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Section 2: The War on Terror

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II. WAR ON TERROR

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HAMDAN AND ITS AFTERMATH

"Justices, 5-3, Broadly Reject Bush Plan to Try Detainees"

The New York Times
June 30, 2006
Linda Greenhouse

The Supreme Court on Thursday repudiated the Bush administration's plan to put Guantanamo detainees on trial before military commissions, ruling broadly that the commissions were unauthorized by federal statute and violated international law.

"The executive is bound to comply with the rule of law that prevails in this jurisdiction," Justice John Paul Stevens, writing for the 5-to-3 majority, said at the end of a 73-page opinion that in sober tones shredded each of the administration's arguments, including the assertion that Congress had stripped the court of jurisdiction to decide the case.

A principal flaw the court found in the commissions was that the president had established them without Congressional authorization.

The decision was such a sweeping and categorical defeat for the administration that it left human rights lawyers who have pressed this and other cases on behalf of Guantanamo detainees almost speechless with surprise and delight, using words like "fantastic," "amazing" and "remarkable."

Michael Ratner, president of the Center for Constitutional Rights, a public interest law firm in New York that represents hundreds of detainees, said, "It doesn't get any better."

President Bush said he planned to work with Congress to "find a way forward," and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny.

The ruling marked the most significant setback yet for the administration's broad expansions of presidential power.

The courtroom was, surprisingly, not full, but among those in attendance there was no doubt they were witnessing a historic event, a defining moment in the ever-shifting balance of power among branches of government that ranked with the court's order to President Richard M. Nixon in 1974 to turn over the Watergate tapes, or with the court's rejection of President Harry S. Truman's seizing of the nation's steel mills, a 1952 landmark decision from which Justice Anthony M. Kennedy quoted at length.

Senator Arlen Specter, Republican of Pennsylvania and chairman of the Judiciary Committee, introduced a bill immediately and said his committee would hold a hearing on July 11, as soon as Congress returned from the July 4 recess. Mr. Specter said the administration had resisted his effort to propose similar legislation as early as 2002.

Two Republican senators, Lindsey Graham of South Carolina and Jon Kyl of Arizona, said in a joint statement that they were "disappointed" but that "we believe the problems cited by the court can and should be fixed."
"Working together, Congress and the administration can draft a fair, suitable and constitutionally permissible tribunal statute," they added.

Both overseas and in the United States, critics of the administration's detention policies praised the decision and urged Mr. Bush to take it as an occasion to shut down the Guantanamo prison camp in Cuba.

"The ruling destroys one of the key pillars of the Guantanamo system," said Gerald Staberock, a director of the International Commission of Jurists in Geneva. "Guantanamo was built on the idea that prisoners there have limited rights. There is no longer that legal black hole."

The majority opinion by Justice Stevens and a concurring opinion by Justice Kennedy, who also signed most of Justice Stevens's opinion, indicated that finding a legislative solution would not necessarily be easy. In an important part of the ruling, the court held that a provision of the Geneva Conventions known as Common Article 3 applies to the Guantanamo detainees and is enforceable in federal court for their protection.

The provision requires humane treatment of captured combatants and prohibits trials except by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."

The opinion made it clear that while this provision does not necessarily require the full range of protections of a civilian court or a military court-martial, it does require observance of protections for defendants that are missing from the rules the administration has issued for military commissions. The flaws the court cited were the failure to guarantee the defendant the right to attend the trial and the prosecution's ability under the rules to introduce hearsay evidence, unsworn testimony, and evidence obtained through coercion.

Justice Stevens said the historical origin of military commissions was in their use as a "tribunal of necessity" under wartime conditions. "Exigency lent the commission its legitimacy," he said, "but did not further justify the wholesale jettisoning of procedural protections."

The majority opinion was joined by Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer, who wrote a concurring opinion focusing on the role of Congress. "The court's conclusion ultimately rests upon a single ground: Congress has not issued the executive a blank check," Justice Breyer said.

The dissenters were Justices Clarence Thomas, Antonin Scalia and Samuel A. Alito Jr. Each wrote a dissenting opinion.

Justice Scalia focused on the jurisdictional issue, arguing that Congress had stripped the court of jurisdiction to proceed with this case, *Hamdan v. Rumsfeld*, No. 05-184, when it passed the Detainee Treatment Act last December and provided that "no court, justice, or judge" had jurisdiction to hear habeas corpus petitions filed by detainees at Guantanamo Bay.

The question was whether that withdrawal of jurisdiction applied to pending cases. The majority held that it did not.

Justice Thomas's dissent addressed the substance of the court's conclusions. In a part of his opinion that Justices Scalia and
Alito also signed, he called the decision "untenable" and "dangerous." He said "those justices who today disregard the commander in chief's wartime decisions" had last week been willing to defer to the judgment of the Army Corps of Engineers in a Clean Water Act case. "It goes without saying that there is much more at stake here than storm drains," he said.

Chief Justice John G. Roberts Jr. did not take part in the case. Last July, four days before Mr. Bush nominated him to the Supreme Court, he was one of the members of a three-judge panel of the federal appeals court here that ruled for the administration in the case.

In the courtroom on Thursday, the chief justice sat silently in his center chair as Justice Stevens, sitting to his immediate right as the senior associate justice, read from the majority opinion. It made for a striking tableau on the final day of the first term of the Roberts court: the young chief justice, observing his work of just a year earlier taken apart point by point by the tenacious 86-year-old Justice Stevens, winner of a Bronze Star for his service as a Navy officer in World War II.

The decision came in an appeal brought on behalf of Salim Ahmed Hamdan, a Yemeni who was captured in Afghanistan in November 2001 and taken to Guantanamo in June 2002. According to the government, Mr. Hamdan was a driver and bodyguard for Osama bin Laden. In July 2003, he and five others were to be the first to face trial by military commission. But it was not until the next year that he was formally charged with a crime, conspiracy.

The commission proceeding began but was interrupted when the federal district court here ruled in November 2004 that the commission was invalid. This was the ruling the federal appeals court, with Judge Roberts participating, overturned.

Lt. Cmdr. Charles Swift, Mr. Hamdan's Navy lawyer, told The Associated Press that he had informed his client about the ruling by telephone. "I think he was awe-struck that the court would rule for him, and give a little man like him an equal chance," Commander Swift said. "Where he's from, that is not true."

The decision contained unwelcome implications, from the administration's point of view, for other legal battles, some with equal or greater importance than the fate of the military commissions.

For example, in finding that the federal courts still have jurisdiction to hear cases filed before this year by detainees at Guantanamo Bay, the justices put back on track for decision a dozen cases in the lower courts here that challenge basic rules and procedures governing life for the hundreds of people confined at the United States naval base there.

In ruling that the Congressional "authorization for the use of military force," passed in the days immediately after the Sept. 11 attacks, cannot be interpreted to legitimize the military commissions, the ruling poses a direct challenge to the administration's legal justification for its secret wiretapping program.

Representative Adam Schiff, a California Democrat who has also introduced a bill with procedures for trying the Guantanamo detainees, said the court's refusal to give an open-ended ruling to the force resolution meant that the resolution could not be
viewed as authorizing the National Security Agency's domestic wiretapping.

Perhaps most significantly, in ruling that Common Article 3 of the Geneva Conventions applies to the Guantanamo detainees, the court rejected the administration's view that the article does not cover followers of Al Qaeda. The decision potentially opened the door to challenges, by those held by the United States anywhere in the world, to treatment that could be regarded under the provision as inhumane.

Justice Stevens said that because the charge against Mr. Hamdan, conspiracy, was not a violation of the law of war, it could not be the basis for a trial before a military panel.
The Supreme Court yesterday struck down the military commissions President Bush established to try suspected members of al-Qaeda, emphatically rejecting a signature Bush anti-terrorism measure and the broad assertion of executive power upon which the president had based it.

Brushing aside administration pleas not to second-guess the commander in chief during wartime, a five-justice majority ruled that the commissions, which were outlined by Bush in a military order on Nov. 13, 2001, were neither authorized by federal law nor required by military necessity, and ran afoul of the Geneva Conventions.

As a result, no military commission can try Salim Ahmed Hamdan, the former aide to Osama bin Laden whose case was before the justices, or anyone else, unless the president does one of two things he has resisted doing for more than four years: operate the commissions by the rules of regular military courts-martial, or ask Congress for specific permission to proceed differently.

"[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction," Justice John Paul Stevens wrote in the majority opinion.

While the decision addressed only military commissions, legal analysts said its skeptical view of presidential power could be applied to other areas such as warrantless wiretapping, and that its invocation of the Geneva Conventions could pave the way for new legal claims by detainees held at the military facility in Guantanamo Bay, Cuba.

The ruling shifts the spotlight to Congress, whose members face reelection this fall and who have largely avoided the military commission issue since the Sept. 11, 2001, attacks because of its political uncertainties. The invitation for the president to turn to Congress was extended in a short concurring opinion by one of the justices in the majority, Stephen G. Breyer, who made it clear that the concerns of critics had penetrated deeply at the court.

"Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so," Breyer wrote.

"The Constitution places its faith in those democratic means," Breyer concluded. "Our Court today simply does the same."

Joining Stevens and Breyer in the majority were Justices Anthony M. Kennedy, David H. Souter and Ruth Bader Ginsburg.

Perhaps the only silver lining for the administration was that the decision did not affect the government's authority to keep terrorism suspects at Guantanamo Bay or elsewhere, a point Bush emphasized in his reaction. "We take the findings seriously," he said. "The American people need to
know that this ruling, as I understand it, won't cause killers to be put out on the street."

But the court's action was clearly a setback for the White House. At the high court, its approach to the war on terrorism has suffered the broadest in a series of defeats, and the administration has been sent back to the drawing board in dealing with hundreds of suspected members of the Taliban and al-Qaeda—at a time when international pressure is mounting to shut down Guantanamo Bay.

This is not the situation the president envisioned when he unveiled the military commissions as a tough-minded alternative to the civilian trials that the Clinton administration had used against terrorists. As first outlined in 2001, the commissions did not give defendants a presumption of innocence or guarantee a public trial.

Yet the swift and certain punishment that supporters of the commissions expected has not materialized. The commissions quickly became mired in questions about what many saw as their lack of due process for defendants, and about the unilateral way in which Bush had created them.

Though the Defense Department has modified commission procedures in favor of the accused, military and civilian lawyers continue to object that defendants have no right to be present for the entire trial or to see all of the evidence against them. While 14 of the 490 terrorism suspects at Guantanamo Bay have been designated for trial, not a single case has been decided.

Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. dissented. Chief Justice John G. Roberts Jr. did not participate because he served on the three-judge appeals court panel whose ruling upholding the commissions was under review.

Scalia and Thomas read their dissents from the bench, a demonstration of their strong disapproval of the court's decision. Scalia argued that the court should have stayed out of the case because of a law Congress passed late last year circumscribing the appeal rights of military commission defendants.

Thomas said the majority "openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs."

But center stage at yesterday's dramatic session belonged to Stevens, the 86-year-old World War II veteran who served as a Navy officer and a Supreme Court law clerk during the late 1940s, the last time the United States made extensive use of military commissions.

Though Stevens, the most liberal member of the court, has sometimes employed sharp rhetoric against the Bush administration in other cases, he read a summary of his 73-page opinion yesterday in a somber, seemingly deliberately low-key manner. The written version seemed designed to pick apart the Bush case for the commissions rather than denounce it.

Stevens ruled that the court had jurisdiction, rejecting the administration's argument that it had been ousted from the case by the Detainee Treatment Act of 2005. That law, even though it blocked habeas corpus petitions by Guantanamo Bay prisoners and shifted all appeals regarding military tribunals to the U.S. Court of Appeals for the District of Columbia Circuit, did not clearly state that it was meant to apply
retroactively to Hamdan and others, Stevens wrote.

At the heart of Stevens's reasoning was the observation that an existing statute, the Uniform Code of Military Justice (UCMJ), already prescribes broad rules for military commissions, saying that their procedures must track those of courts-martial unless that is impractical.

But the administration's commissions, Stevens noted, do not meet this standard because they deprive defendants of protections that are basic to the courts-martial. The administration had cited special dangers involved in fighting terrorism, but Stevens concluded that "nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."

Additionally, Common Article 3 of the Geneva Conventions, a provision that guarantees "minimum" protections for detainees, applies to the war against al-Qaeda, and is thus a part of the "law of war," Stevens wrote.

