Destined for an Epic Fail: The Problematic Guantánamo Military Commissions

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"It's true that in response to widespread criticism and legal sanction from the Supreme Court, the military commissions system has improved. . . . But just because the military commissions have gotten better, doesn't make their use lawful or smart . . . ."[1]

- Rear Admiral John Hutson, former Navy Judge Advocate General

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[1] John Hutson, *Military Commissions Are a Failed Experiment, Try Terror Suspects in Civilian Courts*, POLICY.MIC (Mar. 30, 2012), http://www.policymic.com/debates/6237/military-commissions-are-a-failed-experiment-try-terror-suspects-in-civilian-courts, *archived at* http://perma.cc/43PH-3FJM.

I. INTRODUCTION

The decision to treat the September 11, 2001 (9/11) attacks as an act of war had real legal ramifications permitting, for example, the trial of at least some suspected terrorists for war crimes.[2] The government promptly seized this opportunity, announcing the use of military commissions—common law war courts traditionally used to fill gaps in statutory legal coverage[3]—for this purpose.[4] But, unlike the past eras in which they were used, military commissions can no longer be unregulated ad hoc proceedings. Today, minimum fair trial standards are mandated by both international law[5] and the Military Commissions Act of 2009 (MCA),[6] and trials will receive critical scrutiny via both direct and collateral judicial review.[7] This Article provides the most comprehensive critique of trials under the MCA to date, arguing that the Guantánamo tribunals still fall short of applicable legal standards with respect

[2] *See id.*

[3] Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 206 (2008).

[4] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918.1(e) (2002).

[5] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 354–72 (2005).

[6] Military Commissions Act of 2009, 10 U.S.C. §§ 948(a)–950(t) (2012).

[7] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (plurality opinion).

to both procedural and substantive law, and will predictably continue to fail federal judicial challenges.[8]

The commissions' failings are not just legal. Their use hinders, rather than helps, America's efforts to prevail against terrorist adversaries. This conflict is essentially a counter-insurgency; ultimate success requires winning the "hearts and minds" of potential supporters to undermine the terrorists' ability to recruit fighters and raise funds.[9] The use of substandard military tribunals trying only nationals of countries lacking the political will or clout to exempt their citizens is thus doomed to fail politically. As admitted al Qaeda member Ali Hamza Ahmed Suleiman al Bahlul boldly declared after his 2008 Guantánamo "conviction," "the military court[ ] that tried me today will speed up . . . the support of people for us . . . ."[10]

Flaws in the commissions' application of substantive law are even more serious than their procedural shortcomings. The government essentially treats military commission and Article III jurisdiction as fungible, making tribunal selection discretionary.[11] But, this ignores law of war rules and Supreme Court precedent confining commission jurisdiction to circumstances and offenses absent from most Guantánamo cases.[12] The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has now invalidated the widely used "providing material support for terrorism" charge (as well as solicitation) while returning a challenge to conspiracy for further review by a three judge panel.[13] These decisions invalidate seven of the eight commission convictions to date in whole or in part.[14] But, this Article argues that all the completed cases had fatal flaws, meaning the commissions have failed in *every* prosecution so far.

Major pending cases—the capital trials of alleged USS *Cole* bombing mastermind Abd al-Rahim Hussein Muhammed Abdu al Nashiri, and alleged 9/11 planner Khalid Shaikh Mohammad and four co-conspirators—have substantial, if not fatal, flaws as well. Some charged conduct took place outside the scope of any armed conflict although conflict nexus is a necessary precondition for law of war jurisdiction.[15] Some conduct violates federal law

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[8] Failures to date include: *Hamdan*, 548 U.S. at 567; al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *21 (D.C. Cir. July 14, 2014) (en banc) (confirming the invalidity of providing material support to terrorism and solicitation charges while returning constitutional challenges to a conspiracy charge to a three-judge panel); Hamdan v. United States (*Hamdan II*), 696 F.3d 1238, 1241 (D.C. Cir. 2012), *overruled by* al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *5 (D.C. Cir. July 14, 2014) (en banc).

[9] DAVID J. KILCULLEN, COUNTERINSURGENCY 185–216 (2010).

[10] Official Authenticated Transcript at 967, United States v. al Bahlul, TRANS (Military Comm'ns Trial Judiciary May 7, 2008).

[11] *See infra* Part II.

[12] *See infra* Part II.

[13] *See al Bahlul*, 2014 WL 3437485, at *21.

[14] *See infra* Part II.A.

[15] *See infra* Part II.B.

but not the law of war.[16] All Guantánamo charges fail to distinguish between the robust set of international armed conflict rules and the lesser set of non-international conflict regulations even while the government generally holds itself accountable only for complying with the latter.[17] Meanwhile, military tribunal use effectively obligates the defense to make law of war unique arguments, such as contending that the Pentagon and World Trade Center were lawful targets[18] and that civilian lives lost on 9/11 were mere "collateral damage," not murders,[19] which will inflict further pain on the victims' families. These issues can *all* be avoided just by using federal charges in Article III courts.

Claims that the commissions offer *legitimate* practical advantages over Article III trials are also mistaken. President Obama has said that "[m]ilitary commissions . . . allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts."[20] But these assertions are misleading. Battlefield evidence collection, like *any* overseas evidence gathering, is exempt from Fourth Amendment mandates.[21] Commission rules for classified evidence are based on the Classified Information Procedures Act (CIPA)[22] that have been applied by Article III courts in dozens of terrorism cases since 9/11.[23] So the commissions have no legitimate advantage in either of these respects. But the evident intelligence agency role at Guantánamo, classification of detainee statements, and liberal hearsay rules suggest that the commissions have the *illegitimate* purpose of facilitating use of evidence obtained through coercion while screening Central Intelligence Agency (CIA) personnel from exposure or criminal liability. While the MCA categorically bars evidence obtained through torture or cruel, inhuman, or degrading

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[16] *See infra* Part II.

[17] *See infra* Part II.E.

[18] *See infra* Part V.C.1.

[19] *See infra* Part V.C.2.

[20] Press Release, The White House, Remarks by the President on National Security (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09, *archived at* http://perma.cc/RE4U-4896.

[21] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

[22] MCA 2009 rules are patterned on CIPA, 18 U.S.C. app., and declare that "[t]he judicial construction of the Classified Information Procedures Act . . . shall be authoritative in the interpretation of this subchapter . . . [except where] inconsistent with the specific requirements of this chapter." 10 U.S.C. § 949p-1(d) (2012).

[23] CTR. ON LAW AND SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011, at 13, http://www.lawandsecurity.org/Portals/0/Documents/Issue.pdf (last visited Aug. 17, 2014) [hereinafter TERRORIST TRIAL REPORT CARD], *archived at* http://perma.cc/FF4D-JXVU.

treatment,[24] commission practice suggests that the Guantánamo tribunals are not fully obeying this statutory command.[25]

Paradoxically, the commissions will be the *least* efficient of all possible trial forums in terms of the time required to reach final judgments. Commission proceedings advance fitfully at best. Although President Bush demanded Congress pass the initial MCA in the fall of 2006 so that families of 9/11 victims "should have to wait no longer" for justice,[26] the earliest possible start of the alleged 9/11 conspirators' trial is now early 2015,[27] more than 3,000 days since Bush's call for action, although even that is likely overly optimistic.[28] Even then, the commissions' unique jurisdiction and procedure will be litigated for years. Al Nashiri's case had already seen 227 motions briefed to the trial judge by February 2014,[29] yet was still at least a year away from actual trial.[30]

Conservative critics portrayed the 2010 federal conspiracy conviction of former CIA detainee Ahmed Ghailani as a near acquittal after the jury declined to convict him for murder,[31] implying that civilian trials pose a significant risk of setting actual terrorists free. But it is the Guantánamo tribunals, not the federal courts, which pose the real risk of failure. Ghailani was tried, convicted, sentenced to life in prison, had his appeal rejected by the Second Circuit Court of Appeals, and his petition for certiorari denied by the Supreme Court,[32] all while the ongoing Guantánamo cases still languished in pre-trial hearings.

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[24] 10 U.S.C. § 948r(a) (2012).

[25] *See Some Key Facts on Military Commissions v. Federal Courts*, HUM. RTS. FIRST (Dec. 31, 2011), http://www.humanrightsfirst.org/resource/some-key-facts-military-commissions-v-federal-courts, *archived at* http://perma.cc/FJC5-9V3Z.

[26] Press Release, The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), http://georgewbush-whitehouse.archives.gov/news/releases.html, *archived at* http://perma.cc/XXV7-C25M.

[27] *See Chief Prosecutor Seeks January 2015 Start for 9/11 Trial*, ALTERNET, http://www.alternet.org/progressive-wire/chief-prosecutor-seeks-january-2015-start-911-trial (last visited Aug. 23, 2014), *archived at* http://perma.cc/4J3P-T9TZ.

[28] *See, e.g.*, Ryan J. Reilly, *FBI Infiltration of Gitmo Defense Team Tosses 9/11 Trial into Disarray*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/04/17/fbi-guantanamo_n_5167296.html (last updated Apr. 18, 2014, 11:59 AM), *archived at* http://perma.cc/7M6A-F3EL.

[29] Matt Danzer, *Statement of Chief Prosecutor on Pre-Trial Motions in Al-Nashiri Case*, LAWFARE (Feb. 26, 2014, 4:04 PM), http://www.lawfareblog.com/2014/02/ statement-of-chief-prosecutor-on-pre-trial-motions-in-al-nashiri-case/, *archived at* http://perma.cc/V4GL-NGTU.

[30] *See* Carol Rosenberg, *USS Cole Case Judge Names Air Force Successor*, MIAMI HERALD (July 10, 2014), http://www.miamiherald.com/2014/07/10/4229237/guantanamo-judge-steps-down-from.html, *archived at* http://perma.cc/LP2F-62DH.

[31] *See* Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2011, at A18, *available at* http://www.nytimes.com/2011/01/26/nyregion/26ghailani.html, *archived at* http://perma.cc/CUU8-DQHF.

[32] *See* United States v. Ghailani, 733 F.3d 29, 36 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

Part II of this Article briefly reviews historical military commission employment and identifies key jurisdictional limitations including temporal constraints on prosecution and the required nexus with hostilities.

Part III considers both the legal and practical criteria for conducting a "fair" trial that a "legitimate" commission would need to meet.

Part IV examines several residual post-MCA procedural concerns. It will show how issues such as the excessive authority concentrated in the hands of the convening authority, practical denial of the right to counsel of choice, systemic inequalities between prosecution and defense, and abuses of classification authority all serve to undermine the trials' legitimacy.

Part V uses the charges levied against three Obama-era defendants—Omar Khadr, who pleaded guilty in 2010, and the pending capital cases of al Nashiri and Khalid Sheikh Mohammad—to analyze substantive legal issues with the commissions. Most charges have real issues with law of war compliance or limits on military jurisdiction. These cases also risk creating legal precedents that could redound to U.S. detriment, facilitating future attacks on our military and foreign prosecutions of American officials. While the 9/11 charges have a firmer foundation than the others, the government's approach still raises issues avoided by a regular federal trial.

Despite recent bipartisan support and procedural improvements, legal flaws continue to undermine the commissions' credibility. Their continued use under a president who admitted that "Guantánamo set back the moral authority that is America's strongest currency in the world"[33] is contrary to both law and overall U.S. national interests.

II. THE ORIGINS AND LIMITS OF MILITARY COMMISSION JURISDICTION

A. *Military Commission Origins and Judicial Review*

Military commission proponents often seek to enhance their credibility by asserting historical precedents dating back to the Revolution.[34] But, military commissions were actually created by General Winfield Scott during the Mexican War of 1846–1848 for reasons anticipating modern counter-insurgency doctrine.[35] Scott planned a bold offensive, marching his outnumbered invasion force inland from Vera Cruz to capture Mexico City.[36] Lacking sufficient forces to continuously garrison a supply line back to the coast, he needed general Mexican acquiescence to his army's presence in order to procure needed provisions along his march and avoid the kind of popular

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[33] Press Release, The White House, *supra* note 20.

[34] *See, e.g.*, *id.*

[35] *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31–40 (2005).

[36] *Id.*

uprising that had hamstrung Napoleon's forces in Spain.[37] Scott thus recognized the need to win the locals' "minds and feelings."[38] Unruly conduct by American troops threatened this objective, but the statutory Articles of War only permitted courts-martial for military offenses such as desertion, leaving no means to repress common crimes.[39] Scott resolved this problem by invoking law of war authority to impose "martial law" in occupied territory and try crimes committed by, or against, his troops before military commissions, which he based on court-martial practice.[40]

Commissions saw wider use during the American Civil War, being used in more than 4,000 cases.[41] They were addressed in statutes for the first time and given the same post-trial review as courts-martial.[42] Commissions were not legally mandated to follow any specific procedural rules, although in practice they continued to mirror courts-martial.[43] This conflict also saw commissions' first judicial challenges. The Supreme Court held that they were not part of the judicial structure created by Article III, and federal courts thus lacked direct review authority.[44] The Court had reached the same conclusion regarding courts-martial six years earlier.[45] But, it confirmed the availability of collateral review and rejected martial law trials when civilian courts were open in its famous 1866 *Ex parte Milligan* decision.[46] *Milligan* also established the modern military jurisdictional nomenclature, calling tribunals in occupied enemy territory "military government courts," and reserving "martial law" to describe the exercise of military authority within the army's own national territory.[47]

Military commissions figured prominently during the counterinsurgency which followed Spain's 1898 cession of the Philippines to the United States.[48] Commissions tried both serious common crimes as well as law of war cases until the establishment of a civilian territorial government in 1902.[49] They continued to hew to court-martial standards, including faithful application of U.S. common law rules of evidence.[50]

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[37] David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 139–43 (2005).

[38] *See* DAVID A. CLARY, EAGLES AND EMPIRE: THE UNITED STATES, MEXICO, AND THE STRUGGLE FOR A CONTINENT 303 (2009).

[39] *See* Glazier, *supra* note 37, at 140.

[40] *Id.* at 140–41.

[41] *See* MARK E. NEELY, JR., THE FATE OF LIBERTY 168–73 (1991).

[42] David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2043 (2003).

[43] *Id.* at 2042–44.

[44] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 252 (1863).

[45] Dynes v. Hoover, 61 U.S. (20 How.) 65, 74 (1857).

[46] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 66–93 (1866).

[47] *See* 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS *1245 (tracing the term "military government" to Chief Justice Chase's *Ex parte* Milligan opinion).

[48] Glazier, *supra* note 35, at 47–48.

[49] *Id.* at 49–50.

[50] *Id.* at 47–56.

It was only in World War II that military commissions deliberately departed from court-martial standards. In 1942, eight Nazi saboteurs landed on the U.S. East Coast and were arrested by the FBI after one turned traitor.[51] The government scrambled to come up with an effective way to try them.[52] Ultimately the President approved Attorney General Francis Biddle's proposal to employ a military commission which was allowed to make their own rules of procedure.[53] The presidential order purported to foreclose judicial review, but the Supreme Court assembled for a special summer term to consider the saboteurs' habeas case, styled *Ex parte Quirin*.[54] The Court upheld the commission's law of war jurisdiction, including authority to try U.S. citizens. But, just by meeting, the Court repudiated presidential foreclosure of judicial review;[55] it did not address commission procedure.[56] Martial law employment of military commissions in Hawaii, in contrast, was overruled in *Duncan v. Kahanamoku*.[57]

Although historically overshadowed by the International Military Tribunals at Nuremberg and Tokyo, the United States conducted thousands of military trials in the interim between the Axis military surrenders and the formal conclusion of peace treaties.[58] These tribunals sat both as military government courts in occupied Germany and Japan, and as law of war tribunals throughout the European and Pacific theaters.[59] The Supreme Court upheld both the military government trial of an American civilian dependent[60] and law of war military commissions sitting in the Philippines[61] and China.[62]

Military commissions were then largely forgotten until 9/11 when Bush Administration lawyers dusted off *Quirin*, ignoring significant developments in international criminal law in the intervening decades.[63] After a rocky start that saw several prosecutors reassigned after voicing ethical concerns and a chief

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[51] *See* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 25–42 (2003).

[52] *Id.* at 46–49.

[53] *See id.* at 50–53.

[54] David Glazier, *The Development of an Exceptional Court: The History of the American Military Commission*, *in* GUANTÁNAMO AND BEYOND 37, 49–50 (Fionnuala Ni Aoláin & Oren Gross eds., 2013).

[55] *Id.* at 49–51.

[56] *See* FISHER, *supra* note 51, at 109–13.

[57] Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946).

[58] FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955, at 51 (1989) (documenting U.S. trials of 1672 Germans); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951, at 48 (1979) (documenting U.S. trials of 1409 Japanese defendants); Glazier, *supra* note 42, at 2063 n.259.

[59] *See* Glazier, *supra* note 42, at 2062–73.

[60] Madsen v. Kinsella, 343 U.S. 341, 342–43 (1952).

[61] *In re* Yamashita, 327 U.S. 1, 25–26 (1946).

[62] Johnson v. Eisentrager, 339 U.S. 763, 785 (1950).

[63] JESS BRAVIN, THE TERROR COURTS 38–39, 60–63 (2013).

prosecutor fired before the first trial got underway,[64] the Supreme Court halted the proceedings in *Hamdan v. Rumsfeld* for violating both the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.[65] Because *Hamdan* was based on statutory and treaty interpretation, it was amenable to legislative remedy. Congress responded with the Military Commissions Act of 2006, authorizing tribunal use subject to procedural improvements and establishing direct appellate review.[66]

The first Guantánamo "conviction" was Australian David Hicks's March 2007 guilty plea to providing material support for terrorism.[67] Hicks, like all those who subsequently accepted plea deals, was required to renounce any right to appeal.[68] The second case, and first actual trial, was that of Salim Hamdan, who was convicted of providing material support for terrorism.[69] In the final military commission of the Bush presidency, Ali Hamza Ahmed Suleiman al Bahlul was convicted and sentenced to life imprisonment for conspiracy, providing material support for terrorism, and solicitation to commit murder.[70] He refused to mount a defense after being denied representation by counsel of his own nationality or the fallback of self-representation.[71]

After President Obama decided to resume commission use under his Administration, Congress enacted the MCA 2009,[72] making modest tweaks to the 2006 iteration.[73] The commissions have subsequently resolved five more cases, all by pleas. Ibrahim al Qosi pleaded guilty to conspiracy and providing

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[64] *See id.* at 134–42.

[65] Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (plurality opinion).

[66] Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006), *amended by* Military Commissions Act of 2009, 10 U.S.C. §§ 948(a)–950(t) (2012).

[67] *First Gitmo Conviction Invalidated by New Ruling, Attorneys Say*, CTR. FOR CONST. RTS. (Aug. 20, 2014), http://ccrjustice.org/newsroom/press-releases/first-gitmo-conviction-invalidated-new-ruling,-attorneys-say, *archived at* http://perma.cc/MD9A-NR7L.

[68] *See, e.g.*, Josh White, *Australian's Plea Deal Was Negotiated Without Prosecutors*, WASH. POST, Apr. 1, 2007, at A7, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100976.html, *archived at* http://perma.cc/NA7F-L87Y.

[69] *See* Joe McMillan, *The United States on Trial*, *in* THE GUANTÁNAMO LAWYERS 178 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

[70] William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19, *available at* http://www.nytimes.com/2008/11/04/washington/04gitmo.html, *archived at* http://perma.cc/MY6S-RFWK.

[71] *See* Official Authenticated Transcript at 56, 73, United States v. al Bahlul, TRANS (Military Comm'ns Trial Judiciary Aug. 26, 2004 & Jan. 11, 2006); David Frakt, *Guest Post: David J. R. Frakt on the Al-Bahlul Amicus Brief*, OPINIO JURIS (July 28, 2013, 12:51 PM), http://opiniojuris.org/2013/07/28/guest-post-david-j-r-frakt-on-the-al-bahlul-amicus-brief/, *archived at* http://perma.cc/L8B6-SJEV.

[72] JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND LEGAL ISSUES 3 (Mar. 7, 2014), http://www.fas.org/sgp/crs/natsec/R41163.pdf, *archived at* http://perma.cc/PHY7-GE3C.

