



# Stanford Law Review

## WHO MAY BE TRIED UNDER THE MILITARY COMMISSIONS ACT OF 2006?

Michael Montaña

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“I want us to see the process of legislation . . . as . . . the representatives of the community com[ing] together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all . . . .” —Jeremy Waldron, *The Dignity of Legislation*<sup>1</sup>

“Sit down, my son. We don’t read most of the bills [that we vote on].” —U.S. Representative John Conyers<sup>2</sup>

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1. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 2 (1999).

2. *FAHRENHEIT 9/11* (Lions Gate Films 2004) (commenting on the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001)). Quotations from the film, including the one cited here, are available at the Internet Movie Database, <http://www.imdb.com/title/tt0361596/quotes>.

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## INTRODUCTION

On October 17, 2006, seated in the East Room of the White House, President George W. Bush signed the Military Commissions Act of 2006<sup>3</sup> (MCA) into law.<sup>4</sup> Moments before, he succinctly—if not entirely accurately<sup>5</sup>—recounted the Act’s history:

In the months after 9/11, I authorized a system of military commissions to try foreign terrorists accused of war crimes. . . . [T]he legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress.

. . . I asked Congress for that authority, and they have provided it.<sup>6</sup>

But what exactly did the MCA grant our federal executive authority to do?

At the close of his speech, President Bush claimed that those who had supported the MCA were bequeathing to America a “freer, safer . . . world.”<sup>7</sup> But in the weeks preceding the bill’s passage, many had vociferously disagreed with the President’s characterization of the bill.<sup>8</sup> In editorials<sup>9</sup> and in legal web logs,<sup>10</sup> constitutional scholars were up in arms. Tellingly, complaints came

3. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

4. Press Release, White House, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), 2006 WL 2950499 (White House).

5. See *infra* quotation accompanying note 6. Regarding what President Bush authorized after 9/11, it appears that he had every intention of at least detaining and possibly trying citizens and not just “foreign” terrorists (if by “foreign” we mean “alien”) before military tribunals. Consider the case of Yaser Esam Hamdi. Tom Jackman, *Judges Uphold U.S. Detention of Hamdi—Courts Must Yield to Military on ‘Enemy Combatants,’ 4th Circuit Rules*, WASH. POST, Jan. 9, 2003, at A1. An American citizen born in Louisiana, Hamdi was held as an “enemy combatant” but ultimately released to Saudi Arabia on the condition that he relinquish his citizenship.

6. Press Release, White House, *supra* note 4.

7. *Id.*

8. See, e.g., *Habeas Corpus Review for Prisoners of War*, CQ CONG. TESTIMONY, Sept. 25, 2006 (testimonies of Bruce Fein, John D. Hutson, Senator Patrick Leahy, Thomas Sullivan, and Lt. Commander Charles Swift); Editorial, *Anti-Constitution: Cowardly Congress Passes Disgraceful Bill*, SALT LAKE TRIB., Sept. 28, 2006; Sheila Suess Kennedy, Editorial, *Rights, Words in the Real World*, INDIANAPOLIS STAR, Oct. 16, 2006, at A9.

9. See, e.g., Bruce Ackerman, Editorial, *Railroading Injustice*, L.A. TIMES, Sept. 28, 2006, at B13.

10. See, e.g., Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2006/09/imagine-giving-donald-rumsfeld.html> (Sept. 27, 2006, 08:55 EST). Marty Lederman, a.k.a. Martin S. Lederman, cannot be dismissed as a hysteric without appreciation for the necessary power of the presidency. An Associate Professor of Law at Georgetown, Lederman served as an Attorney Advisor in the Department of Justice—that is, within the

from across the political-ideological spectrum, and at least one cable news anchor went so far as to denounce the MCA as the “[b]eginning of the end of America.”<sup>11</sup> There seemed to be much to disagree over. Said one vocal law professor, “Choosing the most indefensible provision of this bill is a tall order—there are many worthy candidates.”<sup>12</sup> Still, objections to the bill did coalesce around certain poles. Chief among detractors’ concerns were provisions of the MCA appearing to provide the executive with the authority to try American citizens before military commissions or detain them indefinitely.<sup>13</sup>

Although some defenders of the law sought to put such worries to rest by arguing that the law only applies to aliens (i.e., noncitizens),<sup>14</sup> the intensity of dispute in public discourse over the meaning of the MCA reflects not just wishful or fearful thinking on the part of participants but deep ambiguity in the language of the statute itself. Indeed, in some respects, the MCA appears to lack coherence.<sup>15</sup> Yet, to date, no one has offered a systematic academic analysis of the law in an attempt to discern its “ultimate” meaning.<sup>16</sup>

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executive branch—under both President William Jefferson Clinton and President George W. Bush. Georgetown University Law Center, Martin S. Lederman Faculty Profile, [http://www.law.georgetown.edu/faculty/facinfo/tab\\_faculty.cfm?Status=Faculty&ID=2134](http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=2134) (last visited Mar. 11, 2009).

11. Keith Olbermann, ‘*Beginning of the End of America*’: Olbermann Addresses the Military Commissions Act in a Special Comment, MSNBC.COM, Oct. 19, 2006, <http://www.msnbc.msn.com/id/15321167>. Mr. Olbermann is, admittedly, something of a colorful character who often aims to excite his audience (much as Bill O’Reilly aims to incite his audience). Nonetheless, his view on the MCA broadly distills that of luminaries on all sides and for that is all the more striking. See, e.g., Ackerman, *supra* note 9; Richard A. Epstein, Op-Ed, *Produce the Body*, WALL ST. J., Oct. 7, 2006, at A7 (arguing that the MCA “unwisely remov[es] an indispensable and long-standing check on the abuse of executive power”). Epstein is a law professor at the University of Chicago, a Senior Fellow at the Hoover Institution, and an Adjunct Scholar at the Cato Institute whose conservative bonafides cannot be challenged. Cato Institute, Richard A. Epstein—Adjunct Scholar Profile, <http://www.cato.org/people/richard-epstein> (last visited Feb. 1, 2009). Indeed, his textbook on torts has even been accepted into the Federalist Society canon. The Federalist Society for Law and Policy Studies, List of Conservative and Libertarian Legal Scholarship: Torts, <http://www.fed-soc.org/resources/id.539/default.asp> (last visited Feb. 1, 2009). For a broader, conservative legal critique of the Bush Administration, see GENE HEALY & TIMOTHY LYNCH, CATO INST., POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH (2006), available at [http://www.cato.org/pubs/wtpapers/powersurge\\_healy\\_lynch.pdf](http://www.cato.org/pubs/wtpapers/powersurge_healy_lynch.pdf).

12. Lederman, *supra* note 10.

13. Ackerman, *supra* note 9; Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2006/09/does-military-commissions-act-apply-to.html> (Sept. 29, 2006, 12:06 EST); Lederman, *supra* note 10; see also Posting of Robert A. Levy to Cato @ Liberty, <http://www.cato-at-liberty.org/2006/10/02/does-the-military-commission-act-apply-to-us-citizens> (Oct. 2, 2006, 13:28 EST).

14. See Posting of Bart DePalma to Balkinization, <http://balkin.blogspot.com/2006/09/imagine-giving-donald-rumsfeld.html> (Sept. 27, 2006, 15:53 EST).

15. See discussion *infra* Part III.C and notes 59, 61.

16. However, almost everyone in this debate has *assumed* it to mean one thing or another.

As a work of statutory interpretation, that is the project of this Note. Like any exegesis, it might only be limited by the range of source materials available for study. However, in the interest of space, I have elected to examine only the major customary textual and historical sources available in the public record. Based on the statutory text of the MCA, Defense Department materials, public comments of the President, and legislative history, I attempt to answer the question: who may be tried under the MCA? There is no *in pari materia* analysis, nor any based on wide-ranging periodical research, for I am concerned neither with completely hypothesizing judicial interpretation nor with public construction of meaning.

Note, too, that this is not a work of constitutional interpretation as such; that is, even though quasi-constitutional principles of interpretation<sup>17</sup> may come into play, this Note does not aim to dispute the constitutionality of the MCA. Rather, it seeks to uncover what exactly the MCA *purports* to authorize and to sketch the limits of what the executive might claim it to authorize.

Given the executive branch's structural orientation towards self-aggrandizement and the commissions' ability to hand down death sentences, discerning now who may be tried under the MCA is vital if we are to know how strong the rule of law remains in our country. But there are further reasons for exploring this topic that get us to the heart of what the rule of law means that will not be affected by how courts, Congress, or the President weigh in on the MCA in the future. Courts may strike it down, Congress may repeal it, or future Presidents may refuse to enforce it. But even *if* any of those possibilities should come to pass, the MCA will stand as a testament to its historical moment, one we have not yet left behind and the echoes of which we may someday hear again. Considering its textual and contextual meaning, its substance and history, can, then, teach us much about how to write or not write a law, depending on what one's goals are and where one sits—the Capitol or the White House.

There are strong internal and external pressures on any presidential administration to embody the oft-repeated institutional virtues of the executive branch: flexibility and dispatch.<sup>18</sup> Internally, a President will want to exert control over the executive branch bureaucracy in order to efficaciously advance his or her broader policy agenda. Externally, a President will be politically rewarded for accomplishing the goals he or she was elected to meet. These pressures are never stronger than in the wake of a large-scale terrorist attack on domestic soil.

However noble the goal of protecting national security, a problem arises when an administration resorts to running roughshod over established

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17. The avoidance canon, for example, relies upon separation-of-powers notions derived from the structure of the Constitution, but I will not address the merits of these. *See infra* note 150 and accompanying text.

18. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

precedent or to outright lawbreaking in its efforts to protect the great mass of voters. The situation grows even more complex when presidential policy and tactics both at times seem driven as much by substance as by an ideological commitment to expanding executive power or “restoring” it to some imagined ideal.<sup>19</sup>

Against this backdrop, enacting ambiguous legislation creates an alluring opportunity for executive lawmaking. In the linguistic space opened by a poorly written statute unencumbered by a robust legislative history, the executive will inevitably act, and it will do so in accord with its own vision of its proper constitutional role. Thus, uncovering the meaning of the MCA—the substantive provisions of which are still in force<sup>20</sup>—tells us something not only about the substance of the statute itself but about the various uses of legiscraft generally.

### I. THE GREAT WRIT AND THE GREAT WORRY

In *Boumediene v. Bush*, the Supreme Court recently invalidated provisions of the MCA attempting to suspend habeas corpus for detainees in the war on terror held at Naval Station Guantánamo Bay, Cuba (Guantánamo).<sup>21</sup> Yet, for the reasons outlined above, it is worth pausing to ponder the original scope of the legislation. In attempting to suspend the writ, the MCA reached for a vast expansion of presidential power:

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.<sup>22</sup>

If applicable to citizens and read in conjunction with the threat of indefinite detention and execution,<sup>23</sup> the MCA would have created a parallel world in which the executive has all but plenary authority over the ultimate fate of every American. In blunter times, we would call this “tyranny.”<sup>24</sup>

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19. During his term in office, former Vice President Richard B. Cheney, of course, became the most well-known and well-placed advocate for the “restoration” of executive power. See Charlie Savage, *Hail to the Chief, Dick Cheney’s Mission to Expand—or ‘Restore’—the Powers of the Presidency*, BOSTON GLOBE, Nov. 26, 2006, at C1.

20. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (“It bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”).

21. 128 S. Ct. 2229.

22. Military Commissions Act of 2006, 10 U.S.C.A. § 950j(b) (West 2008).

23. See 10 U.S.C.A. § 948d(d).

24. [T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most

Because the *Boumediene* majority did not construe the MCA as a “formal suspension of the writ,”<sup>25</sup> it did not undertake an independent assessment of the factual predicates that the Suspension Clause requires for legitimate congressional action under its terms.<sup>26</sup> Still, in order to shed light on the executive mindset informing its interpretation of the MCA in other areas, it is worth exploring briefly how the President might have tried to claim that the MCA enacted a formal suspension of the writ in order.

The Constitution stipulates that the Great Writ may only be suspended when in times of “Rebellion or Invasion the public Safety may require it.”<sup>27</sup> It does not appear that either rebellion or invasion—as those words are usually understood—currently plagues the United States.<sup>28</sup> Still, one can imagine the President claiming that the United States is under “invasion” by terrorists. Whatever one may think of the Bush Administration’s view that unconventional conflict imbues words once thought clear in meaning with unconventional content,<sup>29</sup> it remains a political and legal fact that it believed that “war” is the proper paradigm for characterizing our conflict with

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formidable instruments of tyranny. . . . ‘To bereave a man . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny . . . but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.’

THE FEDERALIST NO. 84 (Alexander Hamilton) (quoting Blackstone in part).

25. *Boumediene*, 128 S. Ct. at 2262.

26. U.S. CONST. art. I, § 9, cl. 2. Thus it remains an open question whether courts could (or would) even assess the sufficiency of a congressional determination that a state of “rebellion” or “invasion” obtains under the Suspension Clause. *Id.* Such a claim could likely be set aside under political question doctrine. *See infra* note 55.

27. U.S. CONST. art. I, § 9, cl. 2.

28. The idea that the United States is under invasion is not wholly without public salience, but that term tends to be bandied about in an entirely different context, that of undocumented immigration. *See, e.g.,* PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006) (arguing, *inter alia*, that the American Southwest is being “reconquered” by Mexico through undocumented immigration); Samuel Huntington, *The Special Case of Mexican Immigration*, AM. ENTER., Dec. 2000, at 20 (“The invasion of over 1 million Mexican civilians is a . . . threat to American societal security . . . .”); Lou Dobbs Tonight, *Broken Borders*, <http://loudobbs.tv.cnn.com/category/broken-borders/> (last visited Mar. 11, 2009). Otherwise, there is a general dearth of news coverage on America being invaded.

29. *See generally* Memorandum from Jay S. Bybee, Assistant Att’y Gen., on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (concluding that “[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years”). *But cf.* BLACK’S LAW DICTIONARY 1528 (8th ed. 2004) (defining “torture” much more generally as “[t]he infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”).

terrorists<sup>30</sup> and construed its powers accordingly. Setting ambiguity to rest, President Bush proclaimed, “The war on terror is no figure of speech.”<sup>31</sup> (Incidentally, the Obama Administration, or at least some elements within it, appears to agree.<sup>32</sup>)

The Bush Administration also believed that terrorists are present in the United States.<sup>33</sup> Indeed, in remarks on the day President Bush transmitted his draft proposal of the MCA to Congress, he pressed both of these points. He referred to our conflict with terrorism as “war” twelve times,<sup>34</sup> and alluded to the shadowy presence of terrorists within the territorial United States eight times, once going so far as to speak of “infiltrat[ion]”<sup>35</sup>—not quite “invasion,” but close.<sup>36</sup>

President Bush’s legal advisors may have backed an expansive conception of invasion as well. In defending the constitutionality of the MCA as a suspension of the writ, one has claimed that “the United States suffered the equivalent of an invasion on September 11, 2001.”<sup>37</sup> Therefore, he says, “[w]e need not restrict ‘invasion’ to an attack by a nation-state in which a significant enemy armed force has a sustained presence in American territory.”<sup>38</sup> Equivalence is enough. Further, argues this former advisor, the mere anticipation of an invasion—or, one presumes, anticipation of its attack “equivalent”—can suffice to satisfy the Suspension Clause.<sup>39</sup>

Legal advocates should take note: these are awfully anemic arguments. First, it is hard to defend the President’s characterization of the American

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30. See *infra* note 34 and accompanying text.

31. President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 437, 438 (Mar. 20, 2004).

32. See *infra* notes 42 and 293-97 and accompanying text.

33. See *infra* note 34.

34. He actually referred to it as “war” seventeen times if you count instances wherein President Bush referred to “laws of war,” “war criminals,” and “war crimes.” Most forcefully, he stated, “The procedures in the bill I am sending to Congress today reflect the *reality* that we are a nation at war . . . .” Press Release, White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006) (emphasis added) (on file with author). In his 2004 State of the Union address, President Bush was even clearer in invoking the paradigm of war. See Address Before a Joint Session of the Congress on the State of Union, 40 WEEKLY COMP. PRES. DOC. 94, 96 (Jan. 20, 2004) (quoted *infra* note 47).

35. Press Release, White House, *supra* note 34.

36. BLACK’S LAW DICTIONARY, *supra* note 29, at 843 (defining “invasion” first as “[a] hostile or forcible encroachment on the rights of another” and second as “[t]he incursion of an army for conquest or plunder”).

37. Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1284 (2007). Yoo’s codiscussant agreed on this point. *Id.* at 1285 (“[T]he September 11 attacks constituted an ‘invasion’ under the Suspension Clause.”).

38. *Id.*

39. *Id.*

struggle against terrorism as “war.”<sup>40</sup> While many sincere and intelligent thinkers disagree<sup>41</sup> (including some of those now lodged in the Obama Administration<sup>42</sup>), courts have largely acquiesced in this usage,<sup>43</sup> and a discourse on this issue too vast to properly treat here has arisen.<sup>44</sup> I do not consider this a close question. To speak of a “war on terror” is to invoke a metaphor.<sup>45</sup> It is a uniquely apt metaphor given the kind of force involved in the underlying activities, but it is a metaphor nonetheless.<sup>46</sup> For decades, the United States and most other countries treated terrorism as a criminal problem,

40. See, e.g., Bruce Ackerman, Keynote, *Terrorism and the Constitutional Order*, 75 *FORDHAM L. REV.* 475, 477-82 (2006).

41. See, e.g., JOHN YOO, *WAR BY OTHER MEANS* 1-17 (2006); Douglas W. Kmiec, *A Tortured Issue*, *NAT'L REV. ONLINE*, Jan. 18, 2005, <http://www.nationalreview.com/comment/kmiec200501181125.asp>.

42. David G. Savage, *Terror Fight Is a State of War, Nominee Says; Obama's Choice for Solicitor General Says 'Enemy Combatants' May Be Held Without Charge Indefinitely*, *L.A. TIMES*, Feb. 11, 2009, at A14, (““Do you believe we are at war?” [Senator Lindsay] Graham asked. ‘I do, Senator,’ [then-Solicitor General nominee Elena] Kagan replied.”).

43. For example, the Fourth Circuit wrote:

The exceedingly important question before us is whether the President of the United States possesses the authority to detain militarily a citizen of this country who is closely associated with al Qaeda, *an entity with which it is at war*; who took up arms on behalf of that enemy and against our country *in a foreign combat zone of that war*; and who thereafter traveled to the United States for the avowed purpose of further *prosecuting that war* on American soil, against American citizens and *targets*.

*Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (emphases added). Similarly, the Supreme Court wrote:

We recognize that the national security underpinnings of the “war on terror,” although crucially important, are broad and malleable. . . .

. . . .

. . . Further, we understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding *law-of-war* principles.

*Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (emphasis added). Whatever one makes of these and like judicial references, it bears note that the Supreme Court has been considerably more skeptical than lower courts about the appropriateness of the paradigm of war in the struggle against terrorism, placing “the war on terror” in scare quotes and continuing in *Hamdi* to say that “if the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.” *Id.* at 521. Whether a determination—as opposed to an assumption—that the United States is or is not at war would even be justiciable is an open question.

44. For a comprehensive summary of the conceptual problem in historical context, see STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 376-94 (2008). For a short, applied analysis, see INT’L FED’N FOR HUMAN RIGHTS, *COUNTER-TERRORISM VERSUS HUMAN RIGHTS: THE KEY TO COMPATIBILITY* 7-11 (2005), available at [www.fidh.org/IMG/pdf/counterterrorism429a.pdf](http://www.fidh.org/IMG/pdf/counterterrorism429a.pdf).

45. Bruce Ackerman, Response, *This Is Not a War*, 113 *YALE L.J.* 1871, 1871-78 (2004). *But see* Symposium, *What Kind of War Are We Fighting, and Can We Win It?*, *COMMENTARY*, Nov. 2007, at 21-43.

46. Understanding the phrase to signify nothing more than a metaphor, albeit an understandable one, I both dispense with scare quotes and refrain from capitalization when employing it.

and many experts believe that we should continue treating it as such.<sup>47</sup> Continuing to do so would both deny terrorists the legitimacy of being treated as though they stand on equal footing with state actors<sup>48</sup> and would preempt many of the legal and semantic battles that the conflation of terrorism with war has generated.

Second, even supposing that terrorists are in the United States plotting vast destruction, it is difficult to defend the notion that their presence constitutes “invasion.” In standard American English, this word connotes large, even massive, intrusions into one country by the military forces of another country with the intent of occupation and subjugation<sup>49</sup>—in other words, conquest.<sup>50</sup>

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47. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 7-10 (2008); STEPHEN I. VLADECK, *THE CONSTITUTION PROJECT, A CRITIQUE OF “NATIONAL SECURITY COURTS”* (2008), available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, 2 *ADVANCE* 63 (2008), available at <http://www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf>; cf. Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html> (arguing that Congress ought to create a special court to hear terrorism cases involving difficult evidentiary issues, as well as allow for preventive detention, but also that “[c]riminal prosecutions should still take place where they can”); Robert M. Chesney, *Optimizing Criminal Prosecution as a Counterterrorism Tool 2* (Dec. 19, 2008) (working paper, Series on Counterterrorism and American Statutory Law), available at [http://www.brookings.edu/~media/Files/rc/papers/2008/1219\\_prosecution\\_chesney/1219\\_prosecution\\_chesney.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/1219_prosecution_chesney/1219_prosecution_chesney.pdf) (arguing that “America needs an optimally functional criminal justice apparatus for counter-terrorism cases”). Former President Bush, for his part, explicitly rejected the criminal law paradigm:

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. . . . [But a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.

Address Before a Joint Session of the Congress on the State of the Union, 40 *WEEKLY COMP. PRES. DOC.* 94, 96 (Jan. 20, 2004). In fairness, however, it should be pointed out that this view is not limited to “conservatives” and is, indeed, shared by some “liberals.” See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 *STAN. L. REV.* 101, 149 (2008) (“My own view is that the attacks of September 11, 2001, were indeed acts of war (not merely crimes).”). Still, even the defendants in *Ex parte Quirin*—German soldiers who had come ashore in New York, donned civilian clothes, and tried to sabotage war facilities, men whom we would surely label terrorists today—were charged with criminal offenses (their constitutional challenge was to forum). 317 U.S. 214 (1944).

48. I am not alone in this analysis. See Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at 7-1 (reviewing TALAL ASAD, *ON SUICIDE BOMBING* (2007)); STEPHEN FLYNN, *THE EDGE OF DISASTER* (2007); IAN SHAPIRO, *CONTAINMENT* (2007); THE U.S. ARMY/MARINE CORPS *COUNTERINSURGENCY FIELD MANUAL* (2007)) (arguing same and quoting Hilary Benn, British Secretary of State for International Development, arguing same).

49. *NEW OXFORD AMERICAN DICTIONARY* 892 (Elizabeth J. Jewell & Frank Abate eds., 2001) (defining “invade” and “invasion”); *OXFORD DICTIONARY OF CURRENT ENGLISH* 466

Despite the hideous death toll, “invasion” cannot describe what happened on September 11, 2001, or what has happened on American soil since. Al Qaeda is a nonstate actor whose funding comes from private sources.<sup>51</sup> Battalions of enemy soldiers are not lining up at our borders or landing ships on our shores.<sup>52</sup> Indeed, as Richard A. Epstein has pointed out, “a world of difference separates the risk of future terrorist acts from a present invasion on American soil.”<sup>53</sup> Moreover, Al Qaeda’s goal is, at its most ambitious, not to conquer the United States but to drive it from the Middle East.<sup>54</sup>

Nonetheless, for present purposes what matters is what the *executive* believes. Practically and quite literally speaking, it is on this basis that the executive will act. If the President does believe that the United States is under invasion by an enemy with whom we are at war, then he is likely to construe his powers broadly, even with respect to citizens.<sup>55</sup>

Without rehearsing all of the MCA’s infirmities or straying too far from the central purpose of this Note, it is worth recounting some of the ways that MCA-authorized military commission procedures vary from traditional standards of criminal procedure before Article III courts. Under the MCA, military commissions make findings of both law and fact, and therefore the judge and jury function is mixed within a single body.<sup>56</sup> Secret evidence may

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(2d ed. 1993). *But see* VIII OXFORD ENGLISH DICTIONARY 34 (2d ed. 1989) (defining “invade” more broadly as “[t]o enter in a hostile manner, or with armed force; to make an inroad or hostile incursion into”). However, “incursion” connotes something more than a one-time sneak attack.

50. BLACK’S LAW DICTIONARY, *supra* note 29, at 843.

51. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, ch. 6, *available at* <http://www.state.gov/s/ct/rls/crt/2007/index.htm>.

52. As President Bush himself noted on the day he sent his draft of the MCA to Congress, “The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas.” Press Release, White House, *supra* note 34.

53. Epstein, *supra* note 11.

54. *See generally* MARY HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR (2006) (arguing that the oft-heard explanation for why radical Islamic jihadists attacked the United States and continue to want to do us harm—namely, that they “hate our freedom”—is incorrect and should be augmented by an understanding of their geopolitical and ideological aims, which focus first and foremost on eliminating American influence in the Middle East). In fairness, Habeck does argue that jihadist ideology logically entails spreading Islamic law to all corners of the earth. This would involve conquest, she points out, but it would seem from Habeck’s account that only the most fantasist ideologues have this in mind.

55. Whether a state of invasion obtains, moreover, may be nonjusticiable under political question doctrine. As Justice Scalia noted in his *Hamdi* dissent, “whether the attacks of September 11, 2001, constitute ‘invasion,’ and whether those attacks justify suspension [of the writ of habeas corpus] several years later, are questions for Congress rather than this court.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

56. It may be true that all administrative procedures mix such functions to one degree or another, but it also remains true that “[e]ven before the birth of this country, separation of

be used against defendants,<sup>57</sup> and, under certain circumstances, evidence extracted through torture is admissible.<sup>58</sup> Defendants may be compelled to testify against themselves.<sup>59</sup> There is no right to a speedy trial.<sup>60</sup> There are no

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powers was known to be a defense against tyranny.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (quoting *Loving v. United States*, 517 U.S. 748, 756 (1996) (alteration in original)); *see also id.* at 2269 (“A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures.”). Justice David Souter made a similar point in his concurrence in *Hamdi v. Rumsfeld*:

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

542 U.S. 507, 545 (2004) (Souter, J., concurring). On this point, even Judge Richard Posner seems to agree, asserting that “people whose profession is to protect national security are unlikely to give a great deal of weight to civil liberties unless required to do so by some outside force, such as the judiciary.” RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 61 (2006) (quoted in David Cole, *The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11*, 59 *STAN. L. REV.* 1735, 1748 (2007), along with the preceding quotation from Souter’s *Hamdi* concurrence).

57. Military Commissions Act of 2006, 10 U.S.C.A. §§ 949d(f), 949j(c) (West 2008); *see also Boumediene*, 128 S. Ct. at 2269 (expressing concern over secret evidence in CSRT proceedings).

58. 10 U.S.C.A. § 948r(b) (“A statement obtained by use of torture shall not be admissible . . . *except* against a person accused of torture . . . .” (emphasis added)). A clearer and more cruelly ironic roadmap to torture was never authored: in order to get away with torture, the government need only charge the victim with committing torture. Additionally, § 948b(d)(B) of the MCA states that 10 U.S.C. § 831(d) (2006) shall not apply to military commissions under the law. The latter provision, Article 31(d) of the Uniform Code of Military Justice, declares: “No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.” § 831(d). If Article 31(d) does not apply to military commissions under the MCA, then they can presumably admit evidence through coercion, of which torture is, of course, at least in its instrumental form, but an extreme version. Moreover, given the exceptionally narrow definition of torture embraced by the Bush administration, Memorandum from Jay S. Bybee, *supra* note 29, it is difficult to see what would actually count as excludable evidence.

59. 10 U.S.C.A. §§ 948b(d)(1)(B), 949a(b)(2)(C). To say a further word on incoherence in the statute, the first of the foregoing provisions states that 10 U.S.C. § 831(a), (b), (d) do not apply to military commissions under the MCA. § 948(d)(1)(B). 10 U.S.C. § 831(a) states that “[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.” Thus, it would appear that, if § 831(a) does not apply, a person may be compelled to self-incriminate before a military commission under the MCA. Section 949a(b)(2)(C) would seem to confirm this: “A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of § 948r of this title.” But § 948r states that “[n]o person shall be required to testify against himself at a

double jeopardy rules: if the Department of Defense is unsatisfied with the outcome of a trial, it may order a retrial.<sup>61</sup> And then do so again.<sup>62</sup> Moreover, the MCA may authorize the indefinite detention of captives in the war on terror.<sup>63</sup> In light of these statutory features, whether the MCA indeed does apply to citizens is an issue that demands resolution.

In the following pages, I will first analyze the text of the MCA on its own terms. While demonstrating the statute's ambiguities and contradictions, I will sketch possible executive department interpretations based first on the text itself and then on executive-branch materials, presidential pronouncements, and legislative history.

At the outset, I wish to acknowledge the following realist premises: Congress is a "they," not an "it" (though the less jarring and more traditional "it" locution will be used throughout). It does not have a singular will. Much of what it produces results from compromise among parties with different views of the meaning of specific words, of the purposes of the legislation in question, and, indeed, of the purposes of legislation generally. There is, therefore, no one correct reading of statute. Moreover, statutes, for all practical purposes, ultimately acquire meaning when applied, for only then can we count their effects. Thus, the interpretation of statutes is, at best, the elaboration of sense. Certain principles of constitutional politics or democratic theory may persuade the reader that laws ought to be interpreted one way or another, in particular with deference to legislative intent,<sup>64</sup> but the reader's own commitments and

proceeding of a military commission under this chapter."

60. § 948b(d)(1)(A).

61. § 950b(d)(2)(B)(ii). *But see* § 950e(b)(1)(A). The former statutory provision allows for the convening authority (the Department of Defense) to order a rehearing in revision—even for charges for which a defendant was found not guilty—if the defendant has been found guilty of one of the specifications of that charge. *See* BLACK'S LAW DICTIONARY, *supra* note 29, at 1434-35 (defining "specification" and distinguishing between charges and specifications by helpful reference to HENRY M. ROBERT, ROBERT'S RULES OF ORDER NEWLY REVISED § 61, at 636 (10th ed. 2002)). But the latter statutory provision appears to provide a blanket ban on rehearings for charges of which a defendant has been found not guilty. To the extent that these two provisions are logically incompatible, either the statute is incoherent or it effects an improvidently sequenced carveout.

62. § 950b(d). There are no statutory limits on how long this might go on.

63. Lederman, *supra* note 10. The MCA does not explicitly authorize detention, but it would seem to be a lesser-included power necessary for bringing someone to trial. Indeed, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), the Supreme Court held that detention of belligerents for the duration of hostilities is a necessary incident to war and authorized in the war on terror, with certain limitations, by the Authorization for Use of Military Force.

64. It is generally agreed that, when applying statutes, courts are to give force to the meaning Congress intended. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283-94 (1989) (providing a general overview of the theory of legislative supremacy in statutory interpretation). More controversial is the question of how judges should determine legislative intent when reading ambiguous statutes. *Compare* STEPHEN BREYER, ACTIVE LIBERTY (2005) (arguing that courts should use a number of tools, including legislative history, tradition, and precedent), *with* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (arguing that judges should discern meaning solely from statutory

policy judgments—conscious and unconscious—inevitably contribute to the construction of meaning. In the hope of cabining these effects of bounded human subjectivity, I have generally limited this Note to descriptive analysis.

## II. TEXT

The MCA has numerous provisions that seemingly touch upon the issue of who may be tried before military commissions in the war on terror. I address them independently and in concert in order to discover how they may interact to impose internal limitations on the jurisdiction of military commissions.

### A. *The Jurisdictional Grant*

Section 948d of the MCA sets forth the jurisdiction of military commissions at Guantánamo. It reads, in relevant part:

(a) Jurisdiction.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an *alien unlawful enemy combatant* before, on, or after September 11, 2001.

(b) Lawful Enemy Combatants.—Military Commissions under this chapter shall not have jurisdiction over lawful enemy combatants. . . .

(c) Determination of Unlawful Enemy Combatant Status Dispositive.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of the Defense that a person is an unlawful enemy combatant is *dispositive* for purposes of jurisdiction for trial by military commission under this chapter.<sup>65</sup>

On their face, these provisions grant military commissions under the MCA jurisdiction over noncitizens (“alien[s]”)<sup>66</sup> who are also “unlawful enemy combatant[s]”<sup>67</sup> (but not noncitizens who are “lawful enemy combatants”<sup>68</sup>) as determined by the executive.<sup>69</sup>

However, note that the jurisdictional grant is a positive grant that contains no exclusivity language. That is, it does not stipulate that military commissions *only* have jurisdiction over alien unlawful enemy combatants. Applying the canon of *expressio unius est exclusio alterius*—which holds by negative implication that the express mention of one thing excludes all others—one could read § 948d to contain an implied limitation on the jurisdictional grant.

