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# Clarify terms and definitions relevant to Military Commission Prosecutions

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# MEMORANDUM FOR THE MILITARY COMMISSIONS

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CLARIFY TERMS AND DEFINITIONS RELEVANT TO MILITARY COMMISSION PROSECUTIONS

**1. Constitutional Power.** Does Congress have the constitutional power—under either the Define and Punish Clause or the Declare War Clause of the U.S. Constitution—to try, by military commission, misconduct that post-dates the enactment of the Military Commissions Act of 2006, but that is not a violation of the international law of war (both conventional and statutory)?

**2. "Law of War."** Does the phrase "the law of war"—in Article 15 of the 1916 Articles of War (39 Stat. 650) and Article 21 of the Uniform Code of Military Justice (10 U.S.C. § 821)—mean the "international law of war" or "offences in violation of the laws and usages of war [that], in the experience of our wars, [were] made the subject of charges and trial" by U.S. military commissions?

**3. Spying.** (a) When did spying cease to be a violation of the international law of war? (b) Assuming that spying is not a violation of the international law of war, Does the phrase "in violation of the law of war" in the spying provision of the Military Commissions Act of 2009 (10 U.S.C. § 950t(27)) render that offense invalid?

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## I. INTRODUCTION

### *A. SCOPE*

This memorandum answers whether Congress—under the Define and Punish Clause or the Declare War Clause of the Constitution—may use military commissions to try misconduct that post-dates the enactment of the Military Commission Act of 2006 and does not violate the international law of war. In addition, the memorandum defines "the law of war" as used in Article 15 of the 1916 Articles of War and Article 21 of the Uniform Code of Military Justice. Finally, the memorandum demarcates when spying stopped violating the law of war and answers whether this renders Section 950t(27) of the Military Commissions Act invalid.

### *B. SUMMARY OF CONCLUSIONS*

**1. CONGRESS—UNDER THE DEFINE AND PUNISH CLAUSE AND THE DECLARE WAR CLAUSE OF THE U.S. CONSTITUTION—MAY ENACT LEGISLATION THAT AUTHORIZES THE CREATION OF MILITARY COMMISSION TO TRY VIOLATIONS THAT OCCUR WITHIN THE PERIOD OF WAR AND VIOLATE CONVENTIONAL AND STATUTORY INTERNATIONAL LAW OF WAR.**

Through the analysis of the Constitution, federal legislation, Supreme Court jurisprudence, and relevant scholarship, this memorandum concludes that Congress has the constitutional power, pursuant to the Define and Punish Clause and the Declare War Clause of the Constitution, to enact legislation that authorizes the creation of military commissions. Because military commissions are not Article III courts, but rather are Article I courts created pursuant to Congress's Define and Punish and Declare War powers, their jurisdiction is limited to individuals charged with crimes committed "within the period of war" and that violate the conventional and statutory international law of war.

Specifically, Justice Steven's plurality opinion of the 2004 case *Hamdan v. Rumsfeld ("Hamdan I")*, clarified that law-of-war commissions convened pursuant to the UCMJ may only assume jurisdiction over "offenses that by the law of war may be tried by military commission"

that are "committed within the field of the command of the convening commander" and "within the period of the war."[1] In addition, law-of-war commissions convened pursuant to the 2009 MCA, may only try offenses made punishable by the Act [as well as Sections 904 and 906 of Title 10 (aiding the enemy and spying)] or offenses that violate the law of war when committed by an alien unlawful enemy combatant that occurred during the period of the war. Crimes triable by military commission are defined in subchapter VIII (10 U.S.C. §§950p– 950t).

**2. THE "LAW OF WAR"—IN ARTICLE 15 OF THE 1916 ARTICLES OF WAR (39 STAT. 650) AND ARTICLE 21 OF THE UNIFORM CODE OF MILITARY JUSTICE (10 U.S.C. § 821)—MEANS THE "INTERNATIONAL LAW OF WAR"**

"Law of war" as used in Article 15 of the Articles of War means "international law of war." This is evident through and analysis of the Supreme Court's application of this term when reviewing the jurisdiction of military commissions used after the Civil War and during and after WWII. The Supreme Court uniformly opined that the term "law of war" as used in Article 15 meant "the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention."[2] The Court noted that violations of the law of war included those "recognized by the Annex to the Fourth Hague Convention of 1907, [the Tenth Hague Convention, and the Geneva Red Cross Convention] respecting the laws and customs of war on land."[3]

[1] Hamdan I, at 612 [Electronic copy provided in accompanying USB flash drive at Source 12].

[2] *In re Yashmita*, 327 US 1, 8 [Electronic copy provided in accompanying USB flash drive at Source 11].

[3] *See id.* at 15-16 ("This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be 'commanded by a person responsible for his subordinates.' Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels 'must see that the above Articles are properly carried out.' And Article 26 of the Geneva Red Cross Convention of 1929 for the amelioration of the condition of the wounded and sick in armies in the field, makes it 'the duty of the commanders-in-chief of the belligerent armies to provide for the

"Law of war" as used in Article 21 of the UCMJ also means "international law of war." In *Hamdan I,* the Supreme Court held that through Article 21 of the UCMJ, Congress "incorporated by reference" the common law of war, which allows certain offenses not defined by statute to be triable by military commission.[4] The Court noted that these offenses included violations that through "'universal agreement and practice' in this country and internationally, recognized as an offense against the law of war."[5]

**3. SPYING CEASED TO BE A VIOLATION OF THE INTERNATIONAL LAW OF WAR AFTER THE CREATION OF THE HAGUE REGULATIONS OF 1899. HOWEVER, THIS DOES NOT RENDER SECTION 950T(27) OF THE 2009 MCA INVALID.**

Spying ceased to be a violation of the international law of war after the creation of the Hague Regulations of 1899. Nonetheless, this does not render Section 950t(27) of the 2009 MCA invalid. Further inquiry into the 2010 Manual for Military Commissions ("2010 MMC"), revealed that a military commission may still properly exert jurisdiction over an individual accused of spying, pursuant to Section 950t(27). However, the 2010 MMC clarified that the accused must have employed a means (e.g., poison gas) or method (e.g., perfidy) prohibited by the law of war while spying. Alternatively, the 2010 MMC notes that even if the accused did not employ a means or methods prohibited by the law of war while spying, military commission may

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details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases…'And, finally, Article 43 of the Annex of the Fourth Hague Convention, requires that the commander of a force occupying enemy territory, as was petitioner, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'").