This means that terrorism suspects benefit from Common Article 3's prohibition against trials by anything other than "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Because they were not properly authorized by Congress and do not match court-martial rules, Bush's military commissions do not qualify, Stevens wrote.

The court's opinion embraced a role for international humanitarian law that the administration has repeatedly rejected.

"The court seems to be saying that the war on terrorism at least in some regards is governed by Common Article 3," said Michael J. Glennon, a professor of international law at Tufts University. "That's an important step."

Legal analysts said that the court's opinion could lead to a challenge to the National Security Agency's domestic surveillance program, because wiretapping is already covered by a federal statute, the Foreign Intelligence Surveillance Act, just as military commissions were, in the court's view, covered by the UCMJ.

"The same reasoning would seem to apply to the NSA case, because the argument that the authorization to use military force enables them to ignore FISA goes down the drain," said Joseph P. Onek, senior counsel of the Constitution Project, a Washington-based civil liberties organization that opposed the commissions.
WASHINGTON—A federal appeals court granted a Bush administration request to make more legal arguments over the fate of hundreds of lawsuits filed by detainees held at Guantanamo Bay, Cuba.

A three-judge panel set a schedule for lawyers for the government and the detainees to provide their views in writing over the next few weeks about the impact of the Supreme Court's ruling in June in the case of Osama bin Laden's driver.

In a rebuke of President Bush, the Supreme Court ruled 5-3 that his plan to hold criminal trials before military tribunals for some of the Guantanamo detainees violates U.S. and international law.

"It's distressing," said detainee lawyer Thomas B. Wilner, who opposed the government's request for another round of briefing on the issue. "This case has now been pending for two years."

The order filed Wednesday means there will be a rare fourth round of legal filings to determine the fate of lawsuits that detainees filed challenging the legality of their detentions.

The justices, in the June ruling on bin Laden's driver, Salim Ahmed Hamdan, also said a law passed by Congress late last year to limit lawsuits filed by Guantanamo detainees does not apply to pending cases like that of Hamdan.

By the time the law was passed in December, civil cases had been filed on behalf of hundreds of detainees.

In 2004, the Supreme Court said detainees can challenge the legality of their detentions. Congress passed the Detainee Treatment Act to limit those lawsuits and to set up a process for detainees to challenge their designations as "enemy combatants."

The three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit has already heard arguments twice in September 2005 and in March in appeals filed by both sides challenging conflicting rulings by trial judges on whether the lawsuits can proceed.
A president responds to an unprecedented war with unprecedented measures that test the limits of his constitutional authority. He suffers setbacks from hostile Supreme Court justices, a critical media and a divided Congress, all of which challenge his war powers.

Liberal pundits and editorial pages would have you believe this describes President Bush after the Supreme Court last week rejected military commissions for trying terrorists. But it just as easily fits Abraham Lincoln when he issued the Emancipation Proclamation freeing the slaves or Franklin D. Roosevelt when he made the United States the great "arsenal of democracy" in the lead-up to World War II.

The court's decision in *Hamdan vs. Rumsfeld* ignores the basic workings of our separation of powers and will hamper the ability of future presidents to respond to emergencies with the forcefulness and vision of a Lincoln or an FDR.

Long-standing U.S. practice recognizes that the president, as commander in chief, plays the leading role in wartime. Presidents have started wars without congressional authorization, and they have exercised complete control over military strategy and tactics. They can act with a speed, unity and secrecy that the other branches of government cannot match. By contrast, legislatures are large, diffuse and slow. Their collective design may make them better for deliberating over policy, but at the cost of delay and lack of resolve.

The Sept. 11 attacks succeeded in part because our government was mired in a terrorism-as-crime approach that worried less about preventing attacks than about hypothetical threats to civil liberties—hence the "wall" preventing our law enforcement and intelligence agencies from sharing information. Our laws considered war as conflict only between nations and failed to anticipate the rise of non-state terrorist organizations that could kill 3,000 Americans, destroy the World Trade Center and damage the Pentagon in a single day.

Bush invoked his constitutional authority to fight this shadowy enemy that does not wear uniforms, targets civilians and violates every rule of civilized warfare. Like George Washington, Andrew Jackson, Lincoln and FDR, Bush established military commissions to try enemy combatants for war crimes. If the commander in chief couldn't have taken wartime actions on his own, then the slaves would have remained Confederate property during the Civil War and Britain would not have fully benefited from American aid and military support before World War II.

As an official in the Bush administration's Justice Department from 2001 to 2003, I argued that the president had the constitutional power to act, alone if necessary, to defend the country from another attack. I helped shape the legal policies—one of which the Supreme Court has now blocked—giving him the flexibility to wage a successful war on terrorism.
Wartime decisions, which often must be made under pressure of time and unique circumstances, do not always fit the general rules passed beforehand by legislatures. War is dangerous and unpredictable and best handled by a president who can act with "decision, activity, secrecy and dispatch," in the words of the Federalist Papers.

Congress has an important role but one exaggerated by critics of the war on terrorism. It could easily have blocked any aspect of the administration's terrorism policies simply by removing funding or political support. It could have closed Guantanamo Bay in a day, if it wished. Instead, it authorized the president to use all necessary and appropriate force against any individual, organization or state connected to the 9/11 attacks. Then, following past practices, it sat back and let the president handle the details and assume the political risks. Critics seem to believe that Bush's policies are at odds with the Republican Congress. They are not.

What makes this war different is not that the president acted while Congress watched but that the Supreme Court interfered while fighting was ongoing. Given its seizure of control over some of society's most contentious issues, such as abortion, affirmative action and religion, maybe the court's intervention should come as no surprise. But its effort to inject the Geneva Convention into the war on terrorism—even though the treaties do not include international conflict with non-states that violate every rule of civilized warfare—smacks of judicial micromanagement. The Supreme Court has never before imposed its preferred interpretation of a treaty governing warfare on the president during war, and Geneva has never been understood to give enemy combatants rights in our courts.

The court displays a lack of judicial restraint that would have shocked its predecessors. In World War II, the Supreme Court established precedents directly to the contrary. To evade these previous rulings, the court misread a law ordering it not to decide Guantanamo Bay cases, narrowed the very same authorization to use military force that it had read broadly just two years ago, ignored centuries of practice by presidents and Congress on military commissions and intruded into the executive's traditional national security prerogatives. Justices used to appreciate the inherent uncertainties and dire circumstances of war, and the limits of their own abilities. No longer.

But here, unlike abortion, the Supreme Court does not have the last word. Congress and the president can enact a simple law putting the court back in its traditional place, allowing for the usual combination of presidential initiative and general congressional support. There is no other way to fight a successful war, as we learned Sept. 11.
"Invent This Wheel!!!"

Slate Magazine
July 11, 2006
Neal Katyal

Today the Senate begins hearings on whether to create, from scratch, a new legal system to handle the cases against suspected terrorists held at Guantanamo Bay and around the world. The hearings are a response to *Hamdan v. Rumsfeld*, the Supreme Court decision that last month struck down President Bush's fake trial system at Guantanamo. This debate is important, and long overdue, but it should not obscure the fact that the military already has a battle-tested system for dealing with such problems: courts-martial. We should only break from that proud American tradition for the best of reasons and with adequate empirical support. There are no such grounds here, and changing the rules now will be another fruitless step backward from our goal of bringing terrorists to justice.

Ever since the morning of June 29, when the Supreme Court announced its decision in *Hamdan* (I argued the case in the Supreme Court), I've received dozens of inquiries asking how it feels to be vindicated after five years of battling the military courts at Guantanamo. I testified at the first Senate hearing on the issue in November of 2001, and I concluded then that President Bush's then-two-week-old decision to adopt military commissions to try the detainees was flatly illegal. The ultimate result, I said at that time, would be reversal by the courts with no convictions.

So, I'd be lying if I said it didn't feel good, five years later, to have predicted the result in *Hamdan*. I've also learned, though, that I was wrong about one particular point back then: The fallback is not always a civilian trial. Instead of wasting its time resuscitating Bush's failed commissions, Congress should now do what it failed to do in 2001: Look seriously at the option of using courts-martial to try terrorists.

In 2001, I knew squat about the existing military-justice system. The debate at that time simply pitted civilian courts against the new Bush military commissions, with no other alternative considered. Civilian trials, with the heavy protections they afford criminal defendants and witnesses, pose risks to security, and if the administration wanted to make changes to that system, I testified that Congress had to authorize them. I believed then that the career officials in the departments of Defense and Justice had considered, and rejected, other alternatives to civilian justice before resorting to the drastic step of creating new commissions through presidential decree.

But the civilians running the new tribunal process cut out those individuals who best understood the laws of war including the judge advocates general. There is no evidence that they even thought about using courts-martial, despite the fact that a statute on the books since World War I allows court-martial trials to punish terrorism.

It is not entirely surprising that they had a legal blind spot. Military law used to be a popular course a half-century ago in law schools, yet today many leading schools do not even offer it. The result is a deep bias
against military law as well as civilians who think to the extent they think about it at all that the Uniform Code of Military Justice is a backwater system in which anything goes.

I've spent the last four years learning the truth. In 1950, Congress' adoption of the UCMJ revolutionized military law. It built a system based on fundamental respect for our nation's traditions as well as international law. The result was a military-justice system that is the envy of the world.

Some pundits, in the wake of the Hamdan decision, seized upon various purported problems with courts-martial and urged rushed legislation the discussion of which began in earnest today in the hearings. But as I argued once in Slate, signing off on such a new court system would still be a grave mistake for three basic reasons.

First, the existing court-martial system is already tooled up to handle terrorism cases. We've had courts-martial on the battlefields of Afghanistan and Iraq. The "jury" hearing terrorism cases all have security clearances. Military rules already permit closure of the courtroom for sensitive national-security information, authorize trials on secure military bases far from civilians, enable substitutions of classified information by the prosecution, permit withholding of witnesses' identities, and the like. The UCMJ, in short, has flexible rules in place that permit trials under unique circumstances, and there is no reason to think that they cannot handle these cases today.

Moreover, a court-martial is a decidedly legal proceeding. Congress already has substantial law on the books authorizing and governing them. The Supreme Court has on countless occasions recognized and affirmed such proceedings. And they satisfy all the conditions the Hamdan majority found the president's commissions failed to meet.

By using an existing system, we would not just be reaffirming our core American values, we'd also get better prosecutions. Right now, England refuses to recognize the commission system, with its attorney general calling them completely "unacceptable" because they fail to offer "sufficient guarantees of a fair trial in accordance with international standards." Australia has cut a special side deal with the Bush administration so one of its citizens, David Hicks, is treated differently from other commission defendants. A United Nations Expert Committee says these commissions are fundamentally unfair. This report may prompt other nations to refuse to let their citizens be tried in these bodies. And extradition, sharing of prosecution/intelligence information, and availability of witnesses will all become extremely serious problems when other countries refuse to cooperate. Without an extensive track record showing that courts-martial are failures, it is exceptionally dangerous to gamble our prosecution strategy on the administration's diplomatic ability to persuade other nations to cooperate with these commissions.

Second, whatever purported benefits might be gained by some new system have to be weighed against the inevitable litigation risk. The Hamdan decision makes clear that any changes that depart from our nation's military tradition and international law are going to be closely scrutinized by the courts. The result of changing the rules again now will be another four years with no prosecutions and perhaps yet another reversal in the Supreme Court. "Four more years" is not a convincing slogan, especially when not a single terrorist has been brought to justice in these military commissions.
Only about 10 individuals were ever even indicted and those indictments took nearly three years to prepare.

Some clever Republicans are trying to get around that problem by legislating an "abstention" rule providing that challenges to the new system can take place only after someone had their trial, not before it. This was the president's main position in the Hamdan case, as well that Hamdan could not challenge his commission until he was convicted. Anyone, in Congress or the courts, who advances that ludicrous notion should be particularly ignored today. Can you imagine if that advice were followed? We'd have had each terrorist trial take place under the president's system, and then, years later, the Supreme Court would have had to reverse all the convictions when they finally got to decide Hamdan. A terrible result, for the nation and for justice. All these convicted terrorists would face freedom if they could not be retried in some other system.

Instead of abstention, any legislation enacted today should make clear that it would immediately authorize a challenge to a three-judge district court and subsequent appeal to the Supreme Court. It's time to get this show on the road, folks. The administration's "wait and see" attitude toward criminal convictions of terrorists is not something that can wait any longer.