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text and most especially not from legislative history).

65. 10 U.S.C.A. § 948d(a)-(c) (emphases added).

66. § 948d(a).

67. *Id.*

68. § 948d(b).

69. § 948d(c).

This canon is often employed by the Supreme Court,<sup>70</sup> and seems especially appropriate in cases in which statutes seem to depart from a judicially cognizable normative baseline.<sup>71</sup> Given that the entire reason the MCA exists is to overcome the Supreme Court's decision in *Hamdan v. Rumsfeld*, which held that the President's prior military-commissions system departed so thoroughly from the normative (in this case, constitutional) baseline as to require congressional authorization<sup>72</sup>—which authorization the MCA purports to grant—there is a good argument for applying the canon here and reading § 948d as containing an implied limitation on military commissions' jurisdiction.

On the other hand, *expressio unius* is a weak canon, and courts freely disregard it when they believe it to produce absurd results.<sup>73</sup> Here, the executive could argue that the MCA itself represents a shift in the normative baseline with reference to which the MCA should be interpreted. On this account, in the face of the Court's high-minded, adverse ruling against the President in *Hamdan*, the people, through their representatives, spoke clearly in favor of expansive executive power. The absurd result in applying *expressio unius*, then, would be to undermine the will of the people. The two political branches, Congress and the President, have agreed on a policy, and now courts, out of respect for the democratic process and their own institutional limits, ought not to interfere with those judgments by reading the MCA's jurisdictional grant in a manner inconsistent with the normative baseline shift it apparently embodies.

On its own, this would seem to militate in favor of a less restrictive reading of the jurisdictional grant. But one other factor weighs in favor of such a reading: the upshot of inference by negative implication depends on what one's understanding of the predicate is. Those opposed to expansive presidential power take as predicate the specific substance of the jurisdictional grant, but one could also take as predicate the abstract character of the provision. In terms of the latter, the jurisdictional grant is a *positive* grant of authority. As a positive grant, therefore, one might argue that what *exclusio unius* excludes are implied limitations on the grant. This, however, is a strained and unconventional application of the canon, and should not guide interpreters.

Moreover, the contention that the MCA represents the popular repudiation of the Supreme Court's decision in *Hamdan* and therefore reflects a normative "baseline shift" should be approached with skepticism. The MCA was passed in the waning days of the 109th Congress, and just a few weeks after adoption,

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70. WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 825 (3d ed. 2001) (citing numerous Supreme Court cases).

71. *Id.*

72. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

73. ESKRIDGE ET AL., *supra* note 70, at 824; see also *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

the Republican Party, which had championed the legislation, lost its majority in both chambers. If anything, that stunning defeat—a greater party swing than in the so-called “Republican Revolution” of 1994—should be considered by courts as a popular repudiation of whatever purported baseline shift the 109th Congress may have intended to effect.<sup>74</sup>

Finally, § 948d(a) and 948d(c) seem, on their faces, to set forth entirely different standards for falling within the jurisdiction of military commissions under the MCA. Whatever else may be true or derivable from § 948d(a), it at least makes clear that being an alien unlawful enemy combatant brings one within the authority of military commissions in the war on terror.<sup>75</sup> Section 948d(c), however, may be read as a vastly broader jurisdictional grant. It states that being found an “unlawful enemy combatant is *dispositive* for purposes of jurisdiction for trial by military commission.”<sup>76</sup> Depending on how the word “dispositive” is directed, this provision could mean vastly different things. “Dispositive” could be directed backward, towards Combatant Status Review Tribunal (CSRT) findings. If so, then § 948d(c) would only seem to indicate that CSRT decisions are final for the purposes of finding jurisdiction under § 948d(a) and therefore would not alter that jurisdictional grant. But “dispositive” could also be directed forward, towards “for purposes of jurisdiction.”<sup>77</sup> On this reading, § 948d(c) means that a CSRT finding of unlawful enemy combatant status is alone sufficient for trial before a military commission.

That sufficiency is unaffected by the *Boumediene* Court’s granting of habeas review of CSRT decisions. For even though those decisions may no longer be “dispositive” in the absolute sense, they remain so with respect to the executive’s self-regarding administrative procedures. The *Boumediene* Court provided a means for testing the President’s assertions vis-à-vis any particular person accused of being an unlawful enemy combatant, but, going no further, the Court provided no guidance as to what CSRT determinations would be struck down or on what basis. It certainly did not address itself to the issue of citizenship.<sup>78</sup> Therefore, whether the President, through CSRTs, could legally classify citizens as unlawful enemy combatants remains an open question.<sup>79</sup>

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74. The view that the midterm elections of 2006 represented a broad rejection of Republican Party policies is not, however, universally held. See David Brady et al., *The Midterm Revolution That Wasn’t*, HOOVER DIGEST, Jan. 2007, available at <http://www.hoover.org/publications/digest/6731081.html>.

75. See 10 U.S.C. § 948d(a) (2006).

76. § 948d(c) (emphasis added).

77. *Id.*

78. In essence, *Boumediene* opened up the possibility of the Court one day addressing the specific question of whether citizens may be designated as unlawful enemy combatants by CSRTs but did not go on to answer that question.

79. In *Hamdan*, the Supreme Court did not reach the issue of whether the CSRTs properly adjudicated the legal status of detainees at Guantánamo Bay. See Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*,

Titles, traditionally a weak and disputed source of interpretive authority,<sup>80</sup> are here of little help in interpreting the MCA's jurisdictional grant. Section 948d as a whole is called "Jurisdiction of military commissions."<sup>81</sup> This would seem to indicate that the section read as a whole should be determinative of jurisdiction, but that alone tells us nothing about the nature of the jurisdictional grant. Does it mean that every individual subsection should be read to confer jurisdiction (so that the broader, forward-directed application of "dispositive" becomes tenable) or does it mean that subsections should be read together to craft a single rule (so that subsection (c) is subordinated to subsection (a))? What kind of interstitial rules would require one or the other approach? Could the fact that subsection (a) is, somewhat repetitively, titled "Jurisdiction," provide the answer (suggesting the second approach)? Or, on the other hand, does the declarative mood of the title of subsection (c) suggest that we read it constructing "dispositive" as forward-directed and therefore accept the former approach to the section as a whole, taking each subsection as a separate grant of authority? There are no definitive answers here.

### B. *The Definition Section*

Taking the jurisdictional grant of § 948d at face value, I now turn to the definition section of the MCA. In relevant part, § 948a reads:

(1) Unlawful enemy combatant.—

(A) The term "unlawful enemy combatant" means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

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

....

(2) Lawful enemy combatant.—The term "lawful enemy combatant" means a person who is—

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

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116 YALE L.J. 667, 667 n.5 (2006) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 & n.61 (2006)). My own view is that the Court avoided answering this question because it did not want to approach the ontological and necessarily predicate question of whether the "war on terror" is in fact, legally speaking, a "war."

80. ESKRIDGE ET AL., *supra* note 70, at 831.

81. § 948d.

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed[,] distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(3) Alien.—The term “alien” means a person who is not a citizen of the United States.<sup>82</sup>

Note first that while “unlawful enemy combatant” appears at first glance to be defined by reference to “lawful enemy combatant,” the definition of the latter, while necessary, is not sufficient to delimit the definition of the former. Unlawful enemy combatants, under § 948a, simply cannot be lawful enemy combatants; that is, from the universe of people who can be unlawful enemy combatants, those who fit the definition of lawful enemy combatants are excluded. Thus, the reference in § 948a(1)(A)(i) to § 948a(2) tells us little about who may be unlawful enemy combatants beyond that regular, uniformed, armed forces of a cognizable government may not be.

### 1. *A perplexing parenthetical*

Oddly, the parenthetical reference to Taliban and Al Qaeda fighters makes the definition of unlawful enemy combatants even more inscrutable. If the parenthetical distributes only over the immediately antecedent “lawful enemy combatant,” then Taliban and Al Qaeda fighters would be lawful enemy combatants under the MCA. This hardly seems right, given that lawful enemy combatants have a right under the Geneva Conventions, absent a contrary statute of the detaining power, to be tried by the same tribunals (in this case, United States courts martial) as the capturing country’s own armed forces,<sup>83</sup> and the whole point of the MCA is to try fighters captured in the war on terror before military commissions specially convened for that purpose.

On the other hand, if the parenthetical distributes across the entirety of § 948a(1)(A)(i), then Taliban and Al Qaeda fighters are to be considered unlawful enemy combatants, potentially triable under the MCA. This is generally consistent with the rest of the MCA, in particular, its explicit lifting of Geneva Convention protections from Guantánamo detainees: “No alien unlawful enemy combatant subject to trial by military commissions under this chapter may invoke the Geneva Conventions as a source of rights.”<sup>84</sup> But it is

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82. § 948a(1)(A) to § 948a(3).

83. *See* Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-33 (2006).

84. § 948b(g).

not entirely consistent with past pronouncements by President Bush. In 2002, he somewhat confoundingly stated that Taliban prisoners at Guantánamo Bay are entitled to Geneva Convention protections even though they do not qualify as prisoners of war, but that Al Qaeda captives have no such rights.<sup>85</sup> Under the MCA, the two groups are lumped together. So either the executive has no consistent position on the status of detainees at Guantánamo or the MCA represents a clear and final change in position as informed by post-2002 detainee litigation. The presumption of internal statutory coherence<sup>86</sup> compels the latter interpretation.

## 2. *Surplus language and its political uses*

However, whatever § 948a(1)(A)(i) may mean, it may ultimately be irrelevant in its entirety because it is swallowed by § 948a(1)(A)(ii). Note that § 948a(1)(A)(i) and § 948a(1)(A)(ii) are listed as options. Under the traditional inclusive construction of “or” (i.e., truth-functionally as “and/or”)<sup>87</sup> the fulfillment of either set of criteria by a detainee would be sufficient to qualify him or her as an unlawful enemy combatant. And while § 948a(1)(A)(i) appears to place some limits on who can qualify as an unlawful enemy combatant, § 948a(1)(A)(ii) does not. Instead, it allows the executive at any time whatsoever—past, present, or future—to confer unlawful-enemy-combatant status through the establishment of CSRTs “or another competent tribunal” upon any detainee whatsoever.

Additionally, § 948a(1)(A)(ii) does not include an exemption for the class defined below in § 948a(2) as “lawful enemy combatants” (and exempted from § 948a(1)(A)(i)). Thus, persons meeting the characteristics of § 948a(2) would appear to be eligible for classification as unlawful enemy combatants under § 948a(1)(A)(ii). If Congress intended to exclude lawful enemy combatants as defined in § 948a(2) from § 948a(1)(A)(ii), it most certainly could have. Moreover, it showed that it knew how by excluding lawful enemy combatants from § 948a(1)(A)(i).

In short, a lot turns on the word “or.” If the “or” between the two subsections is a hard disjunctive “or,”<sup>88</sup> then § 948a(1)(A)(ii) would appear to grant the executive plenary power to determine who is an unlawful enemy combatant and to make surplusage of § 948a(1)(A)(i).

There is generally a rule against reading statutory language as surplusage.<sup>89</sup> Doing so goes against the theory of a rational legislature that is

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85. Press Release, White House, Fact Sheet, Status of Detainees at Guantánamo (Feb. 7, 2002), 2002 WL 191071 (White House).

86. See ESKRIDGE ET AL., *supra* note 70, at 830.

87. See generally Ray Jennings, *Disjunction*, STANFORD ENCYCLOPEDIA OF PHIL., Oct. 1, 2008, <http://plato.stanford.edu/entries/disjunction/#8> (explaining the various uses of “or”).

88. *Id.*

89. ESKRIDGE ET AL., *supra* note 70, at 833.

presumed only to include language with meaning.<sup>90</sup> By extension, it offends the idea of judicial deference to the political branches: who are judges to decide that (constitutionally) sound legislative enactments have no force? These arguments fall flat here, however. It may be that “[a] construction which would leave without effect any part of the language of a statute will normally be rejected,”<sup>91</sup> but under abnormal circumstances, as when the implication of surplusage seems inevitable, such language must be discounted—at least in its dimension as actually applicable law.

Such language may still serve an expressive or political function. And here it is important to distinguish between surplusage and redundancy. The two are easily conflated.<sup>92</sup> Redundancy repeats content.<sup>93</sup> Strictly speaking, any member of a redundant set can be stricken without loss of function or meaning provided that not all members of the set are stricken. “Surplusage,” as I use it, indicates that one member of the set (in this case a pair) in no way limits the power granted by the other member. It is literally “more than what is needed.”<sup>94</sup> This, of course, does not mean that § 948a(1)(A)(i) (including its incorporation of § 948a(2)), serves no purpose. Note that the surplusage does not run both ways. If our baseline is the MCA as it now stands, the President’s power would be greatly reduced if § 948a(1)(A)(ii) were stricken. Thus, inclusion of § 948a(1)(A)(i) may reveal a desire on the part of Congress and the President to assuage—however intellectually dishonestly—the public discomfort that § 948a(1)(A)(ii) alone might engender.

Interestingly, the definitions section of the draft version of the MCA transmitted from the White House to Congress on September 6, 2006, was even less clear than the definitions section in the version that became public law. It neither included nor excluded present or future determinations of unlawful-enemy-combatant status by the executive as dispositive for such classification.<sup>95</sup> It did, however, declare that CSRT determinations made “before the effective date of [the MCA]” were dispositive.<sup>96</sup> By implication, this could be read to exclude any CSRT determinations on or after the date the MCA passed into law. If so, then Congress may actually have given the President more than he asked for with respect to the power to classify individuals as unlawful enemy combatants—while allowing the *impression* to stand that his power was somehow limited.

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90. *Id.*

91. *Id.* (quoting PETER MAXWELL, MAXWELL ON THE INTERPRETATION OF STATUTES 36 (12th ed. 1969)).

92. *See, e.g., id.* (conflating surplusage and redundancy).

93. *See* NEW OXFORD AMERICAN DICTIONARY, *supra* note 49, at 1429.

94. *Id.* at 1710 (defining “surplus”).

95. Military Commissions Act of 2006, White House draft transmitted to the House and Senate (Sept. 6, 2006), *available at* <http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf>.

96. *Id.*

### 3. *Settling the issue?*

Last is the term “alien,” which is straightforwardly defined as a noncitizen.<sup>97</sup> This is consistent with common understandings of the term.<sup>98</sup> Though “alien” is combined with “unlawful enemy combatant” throughout the MCA,<sup>99</sup> we are left to query why the MCA’s definition section separates out “alien” from “alien unlawful enemy combatant” but does not separate out “unlawful.”<sup>100</sup> For there are, in fact, four logically possible classes of enemy combatant under the President’s nomenclature:

**Table 1. Enemy Combatant Classes**

	<b>Lawful</b>	<b>Unlawful</b>
<b>Alien</b>	<i>1. alien lawful enemy combatants</i>	<i>2. alien unlawful enemy combatants</i>
<b>Citizen</b>	<i>3. citizen lawful enemy combatants</i> <sup>101</sup>	<i>4. citizen unlawful enemy combatants</i>

So why the odd asymmetry of only parsing out “alien?”

Consider the definitional structure discussed above in Part II.B, paragraph one, and Part I.B.2. Defining an “unlawful enemy combatant” either (a) negatively as someone who is *not* a “lawful enemy combatant,” and then defining the second term separately, or (b) as someone the executive deems to be an unlawful enemy combatant, without respect to citizenship status, preserves the integrity of the term “unlawful enemy combatant.”<sup>102</sup> By not building potentially limiting notions of citizenship into this definition, the MCA renders it less specific, and the end result is to leave the executive with as much latitude as possible in conferring unlawful-enemy-combatant status upon detainees under § 948a(1)(A)(ii).

Now recall that the government has declared several individuals to be members of class four in the matrix above. The most striking case is, of course, that of José Padilla. An American citizen, he was apprehended at Chicago O’Hare International Airport by the Federal Bureau of Investigation and detained for a month in civilian custody before being declared an “enemy

97. 10 U.S.C. § 948a(3) (2006).

98. See BLACK’S LAW DICTIONARY, *supra* note 29, at 79 (“In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.”).

99. See, e.g., §§ 948b(a), 948d.

100. § 948a.

