

# NOTE

## “BORN OF MILITARY NECESSITY:” REDESIGNING MILITARY COMMISSIONS FOR THE 21ST CENTURY

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### ABSTRACT

*Military commissions, military courts of law traditionally used to try law of war offenses, must be authorized by congressional statute. The current statute, the Military Commissions Act of 2009 (MCA), authorizes commissions to assert jurisdiction over an alien unprivileged enemy belligerent who: A) has engaged in hostilities, B) has purposefully and materially supported hostilities or C) was a part of Al Qaeda. The statute offers a vague definition of hostilities—“conflicts subject to the laws of war”—nor does it provide additional guidance on either what constitutes “purposefu[l] and materia[l] suppor[t]” or organizational affiliation. The MCA’s rigid yet ill-defined jurisdiction requirements may inhibit prosecution via military commission in the years to come, given the ever-changing national security landscape highlighted by evolving conventional and unconventional tactics, groundbreaking military theatres, and a fluid terrorist Rolodex. This Note takes a step back to analyze commissions’ history and current iteration and then to suggest holistic change incorporating salient lessons to maintain military commissions as a practicable option. After having done so, this Note will advocate a substantial overhaul of jurisdiction requirements to be more transparent and more adaptable to a changing global security dynamic.*

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I. INTRODUCTION

Today, military commissions—referred to colloquially as military tribunals—are being put out to pasture. President Obama signaled as much when announcing his plan to close the Guantanamo Bay Naval Station Prison, Cuba, on February 23, 2016.<sup>2</sup> In the historic announcement, the President remarked that military commissions—famously held at Guantanamo Bay, or “Gitmo”<sup>3</sup>—“are very costly [and] have resulted in years of litigation with-

<sup>2</sup> Remarks on Closing the Detention Facilities at the United States Naval Base in Guantanamo Bay, Cuba, 2016 DAILY COMP. PRES. DOC. 1 (Feb. 23, 2016) [hereinafter Guantanamo Closure Speech].

<sup>3</sup> *The Guantanamo Trials*, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/guantanamo-trials> [<https://perma.cc/J8D8-WHTU>]. This nickname’s origins are unclear: some claim it’s “a somewhat awkward contraction of Guantanamo,” NICHOLAS E. REYNOLDS, A SKILLFUL

out a resolution.”<sup>4</sup> The President, in other words, “threw the existing military commissions under the bus” by implying—not so subtly—that Article III courts are better suited to try terrorists, with commissions only sufficient for “unique circumstances,” namely tortured defendants who cannot be tried in civilian courts.<sup>5</sup>

And while Obama did not bar further commissions<sup>6</sup>—in fact he explicitly left open the opportunity for prosecution via military commission for remaining Guantanamo detainees<sup>7</sup>—“the strong implication of his statement was that new prosecutions won’t be forthcoming.”<sup>8</sup> This is true especially without statutory changes to commissions’ procedures, which he overtly requested.<sup>9</sup>

The detention of suspected terrorists at Guantanamo Bay has come under fire from courts,<sup>10</sup> journalists,<sup>11</sup> commentators,<sup>12</sup> scholars,<sup>13</sup> presiden-

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SHOW OF STRENGTH: U.S. MARINES IN THE CARIBBEAN, 1991–1996 4 (2003), but others believe it’s the phonetic pronunciation of the base’s designation, GTMO, *see GTMO Entry Clearance Information*, NAVAL STATION GUANTANAMO BAY, NAVY INSTALLATIONS COMMAND, [https://www.cnic.navy.mil/regions/cnrse/installations/ns\\_guantanamo\\_bay/about/installation\\_guide/gtmo\\_entry\\_clearance\\_information.html](https://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/installation_guide/gtmo_entry_clearance_information.html) [<https://perma.cc/K4Q2-72YL>].

As well, the Bush Administration specifically chose Guantanamo to prevent detainees from petitioning for habeas corpus. In *Johnson v. Eisentrager*, the Court proscribed six criteria for withholding the Great Writ: the detainee “(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.” 339 U.S. 763, 777 (1950). Guantanamo checked all the boxes. Years later, Justice Kennedy re-imagined *Eisentrager* as a standard, holding that *de facto* sovereignty over a military base permitted detainees habeas rights. *See Boumediene v. Bush*, 553 U.S. 723, 726–28 (2008).

<sup>4</sup> Guantanamo Closure Speech, *supra* note 2.

<sup>5</sup> *See* Noah Feldman, *Obama Makes Guantanamo Tribunals More Difficult*, BLOOMBERG: BLOOMBERG VIEW (Feb. 23, 2016, 1:44 P.M.) <http://www.bloombergview.com/articles/2016-02-23/obama-makes-guantanamo-tribunals-more-difficult> [<https://perma.cc/W2T9-YELR>] (citing Guantanamo Closure Speech, *supra* note 2).

<sup>6</sup> *See* Guantanamo Closure Speech, *supra* note 2.

<sup>7</sup> *See* DEPARTMENT OF DEFENSE, PLAN FOR CLOSING THE GUANTANAMO BAY DETENTION FACILITY, [http://www.defense.gov/Portals/1/Documents/pubs/GTMO\\_Closure\\_Plan\\_0216.pdf](http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf) [<https://perma.cc/4WF6-P7X4>] (“22 [detainees] were initially referred by the Guantanamo Review Task Force for prosecution (either before a military commission or in an Article III court). In the event these detainees are transferred to the United States, it may be possible to prosecute some of them in one of these two fora.”); Feldman, *supra* note 5.

<sup>8</sup> *See* Feldman, *supra* note 5.

<sup>9</sup> *See* Guantanamo Closure Speech, *supra* note 2 (“We’re therefore outlining additional changes to improve these commissions, which would require congressional action, and we will be consulting with them in the near future on that issue.”).

<sup>10</sup> *See* Noah Feldman, *Two Messy Gitmo Trials Land at Supreme Court’s Step*, BLOOMBERG: BLOOMBERG VIEW (Oct. 26, 2016, 10:55 A.M.), <https://www.bloomberg.com/view/articles/2016-10-26/two-messy-gitmo-trials-land-at-supreme-court-s-step> [<https://perma.cc/9W3Z-4AWC>] (noting that the Court will likely be petitioned for certiorari on two pending military commissions cases whose claims were recently adjudicated in the United States Court of Appeals for the District of Columbia this fall).

<sup>11</sup> Trevor Timm, *Obama Doesn’t Need Congress To Close Guantanamo – so what’s keeping him?*, GUARDIAN (Nov. 12, 2015), <http://www.theguardian.com/commentisfree/2015/nov/12/obama-close-guantanamo-without-congress> [<https://perma.cc/454S-CQNS>].

tial candidates,<sup>14</sup> and elected officials.<sup>15</sup> This has been joined by narrower—but equally ardent—calls to try alleged terrorists in civilian courts under domestic criminal charges instead of military commissions on law of war offense charges.<sup>16</sup> But the desires to close Guantanamo Bay<sup>17</sup> and exclu-

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<sup>12</sup> See, e.g., Editorial Board, Op-Ed, *A Rebuke to Military Tribunals*, N.Y. TIMES (June 18, 2015), <http://www.nytimes.com/2015/06/18/opinion/a-rebuke-to-military-tribunals.html>; [https://perma.cc/U7TQ-J5DG]; Editorial Board, Op-Ed, *Perpetuating Guantanamo's Travesty*, N.Y. TIMES (Jan. 17, 2015), <http://www.nytimes.com/2015/01/18/opinion/sunday/perpetuating-guantanamos-travesty.html> [https://perma.cc/E67R-NQ4K].

<sup>13</sup> See, e.g., Jane Harman & Jack Goldsmith, Op-Ed, *What should America do with Guantanamo's high-risk detainees?*, WASH. POST (Feb. 6, 2015), [https://www.washingtonpost.com/opinions/what-should-america-do-with-guantanamos-hard-cases/2015/02/06/6365464e-abde-11e4-ad71-7b9eba0f87d6\\_story.html](https://www.washingtonpost.com/opinions/what-should-america-do-with-guantanamos-hard-cases/2015/02/06/6365464e-abde-11e4-ad71-7b9eba0f87d6_story.html) [https://perma.cc/JJ5W-FUBZ]; Jennifer Daskal, Op-Ed, *Close Guantanamo, but do it right*, NEWSDAY (Feb. 6, 2015), <http://www.newsday.com/opinion/oped/close-guantanamo-but-do-it-right-jennifer-daskal-1.9913332> [https://perma.cc/EJH9-EVTC].

<sup>14</sup> See, e.g., Press Release, Bernie Sanders, Sanders in Delegation Traveling to Cuba (Feb. 6, 2014), <http://www.sanders.senate.gov/newsroom/press-releases/sanders-in-delegation-traveling-to-cuba> [https://perma.cc/73MP-ZYUU]; Rebecca Kaplan, *Hillary Clinton urged Obama to close Guantanamo Bay*, CBS NEWS (Nov. 30, 2015), <http://www.cbsnews.com/news/hillary-clinton-urged-obama-to-close-guantanamo-bay> [https://perma.cc/6KQH-K6KY]. Admittedly, only 2016's Republican candidates largely supported maintaining, if not augmenting, Guantanamo's detention facilities. See, e.g., Alexander Bolton, *Trump calls for more prisoners in Gitmo*, HILL (Dec. 19, 2015), <http://thehill.com/blogs/ballot-box/gop-primaries/263809-trump-calls-for-more-prisoners-in-gitmo> [https://perma.cc/RG6H-FFF8]; *Rubio: I'd grow Guantanamo*, MIAMI HERALD (April 13, 2015), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article18449078.html> [http://perma.cc/6BPY-UCMW].

<sup>15</sup> President Obama campaigned on a promise to close Guantanamo and, soon after taking office, issued an Executive Order to begin doing so. See Exec. Order No. 13,492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4,897 (Jan. 27, 2009). Many Senators and Members—on both sides of the aisle—feel similarly. See, e.g., Dianne Feinstein, Op-Ed, *Let's Finally Close Guantanamo*, N.Y. TIMES (Nov. 4, 2015) <http://www.nytimes.com/2015/11/05/opinion/lets-finally-close-guantanamo.html> [https://perma.cc/ZNB8-FWRY]; Kristina Wong, *Obama's last hope on Gitmo: John McCain?*, THE HILL (May 17, 2015), <http://thehill.com/policy/defense/242290-obamas-last-hope-on-gitmo-john-mccain> [https://perma.cc/383W-6M7G] (quoting Sen. McCain as having “always been in favor of closing Guantánamo because of the image Guantánamo has in the world, whether it's deserved or not deserved”).

<sup>16</sup> See, e.g., Anthony D. Romero, Op-Ed, *Terrorists Are Criminals and Should be Tried in Civilian Court*, U.S. NEWS (Feb. 16, 2010), <http://www.usnews.com/opinion/articles/2010/02/16/terrorists-are-criminals-and-should-be-tried-in-civilian-court> [https://perma.cc/52RU-YWWF]; Don Borell, Op-Ed, *Trying terrorist in civilian court is the right move*, HILL: CONGRESS BLOG (Oct. 17, 2013) <http://thehill.com/blogs/congress-blog/homeland-security/328939-trying-terrorist-in-civilian-court-is-the-right-move> [https://perma.cc/VZ4K-EBXG]; Timothy M. Phelps, *Court ruling limits use of military commissions for terrorism suspects*, L.A. TIMES (Jun. 12, 2015), <http://www.latimes.com/nation/la-na-court-military-commissions-20150612-story.html> [https://perma.cc/MYB7-Z3CZ] (quoting Yale Law School Professor Eugene Fidell as saying, “There is so little left to the potential jurisdiction of military commissions . . . . This patient is dying on the operating table, and it is time we said ‘do not resuscitate.’”).

<sup>17</sup> Some academics argue to maintain the facility, see Jennifer Daskal, Op-Ed, *Don't Close Guantanamo*, N.Y. TIMES (Jan. 10, 2013), <http://www.nytimes.com/2013/01/11/opinion/dont-close-guantanamo.html> [https://perma.cc/CZR3-U5KC]; Edwin Meese III, *Guantanamo Bay prison is necessary*, CNN (Jan. 11, 2012), <http://www.cnn.com/2012/01/11/opinion/meese-gitmo/> [https://perma.cc/NCE6-JL57], as do some journalists, see Tom Rogan, *Rogan: Why Guantanamo Bay Should Stay Open*, WASH. POST: POWERPOST (Nov. 10, 2015), <https://www>

sively try alleged terrorists in civilian courts<sup>18</sup> are not universally shared. Ultimately, both beliefs insufficiently understand commissions' statutory and constitutional limitations and belie the role of military commissions in our nation's legal history; as such, both views are right and both views are wrong.

Commissions are our country's legal phoenix, cyclically decomposing into and resurrecting from ashes; unquestionably, we are nearing this cycle's end, as the prosecution of its final three "legacy" cases—the 9/11 Five, the U.S.S. Cole bombings, and Abdul Hadi al Iraqi—appear to be these commissions' final proceedings.<sup>19</sup> For now, Post-9/11 commissions are the tip of the iceberg; other comparable (or not so comparable) commissions throughout our history reveal the ebbs and flows of America's military tribunals to better understand this most recent iteration.

In this way, the phoenix is a particularly apt metaphor. Legend tells us the phoenix "took several necessary steps" before its death in preparation for its rebirth.<sup>20</sup> As this chapter of commissions likely closes and we leave the crucible of war that shaped our post-9/11 posture, we are permitted the clarity and latitude to reevaluate and reassess laws and policies. Such introspection is our "necessary steps" to prepare commissions for regeneration, incorporating the lessons of past iterations as well as those currently proceeding to entrust future commissions with more robust legal frameworks.

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.washingtonpost.com/news/powerpost/wp/2015/11/10/rogan-why-guantanamo-bay-should-stay-open/ [https://perma.cc/4M3N-AN23].

Many politicians agree. See Martin Matishak, *Senator says Gitmo detainees can 'rot in hell'*, THE HILL (Feb. 5, 2015), <http://thehill.com/policy/defense/231853-republican-senator-gitmo-detainees-can-rot-in-hell> [https://perma.cc/7445-M27Y] (citing Sen. Tom Cotton saying, "In my opinion, the only problem with Guantánamo Bay is there are too many empty beds and cells there right now"); Rep. Jim Bridenstine, *The Moral Case for Keeping Guantanamo Open*, NAT'L REV. (Jan. 13, 2015), <http://www.nationalreview.com/article/396298/moral-case-keeping-guantanamo-open-jim-bridenstine> [https://perma.cc/7TBC-WRGZ?type=image] Rep. Buck McKeon, Op-Ed, *Keep Guantanamo open: Opposing View*, USA TODAY (May 2, 2013), <http://www.usatoday.com/story/opinion/2013/05/02/guantanamo-bay-buck-mckeon-editorials-debates/2131137/> [https://perma.cc/K7UQ-27ZK], including those running for President, see, e.g., Sen. Marco Rubio, *We Can't Go Along with President Obama's Dangerous Plan to Close Gitmo*, MARCO RUBIO – A NEW AMERICAN CENTURY (Nov. 18, 2015), <http://web.archive.org/web/20160317112314/http://marcorubio.com/news/marco-rubio-guantanamo-bay-obama-terrorism/> [https://perma.cc/LR62-A78K]; Alexander Bolton, *Trump calls for more prisoners in Gitmo*, HILL (Dec. 19, 2015), <http://thehill.com/blogs/ballot-box/gop-primaries/263809-trump-calls-for-more-prisoners-in-gitmo> [https://perma.cc/R2CY-EVHG] (citing Mr. Trump as stating "I would leave [Guantanamo Bay] just the way it is, and I would probably fill it up with more people that are looking to kill us").

<sup>18</sup> See e.g., Michael B. Mukasey, *Civilian Courts Are No Place to Try Terrorists*, WALL ST. J. (Oct. 19, 2009), <http://www.wsj.com/articles/SB10001424052748704107204574475300052267212> [https://perma.cc/JZ8H-7WDS]; Jerry Markon, *Prosecuting Terrorist Trials in U.S. Courts Poses Tremendous Hurdles*, WASH. POST (Mar. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/05/AR2009030503662.html> [https://perma.cc/A3P5-E5JT].

<sup>19</sup> Steven Vladeck, *General Martins on the Shrinking Military Commissions*, JUST SECURITY (Feb. 23, 2015, 10:59 A.M.), <https://www.justsecurity.org/20289/general-mark-martins-shrinking-military-commissions/> [https://perma.cc/5QFQ-YW3R].

<sup>20</sup> ROELOF VAN DER BROEK, THE MYTH OF THE PHOENIX 161 (I. Seeger trans., 1972).

It must be unambiguously stated at the outset that this Note in no way normatively evaluates commissions' merits; much has been written comparing their strengths and weaknesses to civilian counterparts.<sup>21</sup> Rather, this Note assumes commissions' worth and, in an attempt to keep them as practicable options for trying enemy combatants when appropriate, navigates previously uncharted territory: evaluating the long-term viability of commissions' jurisprudentially and statutorily prescribed aims and limits. I do so by identifying where commissions may, in the future, fail to be an "option when individuals are detained during battle."<sup>22</sup> I narrowly aim to answer this question specifically relating to the statute's jurisdiction provisions.

Before that evaluation, however, we must ask why such an exercise is necessary: are there current problems with the statute's three jurisdictional provisions? The short answer: not quite yet.

As mentioned, Guantanamo Bay is a highly political place.<sup>23</sup> Aside from questions of prisoner detention there generally, people are frustrated with commissions' delay and cost.<sup>24</sup> Because Congress is required to legislatively authorize commissions,<sup>25</sup> a favorable opinion of commissions' neces-

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<sup>21</sup> See, e.g., JENNIFER K. ELSEA, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT, CONGRESSIONAL RESEARCH SERVICE (2014); Lindsey N. Overton, *Are Two Judicial Systems Better Than One?: A Look at the Debate Between Military Tribunal Commissions Versus Federal Civilian Trials in Terrorism Cases*, 4 ALB. GOV'T L. REV. 877 (2011); Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012).

<sup>22</sup> Guantanamo Closure Speech, *supra* note 2.

<sup>23</sup> See *supra* notes 14 & 15.

<sup>24</sup> See, e.g., Human Rights Watch, *Angst Over Further Military Commission Delays*, BLOG: HUMAN RIGHTS WATCH (Jul. 21, 2015), <http://www.humanrightsfirst.org/blog/angst-over-further-military-commission-delays> [<https://perma.cc/RL3F-GTRU>]; WILLIAM T. COLEMAN, COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA'S PROMISE 351 (2010) (finding the delays "enormously frustrating"); Guantanamo Closure Speech, note 2 ("[T]hese [commissions] are very costly, they have resulted in years of litigation without a resolution.").

<sup>25</sup> See *infra*, Part I; *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.28 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); *Ex parte Milligan*, 71 U.S. 2, 121–22 (1866), *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878); *Ex parte Quirin*, 317 U.S. 1, 26–29 *modified sub nom.* U.S. *ex rel. Quirin v. Cox*, 63 S. Ct. 22 (1942) ("The Constitution thus invests the President as Commander in Chief . . . to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."); *In re Yamashita*, 327 U.S. 1, 10–11, 16, 23 (1946); *Madsen v. Kinsella*, 343 U.S. 348–49 (1952) ("In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States."); *Hamdan*, 548 U.S. at 593 citing *Quirin* at 28–29 ("[T]he *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.").

sity and importance is vital to their continued viability in future conflicts beyond Al Qaeda.<sup>26</sup> However, given an increasingly negative opinion of commissions<sup>27</sup> and the rapidly changing threats facing our country, the current trials are poised to be our nation's final experimentation with commissions unless wholesale changes are brought to bear, especially ones that can increase efficiency and decrease judicial resources expended without sacrificing the rule of law. Believing that commissions still serve a substantial purpose in our national security and legal apparatuses—including, as President Obama stated, an efficient yet just prosecutorial option for those “detained during battle”<sup>28</sup>—I propose changing the MCA's jurisdiction hooks.

The MCA only authorizes convening a commission against an “alien unprivileged enemy belligerent,”<sup>29</sup> or “an individual who is not a citizen of the United States”<sup>30</sup> “(other than a privileged belligerent) who: (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”<sup>31</sup>

Together, the definition of “hostilities”—invoked in two prongs but still largely opaque in today's law of war doctrine—and restriction to Al Qaeda operatives will narrow commissions too severely to afford a viable option in today's changing geopolitical landscape. To mitigate inevitable objections while preserving fundamental fairness, I advocate two specific changes: permitting the Secretary of Defense to define “hostilities” under rulemaking procedures and opening jurisdiction to members of all foreign terrorist organizations. These changes would create fluid yet precise jurisdictional reach to better encompass members of terrorist organizations who would be arbitrarily excluded from military commissions under the current statute.

This Note methodically walks through the statutory and jurisdiction limitations of commissions to illustrate how these changes would help commissions realize its aim of affording the military a viable *en bello* trial for unprivileged belligerents while preventing impending objections on the horizon. To do so, Section II details the history of military commissions. Section III then outlines the current iteration's jurisdiction hooks in the commissions'

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<sup>26</sup> Throughout this Note, I refer to Al Qaeda as spelt in the Military Commissions Act. Other sources, including some cited, use accepted spelling alternatives.

<sup>27</sup> See, e.g., David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008); Stephen Vladeck, *The unraveling Guantánamo military commissions*, MSNBC (May 19, 2015), <http://www.msnbc.com/msnbc/the-unraveling-guantanamo-military-commissions> [https://perma.cc/R98P-LXH9].

<sup>28</sup> Guantanamo Closure Speech, *supra* note 2.

<sup>29</sup> 10 U.S.C. § 948c (2012).

<sup>30</sup> 10 U.S.C. § 948a(1) (2012).

<sup>31</sup> 10 U.S.C. § 948a(7) (2012). Henceforth, I will refer to each of the three possible methods of demonstrating one's loss of noncombatant status as “prongs.”

current state to determine who, exactly, can sit trial in a military commission. Section IV diagnoses the legislation's jurisdiction ailments—specifically, how these hooks are ill equipped to handle obvious potential pitfalls as the international security landscape continues to evolve. Finally, Section V proffers specific amendments to cure these deficiencies and discusses their ramifications to demonstrate why they ought be enacted.