Third, the Supreme Court got it right. The president's military commissions departed in every way from the most basic tenets of American justice. For the first time, defendants were kicked out of their own criminal trials without their consent. Even a military commission prosecutor called the system "a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged." Another prosecutor lamented that "writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard particularly when you want to call yourself an officer and a lawyer."

Indeed, something that has gone without notice thus far is that every judicial opinion to side with Mr. Hamdan has been penned by a jurist who actually served in our military: Justice John Paul Stevens, Justice Anthony Kennedy, and lower court Judge James Robertson. A coincidence perhaps, but unlikely. For years, the military has stood at the forefront of protecting the rule of law, knowing that if our courts give the executive branch the power to break from the Geneva Conventions, then executives from other countries will do it back to our own troops some day when they are captured.

For that reason, and despite all the administration huffing and puffing about the court's Geneva Conventions holding, the Pentagon quietly last Friday issued a memo agreeing with the Supreme Court's interpretation of the Conventions and finding that Common Article 3, the provision at issue in Hamdan, now protects detainees across the globe.

Justice Stevens' opinion in Hamdan put it simply, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case." I would have thought that, upon hearing those words and from a five-justice majority composed of three Republican appointees the president's reaction would have been to ponder the oath he took to uphold the Constitution and laws of the United States. Instead, the administration treated this most
serious of matters as yet another political
game, with Bush going so far last Friday as
to absurdly declare that the Hamdan justices
"accepted the use of Guantanamo, the
decision I made" with respect to detaining
individuals there. That statement was
particularly odd, since the Solicitor
General's Office and I had both represented
to the court that detentions were not at issue
in the case, and the court itself made that
fact clear.

When the president spins a Supreme Court
opinion in this way, i.e., badly, you have to
wonder what else is being spun. Bush's
latest statement confirms my hunch that, like
a college boy around the tempting Jessica
Alba, whenever this administration gets near
Guantanamo, they cease to think rationally.
These folks cannot be trusted to run a new
prosecution system. It's time for tough and
fair justice, military-style. And that means
the system we already have.
President Bush entered office intending to enfeeble congressional or judicial checks on executive authority. The legal theory concocted was that the Constitution erected a "unitary executive" free from restraint or superintendence by coequal branches in exercising executive power.

Accordingly, Congress was powerless to regulate either the gathering of foreign intelligence, or the use of military force abroad, or the tribunals to adjudicate war crimes. The Supreme Court was powerless to review the president's indefinite detentions of U.S. citizens as alleged illegal combatants. And the president was empowered to operate a perpetual secret government to fight international terrorism, unaccountable either to Congress or the people or the law. In sum, Mr. Bush's ambition was to conflate Inauguration with coronation.

But by a 5-3 vote, the Supreme Court repudiated that regal ambition in *Hamdan v. Rumsfeld* (June 29, 2006). The unitary executive theory collapsed like a deck of cards. The high court lectured Mr. Bush like a schoolboy on constitutional checks and balances, and on the dangers of an omnipotent chief executive. The court further discredited President Bush's claim that Congress' Joint Resolution Authorizing the Use of Military Force (AUMF) after the September 11 terrorist attacks crowned him with power to flout sister statutes or treaties. It held both prohibited Mr. Bush's creation of military commissions authorized to return guilty verdicts for alleged war crimes based on secret evidence. The court lectured that Mr. Bush should ask Congress to amend the law or override the Geneva Convention if he wanted a military commission alternative to customary courts-martial.

*Hamdan* removes any veneer of legality from President Bush's warrantless domestic surveillance program in contravention of the Foreign Intelligence Surveillance Act (FISA). It also rejects the president's authority to torture or otherwise maltreat detainees to gather foreign intelligence in violation of the Detainee Treatment Act of 2005. And the Supreme Court's precedent denies the president's assertion that Congress is helpless to regulate use of military force, an insistence which has repeatedly been made in presidential signing statements for the Intelligence Authorization Act. Like President Richard M. Nixon before him, Mr. Bush's craving for an imperial presidency will likely bring the office to its ebb.

Justice Benjamin Cardozo taught that the great tides and events that affect the rest of men do not pass Supreme Court justices idly by. They generally read newspapers, listen to radio and watch television. They are influenced by extrajudicial evidence of government abuses or overreaching. Nixon lost the Pentagon Papers and Nixon Tapes cases less from constitutional logic than from the Supreme Court's conviction Nixon
was an untrustworthy and dangerous custodian of the presidency. Franklin Roosevelt was rebuked in Schechter Poultry and Humphrey's Executor primarily because the justices perceived a threat of executive omnipotence reminiscent of Adolf Hitler and Benito Mussolini.

_Hamdan_ was born of a corresponding Supreme Court concern: namely, that President Bush is systemically seeking to dismantle the Constitution's checks and balances under an extravagant unitary executive theory.

Justice John Paul Stevens, writing for a plurality, categorically denied the president could exclude Congress from any role in punishing alleged war crimes or otherwise confronting wartime dangers:

"Emergency alone .. will not justify the establishment and use of penal tribunals not contemplated by Article I, section 8 and Article III, section 1 of the Constitution unless some other part of that document authorizes a response to the felt need .. And that authority, if it exists, can derive only from powers granted jointly to the president and Congress in time of war.

"The Constitution makes the President the 'Commander in Chief' of the Armed Forces .. but vests in Congress the powers to 'declare War .. and make Rules concerning Captures on Land and Water' .. to 'raise and support Armies' .. to 'define and punish .. Offenses against the Law of Nations' .. and 'To make Rules for the Government and Regulation of the land and naval Forces.' "

Congress further enjoys authority under the "Necessary and Proper" Clause of Article I, section 8 to regulate power the Constitution entrusts to the president. Accordingly, the president must partner with Congress in waging war instead of holding the legislative branch in vassalage.

Justice Stephen Breyer, in a concurring opinion, lectured: "Where, as here, no emergency prevents consultation with Congress, judicial insistence on that consultation [to establish a military commission] does not weaken our nation's ability to deal with danger. To the contrary, that insistence strengthens the nation's ability to determine through democratic means how best to do so. The Constitution places its faith in those democratic means."

Justice Anthony Kennedy, in a companion concurrence, added: "Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."

Mr. Bush, however, will ignore the clear lesson of _Hamdan_ and recklessly press forward with his unitary executive theory. He will blame congressional or judicial critics as weak on terror and national security. The rule of law, he will insinuate, is unacceptable in a post-September 11 world. But Mr. Bush will be repudiated by Congress, the courts, and the American people. He will leave the White House with fewer powers than when he entered.
JOHN C. YOO, a principal architect of the Bush administration's legal response to the terrorist threat, sounded perplexed and a little bitter on Thursday afternoon. A few hours earlier, the Supreme Court had methodically dismantled the legal framework that he and a few other administration lawyers had built after the Sept. 11, 2001, attacks.

"What the court is doing is attempting to suppress creative thinking," said Professor Yoo, who now teaches law at the University of California, Berkeley. "The court has just declared that it's going to be very intrusive in the war on terror. They're saying, 'We're going to treat this more like the way we supervise the criminal justice system.'"

While in the Justice Department's Office of Legal Counsel from 2001 to 2003, Mr. Yoo helped write a series of memorandums setting out a bold and novel legal strategy to find, hold, question and punish the nation's enemies. The memorandums said the Geneva Conventions do not apply to people the administration designates as enemy combatants. They contemplated the use of highly coercive interrogation techniques. They justified secret surveillance.

The court's decision in Hamdan v. Rumsfeld, Professor Yoo said, may signal the collapse of the entire enterprise. "It could affect detention conditions, interrogation methods, the use of force," he said. "It could affect every aspect of the war on terror."

He was not overstating his case. True, the decision itself—holding that the government could not try detainees held at Guantanamo Bay, Cuba, for war crimes in a particular way—was narrow, given that it directly affected only 10 men and did not address the administration's broader contention that it can hold those men and hundreds of others without charges forever. And Congress may yet put some or all of the president's programs on firmer legal footing.

But the effect of the decision, constitutional lawyers across the political spectrum agreed, could devastate the administration's main legal justifications for its campaign against the terrorist threat.

"The mood music of this opinion so lacks the traditional deference to the president," said John O. McGinnis, who served in the Justice Department from 1987 to 1991 and now teaches law at Northwestern, "that it would seem to have implications for his other programs."

The administration had built its case in part on a vote by Congress, taken a week after Sept. 11, that authorized the president to "use all necessary and appropriate force" against those who participated in and supported the attacks. The administration has relied on that authorization as legal support for several of its programs.

In 2004, the Supreme Court endorsed a part of this argument, but Justice John Paul Stevens, writing for the majority in Hamdan,
was having none of it. There is, he said "nothing in the text or legislative history" of the authorization "even hinting that Congress intended to expand or alter" existing laws concerning military trials.

The opinion, Professor Yoo said, seemed to require Congress to specify a laundry list of powers before the president can act.

"I worked on the authorization," he added. "We wrote it as broadly as possible. In past wars, the court used to let the president and Congress figure out how to wage the war. That's very different from what's happening today. The court said, 'If you want to do anything, you have to be very specific and precise about it.'"

The logic of the ruling and its requirement that Congress directly authorize presidential actions even in wartime has broad implications. For one thing, said Laurence H. Tribe, a law professor at Harvard, it seems to destroy the administration's argument that Congress blessed the National Security Agency's domestic surveillance program when it voted for the authorization.

"That argument is blown out of the water and is obliterated," Professor Tribe said.

Justice Stevens also took aim at the administration's chief constitutional argument, the one that critics call "Article II on steroids."

Because Article II of the Constitution, among other things, anoints the president as commander in chief, Professor Yoo and other administration lawyers have argued the president can ignore or override laws that seem to limit his authority to conduct war. In the current struggle against terrorism, they argue, the entire world is the battlefield.

Perhaps not any more. Steven G. Calabresi, a law professor at Northwestern and a founder of the Federalist Society, the conservative legal group, said this second argument is also in trouble.

"The court is certainly not embracing the broader Article II power," he said.

Indeed, a footnote in the majority opinion, one sure to be read closely, seems tailored to address these other controversies by rejecting the argument that the president is free to ignore Congressional limitations on his power.

"Conceivably the court had in mind controversies like the N.S.A. terrorist surveillance program" in crafting the footnote, said Curtis A. Bradley, a former Bush administration lawyer who now teaches law at Duke.

There are supporters of the N.S.A. program who say that the Hamdan decision does not affect it. They note that a 2002 appeals court decision said that Congress "could not encroach on the president's constitutional power" to conduct warrantless surveillance to obtain foreign intelligence.

The wholesale rejection of the administration's positions in Hamdan may have its roots in part in judicial hostility toward the memorandums Professor Yoo helped prepare several years ago. The justices in the majority, said Professor McGinnis, "have been so skeptical of a variety of legal interpretations coming out of the executive branch, like the so-called torture memos, that they are not giving the
president any deference."

But some justices seemed to leave a door open, suggesting that the decision is not so much a judicial attack on executive power as it is an insistence that Congress, rather than a small group of administration lawyers, must play a leading role in formulating the response to terror.

"Where, as here, no emergency prevents consultation with Congress," Justice Stephen G. Breyer wrote in a brief concurrence that three other justices joined, "judicial insistence upon that consultation does not weaken our nation's ability to deal with danger. To the contrary, that insistence strengthens the nation's ability to determine—through democratic means—how best to do so."

But Professor Yoo was not inclined to accept the decision as a triumph of the democratic process. Instead, he saw it as a judicial usurpation of the president's power to protect the nation. "The court is saying we're going to be a player now," he observed ruefully.
One of the more serious misconceptions about the Supreme Court's decision in *Hamdan v. Rumsfeld* is that it requires application of the 1949 Geneva Conventions to the war on terror generally and that as a result Congress is somehow constrained in how it chooses to address detainee issues. This is simply not the case. The *Hamdan* court ruled on a narrow issue involving Common Article 3 "common" because it appears in all four Geneva treaties. It did not suggest that the Geneva Conventions otherwise benefit members of al Qaeda or their allies, that such individuals must be given the rights and privileges of lawful prisoners of war or that Congress must reflect this policy in a new statute authorizing military commissions. Indeed, both as a matter of constitutional law and policy, Congress has very broad discretion in devising an appropriate set of procedures for military commissions.

