of comparison, the study isolated the behavioral data at twelve high school situated on college campuses in New York City. These schools were chosen because they are surrounded with enough resources to provide a quality education. African-American students were marginally represented more at these college secondary campuses compared to citywide schools – 37.8 percent compared to the city average of 35 percent – however the suspension rate was half the citywide rate for every race. Average attendance at the collegiate secondary schools were roughly 95 percent compared to the 80 percent
citywide average, thus proving resources are necessary to provide a quality education and motivation to students.

Racial disparities have been apparent and well documented in school disciplinary policies for decades. Recent data from the Department of Education prove this notion. Although African-American students constitute only 17 percent of public school students they make up 32 percent of out-of-school suspensions. Caucasian students (although 63 percent of public school enrollment) equate to only 50 percent of suspensions and approximately 50 percent of expulsions. (Skiba, Zero Tolerance)

Unfortunately, African-Americans seem to be the most persecuted sect of students. A study by the Applied Research Center “show[ed] that black children, particularly black males, are disciplined more often and more severely than any other minority group.”

*The Condition of Education* released by the United States Department of Education in 1997 revealed that almost 25 percent of all African-American male students were suspended at least once over a four year period. In addition to these alarming numbers, zero-tolerance policies are more likely to exist in African-American and Hispanic school districts. During the 1996-1997 school year, predominately minority school districts “were more likely to have policies addressing violence (85%), firearms (97%), other weapons (94%), and drugs (92%) than white districts (71% - violence, 92% - firearms, 88% - other weapons, and 83% - drugs). Studies show that African-American students
are far more likely than their white peers to be suspended, expelled, or arrested for the same conduct at school. (Skiba, Zero Tolerance)

These race discrepancies continue after secondary education. In 2002, African-American teenagers made up 16 percent of the juvenile population but were 43 percent of juvenile arrests – while Caucasians were 78% of the juvenile population and 55% of the youth arrests. In 1999, minority youth accounted for 34 percent of the United States population but 62 percent of youth in juvenile prison.

What causes these race discrepancies? One clear reason is socioeconomic status. Unfortunately, race and socioeconomic status is highly connected in American society thus “increasing the possibility that any finding of disproportionality due to race is a by-product of disproportionality associated with socioeconomic status.” (Skiba, The Color of Discipline) As previously mentioned, low socioeconomic status is correlated with increased school suspension. In a statement before the United States Commission on Civil Rights, the National Association of Secondary School Principals in 2000 argued that the racial disproportionality of zero tolerance policies:

“…is not an issue of discrimination or bias between ethnic or racial groups, but a socio-economic issue… A higher incidence of ethnic and racial minority students being
affected by zero tolerance policies should not be seen as disparate treatment or discrimination but in terms of an issue of socioeconomic status.”

A possibility exists that African-Americans innately have high rates of disruptive behavior and thus the higher rates of suspension and punishments are mandated. However, there have been no significant studies on this notion and no evidence that Blacks misbehave at a higher rate than other races. A study done by Shaw and Braden (1990) suggested that “although Black children received a disproportionate share of disciplinary referrals and corporal punishment, white children tended to be referred for disciplinary action for more severe rule violations than black children.”

In the research study performed Skiba, et. al even with socioeconomic statuses controlled, significant racial disparities remained. These discrepancies though, were not at the administrative level. At that level, measures reflecting the disposition of the disciplinary policy were not subject to racial disproportionality. School administration seemed to dole out suspensions for most offenses regardless of race or socioeconomic statuses. In addition, the study failed to show a pattern of more serious behavior among those who were punished more often. White students were more likely to be referred to the office for more serious offenses such as “smoking, leaving without permission, obscene language, and vandalism,” while African-Americans were usually
suspended for “disrespect, excessive noise, threat, and loitering.” Thus African-American students are suspended more often than not due to a higher rate of office referral. What causes this increase? Bullara (1993) argues that the typical classroom style “[that] relies heavily on negative consequences contributes to school rejection and dropout by African-American youth; for such students the choice of either staying in school or dropping out may be less of a choice and more of a natural response to a negative environment in which he or she is trying to escape.” To resolve this issue, effective teacher training must be created as a majority of teachers feel “underprepared in the area of classroom management.” (Calhoun 1987)