## II. A BRIEF HISTORY OF MILITARY COMMISSIONS IN THE UNITED STATES

Military commissions are steeped in United States history, tracing their lineage to the birth of the nation. Tracing commissions' history is not simply an academic exercise. Rather, it contextualizes the outer bounds of military commissions' jurisdiction and the need for specified congressional authorization.

On October 2, 1780, Major John André was hanged for espionage after the first military tribunal in our young nation's history.<sup>32</sup> André, himself a high-ranking officer in Her Majesty's Army, fought against then-General George Washington and the Continental Army. As the head of British intelligence in 1779, André began corresponding with an American general named Benedict Arnold. At the time, Arnold was the Commanding Officer of the American Army's installation at West Point, New York (what would become the eponymous military academy).<sup>33</sup> West Point was a strategic waypoint: situated on the Hudson River, it connected New England to the rest of the Northeast Corridor. Aiming to acquire the valuable position and divide the colonies,<sup>34</sup> André turned Arnold—who was himself disgruntled by his stature in the Continental Army—and offered him only £20,000 to surrender West Point (roughly \$1.1 million in 2016 dollars).<sup>35</sup> When the Americans detained André,<sup>36</sup> Washington was alerted to the conspiratorial correspondence. The British decided against a potential trade of Arnold for André as they felt “they would have little hope of inducing any other American officers to defect.”<sup>37</sup> With no other option, Washington convened the first military tribunal in Tappan, New York.<sup>38</sup>

This tribunal, “born of military necessity,”<sup>39</sup> laid the foundation for commissions and included many aspects of today's commissions. The tribunal was convened by a military officer, in this case General Washington himself, just as today's commissions must be convened by the proper author-

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<sup>32</sup> Wigall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 832 (1948).

<sup>33</sup> *Id.*

<sup>34</sup> MICHAEL J. SULICK, *SPYING IN AMERICA* 52 (2012).

<sup>35</sup> *Id.* at 51–52. A pittance compared to even the most conservative estimate of West Point's real estate value today.

<sup>36</sup> G.J.A. O'TOOLE, *HONORABLE TREACHERY* 56–57 (2014).

<sup>37</sup> SULICK, *supra* note 34, at 56.

<sup>38</sup> O'TOOLE, *supra* note 36, at 56–57.

<sup>39</sup> Hamdan, 548 U.S. at 590.



ity.<sup>40</sup> Just like current commissions, André’s tribunal was heard by multiple military officers—fourteen to be precise—and was presided over by another officer, again Washington.<sup>41</sup> Moreover, the tribunal heard argument from military officers representing the defendant<sup>42</sup> and permitted André to speak in his own defense, just as today’s iterations do.<sup>43</sup> Finally, just as André was hanged, today’s commissions carry with them the potential penalty of death.<sup>44</sup>

Military tribunals briefly reappeared during the War of 1812. Then-General Andrew Jackson imposed martial law in New Orleans during the war. A state legislator named Louis Louaillier publicly opposed Jackson’s decision, publishing an editorial in a widely distributed newsletter.<sup>45</sup> Subsequently, Jackson imprisoned Louaillier, suspended his right to habeas corpus, and attempted to convene a tribunal to prosecute the legislator.<sup>46</sup> After getting wind of the impending proceedings, U.S. District Court Judge Dominick Hall ordered Louaillier to be released. Jackson’s response? Ordering the arrest of Judge Hall.<sup>47</sup> Louaillier was in the end acquitted as the court found that his status as a civilian who in no way participated in any military engagement failed to confer jurisdiction to a military commission trying any alleged infraction.<sup>48</sup>

Despite the fruitless result, the attempted tribunal for Louaillier was not Jackson’s last use of military commissions. Jackson convened another commission to try two British Indian traders accused of inciting and assisting the Creek Indians in 1818. The two traders, Alexander Arbuthnot and Robert Ambrister, were convicted and executed.<sup>49</sup>

<sup>40</sup> See O’TOOLE, *supra* note 36, at 57; Manual for Military Commissions, Rule 406, 407 (regarding referrals and convening authorities) [http://www.mc.mil/Portals/0/2010\\_Manual\\_for\\_Military\\_Commissions.pdf](http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf) [https://perma.cc/JLJ7-S3H7]; 10 U.S.C. § 948j (2012). Admittedly, however, convening the trial was not required at the time. Instead, “Washington was entitled to hang André after [a] summary hearing[.]” O’TOOLE, *supra* note 36, at 57.

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<sup>41</sup> Compare 10 U.S.C. § 949m(c) (Supp. I 2013) (requiring “in a case in which the penalty of death is sought, the number of primary members of the military commission under this chapter shall be not less than 12 primary members”), with O’TOOLE, *supra* note 36, at 57.

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<sup>42</sup> Compare O’TOOLE, *supra* note 36, at 57 (noting that Washington heard arguments from one of André’s deputies and, though such defense was not required of the tribunal, Washington “agreed to postpone the execution for a day and sent a representative to hear further arguments from a deputation of three British officers at Dobbs Ferry”), with 10 U.S.C. §§ 949(a), 949(d).

<sup>43</sup> See O’TOOLE, *supra* note 36, at 57.

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<sup>44</sup> Compare O’TOOLE, *supra* note 36, at 57, with 10 U.S.C. § 949m(c) (Supp. I 2013).

<sup>45</sup> See PIERCE O’DONNELL, IN TIME OF WAR: HITLER’S TERRORIST ATTACK ON AMERICA 120 (2005).

<sup>46</sup> *Id.*

<sup>47</sup> MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW 36 (2006).

<sup>48</sup> LOUIS LOUALLIER, THE APPEAL OF L. LOUALLIER, SEN., AGAINST THE CHARGE OF HIGH TREASON AND EXPLAINING THE TRANSACTIONS AT NEW-ORLEANS 25 (1827). In fact, Jackson was himself fined \$1,000 for contempt of court for this stunt. See Warshauer, *supra* note 47, at 39. That’s roughly equivalent to \$13,900 today.

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<sup>49</sup> See GEORGE C. KOHN, DICTIONARY OF WARS 486 (3d ed. 2007).

After Jackson, our country next saw military commissions in their formal establishment during the Mexican-American War. In 1847, General Winfield Scott issued General Order No. 20, establishing military commissions—the first official use of the term—to try “conduct not triable by courts-martial, including ‘assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property.’”<sup>50</sup> The order also created a second set of tribunals to try violations of the laws of war where courts-martial again lacked jurisdiction under the Articles of War, the laws that govern military conduct (and a precursor to the Uniform Code of Military Justice).<sup>51</sup> Ultimately, the dual structure was disposed of and commissions became the sole avenue to try both categories of offenses.<sup>52</sup> Commissions returned to dormancy after the war ended.

Commissions next reappeared during the Civil War and Reconstruction era. An attorney and legal scholar in his own right,<sup>53</sup> Army General Henry Halleck “recognize[d] that the Articles of War were inadequate for administering justice during the rebellion.”<sup>54</sup> Halleck issued General Order No. 1 to outline the nature and jurisdictional boundaries of commissions.<sup>55</sup> This order proved pivotal to the foundation of today’s commissions, as this was the first time military commissions “became the accepted venue for dealing with the troublesome issue of how to punish unlawful combatants.”<sup>56</sup> The North ultimately convened over two thousand commissions during the Civil War,<sup>57</sup> even trying the famed Lincoln conspirators in military commissions.<sup>58</sup>

The most famous and influential case amongst those tried during this period was against a leader in the Copperhead movement<sup>59</sup> in Indiana,

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<sup>50</sup> *Military Commissions History*, Office of Military Commissions, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> [https://perma.cc/PP2G-VBGV].

<sup>51</sup> MAJ. GEN. WINFIELD SCOTT, GENERAL ORDERS, No. 20 (Feb. 19, 1847), <https://archive.org/stream/headquartersofar00scot#page/n1/mode/2up> [https://perma.cc/CK7W-3V29].

<sup>52</sup> *Id.*

<sup>53</sup> See generally GEN. GEORGE HALLECK, INTERNATIONAL LAW, OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR, VOL. 1 (1861).

<sup>54</sup> Major Michael O. Lacey, *Military Commissions: A Historical Survey*, THE ARMY LAWYER, Mar. 2002, at 41, 43.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 833 (2d ed. 1920 reprint)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 44. For a more detailed story of the Lincoln conspirators and their military commissions see DOUG LINDER, THE TRIAL OF THE LINCOLN ASSASSINATION CONSPIRATORS (2006), <http://law2.umkc.edu/faculty/projects/ftrials/lincolnconspiracy/lincolnaccount.html> [https://perma.cc/U93K-Y9NQ].

<sup>59</sup> Copperheads were Civil War-era Northern Democrats who prioritized peace with the Southern Confederacy over maintaining opposition to slavery. They fought against Lincoln, believing that if the Union rescinded their abolitionist demands, peace could be achieved. See generally JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN’S OPPO-

Lambdin P. Milligan. After a military commission found Milligan guilty of planning and organizing an attack on the Democratic convention, General Alvin Hovey approved Milligan's death sentence.<sup>60</sup> In response, Milligan petitioned for a writ of habeas corpus, first with the Federal Circuit in Indiana and ultimately with the Supreme Court.<sup>61</sup> Having granted the writ, the Court set a constitutional boundary for military commissions, holding that such tribunals were unconstitutional if the relevant jurisdiction's civil courts could adequately try the case.<sup>62</sup>

Following a fleeting appearance in the Spanish-American War,<sup>63</sup> commissions next substantially re-emerged during World War II. President Franklin Delano Roosevelt ordered a tribunal to charge eight German prisoners of war.<sup>64</sup> The Germans stood accused of espionage and attempted sabotage as part of *Operation Pastorius*, a failed German plan to impair strategic American economic targets, including the Niagara Falls hydroelectric plants and railroad passages in Pennsylvania.<sup>65</sup> After the eight were found guilty, they challenged the commission's jurisdiction, claiming the following: [T]he President is without any statutory or constitutional authority to order [them] be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in civilian courts with the safeguards, including trial by jury, which the *Fifth* and *Sixth Amendments* guarantee to all persons charged in such courts with criminal offenses.<sup>66</sup>

In a unanimous opinion, Chief Justice Stone upheld their sentences in *Ex parte Quirin*<sup>67</sup> because unlawful combatants, including military service members donning civilian clothing to gain a strategic advantage, are "subject to capture and detention [and] are subject to trial and punishment by

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NENTS IN THE NORTH (2006); FRANK L. KLEMENT, *LINCOLN'S CRITICS: THE COPPERHEADS OF THE NORTH* (Steven K. Rogstad ed., 1999).

<sup>60</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *Id.* at 123 ("The sixth amendment affirms that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before anyone can be held to answer for high crimes, 'excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger,' and the framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth amendment to those persons who were subject to indictment or presentment in the fifth . . . . Everyone connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity.").

<sup>63</sup> See Lacey, *supra* note 54, at 45.

<sup>64</sup> 317 U.S. 1, 18–19 (1942), *modified sub nom.* U.S. *ex rel.* Quirin v. Cox, 63 S. Ct. 22 (1942) (emphasis in original).

<sup>65</sup> See generally MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (2007).

<sup>66</sup> *Quirin*, 317 U.S. at 24 (emphasis added).

<sup>67</sup> *Id.* at 48.

military tribunals for acts which render their belligerency unlawful.”<sup>68</sup> The Court explained that such combatants are “generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war” and are therefore “subject to trial and punishment by military tribunals.”<sup>69</sup> *Quirin* remains good law and serves as underlying precedent for a military commission’s jurisdiction over unlawful combatants.<sup>70</sup> Military commissions were seldom called on for the duration of the 20th century after *Quirin*.

September 11, 2001 ushered in a new era of commissions. After that fateful day, enemy detainees affiliated with Al Qaeda, the Taliban, or affiliated organizations were held at Guantanamo Bay, and many were tried by military commissions under Military Order No. 1, signed March 21, 2002.<sup>71</sup> However, these individuals were not held as prisoners of war: after hearing from the White House Counsel and the Defense Department’s General Counsel, President Bush stated that Al Qaeda operatives did not meet the Geneva Convention’s standards for either prisoner of war status or Common Article III protections.<sup>72</sup>

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<sup>68</sup> *Id.* at 31.

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, Application of Yamashita, 327 U.S. 1, 7–9 (1946).

<sup>71</sup> Military Order, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.2 (2002).

<sup>72</sup> *See* Memorandum from the President to the Vice-President *et al.*, *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf). [<https://perma.cc/6RDN-7JYF>]. Specifically, the President found:

1. . . . Geneva applies to conflicts involving “High Contracting Parties,” which can only be states. Moreover, it assumes the existence of “regular” armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as commander in chief and chief executive of the United States . . . I hereby determine as follows:

a. I . . . determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I . . . determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise the authority in this or future conflicts.

c. I . . . determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.”

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees

President Bush also issued an order that:

authorize[d] the Secretary of Defense to constitute “military commissions” for the purposes of trying non-citizens whom the President determines there is reason to believe either (1) are or were members of Al Qaeda, (2) engaged in, aided or abetted, or conspired to commit ‘acts of international terror,’ or (3) knowingly harbored Al Qaeda members or international terrorists.<sup>73</sup>

Notably, however, the order does not specify what crimes commissions are to try.<sup>74</sup> For this reason, there was uncertainty as to whether commissions would be the primary prosecution venue for terrorists or simply be an available backup option to Article III proceedings.<sup>75</sup>

As commissions proceeded, detainees challenged their constitutionality. In 2004, the Supreme Court decided two landmark cases that would define their scope. *Rasul v. Bush*<sup>76</sup> held that a district court’s power to grant a habeas writ under 28 U.S.C. § 2241 empowered them to hear a foreign national’s habeas petitions;<sup>77</sup> *Hamdi v. Rumsfeld*<sup>78</sup> held that a detained United States citizen must be given the chance to contest the government’s determinations regarding his status as an enemy combatant.<sup>79</sup> *Rasul* and *Hamdi* form the foundation that detainees—citizens and foreign nationals alike—must be afforded a legal avenue to dispute their detention and, ultimately, prosecution.

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humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the secretary of defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva . . . .

Bush’s memo relied on the infamous “Torture Memo”—also known as the “Bybee Memo,” in dubious honor of its author, Assistant Attorney General Jay Bybee—which essentially justified torturing these individuals because they were not entitled to Geneva protections. See Memorandum from the President to the Vice-President et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 22, 2002), <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>. [<https://perma.cc/JJ2K-8SS4>].

<sup>73</sup> Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 471 (2002) (citing Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(A)(1)(i)–(iii), 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001)).

<sup>74</sup> See *id.* at 472–73.

<sup>75</sup> See *id.* at 477 (“In practice, the strategy of the U.S. in a situation like the one I am describing will probably be to keep its options open. To maximize flexibility, the U.S. government would probably try to give itself the option of invoking either the crime paradigm or the war paradigm at any moment.”).

<sup>76</sup> 542 U.S. 466 (2004).

<sup>77</sup> *Id.* at 479.

<sup>78</sup> 542 U.S. 507 (2004).

<sup>79</sup> *Id.* at 533.

After *Rasul* and *Hamdi*, the Bush Administration set up Combatant Status Review Tribunals (CSRTs) coordinated through the Office for the Administrative Review of the Detention of Enemy Combatants.<sup>80</sup> Designed as “a formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant,”<sup>81</sup> CSRTs were thought to adhere to the Court’s requirements under *Rasul* and *Hamdi*. However, CSRTs were then held insufficient in *Hamdan v. Rumsfeld*.<sup>82</sup> The *Hamdan* Court took issue with multiple aspects of the CSRTs. The Court bypassed the question of whether the executive had the authority to convene a military commission, including the one by which Hamdan was tried, but held that detainees to be tried before tribunals possessed basic constitutional rights as well as those established by the Uniform Code of Military Justice (UCMJ)<sup>83</sup> and the Geneva Conventions.<sup>84</sup> What’s more, specifically for Hamdan’s case, the Court held that conspiracy, one of his charged offenses, was not in “‘universal agreement and practice’ both in this country and internationally, recognized as an offense against the law of war.”<sup>85</sup>

Twenty legislative days after *Hamdan* was announced, the Military Commissions Act of 2006 was introduced into the Senate by Sen. Mitch McConnell (R – KY).<sup>86</sup> President Bush signed it into law within a month.<sup>87</sup> Again, however, the Supreme Court struck down the law in *Boumediene v. Bush* because the framework still did not afford detainees a genuine opportunity to sufficiently challenge their detention and status.<sup>88</sup> After the decision, Congress quickly passed the Military Commissions Act of 2009 (MCA),<sup>89</sup> which included procedural changes that aimed to abate the Court’s concerns.<sup>90</sup> For example, the new iteration: “expanded the scope of the CMCR’s appellate jurisdiction [and] the scope of the D.C. Circuit’s review on appeal from the CMCR to encompass all ‘matters of law, including the sufficiency

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<sup>80</sup> U.S. DEPARTMENT OF DEFENSE, GUANTANAMO DETAINEE PROCESSES, (2005), <https://web.archive.org/web/20050910220407/http://www.defense.gov/news/Sep2005/d20050908process.pdf>. [<https://perma.cc/H88J-GQ4R>].

<sup>81</sup> *Id.*

<sup>82</sup> 548 U.S. at 557.

<sup>83</sup> The UCMJ, 10 U.S.C. §§ 801–946 is the embodiment of Congress’ control over the armed forces’ general proceedings and operations. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces.”).

<sup>84</sup> 548 U.S. at 613–36.

<sup>85</sup> 548 U.S. at 603 (citing *Quirin*, 317 U.S. at 30.).

<sup>86</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>87</sup> *Id.*

<sup>88</sup> *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“Petitioners . . . are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).

<sup>89</sup> 10 U.S.C. §§ 948–950.

<sup>90</sup> See Jaelyn Belczyk, *House passes amendments to Military Commissions Act*, JURIST: PAPER CHASE (Oct. 9, 2009, 2:44 P.M.), <http://jurist.org/paperchase/2009/10/house-passes-amendments-to-military.php>. [<https://perma.cc/8UH4-6B2Z>].

of the evidence to support the verdict.’”<sup>91</sup> More, it “clarified the Supreme Court’s jurisdiction” to mimic federal criminal law, and removed the most restrictive appellate jurisdictional requirement, which stated that “‘no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions.’”<sup>92</sup> In doing so, Congress seemed to have taken the Court’s ruling into consideration to better craft commissions to comply with constitutional safeguards the Court would impose.

While far from perfect and still under fire from myriad cases at the Court of Military Commissions Review, the D.C. Circuit, and the Supreme Court,<sup>93</sup> the MCA continues to remain with us. We can nevertheless tweak commissions, but instead of retrofitting legislation with quick fixes—akin to what was done from 2004 to 2009—we have the opportunity to step back, internalize these lessons, and provide holistic change, improving the frameworks at play. Below I address but one aspect: jurisdictional limits. Specifically, I advocate for more variable yet transparent jurisdictional limits than the MCA currently employs.

### III. WHO CAN SIT TRIAL IN A MILITARY COMMISSION TODAY?

Over whom can a military commission assert jurisdiction? The statutory answer reads, an “alien unprivileged enemy belligerent.”<sup>94</sup> But what does that mean?

First, an alien is “an individual who is not a citizen of the United States.”<sup>95</sup> Though there are moral and legal considerations to restricting prosecution to aliens, that is beyond this Note’s scope. Henceforth, when referencing unprivileged enemy belligerents, this Note assumes their status as aliens.

An “unprivileged enemy belligerent” is:

[A]n individual (other than a privileged belligerent) who: (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities

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<sup>91</sup> Steve Vladeck, *A Guide to Appellate and Collateral Review Under the Military Commissions Acts*, LAWFARE (Apr. 4, 2013, 2:42 P.M.), <https://www.lawfareblog.com/guide-appellate-and-collateral-review-under-military-commissions-acts> [https://perma.cc/VL3D-BHEX] (discussing the changes to appellate and collateral review process and citing 10 U.S.C. § 950j(b) (Supp. I 2008) (repealed 2009)).

<sup>92</sup> *Id.*

<sup>93</sup> See Feldman, *supra* note 10.

<sup>94</sup> 10 U.S.C. § 948c (2012).

<sup>95</sup> 10 U.S.C. § 948a(1) (2012).

against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.<sup>96</sup>

This is a complex yet vague definition. To best understand the contours of this piecemeal definition, this Note begins by breaking down each clause.

The first phrase is a “privileged belligerent.” Before even asking what constitutes a “privileged belligerent,” we must first ask what defines a “belligerent,” or combatant, generally.<sup>97</sup>

“Combatants are persons engaged in hostilities during an armed conflict.”<sup>98</sup> Conversely, civilians are those who do not take part in hostilities.<sup>99</sup> Combatants and civilians are often viewed as mutually exclusive populations; one is often defined as the other’s inverse.<sup>100</sup>

Distinctions between privileged and unprivileged combatants are monumentally important in warfare. Not only do these labels determine who can be killed, they impact who can be detained and prosecuted by military commissions.<sup>101</sup> Privileged combatants are best thought of as those whose official role in the conflict necessarily assumes a grave risk, which bars prosecuting them for harming other such privileged combatants.<sup>102</sup> Unprivileged combatants, however, are those who hold no legitimate claim to such a role and therefore warrant no analogous protections. The protected classes are:

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<sup>96</sup> 10 U.S.C. § 948a(7) (2012). Henceforth, I will refer to each of the three possible methods of demonstrating one’s loss of noncombatant status as “prongs.”

<sup>97</sup> Throughout this Note, I use “combatants” and “belligerents” interchangeably. The two are often considered synonymous. See, e.g., David A. Wallace, *Fighting Wars Justly: The Legal and Moral Concerns and Consequences of Private Military and Security Contractors in Modern Armed Conflicts*, in *JUST WAR IN RELIGION AND POLITICS: STUDIES IN RELIGION AND THE SOCIAL ORDER* 245, 269, n.67 (Jacob Neusner, Bruce D. Chilton, & R. E. Tully eds., 2013).