101. This quadrant may represent a null set insofar as citizen enemy combatants would be treasonous, and treason is not lawful.

102. See § 948a(1)(A), (2)(A)-(C).

combatant.”<sup>103</sup> At that point, he was turned over to the Department of Defense, which placed him in a military brig in South Carolina and held him incommunicado for almost two years.<sup>104</sup> The Bush Administration claimed it could hold him indefinitely, or at least until the end of the war on terror.<sup>105</sup> After Padilla challenged his detention and the Fourth Circuit Court of Appeals upheld it,<sup>106</sup> the Department of Defense suddenly transferred Mr. Padilla back into civilian custody,<sup>107</sup> keeping the appellate court’s precedent intact.<sup>108</sup> John Walker Lindh, also a citizen, was deemed an “unlawful enemy combatant.”<sup>109</sup> Unlike Padilla, however, Lindh took a plea bargain, accepting guilt for numerous criminal charges related to alleged acts of terrorism.<sup>110</sup> Curiously, Lindh’s plea agreement provides that in the future, indeed “for the rest of the defendant’s natural life,” the government may “capture and detain” Mr. Lindh as an “unlawful enemy combatant” should it deem it necessary.<sup>111</sup>

These men’s cases demonstrate that the Bush Administration made a sustained and determined effort to defend what it considers executive prerogatives with respect to citizens it deems to be unlawful enemy combatants.<sup>112</sup> This raises the question: given the origin of the MCA in the White House and its development under the hand of congressional allies, could the odd structure of the definitions section of the MCA aim to preserve the asserted right—not to *try* citizens before military commissions—but to detain

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103. Ackerman, *supra* note 9; Amanda Ripley, *The Case of the Dirty Bomber*, TIME, Jun. 24, 2002, at 28, available at <http://www.time.com/time/nation/article/0,8599,262917,00.html>.

104. Jenny S. Martinez, Op-Ed, *The Real Verdict on Jose Padilla*, WASH. POST, Aug. 17, 2007, at A23.

105. *Id.*

106. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

107. Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at A1. Of the purposes of such tactics, one of Mr. Padilla’s lawyers commented, “The government continues to be more focused on protecting its strategies than allowing them to be subjected to legal review.” *Id.*

108. Ackerman, *supra* note 9.

109. Plea Agreement, *United States v. John Lindh*, Criminal No. 02-37A (E.D. Va. 2002), available at <http://news.findlaw.com/cnn/docs/terrorism/uslindh71502pleaag.pdf>.

110. *Id.*

111. *Id.* Paragraph twenty-one of the agreement is quite astonishing:

With the following exception, the United States agrees to forego any right it has to treat the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment. The exception is as follows: For the rest of the defendant’s natural life, should the Government determine that the defendant has engaged in conduct proscribed by the offenses now listed at 18 U.S.C. § 2332b(g)(5)(B), or conduct now proscribed under 50 U.S.C. § 1705, the agreement contained in this paragraph shall be null and void, and the United States may immediately invoke any right it has at that time to capture and detain the defendant as an unlawful enemy combatant based on the conduct alleged in the Indictment.

*Id.* It is unclear what value, if any, the assurance in the first sentence has. (Also note that the agreement does not prevent the government from detaining Lindh as an unlawful enemy combatant for allegations other than those made in the indictment.)

112. See Liptak, *supra* note 107.

them indefinitely?<sup>113</sup> Even if it does not, the structure of the MCA's definition section should give the reader pause, for it at least suggests a desire on the part of its authors to grant the President broad powers. That conclusion could have deep consequences for interpreting the rest of the statute.

Still, a plain reading of the MCA's definition section, when applied to the jurisdictional grant, and viewed in light of the purpose provision of the statute, which states, "This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission,"<sup>114</sup> compels the conclusion that citizens may not be tried under the MCA. On a plain reading, the definitions section creates a limitation on executive power. The problem, as I will continue to demonstrate, is that there is sufficient "wobble room" in the statute to allow a presidential administration inclined to strained readings of law to do what a plain reading might not seem to permit.<sup>115</sup> A plain reading is not the only one possible.

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113. *Accord* Lederman, *supra* note 10.

114. 10 U.S.C.A. § 948b(a) (West 2008).

115. And let there be no doubt that a presidential administration might be inclined toward strained readings of law. Most relevantly here, of course, the Bush-era Office of Legal Counsel (OLC) became notorious for its questionably far-reaching interpretations of the Constitution and domestic and international law. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, on Military Interrogation of Alien Unlawful Combatants Held Outside the United States to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 14, 2003) (on file with author); Memorandum from Jay S. Bybee, *supra* note 29; Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., on Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens to Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs (June 27, 2002), *available at* <http://www.usdoj.gov/opa/documents/memodetentionuscitizens06272002.pdf> [hereinafter Yoo Memo to Bryant]; Memorandum from Alberto R. Gonzales, Counsel to the President, on Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban to President George W. Bush (Jan. 25, 2002), *available at* [http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales\\_addington\\_memo\\_jan252001.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf); Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Application of Treaties and Laws to al Qaeda and Taliban Detainees to Alberto R. Gonzalez, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 22, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>; Memorandum from John Yoo, Deputy Assistant Att'y Gen. & Robert J. Delahunty, Special Counsel, on Application of Treaties and Laws to al Qaeda and Taliban Detainees to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>. To their credit, others within the Bush Administration took issue with some of these opinions. *See, e.g.*, Memorandum from William H. Taft, IV, Legal Advisor, Dep't of State, on Comments on Your Paper on the Geneva Conventions to Alberto R. Gonzalez, Counsel to the President (Feb. 2, 2002) (counseling, contrary to the Office of Legal Counsel, that the Geneva Conventions apply to the U.S. conflict in Afghanistan), *available at* [http://www.nytimes.com/packages/html/politics/20040608\\_DOC.pdf](http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf); Memorandum from Alberto Mora, General Counsel, Dep't of the Navy, on Statement for the Record: Office of

## C. “Principals” and Offenses

Two final provisions of the MCA text deserve our attention. Both are contained in Subchapter VII, the portion of the law purporting to address punitive matters.<sup>116</sup> This subchapter primarily—but, as we shall see, not only—enumerates the list of offenses with which detainees may be charged before military commissions.<sup>117</sup> First among the issues we must consider is the introduction of a new term to describe who is subject to the MCA; second is the listing of an enigmatically defined crime. Each of these provisions undermines the stability of the contention that the definitions section, statement of purpose,

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General Counsel Involvement in Interrogation Issues to Inspector Gen., Dep’t of the Navy (July 7, 2004) (arguing that the legal framework upon which the Bush Administration had predicated many of its tactics in the war on terror was unsound and dangerous to American military personnel because of the reciprocal behavior it might invite), *available at* <http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf>. One went so far as to call them “deeply flawed,” “wholly inadequate analys[e]s of the law” that demonstrated “catastrophically poor legal reasoning” and might not withstand judicial scrutiny because so “profoundly in error” and “clearly at variance with applicable law.” Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32 (referring to Memorandum from Alberto Mora, *supra*). Indeed, so egregious were many of the opinions that they eventually had to be withdrawn. Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG., Sept. 9, 2007, at 40, *available at* <http://www.nytimes.com/2007/09/09/magazine/09rosen.html?pagewanted=all>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., for the files, on Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), *available at* <http://www.usdoj.gov/opa/documents/memostatusolcopinions01152009.pdf>. By then, however, these and other, still classified OLC memoranda had already provided the necessary foundation for many of the most controversial practices in the war on terror. On their account (both the memoranda and the practices), John Yoo has become the subject of a civil suit and the object of a Department of Justice internal investigation. Charlie Savage & Scott Shane, *Terror-War Fallout Lingers Over Bush Lawyers*, N.Y. TIMES, Mar. 9, 2009, A1. (José Padilla, the alleged “dirty bomber,” is suing Mr. Yoo over the torture he (Mr. Padilla) allegedly received at interrogators’ hands while in U.S. custody, and for which Mr. Padilla claims Mr. Yoo is ultimately responsible. *Id.*; see Ripley, *supra* note 103. The Department of Justice is investigating Mr. Yoo for ethics violations, in effect, to determine whether his conduct constitutes malpractice. Savage & Shane, *supra*. Defenders of Mr. Yoo have blamed the investigation on “partisan politics.” *Id.* But that assertion would appear to be belied by the fact that the Department of Justice Office of Professional Responsibility’ investigation began during the Bush Administration. See Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, NEWSWEEK, Feb. 23, 2009, at 9, *available at* <http://www.newsweek.com/id/184801>. For his part, John Yoo has vigorously defended his legal and policy work for the Bush Administration in seemingly every venue in which he would be heard. See, e.g., YOO, *supra* note 41. Elsewhere, others in the academy and the courts have criticized the Bush Administration’s legal reasoning as strained. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 532-34 (2007) (chastising the Bush Administration for its questionable understanding of the constitutional foreign affairs power, especially as it relates to the Clean Air Act); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

116. 10 U.S.C.A. § 950p-w (West 2008).

117. *Id.*

and jurisdictional grant in conjunction serve to protect citizens from trial before military commissions.

### 1. *New language*

As Parts III.A and III.B showed, because citizens, as such, cannot qualify as “*alien* unlawful enemy combatants,”<sup>118</sup> the jurisdiction, definition, and purpose sections of the MCA, read plainly and together, can support an interpretation of the law that excludes the possibility of citizens being tried before military commissions. The sustainability of that understanding, however, depends upon the exclusivity of the jurisdiction, definition, and purpose section triptych, that is, upon reading it as the closed set it appears to be. For if other provisions of the law have something to say about who may be tried before military commissions, the interpreter is faced with a dilemma: either those other provisions must be read to weaken the arguable coherency of the definition, purpose, and jurisdiction section triptych (because the interpreter is forced to consider how outside inputs contribute to the meaning of the words contained in that triptych), or they must be read to serve as addenda expanding or contracting the sphere of persons triable before military commissions.

Subchapter VII of the MCA appears to intrude upon that stability of the definition, purpose, and jurisdiction sections in the latter way. I rule out the former possibility because the portions of Subchapter VII with which we are concerned share no relevant language with the definition, purpose, and jurisdiction sections of the MCA. Thus, there is no textual “hook” on which to hang a merely informative (rather than dilating) reading of Subchapter VII. I now turn to the individual provisions undermining the balance.

First, § 950q, titled “Principals,” reads, in relevant part: “*Any person* is punishable as a principal under this chapter who—(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission . . . .”<sup>119</sup> If read unequivocally, this provision could, on its face, draw citizens within the terms of the MCA. However, such a reading would require distinguishing between persons triable and crimes punishable. For if, on the other hand, an offense is only punishable under this chapter when committed by an alien, then only aliens would be persons punishable as “principal[s] under this chapter.”<sup>120</sup> Disentangling punishable crimes from punishable people, however, one can see how § 950q could be read as a power-expanding addendum to the definition, purpose, and jurisdiction section

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118. Absent other interpretive inputs or claims, any other reading of the meanings of “citizen” and “alien,” simpliciter, that is, reading them to somehow mean the same thing, would require us to reject the possibility of meaning altogether. I do not intend to lead the reader that far.

119. § 950q-q(1) (emphasis added).

120. *Id.*

triptych. If *any* person—that is, any human being<sup>121</sup>—without limitation can be tried for committing a crime listed in the MCA, then citizens are straightforwardly at risk of being brought before military commissions.

Of course, a counterargument immediately presents itself: statutes should be read holistically,<sup>122</sup> and doing so here requires that the meaning of “principal” be limited by the definition, purpose, and jurisdiction sections of the MCA. The pedigree of this approach cannot be gainsaid.<sup>123</sup> Looking to the entire enactment in order to understand its subparts can be seen in American courts as early as 1805<sup>124</sup> and continues to the present day.<sup>125</sup> Generally, doing so requires the admittedly unrealistic assumption of statutory coherence<sup>126</sup>—as noted in Part I, Congress is a “they,” not an “it,” and imputing to Congress a singular will fails to take account of the compromise that often goes into the legislative drafting process and the piecemeal way in which many statutes are assembled.<sup>127</sup> But, goes the rejoinder, in the case of the MCA, this is less of a concern because the statute originated in complete draft form from within the White House<sup>128</sup> and was passed by Congress without wholesale reformation.<sup>129</sup>

Ultimately, the latter argument serves to undermine the former. If we assume a unitary force and will behind the drafting of the MCA, then we should also assume that the legislature knew what it was doing by introducing a

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121. I assume but do not argue nor need to prove that the MCA was not meant to apply to nonnatural persons, i.e., corporations and unincorporated associations. That question both lies beyond the scope of and is immaterial to my argument.

122. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.02 (Norman Singer ed., 5th ed. 1992).

123. *Id.* § 47.02, at 139 (asserting that holistic interpretation is “the most realistic [approach] in view of the fact that a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another”); *see also* ESKRIDGE ET AL., *supra* note 70, at 830 (citing MAXWELL, *supra* note 91, at 47-64 (discussing the English background of holistic interpretation)).

124. *See* United States v. Fisher, 6 U.S. 358, 372 (2 Cranch) 358, 372 (1805).

125. *See, e.g.*, Dolan v. USPS, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute.”); United Savings Ass’n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

126. ESKRIDGE ET AL., *supra* note 70, at 830-31.

127. *Id.*; *supra* Part I, para. 11.

128. One can argue that even legislation originating from the White House cannot be viewed as unitary given that competing parties within the executive branch may contribute to the text. Strictly true, it is a less compelling argument than when applied to the many-headed hydra that is the Congress, especially in the national security context where policy making appears to be far less influenced by powerful economic interest groups than in, say, agriculture or trade.

129. Nor, indeed, was there even considerable redrafting. *Compare* Military Commissions Act of 2006, White House draft transmitted to the House and Senate (Sept. 6, 2006), *available at* <http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf>, *with* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

new term in § 950q. It could have formulated the section as follows: “Any alien unlawful enemy combatant is punishable as a principal under this chapter who—(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission . . . .” Even more precisely, Congress could have said, “Only alien unlawful enemy combatants as defined in Subchapter I are punishable under this chapter, and then only if they are found guilty of committing an offense listed herein.” Instead, Congress said “*any* person is punishable . . . under this chapter.”<sup>130</sup>

As commentators favoring the whole act approach to statutory interpretation have noted, “from the general presumption that the same expression is presumed to be used in the same sense throughout an Act . . . there follows the further presumption that a change in wording denotes a change in meaning.”<sup>131</sup> Thus, reading the MCA as internally coherent and taking its authors to be rational actually may serve to strengthen the original argument. Congress knew what it was doing by changing language here: opening up the possibility for executive trial of citizens before military commissions.

## 2. *Statutory esotericism*

In a similar vein, § 950v(b), which sets forth the specific crimes with which “principals” may be tried, also begins with blanket language stating that its list of offenses “shall be triable by military commission under this chapter at any time without limitation.”<sup>132</sup> It is unclear whether “without limitation” applies merely to the literal time at which such crimes may be tried—peacetime, war, etc.—or to the prior words of the sentence as a whole, meaning that such crimes can be tried by military commission not only whenever but whosoever the defendant might be.<sup>133</sup> More worrisome, perhaps, is the description of one particular crime: “wrongfully aiding the enemy.”<sup>134</sup>

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130. 10 U.S.C.A. § 950q (emphasis added).

131. United States v. Fisher, 6 U.S. 358, 388-97 (1805); ESKRIDGE ET AL., *supra* note 70, at 834 (quoting MAXWELL, *supra* note 91, at 282). *But see id.* (noting that “this is a weak presumption”).

132. 10 U.S.C.A. § 950v(b).

133. To this one might add geographic scope, as well. The Department of Defense believes that under the MCA, it may set up military commissions wherever it wishes. OFFICE OF THE MILITARY COMM’NS, OFFICE OF THE SEC’Y OF DEF., MANUAL FOR MILITARY COMMISSIONS II-2, Rule 201(a)(2)-(3) (2007) [hereinafter MANUAL FOR MILITARY COMMISSIONS], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-mil-commissions.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-mil-commissions.pdf) (“The M.C.A. applies in all places. . . . The jurisdiction of a military commission with respect to offenses under the M.C.A. is not affected by the place where the military commission sits.”); Press Briefing on New Military Commissions Rules, Dan Dell’Orto, Principal Deputy Gen. Counsel & Brigadier Gen. Thomas Hemingway, Legal Advisor, Office of Military Comm’ns, Dep’t of Def. (Jan. 18, 2007) (on file with author).

