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## An Anti-Authoritarian Constitution? Four Notes

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## Article

# An Anti-Authoritarian Constitution? Four Notes

Patrick O. Gudridge†

"Hamdan offers principles that can set the legal world aright again."<sup>1</sup>

"Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the [Military Commissions Act of 2006] was to overrule Hamdan."<sup>2</sup>

"It is a matter of shame, but we have no choice but to conduct a national debate about torture."<sup>3</sup>

Celebrations of *Hamdan v. Rumsfeld*<sup>4</sup> started too soon. What we make of *Hamdan*, it now appears, depends in important part, at least, upon what we make of the Military Commissions Act of 2006.<sup>5</sup> In this Article, I propose two suggestions

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† Professor, University of Miami School of Law. I have learned much from Mario Barnes, Cynthia Drew, Michael Froomkin, and especially Steve Vladeck. Thanks also to the thoughtful and patient editors of the University of Minnesota Law Review and to Oren Gross for his generous invitation. Copyright © 2007 by Patrick O. Gudridge.

1. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2352 (2006).

2. *Boumediene v. Bush*, 476 F.3d 981, 986 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), and *application denied*, No. 06A1001, slip op. (U.S. Apr. 26, 2007). Judge Randolph's sometimes hyperbolic opinion in *Boumediene* in the end proceeds quite carefully in a way that is not entirely consistent with this initial assertion. *See infra* note 220.

3. Jeremy Waldron, *What Can Christian Teaching Add to the Debate About Torture?*, 63 THEOLOGY TODAY 330, 330 (2006).

4. 126 S. Ct. 2749 (2006).

5. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

that may fly in the face of emerging conventional wisdom. First, the majority opinion in *Hamdan*—significantly, not all of the opinion that Justice Stevens wrote—reveals with unusual clarity the surprisingly substantial impact of a seemingly non-consequential supposition of American constitutional law—an assumption about the ordinary formal plurality of legal instruments. *Hamdan*, therefore, might be important *theoretically* independently of its immediate practical significance. Second, I think, the Military Commissions Act is more complicated than usual accounts suggest. The Act does not so much resolve the many questions raised by the government's plans to try captured adversary combatants for war crimes—rather, it describes a politics within which those questions might be posed and alternative answers might compete. Is this “a matter of shame”? In part, the answer turns on what the officials that the Military Commissions Act puts in charge—especially military judges—do in exercising their authority. It is perhaps surprising that protection of individual rights to fair treatment should depend primarily on choices made by military judges—ultimately, on constitutional culture as they understand it. But within the Act's several parts, I think, we can glimpse the outlines of a recognizable constitutional dynamic, an organized assignment of responsibility which gives real weight to whatever concerns military judges elect to assert. I leave open the question of whether we should therefore acknowledge a grudging appreciation of the efforts of the Act's drafters, or rather, think harder about what our constitutional constructions generally accomplish. It should be clear, in any case, that the battle has just begun, that the outcome of the conflict that Congress structured is not essentially predetermined.

This Article presents itself as four freestanding notes. The first identifies the challenge that Justice Stevens's opinion in *Hamdan* poses. The second note sketches, in an abstract way, the primary context—the “documentary substrate”—within which what Stevens took for granted might plausibly claim to be self-evident. The third effort outlines the Military Commissions Act at some length, in the process underscoring the ways in which it confounds simpler summaries and critiques. Finally, I restate the Military Commissions Act once more, this time describing it in the constitutional terms its organization appears to suggest.

## I. THE CHALLENGING SIMPLICITY OF THE *HAMDAN* OPINION

The pertinent part of the majority opinion Justice Stevens writes in *Hamdan* is notably brief. An extended discussion disposes of several threshold questions.<sup>6</sup> Stevens also recounts in substantial detail what he calls “common law”<sup>7</sup> in order to show that the commission established to try Hamdan cannot fit within the categories of military commissions that Presidents (or other executive officials or military leaders) have convened without specific congressional authorization.<sup>8</sup> This discussion includes, among other topics, an analysis of why the charge of conspiracy brought against Hamdan is not “acknowledged to be an offense against the law of war,”<sup>9</sup> and therefore not a proper basis for military commission inquiry absent congressional approval.<sup>10</sup> Justice Kennedy refused to join this part of the Stevens opinion, reducing it to plurality status.<sup>11</sup> The *Hamdan* passage that wins majority support addresses the separate question of whether “[t]he procedures that the Government has decreed will govern Hamdan’s trial by commission” conform enough to the requirements of the Uniform Code of Military Justice (UCMJ).<sup>12</sup> Stevens concludes that the executive-drafted rules differ too much.<sup>13</sup> He also finds that the *Hamdan* procedures would not satisfy the “regularly constituted court” standard set in Common Article 3 of the Third Geneva Convention.<sup>14</sup> Geneva Conventions provisions are pertinent, he makes clear, because they are constituent elements of “the law of war” deemed to be controlling by the UCMJ.<sup>15</sup> Justice Stevens out-

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6. See *Hamdan*, 126 S. Ct. at 2762–72 (discussing, inter alia, the possible preemptive effect of the Detainee Treatment Act of 2005 and the propriety of abstention given the circumstances).

7. *Id.* at 2775 (plurality opinion).

8. *Id.* at 2775–86.

9. *Id.* at 2780.

10. *Id.* at 2780–85.

11. *Id.* at 2799–800, 2808–09 (Kennedy, J., concurring in part). Justices Souter, Ginsberg, and Breyer joined Justice Stevens’s plurality opinion. See *id.* at 2799 (Breyer, J., concurring). Justice Thomas criticized this part of the Stevens opinion at length. See *id.* at 2825–38 (Thomas, J., dissenting).

12. *Id.* at 2786–93 (majority opinion).

13. *Id.* at 2790–93 (explaining that deviations from courts-martial procedures “must be tailored to the exigency that necessitates it” and concluding that the President has failed to “justify variances from the procedures governing courts-martial”).

14. *Id.* at 2796–97 (plurality opinion).

15. *Id.* at 2794 (majority opinion).

lines implications of the Common Article 3 assurance of “all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>16</sup> But Justice Kennedy again refused to join, reducing the Stevens opinion on this point to a plurality effort.<sup>17</sup>

There is, of course, the obvious challenge: assuming that the order establishing the Hamdan tribunal fixes procedures inconsistent with the UCMJ model, why is the President limited by that model, even assuming that the UCMJ announces its own applicability? Justice Stevens acknowledges that in the absence of a controlling statute “the President may constitutionally convene military commissions ‘without the sanction of Congress’ in cases of ‘controlling necessity.’”<sup>18</sup> But because the UCMJ covered the *Hamdan* case, Stevens concludes, it was not necessary to explore this contingency.<sup>19</sup> “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”<sup>20</sup> Stevens notes that “[t]he Government does not argue otherwise.”<sup>21</sup> But he plainly regards the proposition that he asserts as decisive in any event. Why? Justice Stevens cites Justice Jackson’s famous three-part categorization in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), pointing (it seems) to Jackson’s judgment that presidential power “is at its lowest ebb” if executive measures are “incompatible with the expressed or implied will of Congress.”<sup>22</sup> But Jackson set up his categories as a preliminary exercise, as a way of laying odds, a kind of constitutional law bookmaking. He found it necessary to proceed further—to ex-

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16. *Id.* at 2797–98 (plurality opinion).

17. *See id.* at 2800, 2809 (Kennedy, J., concurring in part).

18. *Id.* at 2774 (majority opinion) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866)).

19. *Id.*

20. *Id.* at 2774 n.23.

21. *Id.* Justice Thomas also argued that executive officials had acted within the scope of authority acknowledged by pertinent congressional enactments. *Id.* at 2823–25 (Thomas, J., dissenting).

22. 343 U.S. 579, 637 (1952) (Jackson, J., concurring), cited in *Hamdan*, 126 S. Ct. at 2774 n.23. Cass Sunstein argues that *Hamdan* raised an issue that Justice Jackson did not address: the proper way to interpret a case in which a congressional action could be read as either consistent or inconsistent with presidential action. Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. (forthcoming June 2007).

plore whether particular arguments on behalf of unilateral executive authority were persuasive on their own terms, even in the face of contrary congressional action, given pertinent constitutional provisions and commitments.<sup>23</sup> Stevens sees no need for this added undertaking in *Hamdan*.<sup>24</sup>

In an important respect, Justice Stevens stood alone. Justices Breyer and Kennedy both thought that further explanation was necessary, each joining the other's opinion in this regard, each also joined for this purpose by Justices Souter and Ginsburg.<sup>25</sup> Breyer evoked democracy:

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.<sup>26</sup>

Justice Kennedy emphasized the virtue of stability:

Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.<sup>27</sup>

Both concurring opinions, however, beg crucial questions. "Democratic means" might encompass unilateral presidential action as well as joint legislative and executive decision making. Most of the time, anyway, presidents win office through popular vote—just like senators and representatives—withstanding the intricacies of the Electoral College scheme. Justice Breyer's argument presupposes an account of why elected legislators make some distinctive democratic contribution to political processes that elected presidents cannot. Breyer appears to treat the UCMJ as important chiefly because its pertinence otherwise works to provoke further congressional

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23. *Steel Seizure*, 343 U.S. at 640–55 (Jackson, J., concurring).

24. See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. (forthcoming May 2007) ("*Hamdan* has virtually nothing to do with . . . constitutional law generally.>").

25. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring); *id.* (Kennedy, J., concurring in part). Justice Stevens joined neither concurring opinion, but at two points in the plurality opinion quoted Justice Kennedy's opinion. *Id.* at 2797–98 (plurality opinion).

26. *Id.* at 2799 (Breyer, J., concurring).

27. *Id.* (Kennedy, J., concurring in part).

involvement contemporary with presidential action. Justice Kennedy in this respect thinks similarly—his invocation of “standards tested over time” is not a justification for taking the UCMJ seriously as such, but rather an account of how in general the Constitution “is best preserved,” through “[r]espect for laws derived from the customary operation of the Executive and Legislative Branches.”<sup>28</sup> “Customary operation,” though, is precisely the matter in question. It is not at all clear how Kennedy’s formula would address the argument that circumstances prompting a particular executive order—say, the military order defining commission procedures at issue in *Hamdan*—were truly different, requiring and justifying a different, unilateral presidential approach.

Justice Stevens is quite confident, as a statutory matter, about how to analyze the question of difference. Section 36(b) of the UCMJ, he is sure, puts the burden on the President to establish that it would not be “practicable” to conform military commission procedures to the courts-martial procedures set out in the larger body of the UCMJ.<sup>29</sup> He associates section 36(b), added after World War II, with congressional repudiation of the military commission procedures put to use in the Yamashita prosecution upheld by the Supreme Court notwithstanding vigorous dissents by Justices Murphy and Rutledge.<sup>30</sup> Stevens is conspicuously careful not to introduce into the *Hamdan* opinion the sense of outrage communicated throughout Justice Rutledge’s lengthy critique of commission procedures in *In re Yamashita*.<sup>31</sup> It would be easy, nonetheless, to explain the rigor that he ascribes to section 36(b) as the statutory manifestation of that outrage. A statute is a statute, however. The Stevens reading of section 36(b) may be one plausible account, but an alternative interpretation that emphasizes the uniqueness of *Yamashita* might also be plausible, and thus (it might be argued) be properly adopted by the President, and just as properly accorded deference.<sup>32</sup> Justice Stevens has surely not forgot-

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28. *Id.*

29. *Id.* at 2791–92 (majority opinion).

30. *See id.* at 2788–90; *In re Yamashita*, 327 U.S. 1, 26–41 (Murphy, J., dissenting); *id.* at 41–81 (Rutledge, J., dissenting).

31. *See Hamdan*, 126 S. Ct. at 2789 n.46.

32. For more extensive discussion, see Stephen J. Ellmann, *The “Rule of Law” and the Military Commission*, 51 N.Y.L. SCH. L. REV. (forthcoming May 2007), and Sunstein, *supra* note 22.

ten *Chevron*.<sup>33</sup> His reading of section 36(b) must be motivated by more than his sense of legislative history.

## II. IMPLICATIONS OF THE DOCUMENTARY SUBSTRATE

It is useful to step back. There is an ordinarily unpacked dimension to constitutional law that Justice Stevens does not discuss in *Hamdan*—that, once recognized, maps the majority opinion's otherwise implicit normative order. The discussion that follows, unfortunately, is in large part abstract. But I begin quite concretely, with some illustrations of the difficulties encountered before *Hamdan* by judges and commentators addressing the question of presidential action in the face of contrary legislation.

### A.

*Steel Seizure*<sup>34</sup> exposes, Henry Monaghan declares, a “bed-rock principle of the constitutional order.”<sup>35</sup> Absent a sufficiently specific Article II grant, “the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting.”<sup>36</sup> Professor Monaghan reads *Steel Seizure*, it seems, mainly for its result—he does not closely associate his own analysis with any of the particular approaches taken by the Justices writing in the case.<sup>37</sup> Monaghan's magisterial study, moreover, disquietingly reminds its readers how often and how much presidential power originates “off-bedrock” as a practical matter—does not derive in any direct way from congressional action, instead supposes expansive readings of the delegation doctrine, or evokes the necessities of at least some exercises in foreign relations, or the brute re-

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33. He wrote it. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839 (1984).

34. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

35. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10 (1993).

36. *Id.*

37. For critical discussion of the *Steel Seizure* opinions, with citations to the literature, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 370–72 (5th ed. 2005), and Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006) (sketching favorably the implications of Chief Justice Vinson's dissent in *Steel Seizure*).



quirements of genuine emergencies, or simply responds to the ordinary pressures of responsible administration.<sup>38</sup>

Remarkably often, judicial rulings and academic commentaries considering whether executive officials can proceed in the face of contrary congressional enactments turn out to be missing clear-cut constitutional explanations.<sup>39</sup> For present purposes, a few examples suffice.

Judge Augustus Hand's opinion in *United States v. Western Union Telegraph Co.*<sup>40</sup> is the prototype, seemingly, that Justice Jackson drew upon in writing his *Steel Seizure* opinion.<sup>41</sup> Hand addressed unilateral executive action blocking unauthorized cable landings on U.S. shores. "Certainly many, if not most, executive powers flow from legislative enactments."<sup>42</sup> The executive order could not be justified as an exercise of presidential war power. "[I]t is nowhere suggested that there is any hostile purpose in the attempt to land the cables of the Western Union at Miami Beach."<sup>43</sup> Judge Hand worried floridly about the implications of upholding the executive action:

If the President has the right, without any legislative sanction, to prevent the landing of cables, why has he not a right to prevent the importation of opium on the ground that it is a deleterious drug, or the importation of silk or steel because such importation may tend to reduce wages in this country and injure the national welfare? In the same way, why does not the President, in the absence of any act of Congress, have the right to refuse to admit foreigners to our shores, and to deport those aliens whose presence he regards as a public menace?<sup>44</sup>

Hand also thought that, if there were sufficient evidence of congressional acquiescence in unilateral executive action (and

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38. See Monaghan, *supra* note 35.

39. "Issues of executive power . . . are too important to be left to the kind of legal scholasticism that characterizes judicial opinions and much scholarship on these issues." Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2356 (2006); see also Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2138–39, 2158–59 (2004) (substituting administrative law cost-benefit analysis for indeterminate constitutional inquiry).

40. 272 F. 311 (S.D.N.Y.), *aff'd*, 272 F. 893 (2d Cir. 1921), *rev'd*, 260 U.S. 754 (1922).

41. For discussion of *Western Union* as Justice Jackson's point of departure, see Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1110–12 (2006).

42. *Western Union*, 272 F. at 313.

43. *Id.* at 314–15.

44. *Id.* at 315.

there was some), the question would become political, outside the purview of judicial action.<sup>45</sup> But there was, it turned out, more evidence of congressional acquiescence in the foreign activities of Western Union and its counterparts. Hand ultimately rejected the presidential assertion of power: "Congress has gone too far to make this position tenable."<sup>46</sup> "Too far" is not an argument—nor are rhetorical questions. Judge Hand wrote elaborately, but in the end remarkably narrowly.<sup>47</sup>

Professor Monaghan treats *Little v. Barreme*,<sup>48</sup> work of Chief Justice Marshall in 1804, as "fundamental," as having "settled" the point that "the President lacks authority to act *contra legem*."<sup>49</sup> Marshall's opinion is notably odd, however. A congressional statute authorized seizure of American-owned trading ships proceeding to any French port or place; presidential instructions ordered seizure whether an American ship was going to or returning from a French location.<sup>50</sup> The case report begins with a statement of the proposition for which the decision might be understood to stand: "A commander of a ship of war of the United States, in obeying his instructions from the President . . . acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution."<sup>51</sup> Remarkably, Chief Justice Marshall's opinion emphasizes that Marshall himself initially thought that the presidential directive should shield the commander of the war ship from personal liability notwithstanding capture of a "returning" ship and the directive's inconsistency with the Act of Congress.<sup>52</sup> "But I have been convinced that I was mistaken . . . I acquiesce in [the opinion] of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions

45. *See id.* at 318–19.

46. *Id.* at 322.

47. For a more recent opinion, quite similar in effect, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981), discussed in the text accompanying notes 91–94, *infra*. Cf. Levinson & Pildes, *supra* note 39, at 2353–54 (suggesting that Justice Jackson's *Steel Seizure* categories are likely to provide diffident or question-begging judicial analyses).

48. 6 U.S. (2 Cranch) 170 (1804).

49. *See* Monaghan, *supra* note 35, at 24.

50. *See generally* STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 643–62 (1993) (discussing the "quasi-war" backdrop).

51. *Little*, 6 U.S. (2 Cranch) at 170.

52. *See id.* at 173, 179.

would have been a plain trespass.”<sup>53</sup> Why should “plain trespass” matter so much? There was no further explanation.

Two Supreme Court cases decided in 1836 show the “settled” question was in some sense either still up in the air or more complicated than *Little v. Barreme* might at first suggest.<sup>54</sup> *Tracy v. Swartwout*<sup>55</sup> arose because a federal tariff collector demanded a bond, before releasing sugar cane “sirup” to plaintiffs, in the amount of three cents per pound of sirup, as instructed by the Secretary of the Treasury, rather than fifteen percent of the value of the shipment, as authorized by statute.<sup>56</sup> The trial judge apparently reacted much like Chief Justice Marshall had initially in *Little*, and urged the jury to award only nominal damages against “an innocent collector”<sup>57</sup>—which the jury promptly did, in the amount of six cents.<sup>58</sup> The Supreme Court was clear—clearer than Marshall—concerning the basic principle: “The secretary of the treasury is bound by the law . . . . It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.”<sup>59</sup> The jury charge, however, was treated as a matter of delicacy:

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53. *Id.*

54. My colleague Stephen Vladeck argues that the strong interpretation of *Little v. Barreme* is reinforced by Chief Justice Marshall’s opinion in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). See Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. (forthcoming Apr. 2007). In *Brown*, reversing a decision written by Justice Story on circuit, Marshall concluded that the 1812 declaration of war, given contemporary understandings of the law of war, did not in and of itself, in the absence of more explicit congressional direction, confiscate British property. *Brown* is obviously an important decision (Professor Vladeck is right in thinking that it should be more widely read). Marshall’s opinion—and also Story’s dissent, see *Brown*, 12 U.S. (8 Cranch) at 129–54 (Story, J., dissenting)—illustrate the elaborate but careful combination of international law sources and constitutional analysis characteristic of the early federal period. But the case did not involve presidential or other high level executive action per se—rather (Marshall takes pains to emphasize) the independent intervention of a U.S. attorney, see *id.* at 121–22 (majority opinion). Both Marshall and Story proceed, in large part, within a jurisprudential regime that gives great weight to property rights and established expectations. Overt executive action, within this legal context, might well have mattered much.

55. 35 U.S. (10 Pet.) 80 (1836).

56. *Id.* at 81–82.

57. *Id.* at 86.

58. *Id.* at 83.

59. *Id.* at 95.

A court may not only present the facts proved, in their charge to the jury; but give their [sic] opinion as to those facts, for the consideration of the jury. But, as the jurors are the triers of facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their [sic] own judgments. . . . This language seems to be susceptible of but one construction, and that is, that as the plaintiffs refused to give the bond required by the collector, who acted in good faith, they ought to recover no more than nominal damages.<sup>60</sup>

The trial judge would have acted properly, apparently, if he had urged “a most dangerous principle” more circumspectly.

*United States v. Bradley*,<sup>61</sup> another bond case,<sup>62</sup> involved an attempt to collect on a pledge given by a military paymaster in terms prescribed by the Secretary of War encompassing provisions over and above those specified by Congress. The Supreme Court’s ultimate conclusion sounds like *Little v. Barreme*:

We think, then, that the present bond, so far as it is in conformity to the act of 1816 . . . is good; and for any excess beyond that act, if there be any . . . , it is void, pro tanto. The breach assigned is clearly of a part of the condition . . . which is in conformity to the act; and therefore action is well maintainable therefor.<sup>63</sup>

The preceding discussion, however, demonstrated at length that Justice Story, writing for the Court, did not think he was expounding constitutional law: “That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*; is a doctrine well founded in the common law, and has been recognized from a very early period.”<sup>64</sup> English cases received elaborate presentation;<sup>65</sup> the Supreme Court’s own decisions, it seemed pretty much enough to say, showed that “a similar doctrine has been constantly maintained.”<sup>66</sup> In all, Story satisfiedly noted, “This is not only the dictate of the common law, but of common sense.”<sup>67</sup>

60. *Id.* at 95–97.

61. 35 U.S. (10 Pet.) 343 (1836).

62. On the importance of bonds in early administrative law, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1316–18 (2006).

63. *Bradley*, 35 U.S. (10 Pet.) at 364.

64. *Id.* at 360.

65. *Id.* at 360–63.

66. *Id.* at 363.

67. *Id.* at 364. For discussion of the distinction between common sense jurisprudence and common law jurisprudence, controversial in the period, see JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NA-*

Justice Story makes matters clear. *Little, Tracy, and Bradley* chiefly addressed the requirements of law or equity—for example, trespass or accounting.<sup>68</sup> The defense of following instructions, to whatever extent it trumped remedy or liability, originated, it appeared, largely in considerations of individual responsibility and corrective justice, pretty much specific to the particular case. The agency question acquired its overall shape from the common law context. It is not obvious, within the setting, whether the conflict of executive and congressional instructions mattered simply because the conflict put the officer immediately party to the case on notice that the limits of government office were not clear, or because that party was supposed to have understood how to resolve the conflict. Given the norms marked as pertinent by the causes of action, strong statements of constitutional principle were at risk, subject independently of their own terms to judicial sense of the vagaries of the cases.

The most prominent recent academic exploration of executive action *contra legem* is probably the call to arms Neal Katyal and Laurence Tribe issued in 2002 at the outset of the military commissions controversy.<sup>69</sup> Professors Katyal and Tribe, exploring many matters in their essay, elaborated especially provocatively on a theme sounded in Justice Douglas's *Steel Seizure* concurring opinion, emphasizing constitutional protections of individual rights as a key to organizing separation of powers thinking.<sup>70</sup> “[O]ur Constitution’s structure,” Katyal and Tribe argue, is “designed in large measure to secure individual rights by resisting the centralization of unchecked power.”<sup>71</sup> They explore at some length, in particular, the consti-

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TIONAL NEW HAMPSHIRE 18–55 (2004).

68. See Mashaw, *supra* note 62, at 1321–31 (discussing common law actions as the context for the development of early administrative law).

69. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002). Over and above its intrinsic merits, this article is noteworthy because of the prominence of its authors. Professor Katyal subsequently argued on behalf of Hamdan before the Supreme Court. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006). Professor Tribe is Professor Tribe.

70. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 630–32 (1952) (Douglas, J., concurring) (asserting that the Fifth Amendment just compensation requirement necessitates prior congressional authorization of a taking).

71. Katyal & Tribe, *supra* note 69, at 1309; see also *id.* at 1266 (“[I]n the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution’s text, structure, and logic demand

tutional requirement of equal protection of the laws, its applicability to a scheme of military commissions targeting only non-U.S. citizens, and the case for congressional involvement that the difficulties of unequal treatment suggest.<sup>72</sup>

This approach appreciates Madisonian irony: separation of powers may be understood as oblique protection of individual rights too ubiquitous to be specified constitutionally (Madison's sometime view),<sup>73</sup> but once enumerated (his second project), constitutional rights suggest the appropriate organization of otherwise obscure constitutional assignments of institutional responsibility. What if unilateral executive action is seemingly consistent, in both its substance and the procedures that it establishes, with constitutional recognitions of individual rights—do separation of powers concerns therefore abate? Within the context in which they wrote, Professors Katyal and Tribe were not required to face this question.<sup>74</sup> What if constitutional understandings of individual rights are themselves equivocal—as much concerned with marking proper fields of government action as elaborating and vindicating individual claims? Considered closely, constitutional rights might appear too often too irresolute to suggest much about government organization. Indeed, the carefully structured discussion Katyal and Tribe present regarding equal protection ideas implicated in distinctions between aliens and citizens is itself suggestive.<sup>75</sup> “General propositions,” Justice Holmes taught, “do not decide concrete cases.”<sup>76</sup> This is not quite right, obviously. There is a place for straightforward formulations of individual rights within constitutional law. But usually these wordings are put to work as outlines of acknowledgements—allowed to vary in detail—required to be evident in official instruments. It is not clear that straightforward formulas, standing alone, can support the weight of close separation of powers inferences.

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approval by Congress if life, liberty, or property are to be significantly curtailed or abridged.”).

72. See *id.* at 1298–303. For a briefer discussion of due process implications, see *id.* at 1303–04.

73. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 536–43 (1969).