Application of the four Geneva Conventions has been one of the war on terror’s most contentious legal issues. In the aftermath of the September 11 attacks, the Bush administration correctly concluded that neither members of al Qaeda nor their Taliban allies are entitled to Geneva Convention protection as either POWs or civilians. Al Qaeda and allied operatives are not POWs because that status, which involves a number of important rights upon capture and detention, is reserved for those who meet the most critical criteria of lawful combatants a regular command structure, uniforms, carrying arms openly and eschewing deliberate attacks on the civilian population prior to capture. At the same time, they are not civilians because they engage in hostilities. Nothing in the *Hamdan* ruling questions this construction of the treaties.

Rather, the *Hamdan* court only addressed Common Article 3 in relation to the question of how military commissions must be organized. This was relevant to its decision because section 821 of the Uniform Code of Military Justice (UCMJ) recognizes the legality of military commissions and their traditional jurisdiction under the "law of war." The law of war, of course, is made up of various customary norms and practices as well as a number of important treaties to which the United States is a party including the Geneva Conventions. Where it applies, during "internal" armed conflicts, Common Article 3 provides certain minimal humanitarian requirements designed for the context of a civil war.

Through some very fast judicial footwork transforming the international conflict between the United States and al Qaeda into an internal conflict in Afghanistan the Supreme Court concluded that Common Article 3 applied in *Hamdan* as part of the "law of war" referenced in section 821.

The practical result, however, is minimal. Most if not all of Common Article 3 is
entirely consistent with what has been Bush administration policy. Most importantly, the provision requires that detainees must be treated humanely (a point the president has consistently stressed) and that they can be criminally punished only after "judgment pronounced by a regularly constituted court." Because another UCMJ section (1836) requires that military commissions generally follow the same rules as regular courts martial, and because the government failed to justify departures from this, the court ruled that these military commissions were not "regularly constituted." This was the technical, and narrow, basis of the court's decision; the critics' claims that the court has held the Geneva Conventions apply to the war on terror are just wrong.

Moreover, the Supreme Court did not suggest nor could it have suggested that Congress was bound by the court's interpretation of Common Article 3, or any other part of the Geneva Conventions, in future military commission legislation. That interpretation is the law of the Hamdan case and must be followed as precedent by lower courts facing similar factual situations. However, the political branches are constitutionally entitled to determine the meaning of treaties as they relate to the international legal obligations of the United States.

In the first instance, the president (as in the Supreme Court's own words, the "sole organ" of American foreign-policy) is entitled to interpret treaties to which the United States is a party. In addition, Congress is constitutionally entitled to legislate in ways that are inconsistent with the Supreme Court's view of any particular treaty (or, for that matter, with the president's view), and the court must apply the later enactment as binding. That is textbook constitutional law.

Therefore, the Supreme Court has not required that the Geneva Conventions be applied in the war on terror; neither members of al Qaeda nor their allies, including members of the Taliban, must be granted POW status because of the Hamdan decision. Even more importantly, Congress is not required to adopt the court's view of Common Article 3 in its consideration and enactment of new legislation on military commissions. That legislation should, of course, be consistent with U.S. international obligations but only as interpreted by the president and Congress in their respective constitutional roles.
The Bush administration likely will have to extend rights to terrorism suspects at the U.S. military prison at Guantanamo Bay, Cuba, that it has denied for years, after the Supreme Court invalidated the government's system of military trials and ruled that the detainees must be treated according to international standards, officials and experts said yesterday.

Senior administration officials acknowledged that the ruling scuttles their plans to put as many as 80 detainees through administration-created "military commissions"—with extremely limited rights—and said it is unclear how they will respond. The 5 to 3 ruling in Hamdan v. Rumsfeld sent officials scrambling to evaluate options for the 450 detainees at Guantanamo Bay, some of whom have been held for more than four years without trial.

The choices, experts and government officials said yesterday, largely include putting suspects through time-tested military courts-martial, charging them in U.S. criminal courts or working with Congress to develop new rules to comply with the court's decision.

The administration could also ask foreign governments to try the more than 150 prisoners it considers hard-core terrorism suspects. The rest are likely to be returned to their home countries for further detention or release.

But if the United States decides it wants to hold the trials, detainees probably would gain more access to the evidence against them and the right to be present for much or all of the proceedings—both of which were denied in some circumstances under the military commission rules, the experts and officials said.

The court did not rule on whether Guantanamo Bay should be closed, and its action does not affect operations at the facility. Military officials said yesterday that scheduled military commission hearings for 10 suspects have been suspended.

Retired Army Gen. Barry R. McCaffrey, a professor of international affairs at the U.S. Military Academy who visited Guantanamo Bay last week, said the military commissions were destined to fail. He said the government should have used courts-martial and the Uniform Code of Military Justice (UCMJ), which grants defendants more rights.

"We put ourselves in an unnecessary legal mess from the beginning, and now we've gotten ourselves in such a mess legally and politically, there's no easy solution," McCaffrey said yesterday. "The UCMJ is the only way to go forward."

Senior members of the Senate Armed Services Committee yesterday vowed to quickly develop legislation to govern military trials for terrorism suspects,
announcing just hours after the court's ruling their intent to hold hearings and develop law by September. Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, said he plans to reintroduce legislation next month that would authorize military commissions.

Sen. Lindsey O. Graham (R-S.C.) said he also plans legislation. "We are stronger as a nation when all three branches buy into the legal framework," he said.

Graham said it would be "chaos" to try such detainee cases in criminal courts, arguing that the Sept. 11, 2001, attacks should be treated as acts of war and not crimes to be prosecuted in civilian courts.

Senior administration officials, requesting anonymity during a teleconference call with reporters, said they plan to work with Congress but are not ruling out anything. "There's no particular direction that we're heading in right now except to review the decision and consider all options that would be available to us and Congress," one official said.

Several officials said the U.S. courts are too limiting, in part because the strict rules of evidence could cause problems in cases in which suspects were arrested by a foreign government, held for years and transferred without critical evidence—and whose trials would require the presence of witnesses who are difficult, if not impossible, to locate.

Many experts and human rights groups favored the use of the UCMJ, which they described as transparent and fair.

"You could pass legislation that authorizes military commissions that look essentially like military courts-martial and that would be consistent with the decision, but why do that when we already have courts-martial that are consistent with the decision?" asked Tom Malinowski, Washington advocacy director for Human Rights Watch.

Rights groups hailed the decision as a major victory for the rule of law in America. The ruling appeared to grant detainees certain protections under the Geneva Conventions Common Article 3, which could require the U.S. government to treat all detainees in the war on terrorism—whether they are held in the United States or abroad, or in secret facilities operated by the CIA—according to international standards.

"Just because you're a president at war doesn't mean the law ceases to exist," said Jumana Musa, a lawyer at Amnesty International. "The best-case scenario now is that they charge the detainees under an established system of law. If they're not going to charge them, they need to release them."

Unlike evidence in most criminal or military court proceedings, the bulk of the government's evidence against suspected terrorists at Guantanamo Bay can be circumstantial and classified. The cases against many Guantanamo Bay detainees may rest on statements gleaned from interrogations of prisoners throughout the world, as well as from intelligence collected by the CIA and others.

Safeguarding such information is a principal concern of the U.S. government. "In most situations, that's always going to be the overriding concern," said Robert McNamara, a CIA general counsel until
2001. "You shouldn't have to decide to let someone go to protect sources and methods."

The State Department has sought to transfer all but the most dangerous detainees to their countries of origin. But this has proved problematic for several reasons, said Pierre Prosper, the State Department's former ambassador at large for war crimes, who spent most of his tenure traveling the globe to work out such transfers.

"Some countries had reservations about inheriting the security risk that the detainees posed," Prosper said. Others did not have the secure prisons and professional guards necessary to assure U.S. authorities that they would remain in custody.

In other cases, particularly in Europe, it would be illegal to hold detainees transferred from Guantanamo Bay unless they could be charged with a specific crime. In some cases, the U.S. military is unwilling to give European authorities the classified evidence they would need.

John B. Bellinger III, legal adviser to Secretary of State Condoleezza Rice, said this week that relocation efforts continue, especially for about 300 detainees from Afghanistan, Saudi Arabia and Yemen, who make up about two-thirds of Guantanamo Bay's population.

"We want to get out of the Guantanamo business if we can," Bellinger said.
The Supreme Court decision striking down the use of military commissions to bring terrorism detainees to trial has set off sharp differences among Republicans in Congress over what kind of rights detainees should be granted and how much deference should be shown the president in deciding the issue.

The debate is expected to consume the rest of the summer in Congress as lawmakers head into an election season expected to be dominated by issues of national security. The issue reflects the difficult legal, diplomatic and political choices the government faces in dealing with terrorism suspects.

The divisions do not fall strictly along traditional partisan lines and are as much within the parties as between them, particularly for Republicans. On one side of the debate are Republicans who believe Congress should give the president the authority to set up the kind of military commissions that were struck down by the court. Such commissions would sharply curtail defendants' rights.

On the other side are those who say the trials should be modeled on the military system of courts-martial, an approach that would give detainees more due-process rights than would the commissions. In between, many Republicans and Democrats alike argue for starting with the military judicial system and tweaking it to reflect the differences of trying terrorism suspects.

The debate will play out in a series of Congressional hearings quickly scheduled for this week, as lawmakers return to Washington after their weeklong Fourth of July recess.

Aides to President Bush said they had not yet reached any conclusions about what legislation should look like. Dan Bartlett, counselor to Mr. Bush, said lawyers for the White House, State Department and Justice Department were still reviewing the court's decision in the case, *Hamdan v. Rumsfeld*.

Senator Lindsey Graham, Republican of South Carolina, who is expected to take a leading role on the issue as a member of the Armed Services Committee, argued that the administration's version of the military commissions had to be "reined in" to make clear, for instance, that evidence gathered by coercive interrogation techniques could not be introduced as evidence.

"I'm trying to get my colleagues to think about the international community's reception to what we do," said Mr. Graham, a former military lawyer. "We've got a chance to improve our image."

In its decision, the Supreme Court said, on a 5-to-3 vote, that the planned commissions were unauthorized by federal statute and violated international law.

Administration officials, who have been consulting with Mr. Graham, are looking to him to play a central part in drafting
legislation. Senators John W. Warner of Virginia, who is chairman of the Armed Services Committee, and John McCain of Arizona also are expected to be at the forefront for the Republicans, while Senator Carl Levin of Michigan is quite likely to emerge as a point man for the Democrats.

On the Judiciary Committee, Senator Arlen Specter of Pennsylvania, the Republican chairman, and Senator Patrick J. Leahy, the committee's ranking Democrat, who first proposed Congressional action on military tribunals in 2001, are also expected to play central roles.

The Supreme Court decision left lawmakers with the challenge of resolving a complicated legal issue under the pressure of a heated election season and a limited amount of time left on their calendar.

While both parties are united in saying they want to act quickly, they face fights over what form of trial to use and whether the protections of the Geneva Conventions apply to terrorism suspects.

In hearings on Capitol Hill this week, the House Armed Services Committee will take testimony from lawyers, including several sympathetic to the administration. Two Senate committees, Judiciary and Armed Services, will take testimony from constitutional lawyers and top military lawyers, who some Republican senators believe were ignored in the White House discussions that led to the establishment of commissions. The only administration officials scheduled to testify are lawyers from the Justice Department and the Pentagon.

While Republicans are divided on central issues, Democrats have their own challenge. They see the court's decision as a rare rebuke to Mr. Bush, and they hope to turn the debate into a broader one over presidential power. But they said they also recognized that they must cooperate on legislation or risk being portrayed as weak on terrorism.

Some Republicans and many Democrats say that the administration may have hurt itself by rebuffing efforts as early as 2001 by Republicans and Democrats in the Senate to set up some kind of military commission. "Congress is going to want to be a full partner, and not a rubber stamp for this process," said Senator John Cornyn, Republican of Texas and a close ally of the White House.

The central question is what kind of forum to set up. Commissions allow the government wide berth in introducing evidence, including hearsay, which is banned in military courts, and restrict the rights of the accused to be present in the court and to see the evidence against them. Military courts-martial, while not as strict as civilian courts, restrict the kind of evidence that can be introduced and allow the accused to interview witnesses and see even classified evidence.

The White House has long resisted anything like courts-martial, saying they could require the government to choose between dropping the charges and disclosing more than it wants to about the sources and nature of the intelligence used to develop a case against the detainees.

Senator Warner, who will direct the hearings as chairman of the Armed Services Committee, said he wanted a system that
relied "as much as possible" on the Uniform Code of Military Justice, which the court decision said governed the treatment of detainees.