[4] Ex parte Quirin 317 U.S., at 30 [Electronic copy provided in accompanying USB flash drive at Source 10].

[5] Ex parte Quirin 317 U.S., at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.").

nevertheless try and punish spying because this conduct has been traditionally tried by military commissions, even though such conduct does not violate the international law of war.

## II. BACKGROUND

Military tribunals are used to try individuals for unlawful conduct associated with war.[6] The term "military commission" was first used during the Mexican-American War to refer to a new type of military tribunal, which broadened the limited jurisdiction of courts-martial.[7] Since this time, military commissions have typically been used during times of declared war or rebellion.[8] Since they were first used during the Mexican-American War, subsequent practice, domestic legislation, and Supreme Court jurisprudence has specified the jurisdiction of military commissions to encompass not only common law offenses but also violations of the international law of war.[9]

### *A. THE CREATION AND EVOLUTION OF MILITARY COMMISSIONS*

In 1775, the Second Continental Congress adopted the first military justice code that was applicable to all of the Colonies, the *American Articles of War* (the "Articles of War"), which was a precursor of the modern *Uniform Code of Military Justice* (the "UCMJ").[10] The Articles of

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[6] *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002) [Electronic copy provided in accompanying USB flash drive at Source 23].

[7] Michal O. Lacey, *Military Commissions: A Historical Survey*, The Army Lawyer 41, 42 (2001) ("The first recorded use of the term "military commission" occurred during the Mexican-American War in 18477.") [Electronic copy provided in accompanying USB flash drive at Source 24].

[8] *See generally id.*

[9] ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 165-171 (Ulf Linderfalk, ed. 2007) (Subsequent practice means consistent, treaty-related actions and omissions of the parties to or organs established by the treaty on international level, which reflect the common ideas of all the parties about the interpretation of the treaty.) [Electronic copy provided in accompanying USB flash drive at Source 29].

[10] *See generally* U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE (1970) (Revisions included changes to punishments; rules governing the appointment of courts-martial; and, during the Civil War, the expansion of military jurisdiction over crimes and persons leading to major contests in the courts of law.) [Electronic copy provided in accompanying USB flash drive at Source 30].

War authorized the use of court-martial tribunals to try and punish offenses committed by US soldiers, persons accompanying the military, and spies' accused of military offenses, e.g., desertion or neglect of duty.[11]

During the first years of the Civil War, the only military tribunals used were courts-martial.[12] This was problematic because of their limited jurisdiction that they were granted by the Articles of War. In an effort to fill the jurisdictional void, General Scott issued General Order Number 20 in 1847,[13] which states:

> 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 whether committed by Mexicans or other civilians in Mexico against U.S. military forces . . . should be brought to trial before military commissions.[14]

Thereby Gen. Scott created "military commissions" with jurisdiction over US soldiers and Mexican citizens accused of the listed common-law offenses.[15] During this time, military commissions were also used to try unlawful combatants accused of violations of the law of war, such as "threatening the lives of soldiers" and "riotous conduct."[16] However, "councils of war"

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[11] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-24 (2d ed. 1920 reprint) (a comprehensive treatise on the science of military law. The genesis of this work traces back to an 1880 work published by the author as an annotated digest of JAG opinions. This digest was updated in 1886 to reflect significant trials and acts of military government, and material modifications to written military law, particularly Army Regulations. The treatise presented herein updates the 1886 work to reflect changes since that date in the scope and procedures of military law, as the courts and the legislature defined them.) [Electronic copy provided in accompanying USB flash drive at Source 31].

[12] *See generally* Lacey, *supra* note 7.

[13] This was the first recorded use of "military commissions."

[14] *See* WINTHROP, *supra* note 11.

[15] *See* Lacey, *supra* note 7.

[16] *See id.*

were used to try violations of the law of war committed by lawful combatants.[17]

During the Civil War, President Lincoln issued the General Order No. 100, i.e., the "Lieber Code." This codified the rules and procedures for the US army and established the jurisdiction of military commissions.[18] Notably, the Lieber Code merged "council of war" and "military commissions" to form the modern day military commission. It did so by definitively granting military commissions subject matter and *in personam* jurisdiction over violations of the law of war.[19] Over two thousand commissions were convened during the Civil War to try violations of the law of war.[20] After the war's conclusion, the Supreme Court took up the question of their constitutionality in *Ex parte Milligan*.[21]

Military commissions were used to punish violations of the law of war in almost every American conflict between the Civil War to the Second World War, i.e., in 1873 a Mococ Indian was tried during the Indian Wars, in 1899 Rafael Ortiz was tried during the Spanish American War.[22] The ubiquitous use of military commissions led Congress to amend Article 15 of the Articles of War in 1916 to officially establish military commissions' jurisdiction over individuals

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[17] *See* JENNIFER K. ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS (CRS REPORT P.L.31191, 2001) (providing a background of US history of military commissions.) [Electronic copy provided in accompanying USB flash drive at Source 32].

[18] Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998). [Electronic copy provided in accompanying USB flash drive at Source 25].

[19] *See id.*

[20] *See id.*

[21] *See* Ex parte Milligan, 71 U.S. 2, 121-123 (1866) [Electronic copy provided in accompanying USB flash drive at Source 9] (Writing for the majority, Justice Davis explained that military jurisdiction could not be extended to civilians in territory not under martial law or military occupation "where the courts are open and their process unobstructed." The Constitution—Article III's jury trial clause and the Fifth and Sixth Amendments—required Milligan to be prosecuted in a civilian court, if at all.).

[22] *See generally* Lacey, *supra* note 7.

charged with violations of the law of war.[23] Specifically, Article 15 made the jurisdiction of the general court-martial concurrent with that of the military commission for trial of offenses against the law of war.[24]

The use of military commissions during World War II ("WWII") provided the Supreme Court with the opportunity to revisit the constitutionality of these tribunals.[25] In *Ex parte Quirin*, the Supreme Court recognized the authority of military commissions to try enemy belligerents accused of violating the branch of international law known as the "law of war."[26] The Court again affirmed the constitutional legitimacy of military commissions used to try violations of the law of war in *In re Yashmita*.[27] There, the Court upheld the conviction of the commission, finding that Congress had power under the Define and Punish Clause to punish violations of the law of war.[28]

After WWII, Congress enacted the *Uniform Code of Military Justice* (the "UCMJ"). The UCMJ replaced the Articles of War applicable to the Army and the Air Force, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard.[29] It established one system for the administration of military justice, uniformly applicable in all of its parts to the

[23] http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx

[24] *See generally THE* BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE (1970).