74. See Katyal & Tribe, *supra* note 69, at 1260–66.

75. See *id.* at 1298–303.

76. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

## B.

The requirement that—almost always—“executive officials must exhibit some statutory warrant”<sup>77</sup> holds, Professor Monaghan insists, as “literary theory.”<sup>78</sup> “Literary theory” is “bed-rock”? However ironic he means his labeling to be,<sup>79</sup> Monaghan catches what he knows to be an old truth. Writing his acclaimed *The American Enlightenment, 1750–1820*, Monaghan’s colleague Robert Ferguson identified the emergence of “the literature of public documents” as a distinctive, plainly important development originating in the revolutionary and constitutional periods.<sup>80</sup> Ferguson depicted the drafting of the Constitution in particular as a creation of “recognizable form,” a “precise arrangement of tone and structure,” serving thereby as “both a claim of accomplishment and a rejection of prevalent fears.”<sup>81</sup> Within Monaghan’s own account, it is easier to notice historical contingency. The 1787 constitutional arrangement codifies 1776 revolutionary rhetoric. The American conception of executive authority—its emphasis on law enforcement as opposed to prerogative—is first of all critical, begins as a reaction against the English monarchical alternative.<sup>82</sup> The normative force acquired as a result might well have struck contemporaries as compelling, but what substitutes now, several centuries later? The organizing categories of legal thought prevalent in the constitutional period, need not match their subsequent (our current) counterparts, either in substance or organization. *Little v. Barreme*, we have already seen, suggests this possibility.<sup>83</sup> We risk reading backwards.

If the Constitution counts as “literature,” it must be because the Constitution, constraining the diction of those who invoke it, “imposes itself essentially through its formal characteristics,” claims a “capacity for *exemplification*,” in this way es-

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77. Monaghan, *supra* note 35, at 5.

78. *Id.* at 31 (“Whether or not any president can live with it, the literary theory of ‘The executive Power’ recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency.” (quoting U.S. CONST. art. II, § 1, cl. 1)).

79. The description of constitutional law as “literary” is initially presented as a slur of sorts and attributed to Woodrow Wilson. *See id.* at 1.

80. ROBERT A. FERGUSON, *THE AMERICAN ENLIGHTENMENT, 1750–1820*, at 124–49 (1997).

81. *Id.* at 137–38.

82. *See* Monaghan, *supra* note 35, at 12–19.

83. *See supra* text accompanying notes 48–53.

establishes itself as what it is.<sup>84</sup> Professor Monaghan presumably supposes something like this. It is plainly a complex endeavor: The Constitution acknowledges the existence of other legal documents and fixes aspects of the form or content of these documents—for example, statutes, judicial opinions, and executive orders. The Constitution thus establishes itself—*exemplifies*—in part at least through processes of marking whatever is exemplary in these other documents.<sup>85</sup> The Constitution is a document within Professor Ferguson’s “literature of public documents” that encompasses—brings within its own diction—other public documents. It is this compounding, this irreducible documentary multiplicity, that characterizes the setting out of which constitutional law emerges, that serves as its “bedrock.”

### C.

To appreciate the significance of documentary multiplicity, it is helpful to begin with Jeremy Bentham:

At present such is the entanglement, that when a new statute is applied it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea.<sup>86</sup>

For Bentham, the proper response was analytic abstraction:

Take then on the one hand all the imperative provisions belonging to the several laws that compose the code, add together their respective amplitudes: take on the other hand all the qualificative provisions belonging to the same laws, add together in like manner their respective amplitudes, on the other side; from the sum of the one combined with the sum of the other results the general character of the whole system.<sup>87</sup>

84. GÉRARD GENETTE, *FICTION & DICTION* 21, 23 (Catherine Porter trans., 1993).

85. The idea of diction is implicit, for example, in Richard Fallon’s account of constitutional legitimacy:

Although it would seem rhetorical overkill to claim that Congress acts illegitimately whenever it passes a law that the courts subsequently hold unconstitutional, it might well be thought constitutionally illegitimate for the President or Congress to act in deliberate defiance of the Constitution or to demonstrate the kind of egregiously bad constitutional judgment that amounts to an abuse of discretion.

Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1843 (2005).

86. JEREMY BENTHAM, *OF LAWS IN GENERAL* 236 (H.L.A. Hart ed. 1970). Bentham’s manuscript, completed in 1782, was discovered in 1939. *Introduction* to BENTHAM, *supra*, at xxxi.

87. *Id.* at 237. This exercise is illustrative of Bentham’s well-known prin-



Is all this sextant work really necessary to configure “legal material”<sup>88</sup> in operational terms? Formal plurality describes a shifting context—but it is by no means clear that this instability is not itself open to legal address, to tectonic analysis and argument (as it were). Construction of a “whole system,” a well-defined arrangement of legal propositions displacing original legal materials, may be one appropriate way of proceeding—but not a necessary course.<sup>89</sup>

Legal documents are understood to be delimited or bounded, but only provisionally so, always at risk of decomposition into sequences of documents or subsumption within some more encompassing document.<sup>90</sup> Documents within their own terms may include statements asserting norms derived from all sorts of sources, for example, rights and duties, depicted as rules, principles, or policies, for example. Legal work is kaleidoscopic. Documents fall into patterns vulnerable to rearrangement. There can be no necessary starting point or conclusion. Some patterns may persist or recur, and particular patterns—so long as they persist—may define hierarchies. Patterns are always provisional. Aggregated or individually, documents are not necessarily complete or coherent. Overlaps, gaps, inconsistencies, and ambiguities are common.

These assertions suggest, among other things, that law—insofar as its elaborations have consequences—may be a means

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principle of individuation. See *id.* at 156–83 (“Idea of a Complete Law”); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 70–92 (2d ed. 1980).

88. RAZ, *supra* note 87, at 72.

89. The discussion that follows means to bring to the surface familiar suppositions. It is largely written as though it states self-evident truths. In part I borrow from and rather abstractly restate and generalize the appreciation of the multitextual element in constitutional analysis frequently evident in recent commentary. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185 (2001); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002). I also treat as pertinent to contemporary American law—and once more abstract from—explorations of the historical significance of the documentary basis of legal practices, and literary implications of multitextuality more generally. See, e.g., M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND, 1066–1307 passim* (2d ed. 1993); JOHN DAGENAIS, *THE ETHICS OF READING IN MANUSCRIPT CULTURE* 8–26 (1994); RODOLPHE GASCHÉ, *THE WILD CARD OF READING* 66–83 (1998); ADRIAN JOHNS, *THE NATURE OF THE BOOK* 321–22 (1998); CHRIS WICKHAM, *FRAMING THE EARLY MIDDLE AGES* 68, 70 (2005).

90. For a sophisticated appreciation of these tendencies, framed as “the level of generality problem,” see LAURENCE H. TRIBE & MICHAEL G. DORF, *ON READING THE CONSTITUTION* 73–80, 101–17 (1991).

either of ordering or of disrupting. Documents considered in isolation are politically unresolved. A given document might be understood as tantamount to a direct description of fundamental moral, political, economic, or cultural "facts," and therefore foundational, precisely fixing legal order. But this understanding might also provoke a counter-politics recalling the "merely" documentary status of postulated legal order, proposing to replace one document with another. In circumstances in which norms are not otherwise established, legal articulation may work to highlight or emphasize, and therefore work to affirm or establish norms, motivating political, popular, or cultural support that puts off subsequent legal revision even if such revision is not entirely precluded. But even if legal materials appear to acknowledge, for example, extant cultural or economic norms, the instability of legal forms may open ways to undercut these norms. The legal "field" (the materials that might be conceived as supplying the setting or ground for legal arguments and conclusions) is refigured as "flux" (the recurring composition, decomposition, and recomposition of legal materials).

In any particular legal exercise, resolving these dynamics preoccupies analysis side-by-side with independent considerations of content. Considerations of content may shape formal resolution, but the opposite might also hold. Much more of ordinary law is concerned with textual prerequisites or relations than we might at first suppose. For example, statutes, judicial opinions, constitutions, regulations, contracts, and treaties are treated as defined, individuated, limited somehow in content, as ones among many and are also routinely broken into parts or subsumed (in whole or in part) into larger aggregates. Thus, one statute may displace another statute, or accommodate another's content; a statute may limit administrative interpretation or take its own content from that interpretation; a statute may limit common law or be understood to codify it. In the course of fixing these relations, particular terms may acquire prominence or may recede. Consequently, these ordering exercises may change our understanding of pertinent content.

In every instance, there is, therefore, an almost always routine formal politics. Law "is"—comes into being—because of the congruence of document specifications and conditions of salience. Document specifications are the component parts of would-be legal instruments—what is and what is not included within a given document. Conditions of salience are criteria that document specifications do or do not meet. Matches of sali-

ence conditions and documentary characteristics generate apologetics; mismatches generate critiques.

If the question of match or mismatch is especially difficult, its analysis becomes readily visible. In *Dames & Moore v. Regan*, an executive order suspending claims against Iran pending in American courts was clear enough in its own terms, but uncertain as a matter of pedigree.<sup>91</sup> The order could invoke no previous congressional authorization, although it was also not obvious that this authorization was necessary to mark the order as effective.<sup>92</sup> Justice Rehnquist artfully accumulated evidences of international practice, instances of congressional acquiescence in similar circumstances, and judicial opinions acknowledging "some measure" of independent presidential power<sup>93</sup>—in the process, he also underscored the precariousness or contingency of his defense of presidential power.<sup>94</sup>

*American Insurance Ass'n v. Garamendi*<sup>95</sup> presented a converse case. There was no doubt about the power of the President to enter into an agreement with Germany establishing a fund to compensate victims of wrongful conduct by German companies during the Nazi era.<sup>96</sup> On its face, however, the agreement did not purport to preempt aggressive state government efforts to come to grips with the German companies' conduct.<sup>97</sup> In several letters to state officials, federal executives expressed concern about the state action.<sup>98</sup> Justice Souter, writing for a Supreme Court majority, did not assert that these obviously precatory documents had "the force of law."<sup>99</sup> Instead, he argued that the casual form employed reflected a federal decision: "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."<sup>100</sup> The Supremacy Clause therefore ousted conflicting state requirements.<sup>101</sup> Justice Ginsburg, joined by three colleagues, dissented in sharply documentary terms: "As I see it, courts step

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91. 453 U.S. 654, 662–68 (1981).

92. *Id.* at 675–88.

93. *Id.* at 679–82.

94. See Monaghan, *supra* note 35, at 52–53.

95. 539 U.S. 396 (2003).

96. See *id.* at 413–15.

97. See *id.* at 411.

98. *Id.*

99. *Id.* at 401–29; see also *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 330 (1994) (discussing "the force of law").

100. *Garamendi*, 539 U.S. at 427.

101. See *id.* at 416–17.

out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds."<sup>102</sup>

Matches and mismatches are equally plausible states. Neither apologetics nor critique may claim priority. Legal work is formally an unresolved mix of both. Formal politics and norms declared pertinent in the content of particular documents may interact in two ways. Formal demands and dictates of content may compete in claiming priority. Or a pluralist pressure may manifest itself—a tendency for differing contents to co-exist rather than displace or recede—as a result of the formal preoccupation with differentiating legal documents. It is possible that dictates of content might prevail by and large, and that the content dictated might be relatively uniform or harmonious. But it is also possible that the formal politics might sharply fragment documentary contents. Legal normativity is consequently complex.

#### D.

Constitutions are charged with a distinctive task. Whether individually or in the aggregate, other instruments (and thus the processes and norms that they posit) may be specific or general, interconnected sets of propositions or potentially inconsistent lists, decisive or highly qualified or utterly ambiguous. Constitutions might reveal combinations of these attributes as well. But if they are to succeed to any important extent in limiting variation in the content of other legal instruments, if constitutions are supposed to stabilize to some degree the rule of law, their form must somehow follow function.<sup>103</sup> On this assumption, it may not be enough to define (within or alongside the constitution as such) institutional arrangements charging a particular government body—for example, a court—with routine responsibility for interpreting and applying constitutional terms to validate or invalidate and thus constrain the reach of

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102. *Id.* at 443 (Ginsburg, J., dissenting). For further criticism of *Garamendi*, see Graham O'Donoghue, Note, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1120–56 (2006).

103. For a thoughtful discussion that reverses the perspective developed here and treats the rule of law as organizing constitutional law, see Ellmann, *supra* note 32. In his important account, Richard Fallon uses constitutional law as a testing medium, as it were, in order to disaggregate the concept of “rule of law.” See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

other legal instruments. If the exercise of this responsibility is not entirely ad hoc, and thus relocate rather than address the underlying difficulty, interpreters must draw upon some means of stabilization deployed within their own efforts—organizing their own efforts and, as a result, organizing the efforts of other legal actors, even if only dialectically. There may be resources available, extrinsic to the constitution as such, that incorporate strong markers of orthodoxy and unorthodoxy—religious teachings, perhaps. Alternatively, interpreters themselves might formulate constitutional propositions in terms that restate constitutional language, but also figure as independent recurring elements within constitutional analysis—formulations akin to index terms, introducing some measure of stability by organizing argument.<sup>104</sup>

The question, really, is what stability requires. The workings of constitutional law within the larger rule of law should be visible. The idea that interpretive processes are appropriate, more or less regardless of the resources they draw upon, so long as they are pretty much invisible,<sup>105</sup> is inapposite if what constitutional law is supposed to supply is shape—enough basis for an accumulating perception that law-making exercises are not always precarious and open altogether to revision. This need not mean that constitutions must be understood to state rules, relatively well-defined and well-known criteria that other legal instruments must meet in order to be valid. Constitutions may indeed include such rules, but necessarily unreliably; they are subject to all the ordinary dangers of overlap, incompleteness, inconsistency, and ambiguity that legal instruments run. It might be enough, however, to produce the requisite sense of shape, if constitutional terms are thought to suggest distinctive preoccupations, themes coexisting over-and-above or in-and-around their lists of rules. If it were possible to discern these same preoccupations—brooding omnipresences, as it were—within the terms of other legal instruments; if it were possible to read these instruments as incorporating and thus acknowledging constitutional themes—this might well be ordering enough.