<sup>98</sup> DEP’T OF NAVY ET AL., NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.4.1 (2007). [http://www.jag.navy.mil/documents/NWP\\_1-14M\\_Commanders\\_Handbook.pdf](http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf) [<https://perma.cc/7XHG-YKS9>].

<sup>99</sup> See generally DEP’T OF NAVY ET AL., NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3 (1995) (defining civilians as “those individuals who do not form part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts”).

<sup>100</sup> See, e.g., *id.* (“In this context, noncombatants and, generally, the civilian population, are synonymous.”).

<sup>101</sup> The Article uses privileged and lawful interchangeably, as well as their opposites – unprivileged and unlawful.

<sup>102</sup> See Knut Dörmann, *The Legal Situation of ‘Unlawful/Unprivileged Combatants’*, 85 INT’L REV. RED CROSS 45, 45–46 (2003) (lawful combatants are given “‘a licence [sic] to kill or wound enemy combatants and destroy other enemy military objectives.’ Consequently (lawful) combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour [sic] would constitute a serious crime in peacetime”) (internal citations omitted). Convention, with Annexes, Dated at Geneva Aug. 12, 1949, T.I.A.S. No. 3364 (Feb. 2, 1956).



1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - a) that of being commanded by a person responsible for his subordinates;
  - b) that of having a fixed distinctive sign recognizable at a distance;
  - c) that of carrying arms openly;
  - d) that of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents[.]
5. Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft[.]
6. Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces[.]
7. Persons belonging, or having belonged, to the armed forces of the occupied country[.]
8. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or nonbelligerent Powers on their territory[.]<sup>103</sup>

Therefore, an *unprivileged* combatant is a combatant who cannot be classified within one of the above categories.

What's more, once an individual is reclassified as an unlawful combatant, that designation is permanent. The MCA's offenses have no statutes of limitation, so an individual whose conduct warrants reclassification can be arrested, detained, and prosecuted at any time after their actions. Therefore, one cannot engage in or support hostilities as a combatant—privileged or unprivileged—one minute and reclaim his protected civilian status the next, which is known as being a “revolving door” terrorist.<sup>104</sup>

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<sup>103</sup> 10 U.S.C. § 948a(6) (2012) (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 4. 6 U.S.T. 3316, 75 U.N.T.S. 135).

<sup>104</sup> See e.g., INT'L COMM. OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70–72 (2009) [hereinafter Interpretative Guidance] (detailing the concept of a “revolving door” terrorist). It is worth noting that the United States, while not chiefly alone, does not bask in unanimous consent regarding who *should* be candidates to sit trial in military scenarios; the

An alien unprivileged enemy combatant is not automatically eligible to sit trial in a military commission. Said belligerent must meet one of the three additional, disjoint jurisdictional prongs: A) having engaged in hostilities, B) having purposefully and materially supported hostilities, or, C) being part of Al Qaeda.<sup>105</sup>

Before elucidating the specifics of these important terms of art—or lack thereof—it must be stated that this Note does not refer to these jurisdictional limits as “personal jurisdiction,” though it may seem at first blush as if that is the appropriate lens with which to frame the debate. Rather, as the Supreme Court tells us, “[J]urisdiction, it has been observed, is a word of many, too many, meanings.”<sup>106</sup> And in light of recent doctrinal changes, the question of whether or not the detainee is triable by a military commission may yet be categorized as an issue of subject matter jurisdiction centering, not on the hostile conduct that establishes each element of the offense, but rather on the hostile status of the enemy belligerent.<sup>107</sup> Bypassing this knotty legal issue altogether, this Note simply adopts, evaluates, and offers suggestions regarding the act’s “jurisdiction”<sup>108</sup> in its unspecified form.

Now, we turn to each operative word or phrase in the three disjoint jurisdiction prongs to fully flesh out commissions’ jurisdictional reach. Specifically, we must examine what defines: “engage in,” “material and purposeful support,” and being “part of” an organization. The final term of art worth further exploration is “hostilities.” However, because this term is one of the law’s glaring insufficiencies, its definition and invocation in the context of the MCA is discussed in Part IV.i.

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International Committee of the Red Cross advocates for an *extraordinarily* different system and approach to the problem of civilian participation than that of the United States. The ICRC finds the U.S.’s prosecution of indirect participation of hostilities, to be discussed *infra*, morally objectionable. Additionally, the organization believes that our country’s view on “revolving door” terrorists is incorrect, and that individuals acting as terrorists without an affiliation to a terrorist organization should *only* be targeted or arrested if they are caught in the act.

While there is much to say about the policy implications of such a view and the substantive debate to be had discussing its merits and pitfalls, this is, unfortunately, not the proper venue.

<sup>105</sup> See 10 U.S.C. § 948a(6) (2012). Henceforth, I will refer to each of the three possible methods of demonstrating one’s loss of noncombatant status as Prongs A, B, and C, respectively.

<sup>106</sup> See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (internal citations and quotations omitted).

<sup>107</sup> For a lengthy explanation of this doctrine, see Supplement to Brief on Behalf of Appellant, *In re Al-Nashiri*, 2016 U.S. App. Lexis 15974, 2–7 (D.C. Cir. 2016) (No. 14-001). As the Supplement details, there is a substantive argument that under the Supreme Court’s reasoning in *United States v. Wong*, 135 S. Ct. 1625 (2015), the question of “jurisdiction” discussed *infra* is actually a question of law to be decided by a trial court judge and thus more analogous to subject matter jurisdiction than personal jurisdiction. See Supplement, *supra*, at 2–7. Again, I owe General Martins the credit for his helpful insight on this doctrine.

<sup>108</sup> 10 U.S.C. § 948d. (2012).

*i. What Defines “[E]ngaged [I]n?”*

The first additional prong that would confer a military commission to try an alien unprivileged enemy combatant is if the accused has “*engaged in hostilities against the United States or its Coalition Partners.*”<sup>109</sup>

The Oxford Dictionary of English (ODE) defines “engage in” as to “[p]articipate or be involved in.”<sup>110</sup> The ODE then lists the term’s synonyms: “participate in, take part in, join in, become involved in, go in for, partake in/of, share in, play a part/role in; have a hand in, be a party to, enter into.”<sup>111</sup> External authorities analyzing this specific question confirm this definition. For example, the International Committee of the Red Cross (ICRC) similarly defines engagement with respect to hostilities as taking explicit actions intended to impact the hostilities.<sup>112</sup>

*ii. What Amounts to Purposeful and Material Support?*

The second prong to confer jurisdiction is the accused having “purposefully and materially supported hostilities against the U.S. or coalition forces.”<sup>113</sup> Again, the MCA does not define material support, nor has this specific question been litigated in the context of commissions.<sup>114</sup> As a result, “the outer bounds of the power to detain alleged terrorists [on this basis] are still not fully determined.”<sup>115</sup> Therefore, we must turn to other sources for statutory interpretations, including U.S. Code provisions, domestic federal jurisprudence, and external sources, to intuit what satisfies this definition.

*A. Related Statutory Language*

Providing Material Support for Terrorism (PMST)—offense twenty-five of the MCA—invokes nearly identical language as Prong B, including a similar title. Because “[a] term appearing in several places in [the same] statutory

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<sup>109</sup> 10 U.S.C. § 948a(6)(A) (2012) (emphasis added).

<sup>110</sup> OXFORD DICTIONARY OF ENGLISH (Catherine Soanes & Angus Stevenson eds., 2d ed. 2009).

<sup>111</sup> *Id.*

<sup>112</sup> See Interpretive Guidance, *supra* note 104, at 47–51 (participating—equivalent to engaging—in hostilities constitutes executing “acts that ‘must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.’” *Id.* at 47.).

<sup>113</sup> 10 U.S.C. § 948a(6)(B) (2012).

<sup>114</sup> The question of what constitutes purpose is uncontroversial. Thus, this Note foregoes discussing it, focusing specifically on what actions constitute material support.

<sup>115</sup> Tim Stahlberg & Henning Lahmann, *A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe*, 59 AM. J. COMP. L. 1051, 1065 (2011). See also *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (“[T]he ‘purposefully and materially supported’ . . . language constitutes a standard whose outer bounds are not readily identifiable.”).

text is generally read the same way each time it appears,”<sup>116</sup> the charge’s definition of material support could reasonably equate to the jurisdictional hook’s definition.<sup>117</sup>

In fact, the MCA invokes the homonymous domestic criminal charge, Providing Material Support to Terrorism, to define material support or resources:

[T]he term ‘material support or resources’ [as] any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>118</sup>

Thus, the definition of PMST as an offense (as well as its civilian cousin) can be shoehorned for the jurisdictional prong’s definition, best summarized as offering of services or resources in support of or connected to hostilities.

Unrelated provisions of the Code confirm that both assets and services constitute support. For example, in discussing American service members’ “[p]rohibition on provision of support to the International Criminal Court,”<sup>119</sup> the U.S. Code specifically discusses service-members’ provision of support, which “means assistance of any kind, including financial support, transfer of property or other material support[.]”<sup>120</sup> “Other” modifies the first two items in the list suggesting that the use of the word “other” indicates “assistance”—a service—“financial support” and the “transfer of property”—assets—all constitute “material support.”

In fairness, a direct substitution is not beyond criticism. Prong B requires the accused to have “materially supported” terrorism, whereas the MST encompasses “material support *or resources*.”<sup>121</sup> Specifically, critics may claim that “variation in the connection in which [identical] words are

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<sup>116</sup> Ratzlaf v. United States, 510 U.S. 135, 143 (1994).

<sup>117</sup> Despite the fact that the offense was deemed unconstitutional. *See Hamdan v. United States (“Hamdan I”)*, 696 F.3d 1238, 1251 (D.C. Cir. 2012) (striking down MST because it is “not a recognized violation of the international law.”).

<sup>118</sup> 10 U.S.C. § 950t (2012) (citing 18 U.S.C. § 2339A) (2012). Furthermore, “the term ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and . . . the term ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge.” 18 U.S.C. § 2339A (2012).

<sup>119</sup> 22 U.S.C. § 7423(e) (2012).

<sup>120</sup> 22 U.S.C. § 7432 (2012). In fairness, this argument is not without holes; other sections of the Code appear to treat material support as distinct from resources. *See, e.g.*, 18 U.S.C. § 832 (2012) (“material resources or support”); 18 U.S.C. § 2151 (2012) (suggesting technical, financial and “material” support are different subsets of support).

<sup>121</sup> *Compare* 10 U.S.C. § 948a(7) (2012), *with* 18 U.S.C. § 2339A (2012) (emphasis added).

used . . . reasonably . . . warrant[s] the conclusion that they were employed in different parts of the act with different intent.”<sup>122</sup> Moreover, the construction against superfluous language canon implies that distinct words or phrases denote distinct definitions.<sup>123</sup> This criticism is likely insufficient to overcome equating the two, given the strength of the arguments above.

### *B. Relevant Jurisprudence*

Because the issue has not been litigated within the military commissions pipeline, we must turn to domestic jurisprudence of the analogous domestic language cited above. Case law yields no defining lines, or “outer bounds,”<sup>124</sup> of material and purposeful support in the context of terrorism. Court articulations confirm that the phrase consists of offering of services *or* resources in support of or connected to hostilities. For example, carrying munitions and feeding would-be combatants have been held sufficiently supportive under Prong B,<sup>125</sup> as was “facilitating the travel of others to join the fight against the United States in Afghanistan.”<sup>126</sup> In yet another case, the accused was convicted for “assist[ing] in purchasing paramilitary equipment” to be used in terrorist attacks.<sup>127</sup> Even nurses were found to have provided material support for having a “direct application to an FTO [Foreign Terrorist Organization]’s terrorist activities” because their clinic specialized in the treatment, recovery, and return of Al Qaeda terrorists.<sup>128</sup> These cases all demonstrate that nearly any action undertaken that assists those participating in hostilities constitutes material support.

Courts have extended civilian material support to actions that have no direct bearing on *specific* military action. Because one can “support[ ] troops behind the front lines [and] not confront enemy combatants face to face,” the U.S. Court of Appeals for the District of Columbia held that material support extends beyond providing assistance to those directly engaged in hostilities.<sup>129</sup> This thinking arguably stemmed from the Supreme Court’s ruling in *Holder v. Humanitarian Law Project*.<sup>130</sup> In that case, the Court held that public awareness campaigns specifically affiliated with and designed by a group engaged in hostilities constituted material support sufficient to withhold one’s noncombatant civilian status given the effect of a coordinated

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<sup>122</sup> *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933).

<sup>123</sup> *See Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”).

<sup>124</sup> *See Al-Bihani*, 590 F.3d at 873.

<sup>125</sup> *Id.* (“[W]herever the outer bounds [of what constitutes ‘purposefully and materially supported’] may lie, they clearly include traditional food operations essential to a fighting force and the carrying of arms.”).

<sup>126</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) *rev’d and remanded sub nom. Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (reversed on other grounds).

<sup>127</sup> *United States v. Khan*, 461 F.3d 477, 488 (4th Cir. 2006), *as amended* (Sept. 7, 2006).

<sup>128</sup> *United States v. Warsame*, 537 F. Supp. 2d 1005, 1009 (D. Minn. 2008).

<sup>129</sup> *See Khairkwa v. Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012).

<sup>130</sup> *See generally Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

advertising effort to induce increased participation in hostilities.<sup>131</sup> Thus, relevant jurisprudence demonstrates that both directly and indirectly offering services or resources in support of or connected to hostilities demonstrates the loss of one's noncombatant civilian status.

Additionally, as was done in the U.S. Code, court opinions have equated "material support or resources" with material support. For example, in *Holder*, Chief Justice Roberts references 18 U.S.C. § 2339(B)—a statute entitled "Providing material support or resources to designated foreign terrorist organizations"—as the "material-support statute."<sup>132</sup> The Chief Justice holds that the statute was written in such a way to ensure "any form of material support furnished 'to' a foreign terrorist organization should be barred."<sup>133</sup> Holdings such as *Holder* that liken "material support or resources" to "material support" yet again substantiates the claim that material support sufficient for Prong B comprises "any form" of services or resources in support of or connected to hostilities.<sup>134</sup>

### C. Dictionary Definitions

Finally, Black's Law Dictionary defines "support" as providing "maintenance" or "necessaries."<sup>135</sup> This meaning is corroborated in plaintext, as ODE defines support as "giving assistance to," including "be[ing] actively interested in and concerned for the success of."<sup>136</sup> Against the backdrop of warfare and actions that may "support" it, "[c]ontext confirms that ordinary meaning here."<sup>137</sup> Black's defines "material" as, "of or relating to the matter . . . ; having some logical connection with the consequential facts; of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."<sup>138</sup>

Therefore, offering either direct or indirect services—including resources—to those engaging in hostilities satisfies the jurisprudential precedent, legislative analogs, and dictionary definitions of both "material" and "support" when such actions have a discrete relationship to those hostilities.

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<sup>131</sup> See *id.* at 26 ("As the Government states: 'The statute does not prohibit independent advocacy or expression of any kind.' Section 2339B also 'does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so.' Congress has not, therefore, sought to suppress ideas or opinions in the form of 'pure political speech.' Rather, Congress has prohibited 'material support,' which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.").

<sup>132</sup> *Id.* at 29.

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., *Warsame*, 537 F. Supp. 2d at 1012 (referencing provision of currency and personnel generally as "material support under 18 U.S.C. § 2339A(b)(1)").

<sup>135</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>136</sup> OXFORD DICTIONARY OF ENGLISH (Catherine Soanes & Angus Stevenson eds., 2d ed. 2009).

<sup>137</sup> *Holder*, 561 U.S. at 24.

<sup>138</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

*iii. Who is “A Part Of” an Organization?*

Courts “have adopted no categorical rules to determine whether a detainee is ‘part of’ an enemy group.”<sup>139</sup> Rather, “determination of whether an individual is ‘part of’ al-Qaida ‘must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.’”<sup>140</sup>

Attacking the question functionally, a primary feature of being “part of” an organization is having a role in its command structure. The D.C. Circuit has consistently held that Al Qaeda’s structure is “generally unknown”<sup>141</sup> and largely “amorphous.”<sup>142</sup> Because of this, “operat[ing] within al Qaeda’s formal command structure is surely sufficient . . . to show [the accused] is ‘part of’ the organization.”<sup>143</sup>

But because it is “possible that someone may ‘properly be considered ‘part of’ al-Qaida even if he never formally received or executed any orders,’”<sup>144</sup> courts look to “other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it.”<sup>145</sup> Unfortunately, courts found it “impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al Qaeda.”<sup>146</sup> For example, in *Uthman v. Obama*,<sup>147</sup> the D.C. Circuit found the accused to be more likely than not part of Al Qaeda because he was captured in Tora Bora, an isolated area associated with Al Qaeda personnel and skirmishes; he was captured with two known Al Qaeda members, including Osama bin Laden’s former bodyguards; he had studied at a religious school with known Al Qaeda connections; he traveled to Afghanistan using common Al Qaeda routes and paid by someone else; he was seen at an Al Qaeda guesthouse; and his justification for his travels “involves a host of unlikely coinci-

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<sup>139</sup> *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013) *cert. denied*, 134 S. Ct. 1621 (2014).

<sup>140</sup> *Salahi v. Obama*, 625 F.3d 745, 751–52 (D.C. Cir. 2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725.) (2010)). *See also Hussain*, 718 F.3d at 968 (“[W]e look at the facts and circumstances in each case.”).

<sup>141</sup> *Bensayah*, 610 F.3d at 725 (citing AUDREY K. CRONIN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: AL QAEDA AFTER THE IRAQ CONFLICT 3 (2003) (“There is a great deal that remains unknown or debatable about the specific nature, size, structure and reach of [al Qaeda.]”).

<sup>142</sup> *Id.* (citing KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: AL QAEDA: PROFILE AND THREAT ASSESSMENT 7 (2005) (“Al Qaeda has always been more a coalition of different groups than a unified structure . . .”).

<sup>143</sup> *Bensayah*, 610 F.3d at 725.

<sup>144</sup> *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) (citing *Salahi*, 625 F.3d at 752).

<sup>145</sup> *Bensayah*, 610 F.3d at 725. *See also Awad v. Obama*, 608 F.3d 1, 11 (1st Cir. 2010) (“[T]here are ways other than making a ‘command structure’ showing to prove that a detainee is ‘part of’ al Qaeda.”).

<sup>146</sup> *Id.*

<sup>147</sup> 637 F.3d 400 (D.C. Cir. 2011).

dences.”<sup>148</sup> Other courts have relied on similar factors to make their findings.<sup>149</sup>

Though one may be “a part of” an organization, there may be relevant and substantial reasons to afford them legal protection from prosecution. For example, in *Al Warafi v. Obama*,<sup>150</sup> the defendant claimed “he qualifie[d] as medical personnel,” entitling him to legal protection for his actions. Though Warafi’s prior Taliban service, lack of medical identification, and weaponry undermined his claim and persuaded the court to withhold legal protections,<sup>151</sup> a defendant could nevertheless be granted such protections on similar grounds if said conditions were met.

Having amassed all relevant data, including potentially exonerating factors, courts will “look at each piece of evidence ‘in connection with all the other evidence’ in the record, and not in isolation,”<sup>152</sup> including a detailed analysis of the sufficiency of each piece of evidence.<sup>153</sup> Only after such thorough analysis and balancing can a court properly decide if—based on a preponderance of the evidence standard<sup>154</sup>—the accused satisfies Prong C’s affiliation requirements.

#### IV. WHY THE JURISDICTIONAL LIMITATIONS ARE INSUFFICIENT

The law has two glaring deficiencies in its jurisdictional parameters: what constitutes “hostilities” and the confinement of jurisdiction via allegiance to Al Qaeda.

To pinpoint the law’s inadequacy in defining hostilities, I first examine the current state of the law. But what legally constitutes hostilities remains unsettled. Thus, this section first seeks to answer that question to the extent possible—including highlighting specific points of disagreement—via domestic jurisprudence and statutes as well as international jurisprudence. I juxtapose that with today’s state of warfare, including the changing nature of the tactics and battlefields.

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<sup>148</sup> *Id.* at 403–08.

<sup>149</sup> *See, e.g.*, *Salahi*, 625 F.3d at 753 (the district court may be able to “infer from Salahi’s numerous ties to known al-Qaida operatives that he remained a trusted member of the organization”); *Bensayah*, 610 F.3d at 725–27.

<sup>150</sup> 716 F.3d 627 (D.C. Cir. 2013) *cert. denied*, 134 S. Ct. 2134 (2014).

<sup>151</sup> *Id.* at 629–32.

<sup>152</sup> *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013) (citing *Almerfed v. Obama*, 654 F.3d 1, 4. (D.C. Cir. 2011)); *see also Salahi*, 625 F.3d at 753 (“Merely because a particular piece of evidence is insufficient, standing alone, to prove a particular point does not mean that the evidence may be tossed aside and the next piece of evidence may be evaluated as if the first did not exist. The evidence must be considered in its entirety in determining whether the government has satisfied its burden of proof.”) (internal citation and quotation marks omitted); *Al-Adahi v. Obama*, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010) (“[T]he district court wrongly required each piece of the government’s evidence to bear weight without regard to all (or indeed any) other evidence in the case.”) (internal citation and quotation marks omitted).

<sup>153</sup> *Bensayah*, 610 F.3d at 725–27.

<sup>154</sup> *Hussain*, 718 F.3d at 971.



The second deficiency with the jurisdiction requirement is authorizing jurisdiction via affiliation to *only* Al Qaeda. Providing a snapshot of today's national security landscape, several years after the law's enactment—and fifteen years after the law's primary impetus—highlights why the law, as written, may not remain a viable option for future commissions.

*i. What Constitutes a Conflict Subject to the Laws of War Under America's Jurisprudence?*

Appearing in two separate jurisdiction prongs, the MCA defines “hostilities” as “any conflict subject to the laws of war.”<sup>155</sup> Unfortunately, there is substantial uncertainty and ongoing debate over which conflicts *are* subject to the laws of war and thus satisfy the definition.

*A. Domestic Jurisprudence*

Domestic jurisprudence regarding hostilities and the laws of war only slightly informs the debate.

