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## Junking Checks and Balances?

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"Checks and balances" has a nice ring. But it's a currency that doesn't go a long way in Washington today.

The Military Commissions Act of 2006, of MCA, passed by the House and Senate and likely to be signed by the President tomorrow is a wholesale assault on the idea of a limited government under law. It will be taken by the Bush Administration as a blank check to torture, to detain indefinitely without just cause, and to trample the values that win America respect in the world. From tomorrow, counter-terrorism is the "land of do as you please" for the President and the wise men of the Defense Department--those savants who brought you Iraq, the gift that keeps on giving (at least if you're a [jihadist](#)).

The MCA comprehensively assaults two ideas: The idea of *checking* executive power by laws. And the idea of a separate branch of government *ensuring* those limits are respected. These are the basic tools of accountability. The MCA frontally attacks both of these--although only time will tell whether it succeeds.

How does the Military Commissions Act assail checks and balances? Consider the key issues of detention and torture.

The MCA says nothing explicit about the detention power. Indeed, I would argue that nothing in the legislation ought to be read to *imply* a detention power. Of course, that's not what David Addington and his colleague Alberto Gonzales will tell us. Rather, they will contend--publicly or not, it's hard to predict--that the MCA allows the executive branch power to detain literally anyone it wants provided it complies with a token gesture at procedure.

Here's how the Addington play for detention power will work. The opening definition of the Act describes elaborately what an "unlawful enemy combatant" is. Why? The term is a neologism. The laws of war do not use or define this term. Indeed, it is a mutation of a phrase used in a subordinate clause of a 1942 Supreme Court opinion. Nothing else in the Act directly turns on this definition--although only an "*alien* unlawful enemy combatant" can be subject to trial by military commission. So why bother with the elaborate definition? And why extend the definition to U.S. citizens as well as non-citizens?

Back in 2004, the Supreme Court, in the now well-known [Hamdi v. Rumsfeld decision](#), stated that an "enemy combatant" captured in hostilities could be held for the duration of those hostilities. The Court made very clear it was talking about only the limited context of the ground war in Afghanistan, not some amorphous and unending "war on terror." But Addington et al. will, however, take *Hamdi's* sanction of detention--and extend it far, far beyond *Hamdi*. It will be a detention power that applies anywhere and anytime.

There are two ways in which you--citizen or non-citizen, resident of Topeka or Timbuktu--can become an "unlawful enemy combatant."

The first way is if you engage "in hostilities" or "purposefully and materially support" hostilities. This sounds reasonable enough until you realize that no-one has the slightest clue what it means to "*purposefully* and materially support" hostilities. Do you need to intend to *aid the hostilities*? Or is it enough to intend to *give the support*? Would purposely giving to a charity that then gave money to Hamas count, even if you knew nothing about the Hamas? What about writing an editorial that gave "aid and comfort" to the enemy--say, by criticizing the Administration's Iraq policy?

The second way is--if it's even possible--more dangerous: You are designated an enemy combatant by a Combatant Status Review Tribunal--the Potemkin proceedings jerry-rigged at Guantánamo--or you are designated by "another competent tribunal" created by the Defense Secretary.

It's the latter that catches in the throat, because the MCA does not define what Rumsfeld's "competent tribunal" must look like. Rummy himself with the always-fair-and-impartial Addington? Five Syrian torturers (like the ones to whom the U.S. sent the

hapless [Canadian Maher Arar](#))? A bunch of guys who flip coins for your liberty? Sure, why not? The MCA doesn't stop the executive from using any of these, provided Rumsfeld gave them power and hence made them "competent."

At least for non-citizens, moreover, that would be that: For the first time in U.S. history, an Act of Congress singles out a group of persons--non-citizens--and deprives them of any right to challenge their detention wherever they are picked up. No non-citizen would, the MCA seems to say, be able to challenge this detention. And while citizens are certainly entitled to a hearing, the Government will fight tooth and nail to make sure this hearing doesn't allow any effective inquiry into the facts on which a detention is based. So no judicial review--and no accountability.

The same dynamic is at play in the anti-torture rules. The MCA alters a criminal statute called the War Crimes Act, which imposed criminal sanctions for certain violations of the laws of war.

Until recently, the United States could proudly point to a long history of supporting a universal ban on torture, and to a strong record in ensuring that those who in fact tortured did not escape accountability. No longer. Now a gamut of horrendous kinds of treatment will be non-criminal--and, the Bush Administration will argue, within the discretion of the President.

Start with the substantive anti-torture rules themselves (which cover both torture and the lesser "cruel and inhuman" treatment). The MCA contains an incredibly complex and convoluted set of definitions. Despite all the cant about clarity, the rules no longer in plain English--as they were in Common Article 3 of the [Geneva Conventions](#) --and they are so full of holes they might have been tortured themselves.

Here are three examples of the duplicitous ambiguity of the MCA when it comes to torture and abuse.

First, "cruel and inhuman" treatment is defined as acts that cause "severe or serious" pain. We know "severe" is worse than "serious" because "severe" is used to define torture (yes, we'll get *there* in a moment). But then "serious pain" is defined as "bodily injury" that causes "*extreme* physical pain." So "serious" pain is only "extreme" pain? Isn't extreme worse than serious? It would seem so--but the MCA is deliberately confusing and circular.

And why the reference to bodily injury? Does that mean that hypothermia and long-time standing and those other wretched "enhanced" techniques more fitting for Stalin's gulags than American facilities are not criminal? Well, yes, I reckon it does.

Second, in another convoluted section, "serious mental pain" is defined in terms of "non-transitory" harms. Thus, if a CIA agent threatens to kill a detainee, or to rape his spouse and his children--all long-recognized as forms of torture--that's not torture; it's not even the lesser "cruel and inhuman" treatment.

Finally, the torture statute itself. Almost unnoticed, the Bush Administration has gutted the no-torture rule. It has added the requirement that a person "*specifically*" intend to cause the pain that amounts to torture. This technical change--foreshadowed in the August 2002 OLC memo--has tremendous implications. It means that any government agent who says his goal was to get information, and not to cause pain, *hasn't tortured no matter how bad the things he does*. If the person water-boards or knee-caps a person, or buries them alive, if it's to get information--well, that's just dandy.

Once again, it's not just the substantive rules that have been assailed: It's also the mechanisms to ensure the rules are followed. Under the MCA, there is no accountability for torture. The MCA cuts off courts' power to hear claims of torture by aliens held as "unlawful enemy combatants." And it vests the President with power to interpret the relevant laws of war. So if he says that "cold cell" and sexual abuse are not "cruel and inhumane," that's the end of the matter.

There are two reasons for hope. First, any reading of the Act that reaches an untrammled detention power may be unconstitutional. The Supreme Court in the 2004 case of [Rasul v. Bush](#)--in what one day will be called "famous footnote 15"--strongly hinted that even non-citizens captured overseas have Due Process rights. Combined with another clause of the Constitution called the Suspension Clause, this means the unchecked detention power and the jurisdiction-strip are likely unconstitutional.

Second, even if the War Crimes Act has been amended, the Due Process Clause also ought still to protect detainees held overseas: Torture is un-American. It's also unconstitutional--and that doesn't change depending on where it's done. Moreover, the law of war, embodied in the Geneva Conventions, is clear: There is no "specific intent" requirement for torture. Countries--whether it's the United States or North Korea--cannot unilaterally define down the rules against torture.

"Unchecked and unbalanced" government--I argue at length in a forthcoming [book](#)--is antithetical to American government. The MCA is also anathema to our best traditions. We must hope it is our traditions that win, and not the selfish partisan posturing that animated this week's votes.

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