134. 10 U.S.C.A. § 950v(b)(26).

As others have noted, this chargeable offense is buried deep within the statute, but one need not succumb to full-blown paranoia or resort to insinuations of conspiratorial deceit to be concerned by this provision.<sup>135</sup> Section 950v(b)(26) describes the crime as follows:

Wrongfully aiding the enemy.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.<sup>136</sup>

Whether “any” should be read in the strict categorical sense and whether, as a general matter, based on the definition, purpose, and jurisdiction section triptych or the “principals” language noted above, a citizen may be a “person subject to this chapter” are matters already discussed, and I will not review the arguments for and against those propositions here. If citizens *are* generally triable before the military commissions, then the “any person subject to this chapter”<sup>137</sup> language in § 950v(b)(26) suffices to show that the language that follows may at times refer to citizens. In that case, that language does nothing more than confirm what has already been established, namely, that citizens may be tried before military commissions. But if, on the other hand, neither the definition, purpose, and jurisdiction provision triptych nor the “principals” language of § 950q conclusively draws citizens within the scope of the MCA, the reader is left to wonder what the rest of § 950v(b)(26) could mean on its own terms.

Logic suggests that it draws citizens within the ambit of the MCA. After all, who but citizens would have an “allegiance or duty to the United States” to breach? At first glance, foreign allies would seem likely candidates. One can imagine, for example, a British soldier defecting to Al Qaeda in Iraq and engaging American troops in battle.<sup>138</sup> The problem there, however, is that it is only by those acts that such a soldier would become an alien unlawful enemy combatant. Therefore, at the moment she chose to breach her allegiance or duty to the United States, she would not have been a “person subject to this chapter”

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135. See Robert Parry, *The Military Commissions Act's Hidden Wording*, SCOOP INDEP. NEWS, Nov. 19, 2007, <http://www.scoop.co.nz/stories/HL0711/S00285.htm>. Though now working for an independent news agency of no particular distinction, Robert Parry is best remembered as the investigative journalist who helped break the Iran-Contra story for the Associated Press and exposed Oliver North's involvement for Newsweek. He won a Polk Award and was a Pulitzer Prize finalist for that work. Dan Kennedy, *Parry's Thrust*, SALON.COM, <http://www.salon.com/media/media960611.html> (last visited Jan. 30, 2009).

136. 10 U.S.C.A. § 950v(b)(26).

137. *Id.*

138. If you are unsatisfied with this example because you believe that the political relationship between the United States and Great Britain would ensure extradition (rather than trial before an American military commission), imagine that a smaller member of the “Coalition of the Willing,” say Tonga, had sent troops to Iraq, and that a citizen of that nation had turned coat. See Press Release, White House, Operation Iraqi Freedom Coalition Members (Mar. 27, 2003) (on file with author).

because not *yet* an alien unlawful enemy combatant (though already an alien). And if she was not prior to that moment a “person subject to this chapter,” she could not be punished for breaching an “allegiance or duty to the United States” on a natural reading of the grammar of § 950v(b)(26).<sup>139</sup> So, if such a person were held by the administration as an alien unlawful enemy combatant, the argument for doing so would have to rely on reading § 950v(b)(26) in *reverse* so that “knowingly and intentionally aid[ing] an enemy of the United States” in fact *makes* one a person subject to the MCA. If that is the case, then the MCA may apply to citizens.

Naturally, it would be even more difficult to shoehorn run-of-the-mill alien unlawful enemy combatants<sup>140</sup> into the contemplation of § 950v(b)(26), for though they are persons subject to the MCA, they have never had an allegiance to the United States. But what of citizens?

“Allegiance” is a term of art. According to the first definition in *Black’s Law Dictionary*, allegiance is “[a] citizen’s obligation of fidelity and obedience to the government or sovereign in return for the benefits of the protection of the state.”<sup>141</sup> “Natural allegiance” is “[t]he allegiance that native-born citizens or subjects owe to their nation,” and “permanent allegiance” is “[t]he lasting allegiance owed to a state by citizens or subjects.”<sup>142</sup> Indeed, the Oath of Citizenship as usually recited in naturalization ceremonies and as approved by the government invokes allegiance twice—once to deny loyalty to another state, again to pledge it to the United States.<sup>143</sup> Even the more generic definition contained in the (nonlegal) *New Oxford American Dictionary* associates allegiance with citizenship, illustrating proper usage with: “Those wishing to receive citizenship must swear allegiance to the republic.”<sup>144</sup> Thus, it would seem that the language of § 950v(b)(26) is most at home with a

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139. Note that it is immaterial whether breach is an act or a status for the latter, though ongoing, can only arise from particular acts and does not inhere in an individual’s personhood. Thus, while one might not continue to “be” an unlawful enemy combatant in the literal present tense that that verb, read strictly, conveys, one continues to “be” an unlawful enemy combatant in the sense of having been determined to have committed at least one act that would place a person in that category at the moment of committing the act. The point here is not that allies’ soldiers cannot commit the offense of “wrongfully aiding the enemy” as a general matter, it is that they cannot be “person[s] subject to this chapter” under the prefatory clause of § 950v(b)(26) *until* they have done so, for it is only in committing the act of wrongfully aiding the enemy that they acquire unlawful enemy combatant status. 10 U.S.C.A. § 950v(b)(26). Moreover, § 950v(b)(26) simply does not need to exist in order to bring allied soldiers who have gone rogue within the ambit of the MCA.

140. Who qualify as “run-of-the-mill alien unlawful enemy combatants”? Think: lifelong Middle Easterners who have forever been citizens or subjects of foreign states and take up arms for terrorist organizations against the United States in Afghanistan, Pakistan, or Iraq.

141. BLACK’S LAW DICTIONARY, *supra* note 29, at 82.

142. *Id.* Ironists who tend toward the bleak will note that *Black’s* helpfully points out that historically “allegiance” referred to “[a] vassal’s obligation to the liege lord.” *Id.*

143. 8 C.F.R. § 337.1 (2008).

144. NEW OXFORD AMERICAN DICTIONARY, *supra* note 49, at 42.

construction that expands the reach of the MCA to citizens. It is they who have an allegiance to breach.

As with reading the allegiance language of § 950v(b)(26) to apply to allies, however, reading it to contemplate citizens creates a “catch-22.” One has either to beg the question (i.e., assume the premise that citizens are “person[s] subject to this chapter”—a view inconsistent with our prior plain reading of the definition, purpose, and jurisdiction sections<sup>145</sup>) or to read § 950v(b)(26) in reverse, so that breaching one’s allegiance to the United States renders one triable by military commission (allowing our broader but possibly less convincing prior reading of the definition, purpose, and jurisdiction sections as open-ended or inclusive of citizens<sup>146</sup> to stand). Neither approach is satisfactory. One frustrates logic; the other frustrates the normal lexical reading of sentences. Yet one or the other approach seems necessary if § 950v(b)(26) is to be given force over citizens, as its hinging on “allegiance” would seem to command.

And this gets to the heart of the indeterminacy of the MCA: The challenge is not just that its language is difficult to parse—almost all statutes are ambiguous in one respect or another, and meaning can never be fully elaborated within the span of a single text. The challenge is that no interpretation of the MCA leads to a fully satisfactory result—every interpretation produces an absurdity or contradiction. Thus it becomes impossible, even on a plain reading, not to interpret some provision to be in derogation of another.<sup>147</sup> In such situations, traditional tools of statutory interpretation fail us. It is a bedrock principle of statutory interpretation that words should not be read to carry “meaning[s] they will not bear.”<sup>148</sup> But what should happen when there is no meaning that is, in another sense, bearable?

If you think that the United States is not genuinely at war or under invasion,<sup>149</sup> then enlisting the avoidance canon might seem like an attractive way of resolving the tensions within the MCA. The canon has several forms, but the one most applicable here is as a saving construction canon: statutes should be interpreted so as to be constitutional.<sup>150</sup> Assuming, then, that the

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145. See *supra* Parts III.A, III.B.

146. See *supra* Parts III.A, III.B.

147. See ESKRIDGE ET AL., *supra* note 70, at 835-46 (excerpting and commenting on *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and noting especially that both the majority and dissent rely on the nonderogation canon).

148. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

149. See *supra* Part I.

150. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citing numerous cases in support of the same proposition); *Ashwander v. TVA*, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J., concurring); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

requirements of the Suspension Clause<sup>151</sup> have not been satisfied,<sup>152</sup> then in order to save the MCA from being struck down as unconstitutional, it must be read so as not to apply to citizens.<sup>153</sup> However, in the face of the MCA's "allegiance" and repeated "any person" language, construing the MCA so as to be constitutional would require a blatant judicial rewrite of the law (so as not to contemplate citizens) that both textual literalists and purposivists concerned with legislative supremacy in providing meaning to statutes might understandably find troubling.

Purposivists might also object to applying the avoidance canon for another reason: doing so ignores the history of the MCA. If the purpose of a statute is to be divined by looking to the "mischief" to be remedied by the law,<sup>154</sup> then we might wonder what mischief the MCA was intended to remedy. Given that the MCA was developed as a direct rejoinder to the Supreme Court's ruling in *Hamdan v. Rumsfeld*,<sup>155</sup> which held that President Bush's preexisting military commissions were unconstitutional (at least insofar as they had been established without congressional authorization),<sup>156</sup> it is easy to formulate an answer: the MCA was developed to return to the executive the powers he claimed pre-*Hamdan*.<sup>157</sup> What that might entail substantively is developed more in the next Part, but, at the very least, for purposivists concerned with divining the law's truest meaning, the historical origins of the MCA in the executive branch recommend the interpretive principle which we earlier

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151. U.S. CONST. art. I, § 9, cl. 2.

152. The *Boumediene* Court appears to have concluded just this. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay.").

153. There are suggestions that this is precisely how the Court appears to have read the MCA in *Boumediene* but only by assumption. *See id.* at 2253 ("The Court has discussed the issue of the Constitution's extraterritorial application on many occasions. These decisions undermine the Government's argument that, *at least as applied to noncitizens*, the Constitution necessarily stops where *de jure* sovereignty ends." (emphasis added)); *id.* at 2259 ("Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term.").

154. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892); *Heydon's Case*, (1584) 3 Co. Rep. 7a, 76 Eng. Rep. 637.

155. DAVE COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 53, 97 (2007); Press Release, White House, *supra* note 4.

156. 548 U.S. 557 (2006).

157. For a helpful discussion of the meta-rationale behind the *Hamdan* decision, see EINER ELHAUGE, *STATUTORY DEFAULT RULES* 6, 99-107, 194 (2008). In short, Elhaug argues that where public preferences are actually enactable by law, courts should resolve statutory ambiguities against enactable preferences in order to elicit a legislative response. Although Elhaug's concern does not appear to be with the welfare of minorities, his proposed rule of interpretation may ultimately result in outcomes similar to the democracy-reinforcing, counter-majoritarian jurisprudence recommended by John Hart Ely. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

showed implicit in the structure of the law: it should be read broadly as a conferral of executive power.<sup>158</sup>

### III. PRIMARY EXECUTIVE BRANCH ELABORATION: REGULATIONS

The MCA grants the executive, through the Department of Defense and the Department of Justice, the authority to provide rules for trial by military commission.<sup>159</sup> Under the *Chevron* doctrine, courts must defer to reasonable administrative interpretations of ambiguous statutes.<sup>160</sup> As a predicate to applying the doctrine, we must understand how the Bush Administration has interpreted the MCA.

#### A. *Miscellanea*

On January 18, 2007, the Department of Defense released the Manual for Military Commissions (“Manual”),<sup>161</sup> which it dubbed “a comprehensive set of pretrial, trial, and post-trial procedures.”<sup>162</sup> At the press conference, Department of Defense Principal Deputy General Counsel Dan Dell’Orto proclaimed:

These procedures . . . will govern the full and fair prosecution of allegations against *alien* unlawful enemy combatants by military commissions. . . . The act and the procedures contained in this manual will ensure that *alien* unlawful enemy combatants who are suspected of war crimes and . . . certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people.<sup>163</sup>

The repeated use of “*alien* unlawful enemy combatants” seems to be a deliberate and careful choice. But it was not universally employed in the announcement. Before handing over the proceedings to Mr. Dell’Orto and Legal Advisor Brigadier General Thomas Hemingway, Deputy Assistant

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158. Ironically, this, when combined with the premise that the United States is not in a state of rebellion or invasion, might actually strengthen the case for striking the statute down as violating the Suspension Clause. *See supra* Part I, *infra* Part V.

159. 10 U.S.C.A. § 949a(a) (West 2008).

160. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

161. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133.

162. Press Briefing on New Military Commissions Rules, *supra* note 133.

163. *Id.* (emphases added). The “full and fair” language that one heard various members of the Administration repeat often and that is included in the cited text appears to have been lifted from *Ex parte Robinson*, 20 F. Cas. 969, 971 (C.C.S.D. Ohio 1855) (No. 11,935), wherein Justice McLean, riding Circuit, held that “where there was clearly jurisdiction and a full and fair hearing,” prior judgments should be considered final by a habeas court. *See also* *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008). The portion of the announcement beginning with the word “regularly” borrows language from the Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 83, at art. 3, § 1(d).

Secretary of Defense for Public Affairs Bryan J. Whitman said, without qualification, that “[t]he Military Commissions Act provided statutory authority to try unlawful combatants for violations of the law of war.”<sup>164</sup> As we shall see, Whitman’s more open-ended locution was more accurate, though neither the Executive Summary, Preamble, nor Scope provisions of the Manual would at first glance so hint.

The Executive Summary, which seems to have provided the near verbatim basis for Deputy General Counsel Dell’Orto’s opening pronouncement, states: “[The Manual] is intended to ensure that *alien* unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people.”<sup>165</sup> The Preamble again references only “alien unlawful enemy combatants”: “The M.C.A. amends . . . [the] Uniform Code of Military Justice . . . to permit greater flexibility . . . for trials of *alien* unlawful enemy combatants . . .”<sup>166</sup> And, in delimiting its scope, the Manual states: “These rules govern . . . trials by military commissions of *alien* unlawful enemy combatants . . . as defined in 10 U.S.C. § 948a(1) and (3) . . .”<sup>167</sup>

Note, however, the “as defined in”<sup>168</sup> caveat in the Scope provision. As discussed at length above, § 948a(1) and (3) of the MCA may provide the basis for the trial of citizens.<sup>169</sup> If so, and if the Executive Summary and Preamble are not operative parts of the Manual,<sup>170</sup> then they are, it would seem, merely lip service to, or allusion without expression of, the idea of excluding citizens from trial by military commission. And if any other part of the MCA *should* so authorize, the purpose provision is open-ended enough to serve as a catchall for those as well: “These rules are intended to provide for the just determination of *every* proceeding relating to trial by military commissions.”<sup>171</sup> Presumably, this would cover trials of both aliens and citizens (terms that the Manual goes on to define in self-evident ways consistent with Title 8 of the United States

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164. Press Briefing on New Military Commissions Rules, *supra* note 133.

165. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133 (third unnumbered page) (emphasis added). More portentously than the Department of Defense perhaps intended, the Executive Summary goes on to add: “This Manual will have an historic impact for our military and our country.” *Id.*

166. *Id.* at I-1 (emphasis added).

167. *Id.* at II-1 (emphasis added).

168. *Id.*

169. See *supra* Part III.B.

170. In statutory interpretation, preambles are not given any special weight, instead being treated merely as one among many other interpretive aids that may be available. ESKRIDGE ET AL., *supra* note 70, at 831-32. “Thus the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms . . .” *Id.* (quoting 2A SUTHERLAND § 47.04, *supra* note 122, at 146). Here, I merely apply this principle of interpretation to regulations authorized by statute.

171. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-1 (emphasis added).

Code, “Aliens and Nationality”<sup>172</sup>) if the latter are triable by military commission.<sup>173</sup>

Much of the Manual is, however, unhelpful in answering this question. Indeed, much of it simply parrots the MCA’s language. For example, the Manual defines “unlawful enemy combatant” in almost exactly the same way as the MCA, both in terms of substance and form.<sup>174</sup> Apart from using virtually identical language, the Manual, like the MCA, defines “unlawful enemy combatant” by reference to the separately defined class of “lawful enemy combatant.”<sup>175</sup> Nonetheless, there is some divergence and clarification.