[73] For a comparison of the 2006 and 2009 MCA versions, see *id.* at 36–55.

material support to terrorism.[74] Omar Khadr accepted a deal requiring him to admit to conspiracy, material support for terrorism, spying, and both murder and attempted murder "in violation of the law of war."[75] Noor Uthman Mohammed pleaded to conspiracy and providing material support for terrorism, and agreed to testify against unspecified detainees.[76] Majid Khan pleaded guilty to the same five charges as Omar Khadr.[77] Finally, Ahmed Mohammed Ahmed Haza al Darbi pleaded guilty to attacking civilians, attacking civilian objects, hazarding a vessel, and terrorism, all relating to a 2002 attack on the French tanker *MV Limburg* despite questions as to whether this attack fell within the commissions' lawful jurisdiction.[78]

Because the federal courts are open and U.S. occupation of Iraq and Afghanistan ended with the establishment of internationally recognized governments, both martial law and military government employment are foreclosed today. The Guantánamo commissions are thus restricted to the law of war role.[79] While federal courts enjoy broad authority with a wide range of potential charges,[80] Supreme Court precedents establish important limits on law of war commission jurisdiction. But, there are other jurisdictional issues, such as temporal limits and nexus to armed conflict that further undermine the validity of pending cases.

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[74] Jane Sutton, *U.S. Cuts Prison Sentence for bin Laden's Cook*, REUTERS (Feb. 9, 2011), http://www.msnbc.msn.com/id/41508557/ns/us_news-security/, *archived at* http://perma.cc/E5YQ-Y2RE.

[75] Andrew Mayeda & Janice Tibbetts, *Khadr Admits War Crimes in Plea Deal at Guantanamo*, CANADA.COM (Oct. 25, 2010), http://www.canada.com/news/Khadr+admits+crimes+plea+deal+Guantanamo/3721762/story.html, *archived at* http://perma.cc/LP3N-4NCL.

[76] Carol Rosenberg, *Sudanese War Criminal Turns Government Witness*, MIAMI HERALD (Feb. 18, 2011), http://miamiherald.com/2011/02/18/2074391/sudanese-war-criminal-at-guantanamo.html, *archived at* http://perma.cc/NFH9-JWZP.

[77] Peter Finn, *Guantánamo Detainee Majid Khan Pleads Guilty, Promises Cooperation*, WASH. POST (Feb. 29, 2012), http://www.washingtonpost.com/world/national-security/guantanamo-detainee-majid-khan-pleads-guilty-promises-cooperation/2012/02/29/gIQAVuIaiR_story.html, *archived at* http://perma.cc/55FS-3UUQ.

[78] *See* Charlie Savage, *Guantánamo Detainee Pleads Guilty in 2002 Attack on Tanker off Yemen*, N.Y. TIMES, Feb. 20, 2014, at A7, *available at* http://www.nytimes.com/2014/02/21/us/guantanamo-detainee-ahmed-muhammed-haza-al-darbi.html, *archived at* http://perma.cc/AY64-NKKW; Referred Charges Dated 2/5/2014, United States v. al Darbi, Charge Sheet (Military Comm'ns Trial Judiciary Dec. 16, 2013). The charge sheet identifies a fifth charge of "attempt" related to hazarding a vessel and terrorism without specifying any intended targets. *Id.* at 10.

[79] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 595–96 (2006) (plurality opinion).

[80] "Jihadist" terrorism defendants have been charged under at least 156 different federal statutes. *See* TERRORIST TRIAL REPORT CARD, *supra* note 23, at 13.

B. *Time of War*

The MCA ambiguously declares that the commissions can try defined offenses whether they took place "before, on, or after September 11, 2001."[81] But, it also requires that conduct be "in the context of and associated with hostilities."[82] Supreme Court precedent is clearer, explicitly limiting commission jurisdiction to periods of hostilities.[83] The Court held in *In Re Yamashita*, for example, that jurisdiction exists only "so long as a state of war exists—from its declaration until peace is proclaimed."[84] This calls into real question jurisdiction over any conduct taking place before the September 18, 2001 Authorization for the Use of Military Force (AUMF) [85] enactment, or at least before the precipitating events of 9/11.

The commissions' legal authority to sit ends with hostilities as well. This issue arose with the original commission use during the Mexican War. An American committed murder in Mexico but escaped military control until peace was concluded.[86] The government reluctantly determined that he could not be punished at all.[87] Regular U.S. courts lacked extraterritorial jurisdiction; murder was not an offense in the Articles of War, precluding court-martial; and military commission jurisdiction was held to end with hostilities,[88] a conclusion reaffirmed by *Yamashita* a century later.[89]

There is no realistic prospect of a peace agreement with al Qaeda. But there is debate about its viability after a decade of U.S. military action, including intervention in Afghanistan, drone strikes, and the killing of Osama bin Laden.[90] An effective cessation of violence resulting from a lack of targets for U.S. strikes and absence of al Qaeda attacks should legally end the conflict.[91] Congressional repeal of the 2001 Authorization for the Use of Military Force should also legally terminate hostilities. These possibilities counsel against assuming the continuing availability of commission prosecutions, a matter of particular concern given the glacial progress of the most significant cases.

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[81] 10 U.S.C. § 948d (2012).

[82] Military Commissions Act of 2009, 10 U.S.C. § 950p(c) (2012).

[83] *E.g.*, *Hamdan*, 548 U.S. at 596 (plurality opinion) ("[I]ts jurisdiction [is] limited to offenses cognizable during time of war . . . .").

[84] *In re* Yamashita, 327 U.S. 1, 11–12 (1946).

[85] Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

[86] *See* TIMOTHY D. JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 165 (1998); Glazier, *supra* note 42, at 2027–28.

[87] JOHNSON, *supra* note 86, at 165; Glazier, *supra* note 42, at 2027–28.

[88] Glazier *supra* note 42, at 2027–28.

[89] *In re* Yamashita, 327 U.S. at 11–12.

[90] *See generally* Deborah Pearlstein, *Law at the End of War*, 99 MINN. L. REV. (forthcoming 2014), *available at* http://www.cardozolawreview.com/content/Symposium/SSRN-id2334326.pdf, *archived at* http://perma.cc/HL9E-WM7Z.

[91] *See id.* at 50–56 (arguing for the adoption of the "cessation of hostilities" standard).

C. *Constraints on Substantive Offenses Under the MCA*

Supreme Court precedent requires that law of war military commission charges be grounded in the international law governing armed conflict.[92] *Quirin*, for example, held that congressional authorization of military commission trials is an exercise of authority under the "define and punish" clause, which refers specifically to "Offences against the Law of Nations."[93] That power is thus facially constrained by international law. The Clause's purpose was to permit Congress to provide fair notice by clarifying proscribed conduct where there might be ambiguity.[94] This does not allow it to depart from clear international rules or unilaterally create new offenses, however.[95]

Even *if* Congress could define new offenses, commission jurisdiction would still be limited by the fact that the MCA was first enacted in 2006, after most detainees now facing prosecution were in U.S. custody and their conduct complete. Any new crimes would be ex post facto enactments forbidden by both the U.S. Constitution[96] and key law of war provisions, including Article 75 of the Additional Geneva Protocol I (AP I) of 1977,[97] widely acknowledged as reflecting customary international law.[98] Article 75 says "[n]o one *shall be accused* or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed . . . ."[99] It is thus violated when an individual is charged; conviction is not required. Denial of a fair trial is a recognized war crime under both customary and treaty law.[100] The bar against ex post facto war crime creation was extended to non-international armed conflict by Article 6 of the Additional Geneva Protocol II (AP II).[101] The

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[92] *E.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 596, 641 (2006) (plurality opinion).

[93] U.S. CONST. art. I, § 8, cl. 10; *Ex parte* Quirin, 317 U.S. 1, 28 (1942).

[94] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 315–16, 594–95, 614–15 (Max Farrand ed., Yale Univ. 1966).

[95] For a more complete analysis, see Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y 295, 328–41 (2010).

[96] U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

[97] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) art. 6 § 2(c), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[98] *See, e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 33 (2004) ("This . . . is particularly important as regards unlawful combatants who are not entitled to the more favourable treatment of prisoners of war. . . .").

[99] AP I, *supra* note 97, art. 75 (emphasis added).

[100] HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 354–72.

[101] AP II, *supra* note 97, art. 6.

U.S. has not ratified AP II, but has never objected to its provisions, and these rules are likely now customary law as well.[102]

Congress clearly recognized this concern; the MCA declares: "Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment . . . ."[103]

But congressional statements are insufficient to create legal truth. It is incumbent on the commissions to verify their jurisdiction,[104] and it is the courts that have the final say.[105] The D.C. Circuit's determination that providing material support for terrorism and solicitation, which were not previously recognized war crimes, could not be applied to conduct taking place before MCA enactment[106] was thus entirely predictable.

D. *Prosecution of Unprivileged Belligerents*

An important question for the Guantánamo commissions concerns the legitimacy of prosecuting "unprivileged belligerency" as a law of war violation. All societies criminalize deliberate killing and destruction of property, the very acts that governments require their militaries to perform during war.[107] To "legalize" participation in armed conflict, the law of war must immunize soldiers from domestic prosecution; granting what is commonly called the "combatant's privilege."[108] But civilized societies also recognize the need to regulate use of force even in war.[109] Because combatants' official acts are placed outside ordinary civil jurisdiction, the law of war must fill the resulting void, defining limits on the permissible use of force and criminalizing violations.

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[102] *See, e.g.*, *Customary IHL*, Rules 100–02, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul (last visited Aug. 24, 2014), *archived at* http://perma.cc/8F43-QKDM.

[103] 10 U.S.C. § 950p(d) (2012).

[104] The MCA implicitly acknowledges this; 10 U.S.C. § 948d declares in part: "A military commission is a competent tribunal to make a finding sufficient for jurisdiction."

[105] As John Marshall definitively declared, "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[106] *See* al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *21 (D.C. Cir. July 14, 2014) (en banc); Hamdan v. United States (*Hamdan II*), 696 F.3d 1238, 1241 (D.C. Cir. 2012), *overruled by* al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *5 (D.C. Cir. July 14, 2014) (en banc).

[107] *See* DINSTEIN, *supra* note 98, at 31.

[108] *See id.*

[109] *See, e.g.*, UK MINISTRY OF DEFENCE, MANUAL OF THE LAW OF ARMED CONFLICT §§ 1.16–41 (2004).

How does the law treat a force like al Qaeda which generally lacks uniforms or regard for the law of war? Criteria for lawful combatantcy are formally articulated in The Hague Land Warfare Regulations:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:—
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."[110]

Because al Qaeda fighters generally lack distinctive emblems/uniforms,[111] a legally accountable chain of command, and respect for the law of war, they are not entitled to claim the "rights" of war, i.e., the combatant's privilege. The law of war need not address unprivileged belligerents' conduct, however, because lacking immunity, they remain fully accountable for any acts of violence they commit under regular domestic laws.[112] Under some circumstances, they can also be prosecuted under the law of war for *actual* war crimes should their conduct bring them within its ambit. German civilians who killed captured Allied flyers during World War II were thus prosecuted for war crimes along with the German military personnel who encouraged or facilitated those killings, for example.[113] But, the law of war does not proscribe the routine killing of combatants, even by those with no right to participate in hostilities.[114] It was only the fact that the Allied airmen had surrendered which made their killing a war crime.[115]

When an unprivileged belligerent kills a combatant, Professor Yoram Dinstein explains, "[the law of war] refrains from stigmatizing the acts as criminal. It merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offence committed against the

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[110] Convention Respecting the Laws and Customs of War on Land annex art. 1, Oct. 18, 1907, 36 Stat. 2277–309. This can be read to suggest that members of an "army" need not have distinctive emblems, etc., because these criteria are only listed under "militia and volunteer corps." *See id.* But, scholars agree these are inherent characteristics of an "army" and thus did not need explicit mention. *See, e.g.*, DINSTEIN, *supra* note 98, at 33–36.

[111] *But see* Brian Glyn Williams, *The 055 Brigade*, WORLD POL. REV. (Oct. 26, 2008), http://www.worldpoliticsreview.com/articles/2821/the-055-brigade, *archived at* http://perma.cc/MT8M-FQMY (reporting that Al Qaeda had a uniformed brigade).

[112] *See supra* note 98 and accompanying text; *see also infra* note 305 and accompanying text.

[113] *See, e.g.*, 1 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 88–92 (1947).

[114] DINSTEIN, *supra* note 98, at 200.

[115] *See* 1 U.N. WAR CRIMES COMM'N, *supra* note 113, at 88–92.

domestic legal system."[116] The International Committee of the Red Cross (ICRC) notes that this opinion was the "prevailing view" among participants in its expert meetings, and states unequivocally that:

> [C]ivilian direct participation in hostilities is neither prohibited by [the law of war] nor criminalized under the statutes of any prior or current international criminal tribunal or court. However, because civilians . . . are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution [even] for lawful acts of war. . . . [They] may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.).[117]

The Supreme Court's 1942 *Quirin* decision has confused many subsequent commentators by its use of the term "unlawful combatants," but careful reading shows that the saboteurs at issue were privileged belligerents issued uniforms by Nazi Germany who unlawfully discarded them in passing behind American lines.[118] They were thus prosecuted for conduct in violation of the law of war, not for their status as unprivileged belligerents.

Unlike most previous U.S. military commissions, which could also sit as military government or martial law courts, the Guantánamo tribunals only have law of war jurisdiction. The only legitimate venue for applying U.S. domestic law is thus ordinary civilian criminal courts.

E. *Classification of the Conflict*

International law divides armed conflicts into two basic classifications, "international" and "non-international." The full set of law of war rules applies only to the former. Historically, nations refused to accept international legal regulation of their dealings with rebels or insurgents on their own territory, so non-international conflicts fell outside the scope of legal regulation they agreed to in dealings with other nation-states.[119] This was justifiable given that these conflicts were contested within the nation's own territory where its sovereignty was absolute, and against individuals breaching a duty of loyalty by engaging in violence against the state.[120] States reserved the right to deal with such forces as traitors or common criminals.[121] The law of war thus made no provision for recognizing non-international conflict participants as belligerents or conferring

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[116] DINSTEIN, *supra* note 98, at 31.

[117] NILS MELZER, INT'L COMM. OF THE RED CROSS (ICRC), INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 83–84 (2009) (footnotes omitted).

[118] *Ex parte* Quirin, 317 U.S. 1, 30–31, 35–36 (1942).

[119] *See, e.g.*, EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 32–47 (2008) (providing background on the development of law regulating non-international conflict).

[120] *See id.*

[121] *See id.*

protections such as entitlement to prisoner of war (POW) status upon them.[122] The state could rely on its domestic law to legitimize the government's use of force.[123] International law also provided no specific authority for detention or trial of the opposition forces, again leaving that to the nation's domestic laws.[124]

Nations engaged in non-international conflicts sometimes found it advantageous to apply international armed conflict measures such as the right to blockade, or to parole or exchange captured fighters under traditional POW rules.[125] The American Civil War is a classic example. In these cases nations could elect to recognize the adversary as a belligerent and draw upon authority from the international law of war; they were then also subject to the law's concurrent limitations on the exercise of that authority.[126]

The Spanish Civil War led states to recognize the desirability of extending some humanitarian protections to non-international conflict participants although most still refused to extend the full international law of war rules to them.[127] Common Article 3 of the 1949 Geneva Conventions[128] and Additional Geneva Protocol II of 1977[129] constitute the international community's limited extension of international regulation to internal conflicts to date.

The differences between international and non-international conflict are particularly evident with respect to war crimes. Historically war crimes were defined only for international conflicts; a limited set of offenses is now applicable to non-international conflicts.[130] The statute of the International Criminal Tribunal for Rwanda (ICTR), adopted by the United Nations Security Council in 1994, was the first binding legal measure establishing individual criminal liability for non-international violations.[131] The ICTR Statute listed only eight specific non-international conflict war crimes (although

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[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See* LA HAYE, *supra* note 119, at 35–37.

[126] *See id.* Third states could also recognize a belligerency invoking neutrality law provisions which would then allow them to deal even-handedly with both sides. *Id.*

[127] *See id.*

[128] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[129] AP II, *supra* note 97, at Part II.

[130] The U.S. War Crimes Act of 1996, for example, criminalizes numerous violations of international armed conflict rules, including all grave breaches of the 1949 Geneva Conventions and violations of four different Hague Land Warfare Regulations, but only nine specific crimes applicable to non-international conflict. *See* 18 U.S.C. § 2441 (2012).

[131] *See* LA HAYE, *supra* note 119, at 1.

acknowledging the list was not exclusive).[132] Article 8 of the Rome Statute of the International Criminal Court (ICC) now defines thirty-four war crimes applicable in international conflict but only nineteen for non-international.[133] Both the ICC Elements of Crimes, and the jurisprudence of other modern international criminal tribunals, require that the classification of the conflict be established as an element of proof in order to convict.[134]

This element is entirely missing from the Guantánamo prosecutions. Neither the MCA,[135] nor its predecessor list of crimes, Military Commission Instruction No. 2,[136] made any effort to associate offenses with conflict typology. Moreover, the government itself lacks coherency on the classification of the current conflict.

The U.S. attack on Afghanistan clearly initiated an international conflict, and the United States acknowledged the applicability of the Geneva Conventions even while concluding that neither Taliban nor al Qaeda fighters qualified for prisoner of war status.[137] The Supreme Court then muddied the waters in 2006 by deciding *Hamdan v. Rumsfeld* on the basis that Common Article 3 governing non-international conflict applied, which was sufficient to invalidate the Guantánamo trials.[138] Following *Hamdan*, commentators began referring to the conflict as non-international and the DOD declared itself accountable only for conforming detainee treatment to Common Article 3's limited mandates.[139] The Obama Administration apparently recognizes that neither non-international conflict rules nor U.S. domestic law provide the requisite legal authority for indefinite detention; it contends that "[p]rinciples derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has

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[132] Comm'n of Experts established pursuant to Security Council resolution 935 (1994), Final Rep., transmitted by letter dated Dec. 9, 1994 from the Secretary-General addressed to the President of the Security Council, 41–42, U.N. Doc. S/1994/1405 (Dec. 9, 1994).

[133] Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[134] *See* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES art. 8 (2011), *available at* http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf, *archived at* http://perma.cc/4CUV-FCCC; *see also* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgement, ¶¶ 100–02 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

[135] *See* Military Commissions Act of 2009, 10 U.S.C. § 950(t) (2012).

[136] *See* DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2 (2003).

[137] Memorandum from George W. Bush, President of the United States, to the Vice President et al. (Feb. 7, 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf, *archived at* http://perma.cc/S7LQ-23V2 (regarding the "[h]umane [t]reatment of Taliban and al Qaeda [d]etainees").

[138] Hamdan v. Rumsfeld, 548 U.S. 557, 628–35 (2006) (plurality opinion).

[139] Memorandum from Gordon England, Deputy Sec'y of Def., to the Sec'ys of the Military Dep'ts et al. (July 7, 2006), *available at* http://www.defense.gov/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf, *archived at* http://perma.cc/MVE8-CCQS.

authorized for the current armed conflict."[140] But, it has only directed that Guantánamo "conditions of confinement" comply with Common Article 3.[141] After Obama announced U.S. recognition of AP I Article 75 as customary international law, an anonymous Administration source said that it would not be applied to al Qaeda, implicitly confirming the government viewed that conflict as non-international.[142]

But law is a two-way street. If the U.S. government need only comply with non-international standards, then its adversary must only do so as well. The Guantánamo commissions should thus be estopped from prosecuting any offense not clearly established as a war crime in non-international conflict. And, in any case, the commissions must incorporate conflict typology into their elements of proof to conform with current law of war rules.

III. CONTEMPORARY FAIR TRIAL STANDARDS

What standards must a military commission trial meet today to be considered "fair"? There were essentially no codified international fair trial standards when military commissions were last used following World War II, other than the 1929 Geneva Prisoner of War Convention's requirements that a "[s]entence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power"[143] and that the "protecting Power" representing the prisoner's nation be notified.[144] But, these protections were rendered moot by a U.S. interpretation—upheld by the Supreme Court in *Yamashita* and subsequently adopted by other Allied nations—that the protections only applied to the trial of post-capture offenses.[145] Nevertheless, U.S. and Allied military tribunals tried Japanese personnel for denying fair trials to both prisoners of war and civilians relying on customary international law due to the belief that Geneva Convention rules did not apply to these situations.[146]

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[140] *See, e.g.*, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re* Guantanamo Bay Detainee Litigation, 787 F. Supp. 2d 5 (D.D.C. Mar. 13, 2009).