Many lawmakers said they supported an approach based on some tweaking of the military system. Senators Graham and Specter, along with Representative Duncan Hunter, Republican of California and the chairman of the House Armed Services Committee, advocate allowing hearsay, as well as a procedure to deal with classified evidence. The rules would be looser than in a court-martial but stricter than in a commission.

"We have to have a system that operates in the war on terror and one that doesn't tie us into knots trying to prosecute the people who have killed Americans in large numbers," Mr. Hunter said.

John C. Yoo, a professor of law at the University of California, Berkeley, who worked on orders expanding presidential power in the treatment of detainees as a former lawyer for the Justice Department, said, "The debate that people are having is whether it's going to be a short bill that just overrules Hamdan completely, which you could do in one sentence, or whether it's going to be a much more comprehensive law that tries to set out essentially a code of procedure for the military commission."

But any effort simply to codify the president's order establishing commissions would be fiercely resisted by influential Democrats.

"The Supreme Court said the president cannot continue to break the law," said Mr. Leahy, the Vermont Democrat. "The worst thing to do would be to simply paper that over and say we'll make it possible for him to break the law."

An effort by Mr. Leahy in 2001 to introduce legislation establishing tribunals was rebuffed by the White House. "They said no, they knew what they were doing, they would do it alone," Mr. Leahy said. "What's happened? Five years, there have been no trials, no convictions, nothing has happened, we've had our reputation severely hurt throughout the rest of the world."

Mr. Graham similarly called it "a mistake" to give Congressional blessing to the military commissions as envisioned in Mr. Bush's presidential order. "We have a chance to start over," he said.

Another central question is whether the Geneva Conventions extend to accused terrorists. Mr. Graham and Mr. Cornyn say no, and Mr. Graham wants Congress to pass legislation overturning the court's finding that Common Article 3 of the conventions applies to detainees. The article's provisions outlawing degrading treatments, he believes, could mean that American soldiers would be subject to prosecution in the war on terror.

But Mr. Cornyn, a former judge, said that the reference to Article 3 meant simply that any court must be established within the military justice system.

"Congress should not, and the court did not hold that, they are entitled to the whole panoply of rights that the prisoner of war would be entitled to under circumstances where the Geneva Conventions apply," Mr. Cornyn said.

Other Republicans, though, fear that any
system that does not pay heed to the court's mentioning of the Geneva Conventions risks being rejected by the court again.

"We've got to structure this law in such a way that if it ever came back up through the Supreme Court, it will not be struck down," Mr. Warner said. "It's important for the credibility of the United States to put this issue at rest and let the world realize we're affording them the protections as the Supreme Court outlined."

Democrats will argue that harsh conditions at Guantanamo have made the prison a rallying cry for new terrorist recruits.

"The issue we believe is most prescient is not the balance between security and liberty, where on issues like this the parties are relatively close, but on competence," said Senator Charles E. Schumer, Democrat of New York. "They just don't do it right, wherever they go. By their stubbornness and refusal to work with Congress, they've made us worse off in Guantanamo today."

Congress has rearranged its schedule to debate the issue this month, and those leading the debate say that they want to vote on new legislation, if any is needed, by September.
"Scholars Agree That Congress Could Reject Conventions, but Not That It Should"

The New York Times  
July 15, 2006  
Adam Liptak

The Supreme Court's decision last month striking down the administration's plans to try detainees held at Guantanamo Bay, Cuba, was widely hailed as a sweeping triumph for judicial supremacy, individual liberty and international law. In its most striking holding, the court said that a provision of the Geneva Conventions concerning the humane treatment of prisoners applied to all aspects of the conflict with Al Qaeda.

But the decision included an escape clause. "Nothing prevents the president from returning to Congress to seek the authority he believes necessary," Justice Stephen G. Breyer wrote in a concurrence joined by three other justices.

And indeed, administration lawyers are now asking Congress not only to resurrect the trial procedures struck down by the court but also to address the prohibitions in Common Article 3 of the conventions, which bar, among other things, "outrages upon personal dignity, in particular, humiliating and degrading treatment."

Legal scholars, including many who say that overriding the Geneva Conventions would be a terrible idea, agree that Congress has the power to do so.

"Congress could come back and write that blank check," said Peter J. Spiro, a law professor at Temple University.

Martin S. Lederman, a former Justice Department official now at the Georgetown University law school, agreed. "As a matter of domestic law, Congress can pass a statute authorizing what treaties forbid."

The general rule is that a treaty is a law like any other, meaning a later law can override it. "The last-enacted piece of legislation is effective," said Scott L. Silliman, a former military lawyer and the executive director of the Center on Law, Ethics and National Security at Duke University. "Can Congress legally restrict the application of the Geneva Conventions? Yes, it can."

Such a move, however, would be groundbreaking, given the status of the Geneva Conventions in international law and in the popular imagination.

"This is the most exalted humanitarian law treaty enacted in the 20th century," said Derek P. Jinks, a law professor at the University of Texas and the author of "The Rules of War: The Geneva Conventions in the Age of Terror."

To be sure, many nations have violated the conventions in practice. But apparently no national legislature has ever taken the step of specifically overriding them.

"The fact that no other country has done it is a sign that this would be a momentous and potentially catastrophic step," said Harold Hongju Koh, who served in the State Department in the
Clinton administration and is dean of Yale Law School. "Do we want to encourage the parliaments of every country in the world that wants to abuse, humiliate and torture our soldiers to reinterpret the Geneva Conventions?"

But that is a point about prudence, not power.

"The issue is not whether they could do it," Dean Koh said. "The question is how much damage we would do to the fabric of the law. It would put us on the wrong side of history."

There is one significant but largely symbolic caveat: any domestic legislation overriding the conventions and the conduct it authorized could still violate international law. But international law is an amorphous concept with few enforcement mechanisms.

Nonetheless, many experts say, the political and practical consequences of rejecting the conventions could provoke a powerful anti-American backlash. "We would be saying to the international community, whose cooperation we desperately need, particularly in intelligence gathering, that we claim to be a nation of laws but are not," Professor Silliman said.

Whatever the wisdom of overriding the conventions, the legislative work to disentangle it from the nation's laws would be substantial. For instance, one federal law makes it a war crime to violate Common Article 3. If Congress overrode aspects of the article, it would presumably also need to amend the war crimes law.

Among the questions left open by the Supreme Court's decision, Hamdan v. Rumsfeld, is whether people detained at Guantanamo and elsewhere can sue over violations of Common Article 3 and whether officials who violate it can be subject to prosecution.

Looking forward, scholars differed on the question of whether Congress would be free to offer its own interpretation of Common Article 3, for example determining that the article allows the conditions that have existed at Guantanamo, or whether it must pass legislation rejecting it outright.

It is certainly true that the language of the article is mostly general and open-textured. It prohibits, in addition to assaults on personal dignity, trials without the legal rights "recognized as indispensable by civilized peoples."

But there are bodies of authority, including domestic military law, international treaties that use similar language and decisions of international tribunals, that have helped establish a common understanding of the precise meaning of the article. While a good-faith debate, in Congress and elsewhere, about the meaning of some of the phrases should be welcomed, Professor Jinks said, the language can be stretched only so far.

"It's going to be very difficult for the administration to demonstrate," he said by way of example, "that any of the so-called enhanced interrogation techniques are consistent with Common Article 3." Among the techniques used at Guantanamo were extreme temperatures, sleep deprivation, blaring music and sexual humiliation.
The administration contends that with the exceptions of the procedures it planned to use to try detainees suspected of terrorism, it has been in compliance with Common Article 3 even in the years it said it was not bound by it.

Professor Jinks said there was an argument to be made for even an implausible Congressional interpretation of Common Article 3 if the alternative was outright repudiation, if only because the rest of the world might view that as slightly less provocative.

"Out-and-out defiance of the treaty is a deeply damaging act," Professor Jinks said. "The question is how much trouble we want to make for ourselves: a lot of trouble, or more trouble than we could possibly imagine."
A day after saying that terror suspects had a right to protections under the Geneva Conventions, the Bush administration said Wednesday that it wanted Congress to pass legislation that would limit the rights granted to detainees.

The earlier statement had been widely interpreted as a retreat, but testimony to Congress by administration lawyers on Wednesday made clear that the picture was more complicated.

The administration has now abandoned its four-year-old claim that members of Al Qaeda are not protected under the Geneva Conventions, acknowledging that a Supreme Court ruling two weeks ago established as a matter of law that they are. Still, administration lawyers urged Congress to pass legislation that would narrowly define the rights granted to detainees under a provision of the Geneva Conventions known as Common Article Three, which guarantees legal rights "recognized as indispensable by civilized peoples."

But some leading senators said they believed that the White House stance might still be evolving, despite the public pronouncements by the lawyers who appeared before Congress. In particular, they thought the White House might be open to a solution that would abandon the tribunal approach in favor of one that would modify court-martial procedures to reflect the realities of putting terror suspects on trial.

"I wouldn't say that that testimony would set the final parameters of where the administration will go on this," said Senator John Warner of Virginia, the chairman of the Armed Services Committee.

As President Bush headed to Europe on Wednesday, his spokesman, Tony Snow, said, "The White House is now working with Congress to try to come up with a means of providing justice for detainees at Guantanamo in a manner that's consistent with the Supreme Court's ruling" in the case, Hamdan v. Rumsfeld.

In addition to guaranteeing legal rights, Common Article Three prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." In testimony, administration lawyers said that the article was too vague, and that because
failure to comply with Common Article Three was a violation of the War Crimes Act, applying the article to detainees could lead to American troops being charged with felony crimes for interrogation tactics that might be argued to be too harsh.

"Congress needs to do something to bring clarity and certainty to Common Article Three," Steven G. Bradbury, an acting assistant attorney general, told the House Armed Services Committee on Wednesday.

Administration lawyers argued that the White House's statement Tuesday night was not a shift, but an announcement and an interpretation of the court's decision. In an interview, Senator Lindsey Graham, Republican of South Carolina, said he agreed.

"I think what they're saying is, Until we get further direction we're going to do the following," Mr. Graham said. "That doesn't preclude them or us from giving definition."

The outcome of the debate could affect detainees around the world. The Pentagon holds about 1,000 Qaeda and Taliban detainees at Guantanamo and at bases in Afghanistan. An estimated three dozen terror suspects are believed to be held by the C.I.A. at secret sites abroad.

In a week of hearings on Capitol Hill, administration lawyers have argued that the best way to bring detainees to trial after the court's ruling would be for Congress to ratify the military commissions the court struck down, with what Daniel J. Dell'Orto, a Pentagon deputy general counsel, described as "minor tweaking."

But several scholars and military lawyers have said that the best way to meet the court's requirements on providing legal and human rights to detainees would be to start with the court-martial procedure set up in the Uniform Code of Military Justice and modify that.

Several lawmakers have said that only a solution that extended Geneva protections to detainees would survive another court challenge.

"It's got to be dealt with so that we do not face a future court challenge, and also so that the international community recognizes our credibility in dealing with these things," said Senator Warner, whose Armed Services Committee will hold hearings on the issue on Thursday.

Military lawyers, human rights groups and some lawmakers have warned that an effort by Congress to limit the rights granted to terror suspects under the Geneva Conventions would blacken the United States' reputation internationally, by effectively announcing to the world that it was reneging on a fundamental and commonly held notion of human rights.

"We should embrace Common Article Three and sing its praises from the rooftops," Rear Adm. John D. Hutson, a former judge advocate general of the Navy who is retired, told the Armed Services Committee. "To avoid it or try to draft our way out of it is unbecoming the United States."

But administration lawyers argue that the vagueness of the language in the provision—including the right to "judicial guarantees which are recognized as indispensable by civilized peoples"—opened the way to problems.

"We just think as you approach these issues, you should give definition and certainty to these issues," Mr. Bradbury told the Senate
Judiciary Committee on Wednesday.

Even some Republicans who are fighting the administration's approach on establishing trials for the terror suspects agree on the need to limit the application of Article Three.

Senator Graham, who pointedly warned administration lawyers that the president would not win by fighting for his approach on trials, said in interviews that Common Article Three must be "reined in." He said it would make death penalty crimes of current interrogation techniques, including keeping detainees awake and forcing them to sit in extremely hot or cold cells—methods he referred to as "things that are not torture but are aggressive."

"What we need to do is take the ruling of Hamdan and define it so that people will not be unfairly prosecuted because they didn't know what was in bounds or not," Mr. Graham said.