Nationally, the American public education system has a fairly low graduation rate of approximately 68 percent students who enter high school in ninth grade graduate by twelfth grade. However, as implied from the plight of minorities in secondary education, the national graduation rates are substantially lower for minority groups and particularly lower for males. In 2001, 50 percent of African-American students, 51 percent of Native American students, and 53 percent of all Hispanic students graduated from American secondary schools. For males, the percentages are even more alarming: Black males have a graduation rate of approximately 43 percent, Native American males 47 percent, and Hispanic males 48 percent. To further worsen matters, official “dropout” statistics do not accurately portray all the students that have
left secondary education thus the numbers could potentially be more alarming than mentioned. (Orfield, Losing Our Future) On closer examination of dropout data by Orfield, et. Al., there were few states where the graduation gap between Whites and minorities was non-existent or reversed. For African-Americans, the gap ranged from 0.0 points in Alaska to 41.3 points in Wisconsin. For Hispanics, the disparity ranged from 6.2 points higher than Whites in Louisiana to 43.4 lower in New York. The national average for the graduation gap was 21.7 points. For Native Americans, the range was 2.8 higher than Whites in Alabama to 56.4 lower in Pennsylvania and a national average of about 23.8 below Caucasians.

Congress attempted to solve the severe dropout problem in the United States by passing the No Child Left Behind (NCLB) Act of 2002 – which included provisions on graduation rate accountability. Unfortunately, these provisions are not mandated and have not accomplished much change in secondary school graduation rates. The No Child Left Behind Act was the federal government’s attempt to provide funding to disadvantaged students by “targeting states, districts, and school with large percentages of children in poverty.” (Orfield, Losing Our Future) To gain federal funding, schools must meet a criterion that Congress believed would stimulate education reform and provide a solution to the graduation rate epidemic. The No Child Left Behind act mandates that states create standardized testing in at least reading and
math and to use these test scores to determine the efficacy of their schools. The basis for 
NCLB is that schools will produce enough reform that in twelve years 100 percent of 
their students will be proficient in math and reading. To ensure this goal, each state 
must create annual benchmarks for its schools and districts and meet these guidelines to 
gain federal funding. The states monitor the progress of the districts and the districts 
monitor the goals of its schools to ensure that Adequate Yearly Progress (AYP) is being 
completed toward the 100 percent goal. If a school fails to make Adequate Yearly 
Progress two years in a row, it is flagged “for technical assistance and labeled as 
‘needing improvement.’” If it cannot improve by using assistance from its overseeing 
entity, the entity is required to intervene and take over the school or district. The No 
Child Left Behind Act has several options to address failing institutions from harsh – 
schools are closed and federal funding removed – to the compromising – requiring a 
school or district to bring in a consultant to address the issues at hand.

States and school districts all across the nation have a new focus now – not to be 
sanctioned due to test-driven requirements. This focus has led to the idea that many 
districts and school want to rid of low performing students to increase their test scores. 
The following scenario demonstrates this reasoning:
“Imagine a school has one thousand tenth grade students. Three hundred are very low achievers and fail a proficiency test. The remaining 700 are predominantly moderate achiever students, and pass. The school does not make the AYP testing goals. The next year the pressure is higher because two years under the goal will result in state intervention. NCLB requires that an even higher percentage of the students who are enrolled will have to pass the test for the school to make AYP. 95 percent of the enrolled eleventh graders must take the test. However, if 200 of the 300 low achievers leave for a GED program or simply drop out before the year gets underway, the ‘leavers’ will not be tested or counted for test-based accountability. As a result, the smaller test pool will have far fewer low achievers and the test scores of this group, compared to the original, should rise considerably. Without one additional dollar spent on instruction or academic support for the low achievers, the school’s test profile will have improved dramatically in just one year.” (Losing Our Future)

Considering resources are lacking at many American public schools, this scenario is more common than not.