“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”<sup>156</sup> This acquiescence includes the nature of hostilities: Courts have concluded that a “determination of when hostilities have ceased is a political decision, and [they] defer to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.”<sup>157</sup>

The Supreme Court’s post-9/11 jurisprudence confirms this deference. The Court’s first post-9/11 opportunity to define “hostilities” was in *Hamdi v. Rumsfeld*.<sup>158</sup> Yaser Hamdi, a U.S. citizen held indefinitely as an unprivileged enemy belligerent, petitioned for a writ of habeas corpus challenging his detention after his capture in Afghanistan in 2001.<sup>159</sup> Citing “longstanding law-of-war principles,” the Court concluded that Congress was authorized to grant the executive “the authority to detain [Hamdi] for the duration of the relevant conflict.”<sup>160</sup> The Court, however, sidestepped defining a conflict’s beginning and end, claiming that the case’s facts over-

<sup>155</sup> 10 U.S.C. § 948a(9) (2012).

<sup>156</sup> *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988).

<sup>157</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010); *see also* *Ludecke v. Watkins*, 335 U.S. 160, 169, (1948) (finding that a war’s “termination is a political act”); *Maqaleh v. Hagel*, 738 F.3d 312, 330 (D.C. Cir. 2013) *cert. dismissed in part sub nom.* *al-Maqaleh v. Hagel*, 135 S. Ct. 782 (2014) and *cert. granted, judgment vacated sub nom.* *Amanatullah v. Obama*, 135 S. Ct. 1545 (2015) and *cert. granted in part, judgment vacated in part sub nom.* *al-Najar v. Carter*, 135 S. Ct. 1581 (2015) (“Whether an armed conflict has ended is a question left exclusively to the political branches.”).

<sup>158</sup> 542 U.S. 507 (2004).

<sup>159</sup> *Id.* at 510–16.

<sup>160</sup> *Id.* at 521; *see also* *Aemar v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (“[T]his court has repeatedly held that under the [AUMF], individuals may be detained at Guantanamo

whelmingly substantiated the occurrence of hostilities, meaning it did not need to define the term's bounds.<sup>161</sup> Though doing so may well have been dicta, it would have been instructive.

The *Hamdi* Court, on the other hand, recognized that unadulterated executive deference without judicial oversight could be problematic: "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."<sup>162</sup> Thus, lower courts have tried to create case-by-case, fact-specific tests to heed the Court's warning. For example, one military commission's trial court judge concluded that whether hostilities, or "active combat,"<sup>163</sup> existed turned on the following factors:

[T]he length, duration, and intensity of the hostilities between the parties; whether there was protracted armed violence between the governmental authorities and organized armed groups; whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat; the number of persons killed or wounded on each side; the amount of property damage on each side; statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict including the presence or absence of a declaration to that effect; and any other facts and circumstances . . . relevant to the existence of armed conflict.<sup>164</sup>

Whether or not this is true remains to be seen, as this case continues to make its way through the court system.<sup>165</sup>

The CMCR affirmed the trial court's factors,<sup>166</sup> though the case is still pending further review. Moreover, even accepting these factors, the court offered no guidance as to what ought to be dispositive. Rather, that question

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so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing.").

<sup>161</sup> *Hamdi*, 542 U.S. at 521. ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

<sup>162</sup> 542 U.S. at 530 (plurality) (citing *Ex parte Milligan*, 4 Wall. 2, 125 (1866)).

<sup>163</sup> *Al Warafi v. Obama*, No. CV 09-2368 (RCL), 2015 WL 4600420, at \*3 (D.D.C. July 30, 2015) (citing *Hamdi*, 542 U.S. at 521).

<sup>164</sup> *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1190 (USCMCR 2011) *vacated*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *reh'g en banc granted, order vacated* (Apr. 23, 2013) *on reh'g en banc*, 767 F.3d 1 (D.C. Cir. 2014) and *aff'd in part, vacated in part, remanded*, 767 F.3d 1 (D.C. Cir. 2014) and *vacated in part*, 792 F.3d 1 (D.C. Cir. 2015), *reh'g en banc granted, judgment vacated* (Sept. 25, 2015), and *aff'd sub nom. Bahlul v. United States*, No. 11-1324, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016).

<sup>165</sup> See Feldman, *supra* note 10.

<sup>166</sup> *Id.*

would be left for individual panel members—jurors in commissions parlance—to decide.<sup>167</sup>

In sum, the only conclusion to be drawn from domestic jurisprudence regarding the definition of “hostilities” is that one’s intuition, not binding precedent,<sup>168</sup> guides his understanding of the term with respect to military commissions.

### B. Legislative Language Insufficiently Captures ‘Hostilities’

The next logical place to look for a more concrete definition of “hostilities” is U.S. law beyond the MCA that invokes the term. Unfortunately, however, other hostilities-related law and the executive branch’s interpretation thereof provide contradictory and scant additional guidance.

Importing an otherwise already accepted definition of the term “hostilities” from a different statute would be clean and easy, not to mention add consistency to an area of the law rife with inconsistencies. Historically, however, the government has not prioritized defining terms of art consistently throughout the law. Myriad terms within diverse sectors of law have nuanced yet vital differences, including in national security law, where the definitions of terrorism are famously disjointed.<sup>169</sup>

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<sup>167</sup> *Id.*; Marty Lederman, *The jurisdictional issue delaying the al-Nashiri military commission: Saudi defendant + French ship + Malaysian shipper + Iranian oil + Bulgarian casualty = trial in a U.S. military commission?*, JUST SECURITY (Oct. 3, 2014, 3:32 P.M.), <https://www.justsecurity.org/15258/issue-delaying-al-nashiri/> [<https://perma.cc/PED4-DCEN>] (“The most troubling thing about this charge is that it identifies a whole slew of factors that might be relevant to the legal question — as well as the unspecified catch-all ‘other facts and circumstances’ — and then instructs the jury to assess those factors and determine ‘whether the acts of the accused occurred during the period of an armed conflict as defined above.’ But there is no definition [in the list], let alone a definition that accurately reflects the international law requirements for an armed conflict. Instead, there is only the listing of various factors and circumstances, with no articulation of how the panel should weigh and evaluate them under the law.”) (emphasis in original).

<sup>168</sup> Rulings from the Court of Military Commissions Review, Court of Appeals for the District of Columbia, and the Supreme Court would all be binding on commissions. *See* 10 U.S.C. § 950f (2012); Vladeck, *supra* note 91.

<sup>169</sup> The State Department put it best: “No one definition of terrorism has gained universal acceptance.” PATTERNS OF GLOBAL TERRORISM 2002 xiii, <http://www.state.gov/documents/organization/20105.pdf> [<https://perma.cc/NS4K-P3HA>] (2003). In fact, over 200 definitions of terrorism have been identified. *Id.* For example, the State Department’s definition, 22 U.S.C. § 2656f(d) (2012), is distinct from domestic criminal law’s definition, 18 U.S.C. § 2331 (2012) (breaking down “terrorism” into “international terrorism” and “domestic terrorism,” each with three unique features). Yet the “federal crime of terrorism” has a different definition entirely. 18 U.S.C.A. § 2332b (2015).

The *Code of Federal Regulations* has yet another definition, 28 C.F.R. § 0.85 (2014); so too do the Federal Emergency Management Agency, FED. EMERG. MGMT. AGENCY, ARE YOU READY?: AN IN-DEPTH GUIDE TO CITIZEN PREPAREDNESS (2004), <http://www.fema.gov/media-library-data/20130726-1549-20490-0802/terrorism.pdf> [<https://perma.cc/N22V-BHL2>], the National Counterterrorism Center, *see* NAT’L COUNTERTERRORISM CENTER, 2012 REPORT ON TERRORISM, <https://fas.org/irp/threat/nctc2011.pdf> [<https://perma.cc/QFY5-J4VZ>], and the Defense Department, ANTITERRORISM JOINT PUBLICATION 3-07.2, [http://www.bits.de/NRANEU/others/jp-doctrine/JP3\\_07.2\(10\).pdf](http://www.bits.de/NRANEU/others/jp-doctrine/JP3_07.2(10).pdf) [<https://perma.cc/48QC-9SAC>].

An obvious starting point for hostilities elsewhere in U.S. law is the War Power Resolutions,<sup>170</sup> which governs wartime engagements. When engaged in military actions abroad, the “Vietnam-era War Powers Resolution stipulates that presidents must terminate unauthorized deployments into what the law calls hostilities 60 days after notifying Congress that they have begun.”<sup>171</sup> After the United States began a bombing campaign against Libya in March 2011, many questioned the President’s authority to continue military operations without congressional approval in light of the War Powers Resolution.<sup>172</sup> State Department Legal Advisor Harold Koh testified before the Senate Foreign Relations Committee that ‘hostilities’ “is an ambiguous term of art that [was] defined nowhere in the statute.”<sup>173</sup> Koh stated that the legislative history suggests, “there [is] no fixed view on exactly what the term ‘hostilities’ would encompass.”<sup>174</sup> Tracing the history of the resolution’s application through U.S. military engagements, Koh included larger skirmishes that did not require congressional approval under the resolution. Specifically, Koh focused on four distinctions that set American operations in Libya apart: the nature of the mission [was] unusually limited”; “exposure of our Armed Forces [was] limited”; “the risk of escalation [was] limited”; and, finally, because “we [were] using limited military means.”<sup>175</sup> As such, Koh concluded that the U.S.’s involvement in Libya “did not constitute the kind of ‘hostilities’ envisioned by the [Resolution].”<sup>176</sup>

However, this conclusion cuts against intuition: “Koh’s definition of ‘hostilities’ [regarding U.S. involvement in Libya] strains the term’s everyday meaning.”<sup>177</sup> Interestingly, Koh admitted in the same testimony that the precedential analysis underpinning his reasoning has “overreached” at times.<sup>178</sup>

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Statutes define terrorism differently, too. *Compare, e.g.,* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act of 2001) Pub. L. No. 107-56, 115 Stat. 275 § 802, with Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (highlighting that both offer their own definitions to terrorism).

<sup>170</sup> 50 U.S.C. §§ 1541–1548. (2012).

<sup>171</sup> Jennifer Steinhauer, *Obama Advisor Defends Libya Policy to Senate*, N.Y. TIMES, (Jun. 28, 2011), <http://www.nytimes.com/2011/06/29/us/politics/29powers.html> [https://perma.cc/FB87-FFVA].

<sup>172</sup> *Id.*

<sup>173</sup> *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep’t of State) [hereinafter Koh Statement].

<sup>174</sup> *Id.* at 8.

<sup>175</sup> *Id.* at 9.

<sup>176</sup> *Id.* at 14.

<sup>177</sup> *Recent Administrative Interpretation: Separation of Powers - War Powers Resolution - Obama Administration Argues that U.S. Military Action in Libya Does Not Constitute “Hostilities.” - Libya and War Powers: Hearing Before the Senate Committee on Foreign Relations*, 112th Cong. 7–40 (2011) (statement of Harold Koh, Legal Adviser, U.S. Department of State), 125 HARV. L. REV. 1546, 1550.

<sup>178</sup> Koh Statement, *supra* note 173, at 22.

The empirical evidence comports with Koh's admission. U.S. operations in Libya included 17,939 sorties, the destruction of Libyan air defenses, ground forces, and Command and Control (C<sup>2</sup>) nodes, killed 60 civilians, and wounded another 55 civilians.<sup>179</sup> The sheer number of operations and deaths in Libya intuitively classifies that episode as hostilities, despite contrary Koh's conclusion.<sup>180</sup> Even more dangerous is the high bar set for future conflicts.

Other statutes' definitions of hostilities support a significantly lower threshold. U.S. law pertaining to child soldiers defines "participat[ing] actively in hostilities" as having "taken part in (A) combat or military activities related to combat, including sabotage and serving as a decoy, a courier, or at a military checkpoint; or (B) direct support functions related to combat, including transporting supplies or providing other services."<sup>181</sup> Therefore, "hostilities" may not even require the exchange of gunfire—quite a far cry from Legal Advisor Koh's thinking. Admittedly, this minimalist definition is still not perfect: it seems highly unlikely that Congress intended the executive to seek authorization for every instance of sabotage and decoy-deployment under the Resolution.

Adding to our legal reasoning is our intuition. Both sides of the debate—Koh's high bar and the child soldier statute's low bar—may be bested by Justice Stewart's famous classification-by-gut-instinct methodology: "I know it when I see it."<sup>182</sup> This famed passage, though attempting to define obscene media, encapsulates domestic jurisprudence and statutory definitions of hostilities: the bounds of a "shorthand description" may be impossible to intelligibly define.<sup>183</sup> It stands to reason that the appropriate bar is somewhere between the two aforementioned extremes.

### *C. International Jurisprudence*

Without sufficient instruction from domestic law, international jurisprudence is next. Unfortunately, analysis of relevant international jurisprudence unfortunately fails to settle the debate. Because the spectrum of what may constitute "hostilities" as conflicts subject to the laws of war in state-on-state and VNSA-on-state conflicts ranges dramatically, military commissions constituted under Prongs A or B of the MCA's jurisdictional provisions are vulnerable to lengthy, costly and legally uncertain appeals.

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<sup>179</sup> United Nations Human Rights Council, *Rep. of the Int'l Commission of Inquiry on Libya*, ¶ 86, UN Doc. A/HRC/19/68 (Mar. 2, 2012).

<sup>180</sup> See Koh Statement, *supra* note 173, at 14.

<sup>181</sup> 18 U.S.C. § 2442 (2012).

<sup>182</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>183</sup> *Id.*

*1. International Armed Conflicts (IACs)*

The opacity surrounding what constitutes an armed attack in state-on-state conflicts insufficiently aids our understanding of what should constitute hostilities for purposes of military commissions jurisdiction.

International armed conflicts are engagements between two sovereigns. The U.N. Charter and Common Article II govern IACs. Unfortunately for commissions, however, the boundaries of these laws are not extraordinarily clear.

Written in World War II's wake, the U.N. Charter was designed to "maintain international peace and security."<sup>184</sup> The charter sets the bar for what constitutes unlawful interference in one's sovereignty, known as an Article 2(4) violation: "the threat or use of force against the territorial integrity or political independence of any state."<sup>185</sup> The standard was set purposefully low to try to deter such actions. This threshold has been found to incorporate even exerting political influence to manipulate a sovereign's political process.<sup>186</sup>

Such provocations do not permit military retaliation. Rather, under Article 51, a sovereign can only execute "the inherent right of individual or collective self-defence[sic] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>187</sup> The next logical question asks, what constitutes an "armed attack?"

The International Court of Justice (ICJ) has tried to answer this question, but failed to proffer a workable definition. The ICJ has stated that an "armed attack" permitting military engagement is

[N]ot merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.<sup>188</sup>

Therefore, any action that interferes with another sovereignty of sufficient scale and effects constitutes an armed attack, under which the sovereign can respond and the laws of war would govern the ensuing conflict.

Traditionally, Article 2(4) and Article 51 have been viewed as coterminous, meaning a violation of Article 2(4) automatically triggers the Article 51 right to self-defense that need only be limited by principles of proportionality. The ICJ has not always accepted this interpretation, but it remains the

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<sup>184</sup> U.N. Charter art. 1.

<sup>185</sup> *Id.* at art. 2(4).

<sup>186</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 202–06 (June 27) [hereinafter *Nicaragua*].

<sup>187</sup> U.N. Charter art. 51.

<sup>188</sup> *Nicaragua*, *supra* note 186, at ¶ 195.

United States' official position.<sup>189</sup> Unfortunately, the “scale and effects” test simply replaces one ill-defined standard with another, as a universally accepted definition of sufficient “scale and effects” has yet to emerge.

An emerging and strengthening doctrine that a gap exists between Article 2(4) violations and Article 51 violations further complicates the question of what constitutes an “armed attack.” In other words, “not every use of force contrary to Art. 2(4) may be responded to with armed self-defence[sic] . . . [because] ‘armed attack’ is a narrower notion than ‘threat or use of force.’”<sup>190</sup>

This position holds that some violations of Article 2(4), even potentially involving military engagement, do not rise to the level of an “armed attack” subject to the laws of war, but do permit proportional retaliatory actions. The ICJ's Judge Bruno Simma famously articulated this theory. The case, known as the *Oil Platforms Case*, involved the United States' retaliatory actions against Iran after an Iranian mine destroyed the USS Samuel B. Roberts.<sup>191</sup> In his concurrence, Simma outlined the gap theory and its policy underpinnings:

I would suggest a distinction between (full-scale) self-defence[sic] within the meaning of Article 51 against an “armed attack” within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally

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<sup>189</sup> William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 299–300 (2004) (“[T]he [ICJ] concluded that, even ‘[o]n the hypothesis that all the incidents complained of [by the United States] are attributable to Iran,’ they did not trigger a right of self-defense because they did not constitute an ‘armed attack.’ In reaching this conclusion, the Court made statements that might be read as suggesting that the attacks were required to reach some unspecified level of gravity before they would qualify as armed attacks . . . . [This] proposition is [not] correct as a matter of international law, however, and the United States does not interpret the opinion as relying on them . . . . In concluding that the actions by Iran did not constitute an armed attack, the Court stated that ‘it is necessary to distinguish ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.’ [T]hese statements might be read to suggest that uses of deadly force by a State's regular armed forces, such as the attacks by Iran at issue in this case, do not qualify as an armed attack unless they reach a certain level of gravity. Such a proposition, however, would be inconsistent with well-settled principles of international law. As noted above, the United Nations Charter specifically recognizes a right to defend against an ‘armed attack,’ and it contains no suggestion that only certain armed attacks qualify. Nor do collective self-defense treaties referring to ‘armed attack’ suggest any gravity requirement. The gravity of an attack may affect the proper scope of the defensive use of force (that is, its proportionality, an issue discussed below), but it is not relevant to determining whether there is a right of self-defense in the first instance.”) (footnotes omitted).

<sup>190</sup> Georg Nolte & Albrecht Randelzhofer, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51*, 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 20 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf eds., 3d ed. 2012), <http://opil.ouplaw.com/view/10.1093/law/9780199639779.001.0001/law-9780199639779-chapter-66#law-9780199639779-note-1216> [<https://perma.cc/F7VK-2YMG>].

<sup>191</sup> *Oil Platforms (Islamic Republic of Iran v. United States)*, ICJ Rep. 161 (Nov. 6, 2003).

short of the quality and quantity of action in self-defence[sic] expressly reserved in the United Nations Charter.<sup>192</sup>

While many subscribe to this theory, it is far from universally accepted.<sup>193</sup>

## 2. *Non-international Armed Conflicts (NIACs)*

Laws governing non-international armed conflicts—conflicts between a sovereign and a non-state actor either within or beyond the sovereign's borders—are founded in the Geneva Conventions' Common Article III. Common Article III sets out the minimum standards for *jus in bello* ("just war") conduct, but "it does not define the conditions or threshold of non-international armed conflict."<sup>194</sup> Article 1 of Geneva Conventions' Additional Protocol II states that such standards "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."<sup>195</sup> While giving somewhat more nuance, Article 1 still lacks "an explicit and complete definition or conditions of non-international armed conflict, except the negative definition[.]"<sup>196</sup>

The International Criminal Tribunal for the Former Yugoslavia (ICTY) tried to winnow down these vagaries during the trial of Duško Tadić, the Bosnian Serb politician and former leader of the Serb Democratic Party. The Tribunal prosecuted multiple individuals for violations of the laws of war executed through the Yugoslav Wars.<sup>197</sup> One of the many questions addressed by the tribunals was the nature of the conflicts and whether they rose to the level of a NIAC. Without proscribing specific tests, the *Tadić* court held that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>198</sup>

<sup>192</sup> *Id.* at 12 (separate opinion of Simma, J.).

<sup>193</sup> See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 176 (3d ed. 2001) ("There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks."); ROSALYN HIGGINS, *PROBLEMS AND PROGRESS: INTERNATIONAL LAW AND HOW WE USE IT* 251 (1994) ("Is the question of level of violence by regular forces not really an issue of proportionality, rather than a question of determining what is 'an armed attack'?"); Dieter Fleck, *Rules of Engagement for Maritime Forces and the Limitation of the Use of Force Under the UN Charter*, 31 *GERMAN Y.B. INT'L L.* 165, 177 (1988) ("Armed attacks cannot logically be divided into such attacks to which response may lawfully be made in exercise of the inherent right of self-defence and other such attacks where self-defence should not be permissible."); John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 *AM. J. INT'L L.* 135, 139 (1987) ("[T]he plain language of Article 51 . . . in no way limits itself to especially large, direct or important armed attacks.")

<sup>194</sup> Dr. Timur Demir, *The Organisational Requirements for the Threshold of Non-International Armed Conflict*, 3 *HUMAN RIGHTS REV.* 127, 130 (2013) (internal citations omitted).

<sup>195</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 1.

<sup>196</sup> Demir, *supra* note 194, at 130.

<sup>197</sup> S.C. Res. 827, ¶ 2 (May 25, 1993).

<sup>198</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).



Again, though, what constitutes ‘protracted armed violence’ in NIACs ‘is not detailed in the *Tadić* case.’<sup>199</sup> *Tadić*’s jurisprudential progeny have suggested that these criteria “refe[r] more to the intensity of the armed violence than to its duration.”<sup>200</sup> This may aid our instinct of what constitutes hostilities, but it most certainly does not offer a bright-light test on which we could rely.

*ii. The Changing Structure of Warfare*

The definition of hostilities put forward by the MCA also fails to encompass the changing nature of tactics in hostilities today. Until only a handful of decades ago, battles were fought on battlefields. These famed sites echoed into eternity; Iwo Jima, Lexington and Concord, Verdun, San Juan Hill, Bunker Hill, Omaha Beach, Fort Sumter are but a few U.S. examples (though this is not unique to U.S. conflicts). No debate was necessary as to when a battle—yesteryear’s “hostilities”—started or ended, as there were declarations and formal procedures. Just as importantly, soldiers<sup>201</sup> donned uniforms on the battlefield to announce their affiliation—think the His Majesty’s “Red Coats” during the American Revolutionary War or today’s ubiquitous camouflage. Neither civilians nor other combatants could confuse those wearing uniforms for innocent civilians there by happenstance, and vice versa. Given their explicit restrictions in geography, scope and participants, these battles would have been easily cognizable as “conflicts subject to the laws of war,” and actions’ legality could be adjudicated without concern for questions of whether the actor was in the heat of “hostilities.” But neither uniforms nor defined battlefields are necessarily part of wars today. Acts of war today could occur—and have occurred—from the Hindu Kush to downtown Manhattan. More, declarations of a conflict’s beginning and end are rarely, if ever, announced.<sup>202</sup> The emergence and normalization of

<sup>199</sup> Demir, *supra* note 194, at 130 (emphasis added).