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104. The point of departure here, obviously, is Charles Fried's idea of "doctrine." See CHARLES FRIED, SAYING WHAT THE LAW IS 6–10 (2004).

105. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 12–13, 15 (Fred B. Rothman & Co. 1993) (1880).

There need to be grounds for thinking that such themes could resist or retard the content-corroding side effects of the ordinary politics of law. The politics of interpretation as such—biases influencing modes of reading—would be just as present in the constitutional context as elsewhere. But the results of the politics of legislation (or administration, or judicial opinion-writing)—the ambiguities, gaps, and conflicts occasioned by the drafting process—are also evident in constitutional texts, and might well figure as starting points rather than obstructions for purposes of the process of identifying and considering constitutional themes. Such seeming deformations, after all, are evidence of pertinent counterconcerns, to be separated out, collected insofar as they recur within constitutional texts, and elaborated alongside the concerns they overlay—concerns themselves isolated, identified as recurring or not, and elaborated. The results of this tabular effort might reveal structured hierarchies or even some unqualified concerns or commitments, but more likely, a series of constitutional oppositions or conflicts would appear. These efforts might vary from interpreter to interpreter. It may be sufficient, however, if the results reveal family resemblances—all interpreters begin, after all, with the same constitutional text or texts. Perhaps the text is too long or too diverse in its parts; perhaps it is too often amended. But in the hoped-for central case at least, the play of interpretation unfolds within a recognizable field.

Constitutional interpreters likely to undertake the task repeatedly—reviewing the work of other legal actors—would want their own writings to be sufficiently clear to be capable of influencing the decisions of those other actors. Concern for consistency would therefore be pertinent, perhaps not always, but often enough to mark departures as notable. Interpretations would also more likely be influential to the extent that they depict constitutional texts as clearly organized in important respects—as either pointing to unequivocal conclusions, or as plainly preoccupied with distinctive concerns, however much in conflict. It is not just a question of readable signals, however. An interpreter judging instruments framed by other actors—statutes, regulations, or opinions—could not determine whether the interpreter's own understandings were accorded enough weight unless the interpreter's own understandings clearly enough marked off identifying forms within constitu-

tional texts.<sup>106</sup> These biases, of course, need not predominate. They share space with the vagaries of interpretive politics in particular instances. Interpreters may also act, of course, on the basis of independently developed substantive constitutional agendas. But the interactive environment is not likely to be irrelevant: participants in processes of constitutional articulation and interpretation will find it difficult to work free of each other. Insofar as this is so, participants in these processes will work reciprocally, and to the extent that they do, their work will have the effect of stabilizing constitutional law and in the process the larger legal regime.<sup>107</sup>

### E.

None of this may be especially prominent. Documentary competitions—in particular, the distinctive collaborative politics of establishing, maintaining, or changing constitutional preoccupations—are substrate movements, not directly expressed in ordinary vocabularies of processes, powers, and rights. Jostling documents do figure occasionally, however, and sometimes also importantly—irrupt, as it were—within judicial efforts to map the suppositions and possibilities of constitutional law.

• It was precisely Justice Brandeis's point in 1938 *Erie Railroad Co. v. Tompkins*, that common law is not "general," is instead a complex of state-by-state documentary accumulations, to be ascertained by studying the opinions of the courts in any particular state.<sup>108</sup> John Ely's subsequent gloss highlighted the federal statutory competition within which Brandeis's supposition had become set—a reinstallation itself precisely congruent with Brandeis's own conclusion.<sup>109</sup>

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106. Thus, for example, the mismatch of grossly categorical legislation criteria and more refined constitutional criteria emphasizing case-by-case contexts is the point of departure for one classic account of the First Amendment overbreadth doctrine. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

107. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 96–100 (2001), for an extended and notably sophisticated discussion—largely parallel, I believe—elaborating upon Michael Bratman's theory of "shared cooperative activity." Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327 (1992). Coleman develops the idea of "shared cooperative activity" to interpret the jurisprudential notion of the rule of recognition. COLEMAN, *supra*, at 92–102, 157–58. For a criticism of Coleman's argument, see RONALD DWORIN, *JUSTICE IN ROBES* 195–96 (2006).

108. 304 U.S. 64 (1938).

109. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693,

• Chief Justice Hughes had already—in *Home Building & Loan Ass'n v. Blaisdell*<sup>110</sup> in 1934—recast (if only for purposes of one opinion) the seemingly fundamental constitutional separation of individual freedom of contract and legislative police power as merely conditional, as subject to the constitutional equivalent of a reservations clause in a corporate charter. *NLRB v. Jones & Laughlin Steel Corp.*<sup>111</sup> in 1937 vertiginously depicted the similarly seemingly basic constitutional distinction between manufacturing and commerce, and its associated corollaries, as simply phrases in particular judicial opinions, documents readily replaced (and constitutional analysis thereby positioned for change) by his own opinion and its new attribution of priority to the constitutional understandings implicit in the specific statutory framework.

• In *Ex parte Endo*<sup>112</sup> and *Yates v. United States*,<sup>113</sup> Justices Douglas and Harlan self-consciously overlaid statutory terms and constitutional propositions, resolving seeming dissonances by concluding that statutory formulations could not be read other than as evocations (alternate wordings keyed to particular settings) of formally primary and therefore substantively definitional constitutional texts.<sup>114</sup>

• Justice Rehnquist, it might be thought, initiated the skirmishes preliminary to our own period precisely by insisting in his *Arnett v. Kennedy* plurality opinion that if the procedural due process threshold requirement of “property” was a matter of nonconstitutional law, then the documents disclosing that law had to be read on their own terms, in all their parts, procedure as well as substance (“the bitter with the sweet”).<sup>115</sup> The pertinence of the seemingly fundamental constitutional guarantee of due process suddenly appeared to turn on the chance play of nonconstitutional legal materials. Later, Justice Brennan’s startling opinion in *Plyler v. Doe* seized on a strategy

697–99 (1974).

110. 290 U.S. 398, 434–39 (1934).

111. 301 U.S. 1, 36–37 (1937).

112. 323 U.S. 283, 299–302 (1944).

113. 354 U.S. 298, 319–20 (1957).

114. For further discussion, see Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1945–68 (2003); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1850–65 (2004) (discussing *Yates* and surrounding cases).

115. 416 U.S. 134, 154–55 (1974). A majority of the Supreme Court rejected Justice Rehnquist’s approach in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540–41 (1985).



similarly grounded in documentary pluralism.<sup>116</sup> *Plyler* assembled its majority, it appears, by taking seriously its own status as an autonomous document, in the process acknowledging implicitly the mutual autonomy and independence of the aggregation of judicial opinions addressing constitutional law. Brennan was, as a result, free to gesture in original terms and in several directions at once in writing *Plyler*, invoking a range of constitutional concerns without claiming to fix authoritatively the pertinence of those concerns outside the context of the opinion itself.

• It is easy to see that the opinion that Justice Stevens wrote in *Hamdan v. Rumsfeld*<sup>117</sup> is another, notably vigorous variation. The play of constitutional argument is meaningless without the presupposition from which it starts. The arrangement and rearrangement of documents, however many variations are possible, posits that there *are* documents, and *only therefore* play.<sup>118</sup> A central portion of the Stevens opinion acquires prominence—its seemingly stubborn insistence on the “fact” of the statute—Stevens’s demand that provisions of the UCMJ, just because they were already enacted, be addressed, not be read as easily sidestepped, be taken seriously by the President in determining that they are not applicable.<sup>119</sup> Put more abstractly, the documentary substrate—its differentiations as well as its overlaps—cannot be treated as other than “fact.” It is this formal assertion, arguably, that gives the Stevens opinion its normative charge. *Hamdan* itself becomes, as a result, *exemplary*—illustrative of what the Constitution supposes, of what deference to the President would deny.

116. 457 U.S. 202, 205–30 (1982).

117. 126 S. Ct. 2749 (2006).

118. Jean-François Lyotard makes much the same point in discussing justice conceived as a language game:

Absolute injustice would occur if the pragmatics of obligation, that is, the possibility of continuing to play the game of the just, were excluded. That is what is unjust. Not the opposite of the just, but that which prohibits that the question of the just and the unjust be, and remain, raised. . . . [A]ny decision that takes away, or in which it happens that one takes away, from one’s partner in a current pragmatics, the possibility of playing or replaying a pragmatics of obligation—a decision that has such an effect is necessarily unjust.

JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, *JUST GAMING* 66–67 (1979) (Wlad Godzich trans., 1985).

119. See *Hamdan*, 126 S. Ct. at 2790–92. The Stevens opinion, we may think, is not too taciturn in its constitutional analysis—rather, entirely forthright even if disconcertingly matter of fact.

### III. THE SURPRISING COMPLEXITY OF THE MILITARY COMMISSIONS ACT

Shortly after President Bush signed into law the Military Commissions Act of 2006, John Yoo declared victory in *The Wall Street Journal*: “The new law is, above all, a stinging rebuke to the Supreme Court.”<sup>120</sup> Margaret Kohn, writing in *Dissent*, largely agreed: “The most astounding thing about the ‘compromise’ legislation is not how little Bush conceded to his critics but how little they demanded. . . . Unfortunately, the Supreme Court decision in *Hamdan v. Rumsfeld* did very little . . . .”<sup>121</sup> Remarkably, John Warner—a seemingly central figure in the congressional effort to revise the administration draft of the Military Commissions Act—appeared to concur: “The full flavor of what we had set out to do, it was by no means all lost, but . . . .”<sup>122</sup>

Plainly, the question of what the Military Commissions Act does has important implications for assessments of *Hamdan v. Rumsfeld*.<sup>123</sup> If the Act grants executive officials authority to proceed in much the same way that the Executive Order at issue in *Hamdan* envisioned, now free from meaningful judicial review, the Supreme Court’s exercise may remain a notable reiteration of the constitutional understanding, however explained, that unilateral presidential lawmaking is almost always dubious in principle. But the point of the principle seems much less clear. The Act itself is complicated and conflicted. Proving this proposition is the purpose of the discussion that follows. It should become apparent that the statutory complexity is not—as it appears in the legislative text as written—so much a product of differing Supreme Court and congressional views, or mostly a result of disagreement between the President and some prominent members of Congress. Instead, within the terms of statutory mechanics, the recurring interplay chiefly visible pits military judges against civilian administrators. Historians will, no doubt, map more precisely and debate intensely the significance of this division within the executive branch politics of the current moment. For present purposes, it is important to appreciate the statutory dynamic

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120. John Yoo, *Congress to Courts: “Get Out of the War on Terror,”* WALL ST. J., Oct. 19, 2006, at A18.

121. Margaret Kohn, *Due Process and Empire’s Law*, DISSENT, Winter 2007, at 5, 5–6.

122. Massimo Calabresi, *Late Bloomer*, TIME, Feb. 12, 2007, at 47, 47.

123. 126 S. Ct. 2749.

on its own terms. The Military Commissions Act acknowledges administrative discretion, but it divides and overlaps responsibilities. The Act presents most of the questions it addresses as open. This openness, in important respects, is evident even in the limits that the Act places on the jurisdiction of Article III courts. *It is important to be clear:* The Act does not “rebuke” either the Supreme Court or the President. It is possible that participants in the statutory adjudicative politics could produce results either confirming fears of the President’s critics—or substantially checking executive ambitions and tactics.

### A.

The Military Commissions Act of 2006<sup>124</sup> is a compound statute—an aggregate or bundle. It includes a very long part,<sup>125</sup> a much shorter but still substantial part,<sup>126</sup> and a collection of housekeeping provisions.<sup>127</sup> The long part adds a new chapter 47A to 10 U.S.C.<sup>128</sup> Over the course of seven subchapters, chapter 47A characterizes military commissions and the accompanying participant roles;<sup>129</sup> outlines pretrial, trial, sentencing, and post-trial procedures (sometimes in considerable detail);<sup>130</sup> and defines a long list of war crimes that are at bottom the commission’s reasons for being, linking these crimes with corresponding punishments (often death).<sup>131</sup> A second substantial part amends the War Crimes Act, 18 U.S.C. § 2441, identifying war crimes subjecting guilty U.S. actors to criminal punishment.<sup>132</sup> The remaining provisions of the Act are mostly rules of construction or adjustments to existing federal statutes thought to be necessary to accommodate the Act’s introduc-

124. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

125. *Id.* § 3(a)(1), 120 Stat. at 2600–31 (to be codified at 10 U.S.C. §§ 948–950).