[141] Exec. Order No. 13,492, Review And Disposition Of Individuals Detained At The Guantánamo Bay Naval Base And Closure Of Detention Facilities, 3 C.F.R. 203, § 6 (2010).

[142] *See* Julian E. Barnes, *Geneva Protections for al Qaeda Suspects? Read the Fine Print*, WALL ST. J. (Mar. 14, 2011, 6:11 PM), http://blogs.wsj.com/washwire/2011/03/14/geneva-protections-for-al-qaeda-suspects-read-the-fine-print/?mod=google_news_blog, *archived at* http://perma.cc/N2MZ-S9MB.

[143] Convention Relating to the Treatment of Prisoners of War art. 63, July 27, 1929, 47 Stat. 2021.

[144] *See id.* arts. 65–66.

[145] *See* 15 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 99–100 (1949).

[146] *Id.* at 99–100, 113.

A. *Modern Criminal Procedure Standards*

The international community has endeavored to fill the treaty-coverage gap with respect to fair trial standards in the years since World War II. More explicit requirements were incorporated in the 1949 Geneva Conventions dealing with prisoners of war (Third Convention)[147] and civilians (Fourth Convention),[148] while Common Article 3 addresses non-international conflicts in all four conventions, requiring that trials be conducted by a "regularly constituted court, affording all the judicial guarantees . . . recognized as indispensable by civilized peoples."[149] The additional Geneva Protocols of 1977 provided more specifics in provisions applicable to both international (Article 75 of AP I)[150] and non-international (Article 6 of AP II)[151] conflict. The military commissions' Chief Prosecutor, Brigadier General Mark Martins, concedes that both are now recognized by the United States as binding customary international law. [152] Martins has helpfully now provided a list of these "fundamental guarantees of fairness and justice," which he asserts that the Guantánamo commissions meet:

> The accused is presumed innocent. The prosecution must prove his guilt beyond a reasonable doubt. The accused has: the right to notice of the charges; the right to counsel and choice of counsel; the right to be present during the proceedings; the right against self-incrimination; protection against use of statements obtained through torture or cruel, inhuman, or degrading treatment; the requirement that admitted statements be voluntary; the right to present evidence, cross-examine witnesses, and compel attendance of witnesses in his defense; the right to exculpatory evidence that the prosecution may have as to guilt, sentencing, and the credibility of adverse witnesses; the right to an impartial decision-maker; the right to exclusion of evidence that is not reliable or probative or that will result in unfair prejudice; the right to qualified self-representation; protection against double jeopardy and against ex post facto laws; and the right to appeal to a federal civilian court consisting of independent judges, and ultimately to the United States Supreme Court.[153]

Two important observations are in order. First, Parts IV and V of this Article will demonstrate commission failings with respect to several of these core requirements, including *inter alia*, denial of right to counsel of choice, use

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147 *See* Geneva III, *supra* note 128, arts. 84, 102, 105–06.

148 *See* Geneva IV, *supra* note 128, arts. 71–72.

149 *See* Geneva I, *supra* note 128, art. 3.

150 AP I, *supra* note 97, art. 75.

151 AP II, *supra* note 97, art. 6.

152 Mark Martins, Chief Prosecutor, U.S. Military Comm'n, The Use of Military Commissions for Trials of Al-Qaeda and Associated Forces, Address at Chatham House 5 (Sept. 28, 2012), *available at* http://www.chathamhouse.org/sites/files/chathamhouse/public/Meetings/Meeting%20Transcripts/280912Martins.pdf, *archived at* http://perma.cc/6GGP-NEC5.

153 *Id.* at 6–7.

of potentially tainted evidence including statements obtained via coercion, and prosecutions based on ex post facto charges. So the commissions do not actually measure up to the standards that the prosecution acknowledges that they must. Second, these procedural measures are *necessary* conditions for a fair trial; each item in this list is mandated either by current international law, the MCA, or both.[154] But they are not *sufficient*. Failure to satisfy personal or subject matter jurisdiction, for example, or convictions based on unreliable evidence will condemn a trial to failure just as surely as will violation of a formal procedural mandate. And the treaty-based rules identified by Martins do not address still more recent legal developments such as the requirement enforced by contemporary international criminal tribunals for "equality of arms" between the prosecution and defense, or the need to distinguish between crimes in international and non-international conflicts.[155]

B. *Requirement for Subject Matter Jurisdiction*

It is a longstanding principle of justice that a court must have valid jurisdiction to conduct a trial. The U.S. Supreme Court holds:

> Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.[156]

The international mandate for a law of war tribunal to have subject matter jurisdiction is implicit in the ex post facto prohibitions. Article 75 of Additional Geneva Protocol I, for example, declares "[n]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed . . . ."[157]

C. *Proof via Credible Evidence*

There is little doubt that modern American civilian courts comply with international procedural standards. Yet the growing body of documented

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[154] *See, e.g.*, International Covenant on Civil and Political Rights arts. 14–15, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976); sources cited *supra* notes 6, 97 & 128.

[155] *See infra* Part IV.

[156] *In re* Sawyer, 124 U.S. 200, 220 (1888) (citation omitted).

[157] AP I, *supra* note 97, art. 75, § 4(c).

erroneous convictions, including 146 exonerations of death row prisoners,[158] whose cases should theoretically have been subject to the highest degree of scrutiny at trial, show that judicial credibility requires more than just notional compliance with procedural standards.

Despite concerns with some procedural and substantive aspects, the Nuremberg International Military Tribunal's trial of senior Nazi leaders has fared reasonably well in the historical spotlight.[159] The primary reason for this was lead prosecutor Robert Jackson's insistence on using only the most credible possible proof of the almost incomprehensible Nazi wrongdoing.[160] Jackson placed primary reliance on the Germans' own documentation of their acts—using official papers, film footage, and still photos.[161] Commentators note this made for "boring" trial days because the tribunal required documents to be read into evidence.[162] Greater reliance on live witnesses would have produced more interesting court sessions, but Jackson was concerned that many would necessarily be persecution victims "hostile to the Nazis, . . . chargeable with bias, faulty recollection, and even perjury."[163] And he felt that use of accomplice testimony "always gives the conviction a bad odor. We decided that it would be better to lose our case against some defendants than to win by a deal that would discredit the judgment."[164] It worked. As Jackson noted in his post-trial report to the President,

> We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. . . . [T]heir fate leaves no incentive to emulation of their example.[165]

The Guantánamo commissions, in contrast are placing significant reliance on detainee admissions despite well documented U.S. coercive interrogation

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[158] *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last updated Sept. 3, 2014), *archived at* http://perma.cc/Z4G5-7965.

[159] Seven German organizations were also tried at Nuremberg, with four "convicted." THE NAZI WAR CRIMES & JAPANESE IMPERIAL GOV'T RECORDS INTERAGENCY WORKING GRP., NATIONAL ARCHIVES, THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, (IMT) NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, http://www.archives.gov/iwg/research-papers/trial-of-war-criminals-before-imt.html, *archived at* http://perma.cc/FQ7L-CN8M. This aspect of Nuremberg has not stood up to historical scrutiny and is not discussed further in this Part.

[160] LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT 16–18 (2001).

[161] *Id.* at 12.

[162] *Id.* at 16–18.

[163] Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, TYRANNY ON TRIAL xxix, xxxv (1999).

[164] *Id.* at xxxvi.

[165] Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L.Q. 338, 343 (1947).

practices.[166] They have even accepted a plea agreement in which a detainee tortured by the CIA has promised testimony in exchange for an assured release from what might otherwise be lifelong preventive detention.[167]

The Nuremberg tribunal sat nearly seventy years ago, before the first incorporation of fair trial standards into international human rights law or the reformation of U.S. constitutional criminal procedure under the Warren Court. Nuremberg nevertheless set a high standard for the Guantánamo trials. Clearing that bar is insufficient for the commissions to claim "victory," they must meet twenty-first century judicial standards to merit approbation. But falling short of the Nuremberg legacy will be prima facie evidence of failure.

IV. PROCEDURAL ISSUES WITH THE GUANTÁNAMO COMMISSIONS

Commissions conducted under the current MCA represent a substantial improvement over the early Bush Administration trial rules. But are they now sufficiently fair to withstand judicial scrutiny and merit public respect for their verdicts? In a word, no. They remain flawed in terms of both their written rules and actual trial practice. In some areas this stems from MCA language permitting downward departures from regular federal court or court-martial practices. In other areas, the government is failing to apply statutory MCA language in good faith, defeating congressional efforts to correct commission shortcomings.

This Part addresses six areas of concern including the lack of equal protection, excessive concentration of authority in the hands of a civilian convening authority, denial of representation by counsel of choice, inequality between prosecution and defense, government abuse of classification rules, and the potential admission of evidence obtained by coercion. Several of these defects are interrelated, and their combination undermines the commissions' ability to deliver fair trials.

A. *Denial of Equal Protection*

U.S. military justice has been permitted to be more summary than American civil courts based on exigencies of military service, not to facilitate convictions via substandard justice. Historically, military officers have elected to follow higher standards than Congress has mandated, choosing, for example, to adopt

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[166] *See, e.g.*, Andy Worthington, *Bin Laden Driver Salim Hamdan Gets Mixed Verdict in First Military Commission Trial*, ALTERNET (Aug. 6, 2008), http://www.alternet.org/story/94133/bin_laden_driver_salim_hamdan_gets_mixed_verdict_in_first_military_commission_trial, *archived at* http://perma.cc/8SRF-RV4U.

[167] *See* Scott Shane, *Testimony on Al Qaeda Is Required in Plea Deal*, N.Y. TIMES (Feb. 29, 2012), http://www.nytimes.com/2012/03/01/us/majid-khan-pleads-guilty-to-terrorism-plots-in-military-court.html?_r=0, *archived at* http://perma.cc/XA9F-SPCL.

common law rules of evidence and allowing defendants assistance of counsel even when prosecutions were conducted by lay officers.[168]

All previous U.S. military tribunals could try Americans.[169] The Guantánamo military commissions, applying lower standards of justice only to foreign nationals, are thus unprecedented. Even if these treaties are not directly applicable to Guantánamo detainees, the fact that this approach violates the Third Geneva Convention,[170]—as well as the International Covenant on Civil and Political Rights' mandate that "[a]ll persons shall be equal before the courts and tribunals,"[171]—suggests that this disparity will undermine the tribunals' international credibility. And, as Jordan Paust argues, this disparate treatment likely violates bilateral treaties with Pakistan and Yemen.[172] Based on the *Boumediene* decision finding that the constitutional right to habeas corpus extends to Guantánamo and the general holdings of the *Insular Cases* it cites,[173] federal courts will be called upon to identify the set of "fundamental rights" that apply to Guantánamo. Even if federal judges predictably find the full Bill of Rights inapplicable, equal protection is arguably such a fundamental right that U.S. courts should overturn tribunals trying only foreign nationals.

B. *Multiple Roles and Civilian Status of the Convening Authority*

The MCA bases military commission procedure on "the procedures for trial by general courts-martial under . . . the Uniform Code of Military Justice,"[174] although it allows the Secretary of Defense to designate "any officer or official of the United States" to convene them.[175] To date all military commission Convening Authorities have been civilians, including two retired judge advocates and one former Court of Appeals for the Armed Forces (CAAF) judge.[176] The UCMJ, in contrast, restricts convening courts-martial to officers

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168 Glazier, *supra* note 42, at 2025–26; Glazier, *supra* note 35, at 53–54.

169 *See, e.g.*, Glazier, *supra* note 35, at 31–39, 47–56 (documenting military commission trials of Americans through World War II).

170 Geneva III, *supra* note 128, art. 102.

171 ICCPR, *supra* note 154, art. 14.

172 Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT'L L.J. 367, 381 (2012).

173 Boumediene v. Bush, 553 U.S. 723, 756–59 (2008) (discussing Insular Cases' holdings that guarantees of some fundamental constitutional rights apply even in "unincorporated" territory where the full Constitution is inapplicable).

174 10 U.S.C. § 948b(c) (2012).

175 10 U.S.C. § 948h (2012).

176 The first convening authority, Deputy Secretary of Defense Paul Wolfowitz, never convened any commissions before being replaced by retired Army judge advocate John D. Altenburg, Jr. *See* David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 156, 158 (2008). Altenburg was replaced by former CAAF Judge Susan Crawford, *id.* at 178–79, who was superseded by retired Navy Judge Advocate General Bruce MacDonald in 2010. News Release, Dep't of Def., Former Judge Advocate General of the Navy to Oversee Military

actually in command billets and the only two civilians in the military chain of command, the President and Secretary of Defense.[177]

The convening authority performs multiple roles in both systems, including approving charges, appointing the trial panel (the rough military approximation of a jury that decides guilt and punishment), approving plea bargains, and performing the initial post-trial review.[178] The Office of Military Commissions Convening Authority has the additional power of selecting the chief judge, who then assigns trial judges from "a pool of certified military judges nominated for that purpose" by the service Judge Advocates General.[179] Current Chief Judge Colonel James Pohl has detailed himself to the ongoing 9/11 proceedings;[180] the convening authority has thus effectively picked the judge in the highest profile case. This is of particular concern given that Pohl is a retired officer recalled to active duty to serve on the commissions for one year at a time.[181] He can be returned to retired status, at a significant pay cut, on fairly short notice.[182] This is not merely a theoretical concern; several years ago, the first commissions judge, Colonel Peter Brownback, was removed in the midst of Guantánamo proceedings after making several rulings that displeased the government.[183]

Commission Process (Mar. 25, 2010), *available at* http://www.defense.gov/Releases/Release.aspx?ReleaseID=13405, *archived at* http://perma.cc/626R-L3UJ.

[177] *See* 10 U.S.C. § 822 (2012).

[178] *See* Charlie Savage, *Amid Criticism, Pentagon Seeks Overhaul of the Court-Martial System*, N.Y. TIMES (Apr. 8, 2013), http://www.nytimes.com/2013/04/09/us/politics/pentagon-to-ask-congress-to-overhaul-court-martial-system.html, *archived at* http://perma.cc/HV64-NV8T; *Organization Overview*, OFFICE OF MILITARY COMM'NS, http://www.mc.mil/ABOUTUS/OrganizationOverview.aspx (last visited Sept. 24, 2014), *archived at* http:// perma.cc/LEV6-TMWZ.

[179] OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, R.M.C. 503(b) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT; Defense Motion to Dismiss at 1–2, United States v. Khadr, AE134 (Military Comm'ns Trial Judiciary July 11, 2008).

[180] Carol Rosenberg, *9/11 Judge Has Handled Tough Cases Before*, MIAMI HERALD (Apr. 28, 2012, 5:00 AM), http://www.miamiherald.com/incoming/article1939992.html, *archived at* http://perma.cc/84V3-GF6P.

[181] *Id.*

[182] *See* Warren Richey, *Guantánamo Judge Refuses to Step Aside*, CHRISTIAN SCI. MONITOR (July 17, 2012), http://www.csmonitor.com/USA/2012/0717/Guantanamo-judge-refuses-to-step-aside, *archived at* http://perma.cc/4FGF-B55Q. The article states Pohl would face a twenty percent pay reduction if returned to inactive retired status, but this reflects only base pay. Military personnel on active duty also receive a substantial tax-free monthly housing allowance; in the case of a Colonel (O-6) with at least one dependent assigned to the metropolitan Washington D.C. area—where the Office of Military Commissions is located—this amounts to an additional $3,132.00 per month lost if Pohl reverts to inactive status. *See* DEP'T OF DEF., 2014 BAH RATES–WITH DEPENDENTS (2014), *available at* http://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/BAH/PDF/2014/2014-With-Dependents-BAH-Rates.pdf, *archived at* http://perma.cc/N7T3-58Y4.

[183] Richey, *supra* note 182.

Court-martial judges, in contrast, are detailed by service Judge Advocate Generals and convening authorities have no influence over their selection.[184]

The convening authority's multiple roles are problematic even in regular military trials. While some commentators erroneously assert that U.S. courts-martial are the "gold-standard" of military justice,[185] they actually fail to meet modern international judicial standards. Other Western democracies now reject the multiple roles permitted U.S. convening authorities[186] and have either changed their law to eliminate this concentration of authority or abolished separate military justice systems entirely.[187]

The convening authority's multiple functions stem from the courts-martial's traditional role in maintaining military discipline. The founders recognized that American independence (and perhaps their own lives) depended upon the Army holding together under harsh Revolutionary War conditions. To instill needed discipline, John Adams persuaded Congress to adopt the British Articles of War essentially verbatim in 1776.[188] The Articles recognized courts-martial as needed wherever the military was deployed to promptly resolve charges and punish offenders.[189] Senior field commanders were thus permitted to both establish courts-martial and review their judgments.[190] Because commanders are concurrently responsible for the welfare of their troops, they have a countervailing interest in seeing justice done by the defendants. Absent these unique considerations, the convening authority's combination of executive and judicial functions should be unacceptable.[191] There is no credible justification

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[184] 10 U.S.C. § 826(c) (2012).

[185] *Implications of the Supreme Court's* Boumediene *Decision for Detainees at Guantanamo Bay, Cuba: Non-Governmental Perspective: Hearing Before the H. Comm. on Armed Servs.*, 110th Cong. 15, 25 (2008) (statement of Colonel Morris Davis; statement of Professor Neal Katyal).

[186] This outcome was forced on Britain by the European Court of Human Rights in *Findlay v. United Kingdom*, 30 Eur. Ct. H.R. 263, 280–83 (1997) and reached by the Canadian Supreme Court interpreting Charter of Rights and Freedoms language based on the ICCPR in *R. v. Généreux*, [1992] 1 S.C.R. 259, 317–19. Australia legislated a "chapter III" military court with the same constitutional protections as its other federal courts. *See, e.g.*, Naomi Woodley, *Government Announces New Military Court*, ABC NEWS (May 24, 2010, 8:37 PM), http://www.abc.net.au/news/stories/2010/05/24/2907931.htm, *archived at* http://perma.cc/L9JL-YEGU.

[187] Germany and the Netherlands now try military cases in civilian courts. *See* Friedhelm Krueger-Sprengel, *The German Military Legal System*, 57 MIL. L. REV. 17, 18–19 (1972); Arne Willy Dahl, Presentation at the SJA/LOS Conference in Garmisch: International Trends in Military Justice 3 (Jan. 2008), *available at* http://www.ismllw.org/PDF/2008-01-International%20 Trends%20in %20Military %20 Justice-UK.pdf, *archived at* http://perma.cc/62L7-ZSY8.

[188] *See* DAVID MCCULLOUGH, JOHN ADAMS 141, 160 (2001).

[189] 5 J. CONT. CONG. 788, 802 (1776).

[190] *Id.*

[191] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) ("The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the

for the commissions' concentration of these powers in the hands of a civilian outside any chain of command. In reviewing past trials, the Court has specifically upheld the authority of "commanders" to convene commissions in their "theater of war."[192] But the Guantánamo detainees have been removed half-way around the world from the "theater" in which they were captured. Courts-martial's speedy trial rules are inapplicable, so there is no need for quick action,[193] while actual commission events have revealed the problematic nature of these multiple roles, including the close alliance of the convening authority with the prosecution.[194]

C. *Representation by Counsel of Choice*

In its seminal 1932 decision on the right to counsel, *Powell v. Alabama*, the Supreme Court declared:

> The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . [T]hough he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[195]

A logical corollary is that the defendant must trust their counsel for an effective defense to be mounted. The Powell Court went on to note that "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure *counsel of his own choice*."[196] In a 2006 opinion, Justice Scalia held that representation by chosen counsel is such a fundamental Sixth Amendment right that "[n]o additional showing of prejudice is required to make the violation 'complete.'"[197]

Even though the "law" employed by the Guantánamo commissions is "international," the MCA limits defense counsel to military judge advocates and

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Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted . . . .").