<sup>200</sup> Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

<sup>201</sup> I use soldiers colloquially, encompassing all soldiers (Army), sailors (Navy), airmen (Air Force), Coast Guardsmen and Marines. I certainly do not wish to denigrate those serving in uniform outside of the Army, but only simplify the lexicon for clarity’s sake.

<sup>202</sup> In fact, formal announcements of a conflict’s beginning and end may no longer be correct today. On Memorial Day 2015, President Obama declared: “it is the first [Memorial Day] since our war in Afghanistan came to an end. Today is the first Memorial Day in 14 years that the United States is not engaged in a major ground war.” Press Release, White House, Remarks by the President on Memorial Day (Mar. 25, 2015), <https://www.whitehouse.gov/the-press-office/2015/05/25/remarks-president-memorial-day> [<https://perma.cc/5YJP-HAJ9>]. However, Muktar al Warafi, a former Taliban medic and current Guantanamo Bay detainee, petitioned for a writ of habeas corpus, citing the President’s declaration as the end of hostilities, which would entitle him to a release. Supplemental Memorandum to Petitioner’s Motion to Grant Petition For Writ of Habeas Corpus, *Al Warafi v. Obama*, No. 09-2368 (D.D.C. Jun. 5, 2015). In response, however, the Department of Justice objected, stating:

Petitioner . . . misunderstands the meaning of the President’s public statements[.] The President has not declared that active hostilities against al-Qaeda, Taliban, and associated forces

such guerrilla tactics in today's warfare makes any definition of hostilities without recognizable bright lines inadequate, leading only to further litigation and inconsistent adjudication as to what constitutes hostilities to satisfy the jurisdiction question.

Additionally, Violent Non-State Actors (VNSAs) such as Al Qaeda or ISIL<sup>203</sup> members do not necessarily wear uniforms identifying their affiliation and thus their potential threat. And while some do wear a uniform,<sup>204</sup> many prefer the anonymity of non-uniform clothing, allowing them to blend into the crowd to get closer to targets before commencing attacks.<sup>205</sup>

Plainly, the statute's definition of hostilities is insufficient to meet the changing tactics of today's conventional wars.

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have ceased or that the fighting in Afghanistan has stopped. Rather, the President's public statements made clear that, in light of continuing threats faced by the United States in Afghanistan, counterterrorism and other military operations would continue even after the end of the combat mission. Simply put, the President's statements signify a transition in United States military operation, not a cessation.

Respondents' Opposition to Petitioner's Motion to Grant Petition For Writ of Habeas Corpus, *Al Warafi v. Obama*, No. 09-2368 (D.D.C. Apr. 24, 2015) (internal citations omitted). The district court dismissed Warafi's argument, stating "war is not a game of 'Simon Says,'" and the President's position, while relevant, is not the only evidence that matters to this issue." *Al Warafi v. Obama*, 2015 WL 4600420, at \*5 (D.D.C. July 30, 2015), *order vacated, appeal dismissed* (Mar. 4, 2016). Instead, the court supported its conclusion by looking at the contrapositive—the President couldn't maintain hostilities despite peace treaties signed with his public statements alone—as well as related precedent. *Id.* (citing *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 167 (1919) ("[T]hose powers are not undone by 'passing references in messages to Congress, nor by newspaper interviews with high officers of the army or with officials of the War Department.'")).

Unfortunately, the D.C. Circuit never adjudicated the issue: Warafi's appeal was "dismissed as moot in light of appellant's transfer from the United States Naval Base at Guantanamo Bay, Cuba." Order., No. 15-5266 (D.C. Cir Mar 4, 2016).

<sup>203</sup> Press Release, U.S. Dep't of State, Terrorist Designations of Groups Operating in Syria (May 14, 2014), <http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm> [<https://perma.cc/2GY-Y-XBSW>]; see also Faisal Irshaid, *Isis, Isil, IS or Daesh? One group, many names*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277> [<https://perma.cc/P9V-G-EXW7>]. Known by many names—the Islamic State, IS, ISIS, ISIL, Daesh—I refer to this group as ISIL, its official State Department designation.

<sup>204</sup> Simon Tomlinson, *From the 'Afghani robe' to the suicide bomber's all-black uniform, how ISIS differentiates between ranks with various outfits*, DAILY MAIL (Sept. 29, 2015), <http://www.dailymail.co.uk/news/article-3253113/From-Afghani-robe-suicide-bomber-s-black-uniform-ISIS-differentiates-ranks-various-outfits.html> [<https://perma.cc/2MQJ-3CJK>].

<sup>205</sup> See, e.g., U.S. Dep't of State, MC Form 458, Charge Sheet (15 Sep. 2011), Abd AI Rahim Hussayn Muhammad AI Nashiri [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(Referred%20Charges).pdf) [<https://perma.cc/4E2G-5PUW>] ("On or about 12 October 2000, as a result of planning and preparation by NASHIRI and others, the suicide bombers, at the direction of NASHIRI, dressed in civilian clothes, piloted the explosives-laden boat to where USS COLE (DDG 67) was refueling, offered friendly gestures to several crew members, and brought their boat alongside USS COLE (DDG 67), roughly amidships. Once alongside at approximately 11:18 a.m. (local), the suicide bombers detonated the explosives, blasting a hole in the side of USS COLE (DDG 67) approximately 30 feet in diameter, killing 17 crewmembers and injuring at least 37 crewmembers. The suicide bombers died in the attack.").

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*iii. The Rise of New Frontiers of Warfare*

Beyond the changing nature of conventional tactics, the definition of hostilities fails to address important new frontiers of warfare, including Artificial Intelligence, cyber attacks, and space-based weaponry. Hostilities emanating from these new frontiers may not be “subject to the laws of war,” meaning commissions do not encompass all *de facto* military theatres and are thus not a practicable vehicle to try those operating therein.

*A. Artificial Intelligence*

Artificial Intelligence, or A.I., has enchanted scientists and science fiction-lovers alike for years. In the last few decades, however, this incredible science has been applied to the arena of warfare: no longer is it just the tall tales *Wargames*<sup>206</sup> or Asimov’s *I, Robot*.<sup>207</sup> Moreover, these are no longer the musings of conspiracy theorists across the Internet: top scientists like Stephen Hawking and industry professionals like Elon Musk signed an open letter in the summer of 2015 warning of autonomous weapons’ ability to wreak havoc when left unchecked, “select[ing] and engag[ing] targets without human intervention.”<sup>208</sup> The letter described A.I. as a “third revolution in warfare, after gunpowder and nuclear arms.” It goes on to claim, “[i]f any major military power pushes ahead with AI weapon development, a global arms race is virtually inevitable, and the endpoint of this technological trajectory is obvious: autonomous weapons will become the Kalashnikovs of tomorrow.”<sup>209</sup> Hyperbolic or not, the letter underscores an important point: A.I. can no longer be ignored as an emerging global threat and developing theatre.

So how does this relate to military commissions? Well, who could be tried if the weapons are themselves autonomous – the robot? Unlikely, to say the least. If an individual programs a robot to execute these engagements, is he engaging in hostilities? Or if he programs a robot that works on the battlefield—even, say, as an autonomous medic—is he nevertheless supporting hostilities? The short answer is, *maybe*. But at the very least, these questions would require lengthy trials and would almost certainly result in years-long appeals, expending extraordinary resources and precious time. In the worst case scenario, the programmer, designer, or anyone else involved in the A.I.’s production could not sit trial in a military commission under Prongs A or B, depending both on whether the drone’s conflict constituted “hostili-

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<sup>206</sup> *WAR GAMES* (MGM 1983).

<sup>207</sup> *ISAAC ASIMOV, I, ROBOT* (1950); *see also I, ROBOT* (Twentieth Century Fox Film Corp. 2004).

<sup>208</sup> *See* Open Letter, *Autonomous Weapons: An Open Letter from AI & Robotics Researchers* (July 28, 2015) (on file at [http://futureoflife.org/AI/open\\_letter\\_autonomous\\_weapons](http://futureoflife.org/AI/open_letter_autonomous_weapons) [<https://perma.cc/ZB3D-F6PK>]).

<sup>209</sup> *Id.*

ties” and whether the programmers are considered to have “engaged in” or “supported” such actions, despite the very drones being *autonomous*.

### B. Cyber Attacks

If the government hopes to use Prong A or B to assert jurisdiction over a non-Al Qaeda hacker (foreclosing Prong C), it should prepare for *serious* challenges to whether the hack constitutes “hostilities.” Thus, depending on what cyber conflicts are subject to the laws of war, one’s status as an “unprivileged enemy belligerent” may be in jeopardy, prohibiting the use of military commissions to try the very individuals the law was designed to.

Since the first major data breach in 2005—an AOL employee “stealing 92 million screen names and e-mail addresses and selling them to spammers who sent out up to 7 billion unsolicited e-mails”<sup>210</sup>—cyber attacks have only grown in size and scope, beginning to threaten the United States’ national security.<sup>211</sup> As one former State Department official stated, any sovereign today is vulnerable to an enemy’s “use of computer network tools to shut down critical national infrastructures (such as energy, transportation, government operations) or to coerce or intimidate a government or civilian population.”<sup>212</sup>

The international legal community agrees that the Laws of Armed Conflict apply to computers generally.<sup>213</sup> But the ways in which these computers are deployed leaves much room for ambiguity. There may be two distinct reasons for uncertainty. *First*, one could classify cyber attacks either as falling in the “gap” between an Article 2(4) violation and an Article 51 U.N. violation or as an Article 51 armed attack.<sup>214</sup> *Second*, as is typically the case, ambiguity favors the powerful.<sup>215</sup> Because, according to U.K.’s Defense Minister, it is “‘possible to envisage entire conflicts being fought in cyber-

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<sup>210</sup> Associated Press, *Ex-AOL worker who stole e-mail list sentenced*, NBC NEWS (Aug. 17, 2005), [http://www.nbcnews.com/id/8985989/ns/technology\\_and\\_science-security/t/ex-aol-worker-who-stole-e-mail-list-sentenced/#.VgYnA9NViko](http://www.nbcnews.com/id/8985989/ns/technology_and_science-security/t/ex-aol-worker-who-stole-e-mail-list-sentenced/#.VgYnA9NViko) [https://perma.cc/82H7-2JK7].

<sup>211</sup> See *The History of Cyber Attacks – A Timeline*, NATO REVIEW, <http://www.nato.int/docu/review/2013/cyber/timeline/EN/index.htm> [https://perma.cc/JRL6-DF3C]; *Cyber attacks: how can they hurt us?*, NATO REVIEW, <http://www.nato.int/docu/review/2013/cyber/Cyber-attack-hurt/EN/index.htm> [https://perma.cc/Y8ZJ-K9C3].

<sup>212</sup> JAMES A. LEWIS, *ASSESSING THE RISKS OF CYBER TERRORISM, CYBER WAR AND OTHER CYBER THREATS*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (2002), [http://csis.org/files/media/isis/pubs/021101\\_risks\\_of\\_cyberterror.pdf](http://csis.org/files/media/isis/pubs/021101_risks_of_cyberterror.pdf) [https://perma.cc/TDX2-SGMH].

<sup>213</sup> See TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 75 (2013) (“The law of armed conflict applies to cyber operations as it would to any other operations undertaken in the context of an armed conflict.”) [hereinafter TALLINN MANUAL]; Lt. Col. Gary D. Solis, *Cyber Warfare*, 219 MIL. L. REV. 1, 1 (2014) (“[D]oes existing LOAC apply to cyber issues? Yes, it does.”); Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 1996 ICJ Rep 223 (noting that LoAC applies to “any use of force, regardless of the weapons employed”).

<sup>214</sup> See, e.g., Michael Gervais, *Cyber Attacks and the Laws of War*, 30 BERKELEY J. INT’L LAW 525, 535–44 (2012).

<sup>215</sup> For this reason, countries like the United States may be loathe to hone these laws, despite pressures from academia.

space,”<sup>216</sup> this presents a huge problem for warfare and, ultimately, military commissions.

Before asking what type of violations—if any—cyber attacks are, it is necessary to take a step back and ask, what *defines* a cyber attack? As luck would have it, “[e]xisting definitions of ‘cyber-attack’ and related terms vary widely.”<sup>217</sup> Whether because of different substantive beliefs of what the definition ought be,<sup>218</sup> incorrectly un-nuanced definitions that gloss over important aspects of cyber actions, or simply an improper frame of reference,<sup>219</sup> no definition has gained unanimous favor.<sup>220</sup>

Accepting, *arguendo*, a single definition of a cyber attack, we now must ask if such an attack falls in the Article 2(4)–Article 51 gap or if it is an Article 51 “armed attack.”<sup>221</sup> Strong arguments can be made on both sides; for this reason, scholars have long continued to call for clarifications—to no avail—“in interpreting Articles 2(4) and 51’s application to cyber-attacks.”<sup>222</sup> Again, this dictates how the sovereign can respond. For military commissions, however, it dictates whether the individual was participating in a conflict subject to the laws of war and thus triable by military commissions.

The United States carries its belief that no such gap exists into the cyber realm. This position was made clear again with Legal Advisor Koh as the government’s mouthpiece:

[T]he United States has for a long time taken the position that the inherent right of self-defense potentially applies against *any* illegal

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<sup>216</sup> Tom McTague, ‘*Call of Duty*’ will become *REAL*: Ministry of Defence reveals how future wars will be fought entirely in cyberspace, DAILY MAIL (May 8, 2014) <http://www.dailymail.co.uk/news/article-2623523/Future-wars-fought-cyberspace-stop-soldiers-killed-line-Defence-Secretary-Philip-Hammond-claims.html> [<https://perma.cc/RCR4-DT7T>].

<sup>217</sup> Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 823 (2012).

<sup>218</sup> *Id.* at 823–39.

<sup>219</sup> See Michael Schmitt, *Armed Attacks in Cyberspace: A Reply to Admiral Stavridis*, LAWFARE (Jan. 8, 2015, 1:45 P.M.), <https://www.lawfareblog.com/armed-attacks-cyberspace-reply-admiral-stavridis> [<https://perma.cc/AJ52-Q8UX>] (arguing that Adm. Starvis’ definition was referring to *jus ad bellum* definitions instead of the Tallinn Manual’s International Humanitarian Law definition).

<sup>220</sup> Hathaway, *supra* note 217, at 823. Though this might be unsurprising in light of the previous discussion of differences in definitions of “terrorisms.” See *id.* (including an incomplete listing of the various definitions of terrorism).

<sup>221</sup> The reliance our society has created on the digital infrastructure creates significant vulnerabilities and foregoes the possibility of treating such an attack as de minimis below an Article 2(4) violation.

<sup>222</sup> Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT’L L. 421, 431 (2011); LAWRENCE T. GREENBERG, SEYMOUR E. GOODMAN & KEVIN J. SOO HOO, *INFORMATION WARFARE AND INTERNATIONAL LAW* 14–19 (1998); James A. Lewis, *Multilateral Agreements To Constrain Cyberconflict*, 40 ARMS CONTROL TODAY 14, 16 (June 2010) (“The development of mutual understandings among nations on thresholds for conflict, including what actions can be considered a violation of sovereignty, on what constitutes an act of war, and what actions are seen as escalatory could reduce the potential for cyberwar.”).

use of force. In our view, there is no threshold for a use of deadly force to qualify as an “armed attack” that may warrant a forcible response[.] In this respect, the existence of complicated cyber questions relating to *jus ad bellum* is not in itself a new development; it is just applying old questions to the latest developments in technology.<sup>223</sup>

President Obama also issued an Executive Order formalizing hackers’ liability, authorizing the Treasury Department to freeze their assets in addition to pursuing criminal sanctions.<sup>224</sup>

The Tallinn Manual differs, applying the “scale and effects” test to cyber attacks. The treatise’s authors—experts themselves—were in lockstep with the U.S. government, “agree[ing] that a physically destructive or injurious use of force clearly qualifies”<sup>225</sup> as an armed attack. But, importantly, the Manual “never limited the definition of cyber armed attacks to those that cause physical damage or injury.”<sup>226</sup> Michael Schmitt, the Manual’s director, advocates that the act’s severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy will ultimately inform the decision on a case-by-case basis.<sup>227</sup> Many others agree.<sup>228</sup> But if that’s the case, where should the line be drawn? Again, these subtle nuances play important roles in whether a military commission remains a viable prosecutorial option.

The hacking of personnel records from the Office of Personnel and Management’s data breach is an excellent example. In the attack, approximately 21.5 million government employees’ or applicants’ files were digitally copied and stolen, including 5.6 million fingerprint files.<sup>229</sup> While there was no direct violence, the hack unquestionably endangers untold government employees, as their most intimate details—social security numbers,

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<sup>223</sup> Legal Advisor Harold Koh, International Law in Cyberspace, Remarks at the US-CYBERCOM Inter-Agency Legal Conference (Sep. 18, 2012) (transcript available at <http://www.state.gov/s/l/releases/remarks/197924.htm> [<https://perma.cc/MFD8-6C38>]).

<sup>224</sup> Exec. Order No. 13,694, § 18077 80 Fed. Reg. (2015).

<sup>225</sup> Collin Allan, *Was the Cyber Attack on a Dam in New York an Armed Attack?*, JUST SECURITY (Jan. 8, 2016, 1:10PM), <https://www.justsecurity.org/28720/cyber-attack-dam-armed-attack/> [<https://perma.cc/T7L8-U6KT>].

<sup>226</sup> See Schmitt, *Armed Attacks*, *supra* note 219; TALLINN MANUAL, *supra* note 213, at 54–61 (discussing the involved factors).

<sup>227</sup> See Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on A Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 914–15 (1999).

<sup>228</sup> See, e.g., RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR 178 (2010) (“[C]yber attacks are to be judged by their effects, not their means. They would be judged as if they were kinetic attacks, and may be responded to by kinetic attacks, or other means.”); Daniel B. Silver, *Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter*, 76 INT’L L. STUD. 92–93 (2002); David Tubbs, Perry G. Luzwick & Walter Gary Sharp, Sr., *Technology and Law: The Evolution of Digital Warfare*, 76 INT’L L. STUD. 7, 15 (2002) (“[L]egal advisers must principally conduct an effects-based analysis of international law to determine the lawfulness of State activities in cyberspace.”).

<sup>229</sup> See Press Release, Office of Personnel Management, Statement by OPM Press Secretary Sam Schumach on Background Investigations Incident (Sep. 23, 2015) <https://www.opm.gov/news/releases/2015/09/cyber-statement-923/> [<https://perma.cc/7ZW5-PGZH>].

psychological evaluations, and family information—can be used against them.

In similar incidents, the United States, Germany, and Ukraine have been victims of cyber attacks on critical infrastructure. In 2013, Iranian hackers infiltrated the Bowman Avenue Dam in Rye, New York, about 20 miles from New York City. The Dam was targeted because of its proximity to the U.S.'s largest city. Though hackers “didn’t take control of the dam but probed the system,”<sup>230</sup> they successfully probed the potential to do so in the future. Germany reported a similar breach, except that resulted in physical damage in one of the nation’s largest iron plants as the hackers interfered with production operations.<sup>231</sup> Ukraine’s infrastructure hack happened on Christmas Eve of 2015, when hackers shut down the country’s energy grid, leaving locals quite literally in the dark.<sup>232</sup> Any harm that may have come was indirect, but certainly potentially substantial.

Are these incidents “armed attacks”? The Obama Administration would say so. The rest of the international community is not as clear. As for how courts interpret these questions, it is yet unclear. Even for those who firmly believe the United States should be free to interpret international law as it so wishes, this point would *undoubtedly* be appealed by future military commissions defendants, leading to further delays, costs, and frustrations.

This also leaves half of the debate untouched. These academic discussions do not bear on NIACs<sup>233</sup>; we are *only* asking what constitutes an armed attack from a sovereign. Though nations have perpetrated recent cyber attacks,<sup>234</sup> Director of National Intelligence James Clapper specifically remarked on non-state actors’ use of cyber attacks in the 2016 Global Threat Assessment:

Terrorists continue to use the Internet to organize, recruit, spread propaganda, collect intelligence, raise funds, and coordinate operations. In a new tactic, ISIL actors targeted and released sensitive information about US military personnel in 2015 in an effort to spur “lone-wolf” attacks. Criminals develop and use sophisticated cyber tools for a variety of purposes such as theft, extortion, and

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<sup>230</sup> Danny Yadron, *Iranian Hackers Infiltrated New York Dam in 2013*, WALL ST. J., Dec. 20, 2015, <http://www.wsj.com/articles/iranian-hackers-infiltrated-new-york-dam-in-2013-1450662559> [https://perma.cc/54LX-ED4R].

<sup>231</sup> See Rachael King, *Cyberattack on German Iron Plant Causes ‘Widespread Damage’*: Report, CIO REPORT: WALL ST. J. (Dec. 18, 2014, 6:06 P.M.), <http://blogs.wsj.com/cio/2014/12/18/cyberattack-on-german-iron-plant-causes-widespread-damage-report/> [https://perma.cc/B47G-EHDV].

<sup>232</sup> See Pavel Polityuk, *Ukraine to probe suspected Russian cyber attack on grid*, REUTERS (Dec. 31, 2015), <http://www.reuters.com/article/us-ukraine-crisis-malware-idUSKBN0UE0ZZ20151231> [https://perma.cc/C69A-HR4L].

<sup>233</sup> Aside from simply the definition of a cyber attack.