Mr. Graham said defining Article Three would be "the hardest part" of the debate on how to bring detainees to trial. He suggested that Congress could limit it in a way that resembled the language of the measure setting standards for the treatment of detainees that was written by Senator John McCain, Republican of Arizona, and signed into law last year.

"It says that every detainee will be treated humanely and that cruel, inhumane treatment will not be allowed against detainees," Mr. Graham said. "Common Article Three with its language goes well beyond the McCain standard."

Mr. Bradbury and Mr. Dell'Orto, too, expressed a preference for Mr. McCain's language.

Legal experts agree that the White House's announcement that it would give Article Three rights to detainees puts future cases of detainee abuse, like those at the Abu Ghraib prison in Iraq in 2004, into the category of war crimes. It raises the stakes, they said, for how American troops treat detainees in military custody.

"This isn't a 'trust me' kind of undertaking anymore," said Diane Orentlicher, a professor of law at American University in Washington. "It's now a legal obligation."
Legislation drafted by the Bush administration setting out new rules on bringing terror detainees to trial would allow hearsay evidence to be introduced unless it was deemed “unreliable” and would permit defendants to be excluded from their own trials if necessary to protect national security, according to a copy of the proposal.

The bill, which officials said was being circulated within the administration, is not final, but it indicates the direction of the administration’s approach for dealing with a Supreme Court decision that struck down the tribunals established to try terror suspects at Guantánamo Bay, Cuba.

The 32-page bill preserves the idea of using military commissions to prosecute terror suspects and makes modest changes in their procedural rules, including several expanded protections for defendants, many of them drawn from the military’s legal code. But the proposal also sets up a possible confrontation with lawmakers who have called for modeling the trials on the military’s rules for courts-martial, which would allow defendants more rights.

The draft measure describes court-martial procedure as “not practicable in trying enemy combatants” because doing so would “require the government to share classified information” and would exclude “hearsay evidence determined to be probative and reliable.”

President Bush reviewed the bill last week in a meeting with his top advisers, according to a senior White House official, who said the advisers told Mr. Bush that they were comfortable with the bill and were ready to present it to military lawyers. When the legislation is in its final form, the administration will have to ask a member of Congress to introduce it.

The White House would not comment on the specifics of the bill.

“We are in the middle of a process of getting reaction from the various stakeholders, and that is why we circulated a draft,” said Dana Perino, a deputy White House press secretary. “We are working to strike a balance of a fair system of justice that deals with terrorists who don’t recognize the rules of war.”

But one former White House official, granted anonymity to discuss internal deliberations, said the administration was circulating the measure among military lawyers at the Pentagon with the intention of winning over Republican senators who have led the calls for using court-martial procedures, including Senator Lindsey Graham of South Carolina, a former military lawyer.

A copy of the draft legislation was provided to The New York Times by an official at an agency that is reviewing it. The copy was labeled “for discussion purposes only, deliberative draft, close hold,” and the official who shared it did so on condition of anonymity. The official did not express an
Mr. Graham described the legislation, which he reviewed briefly last week in a meeting with administration officials, as “a good start,” but added, “I have some concerns.” He would not be specific, saying he wanted to withhold judgment until hearing the views of military lawyers.

Mr. Graham praised the administration for engaging in “a collaborative process” and said the measure incorporated some of his suggestions, including the requirement that a military judge be detailed to each commission.

A senior Congressional aide said Senator John McCain, Republican of Arizona, by contrast, is believed to be more adamant that using the existing commissions with modest changes will not suffice, largely because of the danger that American troops could face similar treatment if captured abroad.

Though House Republicans are considered more supportive of the administration’s plan, it could have difficulty passing the Senate without additional changes, said Eugene R. Fidell, the president of the National Institute of Military Justice.

“I believe the sentiment on the Hill is for a much more nuanced approach that tracks much more closely with the procedures used for general courts-martial,” Mr. Fidell said. He called the administration plan “a missed opportunity.”

Rather than requiring a speedy trial for enemy combatants, the draft proposal says they “may be tried and punished at any time without limitations.” Defendants could be held until hostilities are completed, even if found not guilty by a commission.

Nor does the bill adhere to the military’s rules for the admissibility of evidence and witnesses at trial statements because “the United States cannot safely require members of the armed forces to gather evidence on the battlefield as though they were police officers,” the proposal says.

The draft bill specifies that no matter how it is gathered, evidence “shall be admissible if the military judge” determines it has “probative value.” Hearsay statements, meaning something a witness has heard but does not know to be true, would be allowed “at the discretion of the judge unless the circumstances render it unreliable or lacking in probative value.”

The bill would also bar “statements obtained by the use of torture” from being introduced as evidence, but evidence obtained during interrogations where coercion was used would be admissible unless a military judge found it “unreliable.”

The provision allowing defendants to be excluded from a trial to prevent them from hearing classified evidence against them is likely to be among the more controversial aspects of the administration’s plan. The bill notes that “members of Al Qaeda cannot be trusted with our nation’s secrets.” But the bill specifies that the “exclusion of the accused shall be no broader than necessary” and requires that a declassified summary of the information be given to defendants.

One of the most difficult issues the administration faces is whether a provision of the Geneva Conventions, known as Common Article Three, applies to detainees; the Supreme Court ruled that it did. The measure says explicitly that the Geneva Conventions “are not a source of judicially enforceable individual rights,” meaning that
in the future, terror suspects like Salim Ahmed Hamdan, a Yemeni held at Guantánamo whose case resulted in the Supreme Court ruling, cannot file lawsuits saying their Geneva Convention rights were violated.

“This draft shows that the executive branch doesn’t think the Supreme Court got the questions on the Geneva Conventions right in Hamdan,” said John C. Yoo, a law professor at the University of California, Berkeley, who as a Justice Department lawyer helped draft the president’s original order establishing the military commissions.

Officials said the bill was drafted by Steven G. Bradbury, acting assistant attorney general. On Tuesday, Attorney General Alberto R. Gonzales met with Senator John W. Warner of Virginia, the Republican chairman of the Armed Services Committee, about the administration’s proposal. Mr. Gonzalez later went to the Pentagon to brief senior civilian and military officials, including the judge advocates general from each of the services, a Pentagon official said.

Getting the support of uniformed Pentagon lawyers could prove critical to the fate of the measure. At a hearing before the Senate Armed Services Committee earlier this month, each of the judge advocates general said that, like some lawmakers, they preferred a system for trying detainees that relied on the Uniform Code of Military Justice, which governs court-martial proceedings for United States service personnel.

That was at odds with testimony from civilian lawyers from the Departments of Defense and Justice, who had said that they believed the military code was inappropriate for prosecuting terror suspects and recommended that Congress retain the administration’s military commission system. Pentagon officials said they were still open to suggested changes from the military lawyers.

Eric Ruff, the Pentagon spokesman, said Defense Secretary Donald H. Rumsfeld “is asking that draft legislation be reviewed by everyone from a legal as well as policy perspective, and he would like them to provide feedback on what the effects might be on the ability of our military to carry out its various missions.”
A federal judge ruled yesterday that the National Security Agency's program to wiretap the international communications of some Americans without a court warrant violated the Constitution, and she ordered it shut down.

The ruling was the first judicial assessment of the Bush administration's arguments in defense of the surveillance program, which has provoked fierce legal and political debate since it was disclosed last December. But the issue is far from settled, with the Justice Department filing an immediate appeal and succeeding in allowing the wiretapping to continue for the time being.

In a sweeping decision that drew on history, the constitutional separation of powers and the Bill of Rights, Judge Anna Diggs Taylor of United States District Court in Detroit rejected almost every administration argument.

Judge Taylor ruled that the program violated both the Fourth Amendment and a 1978 law that requires warrants from a secret court for intelligence wiretaps involving people in the United States. She rejected the administration's repeated assertions that a 2001 Congressional authorization and the president's constitutional authority allowed the program.

"It was never the intent of the framers to give the president such unfettered control, particularly when his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights," she wrote. "The three separate branches of government were developed as a check and balance for one another."

Republicans said the decision was the work of a liberal judge advancing a partisan agenda. Judge Taylor, 73, worked in the civil rights movement, supported Jimmy Carter's presidential campaign and was appointed to the bench by him in 1979. She was the first black woman to serve on the Detroit federal trial court.

She has ruled for the A.C.L.U. in a lawsuit challenging religious displays on municipal property. But she has also struck down a Detroit ordinance favoring minority contractors. "Her reputation is for being a real by-the-books judge," said Evan H. Caminker, the dean of the University of Michigan Law School.

The government said it would ask Judge Taylor to stay her order at a hearing on Sept. 7.

The Justice Department and the American Civil Liberties Union — which brought the case in Detroit on behalf of a group of lawyers, scholars, journalists and others — agreed that her order would not be enforced until then, but lawyers for the A.C.L.U. said they would oppose any further stay.
Administration officials made it clear that they would fight to have the ruling overturned because, they said, it would weaken the country's defenses if allowed to stand.

Attorney General Alberto R. Gonzales, at a hastily called news conference after the decision, said he was both surprised and disappointed by the ruling on the operation, which focuses on communications of people suspected of ties to Al Qaeda.

Administration officials "believe very strongly that the program is lawful," said Mr. Gonzales, a main architect of the program as White House counsel and the biggest defender of its legality in a series of public pronouncements that began after the program was disclosed by The New York Times last December.

"We're going to do everything we can do in the courts to allow this program to continue," he said, because it "has been effective in protecting America."

Tony Snow, the White House spokesman, also described the surveillance program as a vital and lawful tool. "The whole point is to detect and prevent terrorist attacks before they can be carried out," Mr. Snow said. "The terrorist surveillance program is firmly grounded in law and regularly reviewed to make sure steps are taken to protect civil liberties."

Democrats applauded the ruling as an important affirmation of the rule of law, while lawyers for the A.C.L.U. said Judge Taylor's decision was a sequel to the Supreme Court's decision in June in Hamdan v. Rumsfeld that struck down the administration's plans to try detainees held in Guantánamo Bay, Cuba, for war crimes.

"It's another nail in the coffin of executive unilateralism," said Jameel Jaffer, an A.C.L.U. lawyer.

But allies of the administration called the decision legally questionable and politically motivated.

"It is an appallingly bad opinion, bad from both a philosophical and technical perspective, manifesting strong bias," said David B. Rivkin, an official in the administrations of President Ronald Reagan and the first President Bush. "It is guaranteed to be overturned."

Mr. Gonzales would not say whether the program played any role in foiling a plot last week to set off bombs in airliners bound for the United States from Britain. But Speaker J. Dennis Hastert, Republican of Illinois, suggested that it did play a role in the investigation.

In a written statement criticizing Judge Taylor's ruling, Mr. Hastert defended the wiretapping operation and said that "our terrorist surveillance programs are critical to fighting the war on terror and saved the day by foiling the London terror plot."

His office declined to elaborate.

Mr. Gonzales said he expected that the ruling would play a role in the debate in Congress over how and whether to change federal eavesdropping laws. But he said the exact impact was "hard to predict."

Among competing proposals, Republican leaders have proposed legislation that would specifically permit the wiretapping program. Some Democrats, however, have introduced legislation that would restrict, or in some cases ban altogether, the government from
conducting wiretaps on Americans without a warrant.

The White House is backing a plan, drafted by Senator Arlen Specter, Republican of Pennsylvania, with the blessing of President Bush, that would allow a secret court to review the legality of the operation.

But in the view of critics, it could also broaden the president’s authority to conduct such operations. Mr. Gonzales said it appeared to administration lawyers that the Specter legislation, if passed by Congress, “would address some of the concerns raised by the judge in her opinion.”

Another element of the Specter legislation would force other lawsuits over the program — like the one brought by the A.C.L.U. in Detroit — to be consolidated into a single action to be heard by the secret court.

Judge Taylor rejected the government’s threshold argument that she should not hear the case at all because it concerned state secrets. Dismissal on those grounds was not required, she wrote, because the central facts in the case — the existence of the program, the lack of warrants and the focus on communications in which one party is in the United States — have been acknowledged by the government.

The government also argued that the plaintiffs lacked standing to sue because they had not suffered concrete harm from the program. Judge Taylor ruled that the plaintiffs “are stifled in their ability to vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney plaintiffs, uphold their oath of providing effective and ethical representation of their clients.”

Some plaintiffs, the judge wrote, have had to incur travel expenses to visit clients and others to avoid possible monitoring of their communications.

Going beyond the arguments offered against the wiretapping program by many legal scholars, Judge Taylor ruled that it violated not only the 1978 law, the Foreign Intelligence Surveillance Act, but also the Fourth Amendment, which prohibits unreasonable searches and seizures.