[192] Hamdan v. Rumsfeld, 548 U.S. 557, 563 (2006) (plurality opinion) (noting law of war commissions were limited to "offenses committed within the convening commander's field of command"); *In re* Yamashita, 327 U.S. 1, 10 (1946) (holding that convening military commissions was a command function).

[193] 10 U.S.C. § 948b(d)(1)(A) (2012).

[194] *See, e.g.*, Glazier, *supra* note 176, at 184.

[195] Powell v. Alabama, 287 U.S. 45, 68–69 (1932). This language was repeated in the Court's major 1963 right to counsel decision, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[196] *Powell*, 287 U.S. at 53 (emphasis added).

[197] United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

civilian attorneys who must be U.S. citizens.[198] Yet many detainees distrust all Americans. Even if the Sixth Amendment is formally inapplicable to Guantánamo, the right to counsel of choice is so globally recognized as to logically now be a fundamental due process requirement for any criminal trial. It was specifically enumerated in the 1919 Versailles Treaty's provision for Allied trials of German war criminals.[199] It was accorded to the Nuremberg defendants who were each represented by "German counsel of his choice, irrespective of whether the lawyer selected had been a member of the Nazi Party or might himself be subject to indictment for war crimes."[200] Defendants at the International Military Trial for the Far East were allowed primary representation by Japanese counsel assisted by a team of American lawyers.[201] And Israel paid $30,000 for Adolph Eichmann to be defended by a German attorney of his choice during his 1960 trial.[202]

This right is now enshrined in international agreements, including the International Covenant on Civil and Political Rights[203] and modern law of war treaties, such as the Third and Fourth Geneva Conventions of 1949;[204] the governing statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY)[205] and Rwanda (ICTR);[206] and the Rome Statute of the ICC.[207]

To facilitate choice of counsel, the ICTY and ICTR would waive their standing requirements for competence in an official language of the court for lawyers speaking the accused's native language, and even permit representation by law professors not admitted to a bar.[208]

Choice of counsel has been a *major* issue at the Guantánamo commissions. Several of those tried to date, including both al Bahlul and Khadr, expressed

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[198] 10 U.S.C. § 948k (2012); OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, R.M.C. 502(d)(2)–(3) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT.

[199] Treaty of Versailles art. 229, June 28, 1919, 2 U.S.T. 43.

[200] HARRIS, *supra* note 163, at 32.

[201] ARNOLD C. BRACKMAN, THE OTHER NUREMBERG 72–75 (1987).

[202] *The Trial of Adolf Eichmann*, HOLOCAUST EDUC. & ARCHIVE RESEARCH TEAM (2007), http://www.holocaustresearchproject.org/trials/eichmanntrial.html, *archived at* http://perma.cc/W5UG-9QP7. Servatius had represented Fritz Sauekel and the Leadership Corps of the Nazi Party at the Nuremberg tribunal. *See* HARRIS, *supra* note 163, at xxvii–iii.

[203] ICCPR, *supra* note 154, art. 14(3)(b).

[204] Geneva III, *supra* note 128, art. 105; Geneva IV, *supra* note 128, art. 72.

[205] S.C. Res. 827, ¶ 1, U.N. Doc. S/RES/827 (May 25, 1993); U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1933)*, art. 21(4)(d), U.N. Doc. S/25704 (May 3, 1993).

[206] S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[207] Rome Statute, *supra* note 133, art. 67(1)(b).

[208] Sylvia De Bertodano, *Defence Counsel*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 292, 293 (Antonio Cassese ed., 2009).

concerns about representation by Americans they did not trust,[209] particularly uniformed military officers, and pleaded for co-national counsel.[210] This problem is exacerbated by military rotational assignment practices which result in many detainees seeing assigned counsel come and go. Most recently, the Army forced Khalid Sheik Mohammed's long-time military attorney, Major Jason Wright, to give up his position as designated military counsel by mandating that he either leave the defense team and attend a nine-month graduate program or resign his commission.[211] Wright chose to resign.[212]

Whether always deliberate or not, many policies implemented by the Joint Task Force (JTF) responsible for Guantánamo detention operations are highly detrimental to effective representation.[213] Given the serious inconveniences involved with travel to and from Guantánamo, for example, defense attorneys realistically need the ability to communicate remotely with their clients between court sessions. But, JTF rules forbid telephonic communication,[214] and the task force commander decreed in 2011 that attorney–client mail would be read, rather than merely inspected for contraband.[215] As a result, the chief defense counsel barred his staff from writing to clients.[216] Recent revelations of monitoring devices disguised as smoke detectors in rooms used for attorney–client meetings and the subjection of detainees to intrusive groin searches

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[209] For a discussion of some reasons why detainees are hesitant to trust defense counsel, see JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 204 (2006).

[210] *See* Andy Worthington, *David Frakt: Military Commissions "A Catastrophic Failure,"* ANDY WORTHINGTON BLOG (Aug. 8, 2009), http://www.andyworthington.co.uk/2009/08/08/david-frakt-military-commissions-a-catastrophic-failure/, *archived at* http://perma.cc/52VR-33R7; *Omar Ahmed Khadr*, TRIAL, http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/ profile/455/action/show/ controller/Profile/tab/legal-procedure.html (last visited Aug. 24, 2014), *archived at* http://perma.cc/644X-YVEM.

[211] Gabriel Urza, *Indefensible: Why Khalid Sheikh Mohammed's Lawyer Is Leaving the Defense Team—And the Army*, SLATE (Aug. 26, 2014, 5:24 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/khalid_sheikh_mohammed_s_guantanamo_defense_lawyer_jason_wright_is_departing.html, *archived at* http://perma.cc/ZJ6M-UG5B.

[212] *Id.*

[213] *See, e.g.*, Joshua W. Denbeaux, *Lieutenant Commander Feces Cocktail*, *in* THE GUANTÁNAMO LAWYERS, *supra* note 69, at 70–71.

[214] Wells Bennett, *Another Order in the 9/11 Case, This One on Legal Mail*, LAWFARE (Nov. 6, 2013, 5:04 PM), http://www.lawfareblog.com/2013/11/another-order-in-the-911-case-this-one-on-legal-mail/, *archived at* http://perma.cc/A7K4-LD3T.

[215] Memorandum from D.B. Woods, Rear Admiral, U.S. Navy, Order Governing Written Communications Management for Detainees Involved in Military Commissions (Dec. 27, 2011), *available at* http://online.wsj.com/public/resources/documents/gitmo122811.pdf, *archived at* http://perma.cc/BG5N-4BQ3.

[216] *See, e.g.*, Jamie Reese, *Guantanamo Chief Defense Counsel Refuses to Allow Review of Attorney Letters*, JURIST (Jan. 12, 2012, 12:44 PM), http://jurist.org/paperchase/2012/01/guantanamo-chief-defense-counsel-refuses-to-allow-review-of-attorney-letters.php, *archived at* http://perma.cc/W6T6-DQ2R.

before meetings with counsel have further impeded attorney–client interactions.[217]

The MCA requirements for civilian defense counsel are *more* stringent than those set for courts-martial.[218] Yet, commission rules are *sui generis* with charges supposedly sourced in international law; no national lawyer brings wholly relevant experience to the commissions. Nevertheless, a civilian may represent a Guantánamo defendant only if he or she:

> (A) is a United States citizen;
> (B) is admitted to the practice of law in a State, district, or possession of the United States, or before a Federal court;
> (C) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;
> (D) has been determined to be eligible for access to information classified at the level Secret or higher; and
> (E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.[219]

A civilian can represent a court-martial defendant, in contrast, without being a U.S. citizen or even a member of any U.S. bar if she just has "appropriate training and familiarity with the general principles of criminal law which apply in a court-martial."[220] The amplifying Manual for Courts-Martial lists factors military judges should consider when authorizing foreign representation, including:

> (i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;
> (ii) whether the accused wants the counsel to appear with military defense counsel;
> (iii) the familiarity of the counsel with spoken English;

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[217] *See, e.g.*, Jeff Kaye, *Will Bogdan's Claims of Insufficient Staffing Cause Al Qaeda to Attack Guantánamo?*, DISSENTER (Aug. 8, 2013, 12:48 AM), http://dissenter.firedoglake.com/2013/08/08/will-bogdans-claims-of-insufficient-staffing-cause-al-qaeda-to-attack-guantanamo/#, *archived at* http://perma.cc/B74Z-J8T6.

[218] *Compare* OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, R.M.C. 502(d)(2)–(3) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT, *with* JOINT SERVICE COMM. ON MILITARY JUSTICE, U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL, R.C.M. 502(d) (2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf, *archived at* http://perma.cc/B8WV-EK85.

[219] 10 U.S.C. § 949c(b)(3) (2012).

[220] JOINT SERVICE COMM. ON MILITARY JUSTICE, U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL, R.C.M. 502(d)(3)(B) (2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf, *archived at* http://perma.cc/B8WV-EK85.

> (iv) practical alternatives for discipline of the counsel in the event of misconduct;
> (v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and
> (vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.[221]

This last criterion is exactly why representation by foreign counsel is so strongly desired by Guantánamo detainees and should be accorded if trials are to be credible. Any legitimate concerns about defense lawyers needing to access classified information could be addressed by requiring that an appropriately cleared U.S. attorney remain part of each defense team as was done at Tokyo; it does not require denying a detainee the right to select his primary counsel.

The MCA mirrors the UCMJ in allowing defendants to request specific U.S. military counsel if "reasonably available."[222] But, this statutory authorization has been effectively gutted by the DOD; its Manual for Military Commissions says that an officer is "reasonably available" for such assignment only if already "assigned to the Office of Military Commissions to perform defense counsel duties at the time the request is received."[223] The comparatively small pool of attorneys assigned to the defense office, coupled with the real potential for conflicts arising from an attorney representing more than one detainee, renders the statutory language effectively meaningless. Khadr previously requested, and was granted, representation by Marine Lieutenant Colonel Colby Vokey, then a senior West Coast-based Marine Corps defense counsel.[224] This would not be permissible under current DOD rules.

Self-representation has also been a recurring Guantánamo issue, but would be far less significant if defendants could choose their own counsel. The right of self-representation is widely recognized in international law and explicitly authorized by the MCA subject only to requirements that a defendant "knowingly and competently waives the assistance of counsel"[225] and maintains proper courtroom decorum.[226] Despite the plain MCA language, no Guantánamo detainee has been allowed to represent himself at an actual trial

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[221] *Id.* at R.C.M. 502(d)(3)(B), discussion.

[222] *See* 10 U.S.C. § 838(b)(3)(B) (2012) (authorizing court-martial defendant to select "reasonably available" military counsel); 10 U.S.C. § 949c(b)(2) (2012) (authorizing military commission defendants to select "reasonably available" military counsel).

[223] OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, R.M.C. 506(c)(1) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT.

[224] Vokey represented Khadr for part of 2006–2007. *See* MICHELLE SHEPHARD, GUANTANAMO'S CHILD: THE UNTOLD STORY OF OMAR KHADR 182, 187–93, 210–11 (2008).

[225] 10 U.S.C. § 949a(b)(2)(D) (2012).

[226] 10 U.S.C. § 949a(b)(4)(A) (2012).

session, providing another reason for concern about the tribunals' commitment to following applicable law.[227]

D. *Inequality Between Defense and Prosecution*

Prosecutors routinely enjoy overall resource advantage vis-à-vis the defendants in most trials. Not surprisingly, Guantánamo practice features combined defense teams substantially outnumbered and with less resources than the prosecution. Of more concern is the inequality of the two sides before the commission. Contemporary international criminal tribunals address this issue under the rubric "equality of arms," requiring that the court ensure equivalent treatment with respect to matters within its control.[228]

This basic concept finds some support in U.S. courts-martial; the UCMJ provides, for example, that defense counsel "shall have *equal* opportunity to obtain witnesses and other evidence."[229] But unlike the UCMJ, the MCA grants defendants only "a *reasonable* opportunity" in this regard,[230] although directing that "[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution."[231]

Commission motions practice reveals prosecution efforts to obstruct defense access to witnesses and evidence on a regular basis. The MCA imposes an affirmative duty to disclose any exculpatory or mitigating evidence "that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant."[232] Nevertheless, defense attorneys have had to file repetitive motions to compel discovery, which are frequently opposed, and the government has imposed obstacles to defense access to materials that judges have granted.[233] A particular concern is the fact that the defense is dependent on the government to identify witnesses to detainee interrogations, but the prosecution has zealously fought such discovery requests and also sought to

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[227] Email from Adam Thurschwell, Gen. Counsel, Office of the Chief Def. Counsel, Military Comm'ns, to author (Sept. 4, 2014, 8:03 PM) (on file with author).

[228] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of the Appeals Chamber, ¶ ¶ 29–56 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); *see generally* Christoph Safferling, *Equality of Arms*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 208, at 311–12.

[229] 10 U.S.C. § 846 (2012) (emphasis added).

[230] 10 U.S.C. § 949j(a)(1) (2012) (emphasis added).

[231] *Id.*

[232] 10 U.S.C. § 949j(b) (2012).

[233] *See, e.g.*, Declaration of Lieutenant Colonel Darrel J. Vandeveld ¶ 5, United States v. Jawad (Sept. 22, 2008), http://s3.amazonaws.com/propublica/assets/docs/vandeveld_declaration_080922.pdf, *archived at* http://perma.cc/KDE9-GP7J; United States v. Khadr Filings, DEP'T OF DEF. (Aug. 3, 2010), http://www.defense.gov/news/United_States_vs_Omar_Khadr_Filings_External_3_Aug_2010_A2BD.pdf, *archived at* http://perma.cc/3RVT-QPA6 (listing all motions filed in case as of Aug. 3, 2010).

deny defense access to individuals in government custody.[234] When frustrated detainee lawyers took measures to identify interrogators, a federal investigation was launched with the implied threat of criminal prosecution.[235] This open obstructionism is further exacerbated by ethical breaches reported by insiders like former prosecutor Lieutenant Colonel Darrell Vandeveld, who revealed government concealment of exculpatory evidence.[236]

Access to expert witnesses is another area of dramatic imbalance contravening the MCA's call for equity. The defense lacks independent funding for experts and must make case-by-case requests to the convening authority, which is closely aligned with the prosecution and routinely denies most requests.[237] The defense can then petition the military judge to direct the provision of an expert, but the prosecution routinely opposes those motions.[238] This violates the MCA mandate for defense witness access equivalent to federal court. Federal public defenders have an independent budget for expert assistance while appointed counsel are statutorily entitled to ex parte consideration of expert witness funding requests.[239]

In contrast to these constraints on the defense, the government has spent extravagantly on experts. It employed forensic psychiatrist Michael Welner at a cost likely over $200,000 to deliver problematic testimony at Khadr's sentencing hearing.[240] Welner's "expertise" was so unimpressive that the judge reportedly quipped that "Dr. Welner would have been as likely to be accurate if he used an Ouija board."[241] And the government can spend $2,250 per day plus expenses for Evan Kohlmann to testify for the admission of his inflammatory pseudo-documentary *The Al Qaeda Plan* that Kohlmann assembled from the

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[234] *See, e.g.*, Ruling on Motion to Compel Access to High Value Detainees at 1–3, 6, 8–9, United States v. Hamdan, AE113 (Military Comm'ns Trial Judiciary Feb. 13, 2008).

[235] *See* Peter Finn, *Lawyers Showed Photos of Covert CIA Officers to Guantánamo Bay Detainees*, WASH. POST (Aug. 21, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/20/AR2009082004295.html, *archived at* http://perma.cc/T5NM-C67H.

[236] Vandeveld, *supra* note 233, ¶ 6.

[237] *See, e.g.*, *id.* at 5.

[238] *See, e.g.*, Ruling on Motion to Deny Production of Professor Corn and to Exclude His Testimony at 117, United States v. Hamdan, AE216 (Military Comm'ns on Trial Judiciary June 13, 2008).

[239] *See* 18 U.S.C. § 3006A(e)(1) (2012).

[240] Welner reportedly spent more than 500 hours preparing for his testimony, and has previously charged the U.S. government $425 an hour for his time. Carol Rosenberg, *Omar Khadr 'Highly Dangerous,' Psychiatrist Says*, MIAMI HERALD (Oct. 26, 2010), http://www.miamiherald.com/2010/10/26/v-print/1891112_deal-gets-child- soldier- 8- years.html, *archived at* http://perma.cc/69C-XG9T; Pamela Manson, *Psychiatrist at Mitchell Hearing Worth His $500,000 Fee, U.S. Attorney Says*, SALT LAKE TRIB. (Dec. 21, 2009), http://www.sltrib.com/utah/ci_14033588, *archived at* http://perma.cc/GU28-MXAE.

[241] Michelle Shephard, *Prosecution's Star Challenged*, TORONTO STAR, Apr. 19, 2011, at A15.

internet videos even though it lacks relevance to most cases.[242] One Hamdan trial observer reported:

> The defense objected to having the video shown because it did not show . . . or even suggest that Hamdan was involved in or had any knowledge of the attacks depicted, and because its images of the destruction of the Twin Towers would unduly prejudice the military commission's panel of military officers who will determine Hamdan's fate. Every government witness to take the stand in this trial has testified that there is no evidence that Hamdan had any role in the planning or execution of any terrorist attack, including 9/11. . . . Judge Keith Allred nevertheless overruled defense objections to the movie. [243]

But while Kohlmann was flown to Guantánamo and paid to support the admission of this problematic video, law of war expert Geoffrey Corn had to deliver core testimony for Hamdan's defense via VTC on a pro bono basis after the convening authority refused government funding.[244] This evident disparity not only violates international legal standards, it now contravenes explicit congressional intent. Language in the 2010 DOD authorization bill proclaims:

> It is the sense of Congress that—
> (1) the fairness and effectiveness of the military commissions system . . . will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases, . . . and
> (2) defense counsel in military commission cases, particularly in capital cases . . . should be fully resourced as provided in such chapter 47A.[245]

This inequality is further highlighted by a disparity in military ranks. The prosecution team is headed administratively and in the courtroom by Brigadier General Mark Martins (an O-7).[246] The defense office is administratively

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[242] *See* Defense Opposition to Government Motion to Deny Production of Professor Geoffrey Corn and in the Alternative Motion in Limine to Deny Testimony at 25–36, United States v. Hamdan, AE208 (Military Comm'ns Trial Judiciary May 28, 2008).

[243] Sahr Muhammed Ally, *When Did the Conflict With al Qaeda Start? Two Visions at Guantánamo*, HUM. RTS. FIRST (July 30, 2008), http://www.humanrightsfirst.org/2008/07/30/ when-did-the-conflict-with-al-qaeda-start-two-visions-at-guantanamo, *archived at* http://perma.cc/GWN6-LLCW.

[244] *Id.*

[245] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1807, 123 Stat. 2190, 2614 (2009).

[246] News Release, Dep't of Defense, New Military Commissions Chief Prosecutor Announced (June 23, 2011), http://www.defense.gov/releases/release.aspx?releaseid=14598, *archived at* http://perma.cc/NGU7-4HAP.

headed by a colonel (O-6),[247] but no defendant has a courtroom lawyer higher than O-5; the most significant detainee, Khalid Sheikh Mohammad, was only assigned a major (O-4).[248] This results in the prosecutor outranking both every member of the defense and the judge, and translates into practical advantages such as invitations to champion the military commission system and the prosecution's cause in extrajudicial appearances before influential public audiences.[249] In January 2014, defense counsel for alleged 9/11 conspirator bin Attash called these public comments (and difficulties in obtaining discovery) to the judge's attention and sought a protective order requiring the prosecution to limit public comments to factual and schedule matters.[250]

While the DOD seems tone deaf to these concerns, Congress, to its credit, is not entirely so. The 2014 National Defense Authorization Act included a waivable mandate for the DOD to fill the chief defense counsel and prosecutor billets with officers of the same grade and calls for equitable resources between the two sides.[251] But because the chief defense counsel's role is administrative, overseeing teams of attorneys with potentially serious conflicts of interest, this would not actually alter the rank inequality within the courtroom even if the DOD elected to comply. Apparently, however, it will not. The government reportedly issued itself a waiver in February 2014.[252]

E. *Abuse of Classification Authority*

Because the MCA rules for classified evidence are based on the CIPA, which is applicable to regular federal trials,[253] the commissions enjoy no legitimate advantage over Article III courts in this respect. The commissions' purported information security advantages are thus largely a red herring.[254]

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[247] Alba Morales, *Guantanamo: System Failure*, MSNBC, http://www.msnbc.com/msnbc/guantanamo-system-failure (last updated Oct. 3, 2013), *archived at* http://perma.cc/D44G-WQDV.