### B. *The Rules’ Take on Jurisdiction*

The Manual’s jurisdiction section, is, problematically, even more shattered than the MCA’s. It begins with a similar provision: “*Jurisdiction of military commissions generally.* A military commission shall have jurisdiction to try any offense made punishable by the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”<sup>176</sup> As with the MCA itself, this language is problematic enough. Does the “or” disjoin all the words following it so that military commissions have jurisdiction over all offenses made punishable under the MCA, including those that may apply to citizens, such as “wrongfully aiding the enemy,”<sup>177</sup> in addition to those made punishable by “the law of war when committed by an alien unlawful enemy combatant?” Or, as would seem natural if there were a comma after the word “war,” does the word “or” merely indicate that “the MCA” and “the law of war” are alternatives under “by,” either of which may stipulate crimes for trial by military commission but only “when committed by an alien unlawful enemy combatant?”

Two other seemingly limiting provisions on personal and subject matter jurisdiction are similarly unhelpful. Rules 201(b)(3)(D) and 201(b)(3)(E) state, respectively, that “[t]he accused must be a person subject to military commission jurisdiction”<sup>178</sup> and that “[t]he offense must be subject to military commission jurisdiction.”<sup>179</sup> But whether this curbs executive power over citizens or not turns on prior determinations about whether citizens may be tried under the MCA as “person[s] subject to this chapter” and whether, less

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172. See 8 U.S.C. §§ 1401, 1427 (2006).

173. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-1.

174. See *infra* note 175 and accompanying text.

175. Compare MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-2, II-4, with Military Commissions Act of 2006, 10 U.S.C.A. § 948a(1)(i)-(ii), (2) (West 2008).

176. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-12.

177. See *supra* Part II.C.2.

178. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-12, Rule 201(b)(3)(D).

179. *Id.* at II-13, Rule 201(b)(3)(E).

questionably, a certain act is a covered offense. Either way, whatever an outside interpreter might determine the answers to those questions to be, the Manual, consistent with but elaborating on the MCA,<sup>180</sup> trumps them. Rule 201(b)(3) states: “A military commission always has jurisdiction to determine whether it has jurisdiction.”<sup>181</sup> In light of such a rule, it is difficult to see what brakes Rules 201(b)(3)(D) and (E) might place on military commission proceedings, at least in the first instance (as opposed to on appeal<sup>182</sup>).

Even Rule 202, which purports to specify in greater detail who may be tried by military commission,<sup>183</sup> is equally circular and discretionary. Primarily, it rehearses the language of § 948d of the MCA, discussed at length, above,<sup>184</sup> to the effect that military commissions may try what they are statutorily authorized to try and that a determination by a CSRT, the President, or the Secretary of Defense “that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission.”<sup>185</sup> As noted, this language admits of the possibility of citizens being deemed “unlawful enemy combatants” and so does nothing to winnow the scope of the MCA.<sup>186</sup> Indeed, the only potentially real elaboration on the matter of personal jurisdiction in Rule 202 is a discussion note—not the strongest source of authority—that reiterates that “[m]ilitary commissions have personal jurisdiction over *alien* unlawful enemy combatants.”<sup>187</sup> As with all such unqualified statements, however, both in the MCA and in the Manual, the discussion note to Rule 202 is merely a positive grant of authority, not a delimiting, necessarily (though an *expressio unius* argument might suggest otherwise<sup>188</sup>): it does not say that military commission *only* have jurisdiction over alien unlawful enemy combatants.

### C. “Principals” and Offenses Redux: Resettling the Issue

Part IV of the Manual, besides curiously abandoning the denomination of “Rule” to refer to subsections,<sup>189</sup> begins by repeating, without elaboration, the

180. [E]xcept as otherwise provided in this chapter and notwithstanding any other provision of law . . . no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, *including challenges to the lawfulness of procedures of military commissions under this chapter.*

Military Commissions Act of 2006, 10 U.S.C.A. § 950j(b) (West 2008) (emphasis added).

181. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-12.

182. *See* 10 U.S.C.A. § 950f(c)-(d) (West 2008).

183. *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-13, Rule 202.

184. *See supra* Part II.A.

185. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-13, Rule 202.

186. *See supra* Part II.A.

187. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at II-14 (emphasis added).

188. *See* discussion *supra* Part II.A, paras. 1-5.

189. *Compare, e.g.,* MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at III-53,

MCA's open-ended language with respect to who may be charged with a crime before a military commission. Part IV.1.a of the manual reads: "Any person is punishable as a principal under this chapter who . . . commits an offense punishable by this chapter . . ." <sup>190</sup> Though it applies with equal force, I will not repeat the analysis of this language offered in Part III.C.1 of this Essay, above, save to note that, as with the parallel provisions in the MCA itself, Part IV.1.a of the Manual can be read as dilative of the Manual's positive jurisdiction provisions so that whatever restrictions on who may be brought before military commissions they (i.e., the Manual's positive jurisdictional provisions) may have been thought to impose are overcome.

Moreover, as with other portions of the Manual that do not explain or expand on the text of the MCA, the reader may infer either that the executive believed the MCA text clear on its face or that the executive believed allowing the textual ambiguity to stand somehow advantageous to its aims. But as discussed above, the meaning of "principals" is far from clear, much less so the relationship between the definition, purpose, and jurisdiction section triptych on the one hand and the "principals" language on the other. Therefore, it is at least not unreasonable to suggest that the ambiguity in Part III.C.1—and elsewhere in the Manual—is deliberate. Why resolve such language or, for that matter, the "any person" language strewn throughout the statute through rulemaking if doing so would reduce the "energy and vigor" with which you may, pursuant to apparent congressional authorization, protect the American people and, in your self-regarding view, fulfill your constitutional obligation? <sup>191</sup> Why, as President, reduce one's own *license*?

Certainly, the Bush Administration has not done so with respect to the MCA. On the two hundred and sixty-second page out of two hundred and sixty-five, the Manual finally addresses the statutory crime of "wrongfully aiding the enemy." <sup>192</sup> First, it presents the same language as the MCA: "Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct." <sup>193</sup> Again, I will spare the reader a recital of my

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Rule 901, *with id.* at IV-1, §§ 950q-950s.

190. Military Commissions Act of 2006, 10 U.S.C.A. § 950q (West 2008); MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-1.

191. See THE FEDERALIST NO. 74 (Alexander Hamilton); John Yoo, *Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism*, HERITAGE FOUND., Apr. 24, 2006, <http://www.heritage.org/Research/PublicDiplomacy/fp4.cfm>; Memorandum Opinion for the Deputy Counsel to the President from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, on the President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), *available at* <http://www.justice.gov/olc/warpowers925.htm>.

192. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19, Part IV(6)(26); see 10 U.S.C.A. § 950v(26) (West 2008).

193. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19, Part IV(6)(26);

previous problematization of these words<sup>194</sup> except to say that it applies with equal force to the Manual as to the MCA itself. Or at least it would, did not the following comment to the crime of “wrongfully aiding the enemy,” as elaborated in the Manual, appear to clarify how the executive might interpret the reach of its power under the MCA:

The requirement that conduct be wrongful for this crime may necessitate that the accused owe allegiance or some duty to the United States of America. For example, *citizenship*, resident alien status, or a contractual relationship in or with the United States is sufficient to satisfy this requirement so long as the relationship existed at the time relevant to the offense alleged.<sup>195</sup>

Maximum punishment: life imprisonment.<sup>196</sup>

These words do not require extensive comment. Taken at face value, they confirm our text-based—but still highly problematic—interpretation of § 950v(b)(26) of the MCA as a rule-swallowing exception to the plain reading of the jurisdiction, purpose, and definition section triptych.<sup>197</sup> No deep analysis is necessary to see that, on their own, these words compel the conclusion that citizens can be tried before military commissions. But the words have the same effect when fully situated in their regulatory context. If citizenship is sufficient both to create an obligation of allegiance to the United States and to make it wrongful to breach that allegiance, then citizens may commit, as an actual matter, the crime of “wrongfully aiding the enemy.”<sup>198</sup> They need only take up arms against the United States. And if, following our earlier analysis that § 950v(b)(26) is unnecessary for drawing aliens within the reach of the MCA,<sup>199</sup> citizens are the ones most capable of violating an allegiance to the United States, then the rule against surplusage<sup>200</sup> requires that we read § 950v(b)(26) *only* to apply to citizens, for it would be surplusage with respect to aliens.

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*see also* 10 U.S.C.A. § 950v(26) (West 2008).

194. *See supra* Part III.C.2.

195. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19 to -20, Part IV(6)(26)(c)(3) (emphasis added).

196. *Id.* Part IV(6)(26)(d).

197. *See supra* Part II.C.2 para. 5-6.

198. It is also worth pondering why this provision might be included at all, given that we already have, in the Constitution, a provision for dealing with traitorous citizens. U.S. CONST., art. III, § 3. Indeed, on its face, this administrative provision appears to export the treason clauses out of Article III and into Article II, at least with respect to certain kinds of captures, namely, those deemed to be unlawful enemy combatants. But as Justice Scalia put it:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution’s Suspension Clause . . . allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge.

*Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (citation omitted).

199. *See supra* Part II.C.2 para. 2-4.

200. *ESKRIDGE ET AL.*, *supra* note 70, at 833.

This, however, is impossible to square with a plain reading of the jurisdiction,<sup>201</sup> purpose,<sup>202</sup> and definition<sup>203</sup> sections of the MCA, as well as the Executive Summary,<sup>204</sup> Preamble,<sup>205</sup> Scope,<sup>206</sup> and Jurisdiction<sup>207</sup> provisions of the Manual—not to mention the proviso at the beginning of § 950v(26) of the MCA and its Manual equivalent, each of which limits the crime of “wrongfully aiding the enemy” to persons subject to the MCA.<sup>208</sup> Had the Department of Defense not included the word “citizenship” in its Manual, then this provision could have been read to clarify that the MCA only applies to aliens—whether residents or nonresidents contracting with the United States government—and interpreters would not have been cast down the rabbit hole of meaning anew. Instead, we are once again faced with language (“citizenship”) that appears to draw citizens within the power of military commissions while at the same time having to know whether the MCA applies to them first before being able to tell whether the substantive crime can in fact be charged. And indeed, there is one further level of ambiguity: the Manual states only that “[t]he requirement that conduct be wrongful for this crime *may* necessitate that the accused owe allegiance or some duty to the United States of America.”<sup>209</sup> By implication, it also may not. Therefore, by the Manual’s terms, it is possible for someone to breach her allegiance without even having one.<sup>210</sup>

Of course, under *Chevron*, courts need only defer to *reasonable* agency interpretations of a statute.<sup>211</sup> Assuming that *Chevron* deference is due,<sup>212</sup> the question remains: is the Secretary of Defense’s interpretation reasonable? The legislative history and public statements of the President provide some guidance.

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201. See Military Commissions Act of 2006, 10 U.S.C. § 948d (2006).

202. See *id.* at § 948b.

203. See *id.* at § 948a.

204. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133 (unnumbered third page).

205. *Id.* at I-1.

206. *Id.* at II-1.

207. *Id.* at II-12.

208. *Id.* at IV-19; see also Military Commissions Act of 2006, 10 U.S.C.A. § 950v(b)(26) (West 2008).

209. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19, Part IV(26)(c)(3) (emphasis added).

210. The absurdity of this scenario most immediately calls to mind antecedents not in law but in literature, namely, the tragicomic predicaments of Captain John Joseph Yossarian. See JOSEPH HELLER, *CATCH-22* (1961).

211. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

212. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

## IV. HISTORY AND MEANING(S)

Because the MCA originated in the Bush White House as a response to a judicial limitation on its behavior, I first examine the background views and inclinations of the President that may have influenced his interpretation of the MCA. Only then do I turn to the legislature, which, as the history shows, acted, with respect to the MCA, primarily as an enabler of the executive's agenda.

*A. Presidential Predisposition*

The nomenclature of the Bush Administration shifted over the course of the (ongoing<sup>213</sup>) war on terror, but internal documents and public pronouncements of the executive branch in cases where citizens have been detained made clear that it believed that the President has the power to detain citizens indefinitely and, possibly, try them before military authorities.

In the first year of the war on terror, the Department of Justice Office of Legal Counsel, which advises the President, held that “[u]nder the Commander in Chief Clause [of the Constitution], the President is authorized to detain all enemy combatants, including U.S. citizens,” and that his power thereunder supersedes any (therefore unconstitutional) statute to the contrary.<sup>214</sup> After the Fourth Circuit Court of Appeals upheld the President's detention of American citizen Yaser Esam Hamdi<sup>215</sup> (a decision later vacated by the Supreme Court<sup>216</sup>), then-Attorney General John D. Ashcroft continued to propound this view:

I applaud today's decision[,] which *reaffirms* the president's authority to capture and detain individuals . . . *who join our enemies* on the battlefield to fight against America and its allies . . . . Today's ruling is an important victory for the president's ability to protect the American people in times of war . . . . Detention of enemy combatants prevents them from rejoining the enemy and continuing to fight against America and its allies, and has long been upheld by our nation's courts, *regardless of the citizenship of the enemy combatant*.<sup>217</sup>

This view is unequivocal. A power can only be reaffirmed if already in existence.

When the case went before the Supreme Court, the Bush Administration continued to push this previously winning argument, claiming that “[t]he

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213. See *infra* Conclusion, paras. 6-8.

214. Yoo Memo to Bryant, *supra* note 115; see U.S. CONST. art. II, § 2, cl. 1.

215. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

216. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

217. Press Release, U.S. Dep't of Justice, Statement of the Att'y Gen. on the Fourth Circuit Decision in the Yaser Hamdi Case (Jan. 8, 2003), available at [http://www.usdoj.gov/opa/pr/2003/January/03\\_ag\\_004.htm](http://www.usdoj.gov/opa/pr/2003/January/03_ag_004.htm) (emphases added). See generally Tom Jackman, *Judges Uphold U.S. Detention of Hamdi—Courts Must Yield to Military on 'Enemy Combatants,' 4th Circuit Rules*, WASH. POST, Jan. 9, 2003, at A1 (providing an overview of the Fourth Circuit's decision).

military's authority to detain enemy combatants in wartime is not diminished by a claim, or even a showing of American citizenship. . . . Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."<sup>218</sup> Further, it contended:

[I]f . . . citizenship does not relieve an enemy combatant of the most severe consequences of violating the law of war—a military commission and punishment up to death—then citizenship does not relieve an enemy combatant of the normal and less drastic consequences of . . . detention during the conflict.<sup>219</sup>

Such notions were consistently asserted.

Moreover, these views likewise conform with the executive's actual treatment of detainees José Padilla and John Walker Lindh. Padilla, a citizen, was held for over three years, more or less incommunicado, in a military brig as an "enemy combatant,"<sup>220</sup> and, when he was finally tried in a civilian court, the government warned his lawyers that it "reserved the right to detain Mr. Padilla again should he be acquitted."<sup>221</sup> John Walker Lindh, also a citizen, was captured on the battlefield in Afghanistan and more swiftly tried in civilian court. However, as a term of his plea bargain, Lindh was required to acknowledge the government's power to detain him as an unlawful enemy combatant after completing his prison sentence.<sup>222</sup>

Indeed, at the press conference announcing his proposed draft of the MCA, President Bush carefully avoided describing it as limited to "alien unlawful enemy combatants," instead describing it as applying to the broader category of "enemy combatants."<sup>223</sup> In his transmittal message to Congress, he also omitted the word "alien" when describing the scope of the MCA.<sup>224</sup> However, at that press conference, President Bush did drop a curious little caveat: "In some cases, we determine that individuals we have captured pose a significant threat . . . . In these cases, it has been necessary to move these individuals to an environment where they can be *held secretly*, questioned by experts, and—*when appropriate*—prosecuted for terrorist acts."<sup>225</sup> This suggests that there are times when trial is not appropriate, and therefore that the MCA, in his view,

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218. Brief of Respondents at 16-17, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (citations, internal quotation marks, and modifications omitted).

219. *Id.* at 17 (citing *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)).

220. Ackerman, *supra* note 9.

221. Liptak, *supra* note 107. Presumably, this intimation was designed to elicit concessions from the Padilla team or perhaps even a plea. The ethics of this kind of prosecutorial tactic in the war on terror context deserve further exploration. At first blush, using the threat of indefinite detention to extract a plea—if indeed that is what was going on—seems problematic.

222. *Id.*; see *supra* notes 109-and accompanying text.

223. See Press Release, White House, *supra* note 34.

224. Press Release, White House, Message to the Congress of the United States (Sept. 6, 2006), 2006 WL 2556594 (White House).