[25] Ex parte Quirin, 317 U.S. 1 (1942) (In this case the Supreme Court found that petitioners were alleged to be unlawful belligerents, and that under the Articles of War, they did not have a constitutional right to a civil tribunal before a jury. Thus, the Court affirmed the President's authority to try petitioners before a military commission.)

[26] Ex parte Quirin, 317 U.S. 1, 45-46 (1942).

[27] *In re Yashmita*, 317 US 1 (1946).

[28] *In re Yashmita*, 317 US 1 (1946) (referencing Annex to the Fourth Hague Convention of 1907.)

[29] *See generally* THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE (1970)

Army, the Navy, the Air Force, and the Coast Guard in time of war and peace.[30]

### *B. MILITARY COMMISSIONS POST-SEPTEMBER 11, 2001*

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia.[31] In response to these attacks—causing nearly 3,000 civilian deaths—Congress adopted a Joint Resolution ("AUMF"). This authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[32]

Acting pursuant to the AUMF, the President ordered the military invasion of Afghanistan. In the ensuing hostilities, hundreds of individuals were captured—among them Salim Ahmed Hamdan ("Hamdan")—and transported to Guantanamo Bay.[33] In November 2001, the President issued a comprehensive military order that created military commissions for the trial of the Guantanamo Bay detainees.[34] After Hamdan was charged with one count of conspiracy to commit offenses triable by military commission, he filed petitions for writs of habeas corpus and mandamus challenging the Executive Branch's intended means of prosecuting

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[30] *See id.*

[31] *See* JENNIFER K. ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS (CRS REPORT P.L.31191, 2001) (providing a background of US history of military commissions.) [Electronic copy provided in accompanying USB flash drive at Source 32].

[32] Authorization for Use of Military Force [hereinafter AUMF], 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III) [[Electronic copy provided in accompanying USB flash drive at Source 1].

[33] *See id.*

[34] Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001) [Electronic copy provided in accompanying USB flash drive at Source 2].

his charge. The Supreme Court concluded that the structure and procedures of the military commission at issue violated the UCMJ requirements (because the commission was not part of the integrated system of military courts established by Congress) and the Geneva Conventions.[35]

In response to the Supreme Court's decision, Congress enacted the Military Commissions Act of 2006 ("2006 MCA"). This amended the statutory procedures that the Court ruled unconstitutional and alleviated the Court's uncertainty regarding the specific crimes covered under the "law of war." The 2006 MCA listed 30 war crimes over which military commissions had jurisdiction and authorized the use of commissions to try "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."[36]

After the Supreme Court held the 2006 MCA provision denying Guantanamo Bay detainees the habeas privilege unconstitutional, Congress passed the 2009 Military Commissions Act ("2009 MCA").[37] The 2009 MCA provides additional procedural safeguards, such as tighter restrictions on the admission of heresy and additional protections against the use of coercive evidence. Nonetheless, it maintains the same substantive offenses as the 2006 MCA.[38]

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[35] *See* Hamdan v. Rumsfeld, 548 U.S. 557 at 636-7 [hereinafter Hamdan I] (In the concurrence, several Justices specifically invited Congress to clarify the scope of the President's statutory authority to use military commissions to try unlawful alien enemy combatants for war crimes).

[36] *See* 10 U.S.C. §§950t [Electronic copy provided in accompanying USB flash drive at Source 3]; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [Electronic copy provided in accompanying USB flash drive at Source 4]; *see also* Hamdan v. United States 696 F.3d at 1248 [hereinafter Hamdan II] [Electronic copy provided in accompanying USB flash drive at Source 13] (After the enactment of the 2006 MCA concerns arose regarding the *ex post facto* implications of the Act, e.g., whether this authorized the retroactive prosecution of conduct that was not considered a law of war violation before the enactment of the 2006 MCA.); *see also* Ali Hamza Ahmad Suliman Al Bahlul v. United States, 767 F.3d 1 (Shortly thereafter, the DC Circuit overruled its decision holding instead, that the 2006 MCA unambiguously authorized the retroactive prosecution of the crimes enumerated in the Act—regardless of their pre-existing law-of-war-status.).

[37] *See* Baumadine v Bush 55 (2008) [Electronic copy provided in accompanying USB flash drive at Source 15] (The Court held "MCA § 7 operates as an unconstitutional suspension of the writ").

[38] Military Commissions Act of 2009, Pub. L. No. 111-84, ch. 47A, sec. 1802, 123 Stat. 2574 (codified at 10 U.S.C. ch. 47A (2012)) [Electronic copy provided in accompanying USB flash drive at Source ] (This expanded

## III. LEGAL DISCUSSION

### *A. CONGRESSIONAL CREATION AND USE OF MILITARY COMMISSIONS*

*Whether—under the **Define and Punish Clause**[39] or the **Declare War Clause**[40]— Congress may create military commissions to try misconduct that occurs after the enactment of the 2006 Military Commissions Act and does not violate the international law of war.*

#### 1. CONGRESS MAY CREATE MILITARY COMMISSIONS PURSUANT TO THE DECLARE WAR & DEFINE AND PUNISH CLAUSE'S OF THE CONSTITUTION

One of the central objects of the Constitution is to provide for the common defense.[41] To this end, the Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas [and] [o]ffenses against the Law of Nations"[42] and the authority to "declare War…and make Rules concerning Captures on Land and Water."[43]

##### *A. DECLARE WAR*

Shortly after the Civil War, in *Ex parte Milligan*, the Supreme Court explained that Congress's constitutional power to "declare war" necessarily authorizes Congress to create all legislation essential for the prosecution of a successful war.[44] The Court clarified that this includes legislation that creates military tribunals to try and punish crimes against the discipline

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defendants' rights to align closer with the rights granted to defendants in courts-martial and federal criminal cases. It enhanced defendants rights to counsel, prohibited the use of statements were obtained by torture or cruel, inhuman, and degrading treatment. It prohibits the use of statements of the accused unless the military judge finds the statement reliable, probative and given either (1) "incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement" or (2) voluntarily. The Act also places the burden for the use of hearsay evidence on the party intending to use it.).

[39] Define and punish clause ARTICLE I, SECTION 8, CLAUSE 10 (*"The Congress shall have Power To …define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations).*

[40] ARTICLE I, SECTION 8, CLAUSE 11 (*The Congress shall have Power To…declare war.... and make Rules concerning Captures on Land and Water.)*

[41] US Const. preamble states "provide for the common defense".