126. *Id.* § 6(b), 120 Stat. at 2633–35 (to be codified at 18 U.S.C. § 2441).

127. *Id.* §§ 2, 4, 5, 6(a), 6(c), 7, 120 Stat. at 2600, 2631–33, 2635–36 (to be codified in scattered sections of 10 and 28 U.S.C.).

128. *Id.* § 3(a)(1), 120 Stat. at 2600–31 (to be codified at 10 U.S.C. §§ 948–950).

129. *Id.* § 3(a)(1), 120 Stat. at 2602–06 (to be codified at 10 U.S.C. §§ 948b–948e, 948h–948m).

130. *Id.* § 3(a)(1), 120 Stat. at 2606–24 (to be codified at 10 U.S.C. §§ 948q–948s, 949a–949o, 949s–949u, 950a–950j).

131. *Id.* § 3(a)(1), 120 Stat. at 2624–31 (to be codified at 10 U.S.C. §§ 950p–950w).

132. *Id.* § 6(b), 120 Stat. at 2633–35 (to be codified at 18 U.S.C. § 2441).

tions.<sup>133</sup> Interpretive declarations are included in the two longer parts of the Act as well.<sup>134</sup>

Many of the interpretive instructions and conforming amendments, if juxtaposed, articulate and put into play a series of tensions. Near the beginning of new chapter 47A, for example, Congress declares, "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."<sup>135</sup> The next provision states, however, that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."<sup>136</sup> Introducing the War Crimes Act amendments, Congress twists similarly:

The provisions of section 2441 of title 18 . . . as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [the amendments to the War Crimes Act].<sup>137</sup>

If statutory assertions of conformity with Common Article 3 mean to be understood as defensible conclusions or regulatory ideals, the question of how this matchup can come about plainly arises if participants in commission proceedings or War Crimes Act trials cannot look to international resources as guides. Perhaps the Military Commissions Act does not ban this kind of consultation—only conclusory assertions of "rights" or "rule[s] of decision." Plainly, though, the underlying statutory assumption is that the Act's own resources will prove to be largely sufficient. Chapter 47A or the War Crimes amendments will, if properly implemented, produce as a by-product adherence to Common Article 3.

133. See *id.* §§ 2, 4, 5, 6(a), 6(c), 7, 120 Stat. at 2600, 2631–33, 2635–36 (to be codified in scattered sections of 10 and 28 U.S.C.).

134. *E.g., id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(f)); *id.* § 6(a)(2), 120 Stat. at 2632.

135. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(f)).

136. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(g)). The pertinent Geneva Conventions are defined earlier in the statute. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948a(5)).

137. *Id.* § 6(a)(2), 120 Stat. at 2632.

The military commission procedures are clearly marked as freestanding:

The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 . . . Chapter 47 . . . does not, by its terms, apply to trial by military commission except as specifically provided . . . The judicial construction and application of that chapter are not binding on military commissions established under this chapter. . . The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any . . . proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.<sup>138</sup>

It might appear that something very much like a quarantine is set up here, an acknowledgement, however oblique, that a military commission is not in fact "a regularly constituted court." If this is not the case, however, it must be evident that chapter 47A procedures possess a distinctive integrity. The procedures should describe and secure a more or less self-contained mode of inquiry and adjudication.

There is, in fact, a considerable, if also sometimes qualified, effort to establish "relative autonomy" revealed in the extended statutory scheme. The independence of judges (and other military participants) is guarded through direct prohibitions,<sup>139</sup> conflict of interest rules,<sup>140</sup> and declarations that consideration of commission service is prohibited for promotion purposes.<sup>141</sup> A bill of rights incorporated in the procedures recognizes a right to present evidence, cross-examine witnesses, and "examine and respond" to admitted evidence.<sup>142</sup> Defense counsel are also provided a "reasonable opportunity" to compel the attendance of witnesses and the production of other evidence.<sup>143</sup> Rights to counsel include the opportunity to retain civilian counsel as well as assigned military defense counsel.<sup>144</sup>

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138. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(c), (e)).

139. *See id.* § 3(a)(1), 120 Stat. at 2609-10 (to be codified at 10 U.S.C. § 949b(a)).

140. *See id.* § 3(a)(1), 120 Stat. at 2604 (to be codified at 10 U.S.C. § 948j(c)).

141. *Id.* § 3(a)(1), 120 Stat. at 2610 (to be codified at 10 U.S.C. § 949b(b)).

142. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)(A)).

143. *Id.* § 3(a)(1), 120 Stat. at 2614 (to be codified at 10 U.S.C. § 949j(a)).

144. *Id.* § 3(a)(1), 120 Stat. at 2604-05, 2610 (to be codified at 10 U.S.C.

Accused individuals have a right to be present (in most circumstances),<sup>145</sup> and a right to defend themselves independently of counsel (subject to some limitations).<sup>146</sup> Absent required showings, trials are public.<sup>147</sup> A “verbatim record of the proceedings” is mandatory.<sup>148</sup> Appellate review available to defendants encompasses administrative review,<sup>149</sup> military judicial scrutiny,<sup>150</sup> jurisdiction afforded the Court of Appeals for the District of Columbia Circuit, and the opportunity to petition the Supreme Court.<sup>151</sup> A version of the double jeopardy rule applies.<sup>152</sup> Independently of chapter 47A itself, section 6(c) of the Military Commissions Act prohibits “cruel, inhuman, or degrading treatment or punishment,” and defines proscribed acts by incorporating—at one step removed—Fifth, Eighth, and Fourteenth Amendment understandings.<sup>153</sup>

## B.

These are not the only “inside” boundary-guards.<sup>154</sup> But there is also a central difficulty. “Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”<sup>155</sup> The privilege

§§ 948k, 949c).

145. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)(B)).

146. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)(D)).

147. *See id.* § 3(a)(1), 120 Stat. at 2611 (to be codified at 10 U.S.C. § 949d(d)).

148. *Id.* § 3(a)(1), 120 Stat. at 2617 (to be codified at 10 U.S.C. § 949o).

149. *Id.* § 3(a)(1), 120 Stat. at 2618–20 (to be codified at 10 U.S.C. § 950b).

150. *Id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950f).

151. *Id.* § 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g).

152. *Id.* § 3(a)(1), 120 Stat. at 2614 (to be codified at 10 U.S.C. § 949h).

153. *Id.* § 6(c), 120 Stat. at 2635. The constitutional understandings apply “as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” *Id.* § 6(c)(2), 120 Stat. at 2635.

154. *See, e.g., id.* § 3(a)(1), 120 Stat. at 2616 (to be codified at 10 U.S.C. § 949l(c)) (placing on the prosecutor the burden to prove guilt beyond a reasonable doubt); *id.* § 3(a)(1), 120 Stat. at 2615 (to be codified at 10 U.S.C. § 949k) (allowing for the defense of lack of mental responsibility). *But see id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(2)(B)) (“Evidence shall not be excluded from trial . . . on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.”).

155. *Id.* § 3(a)(1), 120 Stat. at 2612 (to be codified at 10 U.S.C. § 949d(f)(1)(A)).

“applies to all stages of the proceedings of military commissions,”<sup>156</sup> and may be claimed by heads of executive or military departments or government agencies finding that “information is properly classified” and that disclosure would be “detrimental to the national security.”<sup>157</sup> Alternatively, these officials “may authorize a representative, witness, or trial counsel” to assert the privilege and make the requisite findings.<sup>158</sup> This delegated authority “is presumed in the absence of evidence to the contrary.”<sup>159</sup> “During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information.”<sup>160</sup> Trial counsel—the prosecutor—may also request a presiding judge to authorize “deletion of specified items of classified information from documents to be made available to the accused.”<sup>161</sup>

If classified information is relevant, in whatever way, to the commission inquiry, the risk that the inquiry will be disrupted—diverted from what would be its ordinary course—is obvious. Whether information should be classified is not a question that commission participants are authorized to resolve. The presiding judge does not confer directly with pertinent departments or agencies—rather “trial counsel” (the prosecuting attorney) is assigned the task at the request of the presiding judge, “to consult with the department or agency concerned as to whether the national security privilege should be asserted.”<sup>162</sup> The problem posed by the need to protect classified information plainly introduces an extrinsic element—likely a large matter in some cases—into the trial process. Equally plain, because chapter 47A assigns primary responsibility to the prosecuting attorney not just for consulting third parties, but for raising the issue,<sup>163</sup> the ordinary balance of the adver-

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156. *Id.*

157. *Id.* § 3(a)(1), 120 Stat. at 2612 (to be codified at 10 U.S.C. § 949d(f)(1)(B)).

158. *Id.* § 3(a)(1), 120 Stat. at 2612 (to be codified at 10 U.S.C. § 949d(f)(1)(C)).

159. *Id.*

160. *Id.* § 3(a)(1), 120 Stat. at 2612 (to be codified at 10 U.S.C. § 949d(f)(2)(C)).

161. *Id.* § 3(a)(1), 120 Stat. at 2614 (to be codified at 10 U.S.C. § 949j(c)(1)(A)).

162. *Id.* § 3(a)(1), 120 Stat. at 2612–13 (to be codified at 10 U.S.C. § 949d(f)(2)(C)).

163. *See id.* § 3(a)(1), 120 Stat. at 2612–13 (to be codified at 10 U.S.C.

sary trial—the roughly equal responsibilities of prosecuting and defense counsel—may be considerably skewed in particular cases. Clearly, the ramifications of the national security privilege are significant.

Not surprisingly, civilian defense counsel, if retained, must “protect any classified information received during the course of representation.”<sup>164</sup> But the civilian counsel also must be “determined to be eligible for access to classified information that is classified at the level Secret or higher.”<sup>165</sup> Clearance investigations are time-consuming. Therefore, if they cannot be conducted in the course of trial, the universe of available civilian defense counsel shrinks considerably.

Importantly, chapter 47A declares that “[n]o person shall be required to testify against himself” in a commission proceeding, and prohibits admission of statements made previously that were “obtained by use of torture.”<sup>166</sup> “Torture” is not defined in the procedural parts of chapter 47A.<sup>167</sup> Statutory language, however, anticipates that in particular cases “the degree of coercion” linked with proffered statements might be “disputed” and therefore obligates the presiding military judge to consider, among other things, whether “the totality of the circumstances renders the statement reliable and possessing sufficient probative value.”<sup>168</sup> But if the identity of the individual

§ 949d(f)(2)(B)–(C)).

164. *Id.* § 3(a)(1), 120 Stat. at 2610 (to be codified at 10 U.S.C. § 949c(b)(4)).

165. *Id.* § 3(a)(1), 120 Stat. at 2610 (to be codified at 10 U.S.C. § 949c(b)(3)(D)).

166. *Id.* § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r(a)–(b)).

167. *See id.* § 3(a)(1), 120 Stat. at 2601–02 (to be codified at 10 U.S.C. § 948a). Torture is defined in subchapter VII dealing with punitive matters as one of a list of offenses, if committed by “[a]ny person subject to this chapter,” warranting imprisonment or death. *Id.* § 3(a)(1), 120 Stat. at 2627 (to be codified at 10 U.S.C. § 950v(b)(11)). Torture is characterized as “an act specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within . . . custody or physical control for the purpose of obtaining information or a confession.” *Id.* There is no cross-reference to this definition in the “exclusion of statements obtained by torture” section. *See id.* § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r(b)).

168. *Id.* § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r(c)(1), (d)(1)). Additional pertinent factors depend upon whether statements were obtained before or after enactment of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. If before, the military judge must also consider whether “the interests of justice would be best served by admission of the statement into evidence.” § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r(c)(2)). A post-Act statement may be admitted, even if found to be reliable and in service of the interests of justice, only if “the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or de-



interrogators, the length of their interrogations, the specific content of their questions, or the details of their conduct during the course of questioning is classified information, the reliability inquiry might be considerably compromised,<sup>169</sup> if "the totality of the circumstances" cannot be directly judged as a result.

Hearsay evidence that would not be admissible in general courts-martial proceedings may be admitted in military commission inquiries if, *inter alia*, "the particulars of the evidence (including information on the general circumstances under which the evidence was obtained)" are "ma[de] known to the adverse party."<sup>170</sup> Even so, hearsay might be excluded upon demonstration that "the evidence is unreliable."<sup>171</sup> If "the particulars of the evidence" include classified matter, however, the procedure cannot run its course. "The disclosure of evidence . . . is subject to the requirements and limitations applicable to the disclosure of classified information."<sup>172</sup>

To be sure, chapter 47A authorizes presiding judges, "to the extent practicable," to delete specified items of classified information from documents to be introduced into evidence, to substitute a part or a summary of the information in place of classified information, or to substitute "a statement of relevant facts that the classified information would tend to prove."<sup>173</sup> What if a judge concludes that these alternatives are not adequate replacements? As a general matter, "[t]he military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence," and "[a]ny ruling . . . upon a question of law . . . is conclusive."<sup>174</sup> Al-

grading treatment" as defined in the Detainee Treatment Act. *Id.* § 3(a)(1), 120 Stat. at 2607 (to be codified at 10 U.S.C. § 948r(d)(3)). Is the implication, therefore, that the fact of "cruel, inhuman, or degrading treatment" is not pertinent in evaluating "the interests of justice"?