The No Child Left Behind Act also requires that minorities, those who are learning the English language, students with disabilities, and students from low-income families make Adequate Yearly Progress as well. If any of these groups have not made progress, then the institution in general has not made their annual benchmark. Despite
the benefits that could come from establishing goals on each of these subgroups, it adds an additional level of pressure on minority students - who are disproportionately low achievers - and thus dropout becomes more likely among these groups. There exists a provision in the No Child Left Behind act that allows subgroups to be under the Adequate Yearly Progress for their respective criterion but the school pass its annual benchmark – this mechanism is dubbed the “safe harbor.” In these cases, the number of students within the subgroup in question who score proficient or better in math or reading must increase by 10 percent over the previous year – adding additional pressure on those within each category. In addition, the subgroup must illustrate improvement in another academic indicator such as graduation rate.

In addition to academic achievement benchmarks created by the No Child Left Behind act, as mentioned previously, graduation rate provisions are also included within its text. Graduation rate accountability was added to counter schools pushing out low achievers and create a desire to educate them. Increasing graduation rate is included within the criterion of Adequate Yearly Progress stating that “if a school failed to meet adequate rates for two consecutive years, it would be sent into ‘school improvement status.’” Although this is included in the act, the study done by Orfield, et. Al. suggested that these provisions are not enforced and that the United States Department of Education has taken steps to considerably weaken the graduate rate
provision of the NCLB Act. A review of federally approved plans under the No Child Left Behind Act illustrates these graduation rate issues. Thirty-nine states in the Union set what is deemed a “soft” Adequate Yearly Progress goal for graduation rate accountability. “Soft” as defined by the Orfield study is defined as “schools and districts that fall below the graduation rate goal established by the state can still ‘make AYP’ if they exhibit the smallest degree of improvement from one year to the next.” Only ten states set a boundary that if a school is under, it will constitute failure of Adequate Yearly Progress. Texas is an example of a “soft” graduation rate standard. Texas requires secondary schools to meet a standard of 70 percent graduation “or show improvement.” The required improvement is only 1/10th of a percentage point for any school or district that falls under the 70 percent benchmark. On the other end of the spectrum, California has set a motivated goal of 100 percent graduation rate but Adequate Yearly Progress can be passed if any improvement occurs. Further diluting the graduation rate requirement, Former United States Secretary of Education Roderick Paige issued regulations stating that the graduation rate did not need to be disaggregated for minority subgroups except to act as an additional academic indicator under the “safe harbor” mechanism thus the Adequate Yearly Progress can be met if the aggregate meet the graduation rate benchmark. This new mandate has caused states to require even less from their respective schools – employing “softer” regulations on
graduation rate. In a study committed by the Civil Rights Project at Harvard University and the Urban Institute, for all the states “which disaggregated graduation rates could be calculated” (approximately 46 states and District of Columbia), they all would fail the Adequate Yearly Progress standard for graduation rates and accountability, if the proposition was imposed seriously. This is assuming that at the minimum district graduation rate for the aggregate and disaggregate would be approximately 66 percent. Also, due to the focus on increasing test scores, the drop-out/ pushing out of minorities that are low performers will only worsen over time. Schools and districts are discovering it is more cost-effective and easier to remove poor achievers rather than to rehabilitate.

In summary, the school-to-prison pipeline is currently being propagated by the policies meant to reform the American public education system. The No Child Left Behind Act of 2002 was created and passed as a solution to the lack of funding for educational entities by creating standardized tests and achievement markers such as graduation rate to determine the amount of funding to be provided. However, NCLB has been used improperly – focusing on the standardized markers over the more important notion of graduation rate accountability. Funding wise, states still use calculations of property taxes and other ratings of socioeconomic status to fund schools which provide rich districts with substantial amounts of funding over poorer regions.
Until these calculations are altered, the vicious circle of poorer schools receiving less funding annually and richer schools gaining more and more resources will remain and worsen. Race is a factor that must be addressed in zero tolerance policies because classroom discrimination and low socioeconomic status can cause a disproportionate amount of minorities to be introduced to the pipeline. Until funding is spread out evenly among schools and standardized testing and achievement markers altered to allow growth and promote rehabilitation over punishment, this pipeline will exist and expand over the next few decades.
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The Military Commissions Act of 2006
The Last Throw in the Bush Administration’s Controversial Approach to Fighting International Terrorism.