[42] US Const Art.I §8, cl. 10.

[43] US Const Art.I §8, cl. 11.

[44] Ex parte Milligan 71 U.S. 2, 141.

or security of the army or violations of public safety.[45] The Court stated, "[w]e think the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to… declare war…" [46] Chief Justice Chase concurred with the majority's opinion that the Constitution's Declare War Clause authorizes Congress to create military tribunals to try crimes resulting in a breach of the security and safety of national forces. [47]

***B. DEFINE & PUNISH***

The framers of the Constitution were committed to creating a national government that was agile enough to avoid foreign entanglements but strong enough to deter aggression. Because of this, the Supreme Court has typically interpreted the Constitution's Define and Punish Clause expansively to grant Congress broad law-making authority.[48] Before the conclusion of WWII, in *Ex parte Quirin*, the Supreme Court upheld a military commission's jurisdiction to try nine German saboteurs (alleged to be unlawful belligerents), who acting under the direction of the German High Command, secretly entered the United States in 1942 to carry out military attacks.[49]

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[45] Ex parte Milligan 71 U.S. 2, 138 (The Court notes that even though the fact that Federal Courts were open in Indiana during the Civil War was regarded by Congress as a sufficient reason for not organizing military commissions for the trial of crimes such as that which petitioner was accused of, did not deprive Congress of the right to exercise this power.)

[46] Ex parte Milligan 71 U.S. 2 p 141 ("We think the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to… declare war…").

[47] *See id.*

[48] *Al Bahlul v. US*

[49] *Ex parte Quirin*, 317 U.S. 1, 20-22 (1942); *see also id.* at 22-23 (After their apprehension by the FBI, President Roosvelt ordered that the saboteurs be transferred to military custody to face trial in a military commission.)

The Court held that Congress had sanctioned the commission through its creation of Article 15 of the Articles of War, which states that the Articles' provisions "conferring jurisdiction upon courts martial shall not be construed as depriving military commissions … or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions … or other military tribunals."[50] In addition, the Court concluded that Congress's incorporation of an evolving body of common-law war crimes under international law was both within its Article I power under the Define and Punish Clause[51] and consistent with the right to a jury trial guaranteed under Article III and the Fifth and Sixth Amendments.[52]

The Supreme Court again upheld the constitutional legitimacy of military commissions for the trial and punishment of violations of the law of war in *In re Yashmita*.[53] There, a US military commission, convened in the Philippines, convicted and sentenced to death the Japanese general, Tomoyuki Yamashita, for his failure to prevent atrocities of civilians committed by soldiers under his command during the siege of Manila.[54] The Supreme Court upheld the conviction, holding that pursuant to the Constitution's Define and Punish Clause, Congress had the authority to create military commissions for the trial and punishment of violations of the law of war.[55] The Yamashita Court stated,

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[50] *Ex parte Quirin*, 317 U.S. 1, 27 (1942) (quoting 10 U.S.C. §1486 (1940)).

[51] *Ex parte Quirin*, 317 U.S. 1, 28-29.

[52] *Ex parte Quirin*, 317 U.S. 1, 38-46; *see also id* at 29 (The Court stated, "by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, [were] cognizable by such tribunals.").

[53] In re Yashmita, 327 U.S. 1 (1946).

[54] In re Yashmita, 327 U.S. 1, 5 (1946).

[55] In re Yashmita, 327 U.S. 1, 15-16 (1946) (referencing Annex to the Fourth Hague Convention of 1907.).

> An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. [56]

### *C. QUALIFICATIONS*

#### i. Sixth Amendment Limitation & Fifth Amendment Caveat

In *Ex parte Milligan*, the Supreme Court qualified the jurisdiction of military commissions by forbidding the application of the rules and regulations of the Articles of War to citizens in states that were not under martial law and where the courts were open and their process unobstructed.[57] The Court relied on the Sixth Amendment, which states, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." [58] Nonetheless, the Court noted that the framers of the Constitution limited this right through the Fifth Amendment, which "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger."[59]

#### ii. Sixth Amendment Limitation & Law of War Caveat

[56] In re Yashmita, 327 U.S. 1, 5 (1946).

[57] Ex parte Quirin, 317 U.S. 1.

[58] Ex parte Quirin, 317 U.S. 1.

[59] *Ex parte Milligan* 71 US 2, 123 (In other words, those connected with the military were under the jurisdiction of the Articles of War during their time of service because these individuals surrendered their right to be tried by the civil courts.); *id.* at 124 (Therefore, when peace prevails and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion -- if the passions of men are aroused and the restraints of law weakened, if not disregarded -- these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.) .

In *Ex parte Quirin,* the Supreme Court waived petitioners' Sixth Amendment right because they were charged as unlawful combatants for offenses against the law of war. The Court explained that the Constitution does not require that a jury try offenses against the law of war because the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.[60] Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.[61] Unlawful combatants are likewise subject to capture and detention, but are subject to trial and punishment by military tribunals for acts, which render their belligerency unlawful.[62]

**iii. State of War Limitation**

In *In re Yashmita,* the Supreme Court explained that the use of military commissions is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy "the evils which the military operations have produced."[63] The Court recognized that military commissions may be convened after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the

[60] Ex parte Quirin, 317 U.S. 1, 30-31.

[61] Ex parte Quirin, 317 U.S. 1, 30-31.

[62] Ex parte Quirin, 317 U.S. 1, 30-31.

[63] *Ex parte Quirin, supra*, 28 (held that an important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.); *Kahn* v. *Anderson*, 255 U.S. 1, 9-10 (The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists -- from its declaration until peace is proclaimed).

Government.[64] The Court explained that this was because typically it is only after hostilities have ended that a greater number of offenders and the principal ones may be apprehended and subjected to trial.[65] In fact, the Court noted that:

> In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.[66]

**2. MAY MILITARY COMMISSIONS TRY OFFENSES THAT OCCUR AFTER THE ENACTMENT OF THE 2006 MCA AND THAT DO NOT VIOLATE THE LAW OF WAR?**

Chief Justice Chase, writing for the majority in *Milligan*, established three types of military commissions that are constitutionally legitimate.[67] First, are the martial law commissions, which are established within the US borders and substitute for non-functioning civilian courts in areas where martial law has been declared.[68] To be legitimate, Chase noted that Congress must convene these commissions pursuant to its constitutional authority to raise and support armies and to declare war.[69] In the alternative, the President may also convene these,

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[64] See *Stewart* v. *Kahn*, 11 Wall. 493, 507.