169. "A statement of the accused that is otherwise admissible shall not be excluded from trial . . . on grounds of alleged coercion . . . so long as the evidence complies with the provisions of section 948r . . ." § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(2)(C)).

170. *Id.* § 3(a)(1), 120 Stat. at 2608-09 (to be codified at 10 U.S.C. § 949a(b)(2)(E)(i)).

171. *Id.* § 3(a)(1), 120 Stat. at 2609 (to be codified at 10 U.S.C. § 949a(b)(2)(E)(ii)).

172. *Id.* § 3(a)(1), 120 Stat. at 2609 (to be codified at 10 U.S.C. § 949a(b)(2)(E)(i)).

173. *Id.* § 3(a)(1), 120 Stat. at 2612 (to be codified at 10 U.S.C. § 949d(f)(2)(A)).

174. *Id.* § 3(a)(1), 120 Stat. at 2615-16 (to be codified at 10 U.S.C. § 949l(b)).

though chapter 47A does not make the point explicitly, it is clear that this general grant of authority includes the authority to deny military prosecutors the opportunity to introduce substitutes if they invoke the national security privilege.<sup>175</sup> “[T]he United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that . . . excludes evidence that is substantial proof of a fact material in the proceeding” or that relates to a matter under the provisions dealing with protection of classified information.<sup>176</sup> If necessary, the United States can appeal once more, to the Court of Appeals for the District of Columbia Circuit, which may exercise jurisdiction at its discretion.<sup>177</sup>

### C.

The “convening authority”—the Secretary of Defense or a delegate<sup>178</sup>—reviews “[t]he findings and sentence of a military commission” upon receipt of a written report, whether or not the defendant submits “matters for consideration.”<sup>179</sup> The convening authority also has the “sole discretion and prerogative” to “modify the findings and sentence of a military commission” as a matter of course.<sup>180</sup> “[T]he convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part,” “dismiss any charge or specification by setting aside a finding of guilty,” or “change a finding of guilty . . . to a finding of guilty to . . . a lesser included offense,” but “may not increase a sentence.”<sup>181</sup> The convening authority may also, “in his sole discretion, order a proceeding in revision or a rehearing.”<sup>182</sup> Rehearing requires new commission members<sup>183</sup> (in effect, a new jury) and, of course, moots the defen-

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175. See also MANUAL FOR MILITARY COMMISSIONS pt. II, R. 701(f)(7), at 38 (2007) [hereinafter MMC] (recognizing broad judicial authority).

176. § 3(a)(1), 120 Stat. at 2620 (to be codified at 10 U.S.C. § 950d(a)(1)(B)–(C)).

177. *Id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950d(d)).

178. *Id.* § 3(a)(1), 120 Stat. at 2603 (to be codified at 10 U.S.C. § 948h).

179. *Id.* § 3(a)(1), 120 Stat. at 2618–19 (to be codified at 10 U.S.C. § 950b(a)–(b), (c)(2)(B)).

180. *Id.* § 3(a)(1), 120 Stat. at 2619 (to be codified at 10 U.S.C. § 950b(c)(1)).

181. *Id.* § 3(a)(1), 120 Stat. at 2619 (to be codified at 10 U.S.C. § 950b(c)(2)–(3)).

182. *Id.* § 3(a)(1), 120 Stat. at 2619 (to be codified at 10 U.S.C. § 950b(d)(1)).

183. *Id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950e(a)).

dant's right to appeal a final judgment.<sup>184</sup> However, the Act does not explicitly allow for either revision or rehearing to be ordered because findings or sentences strike the convening authority as too pro-defendant.<sup>185</sup>

The repeated references to "sole discretion"<sup>186</sup> are thus somewhat overstated, but they are also of a piece—with grants of discretionary authority to the Secretary of Defense or delegates—scattered throughout the procedural parts of chapter 47A.<sup>187</sup> The most general, perhaps, is this:

Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.<sup>188</sup>

This grant is also notable:

The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulations so prescribed, or modified, shall be submitted to the Committees on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications . . . go into effect.<sup>189</sup>

Chapter 47A involves the President only very occasionally after the initial, carefully framed authorization "to establish military commissions under this chapter for offenses triable . . . as provided in this chapter."<sup>190</sup>

184. *See id.* § 3(a)(1), 120 Stat. at 2620 (to be codified at 10 U.S.C. § 950c(a)).

185. *See id.* § 3(a)(1), 120 Stat. at 2619, 2621 (to be codified at 10 U.S.C. §§ 950b(d)(2)(B), 950e(b)).

186. *See id.* § 3(a)(1), 120 Stat. at 2619 (to be codified at 10 U.S.C. § 950b(c)-(d)).

187. *See, e.g., id.* § 3(a)(1), 120 Stat. at 2603, 2605-06, 2613-14, 2617-18 (to be codified at 10 U.S.C. §§ 948d(d), 948l(a), 949g(a)(2), 949o(a), 949u(a)).

188. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(a)); *see also id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950f(c)) (stating that the Secretary prescribes procedures for Court of Military Commission Review).

189. *Id.* § 3(a)(1), 120 Stat. at 2613 (to be codified at 10 U.S.C. § 949d(f)(4)).

190. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(b)). There is, however, this provocative declaration: "Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President." *Id.* § 3(a)(1), 120 Stat. at 2623 (to be

Chapter 47A does not provide for judicial review of exercises of discretion by the Secretary of Defense or a delegate. There is, however, no express language prohibiting presiding military judges from declaring regulations invalid.<sup>191</sup> Section 3(b) of the Military Commissions Act puts in place a congressional notice requirement that might, *inter alia*, serve as a trigger for responsive legislative action: “Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions prescribed under chapter 47A . . . .”<sup>192</sup> Section 6(c)(3) of the Act, also independently of chapter 47A itself, obliges the President to establish administrative rules and procedures to “ensure compliance” with the section 6(c)(1) prohibition of “cruel, inhuman, or degrading treatment or punishment” of individuals in the custody or control of the United States.<sup>193</sup>

#### D.

The list of “[c]rimes triable by military commissions”<sup>194</sup>—twenty-eight offenses in all<sup>195</sup>—is notable for its length and the considerable drafting effort to achieve precise definitions of terms, sometimes through cross-references to other U.S. statutes.<sup>196</sup> In advance of the list itself, the question of the culpability of higher authorities, of individuals who organize but do not have immediate connections to triable crimes, is also elaborately addressed. “Principals” are persons “punishable . . . under this chapter” who “commit[] an offense punishable by this chapter, or aid[], abet[], counsel[], command[], or procure[] its

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codified at 10 U.S.C. § 950j(a)).

191. For further discussion considering provisions for appellate review included in chapter 47A and the general authority statutorily granted commission judges, see *infra* Part III.E and note 251 and accompanying text.

192. § 3(b), 120 Stat. at 2631. A similar requirement included in chapter 47A addresses protections of classified information over and above statutory guards. See *id.* § 3(a)(1), 120 Stat. at 2613 (to be codified at 10 U.S.C. § 949d(f)(4)).

193. *Id.* § 6(c), 120 Stat. at 2635.

194. *Id.* § 3(a)(1), 120 Stat. at 2625–30 (to be codified at 10 U.S.C. § 950v).

195. *Id.* § 3(a)(1), 120 Stat. at 2626–30 (to be codified at 10 U.S.C. § 950v(b)(1)–(28)).

196. See, e.g., *id.* § 3(a)(1), 120 Stat. at 2625 (to be codified at 10 U.S.C. § 950v(a)(1)–(3)) (definitions); *id.* § 3(a)(1), 120 Stat. at 2627 (to be codified at 10 U.S.C. § 950v(b)(11)(B)) (cross-reference); *id.* § 3(a)(1), 120 Stat. at 2627–28 (to be codified at 10 U.S.C. § 950v(b)(12)(B)) (definition and cross-references).

commission[,] . . . cause[] an act to be done which if directly performed . . . would be punishable,” or act as “a superior commander who . . . knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”<sup>197</sup> “Solicitation” opens another avenue of approach: “Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable . . . under this chapter shall . . . be punished with the punishment provided for the commission of the offense . . . .”<sup>198</sup> “Conspiracy,” moreover, is the last of the substantive offenses included in the statutory list: “Any person . . . who conspires to commit one or more substantive offenses triable . . . under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished . . . by death or . . . by such punishment . . . as a military commission . . . may direct.”<sup>199</sup> Chapter 47A insists that this elaborate statutory effort aims only to “codify offenses that have traditionally been triable by military commissions” and therefore “does not establish new crimes that did not exist before its enactment.”<sup>200</sup>

The chapter 47A offenses and surrounding amplifications are notably more ambitious—at least on first reading—than the parallel provisions included in section 6 of the Military Commissions Act amending the separate War Crimes Act to add nine offenses statutorily deemed “a grave breach of common Article 3” of the Geneva Conventions.<sup>201</sup> But it is also arguable that most of the chapter 47A offenses—including the principal, solicitation, and conspiracy offenses—might be subsumed within the War Crimes Act offenses as simply particular instances. This form of argument would seem to be entirely appropriate if the chapter 47A offenses are not “new crimes” but

197. *Id.* § 3(a)(1), 120 Stat. at 2624 (to be codified at 10 U.S.C. § 950q).

198. *Id.* § 3(a)(1), 120 Stat. at 2625 (to be codified at 10 U.S.C. § 950u).

199. *Id.* § 3(a)(1), 120 Stat. at 2630 (to be codified at 10 U.S.C. § 950v(b)(28)).

200. *Id.* § 3(a)(1), 120 Stat. at 2624 (to be codified at 10 U.S.C. § 950p(a)); see also *id.* § 3(a)(1), 120 Stat. at 2624 (to be codified at 10 U.S.C. § 950p(b)) (“Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.”).

201. *Id.* § 6(b)(1)(B), 120 Stat. at 2633–34 (to be codified at 18 U.S.C. § 2441(d)).

rather “declarative of existing law.”<sup>202</sup> Section 6 of the Military Commissions Act announces that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in [the amendments to the War Crimes Act].”<sup>203</sup> Section 6, however, does not prohibit interpretations grounded in chapter 47A provisions. Chapter 47A declares that “[t]he findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under [chapter 47].”<sup>204</sup> Notably, this statutory ban too does not extend to references to the language of chapter 47A itself. Nor does it seem to apply to trials of individuals who allegedly commit War Crimes Act offenses, but who would be tried in courts other than courts-martial.

There may be good reasons to read apposite provisions of chapter 47A as a kind of interpretive gloss of the War Crimes Act amendments. If the added War Crimes Act offenses are declaratory of traditional understandings—simply more general versions of the chapter 47A declarations—then the War Crimes Act additions too might presumptively apply retroactively. Section 6 of the Military Commissions Act indeed concludes by specifying that the War Crimes Act amendments generally apply to acts committed after November 26, 1997,<sup>205</sup> nearly ten years prior to Congress’s approval of the Military Commissions Act—a substantial retroactive reach. The Military Commissions Act, however, qualifies its retroactive reach, providing that the immunity granted by the Detainee Treatment Act of 2005 “shall apply with respect to any criminal prosecution that . . . relates to the detention and interrogation of aliens” described in the Detainee Treatment Act, and also “relates to acts occurring between September 11, 2001, and December 30, 2005.”<sup>206</sup> The Detainee Treatment Act immunity extends to any “officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person.”<sup>207</sup> It addresses criminal prosecutions “arising

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202. *Id.* § 3(a)(1), 120 Stat. at 2624 (to be codified at 10 U.S.C. § 950p(b)).

203. *Id.* § 6(a)(2), 120 Stat. at 2632.

204. *Id.* § 3(a)(1), 120 Stat. at 2602 (to be codified at 10 U.S.C. § 948b(e)).

205. *Id.* § 6(b)(2), 120 Stat. at 2635.

206. *Id.* § 8(b), 120 Stat. at 2636.

207. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004(a), 119 Stat. 2739, 2740.

out of . . . engaging in specific operational practices, that involve detention and interrogation of aliens . . . and that were officially authorized and determined to be lawful at the time that they were conducted.”<sup>208</sup> It is a defense that the covered individual “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”<sup>209</sup>

This defense (and therefore the Military Commissions Act War Crimes Act immunity) is, it appears, limited in two ways. Individuals claiming the defense must be charged with “engaging in specific operational practices” (torture or the like). “Principals” or “conspirators”—insofar as they come within the compass of the War Crimes Act additions—who do not directly “engag[e]” in charged acts may not be able to claim the defense. Even if “principals” and “conspirators” who draft and legally rationalize “specific operational practices” might be thought to be “engaging,” these individuals could be hard put to claim “[g]ood faith reliance on advice of counsel” to show that “a person of ordinary sense and understanding would not know the practices were unlawful” if their efforts involved exposure to legal materials indicating that “specific operational practices” were indeed unlawful.