225. Press Release, White House, *supra* note 34 (emphases added).

implicitly authorizes indefinite detention.<sup>226</sup> This should not be a surprise, given that this is a power he repeatedly asserted or sought since shortly after the attacks of September 11, 2001.

First, the Bush Administration applied the doctrine of indefinite detention to aliens. In his Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, signed just one month and six days after the start of military operations in Afghanistan, President Bush stated:

It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is *detained* . . . and, *if* the individual is to be tried, that such individual is tried only in accordance with [the other rules provided in this order.]<sup>227</sup>

Then, two years later, the White House considered seeking legislative authorization to extend that power to citizens within the territorial United States. Under the draft version of the Domestic Security Enhancement Act of 2003, the executive would have had the power to make secret arrests, strip Americans of their citizenship if he or she deems them to be terrorists, and detain them indefinitely.<sup>228</sup> Is it possible that the President came to consider this a *fait accompli* under the MCA? Given its open-ended language as well as the citizenship language buried in the Manual on Military Commissions, it is not unreasonable to think so.

Nonetheless, we must acknowledge the one piece of evidence from within the executive branch tacking in the opposite direction. A fact sheet issued by the White House on the day it sent its draft of the MCA to Capitol Hill stated: “**MYTH:** Americans Will Be Tried By The Military Commissions. **FACT:** . . . Americans accused of war crimes and terrorism-related offenses will continue to be tried through our Article III courts or courts-martial.”<sup>229</sup> On its face, this looks like a clear denial of the applicability of the MCA to American citizens.

But in order to promulgate contrary rules, the President might argue that while citizens were not subject to the MCA in the draft he submitted to Congress, the changes wrought there expanded its scope; ergo, the fact sheet would not have been a lie or deception at the time it was written. Also note that,

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226. See Lederman, *supra* note 10.

227. Press Release, White House, President Issues Military Order (Nov. 13, 2001) (on file with author) (emphases added). The other options under “if,” quite obviously, are either release or indefinite detention without trial.

228. David Cole, *Patriot Act's Big Brother*, NATION, Feb. 27, 2003, at 7, available at <http://www.thenation.com/doc/20030317/cole>; Memorandum from Timothy H. Edgar, Legislative Counsel, Am. Civil Liberties Union, on Section-by-Section Analysis of Justice Department Draft “Domestic Security Enhancement Act of 2003,” also known as “PATRIOT Act II,” to Interested Persons (Feb. 14, 2003), <http://www.aclu.org/safefree/general/17203leg20030214.html>. The full draft of the Domestic Security Enhancement Act of 2003 is available through the Center for Public Integrity at [http://www.publicintegrity.org/assets/pdf/story\\_01\\_020703\\_doc\\_1.pdf](http://www.publicintegrity.org/assets/pdf/story_01_020703_doc_1.pdf).

229. Factsheet, White House, Myth/Fact: The Administration’s Legislation to Create Military Commissions (Sept. 6, 2006), 2006 WL 2556595 (White House).

while barring trial, the fact sheet says nothing of detention, which therefore may still be allowed. It also offers no geographic specificity, leaving open the possibility that different rules may apply depending on where citizen unlawful enemy combatants are captured. Moreover, statutory text, as that which is actually enacted into law, is always given primacy over other material,<sup>230</sup> and, under *Chevron*, executive interpretation of law is given significant deference.<sup>231</sup> Even greater is the judicial branch's posture of deference to the executive branch in the war context.<sup>232</sup> So even fact sheets distributed in order to further (and perhaps explain) the President's legislative agenda are likely to be of little interpretive authority in the eyes of the courts when in tension with the text of the statute and (or even *or*) in conflict with legislatively authorized implementing departmental rules.

Thus, in light of internal memoranda, the *Hamdi*, *Padilla*, and *Lindh* cases, and the President's public statements regarding the MCA, it is, on balance, difficult not to conclude that he believed he could at least detain and perhaps try American citizens under the MCA.

### B. Congress's View

Because of the short timeframe in which the MCA was introduced and passed, its legislative history is not especially thick, but it is worth reviewing. Recall that the President transmitted his version of the bill to Congress on September 6, 2006.<sup>233</sup> At the behest of the White House, Representative Duncan Hunter, Republican of California, introduced H.R. 6054, the Military Commissions Act of 2006, into Congress on September 12, 2006.<sup>234</sup> It was referred to the House Committees on the Armed Services, the Judiciary, and International Relations.<sup>235</sup> The Committee on Armed Services, of which

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230. ESKRIDGE ET AL., *supra* note 70, at 819 ("The starting point of statutory interpretation is to read the statute carefully."); *id.* at 756 ("The apparent plain meaning of a statutory text must be the alpha and the omega in a judge's interpretation of a statute.") (summarizing Justice Antonin Scalia's view as presented in SCALIA, *supra* note 64); HART & SACKS, *supra* note 148, at 1375 ("The words of the statute are what the legislature has enacted as law, and all that it has the power to enact.").

231. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

232. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2276-77 (2008) ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). . . . The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Korematsu v. United States*, 323 U.S. 214 (1944).

233. Press Release, White House, *supra* note 224.

234. H.R. REP. NO. 109-731 (2006). Whether the bill's introduction so close to the anniversary of the September 11 attacks was planned or merely fortuitous is unknown.

235. *Id.*

Representative Hunter was the chair, held a mark-up session, after which he re-conferred with the White House and Senate Republicans.<sup>236</sup>

Representative Hunter then introduced a revised bill, H.R. 6166.<sup>237</sup> For consideration of this bill, the House Committee on Rules provided a closed rule, granting just two hours of debate and waiving all opposing points of order.<sup>238</sup> All motions and nonscrivener-type corrective amendments were defeated.<sup>239</sup> These included a sunset provision, a requirement that detainees not be sent to countries known to engage in torture, a requirement that the President comply with the U.S. Army Field Manual for interrogation or notify the House and Senate Intelligence Committees if deviating, and a grant of habeas corpus rights for detainees whose combatant status has not yet been decided.<sup>240</sup> H.R. 6166 passed the House on September 27.<sup>241</sup> The Senate adopted an identical bill, Senate Bill 3930 on September 28.<sup>242</sup> The bill went back to the House, and for its consideration the House Committee on Rules provided another closed rule, granting one hour of debate and again waiving all points of order against passage of the bill.<sup>243</sup>

Two things bear note: First, the short timeframe within which the MCA was passed suggests that political pressures may have greatly eased its virtually unimpeded passage.<sup>244</sup> With the 2006 midterm elections around the corner and polls showing a strong possibility of losing their House majority to the Democrats,<sup>245</sup> congressional Republicans may have been looking to pass one final law in order to demonstrate their “tough on terrorism” bonafides to wavering voters,<sup>246</sup> or they may simply have wanted to seal their legacy on detainees prior to expected defeat. Certainly there is evidence to support the

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236. *Id.*

237. *Id.*

238. H.R. REP. NO. 109-688 (2006).

239. *See id.*

240. *Id.*

241. H.R. REP. NO. 109-731.

242. *Id.*

243. H.R. Res. 1054, 109th Cong., 152 CONG. REC. H7907 (2006) (enacted), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H7907&dbname=2006\\_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H7907&dbname=2006_record).

244. *See* William Kristol, *The Trap: There Is Now a Clear and Live Contrast Between Bush and the Democrats in the War on Terror*, WKLY. STANDARD, Sept. 25, 2006, at 7, *available at* <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/711lzwcj.asp>.

245. G. Terry Madonna & Michael Young, *A Tale of Two Elections*, REAL CLEAR POLITICS, Oct. 20, 2006, [http://www.realclearpolitics.com/articles/2006/10/a\\_tale\\_of\\_two\\_elections.html](http://www.realclearpolitics.com/articles/2006/10/a_tale_of_two_elections.html). Polling data for this time period is available at <http://www.PollingReport.com> (last visited Jan. 16, 2008).

246. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004) (arguing that the primary rationale for any legislative action is to secure reelection). For a general discussion of the political logic of a “tough on terrorism” posture, see Ackerman, *supra* note 40, at 475. Fortuitously, Professor Ackerman’s Keynote happened to roughly coincide with the passage of the MCA.

former hypothesis. Conventional wisdom at the time held national security to be the Republican Party's strong suit.<sup>247</sup> But the Republican advantage in this area was also known to have significantly eroded since 2002.<sup>248</sup> Indeed, in some polls, it no longer led against the Democratic Party.<sup>249</sup> Thus the Republican Party had a strong incentive to try to polish its brand and remind voters of why they were supposed to favor it in the upcoming elections.<sup>250</sup> Stumping for congressional Republicans, President Bush hammered the urgency of this message home, repeatedly saying, "If the Democrats win, the terrorists win[,] and America loses."<sup>251</sup>

This rush to pass the MCA may also explain the Rules Committee's strong-arm tactics on points of order and the vigor with which amendments were defeated—allowing them would have forced the House to re-confer with the Senate (and, for political reasons, the White House), slowing the legislative process and possibly preventing the Congress from passing the MCA before session's end (and therefore before the elections).

Second, these political pressures, coupled with typical rational abdication by the legislature,<sup>252</sup> may have resulted in an MCA about which there is very little legislative intent, in an absolute sense, except perhaps on the part of the Act's congressional chaperones (primarily, Representative Hunter). Indeed, the only place in the legislative history where the topic of the MCA's applicability to citizens is raised at all is in the dissenting view of Representative Cynthia McKinney, Democrat of Georgia, in the Committee on Armed Services report on H.R. 6054, the version of the MCA originally introduced into Congress and reported out of the committee.<sup>253</sup> (And, from the perspective of Mayhewian electoral incentive analysis, it is worth pointing out that Representative McKinney had a certain luxury to speak her mind insofar as she was not standing for reelection that year, having lost to a challenger in the Democratic Party primary.<sup>254</sup>) Everywhere else American citizens are mentioned, it is in

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247. Raphael Schweber-Koren, *Top Election Falsehoods, Myths, and Talking Points*, MEDIA MATTERS FOR AMERICA, Nov. 3, 2006, <http://mediamatters.org/items/200611040007> (citing several news reports claiming Republican strength on national security).

248. *Id.* (citing numerous polls).

249. *Id.* (citing numerous polls).

250. See Michael Abramowitz & Jonathan Weisman, *GOP Seeks Advantage In Ruling On Trials—National Security Is Likely Rallying Cry, Leaders Indicate*, WASH. POST., July 1, 2006, at A01; Francis X. Clines, *Can the Democrats Win Back Congress?*, N.Y. TIMES, June 7, 2006, <http://select.nytimes.com/2006/06/07/opinion/07talkingpoints.html?pagewanted=all>.

251. Helen Thomas, *The Ball Is In the Democrats' Court*, SEATTLE POST-INTELLIGENCER, Nov. 10, 2006, at B6.

252. See generally, e.g., RICHARD L. HALL, PARTICIPATION IN CONGRESS (1996) (arguing that little legislative action reflects the consensus interest of Congress or its subparts and that it instead reflects the interests of individual members to whom the rest essentially abdicate their policy-making function).

253. See H.R. REP. NO. 109-664, pt. 1 (2006).

254. Brenda Goodman, *Democratic Congresswoman Loses Georgia Runoff for Re-*

the context of needing to protect them from terrorist attacks, not their own government.

Representative McKinney, however, dissented at length, reviewing much of the history of indefinite detention in post-9/11 antiterrorism efforts and repeatedly alluding to the fear that the law might be applied to citizens.<sup>255</sup> The Republican majority did not see fit to comment on the matter. Worryingly, Representative McKinney's concerns were based on a version of the MCA that, while extremely similar to the version ultimately passed, differed in one crucial respect. In the portion of H.R. 6054 dealing with punitive matters, each and every crime punishable under the MCA was described as committed by "*alien* unlawful enemy combatant[s]."<sup>256</sup> To provide the most relevant example, it stated:

(25) Wrongfully aiding the enemy. [An *alien unlawful enemy combatant* who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to whatever punishment a commission may direct.<sup>257</sup>

Under this version of the crime of "wrongfully aiding the enemy," the provenance of an alien unlawful enemy combatant's duty or allegiance to the United States would still not have been self-evidently clear (although the Manual for Military Commissions' elaboration of this allegiance or duty as possibly arising from a contractual relationship with the United States would have clarified the matter (at least with respect to one discrete class of individuals),<sup>258</sup> albeit not in a way consistent with traditional notions of "allegiance"<sup>259</sup>). Nonetheless, it would have been harder to argue that citizens might be drawn into the scope of the MCA by this provision because it so clearly contemplates, at least primarily, noncitizens (i.e., aliens).

That Duncan Hunter, the bill's primary sponsor and legislative adoptive parent, initially supported this version of the bill suggests that he was of the same view. But then Representative Hunter conferred with the White House and Senate Republicans, and this disambiguating language vanished. We do not know how strong the give-and-take was between Congress and the White House, but we do know, based on the President's proposed draft of the MCA, that he would have preferred the language describing the crime of "wrongfully aiding the enemy" to read as follows:

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*election*, N.Y. TIMES, Aug. 9, 2006, at A14.

255. See H.R. REP. NO. 109-664, pt. 1, at 80-91 (2006), 2006 WL 2714419 (Leg. Hist.), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_reports&docid=f:hr664p1.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr664p1.109.pdf).

256. *Id.* at 61-65 (emphasis added).

257. *Id.* at 65 (emphasis added).

258. MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19 to -20.

259. Traditionally, allegiance is due of citizens, such as John Walker Lindh. See *supra* note 109 and accompanying text; *supra* notes 141-44 and accompanying text.

*Any person* who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one of its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to *whatever* punishment the commission may direct.<sup>260</sup>

On its face (and, it must be acknowledged, in isolation), this provision demonstrates that the President wanted the power to try American citizens (who fall into the category of “any person”<sup>261</sup>) before military commissions and to detain them indefinitely (which falls into the category of “whatever punishment”<sup>262</sup>). Perhaps because neither Representative Hunter nor the Senate Republicans were willing to go that far and instead hammered out compromise language, the American people were left with a piece of legislation nearly inscrutable in its terms. The President, meanwhile, was left with a statute ambiguous enough to interpret as he wished it were written, that is, to provide power over citizens.<sup>263</sup>

#### V. META-ISSUES AND STRATEGY

In the absence of clear congressional intent—indeed, in the presence of a legislative history that shows the MCA passing with the vote of a congressional majority unwilling to directly address the law’s applicability to citizens—interpreters are left to rely primarily on the text itself and on administration claims about what the statute means. The theory of legislative supremacy in statutory lawmaking (and therefore interpretation) is venerable, but in cases where legislation emerges as a direct executive response to judicial intervention, that theory has less utility. When statutes are merely authorized but not truly written by legislatures, the theory of legislative supremacy simply fails to reflect reality. Though Congress may have, in a literal sense, “created” the MCA, the legislative function as actually exercised was all but reduced to granting the President a permission slip to resume doing what he had been doing before. In such contexts, readers will probably produce the most accurate interpretation of a statute by looking to executive branch determinations of the law’s meaning because the legislation itself is most likely to represent the understanding of the President.

Note that this view differs from the *Chevron* doctrine in its basis. *Chevron* deference is based primarily on a view of the executive as better positioned than the judiciary to resolve statutory ambiguity because of its political accountability, technical expertise, and consequent ability to balance competing

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260. Military Commissions Act of 2006, White House draft transmitted to the House and Senate (Sept. 6, 2006), *available at* <http://www.law.georgetown.edu/faculty/nkk/documents/MilitaryCommissions.pdf>.

261. *Id.*

262. *Id.*

263. *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 133, at IV-19 to -20, Part IV(6)(26)(c)(3).

interests.<sup>264</sup> My argument for deference is primarily one from historical accuracy and limited to a very narrow set of circumstances: in contexts where the White House is the primary author of legislation and there is significant statutory ambiguity, it may in fact be the President's power to—literally—“say what the law is.”<sup>265</sup> However, that power is merely descriptive, and as a general matter is still bound by the range of reasonable interpretations contained within a given ambiguity. Moreover, I do not take the view that the President has a full-blown completion power.<sup>266</sup> Rather, I suggest only that—in the narrow circumstances I have described—the President's view of the law's meaning should be dispositive.<sup>267</sup>

On principle, even some of those who favor judicial minimalism and deference to executive interpretation of law are inclined to limit it “[w]hen the executive is raising serious constitutional questions.”<sup>268</sup> In such cases, they argue, “statutory ambiguity does not constitute adequate authorization, and the executive branch should not be permitted to act on its own.”<sup>269</sup> Indeed, the dangers of too much latitude in judicial statutory interpretation are every bit as real, if not more so, when the executive, with its incredible command of state power, is given a free hand. As Dean Pound described the dangers of insufficiently tethered statutory interpretation:

[W]hen . . . recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under [the] guise of interpretation, becomes more difficult.<sup>270</sup>

As legitimate as our fear of foreign-based terrorism remains, few fear anything more than presidential lawmaking under the guise of interpretation coupled with the power to detain Americans indefinitely or even try them before commissions operating under procedures that bear little resemblance to those we would usually describe as full and fair. “The very core of liberty secured by

264. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006).

265. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Sunstein, *supra* note 264. Although my argument here is different than either Chief Justice Marshall's or Cass Sunstein's, I cite both to give credit to two of the individuals from whom I am reappropriating (and in Sunstein's case, re-reappropriating) this phrase.

266. Compare Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006) (arguing that the President has the inherent power to fill in gaps in a legislative scheme that *she* views as incomplete, even when Congress has *not* authorized her to do so), with Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2368-74 (2006) (rejecting the executive unilateralism of Goldsmith and Manning's view and denouncing it as a “myth”).

267. This, of course, alone says nothing of a law's constitutionality.

268. Sunstein, *supra* note 264, at 2610.

269. *Id.*

270. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907). See generally cases cited *supra* note 154 (citing to mischief rule cases).

our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”<sup>271</sup>

Some might urge such worriers to think twice. Accepting the President’s view of the MCA as applicable to citizens could actually present a strategic boon to those who wish to have courts invalidate portions of the Act or strike it down in its entirety. For those parts of the Act that do not conform to traditional due process standards may be constitutional violations insofar as citizens may be subject to the Act. On the President’s view of to whom the MCA applies, then, Congress has acted *ultra vires*. Therefore—regardless of the fact that the President is acting with congressional authority at a time of war, and so with his power at its maximum<sup>272</sup>—the MCA would be invalid. And because it has no severability provision, the law could be struck down in its entirety,<sup>273</sup> however unlikely that now seems in light of the fact that the Court did not take the opportunity to do so in *Boumediene v. Bush*.<sup>274</sup>

## CONCLUSION

The story of the MCA reaffirms what some legal realists have long believed: the meaning of law is constructed by its interpreter. Presidential observers will have noted that President Bush issued no signing statement when putting his hand to the MCA. Under a different President, this might not have been so surprising, but President Bush has used signing statements on over seven hundred and fifty occasions, usually like line-item vetoes.<sup>275</sup> Often, he has invoked unitary executive theory<sup>276</sup> and the Constitution (specifically, his

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271. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting).

272. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

273. *See* ESKRIDGE ET AL., *supra* note 70, at 414-15, 888-89. *See generally* Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997) (providing a primer on severability and inseverability clauses and arguing that the latter should be shown greater deference by courts). For a case dealing with common law principles of severability, which the court can arguably always invoke, see *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987).

274. 128 S. Ct. 2229 (2008).

275. Posting of Martin Magnusson to American Constitution Society for Law and Policy Blog, <http://www.acsblog.org/separation-of-powers-on-president-bushs-signing-statements.html> (July 19, 2006, 07:41 EST).

276. For one Senator’s response to this practice, see Press Release, Office of U.S. Senator Patrick Leahy, Leahy: President Strikes Again in PATRIOT Act Bill Signing Statement; Suggests He’ll Pick and Choose Which Parts of Law to Follow . . . Continuing Disturbing Trend, President Again Cites ‘Unitary Executive Theory’ In Picking Provisions Of PATRIOT Law He Intends to Ignore (Mar. 15, 2006), <http://leahy.senate.gov/press/200603/031506c.html>. *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (purporting to show, through a comprehensive history, that the unitary executive theory has animated all American Presidents); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (providing a primer on unitary executive theory).

view of the role of the President in the separation-of-powers framework)<sup>277</sup> to indicate his planned refusal to enforce specific provisions of law.<sup>278</sup> In the past, President Bush has objected to limitations on detainee torture,<sup>279</sup> U.S.A. P.A.T.R.I.O.T. Act oversight,<sup>280</sup> and whistleblower protections.<sup>281</sup> If he thought that the MCA prevented him from detaining or trying citizens, he could have issued a signing statement on October 17, 2006 as well.

But President Bush did not append a signing statement to the MCA, and this could mean any of several things. He could have believed, as I have argued above,<sup>282</sup> that the MCA does authorize the detention and trial of citizens. Alternatively, he could have believed that the MCA does not so authorize and that issuing a signing statement would have been a virtual admission that it does not say what he would like it say, raising alarms among watchdogs that he might defy its terms. Finally, he could have believed that the MCA is indeterminately vague and therefore that his “completion power” entitles him to carry out the law’s purpose<sup>283</sup>—which in his view is to grant him, as the law’s ultimate author, authority to deal with accused terrorists in the war on terror, whether citizens or not, as he sees fit.

One upshot, of course, is that the fear of signing statements as threats to the rule of law may be overblown. Indeed, even presidential signing statements that seem to abrogate legislative enactments may serve a useful signaling function in the political realm, alerting Congress and the American people to potential executive malfeasance. On the other hand, armed with a broad and ambiguous statute, the executive may have even more latitude to make the law he wants—if not clandestinely override the statute (or at least more reasonable interpretations thereof).

The story of the MCA reminds us as well of another lesson: politics matter. Neither congressional Republicans nor the White House were willing to risk not passing some version of the MCA (by failing to compromise) before the midterm elections of 2006, fearing their chances to pass the law would be greatly diminished, if not erased, by a Democratic sweep. Their compromise was to settle on vague language that either side could claim to say what it wished it to say. Unfortunately for interpreters, it may in certain respects say nothing at all. The result is that, on the one hand, the executive can interpret the

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277. For a concise defense of President Bush’s position, see Posting of Ed Whelan to Bench Memos, <http://bench.nationalreview.com/post/?q=ZDk4NmVjMjAzZDk1N2U2ZmQzMjRiNTg2ZDA0NDE5MWM> (June 5, 2006, 08:07 EST).

278. Magnusson, *supra* note 275.

279. Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOSTON GLOBE, Jan. 4, 2006, at A1.

280. Press Release, Office of U.S. Senator Patrick Leahy, *supra* note 276.

281. Denis Du Bois, *Energy Policy Act Compromised by Presidential Signing Statements*, ENERGY PRIORITIES, May 5, 2006, [http://energypriorities.com/entries/2006/05/epact\\_compromised\\_by\\_president.php](http://energypriorities.com/entries/2006/05/epact_compromised_by_president.php).

282. See *supra* Parts III-VI.

283. See Goldsmith & Manning, *supra* note 266.

law as it wishes and conduct itself accordingly; while, on the other hand, Congress can claim shock and feign consternation should such conduct engender unfavorable public opinion. Such are the dangers of the Rorschach approach to legislative drafting under the constraints of compromise.

Nonetheless, what the President sees in the MCA may put an end to the statute.<sup>284</sup> Even though the Court in *Boumediene* imputed a severability provision into the MCA, striking down its removal of jurisdiction to hear habeas claims from federal district courts,<sup>285</sup> one should not presume that the statute as a whole will not eventually fall if citizens captured in the war on terror and detained for trial by the President find a way to challenge those actions.

Furthermore, the growing Democratic congressional majority, emboldened by its party's electoral mandate<sup>286</sup> in the selection of Barack Obama as the forty-fourth President of the United States, could repeal the MCA either in whole or in part.<sup>287</sup> At least one congressperson has already begun to advocate for this.<sup>288</sup> Any attempt to do so, however, would present significant political risks, especially since whether or not President Obama would be supportive is an open question.

In his inaugural address, President Obama charted a new course for the United States, calling upon the nation to "reject as false the choice between our safety and our ideals."<sup>289</sup> Shortly after taking office, President Obama did in

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284. *See supra* Part V.

285. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

286. Senator Barack Obama won three hundred and sixty-five Electoral College votes to Senator John McCain's one hundred and seventy-three. Election Results 2008, <http://elections.nytimes.com/2008/results/president/map.html> (last visited Jan. 19, 2009). That is a "mandate" by any measure.

287. Indeed, major changes in Guantánamo policy are already afoot under President Obama. On his second full day in office, he signed an executive order directing that the military prison there be closed. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). On the same day, President Obama revoked President Bush's executive order allowing for enhanced interrogation techniques. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). As of this writing, however, what exactly will be done with the detainees who remain at Guantánamo is still an open question. Among the proposals possibly under consideration is a plan to remove prisoners from Guantánamo to a newly created system of national security courts. Another is taking the self-explanatory "try or release" approach. *See* Matt Apuzzo & Lara Jakes Jordan, *Obama Plans U.S. Terror Trials to Replace Guantánamo*, ASSOCIATED PRESS, Nov. 10, 2008; Peter Finn, *Guantánamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A01. In the meantime, the President has organized a Special Task Force to work on the issue. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

288. Jane Harman, Op-Ed, *We Don't Need To Turn to 'Dark Side'*, SAN JOSE MERCURY NEWS, Feb. 15, 2009, at 19A. Jane Harman, a Democrat, represents California's 36th District.

289. Pres. Barack Hussein Obama, Inaugural Address (Jan. 21, 2009), 2009 WL 135031 (Westlaw), at \*3, available at [http://www.pic2009.org/blog/entry/president\\_obamas\\_inaugural\\_address](http://www.pic2009.org/blog/entry/president_obamas_inaugural_address).

fact order, inter alia, an end to torture and the shuttering of the prison at Guantánamo Bay.<sup>290</sup> He also moved to try before a federal district court a terrorist suspect who the Bush Administration had insisted needed to be tried before a military commission.<sup>291</sup> But the war on terror is ongoing. And however less frequently than his predecessor President Obama may invoke that moniker to describe our struggle against terrorism, at least some within his Administration believe that war is the proper paradigm for understanding that struggle.<sup>292</sup> Perhaps for that reason, the Obama Administration's policies are not wholly at odds with those of the Bush Administration.<sup>293</sup>

In confirmation hearings for the positions of Attorney General, Solicitor General, and Central Intelligence Agency Director, for example, President Obama's nominees suggested that the "battlefield" in the war on terror might be worldwide, that enhanced interrogation techniques might become necessary if normal techniques fail to yield intelligence (though they would have to be authorized by Congress), and that extraordinary rendition might continue.<sup>294</sup> Additionally, his Deputy Solicitor General has argued that there is a strong case for the legality of President Bush's secret wiretapping program.<sup>295</sup> And, perhaps most specifically germane to our concerns, in a habeas action brought by detainees held at Bagram Air Base in Afghanistan, the Obama Administration literally continued to argue the Bush Administration's case that such detainees have no legal right to challenge their detentions.<sup>296</sup> It is thus conceivable that President Obama might veto a bill to repeal the MCA. In that case, given how unlikely it would be for such a measure to garner the support of the two-thirds of both houses of Congress necessary for a veto override,<sup>297</sup> it would remain for the Courts to strike down the MCA.

Continuity between the Bush and Obama Administrations should not be overstated, however. On the campaign trail, then-Senator Obama proclaimed, "I will . . . reject a legal framework that does not work. . . . I have faith in America's courts, and . . . [a]s President, I will close Guantánamo, *reject the*

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290. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009), available at <http://www.fas.org/irp/offdocs/eo/eo-13491.pdf>; Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at <http://www.fas.org/irp/offdocs/eo/eo-13492.pdf>; Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES, Feb. 18, 2009, at A20.

291. David Johnson & Neil A. Lewis, *U.S. Will Give Qaeda Suspect a Civilian Trial*, N.Y. TIMES, Feb. 27, 2009, at A1.

292. See *supra* note 42.

293. And this may rightly (from the legal perspective) and necessarily (from the policy perspective) be so—I do not opine on that matter.

294. Savage, *supra* note 290.

295. Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1024 (2008) (acknowledging, however, that this argument "does not quite carry the day").

296. Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6.

297. See U.S. CONST. art. I, § 7.

*Military Commissions Act*, and adhere to the Geneva Conventions.”<sup>298</sup> He appears to be keeping some of these promises. For their part, former Bush Administration officials and allies have denounced<sup>299</sup> early Obama Administration policies as misguided and dangerous. In their view, “Mr. Obama may have opened the door to further terrorist acts on U.S. soil by shattering some of the nation’s most critical defenses”<sup>300</sup> and, some seem to vaguely hint, thereby be in violation of his oath of office.<sup>301</sup> If President Obama’s future actions in the war on terror continue to provoke such strong reactions from supporters of the prior administration’s policies, then it may indeed indicate that real change has come in this area and, with the Congress behind him, that politics has come to matter in a way that was not reflected in the drafting and passage of the MCA, that is, in a way that serves clarity and accountability under law.

Finally, but perhaps most fundamentally, the story of the MCA confirms a truth we too easily forget: language is highly seductive. To be sure, extraordinarily fine-grained statutory analysis may at times seem scholastic. But in an age when a presidential administration, enabled by lawyers, can narrow the definition of torture down only to inflicting the kind of extreme pain that would accompany organ failure or death,<sup>302</sup> such analysis is all too necessary.<sup>303</sup> Because it is only through uncommonly close readings of

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298. Statement of Senator Barack Obama, *The War We Need to Win*, WOODROW WILSON INT’L CTR. FOR SCHOLARS, Aug. 1, 2006, available at <http://www.americanrhetoric.com/speeches/barackobamawilsoncenter.htm> (emphasis added). What, exactly, it means to “reject” the MCA is, however, unclear.

299. Some, however, have taken a more prophetic stance, arguing that the Obama Administration, faced with the reality of war and the responsibility of governance, will come to see the virtues of the Bush Administration’s policies and therefore adopt them. See, e.g., David B. Rivkin Jr. & Lee A. Casey, *The Laws of War Have Served Us Well*, WALL ST. J., Jan. 24, 2009, at A11.

300. John Yoo, Editorial, *Obama Made a Rash Decision on Gitmo*, WALL ST. J., Jan. 29, 2009, at A15.

301. Bret Stephens, Editorial, *Guantánamo Is No Blot on U.S. Honor*, WALL ST. J., Jan. 27, 2009, at A13. (This last point is only implied.)

302. See Memorandum from Jay S. Bybee, *supra* note 29, at 6.

303. And here we should perhaps add an admonition to take care both in drafting and in interpreting legislation.

[For] unskillfully framed legislative enactments . . . are all too often faulty both in substance and in form. Even if the ultimate general purpose of a given enactment be well conceived, imperfection of detail and faulty draftsmanship may . . . perpetuate or produce many instances of hardship and injustice.

WESLEY HOHFELD, *A Vital School of Jurisprudence and Law*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 332 (W.W. Cook ed., 1923). Moreover:

Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom [or] even his life. Interpretations of law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims . . . . Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.

statutory language, set against context, that we will be able to predict executive action and prevent abuse. As citizens—and certainly as citizen-lawyers—that is our duty. If, on the other hand, we fail to see the law in all the ways it might be understood, we will not even know where to look for incoming blows.

We may never have another presidential administration that makes and interprets law solely through the lens of its own power. And there may never again be within it a cadre of lawyers so willing to sacrifice legal principle on the altar of a necessitarian national security calculus. But we ought nonetheless to be prepared for such an administration, that we may either hold our legislators more accountable for the laws they pass in our name or cease calling them our representatives. For as Orwell knew, language is the rabbit hole into which our freedoms can disappear,<sup>304</sup> and with them, “[t]he recognition of the claims which anything has to our respect and duty.”<sup>305</sup>

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Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

304. See GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949); GEORGE ORWELL, *Politics and the English Language*, in ALL ART IS PROPAGANDA 270, 280-83, 285-86 (George Packer ed., 2008). For anyone unfamiliar with *Nineteen Eighty-Four*, it is a chilling work of fiction set in a future dystopia in which the totalitarian state expends considerable energy revising the English language—eliminating, replacing, or giving new meanings to words—in order to control thought. As explained in the book’s appendix, “The purpose of [the revised form of English] was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of [the ruling political party’s ideology], but to make all other modes of thought impossible.” ORWELL, NINETEEN EIGHTY-FOUR, *supra*, at 246. My point here is a broader one about the instrumental uses of language.

305. I OXFORD ENGLISH DICTIONARY 332 (1989) (defining “allegiance”); see *supra* notes 141-43 and accompanying text.