[65] The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals. See Report of the Commission, March 9, 1919, 14 Am. J. Int. L. 95, 121. See also memorandum of American commissioners concurring on this point, *id*., at p. 141. The treaties of peace concluded after World War I recognized the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920. The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the law of war. 95 British and Foreign State Papers (1901-1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Rev. 482, 496-7.

[66] See cases mentioned in *Ex parte Quirin*, at note 10.

[67] See also Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2132-2133 (2005) (Writing about how Commissions have historically been used in these three situations.); Winthrop 831-846; Hearings on H. R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949).

[68] Ex parte Milligan 4 Wall., at 141-142,18 L. Ed. 281 (Chase, C. J., concurring in judgment).

[69] *See* Ex parte Milligan 4 Wall., at 141-142,18 L. Ed. 281 (Chase, C. J., concurring in judgment)

during a temporary period, when he cannot reach Congress. The President may only so during times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.[70]

The second types are the military government commissions, which are used to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."[71] These commissions are exercised by the military commander under the direction of the President, with the express or implied sanction of Congress.[72] Lastly, Chase notes the law-of-war commissions, which are "incident to the conduct of war" and are convened when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." The jurisdiction of these commissions is limited to offenses cognizable during the time of war and its role is primarily to determine whether the defendant has violated the law of war.[73] These commissions are created through Congressional acts that prescribe rules and articles of war or otherwise provide for the government of the national forces.

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[70] Ex parte Milligan 4 Wall., at 141-142,18 L. Ed. 281 (Chase, C. J., concurring in judgment).

[71] Ex parte Milligan 4 Wall., at 141-142,18 L. Ed. 281 (Chase, C. J., concurring in judgment) (distinguishing "martial law proper" from "military government" in occupied territory). Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See Madsen v. Kinsella, 343 U.S. 341, 356, 72 S. Ct. 699, 96 L. Ed. 988 (1952).

[72] *See* Milligan 4 Wall., at 141-142,18 L. Ed. 281 (Chase, C. J., concurring in judgment) (distinguishing "martial law proper" from "military government" in occupied territory). Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See Madsen v. Kinsella, 343 U.S. 341, 356, 72 S. Ct. 699, 96 L. Ed. 988 (1952).

[73] *See* Ex parte Milligan, 71 U.S. 2, 121-123 (1866); *see also* Quirin, 317 U.S., at 28-29 (The law-of-war commission has been described as "utterly different" from the other two. The Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the WWII.).

### *A. LAW-OF-WAR COMMISSIONS CONVENED PURSUANT TO THE UCMJ MAY ONLY TRY OFFENSES THAT VIOLATE THE LAW OF WAR THAT OCCURRED "WITHIN THE PERIOD OF THE WAR"*

After a long hiatus, military commissions were revived after the September 11, 2001 ("9/11") terrorist attacks through President Bush's November 13, 2001, executive order.[74] The 9/11 commissions operated solely as law-of-war commissions, which allowed them to exist without the exigency-based justifications underlying martial law and military government commissions. In the 2004 case *Hamdan v. Rumsfeld ("Hamdan I")*, the Supreme Court invalidated the military commissions system established by the 2001 executive order.[75] It did so because it found that these commissions were not convened pursuant to the UCMJ. Further, the structure and procedures governing these commissions violated the UCMJ and Common Article III of the Geneva Conventions, which the UCJM incorporated through its requirement that he commissions comport with the law of war.[76] In addition, Justice Stevens who wrote for the plurality explained that law-of-war military commission may only assume jurisdiction over "offenses that by the law of war may be tried by military commission" that is "committed within the field of the command of the convening commander" and "within the period of the war."[77]

### *B. LAW-OF-WAR COMMISSIONS CONVENED PURSUANT TO THE 2009 MCA MAY ONLY TRY OFFENSES MADE PUNISHABLE BY THE ACT [AS WELL AS SECTIONS 904 AND 906 OF TITLE 10 (AIDING THE ENEMY AND SPYING)] OR OFFENSES THAT VIOLATE THE LAW OF WAR WHEN COMMITTED BY AN ALIEN UNLAWFUL ENEMY COMBATANT THAT OCCUR "WITHIN THE PERIOD OF THE WAR"*

In response to the Court's holding, Congress promptly passed the Military Commissions Act of 2006 ("2006 MCA"), which authorized military commissions and established procedural

[74] Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

[75] Hamdan v. Rumsfeld, 548 U.S. 557 (2006) [hereinafter Hamdan I].

[76] Hamdan I, 548 U.S. at 612-13.

[77] Hamdan I, at 612.

rules modeled after, but notably different than, the UCMJ.[78] The 2006 MCA eliminated the UCMJ's requirement that military commissions had to conform to either of the two uniformity requirements listed in Article 36 of the UCMJ—which President Bush's military commissions were held in *Hamdan I* to violate—by creating chapter 47A in Title 10, U.S. Code.[79] This provides that the UCMJ "does not, by its terms, apply to trial by military commissions except as specifically provided in this chapter."[80] While declaring that the enacted chapter is "based upon the procedures for trial by general courts-martial under [the UCMJ]," it establishes that "[t]he judicial construction and application of [the UCMJ], while instructive, is therefore not of its own force binding on military commissions established under this chapter."[81]

The 2006 MCA confers jurisdiction on military commissions over "*any* offense made punishable by this chapter [as well as Sections 904 and 906 of Title 10 (aiding the enemy and spying)] or the law of war when committed by an alien unlawful enemy combatant" whether

[78] P.L. 109-366, 120 Stat. 2600, codified at chapter 47A of Title 10, U.S. Code (2006).

[79] This excepts military commissions crated under this chapter from the requirements of UCMJ 36. MCA 2006 §4 (adding to 10 U.S.C. §836(a) the words "except as provided in chapter 47A of this title" and to §836(b) the words "except insofar as applicable to military commissions established under chapter 47A of this title").

[80] 10 U.S.C. §948b(d) (It expressly exempts these military commissions from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings), and 32 (pretrial investigations), and the MCA 2006 amended articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to except military commissions under chapter 47A.) MCA 2006 §4 (amending 10 U.S.C. §§821(jurisdiction of general courts-martial not exclusive), 828 (detail or employment of reporters and interpreters), 848 (power to punish contempt), 850(a) (admissibility of records of courts of inquiry), 904 (aiding the enemy), and 906 (spying)). The 2009 MCA amendments, Title XVIII of P.L. 111-84, enable military commissions under chapter 47A to try alien enemy unprivileged belligerents for violating 10 U.S.C. §§904 and 906, but did not amend 10 U.S.C. §§904 & 906 to reflect the change. 10 U.S.C. §948b(d)(2) (Other provisions of the UCMJ are to apply to trial by military commissions under chapter 47A only to the extent provided therein.)