If War Crimes Act offenses substantively encompass chapter 47A crimes, an otherwise apparent gap closes, or at least narrows. The Military Commissions Act insists that its changes to the War Crimes Act are exhaustive. “The provisions . . . as amended . . . fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character,”<sup>210</sup> and also acknowledge other Geneva Conventions responsibilities.<sup>211</sup> The concomitants of these other duties are left to presidential discretion: “[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations

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208. *Id.*

209. *Id.*

210. § 6(a)(2), 120 Stat. at 2632.

211. *Id.* § 6(b)(1)(B), 120 Stat. at 2635 (to be codified at 18 U.S.C. § 2441(d)(5)) (“The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.”).

for violations of treaty obligations which are not grave breaches.”<sup>212</sup> Presidential action (if undertaken) would, it appears, have the force of law.<sup>213</sup> The idea, it seems, is to create a gapless whole, a joint product of congressional and presidential effort. But if War Crimes Act offenses define only a subset of the “traditionally . . . triable” chapter 47A offenses, either the additional chapter 47A offenses would not be Common Article 3 “grave breaches” if committed by U.S. personnel, or notwithstanding the congressional aim to “fully satisfy” the Geneva obligation, the War Crimes Act changes did not address anything like Geneva “grave breaches.” If the War Crimes Act changes and chapter 47A are read together as a common project, the question of the Geneva gap recedes, and the congressional commitment to “fully satisfy” seems a more likely label for the congressional efforts.

#### E.

Not surprisingly, given its initial insistence on its own autonomy, the chapter 47A provisions included in the Military Commissions Act of 2006 include an exclusivity declaration regarding judicial review:

Except as otherwise provided in this chapter . . . , 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>214</sup>

Somewhat more elaborately, section 7 of the Military Commissions Act amends 28 U.S.C. § 2241(e):

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

. . . Except as provided in . . . the Detainee Treatment Act . . . , no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any

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212. *Id.* § 6(a)(3)(A), 120 Stat. at 2632.

213. *Id.* § 6(a)(3)(C), 120 Stat. at 2632 (“Any Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.”).

214. *Id.* § 3(a)(1), 120 Stat. at 2623–24 (to be codified at 10 U.S.C. § 950j(b)).



aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>215</sup>

New § 2241(e) reformulates and generalizes a provision included in the Detainee Treatment Act of 2005:

[N]o court, justice, or judge shall have jurisdiction to hear or consider—

- (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo Bay . . . ; or
- (2) any other action against the United States or its agents relating to any aspect of . . . detention . . . of an alien . . . who—
  - (A) is currently in military custody; or
  - (B) has been determined . . . to have been properly detained as an enemy combatant.<sup>216</sup>

*Schlesinger v. Councilman* holds that Article III federal courts should ordinarily refuse to rule on matters pending in on-going courts-martial proceedings.<sup>217</sup> In *Hamdan*, the Stevens majority opinion concluded that *Councilman's* premises were inapposite because *Hamdan* was not a member of the U.S. military and because the independence of the military tribunals challenged in the case was not sufficiently clear.<sup>218</sup> The opinion also noted in passing that *Councilman* itself recognized an exception in cases involving “defendants who raise substantial arguments that a military tribunal lacks personal jurisdiction over them.”<sup>219</sup> The Military Commissions Act—inter alia, having put in place various measures to foster tribunal independence—appears to put in place its own version of *Councilman* in chapter 47A, and extends protection of the autonomy of its own regime of commissions and appellate review in 28 U.S.C. § 2241(e) to include the process of determining the threshold question of personal jurisdiction.<sup>220</sup>

215. *Id.* § 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241(e)).

216. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2741–42, amended by § 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241(e)).

217. 420 U.S. 738, 761 (1975).

218. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006). In dissent, Justice Scalia argued that, although *Councilman* does not control, it provides a close analogue. *Id.* at 2818–23 (Scalia, J., dissenting).

219. *Id.* at 2772 n.20 (majority opinion); see also *Councilman*, 420 U.S. at 746 (“[T]his general rule carries with it its own qualification—that the court-martial’s acts be ‘within the scope of its jurisdiction and duty.’” (quoting *Smith v. Whitney*, 116 U.S. 167, 177 (1886))).

220. Notably, Judge Randolph’s majority opinion in *Boumediene v. Bush*,

In this regard, the Military Commissions Act notably substitutes “awaiting . . . determination” as the key, replacing the Detainee Treatment Act emphasis on “custody” (or the fact of detention at Guantánamo Bay). “Awaiting determination” connotes, it would seem, “pending conclusion of a process already underway.” Article III habeas corpus or federal question jurisdiction, on this reading, may well remain available in cases of “languishing” individuals—detained aliens sitting in confinement past any reasonable delay in scheduling or conducting combatant status hearings.<sup>221</sup> That construction, interestingly, would be consistent with ordinary federal judicial usage in a longstanding, wide range of cases. “So long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere; at least unless it ignores such claim, or fails to pass upon it within a reasonable time.”<sup>222</sup>

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476 F.3d 981, 986 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), and *application denied*, No. 06A1001, slip op. (U.S. Apr. 26, 2007), for all of its rhetorical flourishes, e.g., *id.* at 987 (“This is nonsense.”), in the end carefully refused to treat the habeas petition at issue (and denied) the equivalent of a Detainee Treatment Act appeal, thus leaving open the possibility of such an appeal and the opportunity for close scrutiny of Combatant Status Review Tribunal procedures. *See id.* at 994. This Article, I should emphasize, does not address the question of whether the Military Commissions Act procedures (or the Detainee Treatment Act procedures) are constitutionally adequate substitutes for habeas corpus review. Instead, the concern here is the necessary prior inquiry—the question of what the statutory procedures are (or what their possible characteristics might be).

221. *See* Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark 5 Years in Limbo*, WASH. POST, Jan. 16, 2007, at A1 (noting that the Supreme Court rejected the claim that the government could detain prisoners indefinitely).

222. *United States v. Fletcher*, 147 U.S. 664, 667–68 (1893). For a sampling of recent judicial opinions using the phrase “awaiting determination” in various contexts in which “determination” is plainly in the offing, see *Padash v. INS*, 358 F.3d 1161, 1172 (9th Cir. 2004), *In re Harmsen*, 320 B.R. 188, 195–96 (B.A.P. 10th Cir. 2005), *Powell v. Barrett*, 376 F. Supp. 2d 1340, 1351–54 (N.D. Ga. 2005), *Moon v. Harrison Piping Supply*, 375 F. Supp. 2d 577, 585–90 (E.D. Mich. 2005), and *In re Candidus*, 327 B.R. 112, 120 (Bankr. E.D.N.Y. 2005). Constitutional concerns occasionally become evident. Regarding criminal procedure, see, for example, *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), which creates a presumption that a probable cause hearing for individuals arrested without a warrant will occur within forty-eight hours. The risk of “languishing,” however, also triggers constitutional scrutiny outside ordinary criminal law settings. Notably, Justice Rehnquist, writing for the majority in *Schall v. Martin*, emphasized the regime of strict deadlines for various judicial hearings that New York had put in place in upholding the constitutionality of its system of pretrial detention of juveniles presenting serious risks of criminal behavior. 467 U.S. 253, 269–71 (1984); *see also* *Ly v. Hansen*,

The Military Commissions Act treatment of any “other action” (than habeas corpus) is also limited. Chapter 47A authorizes the Secretary of Defense to execute “a sentence of confinement adjudged by a military commission” in “any penal or correctional institution under the control of the United States,” but if such an institution is “not under the control of an armed force,” confined individuals must be “subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.”<sup>223</sup> The implication, it seems, is that usual constitutional or statutory standards for treatment of inmates govern detainees confined in nonmilitary federal or state prisons. If equal treatment, as guaranteed by chapter 47A, is not in fact afforded, it is possible that, if the Secretary of Defense has promulgated pertinent regulations, a Department of Defense administrative remedy might be available.<sup>224</sup> In the absence of administrative remedy, however, neither chapter 47A itself nor the Detainee Treatment Act of 2005 appears to offer recourse—although familiar federal civil rights of action would seem to address the problem.<sup>225</sup> If the “other action” limitation added to 28 U.S.C. § 2241(e) is understood to protect the autonomy of chapter 47A and Detainee Treatment Act procedures, and if proceedings described by these statutory sources are in fact concluded, individuals who were formerly described as “detainees” or “alien il-

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351 F.3d 263 (6th Cir. 2003) (finding due process problems posed and a habeas inquiry justified by extended indefinite detention before an INS hearing). Justice Stevens argued in dissent in *New Motor Vehicle Board v. Orrin W. Fox Co.* that the possibility of extended administrative delay in concluding proceedings initiated at the discretion of competitors constituted a violation of due process owed to businesses that, in the interim, are barred from entering particular areas of business. 439 U.S. 96, 121–24 (1978) (Stevens, J., dissenting). Justice Brennan’s majority opinion concluded that the conflicting interests involved, and the underlying concerns prompting the legislation, showed the procedural scheme to be reasonable notwithstanding the risk. *Id.* at 97 (majority opinion). In *Zinerman v. Burch*, the Supreme Court held that Florida’s failure to provide procedures for sufficiently quick review of civil commitment initiated by an individual herself or himself was a due process violation. 494 U.S. 113, 138–39 (1990). The idea at work in all of these cases, it appears, is the notion of the duty to protect that the government owes persons over whom it exercises jurisdiction, in particular those whom it holds in custody, and the “correlative right of protection” these individuals may claim. See *Logan v. United States*, 144 U.S. 263, 295 (1892).

223. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2617–18 (to be codified at 10 U.S.C. § 949u).

224. See *id.*

225. See, e.g., 42 U.S.C. § 1983 (2000).

legal combatants,” but whose status is now best characterized as “federal or state prison inmate” would still, it seems, have recourse to usual federal civil remedies.

#### IV. THE CONSTITUTION SUGGESTED

The Military Commissions Act of 2006, it is easy to conclude, acknowledges the criticisms of the commission procedures Justices Kennedy and Stevens noted in their *Hamdan* opinions. Justice Kennedy’s concerns that military judges preside and that their independence and the autonomy of their proceedings be protected<sup>226</sup> are—we have seen—addressed by the Act itself.<sup>227</sup> Independence and autonomy are also recurring topics glossed in the Trial Manual that the Department of Defense has promulgated as part of the process of implementing the Act.<sup>228</sup> Kennedy also stressed the absence of worked-out rules of evidence within the procedures at issue in *Hamdan*.<sup>229</sup> The Trial Manual includes an evidence code.<sup>230</sup> Justice Stevens pointed to the entirely relaxed approach to hearsay evidence adopted in the original commission rules, to the simultaneous use and exclusion of classified matter that was envisioned, and to the likely absence of defendants from crucial proceedings.<sup>231</sup> The Act and the Trial Manual deal with these matters equivocally—but in each instance in the end assign responsibility to presiding military judges to handle matters properly.<sup>232</sup>

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226. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2805–07 (2006) (Kennedy, J., concurring in part).

227. See *supra* text accompanying notes 139–53.

228. See, e.g., MMC, *supra* note 175, pt. II, R. 104, at 8–9; *id.* pt. II, R. 108, at 9; *id.* pt. II, R. 109, at 9–11; *id.* pt. II, R. 503(b), at 26; *id.* pt. II, R. 902, at 80–81. The Manual will likely prove to be an extraordinarily rich resource for purposes of studying the impact of the military judicial sensibility on administration of the Military Commissions Act. It is, unfortunately, not possible to discuss the Manual in any detail here.

229. *Hamdan*, 126 S. Ct. at 2807–08 (Kennedy, J., concurring in part).

230. MMC, *supra* note 175, pt. III.

231. See *Hamdan*, 126 S. Ct. at 2786–87.

232. See, e.g., MMC, *supra* note 175, pt. II, R. 701(f), at 37–38. Rule 905(j) is especially provocative:

Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority [the Secretary of Defense or delegates] before trial for decision. Submission of such matter to the convening authority . . . is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

*Id.* pt. II, R. 905(j), at 84.

In this connection, as in other contexts, the Military Commissions Act leaves substantial questions open to determination within statutory processes. It is entirely possible, therefore, that the Act will operate as a charade—apparently complex adjudicative processes will march, however intricately, to foreordained conclusions. But is also possible that military judges will take seriously their responsibilities, not only in light of their own constitutional understandings, but in view also of what they take the Act's background norms to be. The question of the "theory of the act"<sup>233</sup>—the content of its implicit constitution—becomes, therefore, especially important.