The Supreme Court has never addressed the question of whether electronic surveillance of partly domestic communication violates the Fourth Amendment. Judge Taylor concluded that the wiretapping program is “obviously in violation of the Fourth Amendment.”

The president also violated the Constitution’s separation of powers doctrines, Judge Taylor ruled. Neither a September 2001 Congressional authorization to use military force against Al Qaeda nor the president’s inherent constitutional powers allow him to violate the 1978 law or the Fourth Amendment, she said.

“There are no hereditary kings in America and no powers not created by the Constitution,” she wrote, rejecting what she called the administration’s assertion that the president “has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution itself.”

Republicans attacked the decision. “It is disappointing that a judge would take it upon herself to disarm America during a time of war,” said Representative Peter Hoekstra, Republican of Michigan, the
chairman of the House Intelligence Committee.

Judge Taylor did give the government a minor victory, rejecting on national security grounds a challenge to a separate surveillance program involving data mining. That ruling is consistent with recent decisions of federal courts in San Francisco and Chicago.

Judges in those cases drew a distinction between the wiretapping program, which the administration has acknowledged and defended, and the data mining program, which has not been officially confirmed.
Today's Supreme Court ruling in *Hamdan v. Rumsfeld* represents a major defeat for the Bush administration when it comes to trying detainees at Guantánamo Bay. But could it mean something more? We can't claim to speak with authority just yet about the 180 pages of opinion the court issued this morning, but there are a couple of intriguing possibilities here.

Warrantless wiretaps: As Think Progress argues, the *Hamdan* decision could offer a glimpse of how the Supreme Court would view the Bush administration's warrantless wiretapping program. In today's decision, five justices—Kennedy, Stevens, Souter, Breyer and Ginsburg—reject the Bush administration's argument that the power to try detainees by military tribunal was implied in the Authorization for Use of Military Force approved by Congress in the days after 9/11. As Think Progress explains, the Bush administration has advanced exactly the same argument in support of its warrantless wiretapping program. That is, Attorney General Alberto Gonzales and other administration officials have argued that Congress somehow implicitly authorized the warrantless wiretapping of American citizens when it passed the Authorization for Use of Military Force, or AUMF, in 2001.

So if the AUMF didn't implicitly authorize the use of military tribunals at Guantánamo, it probably didn't authorize the warrantless wiretaps either, right? That's how it seems, but readers with a keen memory will recall that in the Hamdi v. Rumsfeld decision in 2004, five justices—O'Connor, Rehnquist, Kennedy, Breyer and, in a separate opinion, Thomas—reached the conclusion that the AUMF did authorize the detention of enemy combatants for the duration of the conflict in which they were captured. Sandra Day O'Connor wrote then that it is "of no moment" that the AUMF says nothing about detaining enemy combatants. "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," O'Connor said, "in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."

Why is the outcome in *Hamdan* different? That's a question for Stephen Breyer and Anthony Kennedy to answer; they thought the AUMF authorized the detention of the enemy combatants in Hamdi, and now they say it doesn't authorize the use of the military tribunals in *Hamdan*. In separate opinions, Breyer and Kennedy do answer the question, more or less. In adopting the Uniform Code of Military Justice, they say, Congress set forth the circumstances under which military tribunals can be used and the procedures they are to follow, and the court shouldn't simply assume that the Congress implicitly repealed those measures when it adopted the AUMF. Congress' enactment on
the detention of U.S. citizens, on the other hand, specifically says that citizens may be detained only "pursuant to an Act of Congress." By the court's way of thinking, the AUMF counted, however implicitly, as the "Act of Congress" necessary to justify detention. The Uniform Code of Military Justice didn't create such an opening.

So what does it mean for warrantless wiretapping? Assuming a legal challenge ever got to the Supreme Court, the outcome could turn on two questions. First, does the Foreign Intelligence Surveillance Act leave open the possibility that another "Act of Congress" might authorize spying without the warrants FISA requires? Although FISA itself says it's the "exclusive means by which electronic surveillance may be conducted," the administration has argued that FISA actually contemplates the possibility that a future act of Congress could expand the president's surveillance authorities. But even assuming the court agreed with that view, it would still have to grapple with the second question: If FISA does contemplate additional, broader authorizations for electronic surveillance, did the AUMF amount to one? To answer that question, the court would have to decide whether spying on American citizens—and, arguably, doing so without a warrant—is such an inherent part of waging war that the power to do so must be read into the AUMF in the same way that the power to detain enemy combatants was.

Mercifully, the *Hamdan* decision offers some easier-to-analyze clues about the interrogation techniques the Bush administration is using in the war on terror.

At SCOTUSblog, Marty Lederman argues that the *Hamdan* decision essentially "resolves the debate" over what interrogation techniques the United States may use against detainees. The attorney general has argued that the war on terror "renders obsolete" the Geneva Conventions' "strict limitations on questioning of enemy prisoners and renders quaint some of its provisions." But a majority of Supreme Court justices seem to view things differently. In a section of his opinion in which four other justices joined, John Paul Stevens says that the Geneva Conventions' Common Article 3 applies to the U.S. conflict with al-Qaida.

In addition to setting forth rules for trying detainees—the question at issue in *Hamdan*—Common Article 3 also provides that detainees shall not be subject to "cruel treatment and torture" or "outrages to personal dignity, in particular humiliating and degrading treatment." Lederman argues that these prohibitions are stronger than those contained in the McCain torture ban the president signed last year. He might also note that the administration has argued that the McCain ban can't be invoked in court with respect to detainees at Guantánamo—an argument that may be moot if the Geneva Contentions' protections apply anyway.
Switching course on one of his most controversial anti-terrorism policies, President Bush agreed yesterday to submit the administration's warrantless surveillance program to a court for constitutional review.

A deal negotiated between the White House and Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) came with conditions. Bush is insisting that Congress first give him new leeway in some areas of surveillance and that all lawsuits challenging his eavesdropping policy be funneled to a Washington-based intelligence court that operates in secret.

Even so, the accord is a reversal of Bush's position that he would not submit his program to court review. The administration has contended that the executive branch already has the wartime authority it needs to order the National Security Agency to monitor e-mails and telephone calls between the United States and foreign countries when at least one party is suspected of terrorist ties.

Specter has disputed that assertion, and many Democrats and civil liberties groups responded with outrage after the surveillance program was disclosed in news accounts last winter.

Bush agreed voluntarily to submit his program to the court named for the 1978 Foreign Intelligence Surveillance Act, or FISA, contingent on Congress passing legislation drafted by Specter and administration lawyers.

The legislation would allow the Justice Department unlimited attempts to revise the program to meet the court's approval and would allow it to appeal adverse court rulings. It would also give the NSA in emergency situations a week rather than the current 72 hours to eavesdrop on a domestic target without requesting a warrant, and it would allow the government to send to the FISA court all lawsuits challenging the program's legality. Some suits, filed by groups such as the American Civil Liberties Union, are already pending in various federal courts.

Consolidating lawsuits under the FISA system, Specter said, would prevent federal courts "all over the country" from issuing contradictory rulings on the NSA program.

Yesterday's agreement is the latest in a series of concessions Bush has made in recent days in his hard-line anti-terrorism tactics. On Tuesday, the administration agreed to apply key provisions of the Geneva Conventions to all terrorism suspects in U.S. custody, bowing to the Supreme Court's rejection of its policies involving the treatment of detainees. That move unleashed a congressional debate, which continued yesterday, on how best to provide legal protections to detainees at Guantanamo Bay and other U.S. prisons without compromising national security.

Specter told reporters that Bush agreed to
the plan's basic outlines before the Supreme Court's decision on detainees was announced.

Although the deal represented a clear retreat by Bush, White House aides traveling with him in Germany put an upbeat face on the move. The president approved it in an Oval Office meeting with Specter on Tuesday.

"The bill recognizes the president's constitutional authority and modernizes FISA to meet the threats we face from an enemy that kills with abandon and hides as they plot attacks," said spokeswoman Dana M. Perino.

But Specter, briefing reporters at the Capitol, said his bill would recognize the president's constitutional powers only in general terms and would make it clear that the administration must defer to judicial restraints. "The proposed legislation acknowledges, as we must, the president's inherent Article II authority," he said. "But when the court makes a decision, the court will make a decision in the traditional context that the president does not have a blank check.

"Unless the court finds it's constitutional," he said of the warrantless wiretap program, "it cannot function."

Specter said it is unclear whether a FISA court decision will be made public.

Several Democrats denounced the proposed legislation. "The Specter bill is an end run around the Foreign Intelligence Surveillance Act and provides the president a blank check to conduct warrantless surveillance of Americans," said Rep. Jane Harman (Calif.), ranking Democrat on the House intelligence committee.

The FISA court is composed of seven federal district judges, who are appointed by the chief justice. Congress established it to authorize secret surveillance of espionage and terrorism suspects within the United States. The 1978 law required the Justice Department to show probable cause for targeting people.

But after the Sept. 11, 2001, attacks, Bush said warrantless wiretaps were justified in the name of national security. For months, Specter has pushed to have the FISA court review the NSA program's constitutionality.

Some civil libertarians think Specter's approach invites FISA to give broad approval to surveillance efforts on an unknown number of Americans, whereas the original law presumed that there would be a case-by-case review of individual situations.

Specter said his intent is to get a "determination on constitutionality of the overall program." He added: "It is suggested, but I do not know, that it is impractical to have individual warrants."

He said the bill would direct the attorney general to tell the FISA court what steps NSA takes to minimize the surveillance program's scope and possible privacy invasions, and to explain "how the program is reasonably designed to ensure that the communications intercepted involve a terrorist, agent of a terrorist, or someone reasonably believed to have communicated or associated with a terrorist."

At the administration's insistence, the bill would impose higher penalties for "officials who knowingly misuse foreign intelligence
Consolidating lawsuits under the FISA system, he said, would prevent federal courts "all over the country" from issuing contradictory rulings on the NSA program.

Specter predicted that Congress will pass his bill, even though its two chambers have clashed over immigration, the USA Patriot Act and other matters. If Congress amends the bill in any way that Bush disapproves, he will not be obligated to submit the wiretap program to the FISA court for review, Specter said.

The Bush-Specter deal was reached after intense negotiations over the past few weeks following a public dustup over the issue between the senator and Vice President Cheney. Bush dispatched aides to Capitol Hill to calm tempers and find a compromise.

The White House balked at an early draft that would have mandated the president submit the NSA program to the FISA court for review. Specter agreed to make it voluntary as long as Bush promised to submit the program if Congress passes the bill. Aides privately acknowledged it was a big concession by a president who until now has resisted judicial interference in how he wages war against terrorists.

The White House conceded in part because it believes the NSA program will survive constitutional muster and the Specter bill will make it easier to argue that the program complies with congressional statutes as well. "We've always said it's constitutional," said one administration official who was not authorized to speak on the record.

The language acknowledging the president's constitutional authority to conduct intelligence operations also was important to the White House. "We see it as historic because here's a statute recognizing an authority the president says he has," the administration official said.

Still, that language alone might mean little because it did not define the scope of the authority or explicitly suggest that a president did not need to seek court approval for warrants. But at the same time, Specter agreed to repeal a section of the original FISA law that made it the exclusive statute governing such intelligence programs.

The combination of the statement acknowledging presidential authority and the deletion of the exclusivity clause left open the interpretation that Bush has the power to conduct other surveillance outside FISA's purview, a possibility administration officials noted with approval.

Sen. Russell Feingold (D-Wis.) criticized the agreement, saying he will oppose "any bill that would grant blanket approval for warrantless surveillance of Americans, particularly when this administration has never explained why it believes that current law allowing surveillance of terrorist suspects is inadequate."

Rep. Edward J. Markey (D-Mass.) said: "While I am pleased that President Bush finally has conceded that the domestic surveillance program should be subjected to FISA court scrutiny, this should not exempt the secret program from thorough congressional scrutiny."
NOW THAT THE SUPREME COURT has ruled against the White House on the military detention of U.S. citizens and the presidential institution of military commissions, the next big legal issue seems to be the National Security Agency's warrantless surveillance of international communications. Sen. Arlen Specter, chairman of the Senate Judiciary Committee, recently had the chance to take decisive action--either for or against the president--when he introduced legislation addressing the once-secret NSA program. But he declined the opportunity in favor of a third course: punting the issue to the courts.