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

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

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

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

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\(^1\) 109\(^{th}\) Congress 2d Session S.3930 (hereafter Military Commissions Act of 2006 or MCA)
\(^2\) Military Commissions Act of 2006, preamble.
\(^3\) Military Commissions Act of 2006, sec. 948a. ‘(1) ’(ii).
\(^4\) MCA Section 5.
\(^5\) MCA sec. 948r.
\(^6\) MCA sec. 949d.
\(^7\) The question of access to counsel is not directly addressed in the MCA. Section 948k states that defendants in military commissions may have military or civilian defense counsel once they have been charged. However, Section 7 of the MCA eliminates habeas corpus and section 948r allows for coercive interrogation (which presumably must include solitary confinement) it is difficult to see how anyone could assert a detainee’s right to access counsel until after the detainee had been charged by a military commission.
\(^8\) MCA Section 948d.
The Military Commissions Act of 2006 can be viewed several ways. From one point of view, the law is a practical (if controversial) way of dealing with a unique and troubling problem: how to charge and try foreign terrorists who are not true prisoners of war and who are too dangerous to be given the full protections of the Constitution. From another point of view, the MCA is a human rights disaster, at least symbolically, because it gives every regime in the world political cover to justify restrictions on liberty by citing a crisis and then pointing to the United States. Put another way, how can America hope to champion basic freedoms when we ourselves do not have the strength to preserve them through crises? But what the MCA really represents is the most recent step, and perhaps one of the final steps, in the Bush Administration’s battle for autonomy and freedom from oversight in conducting the War on Terror. As such, the law is proof that the battle for power between branches of government that began in the landmark case of Marbury v. Madison exists today in the form of a clash over the power to fight terrorism.

The history of the Military Commissions Act (MCA) is not simple. To fully understand the purpose and implications of the law, it is necessary to place the MCA in the broader context of the Bush Administration’s approach to combating terrorism since September 11, 2001. In order to examine that history, this paper is divided into four sections. Section One will provide a brief overview of some of the arguments and ideas put forth in support of the current administration’s approach to fighting terror. Section Two will examine of the recent history leading up to and involving the MCA, in particular the Supreme Court’s ruling in Hamdan v. Rumsfeld, the MCA itself, and the case of Boumediene v. Bush challenging the law. Section Three will then more thoroughly examine the Hamdan ruling and examine the MCA as a response to that
ruling. Section Three will also take a more thorough look at the majority and dissenting opinions of the D.C. Circuit Court of Appeals in *Boumediene v. Bush*, as well as several scholarly arguments for and against the MCA. The fourth section will provide a conclusion and a prediction for the future of the legal side of the Bush administration’s war on terror.

**Section I**

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

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

He also frames the debate over how to address the problem of terrorism as “the question of whether the United States is at war with terrorists or whether they are simply a particularly noxious form of political criminal.”

Posner goes on to argue that “the terrorist threat is sui generis—that it fits the legal category neither of ‘war’ nor of ‘crime.’” Posner is critical of libertarians, even going so far as to point out that civil libertarians are misguided in that they fail to understand that “the greatest danger to American civil liberties would be another terrorist attack on the United States.”