[248] *See, e.g.*, Motion to Dismiss Because the Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants at 13, United States v. Mohammad, AE091 (Military Comm'ns Trial Judiciary Oct. 12, 2012).

[249] *See, e.g.*, Martins, *supra* note 152, at 6–7.

[250] Defense Motion for Order to Protect the Right to a Fair Trial, United States v. Mohammad at 21–22, AE266(WBA) (Military Comm'ns Trial Judiciary Jan. 22, 2014).

[251] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1037, 127 Stat. 672, 679 (2013).

[252] Wells Bennett, *2/19 Motions Session #2: Lawyer Stuff*, LAWFARE (Feb. 19, 2014, 10:58 AM), http://www.lawfareblog.com/2014/02/219-motions-session-2-lawyer-stuff/, *archived at* http://perma.cc/87YV-2RG9.

[253] Classified Information Procedures Act (CIPA), 18 U.S.C. app. (2012).

[254] *See, e.g.*, Spencer Ackerman, *'Urban Myth' Behind Graham's Support for 9/11 Military Trials*, WASH. INDEP. (Mar. 11, 2010, 6:00 AM), http://washingtonindependent.com/78925/urban-myth-behind-grahams-support-for-911-military-trials, *archived at* http://perma.cc/T6YN-74YS.

The government initially insisted on making *anything* former CIA detainees said presumptively classified information.[255] This rendered it almost impossible to mount a defense; if a detainee identified a potential alibi witness, for example, that information could not be revealed to any uncleared person unless reviewed by government security personnel and determined to be unclassified.[256] An attorney could not even use information a defendant might provide to them during a trial session without prior classification review or thirty days advance notice to the court.[257]

In December 2013, Judge Pohl issued a less restrictive protective order; detainee statements are now only treated as classified if they reveal:

(a) details of how they were captured;
(b) the foreign countries in which they were detained;
(c) the identity or description of anyone involved with their capture, detention, or interrogation;
(d) interrogation techniques to which they were subjected; or
(e) conditions of their detention in CIA custody.[258]

A core trial issue is going to be the admissibility of detainee statements, including whether or not detainee admissions to "clean teams" following the termination of coercive interrogations are admissible.[259] Treating information about a detainee's own interrogations contained in government documents as classified bars defense attorneys from discussing it with the detainee and requires its handling in secure facilities and transmission only on encrypted systems.[260] Even the modified protective order is thus still a huge impediment to defense efforts.

The actual courtroom conduct of high-value detainee military commission trials has been problematic. Unlike federal courtrooms, spectators and media at the commissions "are sequestered in a soundproofed room behind thick glass" and thus wholly dependent upon a speaker system with a forty-second delay to hear what is being said. [261] A "court security officer" has control over the audio feed for the primary purpose of keeping the public from hearing about the

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[255] Wells Bennett & Benjamin Wittes, *9/11 Military Commission Motions Hearing Preview*, LAWFARE (Aug. 21, 2012, 3:07 PM), http://www.lawfareblog.com/2012/08/911-military-commission-motions-hearing-preview/, *archived at* http://perma.cc/MJV5-BLAQ.

[256] *See id.*

[257] 10 U.S.C. § 949p-5(a)(1) (2012).

[258] *See* Second Amended Protective Order #1: To Protect Against Disclosure of National Security Information at 5, United States v. Mohammad, AE013DDD (Military Comm'ns Trial Judiciary Dec. 16, 2013).

[259] *See, e.g.*, Charlie Savage, *Motion Is Filed to Silence Prosecutor in Sept. 11 Case*, N.Y. TIMES (Feb. 6, 2014), http://www.nytimes.com/2014/02/07/us/motion-is-filed-to-silence-prosecutor-in-sept-11-case.html?_r=0, *archived at* http://perma.cc/3ECP-S8HL.

[260] Second Amended Protective Order #1, *supra* note 258, at 14.

[261] *About the 9/11 War Crimes Trial*, MIAMI HERALD (Nov. 5, 2013), http://www.miamiherald.com/2008/02/27/v-fullstory/436366/about-the-911-war-crimes-trial.html, *archived at* http://perma.cc/5B2E-R78F.

defendants' treatment in CIA hands.[262] The government effectively admits this. In its motion requesting the initial protective order for the alleged 9/11 co-conspirators, the prosecution declared that:

> The accused are all former Central Intelligence Agency (CIA) detainees who were transferred from CIA custody to the custody of the Department of Defense (DOD) at U.S. Naval Station at Guantanamo Bay, Cuba (GTMO). The accused were exposed to classified intelligence sources and methods while they were in CIA custody, and thus are in a position to be able to publicly reveal this highly classified information through their own statements. Any public disclosure of this TOP SECRET (SCI) information at the upcoming arraignment or during any other proceedings in this case reasonably could be expected to cause exceptionally grave damage to the national security.[263]

The SCI classification assigned to detainee comments and concerns for protecting "sources and methods" of intelligence collection is unjustifiable. National security doctrine recognizes that disclosure of specific information known about an adversary can be harmful to national security, but details about U.S. intelligence capabilities are even more sensitive because they can be used to deny future collection.[264] But this is *not* a valid concern with respect to the Guantánamo detainees. The coercive interrogation procedures they were subjected to during the Bush Administration have been repudiated by the Department of Justice, which has withdrawn the legal memos approving them.[265] More importantly, they have been banned by President Obama; an executive order now limits any U.S. government interrogations to those permitted by the Army's intelligence collection field manual.[266] It therefore *cannot* be necessary to classify this information to protect "intelligence sources and methods" from disclosure to potential adversaries today, leading to the obvious conclusion that the purpose of maintaining this secrecy is to protect the CIA from accountability for past detainee abuse. This is not a legitimate judicial function—it is obstruction of justice. President Obama's own executive order categorically bars classification intended to "conceal violations of law" or

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[262] *See, e.g.*, Denny LeBoeuf, *From the Big Easy to the Big Lie*, *in* THE GUANTÁNAMO LAWYERS, *supra* note 69, at 193–96.

[263] Motion for Protective Order: Protection of Classified Information at Arraignment and all Stages of Proceedings at 2–3, United States v. Mohammed, AE032-B (Military Comm'ns Trial Judiciary June 4, 2008).

[264] Federal law mandates that the Director of National Intelligence "protect intelligence sources and methods from unauthorized disclosure" via appropriate classification measures and by preparing intelligence products for dissemination with source information removed to the extent practicable. *See* 50 U.S.C. § 403-1(i) (2012).

[265] Memorandum for the Attorney Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009), *available at* http://www.justice.gov/sites/default/files/olc/opinions/2009/04/31/withdrawalofficelegalcounsel_0.pdf, *archived at* http://perma.cc/8RPL-BMZU.

[266] Exec. Order No. 13,491, 3 C.F.R. 199, 200–01 (2009).

"prevent embarrassment to a person, organization, or agency."[267] If this is the "security" rationale being used to justify continued employment of military commissions, it wholly undermines their legitimacy.

F. *Admission of Evidence Obtained Through Torture or Coercion*

Government efforts to get statements tainted by coercion admitted into evidence also violate the law and call into question the commissions' commitment to justice. The 2009 MCA is unmistakably clear:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.[268]

Other MCA language sets an even higher standard for the admission of a defendant's own words. With a narrow exception for statements at the actual point of capture or during "related active combat engagement," it requires that *any* statement made by an accused must have been "voluntarily given" to be admissible.[269]

Despite these clear rules, commission prosecutors have rationalized that it is the judge's responsibility, not theirs, to act as the admissibility gatekeeper.[270] Successful efforts to get Khadr's statements admitted in the summer of 2010 show that this effort continued even under the Obama Administration.[271] This *might* be justified *if* commission judges were in a position to objectively weigh the relevant factors necessary to determine a statement's pedigree, but they are not. In an adversarial system, the judge must rely on the parties to present the information necessary to reach their decisions. But the government holds all the cards with respect to how these detainee statements were obtained. Through control of the classification system, restrictions on the identification of, and access to, potential witnesses, and limitations on what discovery is provided, it effectively restricts the defense's access to the information needed to credibly challenge the admission of statements obtained through coercion. "Letting the judge decide" is thus tantamount to allowing coerced statements to be used in contravention of the clear statutory prohibitions against doing so.

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[267] Exec. Order No. 13,526, 3 C.F.R. 298, 302–03 (2009).

[268] 10 U.S.C. § 948r(a) (2012).

[269] 10 U.S.C. § 948r(c) (2012).

[270] *See, e.g.*, Josh White, *From Chief Prosecutor to Critic at Guantánamo*, WASH. POST (Apr. 29, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042802982.html, *archived at* http://perma.cc/A95F-H27S.

[271] *See, e.g.*, *Judge Rules Omar Khadr Was Not Abused Despite Rape & Death Threats*, HUM. RTS. FIRST (Aug. 21, 2010), http://www.humanrightsfirst.org/2010/08/21/judge-rules-omar-khadr-was-not-abused-despite-rape-death-threats, *archived at* http://perma.cc/455A-RYWF.

For this reason, the commissions' ability to admit hearsay evidence is now a matter of critical concern. The initial outcry about hearsay admission following President Bush's initial decision to employ the commissions[272] was largely an instinctive reaction on the part of those schooled in the Anglo-American legal tradition. Hearsay use is not inherently detrimental to the defense. In military commissions conducted in Guam following World War II, for example, half the requests for relaxations to the rules of evidence came from the defense.[273] It is easy to imagine a Guantánamo defendant with alibi or character witnesses who would be afraid to travel there for fear of ending up detained themselves. And two witnesses Hamdan wanted to call were barred by the government because they were on the "no-fly" list.[274]

The most plausible reason initially advanced to justify hearsay admission was the need to avoid disruption of U.S. military activities.[275] It was assumed that American soldiers were involved with most detainees' capture and initial questioning but that requiring these personnel be available to testify could adversely impact military operations.[276] Reliance upon post-capture reports or affidavits would thus offer real practical advantage. Today, however, we know that military personnel were involved with perhaps five percent of the Guantánamo captures,[277] and that abusive interrogation practices require careful inquiry into the provenance of any statements either sought to be admitted directly or which led to other evidence collection.

The MCA restricts hearsay use, requiring advance notice and "fair opportunity to meet the evidence."[278] The judge must assess "indicia of reliability within the statement" and "whether the will of the declarant was overborne."[279] This latter consideration will be difficult to establish without access to the declarant. From a practical perspective, the rules burden the defense to demonstrate why hearsay should be kept out while the government controls the information necessary to do so.

Advances in video-teleconferencing, including do-it-yourself capabilities like Skype, largely obviate the need to deny live cross-examination even when it is not practicable to get witnesses to Guantánamo. The commissions have

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[272] *See, e.g.*, William Glaberson, *A Nation Challenged: The Law; Tribunal v. Court-Martial: Matter of Perception*, N.Y. TIMES (Dec. 2, 2001), http://www.nytimes.com/2001/12/02/us/a-nation-challenged-the-law-tribunal-v-court-martial-matter-of-perception.html, *archived at* http://perma.cc/A55F-NB2X.

[273] Glazier, *supra* note 42, at 2070, 2088.

[274] Official Authenticated Transcript at 698, United States v. Hamdan, TRANS (Military Comm'ns Trial Judiciary Apr. 28, 2008).

[275] *See* Victor Hansen, *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules from the Government's Most Recent Efforts to Construct a Military Commissions Process*, 35 WM. MITCHELL L. REV. 1480, 1505–06 (2009).

[276] *Id.*

[277] P. Sabin Willett, *Who's at Guantánamo Anyway?*, *in* THE GUANTÁNAMO LAWYERS, *supra* note 69, at 7.

[278] 10 U.S.C. § 949a(b)(3)(D)(i) (2012).

[279] *Id.* § 949a(b)(3)(D)(ii).

already used video-teleconferencing multiple times to facilitate testimony, including that of a defense expert whose travel the government would not underwrite[280] and the testimony of an officer in Afghanistan.[281] This latter appearance demonstrates the fallacy of concluding that even soldiers in forward theaters are unavailable to testify at Guantánamo. If the commissions are to be credible, hearsay use must not be allowed whenever it could include information gleaned from interrogations of detainees who cannot be questioned about the surrounding circumstances. This should include not just detainee statements per se, but also interrogators' reports.

Evidence obtained through coercion must be barred from the Guantánamo commissions because the law requires it.[282] But there is an important practical reason for this too–it is unreliable. Its use will result in false convictions and thoroughly discredit the trials. Public discussions of "ticking bomb" scenarios and "torture warrants" create the impression that coercive interrogations produce accurate information,[283] but this is largely incorrect. The "enhanced" techniques applied at Guantánamo and black sites were derived from the CIA's KUBARK manual[284] and those techniques U.S. military personnel are exposed to during Survival, Evasion, Resistance, and Escape (SERE) training.[285] These techniques were developed by the Soviets, Chinese, North Koreans, and North Vietnamese for the purpose of eliciting false confessions for show trials and propaganda purposes, *not* for truth-seeking.[286] Militaries on both sides during World War II, in contrast, recognized the importance of rapport-building techniques, not coercion, to gain *accurate* information, a conclusion shared by professional interrogators today.[287] It thus defies logic that justice could be done

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[280] *See* Ally, *supra* note 243 and accompanying text.

[281] Paul Koring, *Omar Khadr Can Be Rehabilitated, U.S. Captain Testifies*, GLOBE & MAIL (Oct. 28, 2010, 10:18 AM), http://www.theglobeandmail.com/news/world/americas/omar-khadr-can-be-rehabilitated-us-captain-testifies/article1776120/, *archived at* http://perma.cc/PFB8-SEHX.

[282] *See* 10 U.S.C. § 948r(a) (2012); *Some Key Facts on Military Commissions v. Federal Courts*, *supra* note 25, at 1–2.

[283] *See* Alan M. Dershowitz, *Want to Torture: Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19, *available at* http://www.alandershowitz.com/publications/docs/torturewarrants2.html, *archived at* http://perma.cc/LKF3-ULYH.

[284] JANE MAYER, THE DARK SIDE 157–64 (2008); Jeff Kaye, *Newly Revealed Portions of CIA Torture Manual: Doctoring Tapes, Foreign Detentions & Interrogating 'Defectors,'* DISSENTER (Apr. 10, 2014, 1:04 AM), http://dissenter.firedoglake.com/2014/04/10/newlyrevealed-portions-of-cia-torture-manual-doctoring-tapes-foreign-illegal-detentions-interrogating-defectors/, *archived at* http://perma.cc/J7FE-2VHD.

[285] MAYER, *supra* note 284, at 157–64; *Torture Techniques Used in Guantanamo*, JUSTICE CAMPAIGN, http://thejusticecampaign.org/?page_id=273 (last visited Sept. 9, 2014), *archived at* http://perma.cc/U6JR-SE7G.

[286] *See* David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1029–31 (2009); Scott Shane, *China Inspired Interrogations at Guantánamo*, N.Y. TIMES, July 2, 2008, at A1, A17, *available at* http://www.nytimes.com/2008/07/02/us, *archived at* http://perma.cc/4S64-PT6E.

[287] Glazier, *supra* note 286, at 1028–29.

using information obtained via coercive means. Military commission use of information developed through these techniques would render their verdicts as unworthy of respect as those of Stalin's show trials.

A particularly insidious aspect of the government's coercive interrogation techniques is that they were intended to create a lasting sense of "learned helplessness" rather than simply yield information while being actively applied.[288] This necessarily gives reason to doubt whether detainee admissions obtained by separate "clean teams" after extended "enhanced interrogations" ended can meet the MCA's voluntariness standards, and requires that the defense be able to fully investigate the treatment their clients were subjected to throughout their captivity.[289]

V. AN ANALYSIS OF MILITARY COMMISSION CHARGES AS LEVIED

This part examines the charges against three Obama-era defendants—Khadr, al Nashiri, and Khalid Sheikh Mohammad—to highlight the variety of legal issues posed by the questionable application of substantive law in the Guantánamo commissions. Khadr's five charges represent every offense involved in the first seven completed Guantánamo prosecutions; if his "conviction" lacks legal merit, then each of these others does as well. Al Nashiri is currently facing charges relating most prominently to the bombing of the USS *Cole* in Aden, Yemen, in 2000, as well as the 2002 attack on the French tanker *MV Limburg*. This would be a straightforward terrorism case in a federal court (which can unquestionably exercise jurisdiction over these events), but it raises serious issues about the timing and scope of armed conflict which call into question its validity as a law of war prosecution. If the *Limburg* is outside the scope of the current U.S. conflict, then the eighth and final completed prosecution to date, that of al Darbi,[290] fails as well. Finally, the case of Khalid Sheikh Mohammad and his alleged co-conspirators shows that even while some al Qaeda members may be legitimately charged under the law of war for at least some of their conduct, doing so unnecessarily raises issues entirely avoidable in federal court, which complicates and prolongs efforts to see justice done.

A. *Omar Khadr*

Youthful Canadian citizen Omar Khadr was the most controversial Guantánamo defendant "convicted" to date, and his October 2010 guilty plea failed to resolve underlying concerns. The scion of a radical Muslim family receiving little sympathy within his own country,[291] Khadr pleaded guilty to

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[288] THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 205–06 (2013).

[289] *See* 10 U.S.C. § 948r(d) (2012).

[290] *See* Offer for Pretrial Agreement at 8, United States v. al Darbi, AE010 (Military Comm'ns Trial Judiciary Dec. 20, 2013); Savage, *supra* note 78.

[291] SHEPHARD, *supra* note 224, at ix–xiv.

charges alleging that he received al Qaeda weapons training after 9/11, spied on U.S. forces, helped make and plant improvised explosive devices, and killed a U.S. soldier with a hand grenade.[292] Serious questions were raised prior to his plea about the accuracy of the underlying facts,[293] about admissions extracted through threats and physical abuse,[294] and about the legitimacy of prosecuting war crimes committed at age fifteen.[295] Far less attention was given to whether his charges described law of war violations triable by a military commission. The analysis that follows concludes that *none* of Khadr's five charges described actual war crimes[296] even assuming the underlying factual predicates are true. The commission thus lacked subject matter jurisdiction.[297] If the United States wanted to prosecute him, it should have done so in domestic U.S. or Afghan criminal courts.

Khadr faced five separate charges:

(1) murder in violation of the law of war
(2) attempted murder in violation of the law of war
(3) conspiracy
(4) providing material support for terrorism
(5) spying[298]

1. *Murder in Violation of the Law of War*

Murder in violation of the law of war was the most serious charge levied against Khadr. The specification stated that "while in the context of and associated with hostilities and without enjoying combatant immunity, [he] unlawfully and intentionally murder[ed] U.S. Army Sergeant First Class Christopher Speer . . . by throwing a hand grenade at U.S. forces . . . ."[299]

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[292] *See* Khadr Military Commission Approved Pretrial Agreement, United States v. Khadr, AE341 (Military Comm'ns Trial Judiciary Oct. 13, 2010); Charge Sheet, United States v. Khadr, AE001 (Military Comm'ns Trial Judiciary Apr. 24, 2007).

[293] *See, e.g.*, *New Witness Account Shows Khadr Charges Should be Dropped: Lawyers*, CBC NEWS (Feb. 5, 2008, 6:59 AM), http://www.cbc.ca/world/story/2008/02/05/khadr-account.html?ref=rss, *archived at* http://perma.cc/B7NQ-G45S.

[294] *See, e.g.*, Lisa Hajjar, *Travesty in Progress: Omar Khadr and the US Military Commissions*, MIDDLE EAST REPORT ONLINE (July 26, 2010), http://www.merip.org/mero/mero072610.html, *archived at* http://perma.cc/786W-CKSN.