*The theory of rights:* The Military Commissions Act, we have seen, repeatedly acknowledges individual rights in the course of its descriptions of procedures for trying enemy combatants. It incorporates—even if filtered through treaty terms—the important constitutional norms of due process of law and equal protection of the laws and the prohibition against cruel and unusual punishment.<sup>234</sup> These guarantees are depicted as already defined, as extrinsic to the arrangements that the Act sets up, thus not subject to—rather presumably recognized within—the Act's own definitions and elaborations. Several more specific preoccupations are immediately shaped by the Act itself, however. Exclusion of evidence obtained by torture or coercion, recognition of rights to counsel and to address evidence, stipulations of burdens of proof, and allowances of appeals all acknowledge the status or interests of individuals, and accord individuals weight within commission processes.<sup>235</sup> It is just as plain, though, that the extent that individual concerns may be met, although statutorily established as a pertinent question, is not necessarily a matter of clear-cut answers. The Act fixes a context within which individual concerns are recognized, but also put in competition with other considerations the Act treats as serious.

Individual rights within the Act are not "trumps" in the Dworkinian sense.<sup>236</sup> Rights, rather, are "topics," issues to be addressed, marked as relevant but also unresolved.<sup>237</sup> The end

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233. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

234. *See supra* note 153 and accompanying text.

235. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2607 (to be codified at 10 U.S.C. § 948r).

236. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1978).

237. *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 14 (1998).

result might be subordination of individual concerns and insistence on the priority of prosecutorial or other goals. Outcomes in particular cases may depend (if matters are not especially clear cut) on whether military judges exercise their authority under the Act to decide, for example, whether interrogation is too coercive to allow admission of seemingly probative statements or whether substitutes for excluded classified information are too lacking to allow trial to go forward. Or regulations governing commission proceedings written by Department of Defense policymakers may prove aggressive enough to be decisive in particular cases one way or another.

*The question of relative autonomy:* The sometimes overlapping jurisdictions of policymakers and military judges may foreshadow a statutory version of constitutional checks and balances—“[a]mbition . . . made to counteract ambition.”<sup>238</sup> The crucial question, though, is whether the possible conflict will manifest itself in practice, manifest itself often enough to mark (however obliquely) affirmative responses to individual concerns as not just theoretical possibilities.

The possibility that military judges might see themselves as relatively autonomous, and act accordingly, is not without underpinnings. The Constitution acknowledges that the American military establishment encompasses distinctive legal institutions.<sup>239</sup> The elaboration of these institutions is a longstanding project. Its history shows significant commitments to substantive synthesis (the Lieber Code, famously<sup>240</sup>) and procedural coherence (the UCMJ<sup>241</sup>). In his remarkable new book, David Kennedy notes how elaborately “law in war” figures in American military thinking and practice.<sup>242</sup> But he also wonders whether twentieth century jurisprudential transforma-

238. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324–27 (2006); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 607–49 (2001).

239. See U.S. CONST. art. I, § 8, cl. 14 (giving Congress the power to make rules for the “Regulation of the land and naval Forces”); *id.* amend. V (granting grand jury privileges “except in cases arising in the land or naval forces”).

240. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (N.Y., D. Van Nostrand 1863), reprinted in RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45–72 (1983).

241. 10 U.S.C.A. §§ 801–946 (West 1998 & Supp. 2006), amended by Military Commissions Act of 2006, Pub. L. No. 109-366, § 4, 120 Stat. 2600, 2631.

242. DAVID KENNEDY, OF LAW AND WAR 5–12 (2006).

tions, evident here as elsewhere, have weakened the normative force of "law in war" in the process of translating military legality into the increasingly widely useful language of risk and opportunity.<sup>243</sup> Within the politics that the Military Commissions Act encodes, however, military judges may find it difficult not to be attentive to legal risks American personnel face—risks in part created by the collection of crimes defined in the Act itself<sup>244</sup> and in part presented by potential military adversaries looking to American practice as justification for their own military prisoner regimes. Actions military judges take in the course of trials of illegal combatants, therefore, might respond not only to the circumstances of cases at hand, but to a felt need to signal an affirmative commitment to marking *legal* limits restricting efforts of American interrogators and prosecutors prompted precisely by American *military* interests.

The stance of the military judges—whether they are to be considered more or less independent actors within the politics of the Military Commissions Act—becomes especially pertinent in evaluating the reach of administrative rulemaking in fixing commission procedures. For example, as we have seen, new 10 U.S.C. § 949a(a) declares that "[p]retrial, trial, and post-trial procedures, including elements and modes of proof . . . may be prescribed by the Secretary of Defense, in consultation with the Attorney General."<sup>245</sup> And again, new § 949d(f)(4) states: "The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information . . ."<sup>246</sup> If the application of regulations in a particular case "materially prejudices the substantial rights of the accused," enforcement of the regulations—if the regulations were invalid—would be "an error of law."<sup>247</sup> Therefore, review falls within the jurisdiction of a Court of Military Commission Review established by the Act,<sup>248</sup> and the Court of Appeals for the District of Columbia Circuit—insofar as challenged regulations are arguably inconsistent "with the standards and proce-

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243. For the gist of the overall argument, see *id.* at 25, 45, 86, 129.

244. § 3(a)(1), 120 Stat. at 2626–30 (to be codified at 10 U.S.C. § 950v(b)(1)–(28)).

245. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(a)).

246. *Id.* § 3(a)(1), 120 Stat. at 2613 (to be codified at 10 U.S.C. § 949d(f)(4)).

247. *Id.* § 3(a)(1), 120 Stat. at 2618 (to be codified at 10 U.S.C. § 950a(a)).

248. See *id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950f(d)) ("[T]he Court may act only with respect to matters of law.").

dures specified in this chapter” or “the Constitution and the laws of the United States.”<sup>249</sup> Supreme Court jurisdiction follows.<sup>250</sup> Appellate review, obviously, supposes an original ruling. Under the Act, this is the job of the commission judge; the pertinent statutory language is broad and unqualified:

The military judge in a military commission . . . shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

. . . Any ruling made by the military judge upon a question of law . . . is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.<sup>251</sup>

*Contra Chevron?*: Apparent equipoise—administrators issuing regulations constraining military judges, military judges scrutinizing the legality of administrative regulations—may be a mirage. If judges conclude that regulations are to be understood as exercises of statutorily conferred discretion, and as such properly upheld routinely, statutory politics becomes mostly hierarchical, more a matter of following orders than checks and balances. In the face of broad administrative leeway, the independence of military judges (or indeed Article III judges) becomes irrelevant except, presumably, in cases of clear-cut constitutional or statutory transgressions. New § 949a(a)—the principal grant of regulation-writing authority—

249. *Id.* § 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g(c)).

250. *Id.* § 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g(d)).

251. *Id.* § 3(a)(1), 120 Stat. at 2615–16 (to be codified at 10 U.S.C. § 949l(b)); see also *id.* § 3(a)(1), 120 Stat. at 2611 (to be codified at 10 U.S.C. § 949d(a)(1)(A)) (noting that a military judge may call a session without the members present for the purpose of “hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty”). Administrative review following trial and preceding exercise of jurisdiction by the Court of Military Commission Review is, it seems, another occasion for consideration of the legality of regulations. See *id.* § 3(a)(1), 120 Stat. at 2618–20 (to be codified at 10 U.S.C. § 950b). Nothing in the Act, however, plainly enough suggests—given the emphatic grant of commission judge authority to rule on “all questions of law”—that post-trial administrative inquiry is the first stage at which objections to regulations are to be brought (although they may need to be raised at this stage to make possible subsequent appellate review). See *id.* § 3(a)(1), 120 Stat. at 2621 (to be codified at 10 U.S.C. § 950f(c)). Statutory congressional notice requirements, and the obligation imposed on the President to secure humane treatment, see *supra* text accompanying note 193, raise the possibility of extra-judicial redress: presidential implementation of an administrative scheme aimed at broad protection might indeed be preemptive, but any legislative or executive response that is entirely hypothetical, likely to be occasional at best, or otherwise ineffectual would be correspondingly less likely to displace judicial review.



does in fact include language suggesting regulatory discretion: "Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial."<sup>252</sup> The emphasis given to administrative perspective seemingly evokes the distinction Justices Stevens and Kennedy drew in *Hamdan* between discretion-granting wording (keying to point of view) and wording consonant with close judicial review (neutral with regard to point of view).<sup>253</sup>

But the very next sentence of new § 949a(a) limits discretion: "Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter."<sup>254</sup> Similar language structures administrative authority to issue regulations concerning commission use of classified information.<sup>255</sup> New § 949a, in particular, supplies much working material for constructing a sense of "chapter" norms. The miniature bill of rights set out in subsection (b) suggests a basic model of procedural fairness.<sup>256</sup> The safe harbors—optional regulations deemed authorized in advance, as it were—also included in the same subsection include their own constraints—for example, the "probative value" requirement and the cross-referenced prohibition of torture and limits on uses of coercive interrogation.<sup>257</sup> As a matter of negative implication, moreover, they reinforce or elaborate the Act's basic model of fairness. The Military Commission Act need not be read as itself establishing a regime of regulation-writing *laissez-faire*.

If so, the statutory phrase "the Secretary considers practicable or consistent" requires explanation. The *Hamdan* distinction, it appears, excludes a "middle" option that the Commissions Act puts in place. The key is "this chapter"—the limit that new § 949a(a) sets constraining judicial scrutiny of regulations. The Secretary of Defense may properly "consider[] . . . military

252. § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(a)).

253. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791 (2006); *id.* at 2801 (Kennedy, J., concurring in part).

254. § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(a)).

255. See *id.* § 3(a)(1), 120 Stat. at 2613 (to be codified at 10 U.S.C. § 949d(f)(4)) ("The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information . . .").

256. See *id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(b)(1)).

257. See *id.* § 3(a)(1), 120 Stat. at 2607–09 (to be codified at 10 U.S.C. §§ 948r, 949a(b)(2)).

or intelligence activities” (or other considerations of practicality) in determining whether to use general courts-martial procedures.<sup>258</sup> Judges cannot second guess these judgments. They can look only to the military commission provisions in the Act in order to determine whether particular regulations are problematic. This restriction, while it declares off-limits judicial policymaking per se, does not prevent military commission judges from addressing “questions of law”—for example, constitutional law—that the Act does not declare to be irrelevant.<sup>259</sup> The statutory characterization of the jurisdiction of the Court of Appeals for the District of Columbia Circuit, included within chapter 47A itself, encompasses the “Constitution and the laws of the United States.”<sup>260</sup> This appellate jurisdiction derives from rulings by commission judges concerning “all questions of law,” a jurisdiction also granted by chapter 47A.<sup>261</sup>

Notably, the interplay of military commission judges and regulation-writing administrators is not an accident of statutory incompleteness or weakness of will. The Military Commissions Act itself organizes this structure. In the process, the Act does not, for example, resolve the question of which interrogation practices amount to torture or are otherwise too coercive or too unreliable or the question of whether commission trials can proceed if important evidentiary sources are deemed unavailable because classified. Instead, the statutory scheme arranges a politics, a contest pitting administrators and judges, within which these questions will find answers, whether as a rule or case-by-case. The Act is not therefore just another example of often-decried congressional abdication through delegation.<sup>262</sup> Its interplay, moreover, provides no occasion for *Chevron* deference<sup>263</sup> or *somesuch* on the part of reviewing courts—

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258. *Id.* § 3(a)(1), 120 Stat. at 2608 (to be codified at 10 U.S.C. § 949a(a)).

259. *See id.* § 3(a)(1), 120 Stat. at 2615–16 (to be codified at 10 U.S.C. § 949l(b)).

260. *Id.* § 3(a)(1), 120 Stat. at 2622 (to be codified at 10 U.S.C. § 950g(c)(2)).

261. *See id.* § 3(a)(1), 120 Stat. at 2615–16 (to be codified at 10 U.S.C. § 949l(b)).

262. For recent explorations of nondelegation concerns, see Merrill, *supra* note 39, at 2103–09.

263. *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001) (“[*Chevron*] posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.”). For a more recent exploration of *Chevron's* complexities, see Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

administrative rulemakers and military commission judges are equally participants in the statutory politics.<sup>264</sup> The statutory arrangement functions as a constitution. It defines the competition of adjudication and administration, identifies background values as well as immediate vocabularies. It also motivates attention to individual rights and problems of fair treatment not only by marking the statutory process as the means to compliance with acknowledged international obligations, but also by juxtaposing and overlapping the statutory lists of foreign and American combatant criminal conduct.

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This arrangement is not, plainly enough, “a machine that would go of itself.” The motivations it presupposes and prompts may be entirely missing from the agendas of administrators or military judges or indeed Article III judges. Any of whom may, as a result, push statutory procedures in some other direction. It is, however, a “rule for government” of the sort that John Marshall and his contemporaries (or Robert Cover) would have likely recognized—a context within which official responsibility might be *judged* (not simply excused).<sup>265</sup>

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264. See Levinson & Pildes, *supra* note 39, at 2364 (noting that courts may show uncomfortableness at “choosing sides” as a grounds for refusing *Chevron* deference). “While it seems quite clear under current law that the lead agency is entitled to *Chevron* deference, should this also be the case where Congress has specifically intervened to strengthen the role of lateral agencies over at least some aspects of decisionmaking?” J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2302–03 (2005) (footnote omitted).

265. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS *passim* (1975); Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 401–02 (2003) (discussing John Marshall).