[81] 10 U.S.C. §948b(d) (It expressly exempts these military commissions from UCMJ articles 10 (speedy trial), 31 (self-incrimination warnings), and 32 (pretrial investigations), and the MCA 2006 amended articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ to except military commissions under chapter 47A.) MCA 2006 §4 (amending 10 U.S.C. §§821(jurisdiction of general courts-martial not exclusive), 828 (detail or employment of reporters and interpreters), 848 (power to punish contempt), 850(a) (admissibility of records of courts of inquiry), 904 (aiding the enemy), and 906 (spying)). The 2009 MCA amendments, Title XVIII of P.L. 111-84, enable military commissions under chapter 47A to try alien enemy unprivileged belligerents for violating 10 U.S.C. §§904 and 906, but did not amend 10 U.S.C. §§904 & 906 to reflect the change. 10 U.S.C. §948b(d)(2) (Other provisions of the UCMJ are to apply to trial by military commissions under chapter 47A only to the extent provided therein.)

such offense was committed "*before, on, or after September 11, 2001*."[82] Crimes triable by military commission are defined in subchapter VIII (10 U.S.C. §§950p– 950t). The MCA defines the following offenses: murder of protected persons; attacking civilians, civilian objects, or protected property; pillaging; denying quarter; taking hostages; employing poison or similar weapons; using protected persons or property as shields; torture, cruel or inhuman treatment; intentionally causing serious bodily injury; mutilating or maiming; murder in violation of the law of war; destruction of property in violation of the law of war; using treachery or perfidy; improperly using a flag of truce or distinctive emblem; intentionally mistreating a dead body; rape; sexual assault or abuse; hijacking or hazarding a vessel or aircraft; terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; attempts; conspiracy; solicitation; contempt; perjury and obstruction of justice. That list was not meant to be exhaustive but rather, to serve as an illustration of acts punishable under the law of war or triable by military commissions.[83]

Although many of the crimes defined in the 2006 MCA are well-established violations of the law of war in the context of an international armed conflict, some of the listed crimes were new.[84] Because of this, concerns arose regarding the *ex post facto* implications of the 2006

[82] 10 U.S.C. § 948d(a) (2006) (emphases added)

[83] Crimes "triable by military commissions" included (1) Hijacking or Hazarding a Vessel or Aircraft; (2) Terrorism; (3) Murder by an Unprivileged Belligerent; (4) Destruction of Property by an Unprivileged Belligerent; (5) Aiding the Enemy; (6) Spying; (7) Perjury or False Testimony; and (8) Obstruction of Justice Related to Military Commissions. Listed as "other forms of liability and related offenses" are: (1) Aiding or Abetting; (2) Solicitation; (3) Command/Superior Responsibility - Perpetrating; (4) Command/Superior Responsibility - Misprision; (5) Accessory After the Fact; (6) Conspiracy; and (7) Attempt.

[84] International armed conflicts are governed primarily by the Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277 ("Hague Convention"), and the Geneva Conventions. Non-international armed conflicts are not covered by the Hague Convention, and are covered only by Common Article 3 of the Geneva Conventions. However, some international criminal tribunals have worked to define war crimes applicable in non-international armed conflicts. For example, Article 3 of the Statute governing the International Criminal Tribunal for the former Yugoslavia (ICTY) includes the following as violations of the laws or customs of war in non-international armed conflict. Such violations shall include, but not be limited to: (a)

MCA, e.g., whether this authorized the retroactive prosecution of conduct that was not considered a law of war violation before the enactment of the 2006 MCA. To settle this apprehension in *Hamdan v. US* ("*Hamdan II*"), the US Court of Appeals for the District of Columbia ("DC Circuit") held that the 2006 MCA did not authorize the retroactive prosecution of conduct committed before the enactment of the Act unless US law already criminalized the conduct as a war crime that was triable by a military commission.[85] Shortly thereafter, the DC Circuit overruled its decision holding instead, in *Ali Hamza Ahmad Suliman Al Bahlul v. United States* ("*Bahlul v. US*"), that the 2006 MCA unambiguously authorized the retroactive prosecution of the crimes enumerated in the Act—regardless of their pre-existing law-of-war-status.[86]

In *Bahlul v. US*, the DC Circuit Court held that the 2006 MCA clearly demonstrated Congress's intent to confer jurisdiction on military commissions over "any offense made punishable" by the 2006 MCA, regardless whether they occurred "before, on, or after September

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employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property. UN Doc. S/Res/827 (1993), art. 3. The ICTY Statute and procedural rules are available at http://www.un.org/icty/legaldoc-e/index.htm. The Trial Chamber in the case Prosecutor v. Naletilic and Martinovic, (IT-98-34)March 31, 2003, interpreted Article 3 of the Statute to cover specifically: "(i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of [Common Article 3] and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict" Id. at para. 224. See also Prosecutor v. Tadic, (IT-94-1) (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 86-89. The Appeals Chamber there set forth factors that make an offense a "serious" violation necessary to bring it within the ICTY's jurisdiction: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ... (iii) the violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.... (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

[85] Hamdan v. US 696 F.3d at 1248.

[86] Ali Hamza Ahmad Suliman Al Bahlul v. United States, 767 F.3d 1

11, 2001."[87] This included offenses based on pre-enactment conduct because the DC Circuit Court held that Congress believed that all of the offenses were already triable by military commissions.[88] And the provisions of the statute enumerating the crimes triable thereunder expressly "do not preclude trial for crimes that occurred before the date of the enactment of this chapter."[89]

In *Hamdan II*, the Department of Defense argued that the element "in violation of the law of war" is established by showing that the perpetrator is an unprivileged belligerent.[90] The latest version of the Manual for Military Commissions reflects the understanding that military commission may try the offense even if it does not violate the international law of war.[91]

***B. DEFINING THE "LAW OF WAR"***

*Does the phrase "the law of war" in 1916 Articles of War Article 15 and of the Uniform Code of Military Justice Article 21 mean "international law of war" and/or "offences in violation of the laws and usages of war [that], in the experience of our wars, [were] made the subject of charges and trial" by US military commissions[92]?*

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[87] Al Bahlul, F.3d 1, 16.