<sup>234</sup> See James R. Clapper, Dir. of Nat’l Intelligence, Statement for the Record: Worldwide Threat Assessment of the United States Intelligence Community Before Senate Select Comm on Intelligence, 114th Cong. 3 (2016).

facilitation of other criminal activities such as drug trafficking. “Ransomware” designed to block user access to their[sic] own data, sometimes by encrypting it, is becoming a particularly effective and popular tool for extortion for which few options for recovery are available. Criminal tools and malware are increasingly being discovered on state and local government networks.<sup>235</sup>

Moreover, at least some security scholars contend that ISIL has and is seeking to augment offensive cyber capabilities.<sup>236</sup> Such offensive actions could be interpreted as violations of the laws of war triable by commission, such as attacking civilian objects, attacking protected property.<sup>237</sup>

For those asking how hacking can have such tangible effects, consider the following case. In February 2016, the Hollywood Presbyterian Medical Center was hacked. Its networks were “paralyzed for about 10 days.”<sup>238</sup> This may have been the first time such an incident was publicly acknowledged, but security experts recognize that this was not the first: indeed a cyber security manager was on record stating, “He knew of at least 20 other attacks on healthcare facilities in the past year and hundreds more in other industries

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<sup>235</sup> *Id.* at 3–4. A white paper commission by the U.S. military’s Special Operations Command—SOCCENT—provides a thorough discussion of ISIL’s unprecedented “cyber expertise” in the realm of coordination and recruitment. See MAJ. GEN. MICHAEL K. NAGATA ET AL., *Multi-Method Assessment of ISIL* (SOCCENT Dec. 2014), [http://socialscience.net/docs/SMA\\_SOCCENT\\_White.Paper\\_Final\\_Dec2014.pdf](http://socialscience.net/docs/SMA_SOCCENT_White.Paper_Final_Dec2014.pdf) [<https://perma.cc/5B2K-HTH9>]; see also Ray Sanchez, *ISIS exploits social media to make inroads in U.S.*, CNN (Jun. 5, 2015) <http://www.cnn.com/2015/06/04/us/isis-social-media-recruits/> [<https://perma.cc/2URN-CZ3C>]; *ISIS recruits fighters through powerful online campaign*, (CBS television broadcast Aug. 29, 2014) <http://www.cbsnews.com/news/isis-uses-social-media-to-recruit-western-allies/> [<https://perma.cc/XA5E-9626>].

<sup>236</sup> See, e.g., Brian Nussbaum, *Thinking About ISIS and Its Cyber Capabilities: Somewhere Between Blue Skies and Falling Ones*, BLOG: CENTER FOR INTERNET AND SECURITY (Nov. 29, 2015, 10:59 A.M.) <http://cyberlaw.stanford.edu/blog/2015/11/thinking-about-isis-and-its-cyber-capabilities-somewhere-between-blue-skies-and-falling> [<https://perma.cc/49CR-WL63>] (“Thus, the biggest questions moving forward will be whether ISIS can or does develop meaningful offensive cyber capabilities. Unfortunately, the initial evidence is more than a bit worrying.”)

The seemingly starkest indicator is information that has come to light surrounding a malware campaign targeting enemies of ISIS in the Syrian city of Raqqa. This campaign, described in some depth by the Citizen Lab at the University of Toronto, suggests that ISIS - or an organization sympathetic to it - is using malware delivered through social media to find identifying information about critics and other enemies of ISIS. This campaign targeted a citizen media organization that has attempted to document the abuses and atrocities ISIS has committed in Raqqa using a ‘customized digital attack designed to unmask their location.’ While Citizen Lab was not able to definitively attribute the attack to ISIS, they did say that the malware ‘differed substantially’ from that used in similar campaigns that the Assad regime has conducted.

Indicators like this, combined with the arguably ‘offensive’ actions undertaken by hackers like Junaid Hussain suggest that, at least at the lower level, such capabilities are either already available to ISIS or are only a few recruitments away.”) (citations omitted).

<sup>237</sup> 10 U.S.C. § 950t (2012).

<sup>238</sup> Alex Dobuzinskis & Jim Finkle, *California hospital makes rare admission of hack, ransom payment*, REUTERS (Feb. 19, 2016), <http://www.reuters.com/article/us-california-hospital-cyberattack-idUSKCN0VS05M> [<https://perma.cc/787F-YP39>].



that had been kept secret.”<sup>239</sup> Essentially, it ““opens the door for other people.””<sup>240</sup> For hackers who knowingly endanger others with such actions, murder may not be entirely out of the question,<sup>241</sup> let alone attacking civilians, civilian objects, or protected property, all crimes triable by military commissions. But even if ISIL lacks the capacity to do so now, any strategic vision for the terror group would almost certainly include it in the near future.

Additionally, more passive hacks could be considered crimes triable by military commissions. Hacks that steal diplomatic or military information, for example, could certainly be considered spying or wrongfully aiding, two triable offenses.<sup>242</sup> Even hacks that do nothing but commandeer a web page and “solicits or advises another or others to commit one or more substantive offenses”—and offense certainly within the realm of possibility given terrorist groups’ documented use of the Internet to spread its message—is a triable offense.

Therefore, in line with this Note’s purpose, if we are to keep commissions a viable option for prosecuting such hackers—notwithstanding claims that such offenses lend themselves better to Article III proceedings—the statute is in need of an amendment.

### *C. Hostilities in the Heavens?*

On May 25, 1961, before a Special Joint Session of Congress, President John F. Kennedy declared that the United States would land a man on the moon before the turn of the decade.<sup>243</sup> It was an extraordinary and historic moment for the scientific community.

But the space race and President Kennedy’s declaration, while undoubtedly captivating the American public’s—if not the world’s—imagination, was met by some with concern of space’s exploitation as the next frontier of warfare, a new battlefield to assert dominance. Fearing such a development, the United Nations passed Resolution 1721 (XVI) to both study the legal implications of space exploration and push for its uses to remain “peaceful” mere months after Kennedy’s speech.<sup>244</sup> Doubling down on their peace efforts, the U.N. then passed Resolution 1884 (XVIII) to “prevent the spread of the arms race to outer space.”<sup>245</sup>

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Say, for example, a hacker sabotages a hospital. If a patient on life support dies because the hospital is no longer able to provide that necessary function, which sounds a lot like second-degree murder. See *Jackson v. Virginia*, 443 U.S. 307, 309 (1979).

<sup>242</sup> See 10 U.S.C. § 950t (listing solicitation, wrongfully aiding the enemy, and spying among triable offenses).

<sup>243</sup> President John F. Kennedy, Special Message to the Congress on Urgent National Needs (May 25, 1961), <https://catalog.archives.gov/id/193915> [<https://perma.cc/468V-A9KY>].

<sup>244</sup> G.A. Res. 1721 (XVI) (Dec. 20, 1961).

<sup>245</sup> G.A. Res. 1884 (XVIII) (Oct. 17, 1963).

Neither resolution required certain practices; they were more aspirational, humble requests of nations to keep space from becoming another battle theatre. Distinct and explicit curtailments came through the United Nations' Outer Space Treaty.<sup>246</sup> The Treaty mandates that signatories "undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner."<sup>247</sup> Moreover, it bars a State's use of the "moon and other celestial bodies" from "[t]he establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers."<sup>248</sup>

But a loophole persists: only nuclear weaponry and weapons of mass destruction, *not* conventional weapons, are prohibited from being placed in orbit. This inherently creates another theatre for hostilities, using either space-to-earth or space-to-space conventional weapons. Once more, while this may seem like the stuff of science fiction, it no longer is. Kinetic bombardment weapons—extraordinarily powerful and precise lasers or arrow-like rods—have been studied by the United States for over a decade<sup>249</sup> and are alleged to be in development by the United States,<sup>250</sup> China, and Russia,<sup>251</sup> yet fit squarely into this category.<sup>252</sup> And as these weapons are purely computer based, discussions of such weaponry need not only be considered in state-on-state violence, should they be hacked.

Recognizing this vulnerability, the Institute for Security and Cooperation in Outer Space has tried to combat it. The organization proposed the Treaty on Prevention of the Placement of Weapons in Outer Space to rectify the legal insufficiency.<sup>253</sup> The comprehensive Treaty requires countries halt and thereafter ban "research, development, testing, manufacturing and deployment of *all* space-based weapons."<sup>254</sup> As this article is being published, no country has signed the Treaty.

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<sup>246</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (known as the Outer Space Treaty).

<sup>247</sup> *Id.* at art. 4.

<sup>248</sup> *Id.*

<sup>249</sup> BOB PRESTON ET AL., *SPACE WEAPONS EARTH WARS* (2003).

<sup>250</sup> Julian Borger, *Bush likely to back weapons in space*, *GUARDIAN* (May 18, 2005), <https://www.theguardian.com/science/2005/may/19/spaceexploration.usnews> [<https://perma.cc/PL8P-G7X8>].

<sup>251</sup> Lee Billings, *War in Space May Be Closer Than Ever*, *SCIENTIFIC AMERICAN* (Aug. 10, 2015), <http://www.scientificamerican.com/article/war-in-space-may-be-closer-than-ever/> [<https://perma.cc/VC96-9J4Z>].

<sup>252</sup> See Eric Adams, *Rods from Gods*, *POP. SCI.* (Jun. 1, 2004), <http://www.popsci.com/scitech/article/2004-06/rods-god> [<https://perma.cc/FH78-6G8M>].

<sup>253</sup> The Treaty on Prevention of the Placement of Weapons in Outer Space, Institute for Security and Cooperation in Outer Space, <http://peaceinspace.com/the-treaty> [<https://perma.cc/9EKH-7SKX>].

<sup>254</sup> *Id.* at art. 1.

Therein lies the vulnerability: as detailed in the above discussion, use of conventional space-based weapons may not be subject to the laws of war and its perpetrators would be untriable by commissions. Domestic criminal charges may be the normatively correct avenue to pursue, but it frustrates this Note's purpose: keeping commissions a viable prosecutorial option for belligerents.

Overall, these new theatres of warfare perversely inhibit convening commissions against *de facto*, if not *de jure*, unprivileged combatants, the exact individuals commissions aim to prosecute.

*iv. Al Qaeda Isn't Alone in Engaging the United States Militarily*

The third and final option for prosecutors to demonstrate the accused's loss of noncombatant civilian status is to prove the accused was "a part of al Qaeda at the time of the alleged offense."<sup>255</sup> The unnecessarily narrow restriction of limiting the Prong only to those in *Al Qaeda* undermines the commissions' long-term prosecutorial viability as the global security landscape continues to evolve.

Al Qaeda is not alone amongst VNSAs in targeting the United States. Though this has more than likely been the case since long before September 11th, this truth is more patently obvious today than it was a decade and a half ago. There has been and continues to be a changing Rolodex of VNSAs with their eyes on the United States.

The United States (and as we now know, France, Belgium, and Germany, among essentially all Western nations) faces threats from an ever-changing Rolodex of VNSAs. Arguably the most famous—and dangerous—today is ISIL.<sup>256</sup> The terrorist group's stronghold over the past few years in parts of Iraq and Syria has ebbed and flowed, but it remains a constant presence in the area.

One may argue that the Al Qaeda-specific jurisdictional hook could encompass ISIL forces for multiple reasons. First, the Obama Administration has determined that there is a sufficient nexus between Al Qaeda and the Islamic State to justify attacking the group under the 2001 AUMF.<sup>257</sup>

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<sup>255</sup> 10 U.S.C. § 948a(7) (2012).

<sup>256</sup> Google news searches for "Daesh," "ISIS," and "ISIL" result in more than double the page hits than similar news searches for "Al Qaeda", " Hamas", and "Taliban" combined as of 5/14/2016. I performed the searches for both in light of the confusion and dual terms. Though this may artificially inflate the search results, the search for "ISIS" alone received three and a half times more results.

<sup>257</sup> See, e.g., Statement from Senior White House Official to the New York Times, Sept. 12, 2014, <https://assets.documentcloud.org/documents/1301198/is-war-powers-theory-back-ground-statement.pdf> [<https://perma.cc/S9S6-AY7Y>]; Hearing on President Obama's Authorization of Military Force Request Before the S. Foreign Relations Comm., 114th Cong. (2015) (statement of John F. ' , Secretary, Dep't of State); Letter from the President — War Powers Resolution Regarding Iraq; Letter from the President to the Speaker of the House of Representatives and President Pro Tempore of the Senate, (Sep. 23 2014), <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq>

What's more, this argument is likely bolstered by citing Congressional appropriations to continue combating ISIL's growth that are bundled together with those aimed at fighting Al Qaeda as a Part of Operation Inherent Resolve.<sup>258</sup>

Without extensively engaging in the substantive debate as to whether ISIL and Al Qaeda are sufficiently related, rest assured that this reasoning is far from secure.<sup>259</sup> The groups' stark differences even led Al Qaeda to actually sever any remaining ties to ISIL and disavow its former relationship.<sup>260</sup> Thus, military commissions are likely unfeasible for ISIL detainees under Prong C; at the very least, it is *yet another* question to litigate and expend resources parsing.

ISIL is not alone. The United States has engaged with the Khorasan Group, a similarly-styled though less famous VNSA operating throughout Syria. The United States government claims that the Khorasan group is a "network of seasoned al Qaida veterans."<sup>261</sup> Presumably, however, their former affiliation is insufficient to clear the standards for jurisdiction. The Defense Department later elaborated that the Khorasan group was an "offshoot of Al Qaida."<sup>262</sup> More to the point, however, "the precise relationship [between the groups] remains somewhat murky."<sup>263</sup>

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[<https://perma.cc/7HFJ-QZXC>] (noting his authority to bomb ISIL in Iraq under Public Law 107-40).

<sup>258</sup> See Letter from Barack Obama to John Boehner Regarding Fiscal Year 2015 Budget Amendments (Nov. 10, 2014), [https://www.whitehouse.gov/sites/default/files/omb/assets/budget\\_amendments/amendment\\_11\\_10\\_14.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/amendment_11_10_14.pdf) [<https://perma.cc/FFJ6-VJK8>]. This line of argumentation first began under an Office of Legal Counsel opinion. See Memorandum from Assistant Attorney General Randolph D. Moss on, Authorization for Continuing Hostilities in Kosovo to Attorney General Janet Reno (Dec. 19, 2000), <https://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf> [<https://perma.cc/LB4D-7UT9>].

<sup>259</sup> Given the marked differences in the two groups' aims, methodologies, and tactics, there is sufficient reason to believe that their relationship was a "marriage of convenience" as opposed to a truly shared religious ideology and commonality of end goals. See AARON ZELIN, THE WAR BETWEEN ISIS AND AL-QAEDA FOR SUPREMACY OF THE GLOBAL JIHADIST MOVEMENT, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY (2014), [http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote\\_20\\_Zelin.pdf](http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf) [<https://perma.cc/4PG3-Q443>]; see also *Hearing on Terrorism in Africa: The Imminent Threat to the U.S. Before the Subcomm. On Counterintelligence and Intelligence of the H. Comm. On Homeland Sec.* 114th Cong. (2015) (statement of Dr. Daniel Byman, Research Director, Center for Middle East Policy, Center for Security Studies, Brookings Institution).

<sup>260</sup> See Liz Sly, *Al-Qaeda Disavows Any Ties With Radical Islamist ISIS Group in Syria*, WASH. POST (Feb. 3 2014), [https://www.washingtonpost.com/world/middle\\_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1\\_story.html](https://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html) [<https://perma.cc/3GMP-QPG8>].

<sup>261</sup> Louise Arimatsu & Michael N. Schmitt, *Attacking "Islamic State" and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUM. J. TRANSNAT'L L. BULL. 1, 159 (2014) (quoting Rear Adm. John Kirby & Lt. Gen. William Mayville, Dep't of Defense Press Briefing (Sept. 23, 2014), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5505> [<https://perma.cc/4PC7-WQME>]).

<sup>262</sup> Rear Admiral John Kirby, Department of Defense Press Briefing (Sep. 25, 2014), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/606932> [<https://perma.cc/GWR7-WX8M>].

<sup>263</sup> Arimatsu & Schmitt, *supra* note 261, at 15; see also Holly Yan, *What's the Difference between ISIS, al-Nusra, and the Khorasan Group?*, CNN (Sep. 24, 2014), <http://www.cnn>

And these are only groups currently operating in the Middle East with a potential connection to Al Qaeda. There remain scores of VNSAs operating across the globe whose Al Qaeda connection—if any—would fall laughably short of Prong C. Thus, though Al Qaeda may have given VNSAs a blueprint against the Western world, individuals that are a part of other similarly heinous organizations would be exempt from prosecution under the MCA on the foundation of affiliation, frustrating commissions' fundamental purpose. This is unnecessarily narrow.

#### V. SUGGESTED CHANGES TO JURISDICTIONAL HOOKS AND THEIR RAMIFICATIONS

Given these significant deficiencies, the jurisdictional hooks must be altered for military commissions to remain a viable avenue to prosecute future law of war violations. More, they must be altered to promote efficiency, as President Obama stated,<sup>264</sup> without sacrificing principles of justice. Hence, I ascribe Justice Scalia's theory that "the rule of law [be] a law of rules"<sup>265</sup> and advocate two separate recommendations that increase flexibility and bright-line determinations. The first proposal changes commissions' jurisdiction from a standard to a rule to expedited adjudication. The second proposal opens the final prong's single-minded affiliation—being part of *only* Al Qaeda—to include other known terrorist organizations to keep commissions viable for future conflicts.

The recommendations detailed below go to addressing these insufficiencies directly, as they would adopt commissions to the ever-changing global security landscape. Recognizing the value of standards in our jurisprudence, I again wish to note that these recommendations *only* apply narrowly to battlefield-based commissions.

##### *i. Defense Department Promulgates Rules Defining 'Hostilities'*

"[C]ompliance with the law of war is the condition upon which [a commission's] authority set forth in Article 21 is granted."<sup>266</sup> Military commissions *must* comply with international jurisprudence of what constitutes 'hostilities' and 'conflicts subject to the laws of war' including the "scale and effects" test and the "intensity" tests for IACs and NIACs, respectively.<sup>267</sup> Instead of a standard to remind vulnerable to decades of litigation, the first

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.com/2014/09/24/world/meast/isis-al-nusra-khorasan-difference/ [https://perma.cc/EZ37-M32R].

<sup>264</sup> See Guantanamo Closure Speech, *supra* note 2.

<sup>265</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

<sup>266</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006).

<sup>267</sup> See *supra*, Part III.C.i-ii.

proposal requires the Defense Department to define “hostilities” in the context of military commissions.

10 U.S.C. § 948a . . .

(9) Hostilities—

~~The term “hostilities” means any conflict subject to the laws of war.~~

Should Congress legislate either a declaration of war or an authorization of military force, the Defense Department shall issue guidelines governing the definition of hostilities in light of relevant warfare operations and practices. This definition would only apply for the Chapter thereof and has no effect on the term’s definition in other provisions.

The Administrative Procedure Act (APA) of 1946<sup>268</sup> outlines how agencies propose and establish regulations in their areas of expertise. This proposal follows the APA’s structure, authorizing the Defense Department to define hostilities so as to create a bright line rule that can be swiftly and objectively adjudicated. Now, rules typically incur a higher upfront cost, but diminish costs as time progresses.<sup>269</sup> This is because developing the rule requires exhaustive investigation that incurs a cost, but will likely prevent litigation because it is harder to argue a violation if clear. On the other hand, a standard will inevitably be litigated repeatedly, incurring costs down the road, as has been borne out.

To be sure, commissions require both *de facto* and *de jure* war-like exigencies.<sup>270</sup> As such, if we are to remove the current definition—“conflict subject to the laws of war”—we need another mechanism to ensure compliance with that rule. Thus, the new definition requires some official declaration of military action, including an AUMF or a formal declaration of war. Pragmatism demonstrates the ridiculousness of deferring costs and its justification. First, the Defense Department already conducts analyses for law of war engagements, significantly diminishing the costs for the investigation. It is not as if a scientific study is being engaged. Second, many of the procedural costs associated with investigation stem from public notice and comment. However, military commissions rules are not required to go through such procedures,<sup>271</sup> leading to a significantly reduced cost.

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<sup>268</sup> An Act to improve the administration of justice by prescribing fair administrative procedure, Pub. L. No. 79-404, 60 Stat. 237 (1946).

<sup>269</sup> See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

<sup>270</sup> *Hamdan*, 548 U.S. at 591 (“Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.”).

<sup>271</sup> 5 U.S.C. § 553(a)(1) (2012) (“This section applies, according to the provisions thereof, except to the extent that there is involved . . . a military or foreign affairs function of the United States.”).

Pitting these diminished costs against the costs of commissions currently shows makes the decision easy. The Court of Military Commissions Review, Court of Appeals for the District of Columbia, and the Supreme Court continue to wrestle with standards time and again.<sup>272</sup> For this reason, no military commission conviction has entirely withstood appeal—all convictions have been overturned explicitly or, as of this article, remain in jeopardy pending further appellate review.<sup>273</sup> Litigation costs are therefore exorbitant relative to the few pending cases, favoring enacting anything we can to expedite future commissions.

Practically speaking, this system is also better than asking Congress to consistently redefine the term in the ever-changing nature of warfare. As detailed above, war is going through rapid and fundamental changes, and, in all likelihood, will continue to. The legislature is consistently too reactionary to depend on to nimbly respond to such changes. Rather, charging the Department of Defense to keep that definition up to date sidesteps a stagnant Congress. Furthermore, even if Congress kept with the times, they simply do not have the same level of expertise as the Defense Department, which already tracks the definition of hostilities in other contexts such as iterating the Law of War Manual.

This proposal is not without its detractors. The most powerful criticisms are the political benefits of opacity, separation of powers in wartime capacity, and the non-delegation doctrine specifically.

#### A. *The Political Benefits of Opacity*

One criticism may point to a vague definition's benefits: executive powers and pliability. By keeping the term vague, critics may argue, the executive can use opacity to set policy. Mr. Koh alluded to this in his testimony before Congress, suggesting it was why those writing laws surrounding hostilities consistently define the term imprecisely.<sup>274</sup>

There are multiple sound responses to this criticism. First, this particularly brazen view of hoarding and augmenting executive authority has been largely repudiated on the political spectrum.<sup>275</sup> That aside, vagueness for po-

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<sup>272</sup> See, e.g., Jess Bravin, *Court Overturns Guantanamo Detainee's Conspiracy Conviction*, WALL ST. J. (June 12, 2015), <http://www.wsj.com/articles/court-overturns-guantanamo-detainees-conspiracy-conviction-1434150794> [<https://perma.cc/QXR6-XP4X>].