[295] *See, e.g.*, Jane Sutton, *Guantanamo Jury Can Consider Omar Khadr's Age*, REUTERS (Aug. 10, 2010, 12:47 PM), http://uk.reuters.com/article/2010/08/10/uk-guantanamo-canadian-un-idUKTRE6792KW20100810, *archived at* http://perma.cc/GG5T-4SSM; Charlie Savage, *U.S. Wary of Example Set by Tribunal Case*, N.Y. TIMES (Aug. 27, 2010), http://www.nytimes.com/2010/08/28/us, *archived at* http://perma.cc/4G2L-8DWB.

[296] *See infra* Part V.A.1–5.

[297] *See supra* Part III.B.

[298] Flyer of Charges, United States v. Khadr, AE327 (Military Comm'ns Trial Judiciary Aug. 10, 2010).

[299] *Id.* at 1.

International law clearly proscribes conduct fairly described as "murder in violation of the law of war."[300] The issue is with its application to Khadr. The relevant MCA language reads:

> (15) MURDER IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, *in violation of the law of war* shall be punished by death or such other punishment as a military commission under this chapter may direct.[301]

Assuming *arguendo* Khadr killed a U.S. soldier in combat, it would not violate the law of war,[302] thus falling outside the scope of this offense. Because combatants are "fair game," the law of war must identify and protect those individuals not liable to direct attack.[303] Under the rubric of "willful killing," the Geneva Conventions proscribe deliberate targeting of "protected persons,"[304] i.e., individuals who either have never been, or no longer are, participants in hostilities. The former category includes civilians (other than those directly participating in hostilities),[305] and "non-combatants"[306]—members of an armed force assigned to medical, religious, or civil defense duties, and barred from fighting except in self-defense. The latter category includes combatants placed *hors de combat* due to illness, wounds, or shipwreck; having voluntarily offered surrender; or forced to bail out of damaged aircraft.[307] Deliberately killing any of these individuals would be "in violation of the law of war."[308] These rules are recognized as customary law, so this outcome is not dependent upon the Geneva Conventions applying.[309]

Killing privileged belligerents[310] can be a war crime if proscriptions against impermissible means and methods of warfare are violated.[311] These situations fall into two general categories: use of a prohibited weapon or means, such as poison;[312] or killing facilitated by treachery or "perfidy."[313] The law of war can

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[300] ROBERT CRYER ET AL., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL LAW AND PROCEDURE 242–43 (2007); KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 194–95 (2001).

[301] 10 U.S.C. § 950t(15) (2012) (emphasis added).

[302] *See* CRYER ET AL., *supra* note 300, at 243.

[303] *Id.*

[304] *See, e.g.*, KITTICHAISAREE, *supra* note 300, at 142–43.

[305] The law of war permits attacking civilians when they are directly participating in hostilities. For a detailed discussion, see generally MELZER, *supra* note 117.

[306] *Id.* at 11–13.

[307] DINSTEIN, *supra* note 98, at 150–51.

[308] CRYER ET AL., *supra* note 300, at 243, 256.

[309] *See* HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 299.

[310] The MCA's definition of privileged belligerent, found at 10 U.S.C. § 948a(6), is overbroad, mistaking Geneva III's Article 4 list of those qualifying as prisoners of war, as a list of those qualifying as privileged belligerents.

[311] CRYER ET AL., *supra* note 300, at 254–58.

[312] *Id.* at 255.

ban weapons either by specific agreement or because they violate general principles addressing "distinction," "superfluous injury," and "unnecessary suffering."[314] Attacks involving treachery or perfidy are essentially hostile acts facilitated by falsely inducing the enemy to believe that the attacker is entitled to a protected status, such as misuse of a flag of truce or protective emblems like the red cross.[315] The 1873 military commission trial of six Modoc Indians for killing under a flag of truce exemplifies the valid use of this charge.[316] The Philippine Insurrection of 1899–1902 provides more relevant examples.[317] Some of those cases referred to the perpetrators as "guerillas" or "outlaws,"[318] but in each case where factual details are available, it was the actual conduct involved, not the status of the perpetrators, which rendered the offense "in violation of the law of war."[319] Acts charged under this nomenclature included burying a wounded U.S. sailor alive,[320] killing prisoners,[321] and the use of assassins behind the lines.[322] When an otherwise lawful combatant commits one of these violations, they are subject to trial under the law of war—that is, they can be prosecuted for a "war crime."[323] The problem in Khadr's case was the overbroad application of the charge, endeavoring to make *any* killing by an unprivileged belligerent fall within its definition. This approach repudiates the functional equivalence between the conflict parties which is a core element of the law of war and endeavors to transform it into a unilateral shield for one side. This stretch is traceable to the Manual for Military Commissions, providing DOD guidance supplementing the MCA.[324] The Manual specifies required

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313 *Id.* at 257.

314 *See, e.g.*, UK MINISTRY OF DEFENCE, *supra* note 109, §§ 6.1.4–2.2.

315 *See* DINSTEIN, *supra* note 98, at 200–206.

316 *See* Glazier, *supra* note 35, at 46–47.

317 For a discussion of these oft-overlooked commissions, see Glazier *supra* note 35, at 47–56. General orders reporting Philippine trial results can be found in CHARGES OF CRUELTY, ETC., TO THE NATIVES OF THE PHILIPPINES, S. Doc. No. 57–205, pt. 2 (1902).

318 *See, e.g.*, GENERAL ORDERS, NO. 264, S. DOC. NO. 57–205, pt. 2, at 364 (1901); GENERAL ORDERS, NO. 334, S. DOC. NO. 57–205, pt. 2, at 366 (1901).

319 Sometimes insufficient facts are reported to determine the basis for the killing to be "in violation of the law of war," but it appears these killings took place in areas under U.S. military governance, suggesting treachery was likely involved. Accounts of fatal stabbings by groups of assailants imply attacks continuing after the victims were incapable of further resistance; both would be substantive violations of the law of war. *See* GENERAL ORDERS, NO. 264, S. DOC. NO. 57–205, pt. 2, at 335–36 (1990); GENERAL ORDERS, NO. 334, S. DOC. NO. 57–205, pt. 2, at 366–67 (1901).

320 GENERAL ORDERS, NO. 150, S. DOC. NO. 57–205, pt. 2, at 345–47 (1900).

321 GENERAL ORDERS, NO. 198, S. DOC. NO. 57–205, pt. 2, at 359–60 (1901); GENERAL ORDERS, NO. 205, S. DOC. NO. 57–205, pt. 2, at 364–65 (1901); GENERAL ORDERS, NO. 370, S. DOC. NO. 57–205, pt. 2, at 370–71 (1901).

322 GENERAL ORDERS, NO. 370, S. DOC. NO. 57–205, pt. 2, at 369–70 (1901).

323 CRYER ET AL., *supra* note 300, at 254–58.

324 *See, e.g.*, 10 U.S.C. § 949a(b)(1) (2012) (allowing the Secretary of Defense, in consultation with the Attorney General, to authorize military commissions to make necessary departures from court-martial rules of procedure and evidence).

elements of proof for each MCA offense. It establishes the elements for murder in violation of the law of war as:

> (1) One or more persons are dead;
> (2) The death of the persons resulted from the act or omission of the accused;
> (3) The killing was unlawful;
> (4) The accused intended to kill the person or persons;
> (5) The killing was in violation of the law of war; and
> (6) The killing took place in the context of and was associated with an hostilities.[325]

There are no fatal flaws in this formulation, which still limits the crime to acts violating the law of war. But the comment following these elements states that an accused "may be convicted in a military commission for these offenses if . . . [the accused] engaged in conduct traditionally triable by military commission (e.g., spying; murder committed while the accused did not meet the requirements of privileged belligerency) *even if such conduct does not violate the international law of war*."[326]

It is not clear that Congress has the constitutional authority to make murder committed while the accused did not meet the requirements of privileged belligerency—a matter the law of war leaves to domestic law—triable by military commission outside occupied territory where a commission can have "domestic" law authority.[327] But that is not the issue here because Congress explicitly limited the MCA's application to killings which violate the law of war.[328] The Manual's drafters seemingly recognized this when they correctly incorporated that requirement into the elements of the offense; the subsequent departure in the comment is thus wholly inexplicable.[329] The Secretary of

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[325] OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, pt. 4, offense (15) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT.

[326] *Id.* (emphasis added).

[327] *See, e.g.*, Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte* Quirin, 42 AKRON L. REV. 13, 19 (2009) (arguing Congress can only authorize Article III courts to try offenses outside an active theater of combat).

[328] Military judge Colonel Stephen Henley has ruled that charges "must be based on the nature of the act, not simply on the status of the Accused." *See* Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction at 3, United States v. Jawad, D-007 (Military Comm'ns Trial Judiciary Sept. 24, 2008).

[329] Conceptual roots of this error trace to the MANUAL FOR MILITARY COMMISSIONS 2007 amplifying the original 2006 MCA. *See* OFFICE OF MILITARY COMM'NS, U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS, pt. 4, offense (15) (2010), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_MIlitary_Commissions.pdf, *archived at* http://perma.cc/4L6-C6GT. For a detailed criticism of how the DOD exceeded its authority in expanding this offense, see Joseph C. Hansen, Note, *Murder and the Military*

Defense is logically entitled to "*Chevron* deference" in interpreting ambiguities in the MCA, but cannot depart from clear facial statutory language.[330]

The conclusion that Khadr could not validly be prosecuted for "murder in violation of the law of war" would not bar him from being held criminally accountable if he threw the grenade that killed Sergeant Speer. Lacking belligerent immunity, he could have been tried in U.S. district court for violating any applicable federal statute having the extraterritorial application necessary to reach conduct in Afghanistan. Alternatively, he could have been prosecuted under Afghanistan's domestic laws.

While fatal to Khadr's prosecution on this charge, this outcome better serves larger U.S. interests. *If* participation in hostilities by civilians or anyone lacking uniforms constituted a war crime, then all those participating in, supervising, or having authorized the CIA's drone program would be war criminals, including both Presidents Bush and Obama.[331] This criminalization would also extend to the use of CIA paramilitary personnel and potentially to U.S. support for third country "unprivileged belligerents," such as the Afghan mujahidin who opposed the Soviet invasion. Ironically, testimony at Khadr's trial revealed that a CIA officer in civilian clothes—an unprivileged belligerent—was present at the fatal firefight.[332]

International criminal law does not formally recognize the defense of *tu quoque*.[333] But the Allies refrained from prosecuting the Luftwaffe's conduct during the Blitz on London at Nuremberg in light of their own subsequent aerial decimation of German cities, and the judges declined to punish Admiral Karl Dönitz for conducting unrestricted submarine warfare after the introduction of an interrogatory showing that the U.S. Navy had done the same thing against

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Commissions: Prohibiting the Executive's Unauthorized Expansion of Jurisdiction, 93 MINN. L. REV. 1871, 1885 (2009).

330 Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (calling for judicial deference to interpretations of ambiguous statutory language by the agency tasked with implementing it, but holding that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

331 *See Hearing on the Rise of the Drones II: Examining the Legality of Unmanned Targeting Before the Subcomm. on Nat'l Sec. & Foreign Affairs of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. (2010) (written statement of David W. Glazier, Professor of Law, Loyola Law School of L.A.), *available at* http://oversight.house.gov/wp-content/uploads/2012/01/20100428Glazier.pdf, *archived at* http://perma.cc/6ZVN-N8BX.

332 *See* SHEPHARD, *supra* note 224, at 126 (2007) (reprinting photo showing Khadr receiving first aid; one man present with a rifle on his shoulder is wearing civilian blue overalls, a blue checked shirt, and a baseball hat); Charley Keyes, *Defense Attorney for Gitmo's Youngest Detainee Hospitalized*, CNN (Aug. 12, 2010, 7:57 PM), http://www.cnn.com/2010/CRIME/08/12/guantanamo.youngest.detainee/index.html, *archived at* http://perma.cc/XU8T-9HNQ.

333 *See* Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 935–37 (2005); *see generally* Sienho Yee, *The* Tu Quoque *Argument as a Defence to International Crimes, Prosecution or Punishment*, 3 CHINESE J. INT'L L. 87 (2004).

Japan.[334] The hypocrisy of prosecuting a defendant for conduct that the U.S. government's personnel engaged in during the very incident from which the charges are based undermines the commissions' credibility.

2. *Attempted Murder in Violation of the Law of War*

Khadr's second charge was attempted murder in violation of the law of war, alleging that he endeavored to kill coalition personnel "by converting land mines into improvised explosive devices and planting [them] in the ground."[335] This charge is based on MCA language:

> (28) ATTEMPTS.—
>
> (A) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.
>
> (B) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.[336]

This definition seems reasonable; international criminal law recognizes inchoate attempt liability once a "substantial step" towards completion has been taken.[337] But because each attempt specification must incorporate another MCA offense, it is subject to any issues associated with that charge. Khadr's attempt count suffers the same problem as his murder charge—although the offense is capable of valid application, the specific conduct alleged in the specification fails to state a law of war violation.

Legal rules governing the use of mines and booby traps have evolved substantially over the last several decades.[338] The driving force has been growing awareness of the harms these weapons wreak on civilians, often long after the conflict has ended. The focus of these developments has thus been on restricting the weapons most likely to inflict civilian casualties, including particularly anti-personnel mines readily detonated by unintended victims.[339] But there is no general prohibition against anti-vehicle mines, and nothing inherently unlawful about the use of improvised explosive devices. The act Khadr is accused of, taking mines which would indiscriminately detonate under any heavy passing vehicle, military or civilian, and converting them into devices selectively detonated to target opposing military forces, should actually

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334 CRYER ET AL., *supra* note 300, at 95–96.
335 Flyer of Charges, *supra* note 298, at 1.
336 10 U.S.C. § 950t(28) (2012).
337 CRYER ET AL., *supra* note 300, at 316–17.
338 *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 578–85 (2010).
339 *See id.*; *see also* DINSTEIN, *supra* note 98, at 67–69.

be favored under the law of war, even if uniquely detrimental to coalition forces.

The gravamen of this charge as applied is thus not that Khadr's conduct violated the law of war, a necessary element for conviction under the statutory language, but rather his status as an unprivileged belligerent. While this status would support prosecution under ordinary domestic laws from which he lacks immunity, it does not support a law of war prosecution.[340]

3. *Conspiracy*

The third charge levied against Khadr, conspiracy, is problematic as a law of war violation in *any* context.[341] International law is necessarily developed by the entire international community, but the substantive offense of conspiracy derives from English common law.[342] World War II U.S. tribunals explicitly rejected the notion that conspiracy to commit a war crime constituted a stand-alone offense.[343] A Supreme Court plurality discussed the charge's specific flaws in *Hamdan*, noting *inter alia* that a conspiracy spanning 1996–2001 predated the conflict with al Qaeda, and that none of Hamdan's alleged conduct violated the law of war. [344]

These issues are more pronounced with respect to Khadr, who only associated with al Qaeda during a two month span in mid-2002, well after all acts attributed to the conspiracy in his charges—including the 1998 embassy bombings and 9/11—were completed.[345] Nothing alleged in his personal conduct constituted criminal law of war violations. The conspiracy charge thus distilled down to Khadr having fought on the wrong side. But the law of war is grounded on legal equality. The cause one fights for makes no difference; those on both sides have equal rights and obligations.[346] Logic demands this. If just fighting for the wrong side was already a crime, it would remove any incentive for those personnel to comply with law of war rules, ensuring the conflict's rapid descent into barbarity. Khadr's conspiracy charge is the logical equivalent of trying to hold every German soldier liable for the Nazi leadership's sins.

The government ultimately recognized the flaws in its position. But rather than concede the charge's invalidity, it asserted that the Guantánamo

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340 *See supra* Part IV.A.

341 CRYER ET AL., *supra* note 300, at 317–18.

342 *See, e.g.*, Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93. CALIF. L. REV. 75, 115–16 (2005).

343 15 U.N. WAR CRIMES COMM'N, *supra* note 145, at 90.

344 Hamdan v. Rumsfeld, 548 U.S. 557, 598–611 (2005) (plurality opinion). Justice Kennedy felt it unnecessary to reach this question. *Id.* at 655 (Kennedy, J., concurring in part).

345 Flyer of Charges, *supra* note 298, at 1–2.

346 *See* DINSTEIN, *supra* note 98, at 4; L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 18–19 (2d ed. 2000).

commissions could prosecute conspiracy as a violation of domestic, rather than international law, despite their dependence on the law of war as the basic source of their jurisdiction.[347] The D.C. Circuit addressed this issue rather curiously in its en banc July 2014 *al Bahlul* decision, holding that al Bahlul waived objection to the charge in declining to mount a defense.[348] The court thus applied only "plain error" review—a standard exceptionally deferential to the government—rather than the traditional de novo review granted to questions of law.[349] The court rejected government efforts to rely on obscure field trials as a source of legal authority. But it decided that because conspiracy was a crime under ordinary federal criminal law and two prominent historical commission trials—those of the Lincoln assassination conspirators in 1865 and eight Nazi saboteurs in 1942—had charged conspiracy, it was not "plain error" to allow al Bahlul to be charged with this offense.[350] The en banc panel then remanded four additional constitutional questions, including the argument that including conspiracy as an offense exceeded congressional authority under the Define and Punish Clause, to a three judge panel for a full hearing.[351] This outcome means that al Bahlul will wait perhaps another year for a resolution of his case, but even more significantly, if his conviction stands, the validity of conspiracy as a military commission charge may be substantially re-litigated by a future defendant who preserves the issue at trial.

A further conspiracy issue was injected into the commissions process by the charges referred against Abd al Hadi al-Iraqi in June 2014. Al-Iraqi is charged, *inter alia*, with participating in al Qaeda spanning the time period from 1996 through October 29, 2006.[352] Because the initial MCA, which included conspiracy as an offense, was signed by President Bush on October 17 of that year, the government will predictably argue that there is no ex post facto issue with this charge even though the most significant portion of the alleged conspiracy took place well prior to that date.

4. *Providing Material Support for Terrorism*

The fourth charge against Khadr, providing material support for terrorism, shares similar issues with conspiracy—it both lacks recognized grounding in

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[347] For a comprehensive critique of the government's defense of the conspiracy charge, see David Glazier, *The Misuse of History: Conspiracy and the Guantánamo Military Commissions*, 66 BAYLOR L. REV. 295 (2014).

[348] al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *4 (D.C. Cir. July 14, 2014) (en banc).

[349] *Id.* at *3–5.

[350] *Id.* at *14–22.

[351] *Id.* at *21.

[352] *See* Charge Sheet at 1–7, United States v. al-Iraqi (Military Comm'ns Trial Judiciary June 4, 2014).

international law,[353] and his charge sheet failed to describe any activity violating the law of war. Essentially, the MCA took a federal criminal statute with a proven track record[354] and sought to make it triable by the commissions. It was reenacted in the 2009 MCA, disregarding testimony from DOD General Counsel Jeh Johnson and Assistant Attorney General David Kris about its problematic status.[355] Kris presciently warned "there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the [commissions'] legitimacy."[356]

The specific application against Khadr further highlights the flawed nature of the charge. None of the conduct described shows any personal involvement with, or support for, actions actually proscribed by the law of war. He was accused of receiving military training, working with improvised explosive devices, and participating in a firefight with Afghan militia and U.S. troops.[357] The only basis for the charge was that he acted on behalf of an organization that had previously engaged in terrorism. But, as already noted, the law of war refuses to hold individual combatants responsible for the cause for which they fight,[358] leaving them legally accountable only for their own acts.

The D.C. Circuit initially rejected the retroactive application of this charge on statutory grounds in its direct review of Hamdan's appeal before rebasing its decision on constitutional footing in *al Bahlul*,[359] effectively invalidating its use at Guantánamo and requiring the government to reconsider every future prosecution in which it intended to apply it.[360]

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353 James G. Vanzant, Note, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1072–73 (2010).

354 A Human Rights First study found that seventy-three defendants were successfully convicted of material support offenses (18 U.S.C. §§ 2339A, 2339B (2012)) in federal courts between 2001 and the end of June 2009. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 12 (2009).