[88] Al Bahlul, F.3d 1, 16.

[89] 10 U.S.C. § 950p(b) (2006); *Landgraf v. USI Film Prods*., 511 U.S. 244, 280 (1994) (Although we presume that statutes apply only prospectively "absent clear congressional intent" to the contrary, that presumption is overcome by the clear language of the 2006 MCA.); *see also Johnson v. United States*, 529 U.S. 694, 701 (2000) (clear statement of intent overcomes presumption against retroactivity); *Martin v. Hadix*, 527 U.S. 343, 353-54 (1999) ("'unambiguous directive' or 'express command'" overcomes presumption against retroactivity); *Reynolds v. M'Arthur*, 27 U.S. 417 (1829) (Marshall, C.J.) ("[L]aws by which human action is to be regulated . . . are never to be construed retrospectively unless the language of the act shall render such construction indispensable.").

[90] M.M.C. 2007, supra footnote 10, at IV-11-12. The comment on the crime "intentionally causing serious bodily injury" stated that "For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy." With respect to the crime "destruction of property in violation of the law of war," the M.M.C. stated that "A 'violation of the law of war' may be established by proof of the status of the accused as an unlawful combatant or by proof of the character of the property destroyed, or both." Id. at IV-13.

[91] Department of Defense, Manual for Military Commissions 2012 (M.M.C. 2012). Id. at IV-14 (comment to the crime of murder in violation of the law of war). Oddly, that the killing "was in violation of the law of war" remains an element of the offense. Id.

[92] *See Hamdan v. Rumsfeld* 548 U.S. 557 (Triable by military commission is derived from the "experience of our wars" and our wartime tribunals).

From the beginning, it was agreed that the military should have a "military justice" system.[93] The first of the many codes regulating the military in the United States actually predated the Constitution and the Declaration of Independence.[94] In 1775, the Continental Congress enacted separate sets of regulations to govern the Army and the Navy, both based on English precedents that, in turn, drew from codes developed by Gustavas Adolfus and the Roman Empire.[95]

The 1775 Articles of War did not remain intact very long, as the very next year the Articles were amended.[96] The First Congress expressly recognized the 1776 Articles of War and this continued in effect (with only minor changes) until 1806. The American Articles of War of 1806 lasted through the War of 1812, the Mexican War, and the Civil War and were revised in 1874. All of these early articles of war provided for trial by courts-martial, although the jurisdiction and composition of these courts underwent minor modifications.[97]

After WWII, the Secretary of Defense appointed the "Forestal Committee" to draft a uniform system of military justice that would also provide full protection of the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of necessary military functions.[98] This uniform system was codified in the *Uniform*

[93] Walter T. Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) [Electronic copy provided at Source 27].

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 11 (1970).

*Code of Military Justice* ("UCMJ"), which was adopted by Congress in 1950.[99] The UCMJ replaced the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard by creating a uniform administration of military justice that applied to all breaches of the military during times of war and peace.[100]

Article 15 of the Articles of War was transformed into Article 21 of the UCMJ and even though minor changes were made, the language of Article 21 remained substantially identical to Article 15.[101] Article 15 of the previous Articles of War states,

> "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by ***the law of war*** may be triable by such military commissions . . . or other military tribunals."[102]

Article 21 of the UCMJ states,

> "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions…or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by ***the law of war*** may be tried by military commissions…or other military tribunals."[103]

**1. "LAW OF WAR" IN ARTICLE 15 OF THE ARTICLES OF WAR MEANS "INTERNATIONAL LAW OF WAR"**

In explaining the 1916 addition of Article 15 to the Articles of War to the House Committee on Military Affairs in 1912, General Crowder stated:

> In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he

[99] U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE (1970); THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 11 (1959).

[100] U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE (1970).

[101] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[102] Article 15 of the 1916 Articles of War (39 Stat. 650.

[103] 10 U.S.C. §821 [Electronic copy provided at Source 8].

> tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved.[104]

In reviewing the jurisdiction of the military commission at issue, which was convened pursuant to the requirements of Article 15 of the Articles of War, the Supreme Court noted that since the beginning of the Court's history it "has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."[105] Through its statement "the status, rights and duties of enemy nations as well as enemy individuals," the Court references the law of all nations, or the "international law" that governed all nations during a time of war. This inference is further supported by an examination of the Court's reasoning regarding whether the petitioners were entitled to a jury trial in a civil court pursuant to the Sixth Amendment of the Constitution. The Court stated,

> [T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law[106] that we think it must be regarded as a rule or principle of the law of

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[104] S.Rep.No.229, 63d Cong., 2d Sess. 53, 98—99. Madsen v. Kinsella, 343 U.S. 341, 353, 72 S. Ct. 699, 706, 96 L. Ed. 988 (1952) (Gen. Crowder continued to explain that "[i]n the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase 'Persons subject to military law.' There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.").

[105] *Ex parte Quirin*, 317 US 1, 27.

[106] *Ex parte Quirin*, 317 US 1, 27; *see also* Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes." The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

war recognized by this Government by its enactment of the Fifteenth Article of War.[107]

The Court also referenced the Hague Convention when defining the offenses covered under Article 15 of the Articles of War's "law of war" provision. The Court stated, "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.[108]

In *Yashmita*, the Supreme Court defined the term "law of war" as used in Article 15 to mean "the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention."[109] The Court noted that the violations for which the petitioner was charged "were recognized by the Annex to the Fourth Hague Convention of 1907, [the Tenth Hague Convention, and the Geneva Red Cross Convention] respecting the laws and customs of war on land."[110] Because of this, the Court concluded that petitioner's violations were "recognized in international law as violations of the law of war." [111]

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[107] Ex parte Quirin, 317 US 1, 36

[108] Ex parte Quirin, 317 US 1, 38.

[109] In re Yashmita, 327 US 1, 8.

[110] In re Yashmita, 327 US 1, 15-16 ("This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be 'commanded by a person responsible for his subordinates.' Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels 'must see that the above Articles are properly carried out.' And Article 26 of the Geneva Red Cross Convention of 1929 for the amelioration of the condition of the wounded and sick in armies in the field, makes it 'the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases…'And, finally, Article 43 of the Annex of the Fourth Hague Convention, requires that the commander of a force occupying enemy territory, as was petitioner, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'").

[111] In re Yashmita, 327 US 1, 8.