<sup>273</sup> *Id.* (noting that after the Al-Bahlul rulings that “four of the eight military commission convictions since 2001 have been thrown out and others remain in legal jeopardy”). This statement was made before the D.C. Circuit en banc reversed its panel, see *Bahlul v. United States*, No. 11-1324, 2016 WL 6122778, at \*1 (D.C. Cir. Oct. 20, 2016), meaning the count is now down to three. However, as the case is likely to be petitioned to the Supreme Court, see Feldman, *supra* note 10, this statement may once again prove accurate.

<sup>274</sup> See *Recent Administrative Interpretation*, *supra* note 177, at 1550, n.41.

<sup>275</sup> See, e.g., Dana Nelson, Opinion, *The growth of executive power has turned politics into war*, WASH. POST: IN THEORY (Mar. 8, 2016), [https://www.washingtonpost.com/news/in-theory/wp/2016/03/08/the-growth-of-executive-power-has-turned-politics-into-war/?utm\\_term=.912a83271b59](https://www.washingtonpost.com/news/in-theory/wp/2016/03/08/the-growth-of-executive-power-has-turned-politics-into-war/?utm_term=.912a83271b59) [<https://perma.cc/7S5A-GYYE>].

litical gain is simply unpersuasive compared to the continued legal boondoggle commissions is viewed as, much less the taxpayers' cost and the closure to be gained by a final verdict.

The second response notes the criticism's overstatement. Whatever definition is promulgated by the Defense Department is *only* for jurisdiction of military commissions. Just as the states previously discussed have no common definition, a promulgated definition would not require commonality. And finally, if the executive feels this pliability trumps precision's potential benefits, the Secretary could promulgate an *identical* definition, in which case the President has lost no authority or power whatsoever. The proposed statute encourages a bright line test but in no way mandates one. Thus, the critic can sleep soundly knowing that an executive branch need not relinquish its policy-making ability.

### B. Separation of Powers in Wartime

Another response to the proposal looks to the Constitution's divided war powers. "The Constitution gives Congress the power to declare wars, fund them, and oversee the way they are fought. Yet the Constitution never says exactly how these powers are to be reconciled with the president's authority as commander in chief."<sup>276</sup> The Constitution empowers Congress to "define and punish . . . [o]ffenses against the Law of Nations."<sup>277</sup> What constitutes "[o]ffenses against the Law of Nations" is not in question. But given that power, critics could claim that such a role includes dictating all aspects of the tribunal—including their jurisdiction—not the executive. In fact, when the Bush Administration ordered commissions via military order, "[s]everal hundred law professors and lawyers wrote to Senator Leahy [then-chairman of the Senate Judiciary Committee], stating that the Bush military order 'undermines the tradition of the Separation of Powers.'<sup>278</sup> To put it mildly, "[t]rial by military commission raises separation-of-powers concerns of the highest order."<sup>279</sup>

On the other hand, Article II stipulates that "[t]he President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States."<sup>280</sup> In that capacity:

The Constitution surely must empower the president to fight wars effectively enough to win them. That means that war must be conducted under the

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<sup>276</sup> Noah Feldman & Samuel Issacharoff, *Declarative Sentences*, SLATE (Mar. 5, 2007), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/03/declarative\\_sentences\\_single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/declarative_sentences_single.html) [https://perma.cc/9Y6V-ABPL].

<sup>277</sup> U.S. CONST. art. I, § 8.

<sup>278</sup> See LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 177 (2005) (citing 147 Cong. Rec. S3277 (daily ed. Dec. 14, 2001)).

<sup>279</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006).

<sup>280</sup> U.S. CONST. art. II, § 2.



president's direction, not run by committee. [Thus, in] the modern era, no country—not even a parliamentary democracy—has been so foolhardy as to place a war under the guidance of a legislative body, rather than a single, unified command . . . . [Rather] at no time in our history has Congress claimed the right to exercise any war power beyond the following: 1) to declare, undeclare, and provide funds for war; 2) to define the field of battle and the nature of the conflict; 3) to enforce law-of-war limitations on the conduct of warfare; 4) and to demand that the president report emergency military actions to Congress for its approval within a fixed period of time.<sup>281</sup>

“The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*.”<sup>282</sup> In his seminal concurrence—though a concurrence, it became the *de facto* holding of the case—Justice Jackson described three categories of scenarios, which dictate the legitimacy of the executive's actions:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate; . . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain; . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.<sup>283</sup>

Though decided before this framework was explicitly set out, the Court in *Ex parte Quirin* followed this framework when adjudicating the constitutionality of commissions generally:

the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.<sup>284</sup>

For this reason, the Supreme Court has only invalidated commissions because they violated the framework “Congress has set forth governing principles for military courts.”<sup>285</sup> Indeed this specific authorization places

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<sup>281</sup> See Feldman & Issacharoff, *supra* note 276.

<sup>282</sup> *Hamdan*, 548 U.S. at 638 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring)).

<sup>283</sup> See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37 (Jackson, J., concurring). Interestingly, in a case decided two months prior to *Youngstown*, the Court foreshadowed this framework, and did so *specifically* in context of military procedures. See *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (“In the absence of attempts by Congress . . . as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.”).

<sup>284</sup> 317 U.S. 1, 25 (1942).

<sup>285</sup> *Hamdan*, 548 U.S. at 639, 638–46 (discussing trial and appellate procedures in courts-martial and commissions, which must be uniform unless impracticable).

commissions in the primary *Youngstown* category, which entitles the executive “to personify the federal sovereignty.”<sup>286</sup>

Therefore, if the executive so believes that military commissions are valuable tools in the war on terror,<sup>287</sup> it is her prerogative to convene commissions so long as they adhere to Congress’ rules regarding courts-martial and commissions procedures.<sup>288</sup> Executive decisions over who may be tried—as dictated by whether potential defendants actually participated in “hostilities”—does not violate this principle. Therefore, permitting the president, via the Secretary of Defense, to define the scope of these trials within Congress’ limits, does not violate the separation of powers: he is simply exercising his executive war powers.

### C. *The Non-Delegation Doctrine*

Assuming *arguendo* that one nevertheless believes the power to invoke tribunals belongs to Congress, a final criticism may be levied: the non-delegation doctrine. Buttressed by the tripartite government’s checks and balances,<sup>289</sup> the doctrine states that the legislature cannot delegate its constitutional obligations to another branch of government.<sup>290</sup> Chief Justice John Marshall dictated the initial standard of how to determine which constitutional powers can be delegated from those cannot: “important subjects, which must be entirely regulated by the legislature itself, [while for] those of less interest . . . a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”<sup>291</sup>

The Court has since re-framed the question as one of frameworks versus executions.

“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it

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<sup>286</sup> *Youngstown*, 343 U.S. at 636.

<sup>287</sup> See generally David S. Kris, *Law Enforcement As A Counterterrorism Tool*, 5 J. NAT’L SEC. L. & POL’Y 1 (2011) (noting that prosecutions are a useful tool in counterterrorism and the war on terror generally).

<sup>288</sup> See *Hamdan*, 548 U.S. at 639, 638–46.

<sup>289</sup> JOHN LOCKE, A SECOND TREATISE ON CIVIL GOVERNMENT 193 (1690) (“The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others . . . . And when the people have said, We will submit to rules . . . no Body[sic] else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised [sic] to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.”).

<sup>290</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986) (“Justice Jackson’s words echo the famous warning of Montesquieu, quoted by James Madison in *The Federalist* No. 47, that ‘there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates . . . .’”) (citing *THE FEDERALIST* No. 47 (James Madison)).

<sup>291</sup> *Wayman v. Southard*, 23 U.S. 1, 43 (1825).

shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”<sup>292</sup>

This principle has permitted executive agencies to make rules that “fill up the details”<sup>293</sup> of legislative standards in myriad ranges of life.

In enacting the MCA, Congress intended to subject anyone involved in armed conflicts to trial by military commissions. By simply permitting the executive branch to offer an articulation of those lines, the rule would not impinge on the legislative framework. Indeed, the rule would “not, in any real sense, invest the president with the power of legislation.”<sup>294</sup>

Beyond the question of distinguishing the important from the trivial, the Court has also repeatedly cited practical considerations “[i]n determining what [Congress] may do in seeking assistance from another branch.”<sup>295</sup> For example, when Congress passed a law to improve air quality by lowering emissions standards, it did not itself dictate what chemicals could or could not be present in emissions and in what amounts. Instead it left that job to the EPA and its administrator via agency rulemaking procedures.<sup>296</sup> Few congresspersons likely have the expertise on warfare and the laws of armed conflict as compared to senior Defense Department executives. It is *exactly* for this reason that Congress delegated other aspects of military commissions to executive rulemaking, which, again, themselves are not even subject to notice-and-comment structures.<sup>297</sup> Therefore, the proposed rule also satisfies the practical considerations envisioned by delegation.

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<sup>292</sup> *Union Bridge Co. v. United States*, 204 U.S. 364, 382–83 (1907) (quoting *Cincinnati, W. & Z.R. Co. v. Clinton Cty. Comm’rs*, 1 Ohio St. 77, 77 (1852)).

<sup>293</sup> See *Wayman*, 23 U.S. at 43.

<sup>294</sup> *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

<sup>295</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“[T]he extent and character of [another branch’s] assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination [sic].”); see also *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (“Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.”); *Interstate Commerce Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912) (“The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.”).

<sup>296</sup> 42 U.S.C. § 7408 (2012).

<sup>297</sup> The Administrative Procedure Act, Pub. L. No. 79-404 § 553 (1946) (“Rule making. (a) This section applies, according to the provisions thereof, except to the extent that there is involved (1) a military or foreign affairs function of the United States . . . .”); see also *Federal Registrar — Crimes and Elements of Trials by Military Commission*, FED. REG., <https://www.federalregister.gov/articles/2003/07/01/03-16379/crimes-and-elements-of-trials-by-military-commission> [<https://perma.cc/7T9M-ZKAJ>] (noting that because 32 CFR is “a military function of the United States [it is] exempt from administrative procedures for rule making”).

*D. Suggestions for Potential Rules*

Warfare continues to develop in unpredictable ways. Hostilities now incorporate too many unique theatres, costs and strategic resources to restrict its definition to one metric. Therefore, a rule should be piecemeal—a combination of theatre-specific and actor-specific disjoint triggers—such that commissions remain viable, if not useful, but only when appropriate. The following are examples categories, including specific suggestions within each.

*1. Conventional Actions*

As discussed above, the United States does not believe in the existence of a gap between Article 2(4) and Article 51 violations.<sup>298</sup> Assuming the government keeps its interpretation, the Secretary could define conventional “hostilities” for purposes of the MCA as the firing a lone bullet fired at our armed forces. Admittedly, this may not be the ideal definition for myriad reasons, ranging from concerns of agency (the inability to control a rogue operative) to questions of causation (what if the United States actually shot first?). Thus, the government may adopt a definition more akin to the “scale and effects” test, putting forward theatre-specific metrics to distinguish a mere border incident and an armed attack.<sup>299</sup>

For example, should the situation call for conventional ground troops, the trigger could cover incremental increases of troops deployed to the region, changes in Defense Readiness Condition<sup>300</sup> to either the entire military or specific to certain units, troops killed, or skirmishes engaged in, to name a few possibilities. In the event of air-based efforts like those carried out in Libya, a metric may use the frequency or gross quantity of sorties flown to a specific location.

Many of these metrics will also resemble the *Tadic* test relating to duration and organization differentiating a NIAC from a rebellion, but certainly some will be unique to—or at the very least more prominently featured in—state or non-state scenarios. For example, air-to-air metrics are likely only to be applied for sovereign nations, as VNSAs have yet to fully field air forces.<sup>301</sup> (Though air-to-ground metrics may be universal, given our use of

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<sup>298</sup> See Taft, *supra* note 189; Koh, *supra* note 223.

<sup>299</sup> *Nicaragua*, *supra* note 186, at ¶ 195.

<sup>300</sup> DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2009), [http://web.archive.org/web/20091108082044/http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://web.archive.org/web/20091108082044/http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) [<https://perma.cc/H997-8E7M>].

<sup>301</sup> Though, reports cite ISIL fighters capturing Syrian jets and paying experienced Syrian pilots to train the jihadists. See David Williams & John Hall, *Does ISIS have an airforce? Terrorist 'fighter pilots' are being train on captured MiGs by Saddam Hussein's exair force officers*, DAILY MAIL (Oct. 17, 2014), <http://www.dailymail.co.uk/news/article-2797167/does-isis-airforce-terrorist-fighter-pilots-trained-captured-migs-saddam-hussein-s-ex-air-force-of-ficers.html> [<https://perma.cc/WY2D-WSVZ>]. Thus far, there have been no reports of ISIS carrying out their own airstrikes on said planes. Reports of Russian airstrikes aiding ISIS

air strikes against ISIL<sup>302</sup> akin to those against Libya.) Undoubtedly, conventional action can take many forms, but it is ripe for parsing via quantitative metrics.

A trigger for conventional action may also have a geographic component relating to the location's previous hostile activity. Two juxtaposing examples prove instructive. First, consider the recent attacks in Paris. This was carried out in an urban setting without any previous hostile engagements, classifying their actions as generating "hostilities" and trying these defendants in military commissions may well frustrate the purpose of the MCA and commissions generally. Compare that with the Camp Chapman attacks. CIA personnel tasked with providing intelligence to support drone attacks against Pakistani targets were stationed at Forward Operating Base (FOB) Chapman, located in Afghanistan's Khost province near the Pakistani border, throughout much of the War on Terror.<sup>303</sup> On December 30, 2009, Humam Khalil al-Balawi, a 32-year old Jordanian doctor in Al Qaeda's upper ranks, reached out to U.S. officials and claimed to be an informant.<sup>304</sup> He was invited to meet CIA personnel at Chapman to divulge his information,<sup>305</sup> but instead used his meeting as a cover to detonate a suicide bomb inside the FOB, maximizing the death count.<sup>306</sup> A perpetrator of an analogous attack—ex-

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forces could lead down another rabbit hole of international law—attribution. But without evidence of attribution, those strikes wouldn't bear on these hypothetical triggers.

<sup>302</sup> Press Release, U.S. Dep't of Defense: Combined Joint Task Force Operation Inherent Resolve, Airstrikes Continue Against ISIL Targets in Syria, Iraq (Sep. 13, 2015), <http://www.defense.gov/News/Article/Article/617014/airstrikes-continue-against-isil-targets-in-syria-iraq> [<https://perma.cc/Z2KU-DAT7>].

<sup>303</sup> Cristina Lamb & Miles Amooore, *How this suicide bomber opened a new front in Al-Aeda's war*, SUNDAY TIMES (Jan. 10, 2010), [http://www.thesundaytimes.co.uk/sto/news/world\\_news/article194722.ece](http://www.thesundaytimes.co.uk/sto/news/world_news/article194722.ece) [<https://perma.cc/XY5X-7RQM>].

<sup>304</sup> Officials genuinely believed that Al-Balawi had established himself as a valuable intelligence asset. According to several news reports:

U.S. and Jordanian officials had come to regard Balawi as trustworthy, former officials said, despite a history of support for Islamist extremism—a point of view he appeared to endorse in an interview with an al-Qaeda-affiliated publication as recently as this past fall.

'He was someone who had already worked with us,' said a former U.S. counterterrorism officer who discussed the ongoing investigation on the condition of anonymity. The official said Balawi had been jointly managed by U.S. and Jordanian agencies and had provided 'actionable intelligence' over several weeks of undercover work along the Afghanistan-Pakistan border.

Joby Warrick & Peter Finn, *Suicide bomber who attacked CIA post in Afghanistan was trusted informant from Jordan*, WASH. POST (Jan. 5, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/04/AR2010010402150.html> [<https://perma.cc/P5U9-3KGU>]; see also Tom Bowman, *Stepped-Up Drone Strikes Test U.S.-Pakistan Ties*, NAT'L PUB. RADIO (Jan. 12, 2010) <http://www.npr.org/templates/story/story.php?storyId=122498263> [<https://perma.cc/JV2P-FR9L>] (reporting that Al-Balawi was "feeding [U.S. intelligence officers] low-level [Al Qaeda] operatives and we were whacking them."); David Osborne, *How CIA was fatally duped by Jordanian double agent*, INDEPENDENT (Jan. 5, 2010), <http://www.independent.co.uk/news/world/americas/how-cia-was-fatally-duped-by-jordanian-double-agent-1859007.html> [<https://perma.cc/4RXE-ZQ3F>].

<sup>305</sup> The base may have been selected because its location permitted an Al Qaeda operative to travel there without arousing too much suspicion and alerting his brethren that he was a double agent.

<sup>306</sup> See generally JOBY WARRICK, *THE TRIPLE AGENT* (2012).

cuted on a military base in an area that had featured significant warfare—would be ripe for prosecution. Thus, a rule governing “hostilities” in conventional attacks may be aided by a geography-based clause so as to include those the MCA aims to try and exclude those that it does not.

## 2. *Cyber attacks*

Cyber attacks will have alternative unique metrics. An appropriate rule may bifurcate military and non-military hacking. If the hack targeted strictly civilian targets, such as the aforementioned civilian dam or hospital, prosecuting the perpetrators would remain the purvey of federal courts. On the other hand, digitally infiltrating or restricting military targets, including but not limited to the Office of Personnel Management hack (given military records stolen), could be grounds for commissions.

This bifurcation may even be semi-permeable. Military targets would *always* be triable by commissions, but some civilian targets could rise to such a level depending on their effect. The financial markets provide a viable example. A civilian target may rise to such a level based on the value of the assets impacted. The 2014 JPMorgan Chase data breach, believed to have compromised data associated with over 83 million accounts—traced to 76 million households (two thirds of the U.S.’s households) and 7 million small businesses—could qualify as such a breach.<sup>307</sup> The amount of money in play from that hack and its sister hack against Fidelity<sup>308</sup> could send shockwaves through the U.S., and therefore global, financial markets. The aforementioned Dam and hospital attacks may also represent sufficiently substantive attacks, depending on how grave their effects were. Smaller hacks of, say, a local store’s customer information may be just as serious for the individuals involved, but not as tasking on the nation. The former poses a genuine risk to our welfare, satisfying the spirit behind “hostilities,” while the latter is simply an isolated pain.

Bifurcating cyber attacks by target, military versus civilian, and even further categorizing civilian targets by some impact metric—individuals im-

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<sup>307</sup> Bernard Siegel, *Ways to Protect Yourself After the JPMorgan Hacking*, N.Y. TIMES, (Oct. 3, 2014) <http://www.nytimes.com/2014/10/04/your-money/jpmorgan-chase-hack-ways-to-protect-yourself.html> [<https://perma.cc/X53J-DVAB>].

<sup>308</sup> Devlin Barrett, Emily Glazer & Kirsten Grind, *J.P. Morgan Hackers Also Stole Fidelity Data, Investigators Think*, WALL ST. J. (Oct 9, 2014), <http://www.wsj.com/articles/state-attorneys-general-weigh-group-to-examine-jpm-cyberattack-1412879567> [<https://perma.cc/T56U-FV2C>]. The hackers targeted nine other institutions. See Matthew Goldstein, Nicole Perloth & David E. Sanger, *Hackers’ Attack Cracked 10 Financial Firms in Major Assault*, N.Y. TIMES: DEALBOOK (Oct. 3, 2014) <http://dealbook.nytimes.com/2014/10/03/hackers-attack-cracked-10-banks-in-major-assault/> [<https://perma.cc/C2JA-S552>]. We have since learned that the other institutions hacked include Citigroup, HSBC Holdings, E\*Trade, Regions Financial Corporations, and Automatic Data Processing (ADP). Michael Riley & Jordan Robertson, *JPMorgan Hackers Said to Probe 13 Financial Firms*, BLOOMBERG (Oct. 9, 2014), <http://www.bloomberg.com/news/articles/2014-10-09/jpmorgan-hackers-said-to-probe-13-financial-firms> [<https://perma.cc/HHJ9-92YJ>].

pacted, dollars, etc.—offers expediency and clarity to determine who is subject to a military commission and who is not.

### 3. *Nuclear, chemical, or biological attacks*

Defining hostilities with regards to the use of nuclear weapons is likely the easiest aspect of the piecemeal solution. I recommend the Secretary define the use of *any* such weaponry as creating the existence of hostilities for purposes of commissions; the other frameworks in place would likely sufficiently separate those who ought be able to sit trial in a commission from those who could not.

Consider the only two nuclear weapons ever used, “Little Boy” and “Fat Man,” were famously detonated over the Japanese cities of Hiroshima and Nagasaki, respectively.<sup>309</sup> These types of nukes, commonly termed ‘strategic nuclear weapons,’ are used as part of a strategic plan to cripple an enemy’s military or civilian infrastructure and economy, hastening war’s end.<sup>310</sup> Having been used during a declared war, those who executed the weapon’s firing—or those who ordered its use—could not be subject to a commission.<sup>311</sup> The same may not be true if they were detonated during peacetime or by a VNSA. In either such scenario, the individual may yet be subject to commissions pending other questions of his or her conduct, such as whether the person was a privileged belligerent acting under a commander or not.<sup>312</sup>

Therefore, we may want to design a rule such that terms “hostilities” to include all nuclear detonations, but limit the availability of a military commission to those detonations taking place on the battlefield. What’s more, the same principles that apply to nuclear weapons are likely viable for biological or chemical weapons. Their use would automatically constitute “hostilities,” where other frameworks serve to adjudicate whether or not the individual responsible for their use are subject to trial by military commission.

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<sup>309</sup> See, e.g., *Little Boy and Fat Man*, ATOMIC HERITAGE FOUNDATION, <http://www.atomicheritage.org/history/little-boy-and-fat-man> [<https://perma.cc/W7GV-V2AA>].

<sup>310</sup> *Strategic Air Command Declassifies Nuclear Target List from 1950s*, NATIONAL SECURITY ARCHIVE, GEORGE WASHINGTON UNIVERSITY (Dec. 22, 2015), <https://nsarchive.gwu.edu/nukevault/ebb538-Cold-War-Nuclear-Target-List-Declassified-First-Ever/> [<https://perma.cc/Y856-UYH7>].