This is hardly uncharted territory for Specter. Throughout his career, he has pledged his devotion to the courts and to court precedent whenever it was politically expedient to do so. But when the politics point the other way, no senator is more vocal in criticizing the judiciary.

NSA SURVEILLANCE OF AMERICANS' INTERNATIONAL communications would normally be subject to the Foreign Intelligence Surveillance Act of 1978, which requires that such surveillance generally be conducted pursuant to a court order. Battling criticism of President Bush's decision to authorize a surveillance program that circumvents FISA, the White House has argued that the president's actions were justified by the post-9/11 Authorization for the Use of Military Force (AUMF) as well as the president's inherent constitutional authority to engage in such surveillance regardless of statutory restrictions.

Specter has expressed his disagreement with the AUMF argument but has remained publicly agnostic on the more controversial "inherent authority" issue. His draft legislation doesn't weigh in on the issue, but rather leaves it to the federal courts. After Specter's proposed changes, Section 801 of FISA would read: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers."

Some constitutional scholars, such as Orin Kerr and Marty Lederman, understand this language to endorse the president's circumvention of otherwise applicable FISA requirements. Such a reading seems implausible, though, in light of the Supreme Court's pre-FISA surveillance case United States v. U.S. District Court ("Keith"). There, the Supreme Court considered language indistinguishable from that in Specter's draft. A federal statute limiting surveillance provided that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to . . . obtain foreign intelligence information deemed essential to the security of the United States." The Court refused to read this language as endorsing surveillance otherwise barred by the statute:

At most, this is an implicit recognition that
the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection "against actual or potential attack or other hostile acts of a foreign power." But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral. . . . It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them.

Specter's draft, like the Keith statute, does not weigh in on the president's claim of inherent authority: It leaves the claim entirely to the courts. In a July 24 op-ed in the Washington Post, Specter himself made clear that "[t]he bill does not accede to the president's claims of inherent presidential power; that is for the courts either to affirm or reject. It merely acknowledges them, to whatever extent they may exist."

On the other hand, a strong affirmation or rejection of the president's claim would dramatically affect judicial review. The Supreme Court has repeatedly shown (most recently in its Hamdan decision) that, as per Justice Robert Jackson's famous concurrence in Youngstown Sheet & Tube Co. v. Sawyer, the court will provide greater deference to the executive's power when Congress agrees with the president's interpretation. Conversely, presidential power is at its lowest ebb when the president acts contrary to Congress' will. But Specter would have no part in this.

THE PRESIDENT'S "INHERENT AUTHORITY" is not the only issue that Specter wants the courts to resolve for him. Abortion was, until this year, Specter's favorite judicial issue. Throughout the confirmation hearings of Justices Roberts and Alito, Specter insisted that Roe v. Wade had become a "super precedent" (even going so far as to comically dub it a "super-duper precedent") that should not be subject to judicial reversal.

Reversal of Roe v. Wade would return abortion to the state legislatures—and would likely also make it an issue of political debate at the federal level. Throughout his tenure in the Senate, Specter has fought to keep that political mess in the courts. Although he now cloaks his argument in the rhetoric of respect for prior judicial decisions, Specter's stance on the abortion issue was evident long before Roe became anything resembling a "super-duper precedent." The Washington Post reported in March 1992, before Planned Parenthood v. Casey upheld Roe, that Specter peppered his primary campaign's stump speech with a warning that abortion is the "most divisive issue since slavery" and that, as the Post summarized his remarks, it "has no place in political campaigns."

If Specter had to take a strong legislative position on abortion, his political fortunes would not be assured in Pennsylvania. This is the state where he struggled to beat back a primary challenge from Pat Toomey in 2004, and where two pro-life candidates, Republican Sen. Rick Santorum and pro-life Democrat Bob Casey Jr., are fighting for the other Senate seat. So long as Specter can commit the issue to the courts, citing only the neutral principle of stare decisis, his political life is made significantly easier.

BUT SPECTER'S LOVE AFFAIR WITH THE COURTS is not without its stormier moments. Despite his stated position in the
surveillance and abortion debates, Specter is a fierce critic of the courts when they contradict him on politically safe issues. Ironically enough, this also manifested itself in the same Roberts confirmation hearing where Specter lauded Roe v. Wade's precedential value.

In that hearing, Specter sharply rebuked the Court's decisions in United States v. Lopez and United States v. Morrison, which limited Congress' ability to rely on the Constitution's Commerce Clause to pass regulations affecting purely intrastate matters. These decisions infuriate Specter, who insisted in the hearing that the Court had belittled Congress' "method of reasoning," and that the decisions represented "the demigration by the court of congressional authority." Right or wrong, Specter seems to reject utterly the Court's contention that Congress cannot be the judge of its own power. If the Court overturned Lopez and Morrison tomorrow, Specter would shed not a tear, even through Lopez, now 11 years old, is older than Roe was when Specter began his Senate tenure in 1980.

Specter's eagerness to abandon his commitment to judicial supremacy and stare decisis isn't limited to the Commerce Clause. In 1993 he co-sponsored the Religious Freedom Restoration Act (RFRA), a bill explicitly passed to reverse the Supreme Court's interpretation of the First Amendment's free exercise clause in Employment Division v. Smith. (Not surprisingly, the high court struck down RFRA, holding that Congress couldn't overturn the Supreme Court's interpretations of the Constitution.)

WHAT DISTINGUISHES THESE CASES involving such seemingly disparate issues as the Commerce Clause, presidential authority, and the First Amendment? Why does Specter defer to the courts on some issues but not others?

It's possible that Specter's selective outrage is driven by his policy preferences. He may laud the judiciary when he likes its decisions and castigate it when he disagrees. He wouldn't be alone in this: Conservatives and liberals alike are guilty of applauding judicial supremacy when it serves their policy interests and decrying it otherwise. However, such selective outrage does not entail a coherent philosophy. And Specter perhaps best exemplifies the intellectual confusion that can result.

But a more likely explanation is that Specter defers to the Court on issues that are politically explosive, while providing no such deference on unquestionable political winners. The Gun Free School Zones Act (struck down in Lopez) and Violence Against Women Act (struck down in Morrison) aren't political risks for Specter at the polls. Indeed, his continued ability to trumpet his commitment to them is a boon. Even RFRA was a political winner: It passed the Senate by an overwhelming 97-3 margin.

However, eagerness to embrace contradictory positions on these issues for the purpose of political gain is a strategy fraught with danger. It contributes to courts becoming increasingly political bodies. When politicians choose to punt issues to the court out of fear of political controversy, it shouldn't surprise them that in turn the courts become more political, like a kind of "superlegislature."
Senator Specter is not afraid to read the Constitution for himself where political expedience permits. But on more explosive issues like NSA surveillance and abortion, he suddenly becomes a champion of the judiciary. This inconsistency should give rise to hard questions about Specter's motivations, and the consequences of his approach.
An attempt to halt the National Security Agency's controversial domestic surveillance program generated intense legal debate Monday before a veteran federal judge, with opponents branding it a threat to American citizens and defenders contending it is legal and essential to national security.

The case is the first major legal challenge to the warrantless wiretapping program, with the Justice Department squaring off against lawyers representing several groups and individuals that seek to have the program declared unconstitutional.

U.S. District Judge Anna Diggs Taylor, who is expected to be the first to rule on the issue, asked only one question during the hearing and gave no indication of how she would rule or when. It was the second hearing she has held within a month on the complex legal issues surrounding the program.

Taylor has scheduled no further hearings, and told the lawyers she would take the case "under advisement," meaning that she would weigh their arguments and issue a ruling.

After the program was revealed by the New York Times, the government admitted that it had launched a domestic wiretapping initiative after the Sept. 11 terrorist attacks. NSA personnel listen in on phone calls and obtain e-mails into and out of the U.S. involving suspected terrorist affiliates. The program bypasses the Foreign Intelligence Surveillance Court, created after government spying abuses in the 1970s, that approves search and wiretapping warrants in some intelligence and terrorismrelated investigations.

In January, the American Civil Liberties Union, the Council on American-Islamic Relations, Greenpeace and several individuals, who expressed fear that the government was spying on them, filed a lawsuit here challenging the program. The first hearing before Taylor was June 12.

Similar suits are pending in federal courts in New York, Oregon and Texas but have had no major hearings, and Taylor’s decision could be influential as other jurists consider the issue.

The ACLU filed the suit in Detroit in part because the area has a large Muslim population. One of the plaintiffs Nazih Hassan, of nearby Ypsilanti, is a member of the Council on American-Islamic Relations and has said he fears he has been a target of eavesdropping because he frequently talks with Muslims abroad.

Since the suit was filed, the government has attempted to allay concerns of the area's Arab Americans. Gen. Michael V. Hayden, the former NSA chief who is now CIA
director, has said the program is narrowly tailored toward Al Qaeda and "is not a drift net over Dearborn" or other towns with large Muslim communities.

In court Monday, Justice Department attorney Anthony J. Coppolino urged Taylor, a longtime judge appointed to the federal bench by President Carter, to throw out the case on two grounds. None of the plaintiffs had shown that they had suffered injury and therefore they had no legal standing to sue, he said, and that if Taylor decided the plaintiffs had standing, the case still should be dismissed because of the "state secrets" doctrine.

The "state secrets" privilege, laid out in a Supreme Court decision in 1953, prohibits disclosure of information in legal proceedings when there is "a reasonable danger" that the evidence would "expose military matters which, in the interest of national security, should not be divulged."

That is clearly the issue in this instance, Coppolino said, because the case involves a challenge to an "ongoing program" of surveillance against Al Qaeda that is integral to the Bush administration's war on terrorism.

He said President Bush had the authority to launch the program after Sept. 11 because of his inherent authority and because of the authorization for use of military force issued by Congress after those attacks.

Because of the program's nature, Coppolino said, the government cannot disclose whether it is conducting surveillance on any of the plaintiffs, including the American-Islamic group; James Bamford, author of two books on the NSA; or Noel Saleh, a Detroit lawyer frequently involved in civil liberties cases. Coppolino said that if the government revealed whether it was or was not spying on a particular individual or group it could harm the entire program.

Among rulings he cited to support his arguments was a 1978 decision by the federal appeals court in Washington that upheld the dismissal of a case alleging that the government had spied illegally on opponents of the Vietnam War.

That decision said that by revealing whether "internal communications" had or had not been intercepted, "the individual himself and any foreign organization with which he has communicated would know what circuits were used.

"Further," the court said, "any foreign government or organization that has dealt with a plaintiff whose communications are known to have been acquired would at the very least be alerted that its communications might have been compromised or that it is a target."

Coppolino said the government could not "reveal even innocuous sounding information" about the NSA surveillance program because it might give Al Qaeda insights into how the program was run, putting the nation further at risk.

ACLU attorney Ann Beeson said the government's position was so expansive that it "would preclude judicial review in every case where the president chose to ignore Congress whenever he wants to wiretap Americans."

She said government officials had revealed sufficient information about the program
that the judge could rule without further fact-finding. That is crucial to the ACLU's argument because it would give the judge an opportunity to rule without delving into the program's inner workings, avoiding the risk of revelations government officials say would harm the country.

Beeson said the June 29 Supreme Court decision that Bush did not have the power to set up special military trials at Guantanamo Bay, Cuba, without the approval of Congress should leave no doubt that there were limits on presidential power in military affairs. In that 5-3 decision, the high court rejected Bush's claim that the commander in chief can make the rules during an unconventional war.

"It is hard to fathom how the subject matter of this case could be a 'state secret,' " Beeson said, given how much energy administration officials have put into publicly defending it.

She said her clients, who include scholars, journalists and lawyers, had suffered "real injuries" because the NSA program had impeded their ability to do research, e-mail people in foreign countries and engage in other activities protected by the 1st Amendment. She said some attorneys representing suspected terrorists had to make "expensive trips" abroad because their ability to communicate with people by phone or computer had been impeded by the surveillance program.

Outside court, Beeson said that she hoped the judge would rule soon, and that she was concerned that the government was invoking the "state secrets" doctrine more and more.

"It was intended to be a shield" to protect a limited amount of information and "they are attempting to turn it into a sword" to scuttle lawsuits challenging government power, Beeson said.

Dawud Walid, executive director of the Michigan chapter of the Council on American-Islamic Relations, said he was troubled that Bush administration officials talked about exporting democracy but were "trying to circumvent democratic processes" at home.

Asked why government officials should have to go to court to get a warrant before wiretapping, Walid replied: "We have a president, not a king."