355 *Military Commissions: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 4 (2009), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Senate-Armed-Services-July-7-2009-old.pdf, *archived at* http://perma.cc/K7K4-X2N6 (statement of Jeh Charles Johnson, General Counsel, Dep't of Defense); *Military Commissions: Hearing Before the S. Comm. on Armed Serv.*, 111th Cong. 3–4 (2009), *available at* http://www.justice.gov/sites/default/files/nsd/legacy/2014/07/23/AAG-Kris-testimony-7-7-09.pdf, *archived at* http://perma.cc/MP24-2A88 (statement of David Kris, Att'y Gen., Nat'l Sec. Div., Dep't of Justice).

356 Kris, *supra* note 355, at 3–4.

357 Flyer of Charges, *supra* note 298, at 1.

358 *See supra* Part V.A.3.

359 al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *5, *10–21 (D.C. Cir. July 14, 2014) (en banc).

360 *See, e.g.*, Charlie Savage, *In Setback for Military Tribunals, Bin Laden Driver's Conviction Is Reversed*, N.Y. TIMES, Oct. 16, 2012, at A22, *available at* http://www.nytimes.com/2012/10/17/us/politics/dispute-over-clothing-dominates-guantanamo-hearing.html?module=Search&mabReward=relbias%3As, *archived at* http://perma.cc/S3UC-AANT.

5. *Spying*

Khadr's final charge, spying, was uniquely defective. First, the MCA's definition of the offense is logically flawed. But even more basic is the fact that the conduct described in Khadr's charge sheet serves as a bar to prosecution for this offense, suggesting either ignorance of, or contempt for, the law of war.

MCA § 950t reads in relevant part:

> (27) SPYING.—Any person subject to this chapter who, *in violation of the law of war* and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.[361]

Although the term *spy* is colloquially applied to those who commit espionage,[362] the military offense of spying is unique. It is *defined* by the law of war, which *authorizes* punishment as a means of self-defense, but it is *not* a war crime. The spy does not violate international law and cannot be tried by any party other than the victim nation, unlike actual war criminals who may be subject to universal jurisdiction.[363] Spies must thus be tried under some form of domestic law.[364] Commanders commit no legal violation by employing spies; George Washington used them during the Revolution with no legal contradiction even while ordering trials and executions of their British counterparts.[365] The MCA requirement that spying be "in violation of the law of war" is thus nonsensical. Perhaps the drafters meant "as defined by the law of war," or perhaps they were simply ignorant of the law. But the result is a flawed statute incorporating an element that can rarely, if ever, be satisfied.

Another unique aspect of the military offense is that a spy who is an enemy fighter must actually be caught behind the lines; a successful return to their side is a permanent bar to punishment.[366] This is a long standing customary law rule

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361 10 U.S.C. § 950t(27) (2012) (emphasis added).

362 Espionage is currently defined in U.S. law at 18 U.S.C. § 794 (2012), whereas the wartime offense of spying is proscribed by the Uniform Code of Military Justice (UCMJ) at 10 U.S.C. § 906 (2012). (Espionage committed by persons subject to U.S. military law is also addressed by the UCMJ at 10 U.S.C. § 906a (2012)).

363 *See, e.g.*, DINSTEIN, *supra* note 98, at 210–11.

364 *See, e.g.*, PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 42 (2009).

365 *See generally* ALEXANDER ROSE, WASHINGTON'S SPIES (2006).

366 This customary international law rule was codified by the Hague Land Warfare Regulations in 1899. Convention With Respect to the Laws and Customs of War on Land arts. 29–31, Oct. 18, 1907, 32 Stat. 1803; *see* DINSTEIN, *supra* note 98, at 211.

included in virtually every major effort at explicating the law of war, ranging from the Lieber Code of 1863[367] to AP I of 1977,[368] as well as military manuals and treatises.[369]

In Khadr's case, it was not just the statutory definition that was at issue. According to his charge sheet, Khadr spied on U.S. convoys in June 2002, but then received "one month of land mine training" in July, effectively estopping the government from asserting that he was captured before rejoining his own forces.[370]

Two other Guantánamo detainees have been charged with spying. Mohammed Hashim was unilaterally repatriated to Afghanistan in December 2009 without ever facing trial.[371] Majid Khan pleaded guilty to five charges, including spying, in a deal that requires him to testify for the government in future trials,[372] even though he returned from his efforts at collecting information in the United States before his capture in Pakistan.[373]

Because the charges preferred against Khadr include each offense used to convict any Guantánamo detainee to date, the concerns discussed in this section call into serious question the validity of every post-9/11 military commission conviction.

B. *Al Nashiri*

Al Nashiri allegedly coordinated the October 2000 suicide bombing attack on the USS *Cole*, almost a year before 9/11 and the subsequent AUMF enactment.[374] He was detained by the CIA following his capture and reportedly subjected to tortures including waterboarding and mock executions.[375] Al Nashiri faces nine charges:

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[367] FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 104 (1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3–23 (Dietrich Schindler & Jiří Toman eds., 1988).

[368] AP I, *supra* note 97, art. 46, § 4.

[369] *See, e.g.*, DINSTEIN, *supra* note 98, at 212–13; GREEN, *supra* note 346, at 120; UK MINISTRY OF DEFENCE, *supra* note 109, § 4.94.

[370] Flyer of Charges, *supra* note 298, at 1.

[371] *See* Charge Sheet, United States v. Hashim, AE016 (Military Comm'ns Trial Judiciary Jan. 8, 2009); Dismissal of Referred Charges, United States v. Hashim (Military Comm'ns Trial Judiciary May 20, 2009); *U.S. Sends 12 Detainees to Home Nations*, CBN NEWS (Dec. 20, 2009), https://www.cbn.com/cbnnews/us/2009/December/US-Sends-12-Detainees-to-Home-Nations/, *archived at* http://perma.cc/6WFC-DJ3F.

[372] Offer for Pretrial Agreement at 3, United States v. Khan, AE012 (Military Comm'ns Trial Judiciary Feb. 13, 2012).

[373] *See* Stipulation of Fact at 3, United States v. Khan, PE001 (Military Comm'ns Trial Judiciary Feb. 13, 2012).

[374] *See* Charge Sheet at 3–12, United States v. al Nashiri, Charge Sheet (Military Comm'ns Trial Judiciary Sept. 28, 2011).

[375] *See, e.g.*, *Al-Nashiri v. Poland*, OPEN SOC'Y FOUNDS., http://www.opensocietyfoundations.org/litigation/al-nashiri-v-poland (last updated Aug. 28, 2014), *archived at* http://perma.cc/BN49-QXVA.

(1) using treachery or perfidy
(2) murder in violation of the law of war
(3) attempted murder in violation of the law of war
(4) terrorism
(5) conspiracy
(6) intentionally causing serious bodily injury
(7) attacking civilians
(8) attacking civilian objects
(9) hijacking or hazarding a vessel or aircraft[376]

The perfidy, murder in violation of the law of war, and intentionally causing serious bodily harm charges refer exclusively to the *Cole* attack, while the attempted murder charge has specifications relating to both the *Cole* and an earlier failed attack on the USS *The Sullivans*.[377] The terrorism charge refers both to the *Cole* and a 2002 attack on the civilian French tanker *MV Limburg*.[378] The final three charges cite only the *Limburg* attack.[379] The conspiracy charge relates to a multi-year effort, allegedly dating to 1996, to use small, explosive-laden boats for terrorist attacks including the three specific attacks mentioned in the other charges.[380]

This case is unique in several respects. If the allegations against him are true, al Nashiri is an actual terrorist unlike most of those prosecuted to date who have generally been either minor functionaries like Hamdan or more traditional foot soldiers, like Australian David Hicks, whose "crimes" included guarding a tank.[381] Al Nashiri is accused of coordinating a major terrorist attack which killed seventeen U.S. Navy personnel, injured thirty-nine others, and did an estimated $250 million worth of damage to a front-line warship, placing it out of service for eighteen months.[382]

There is little doubt that this alleged conduct can be prosecuted as a major crime under a number of different federal statutes. The *Cole* clearly falls within the federal courts' "special maritime and territorial jurisdiction" as a "vessel belonging . . . to the United States . . . ."[383] An FBI agent involved in the investigation says that the government can make a fully admissible federal case notwithstanding the abusive CIA interrogations.[384]

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376 Charge Sheet, *supra* note 374, at 3–12.
377 *Id.* at 3–4, 10.
378 *Id.* at 4–5.
379 *Id.* at 12.
380 *Id.* at 5–6.
381 Charge Sheet at 8, United States v. Hicks, AE002 (Military Comm'ns Trial Judiciary Mar. 1, 2007).
382 David Nagle, *USS Cole Rejoins the Fleet*, NAVY.MIL (Apr. 19, 2002, 8:20 PM), http://www.navy.mil/search/display.asp?story_id=1415, *archived at* http://perma.cc/8FT4-B5L3.
383 18 U.S.C. § 7(1) (2012).
384 Ali H. Soufan, Op-Ed., *Closing the Case on the Cole*, N.Y. TIMES (Oct. 11, 2010), http://www.nytimes.com/2010/10/12/opinion/12soufan.html, *archived at* http://perma.cc/TR4A-TX2G.

Despite the obvious military nature of the *Cole*, commission jurisdiction, in contrast, is highly problematic given the timing of the attack and the fact that a warship is a paradigmatic example of a lawful target in an armed conflict. Prosecuting the bombing as an ordinary federal crime should simply require proving that al Nashiri was involved with the attack, which the law would treat as a prima facie unlawful use of force. Prosecuting it by a military commission invokes the additional burdens of proving (1) that it took place in the context of an armed conflict, *and* (2) that the attack actually violated law of war rules.

1. *Issues with Attack Timing and Scope of the Conflict*

Attack timing is a major issue with respect to the charges based on the *Cole* and the earlier failed attack on USS *The Sullivans*. Both took place well prior to 9/11—the first time that the U.S. government declared itself to be in an armed conflict with al Qaeda. The *Cole*'s crew entered port in Aden, Yemen believing that it was executing a routine peacetime refueling stop.[385] That does not preclude the attack from launching hostilities, just as U.S. forces began December 7, 1941, at peace. But unlike that "day of infamy," which saw the immediate initiation of hostilities against Japan even before Congress declared war,[386] and the award of fifteen Medals of Honor for heroic conduct at Pearl Harbor,[387] the *Cole* attack was never treated as an act of war. The Navy's official investigation describes the crew's lack of threat awareness and assesses the ship's compliance with the Standing Rules of Engagement and peacetime anti-terrorism rules,[388] not the law of war. Although cruise missiles had been fired in response to several prior terrorist strikes, only FBI agents were launched in response to this bombing.[389] No medals were awarded for combat heroism on the *Cole*; an individual falsely claiming to have been on board during the bombing was exposed in part because he illegitimately wore an award denoting combat valor.[390] At least four crew members were awarded the Navy and

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385 *See* Kevin Ryan, *The USS Cole: Twelve Years Later, No Justice or Understanding*, DIG WITHIN (Oct. 7, 2012), http://digwithin.net/2012/10/07/the-uss-cole/, *archived at* http://perma.cc/7VC3-X2GX.

386 *See* JOEL IRA HOLWITT, EXECUTE AGAINST JAPAN 139–43 (2009) (documenting orders to conduct unrestricted air and submarine warfare against Japan within hours of the Pearl Harbor attack on December 7). Congress declared war on December 8, 1941.

387 Richard Goldstein, *John Finn, Medal of Honor Winner, Dies at 100*, N.Y. TIMES (May 27, 2010), http://www.nytimes.com/2010/05/28/us/28finn.html, *archived at* http://perma.cc/LJA6-2U22.

388 *See* Memorandum from Captain, U.S. Navy, to Commander, U.S. Naval Forces Central Command, Command Investigation into the Actions of USS Cole (DDG 67) in Preparing For and Undertaking a Brief Stop for Fuel at Bandar At Tawahi (Aden Harbor) Aden, Yemen on or About 12 October 2000 (Nov. 27, 2000) [hereinafter Command Investigation] (on file with the author).

389 *See* RICHARD A. CLARKE, AGAINST ALL ENEMIES 222–24 (2004).

390 Mark D. Faram & Lance M. Bacon, *Navy: Cole Faker Wore Unearned Awards*, NAVY TIMES (Dec. 8, 2009, 6:43 PM), http://www.navytimes.com/article/

Marine Corps Medal, which the Navy officially specifies as "the senior peacetime award for heroism."[391] President William Clinton spoke at a formal memorial service for the fallen crew members, declaring that "[t]heir tragic loss reminds us that even when America is not at war, the men and women of our military still risk their lives for peace."[392] The Chief of Naval Operation's final endorsement on the Navy's investigation, written months after the attack, noted the certainty of future terrorist attacks even as the Navy was "performing our *peacetime* mission."[393] This consistent official U.S. government treatment of the attack should estop prosecution of its perpetrators under the law of war.

Charges based on the botched effort to strike the USS *The Sullivans* ten months earlier are even more problematic.[394] That effort failed so prematurely that the crew was never aware it had happened.[395]

The *Limburg* charges raise different questions about the scope of conflict. That October 6, 2002, event postdates the recognized initiation of U.S. hostilities with al Qaeda. But, it is unclear that a terrorist attack on a French-flagged vessel under Malaysian charter in the Gulf of Aden constitutes part of any armed conflict, let alone one invoking the jurisdiction of a U.S. military commission. The French government recognized 9/11 as an armed attack and aided U.S. efforts against al Qaeda and the Taliban.[396] France more recently intervened in Mali; President Francois Hollande termed events there a "war"

20091208/NEWS/912080324/Navy-Cole-faker-wore-unearned-awards, *archived at* http://perma.cc/5ZEK-B7TR (quoting *Cole's* commanding officer as stating "the 'V' device wasn't even a possibility, as the Navy considered [the bombing] as occurring in peacetime").

[391] *See* Memorandum from Commanding Officer, USS Cole (DDG 67) to Naval Historical Ctr., USS Cole (DDG 67) Command History for Calendar Year 2001 (identifying crewmembers receiving awards related to the attack on September 5, 2001); Memorandum from William A. Navas, Jr., Assistant Sec'y of the Navy, SecNav Instruction 1650.1H, at 2–25 (2006) (specifying criteria for the Navy-Marine Corps medal). Those killed or wounded received Purple Hearts, which have been awarded for wounds resulting from "international terrorist attack" since March 28, 1973. *Id.* at 2–27. The *Cole* crew also qualified for Combat Action Ribbons, but its award for unilateral attacks on the *USS Liberty* and *USS Pueblo* show that it is not limited to armed conflicts either. *See id.* at 2–58.

[392] Remarks at the Memorial Service for Crewmembers of the U.S.S. *Cole* in Norfolk, Virginia, 2000 PUB. PAPERS 2216 (Oct. 18, 2000), *available at* http://www.gpo.gov/fdsys/pkg/PPP-2000-book3/html/PPP-2000-book3-doc-pg2216.htm, *archived at* http://perma.cc/3P7C-4NR6.

[393] Letter from V.E. Clark, Chief of Naval Operations, to the Sec'y of the Navy (Jan. 9, 2001) (emphasis added) (on file with author).

[394] Charge Sheet, *supra* note 376, at 4.

[395] *Attacks on US Warships in Port of Aden*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/security/ops/cole.htm (last visited Aug. 24, 2014), *archived at* http://perma.cc/ST9K-QBSC.

[396] *See* Jeremy Shapiro, *The Role of France in the War on Terrorism*, BROOKINGS, http://www.brookings.edu/fp/cusf/analysis/shapiro.pdf, *archived at* http://perma.cc/85V2-ZCJF.

against "terrorists."[397] But France made no military response to the *Limburg* attack, terming it only an act of terrorism.[398] This renders associated prosecutions by U.S. military commissions extremely problematic.

There is no similar issue with regular federal prosecution, however. The attack falls within the scope of 18 U.S.C. § 2280, "[v]iolence against maritime navigation,"[399] enacted in 1994 to fulfill U.S. obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.[400] It only requires that "the offender is later found in the United States" to exercise federal criminal jurisdiction.[401]

The issue of whether the *Limburg* bombing was associated with an armed conflict impacts three of al Nashiri's charges. But, the same issue would be dispositive with respect to the commission charges al Darbi pleaded guilty to in February 2014, which are based entirely on that incident.[402]

2. *The Problem with Perfidy*

Even the *Cole* attack is not the clear-cut law of war violation commonly assumed, despite allegations of "perfidy."[403] The charge sheet asserts that the bombers sought to deceive the *Cole*'s crew into believing that they were "entitled to protection under the law of war" by being "dressed in civilian clothing, waving at the crewmembers . . . and operating a civilian boat . . . ."[404] But this was a year before the U.S. government first applied the law of war to combating terrorism, and the *Cole* crew was operating under peacetime rules. How can sailors who do not know that they are at war be induced to accord protection under the law of war? Logically, that should be fatal to the application of this charge.

Close reading of the Navy's investigation reveals that several sailors may have mistakenly believed the boat was coming to pick up garbage, but there is nothing suggesting that the attackers deliberately encouraged this belief, or even benefitted from it.[405] While those behind the attack can (*and should*) be held

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397 *See, e.g.*, Baba Ahmed & Krista Larson, *France Declares Victory Over Extremists in Mali*, BOS. GLOBE (Sept. 20, 2013), http://www.bostonglobe.com/news/world/2013/09/20/hollande-war-mali-islamic-extremists-won, *archived at* http://perma.cc/U8E5-LRUE.

398 *See* Elaine Sciolino, *Threats and Responses: Explosion in Yemen; Preliminary Investigation Indicates Oil Tanker Was Attacked*, N.Y. TIMES (Oct. 11, 2002), http://www.nytimes.com/2002/10/11/world/threats-responses-explosion-yemen-preliminary-investigation-indicates-oil-tanker.html, *archived at* http://perma.cc/6L4P-H38J.

399 18 U.S.C. § 2280 (2012).

400 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668, 1678 U.N.T.S. 221.

401 18 U.S.C. § 2280(b)(1)(C) (2012).

402 Savage, *supra* note 78.

403 Charge Sheet, *supra* note 376, at 3.

404 *Id.*

405 Command Investigation, *supra* note 388, at 66–71.

responsible for a peacetime act of terrorism, an attacker is not liable for his enemy's lack of alertness during armed conflict. The investigating officer found significant shortcomings in the crew's readiness and threat awareness, including failure to comply with several mandatory anti-terrorism security measures such as stationing a watch on the ship's bridge.[406] Extreme vigilance is required in a conflict, particularly because naval warfare rules allow approaching an intended target under a false flag, so long as the attacker's "true colors" were shown before actually opening fire.[407] It is possible that the boat might have displayed an al Qaeda logo or flag;[408] it seems unlikely that anyone on board would have recognized one if it did. While the law of the sea calls for warships to bear distinguishing marks, naval crews are not required to have uniforms.[409] The United States government will look foolish if the prosecution comes down to an allegation that having waved to an adversary now constitutes a war crime.

3. *Issue with the Terrorism Charge*

The application of the terrorism charge to the *Cole* attack is also highly problematic. The MCA provides this definition:

> (24) TERRORISM.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, . . . as a military commission under this chapter may direct.[410]

This language requires either that the victims be "protected persons" or that the violence be "wanton"; in either case it must "be calculated to influence or affect" a government or civilian population "by intimidation or coercion . . . ."[411]

The "protected person" prong is inapplicable for two reasons. This term has no legal status outside of the 1949 Geneva Conventions applicable to armed

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406 *See id.* at 99–101.

407 This customary law rule is considered to remain valid. *See* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA art. 110 (1994).

408 Terrorist organization logos, including an "Al-Qa'ida" flag, can be found on the National Counterterrorism Center's website at *Terrorist Group Logos*, NATIONAL COUNTERTERRORISM CENTER, http://www.nctc.gov/site/groups/index.html (last visited Aug. 24, 2014), *archived at* http://perma.cc/92KQ-TUZG.

409 *See* SAN REMO MANUAL, *supra* note 407, art. 13(g); DEP'T OF THE NAVY ET AL., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS §§ 12.3, 12.5 (2007), *available at* https://www.usnwc.edu/getattachment/, *archived at* http://perma.cc/N3F8-RK4B.

410 10 U.S.C. § 950t(24) (2012).