<sup>311</sup> In fairness, they *may* be subject to other tribunals, as some believe the weapons’ use constitute a war crime. See, e.g., INTERNATIONAL LAW AND POLICY INSTITUTE, NUCLEAR WEAPONS UNDER INTERNATIONAL LAW: AN OVERVIEW 2 (2014), [http://www.geneva-academy.ch/docs/projets/ILPI%20Nuclear%20Weapons%20Under%20International%20Law\\_An%20Overview.pdf](http://www.geneva-academy.ch/docs/projets/ILPI%20Nuclear%20Weapons%20Under%20International%20Law_An%20Overview.pdf) [<https://perma.cc/AK3U-WGVF>] (“Use of nuclear weapons could, under certain circumstances, amount to genocide, crimes against humanity, and/or war crimes.”).

<sup>312</sup> Tactical nuclear weapons—also called non-strategic nuclear weapons—on the other hand, are designed specifically for battlefield use, with significantly smaller yields. See *generally* HANS M. KRISTENSEN, NON-STRATEGIC NUCLEAR WEAPONS, FEDERATION OF AMERICAN SCIENTISTS (May 2012), [https://fas.org/\\_docs/Non\\_Strategic\\_Nuclear\\_Weapons.pdf](https://fas.org/_docs/Non_Strategic_Nuclear_Weapons.pdf) [<https://perma.cc/7GMV-63CD>]. That said, the same principles applying regarding classifying their use as hostilities in all cases and letting the other provisions do the heavy lifting.

ii. *Open Affiliation Prong to All Individuals Who Are “A Part Of” VNSAs Designated By The Foreign Terrorist Organizations List*

An affiliation-based jurisdictional prong restricted only to Al Qaeda members unnecessarily bars similarly situated terrorists from trial by military commission and invites costly and sluggish appeals adjudicating who is part of the group. Indeed a more amenable framework replaces Al Qaeda with analogous organizations. Luckily, such a framework already exists within the State Department: the Foreign Terrorist Organization List (FTOL). Given its procedural safeguards, the FTOL provides a proven, viable solution.

10 U.S.C. § 948a – Definitions . . .

(7) Unprivileged Enemy Belligerent.—The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent) who— . . .

(c) was a part of ~~al Qaeda at the time of the alleged offense under this chapter~~ any foreign terrorist organization, pursuant to 8 U.S.C.A. § 1189, at the time of the alleged offense under this chapter

The 2006 MCA established commissions as an avenue to prosecute “violations of the law of war[.]”<sup>313</sup> Though the original MCA was likely written in response to CSRTs’ insufficiencies under *Hamdan*, it did not limit jurisdiction to Al Qaeda operatives only. In fact, it defined an unprivileged enemy combatant triable by commission apart from organizational affiliation, only referencing “a person who is part of the Taliban, al Qaeda, or associated forces” as an *example* rather than a defining characteristic or criterion.<sup>314</sup> While much has been written regarding the Pandora’s box of who are Al Qaeda’s “associated forces,”<sup>315</sup> the current, operative iteration of

<sup>313</sup> 10 U.S.C. § 948b (2006) Pub. L. No. 109-366, 120 Stat. 2600 (to be amended later by the MCA of 2009).

<sup>314</sup> *Id.* at § 948(a)(7) (“The term ‘unprivileged enemy belligerent’ means an individual . . . who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”).

<sup>315</sup> See, e.g., Marty Lederman, “Associated Forces” has a legal meaning . . . but it’s not “every group that calls itself al Qaeda”, JUST SECURITY (Feb. 4, 2014, 4:00 P.M.), <https://www.justsecurity.org/6756/associated-forces-has-legal-meaning-not-every-group-calls-al-qaeda/> [<https://perma.cc/D6SL-G883>]. For a discussion as to the government’s view with respect to detention specifically, see Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL’Y REV. 141, 145–46 (2013) (“[T]he concept of an ‘associated force’ an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims.

An ‘associated force,’ as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with



commissions speaks only to Al Qaeda.<sup>316</sup> There is an obvious, excellent alternative, both pliable and justiciable: the Foreign Terrorist Organizations List.

The Immigration and Nationality Act states that “[t]he Secretary is authorized to designate an organization as a terrorist organization.”<sup>317</sup> This designation is reserved for a foreign organization that engages in or “retains the capability and intent to engage in” terrorist activities whose execution “threatens the security of the United States.”<sup>318</sup> Specifically, Section 1189(a)(1) of the Act—added by the Antiterrorism and Effective Death Penalty Act of 1996<sup>319</sup>—sets forth three requirements the organization must meet to earn the designation:

(A) the organization is a foreign organization; (B) the organization engages in terrorist activity as defined in the provisions set forth in the margin; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.<sup>320</sup>

Such activities threaten “national security” when they threaten the “national defense, foreign relations, or economic interests of the United States.”<sup>321</sup>

On the procedural side, the Secretary must follow specific administrative procedures. The State Department must also promulgate an announcement of the official designation within 30 days of its occurrence in the Federal Register.<sup>322</sup> Additionally, the Secretary must also inform select

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al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an “associated force” is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.” (citations omitted).

<sup>316</sup> 10 U.S.C. § 948(7)(c) (2012).

<sup>317</sup> 8 U.S.C.A. § 1189(a)(1) (West 2004).

<sup>318</sup> *Id.*, § 1189(a)(1)(B)–(C) (West 2004).

<sup>319</sup> Pub L. No. 104–132, § 302, 110 Stat. 1214, 1248.

<sup>320</sup> 8 U.S.C.A. § 1189(a)(1).

<sup>321</sup> *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 21 (D.C. Cir. 1999) (citing 8 U.S.C.A. § 1189(c)(2) (2004)) (internal citations omitted). Importantly, the D.C. Circuit has held that two organizations may “nonetheless be the same organization, simply operating under aliases.” *Parhat v. Gates*, 532 F.3d 834, 844 n.5 (D.C. Cir. 2008) (citing *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 199–200 (D.C. Cir. 2001)). While not directly litigated, the court could theoretically approve the designation of one group based on its approval to designate the same group operating under a different alias.

<sup>322</sup> *Id.*

Members of Congress seven days before making the designation official,<sup>323</sup> which must include the “factual basis” for such a designation.<sup>324</sup>

Organizations placed on this FTOL are not without recourse. Within thirty days of the notice’s publication in the Federal Register, the “entity may obtain judicial review by application to” the Court of Appeals for the District of Columbia Circuit.<sup>325</sup> Administrative review of a designation is not in and of itself unique,<sup>326</sup> but FTOL review includes some unique features: the aggrieved party challenging its designation is not afforded an “opportunity to either add to or comment on the contents of that administrative record,”<sup>327</sup> and the record may include classified information said organization is not privy to but which can be submitted to the court *ex parte* and *in camera*.<sup>328</sup>

Admittedly, this review is not the most favorable for the aggrieved party, primarily in that it is not an exhaustive review of the record itself. The third factor, whether “‘the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States’—is nonjusticiable” because the designation amounts to a foreign policy decision beyond the reach of the judiciary.<sup>329</sup> Moreover, the standard for judicial intervention is quite high: the court may only “hold unlawful and set aside a designation the court finds to be” “arbitrary, capricious, an abuse of discretion”; “contrary to constitutional right, power, privilege or immunity”; “in excess of statutory jurisdiction, authority or limitation”; “lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court”; or, if the organization’s designation was not made “in accord[ance] with the procedures required by law.”<sup>330</sup>

By linking the association Prong with known terrorist organizations whose designation affords the accused reasonable avenues of appeals, commissions would be able to achieve its remaining prosecutorial option for alien unprivileged enemy combatants “detained during battle,”<sup>331</sup> Al Qaeda

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<sup>323</sup> This group includes “the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate.” 8 U.S.C.A. § 1189(a)(2)(A) (West 2004).

<sup>324</sup> *Id.*

<sup>325</sup> Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192, 196 (D.C. Cir. 2001) (citing 8 U.S.C.A. 1189(b)(1) (2004)).

<sup>326</sup> *Id.* (“[T]his is not in itself an unusual limitation, but one common to many administrative reviews.”).

<sup>327</sup> *Id.* at 197.

<sup>328</sup> See 28 U.S.C.A. § 1189(c)(2) (2004).

<sup>329</sup> People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”).

<sup>330</sup> 8 U.S.C.A. § 1189(c)(b)(3) (2004).

<sup>331</sup> Guantanamo Closure Speech, *supra* note 2.

or otherwise, thereby accommodating the constantly evolving global security landscape amidst changing terror groups.

One criticism may ask if it isn't better to have commissions against different groups individually passed. The answer is not due to dramatically reduced efficiency. As we've seen throughout the Global War on Terror, deliberation becomes obstructionism. Our legislature remains unable to pass an updated Authorization for the Use of Military Force, despite repeated calls for it.<sup>332</sup> Additionally, should we have multiple different authorizing statutes and courts mandate further changes, the legislature and courts will be bottlenecked by repetitive challenges. Having one unified law significantly expedites judicial review and legislative amendment.

The proposed rule also preserves, if not augments, a defendant's rights, as the organization he is "a part of" would be afforded an opportunity to expunge its designation as well as an opportunity to prove he was not a part of the group during the hearing.<sup>333</sup> Though the defendant is in a bind because he—or they—cannot personally argue the group's designation,<sup>334</sup> such is an acceptable cost. If the group itself does not care enough to litigate their placement on the list, it could certainly be seen as tacit acknowledgement of their acceptance—even pride—to be an official enemy of the state. What's more, mandatory periodic reviews ensure that organizations are not unfairly and incorrectly left on the list should their conduct change,<sup>335</sup> and the Secretary of State or Congress can revoke the designation at any time.<sup>336</sup>

Admittedly, this does not resolve the still yet-litigated question of first amendment rights to freedom of association to Al Qaeda. Scholars have debated the First Amendment implications of terrorism-related charges on

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<sup>332</sup> See, e.g., President Barack H. Obama, Address to the Nation by the President (Dec. 6, 2015) ("If Congress believes, as I do, that we are at war with ISIL, it should go ahead and vote to authorize the continued use of military force against these terrorists.").

<sup>333</sup> See 8 U.S.C.A. § 1189(a)(4) (West 2004).

<sup>334</sup> *United States v. Ali*, 799 F.3d 1008, 1019 (8th Cir. 2015) ("[T]his ability to challenge a designation belongs to the organization, not a defendant in a criminal proceeding.").

<sup>335</sup> See *id.*, at § 1189(a)(8). But see *United States v. Ali*, 799 F.3d 1008, 1019 (8th Cir. 2015) ("[T]his ability to challenge a designation belongs to the organization, not a defendant in a criminal proceeding.").

<sup>336</sup> See *id.*, at §§ 1189(a)(5)–(6). Until 2004, an FTO "must [have been] redesignated every 2 years or the designation would lapse. Under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), however, the redesignation requirement was replaced by certain review and revocation procedures. IRTPA provides that an FTO may file a petition for revocation 2 years after its designation date (or in the case of redesignated FTOs, its most recent redesignation date) or 2 years after the determination date on its most recent petition for revocation. In order to provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different as to warrant revocation. If no such review has been conducted during a 5 year period with respect to a designation, then the Secretary of State is required to review the designation to determine whether revocation would be appropriate. In addition, the Secretary of State may at any time revoke a designation upon a finding that the circumstances forming the basis for the designation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation." Press Release, Department of State: Bureau of Counterterrorism, Foreign Terrorist Organizations, <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/YLM9-FU5P>].

one's association, even with a group as nefarious as Al Qaeda.<sup>337</sup> However, in the context of commissions, one's association is not a crime; affiliation only renders the individual subject to a commission, it is not itself a substantive violation.<sup>338</sup>

A final criticism questions, then, what happens when an individual is part of a small group that does not reach the FTOL. Expectedly, the State Department is very deliberate in its decision-making process to place a group on the FTOL, including: finding a factual basis substantial enough to withstand judicial review, notifying Congressional leaders, waiting one week and publishing the designation in the Federal Register.<sup>339</sup> This pace is undoubtedly slower than the pace at which national security threats evolve, leaving a distinct gap where hostile operators are not covered under this provision.

There are two responses to this. The first suggests that, with the FTOL designation now carrying more weight, the pace at which the State Department reviews and classifies an organization would be hastened significantly, thereby diminishing any such a gap. The second, more realistically, concedes the point but recognizes realism. Yes, this may occur, but deliberate is not obstructionist. Currently, *only* Al Qaeda operatives may be subject to military commissions on the sole basis of affiliation. The dynamism of FTOL-based organizational designation is a marked step in the right direction, and we should not let perfect be the enemy of good.

This line of argumentation also leads to the second hypothetical structural change: an individualized designation.

### *iii. Individualized Designations*

The United States already has procedures in place for the executive branch to pinpoint individuals involved in terrorist activities. Recognizing the importance of finances in helping promote and incite terrorism, President Bush signed Executive Order 13,224<sup>340</sup> on September 23, 2001, which:

blocked all property and interests that are in the United States of foreign persons listed in an annex attached to it, of persons determined by the Secretary of the Treasury to act for or on behalf of those persons listed, and of persons determined by the Secretary to

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<sup>337</sup> See, e.g., Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 581–82 (2014) (“[T]he judiciary’s bare assertions that ‘material support’ or financial contributions do not constitute association cannot be sustained given both first principles and well-developed law outside the context of terrorism. In short, in this area the courts have failed in their basic job of honestly engaging with the law.”).

<sup>338</sup> See 10 U.S.C.A. § 950(t) (indicating that West) (association is not a triable crime). Because association is not a recognized international war crime, military commissions *trying* and *convicting* someone simply based on their association is essentially impossible.

<sup>339</sup> See *supra* Section IV.ii.

<sup>340</sup> Exec. Order No. 13,224, 66 C.F.R. § 49079 (2001).

assist in, sponsor, or provide financial, material, technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed or to be otherwise associated with those persons. In addition, the Executive Order prohibited any transaction in blocked property, including provision of services to or for the benefit of those persons listed. The President found that making any donations of the type specified would seriously impair his ability to deal with the national emergency declared in the order. Finally, the President authorized the Secretary of the Treasury to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA<sup>341</sup> and UNPA<sup>342</sup> as may be necessary to carry out the purposes of this order.<sup>343</sup>

Some of the law's procedural aspects have not withstood judicial scrutiny on due process grounds.<sup>344</sup> But its continued application, designating both organizations and *specific individuals* as subject to heightened scrutiny because of connections to terrorism, demonstrates the viability of designating someone an alien unprivileged enemy belligerent outside the existence of a trial.

Individualization for terrorist detention and tribunals already has a viable model: Israel's Incarceration of Unlawful Combatants Law (IUCL).<sup>345</sup>

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<sup>341</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C.A. §§ 1701–08 (1977).

<sup>342</sup> United Nations Participation Act, Pub. L. No. 79-264, 59 Stat. 619, 22 U.S.C. § 287 (1945).

<sup>343</sup> Humanitarian Law Project v. U.S. Treasury Dep't, 578 F.3d 1133, 1140 (9th Cir. 2009) (internal citations and quotations omitted).

<sup>344</sup> See *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 985–86 (9th Cir. 2012) (“We hold that all three *Mathews* factors support the conclusion that OFAC violated AHIF–Oregon’s due process rights. First, OFAC’s blocking notice deprived AHIF–Oregon of its ability to use any funds whatsoever, for any purpose. Second, because AHIF–Oregon could only *guess* (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high. Finally, and perhaps most importantly, although national security might justify keeping AHIF–Oregon in the dark, OFAC makes no effort to demonstrate that its failure to provide AHIF–Oregon with reasons for its investigation promoted national security.”); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 906 (N.D. Ohio 2009) (“In sum, consideration of the *Mathews* factors leads inescapably to the conclusion that OFAC violated KindHearts’ fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations. . . . OFAC did not meet its obligation to provide meaningful notice regarding its deprivation of KindHearts’ property.”); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 657 (N.D. Ohio 2010). *But see* *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (“[Defendant’s] complaint . . . that due process prevents its designation based upon classified information to which it has not had access is of no avail.”).

<sup>345</sup> Incarceration of Unlawful Combatants Law, 5762–2002 (Isr.) [hereinafter IUCL]. This law was later amended in 2008 to include “a temporary provision that expired after two years and allowed the Government to declare that the State is faced with a situation of large-scale fighting. Upon such declaration, the Chief of the General Staff may authorize an officer of the rank of Brigadier General to issue detention orders against unlawful combatants, rather than

The IUCL grants the Chief of the General Staff of the Israeli Defense Force (“Chief”) the right to unilaterally classify a prisoner as an unprivileged combatant if he “has reasonable cause to believe that a person being held by the State authorities is [one] and that his release will harm State security.”<sup>346</sup> The law defines an unlawful combatant as:

[A] person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.<sup>347</sup>

This definition is *remarkably* similar to the MCA’s in substance and verbiage: both identify the individual in question as falling outside of the privileged combatant categories of Article Four of the Third Geneva Convention, who participates in hostilities either directly or indirectly against the state *or* who is affiliated with a fighting force who purports to do so.<sup>348</sup> The Israeli law even incorporates many of the procedural features our courts have required.<sup>349</sup> However, by permitting a high-ranking military officer—under proper safeguards—to determine one’s classification, many problems

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having to issue them himself, as was previously the case. Furthermore, the authority to hear the detainee’s case against the order can be transferred to an officer of the rank of Captain (instead of Major-General) and the timeframe for issuing an order was extended from 96 hours from the time of the temporary detention to seven days. According to the 2008 temporary amendment, the Government’s declaration of a state of large-scale fighting had to be ratified by the Knesset’s Foreign Affairs and Defense Committee within 48 hours and could remain in force for a period of up to three months without being renewed. . . . On January 17, 2013, the Ministry of Justice published a Memorandum Bill to make section 10A, which had been a temporary amendment, a permanent amendment to the Law.” Yuval Shany, Amichai Cohen, & Ido Rosenzweig, *Memorandum Bill – Amendments to the Unlawful Combatants Law*, 49 *TERRORISM & DEMOCRACY* (Jan. 17, 2013), <http://en.idi.org.il/analysis/terrorism-and-democracy/issue-no-49/memorandum-bill-%E2%80%93-amendment-to-the-unlawful-combatants-law/>.

<sup>346</sup> IUCL at § (3)(a).

<sup>347</sup> *Id.* at § (2).

<sup>348</sup> Compare *supra* Part III (defining an “alien unprivileged enemy combatant”), with IUCL at § (2).

<sup>349</sup> First, the accused is granted senior level officer representation. The accused may then file relevant facts with this officer, including details of his incarceration. If the detention differs from the original detention orders, the Chief can terminate the detention order immediately. Additionally, if new relevant factors come to light and the Chief no longer feels that individual’s release poses an immediate threat to Israel, he may be released. More importantly, there are legal safeguards to enable the accused to argue his case. The accused has the right to meet with an attorney “at the earliest possible date” with a ceiling of seven days. The law also requires the accused to meet with a District Court judge within fourteen days to ensure he can plead his case in an efficient and timely manner. If that rule is violated, he may be released unless there are other legally sufficient justifications for his continued detention. Moreover, the accused is to meet with a District Court Judge once every six months to re-evaluate his status. Finally, the Israeli Supreme Court must hear any appeal filed within thirty days. IUCL at §§ (3)–(6).

with the MCA would be cured. For example, concerns regarding hostilities' definition or the nature of one's actions can be swiftly adjudicated, thereby relieving some of the judicial burden on an extraordinarily cumbersome and time consuming process.

Finally, concerns of individualized determinations would likely mimic those levied against the FTOL-based system: executive powers under the non-delegation doctrine and First Amendment freedom of association. The arguments that quashed these concerns previously remain intact. Regarding the former, Congress' explicit delegation of authority to the executive branch does not constitute legislation, but only "filling in the gaps."<sup>350</sup> As for freedom of association, an individualized structure has no bearing on the right's exception for organizations that serve no legitimate purpose and only serve to promote and incite illegal actions.

#### CONCLUSION

This chapter of military commissions is likely closed. There is little good will from the President to move forward with the process. At the time of publication, the two major party's nominees are split on the issue. Donald Trump has stated he wants to expand military commissions, including trying U.S. citizens in commissions (notwithstanding their limitation to trying aliens only<sup>351</sup>). Hillary Clinton, however, has not spoken directly on the issue and previously co-sponsored a 2007 Senate bill to close Guantanamo Bay, but it mandated only that its occupants be "tried in an Article III court *or* military legal proceeding."<sup>352</sup> But, as noted above, public sentiment suggests that they would follow suit. But if we are to keep military commissions as a viable legal wartime avenue during future conflicts, changes need to be made.

As currently constructed, the MCA's first two jurisdictional prongs have a deficiency standing between the law as it stands and long-term viability. The first two prongs are predicated upon the defendant's involvement—direct or indirect—in "hostilities," which the law defines as "conflicts subject to the laws of war." Given the opacity of what comprises such a conflict, I advocated shifting this standard to more bright-line rules via rulemaking authority to effectuate swift adjudication, definitive resolve, and transparency. To do so, an executive agent—likely the Secretary of Defense—ought to promulgate rules as to what constitutes hostilities strictly for purposes of commissions.

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<sup>350</sup> Margaret H. Lemos, Abstract, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CALIF. L. REV. 405, 405 (2008).

<sup>351</sup> See *supra* Part III.

<sup>352</sup> See S. 1249, 110th Cong. § 1 (2007); *The Candidates on Military Tribunals and Guantanamo Bay*, COUNCIL ON FOREIGN RELATIONS: ISSUE TRACKER (Aug. 24, 2008), <http://www.cfr.org/world/candidates-military-tribunals-guantanamo-bay/p14751>.

The third prong suffers from shortsightedness. By only asserting jurisdiction over Al Qaeda, commissions are unnecessarily myopic. To remain an option through future conflicts, the organization with which the defendant is affiliated should be linked to a dynamic list or the individual should be given a specific designation. Instead of requiring a new authorizing Act for commissions against each group that engages the United States—which could take decades—we should expedite the process by using an already-existing framework that tracks terrorists organizations whose members are similarly culpable.

I recognize that these changes only address a few features of one of the law's panoply of potential obstacles. Much work still needs to be done by many in adjusting other aspects of the law to preserve its viability. I implore others to continue that deliberation. As I said earlier, I believe there is a value to having fundamentally fair and just military commissions in genuine wartime conditions. But given these commissions' unique deployment circumstances, we must re-design commissions framework with particular view towards efficiency and conservation of resources during wartime.