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

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11 Posner, 23.
12 Posner, 11.
13 Posner, 11.
14 Posner, 46. Presumably Posner is referring not to the terrorist attack itself, but to the reaction thereafter. Of course, libertarians who advocate restraint in reaction to a first terror attack could respond that restrictions on civil liberties are no more justified after a second attack than they are after an initial one, and furthermore that the specter of severe illegal government action in the future does not justify moderate illegal government action in the present.
executive powers shall be vested in the president,’ submitting only special articles of it to
a negative by the senate…[t]he transaction of business with foreign nations is executive
altogether; it belongs, then, to the head of that department, except as to such portions of it
as are specially submitted to the senate. Exceptions are to be construed strictly.”15 John
Marshall appears to support Jefferson by saying that, “The President is the sole organ of
the nation in its external relations, and its sole representative with foreign nations…The
[executive] department…is entrusted with the whole foreign intercourse of the nation.”16

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

15 Yoo(a), 19, quoting from something else.
16 Yoo(a), 20, again quoting some something else.
Proclamation.\textsuperscript{17} Thus Yoo purports to establish that the Bush administration’s assertion of powers of treaty interpretation is actually nothing new.\textsuperscript{18}

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

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

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

\textsuperscript{17} Yoo(a), 5.
\textsuperscript{18} Yoo(a), 5.
\textsuperscript{19} Yoo(b).
\textsuperscript{20} Yoo(b).
\textsuperscript{21} Yoo(a), 24.
being lawyers, treat history not as a guide but as a trove of anecdotes and rhetorical flourishes. And because they are trained in the common law, which is a body of law made by judges, it comes naturally to them to make constitutional law rather than just apply preexisting rules.\textsuperscript{22}

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

**Section II**

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

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

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

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

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

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

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

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

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

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30 Page 10 of the ruling.
MCA itself is the response, and in this context is not really a “stinging rebuke” of the Court (to quote Yoo). The Court demanded a Congressional act, and a Congressional act was passed. With respect to the Geneva Conventions and the Uniform Code of Military Justice, the MCA seeks to remove any obstacles to trying detainees like Hamdan.

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

‘Sec. 948b. Military Commissions Generally

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

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

‘(A) …(article 10 of the [UCMJ], relating to speedy trial, including any rule of courts-martial to speedy trial.
‘(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the [UCMJ], relating to compulsory self-incrimination.
‘(C) Section 832 (article 32 of the [UCMJ]), relating to pretrial investigation.

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

‘Sec. 948b. Military commissions generally…

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

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

Sec. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.
(a) Implementation of Treaty Obligations-

(2)…No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions
enumerated in subjections (d) of such section 2441 [pertaining to the Geneva Conventions].

(3) INTERPRETATION BY THE PRESIDENT-

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

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

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

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

Any person is punishable as a principal under this chapter who—
‘(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
‘(2) causes an act to be done which if directly performed by him would be punishable by this chapter.
‘(a) In General- Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.
‘(b) Scope of Offense- An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

And, most importantly:

‘Sec. 950v. Crimes triable by military commissions...
‘(28) CONSPIRACY- Any person subject to this chapter who conspired to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished...

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

So is the MCA an example of Congress trying to overrule the Supreme Court? The members of the U.S. Circuit Court of Appeals for the District of Columbia seem to think so, including those who have already found in favor of the Bush administration. After its passage, the MCA was quickly challenged in the U.S. court system, in the case of *Boumediene v. Bush*. The Boumediene case was decided by the U.S. Court of Appeals for the District of Columbia, in favor of the government. In a 2-1 ruling written by *Circuit Judge Randolph*, the Court of Appeals held that the MCA did indeed apply to the petitioners’ habeas claims, and that the MCA did not violate the Suspension Clause of the Constitution.\(^{32}\) In question was Section 7 of the MCA (above), which eliminates all habeas corpus jurisdiction for U.S. Courts over Guantanamo detainees. Furthermore, the Appeals Court opinion plainly states that, “Everyone who has followed the interaction

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

\(^{32}\) Article 1, Section 9, Clause 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”
between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.”

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

Section III

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

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

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

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

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

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

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

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


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

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

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

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

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

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three cases to claim that in 1789 the privilege of the writ [of habeas corpus] extended to aliens outside the sovereign’s territory.”  

The Court of Appeals remains unconvinced, however, stating that, “None of these cases involved an alien outside the territory of the sovereign.” In her dissenting opinion, Rogers rejects this conclusion, asserting that “the historical record and the guidance of the Supreme Court disprove this conclusion.”

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

Conclusion

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

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

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

References