411 *Id.*

conflict between two or more state parties; it is not used in Common Article 3 dealing with non-international conflict. The MCA acknowledges that: "[t]he term 'protected person' means any person entitled to protection under one or more of the Geneva Conventions . . . ."[412] The term thus has no legal meaning outside the context of the Conventions, and the government has determined that these treaties do not apply to the conflict with al Qaeda.[413] But even if the Conventions did apply, a warship crew is not "protected" unless the ship surrenders or sinks.[414] Al Nashiri's charge sheet thus necessarily adopts the alternate MCA definition, alleging that the *Cole* attack "evinced a wanton disregard for human life. . . ."[415]

Wanton must mean more than "deliberate," however, or else the statute would purport to criminalize every wartime killing.[416] Indeed, wartime use of force, not ultimately intended to coerce a government, would be gratuitous violence failing to meet the law of war's "necessity" principle.[417] To accurately reflect the law of war, "wanton" must connote a resort to violence that is unjustified by the circumstances of the conflict and committed to satisfy personal bloodlust or that involves impermissible savagery such as the deliberate infliction of unnecessary suffering. This imposes a substantial burden of proof beyond that required for a federal criminal prosecution, because even military personnel have a right to life outside of armed conflict, and any killing is a crime.

Moreover, treating the *Cole* attack as an incident of armed conflict risks establishing a precedent detrimental to long-term U.S. interests and the safety of our military personnel. To establish the existence of an armed conflict prior to 9/11, the prosecution must rely on Osama bin Laden's calls for violence against the United States as an effective "declaration of war." Conceding this traditional state prerogative to non-state actors opens a Pandora's Box. It logically accords future terrorist groups the right to proclaim hostilities against the United States at a time of their choice; they would then be exempt from criminal accountability if they simply adopted law of war compliant means; e.g., by placing distinctive markings on a vessel and flying their organization's flag before striking. Classifying events like the *Cole* attack as ordinary terrorism, on the other hand, stigmatizes the perpetrators as criminals rather than warriors and entitles the United States to call upon other nations for legal cooperation under

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412 10 U.S.C. § 950p(a)(2) (2012).

413 Bush, *supra* note 137.

414 DINSTEIN, *supra* note 98, at 150–51.

415 Charge Sheet, *supra* note 376, at 4.

416 Black's Law Dictionary defines wanton as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." BLACK'S LAW DICTIONARY 1719–20 (9th ed. 2009). It goes on to state that "[w]anton conduct has properly been characterized as 'vicious' and rates extreme in the degree of culpability." *Id.* (internal citation omitted). The MCA's use of the term must require more than simply the deliberate killing of an adversary to qualify.

417 *See* UK MINISTRY OF DEFENCE, *supra* note 109, §§ 2.2–2.3.

anti-terrorism treaties.[418] There is no similar obligation with respect to an armed conflict; indeed armed conflict creates the possibility of other nations considering themselves to be neutrals bound to avoid assisting either side.

Prosecuting al Nashiri by military commission is thus both legally problematic and increases the future risk to U.S. forces. It is unclear whether the government has considered these factors in deciding how to prosecute him.

C. *Khalid Sheikh Mohammad and the 9/11 "Co-conspirators"*

The most prominent commission defendant, Khalid Sheikh Mohammad, and his four co-defendants[419] face eight charges, all specifically related to the 9/11 attacks:

(1) conspiracy
(2) attacking civilians
(3) attacking civilian objects
(4) murder in violation of the law of war
(5) destruction of property in violation of the law of war
(6) hijacking or hazarding a vessel
(7) terrorism
(8) intentionally causing serious bodily injury[420]

This prosecution rests on the strongest legal grounds of any Guantánamo case to date, yet still has real flaws. Unlike the *Cole* attack, the President promptly identified 9/11 as an act of war;[421] Congress and much of the international community quickly concurred.[422] And no credible commentator would contend that hijacked passenger-carrying civilian airliners constitute legitimate weapons. Nevertheless, there are very significant practical and legal disadvantages implicated by a law of war-based 9/11 military tribunal that federal trials would avoid entirely.

Treated as acts of terrorism, virtually every aspect of the 9/11 attack constitutes validly prosecutable crimes. The hijacking of four aircraft, the killing of each passenger and crew member onboard, the attacks on the World

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418 *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, art. 8, Dec. 15, 1997, 2149 U.N.T.S. 256; *see also Text and Status of the United Nations Conventions on Terrorism*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (last visited Nov. 3, 2014), *archived at* http://perma.cc/BBM9-NYBE.

419 The other four are Walid Muhammad Salih Mubarek Bin'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adan al Hawasawi. *See, e.g.*, Charge Sheet at 1–20, United States v. Mohammad, Charge Sheet (Military Comm'ns Trial Judiciary Apr. 14, 2012).

420 *Id.*

421 Press Release, The White House, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010912-4.html, *archived at* http://perma.cc/Y87T-SQ49.

422 *See, e.g.*, Glazier, *supra* note 286, at 957, 986.

Trade Center and Pentagon, and every resulting death or injury on the ground can each constitute separate federal counts. Liability for related inchoate offenses of solicitation, conspiracy, and attempted commission is well established, as well as various forms of participations such as being an accessory before or after the fact. If treated as "ordinary" terrorists, the defendants would essentially be limited to challenging the admissibility and factual sufficiency of the evidence against them. Military commission use, in contrast, renders virtually every aspect of the unproven trial procedure and substantive law open to judicial challenge, and permits the assertion of unique law of war defenses.

A law of war prosecution is contingent upon the existence of an armed conflict between al Qaeda and the United States. But, once a conflict begins, specialized law of war rules trump both ordinary domestic law and conflicting international human rights law under the *lex specialis* principle.[423] Conducting an attack is then insufficient to give rise to penal liability; the attack must be proven to have violated specific conflict rules which have associated criminal sanctions. Many, perhaps even most, acts that technically contravene law of war rules are not recognized war crimes.[424]

1. *The Pentagon and World Trade Center as Lawful Targets?*

The Pentagon, like the *Cole*, is obviously a valid target during an armed conflict. But, it can colorably be argued that the World Trade Center was a lawful target as well. While the law of war limits attacks to "military objects," that term is broader than a literal reading might suggest, extending to "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[425] Many authorities interpret this to include objects with significant economic value. Matthew Waxman, who served as Deputy Assistant Secretary of Defense for Detainee Affairs between 2005 and 2007, explained in a 2000 Rand study that "[t]he United States generally supports interpretations of 'military objectives' that include economic targets and infrastructure because their destruction is sometimes thought to undermine an adversary's ability to sustain operations as well as its will to do so."[426]

Waxman cites a number of reputable sources for this assertion, including both official Air Force and Navy publications, U.S. law of war expert Michael N. Schmitt (currently chairman of the International Law Department at the Naval War College), and General Wesley Clark, Supreme Allied Commander

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[423] DINSTEIN, *supra* note 98, at 23–24.

[424] *See* CRYER ET AL., *supra* note 300, at 272.

[425] AP I, *supra* note 97, art. 52(2).

[426] MATTHEW C. WAXMAN, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 10 (2000).

during NATO's 1999 Kosovo air campaign.[427] The validity of economic targeting has also been advocated by long-time U.S. government law of war expert Hays Parks. He notes that during the Vietnam War, the U.S. refrained from attacking a number of lawful targets for "political" reasons, including "economic targets not directly associated with the military effort."[428] Parks' views are significant as he is the primary driver behind the draft DOD Law of War Manual.[429] It would surely embarrass the government to have the 9/11 defense call both the DOD official responsible for Guantánamo when Khalid Sheikh Mohammad arrived there and its recently retired senior law of war expert in order to extract admissions that their own work supported the conclusion that the twin towers were lawful targets at the time that al Qaeda was planning the attack. The defense could call al Bahlul (or use hearsay rules to admit trial transcripts) to show that bin Laden specifically requested an assessment of the economic damage resulting from 9/11.[430] And the government's prior defenses of its pseudo-documentary *The Al Qaida Plan* should facilitate the defense's use of its footage stating that the 9/11 targets were selected for "the military, psychological and economic impact their hitting would have . . . ."[431] In other words, al Qaeda apparently applied the criteria that Waxman articulated for lawful targeting. This could constitute a defense to specifications of the "attacking civilian objects" and "destruction of property in violation of the law of war" charges based on attacking the buildings.

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427 *Id.* at 10 n.19.

428 W. Hays Parks, *Linebacker and the Law of War*, AIR U. REV., Jan–Feb. 1983, at 10, *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1983/jan-feb/parks.html, *archived at* http://perma.cc/YWC6-VUU8.

429 *See* W. Hays Parks, Former Senior Assoc. Deputy Gen. Counsel, Int'l Affairs, Office of Gen. Counsel, U.S. Dep't of Def., Update on the DOD Law of War Manual, Address at the American Bar Association Annual Review of the Field of National Security Law (Nov. 30, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/12/Parks.Manual.pdf, *archived at* http://perma.cc/XGY4-HACG; W. Hays Parks, Former Senior Assoc. Deputy Gen. Counsel, Int'l Affairs, Office of Gen. Counsel, U.S. Dep't of Def., National Security Law in Practice: The Department of Defense Law of War Manual (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/hays_parks_speech_2010.authcheckdam.pdf, *archived at* http://perma.cc/W6HV-ZYMF; W. Hays Parks, Former Senior Assoc. Deputy Gen. Counsel, Int'l Affairs, Office of Gen. Counsel, U.S. Dep't of Def., Remarks at International Law Discussion Group Meeting held at Chatham House (Feb. 21, 2011), *in* CHATHAM HOUSE, MEETING SUMMARY: THE U.S. AND THE LAWS OF WAR 2–19, *available at* http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/il210211summary.pdf (last visited Aug. 24, 2014), *archived at* http://perma.cc/8WZH-CAMT.

430 *See, e.g.*, al Bahlul v. United States, No. 11-1324, 2014 WL 3437485, at *1 (D.C. Cir. July 14, 2014) (en banc).

431 *See* Evan F. Kohlmann, *The Al Qaida Plan*, YOUTUBE (May 31, 2012), http://www.youtube.com/watch?v=wZqbZeQmInk. The quoted language can be found in subtitles appearing between 1:31:55 and 1:32:06.

There is another problem with the attacking civilian objects charge—although it is a well-established war crime in international conflicts, it is not clear that attacking civilian objects constitutes a recognized non-international offense. The charge is conspicuously absent, for example, from the list of non-international war crimes detailed in the Rome Statute, meaning that states declined to let the ICC exercise jurisdiction over it.[432] So, any application of this charge may become even more problematic once the commissions address the legal obligation to classify the conflict.

2. *Mass Murders or "Collateral Damage"?*

The loss of nearly 3,000 lives represents the real tragedy of 9/11, not the physical destruction. The Pentagon was restored to its original appearance and the twin towers have been replaced with the new 1,776 foot-tall One World Trade Center. Commission officials implicitly recognize this, listing each individual victim in the charging documents, maintaining a "Victims and Family Members" section on the commissions' website,[433] and flying survivors to Guantánamo at government expense for each hearing.[434]

But while a federal prosecution would respectfully treat each individual as a murder victim, a law of war trial predictably requires the defense to assert that 9/11 civilian deaths were merely permissible "collateral damage." The law of war requires attackers to distinguish between "military" and "civilian" objects but excuses the infliction of civilian deaths and property damage during otherwise lawful attacks so as long as the anticipated losses are "not . . . excessive in relation to the expected military advantage."[435] Given 9/11's profound economic and psychological impact, it can be plausibly asserted that the civilian losses were permissible, particularly considering the massive collateral damage resulting from many past American air attacks abroad. This is potentially a valid defense to the charges of murder and attacking civilians with respect to the large number of victims on the ground, and a complete defense to the intentionally causing serious bodily injury charge because there were no survivors on the planes.

3. *Other Substantive Law Issues*

The conspiracy charge faces the same issues identified in the D.C. Circuit's consideration of *al Bahlul*. Chief Prosecutor Martins's request that the

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[432] *See* CRYER ET AL., *supra* note 300, at 275.

[433] *See* OFFICE OF MILITARY COMM'NS, http://www.mc.mil/HOME.aspx (last visited Oct. 8, 2014), *archived at* http://perma.cc/B7SX-GJP8.

[434] *See* OFFICE OF MILITARY COMM'NS, http://www.mc.mil/FACILITIESSERVICES/Services/Travel.aspx (last visited Aug. 24, 2014), *archived at* http://perma.cc/42YG-ENAA.

[435] UK MINISTRY OF DEFENCE, *supra* note 109, § 2.6.

convening authority dismiss it was denied.[436] The prosecution then concurred with a defense motion asking the judge to dismiss the conspiracy charge, *provided* it could amend the charging document to preserve allegations of participation in a common plan, in other words, to move from conspiracy as a stand-alone offense to conspiracy as a mode of liability for the other charged offenses.[437]

International criminal trials have recognized various forms of contributory liability, so the prosecution's approach is not without legal support. But it is complicated by the fact that different tribunals have taken different approaches. The ICTY, for example, established "Joint Criminal Enterprise" (JCE) to describe this liability and established a body of jurisprudence explicating it.[438] The Rome Statute, in contrast, recognizes liability for "a crime by a group of persons acting with a common purpose,"[439] declining to adopt the JCE formulation. Although functionally similar, the differences demonstrate a lack of unified international agreement. Contributory liability will necessarily be subject to extensive argument and lengthy appeals if Guantánamo convictions are based on it.

Charging "terrorism" as a substantive military commission offense is also problematic given the issues with the MCA's definition of the offense discussed earlier. Moreover, this specific offense is not generally recognized as a stand-alone crime in international law.[440] This is also true of the "hijacking or hazarding a vessel or aircraft" offense. That charge represents an odd amalgamation of "hijacking" (aircraft piracy) from federal law and "hazarding a vessel" from the UCMJ.[441] Interference with aviation or maritime safety is a significant concern of the international community, but the response was treaties requiring nations to criminalize these offenses under domestic law[442] rather than defining new international crimes. Although these acts are clearly

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[436] Charlie Savage, *Military Prosecutor Battles to Drop Conspiracy Charge in 9/11 Case*, N.Y. TIMES (Jan. 18, 2013), http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html, *archived at* http://perma.cc/WXX8-4M7W.

[437] *See* Government Supplement to Defense Motion to Dismiss for Lack of Jurisdiction at 1–2, United States v. Mohammad, AE107A (Military Comm'ns Trial Judiciary Jan. 21, 2013); Government Response to Defense Motion to Dismiss for Lack of Jurisdiction at 1 & n.1, United States v. Mohammad, AE107A (Military Comm'ns Trial Judiciary Jan. 16, 2013); Government Motion to Make Minor Changes to the Charge Sheet at 1–2, United States v. Mohammad, AE120 (Military Comm'ns Trial Judiciary Jan. 16, 2013).

[438] *See, e.g.*, CRYER ET AL., *supra* note 300, at 305–06.

[439] Rome Statute, *supra* note 133, art. 25, ¶ 3(d).

[440] *See* CRYER ET AL., *supra* note 300, at 284–87.

[441] *Compare* 49 U.S.C. § 46502 (2012) (aircraft piracy), *with* 10 U.S.C. § 910 (2012) (hazarding a vessel).

[442] *See United Nations Action to Counter Terrorism*, UNITED NATIONS, http://www.un.org/en/terrorism/ (last visited Aug. 24, 2014), *archived at* http://perma.cc/Y5HT-ZTKJ.

established federal crimes, military prosecution in reliance on the law of war is problematic.

Trying the alleged 9/11 defendants under the law of war is logically permissible given the legal recognition of that event as an armed attack. But doing so credibly requires proving the commission of recognized war crimes applicable to the conflict typology. One area in which the Nuremberg legacy is legitimately challenged is its use of "crimes against peace" and "crimes against humanity" charges without clear prior definition of these offenses. The international community's response was quite clear—it quickly included explicit prohibitions against ex post facto crime creation in both the 1948 Universal Declaration of Human Rights[443] and the 1949 Geneva Conventions.[444] The Rome Statute is explicit that its offenses only apply prospectively.[445] To have any hope of credibility, the Guantánamo trials must recognize that the validity of charges levied is now an essential component of international justice. No modern tribunal can ever again hope to get the "benefit of the doubt" accorded the IMT, particularly when alternative courts with respected procedure and established substantive law are readily available.

To date, the Guantánamo commissions have failed to meet these obligations, undermining their own legitimacy. Moreover, reliance on law of war charges permits the invocation of unique law of war defenses which work to these defendants' advantage. So even where a law of war trial is legally permissible, practical considerations may still suggest that it is not wise to conduct one.

VI. CONCLUSION

Military commission proceedings under the 2009 MCA are a substantial improvement over those originally envisioned by the Bush Administration, but they still fall short of acceptable due process standards. Despite the statutory ban on coerced statements, detainee mistreatment issues continue to permeate almost every aspect of the commission process.[446] Prosecutors seem determined to use detainee statements as their primary evidence, disregarding documented detainee abuse and the MCA's prohibitions against coerced statements. Ignoring Nuremberg Chief Prosecutor Robert Jackson's insistence on the need for evidence beyond question of taint, government prosecutors rely on the premise of "clean team" procedures notwithstanding efforts to induce "learned helpless." The commissions' adversarial nature then effectively shifts the burden of keeping tainted evidence out to the defense while the government controls the information necessary to do so.

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443 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 11 (Dec. 10, 1948).

444 *See* Geneva III, *supra* note 128, art. 99.

445 Rome Statute, *supra* note 133, arts. 22, 24.

446 *See* Savage, *supra* note 295.

Concurrently, commission classification rules—designed to shield the coercers—compromise the ability of defense attorneys to adequately represent their clients. These disadvantages are further compounded by the lack of any right to representation by freely chosen counsel and structural and resource inequalities between prosecution and defense, including restrictions on access to witnesses and the ability to obtain expert assistance.

These procedural issues are just the tip of the legal iceberg. Far too little attention has been paid to the legitimacy of the basic charges. Without valid jurisdiction, any trial is a legal nullity, and procedure becomes irrelevant. To survive legal challenge, Guantánamo charges must be soundly grounded in law of war violations defined at the time of the alleged conduct and applicable to the type of conflict being contested. The problematic charges of conspiracy and providing material support for terrorism, the former now clearly rejected by the D.C. Circuit and the latter in substantial doubt, have been charged in seven of eight cases completed to date, and were the *only* offenses charged in five of these. Additional charges lodged against the remaining defendants either failed to state a recognized law of war violation or the alleged conduct fails to fall within the legitimate jurisdiction of a law of war commission. The perverse irony is that the "war crime" most likely to have actually been present in any of the completed Guantánamo case seems to have been denial of a fair trial, and the perpetrator was the government, not the defendant.

The situation is little better with respect to the capital cases now fitfully moving towards trial. These charges also have potentially serious defects while law of war prosecutions present unique practical downsides entirely avoided by using established federal courts.

The military commissions have been tried for a full decade under two different administrations and have consistently failed to clear any credible legal bar due to their shortcomings in both procedure and substantive law. Meanwhile, federal courts have returned scores of terrorist convictions without legitimate controversy, and with none of the commissions' jurisdictional flaws. The most recent of these, that of Osama bin Laden's son-in-law, Sulaiman Abu Ghayth, led Attorney General Holder to observe:

> This verdict is a major milestone in the government's unrelenting efforts to pursue justice against those involved with the September 11 attacks. . . . It was appropriate that this defendant, who publicly rejoiced over the attacks on the World Trade Center, faced trial in the shadow of where those buildings once stood. We never doubted the ability of our Article III court system to administer justice swiftly in this case, as it has in hundreds of other cases involving terrorism defendants. It would be a good thing for the country if this case has the result of putting that political debate to rest. This outcome

> vindicates the government's approach to securing convictions against not only this particular defendant, but also other senior leaders of al Qaeda.[447]

Continued use of the Guantánamo commissions, in contrast, only plays into the hands of our adversaries, fueling their recruiting and fundraising efforts while deterring legal cooperation from other nations and further tarnishing the United States' reputation as a nation respecting the rule of law.

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[447] Press Release, Dep't of Justice, Statements by Att'y General Holder and Acting Assistant Att'y General Carlin on Conviction of Sulaiman Abu Ghayth (Mar. 26, 2014), *available at* http://www.justice.gov/opa/pr/2014/March/14-ag-313.html, *archived at* http://perma.cc/6ZDV-YV7S.