**2. "LAW OF WAR" IN ARTICLE 21 OF THE UCMJ MEANS "INTERNATIONAL LAW OF WAR"**

In *Hamdan I,* the Supreme Court held that through Article 21 of the UCMJ, Congress "incorporated by reference" the common law of war, which allows certain offenses not defined by statute to be triable by military commission.[112] The Court noted that when neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.[113] The Court explained that the "plain and unambiguous" standard was met in *Quirin*. In that case, the Court held that the violation alleged was through "'universal agreement and practice' in this country and internationally, recognized as an offense against the law of war."[114]

The Court also noted that Article 21 of the UCMJ "conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the rules and precepts of the law of nations, which includes the four Geneva Conventions signed in 1949."[115] The plurality agreed that the law of war, "as the Court explained in *Ex parte Quirin* derives from 'rules and precepts of the law of nations' and it is the body of international law governing armed conflict."[116] In addition, the plurality concluded that through its express cross-reference to the "law of war,"

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[112] Quirin 317 U.S., at 30,

[113] Quirin 317 U.S., at 30,

[114] Quirin 317 U.S., at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.").

[115] See Quirin, 317 U.S., at 28; *see also* Yamashita, 327 U.S., at 20-21.

[116] *Id.*

Congress explicitly incorporated international norms into domestic U.S. law."[117] The plurality also suggested that imposing liability on the basis of a violation of "international law" or the "law of nations" or the "law of war" generally must be based on norms firmly grounded in international law.[118]

### *C. SPYING & THE LAW OF WAR*

The Military Commissions Act of 2009 established the procedures governing the use of military commissions to try "alien unprivileged enemy belligerents for violations of the law of war" and other offenses listed in Section 950t, spying is among these offenses.[119] Section 950t (27) states that an individual who,

> [I]n violation of the law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.[120]

#### 1. STATUTORY INTERPRETATION

When interpreting a statute "the first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[121] "[U]nless otherwise defined, statutory words will be interpreted as taking their ordinary, contemporary, common meaning."[122] Absent a clearly expressed legislative intention to the

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[117] See Ex parte Quirin,. at 10, 13-15.

[118] Hamdan I, 548 U.S. at 602-03

[119] 10 USC §948b(a); See 10 USC §950t.

[120] 10 USC §950t(27) [Electronic copy provided at Source }.

[121] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

[122] *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994); *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*,447 U.S. 102 (1980);*Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

contrary, "that language must ordinarily be regarded as conclusive."[123] Also, pursuant to the Charming Betsy Canon of statutory construction, a national statute must be construed so as not to conflict with international law.[124]

**2. THE HAGUE AND GENEVA CONVENTIONS**

In light of the rules of statutory construction, the plain meaning of the language used in Section 950t (27) seems to make the statute invalid. This is because the statute assumes that "spying", as defined in in Section 950t (27), is a violation of the law of war. This assumption is incorrect. The Supreme Court noted in *Hamdan I* that the "law of war," as used in the UCMJ and the 2009 MCA, mirrors the "law of war" defined in the major treaties of on the law of war, namely the Geneva Conventions and the Hague Conventions. The rules of espionage in times of war, whether based on the Hague Regulations of 1899, 1907, the Geneva Conventions, the Protocol Additional to the Geneva Conventions, or other sources, are straightforward. A spy does not remain at large like other criminals, because espionage is considered a "non-crime crime."[125]

Spying has not been considered a violation of the international law of war since 1899. This is substantiated through the analysis of Articles 30 and 31 of the Hague Regulations of 1899. Article 30 forbids the punishment of a spy who is caught in the act. [126] In addition, Article 31 states that "[a] spy who, after rejoining the army to which he belongs, is subsequently

[123] *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*,447 U.S. 102 (1980).

[124] See *Murray v. The Charming Betsy*, 6 U.S. 64 (1804): "It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains..."

[125] Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 331-32 (1996).

[126] *Regulations concerning the Laws and Customs of War on Land*, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

captured by the enemy is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."[127]

Article 29 of the 1907 Hague Regulations definition of a "spy" is largely similar to that used in Section 950t (27). Article 29 states that "[a] person can only be considered a spy when, acting clandestine or on false pretenses, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Therefore, soldiers who are in uniform and enter the zone of operations of a hostile army, to obtain obtaining information are not considered spies. Similarly, the 1907 Hague Regulations states that soldiers and civilians that carry out their mission openly, "entrusted with the delivery of dispatches destined either for their own army or for the enemy's army" may not be considered spies.[128]

Nonetheless, Article 30 of the 1907 Hague Regulations, which remains the current law, continued to forbid the punishment of a spy that is caught in the act and Article 31 also remained unchanged stating, "[a] spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."[129] Similarly, Article 5 of the Fourth Geneva Convention of 1949[130] states that "[w]here in occupied territory an individual protected person is detained as a spy …

[127] *Regulations concerning the Laws and Customs of War on Land*, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

[128] Schindler & Toman, *supra* note 34, at 78; *see also* Friedman, *supra* note 16, at 319;

[129] *Regulations concerning the Laws and Customs of War on Land*, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907. The wording of the 1907 Hague rules are essentially equivalent.

[130] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

such … [person] shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."

### 3. THE 2010 MANUAL FOR MILITARY COMMISSIONS

The analysis of the international law of war as defined by the Hague and Geneva Conventions—the two major international law of war treaties according to the Supreme Court—it is evident that since 1899, spying has not been considered a violation of the international law of war. In other words, according to the plain meaning of Section 950t (27) of the MCA, the statute is invalid. Further inquiry into the 2010 Manual for Military Commissions ("2010 MMC"), however, demonstrates that the requirement of "in violation of the law of war" does not render the statute invalid. The 2010 MMC breaks up the statute into five elements:

> (1) The accused collected or attempted to collect certain information by clandestine means or while acting under false pretenses;
> (2) The accused intended or had reason to believe the information collected would be used to injure the United States or to provide an advantage to a foreign power;
> (3) The accused intended to convey such information to an enemy of the United States or one of the co-belligerents of the enemy;
> (4) The conduct was in violation of the law of war; and
> (5) The conduct took place in the context of and was associated with hostilities.[131]

The 2010 MMC then clarifies that a military commission may try and punish an individual accused of being a spy, pursuant to Section 950t(27), if the commission finds that the accused employed a means (e.g., poison gas) or method (e.g., perfidy) prohibited by the law of war. Alternatively, the 2010 MMC states that if an individual is charged with engaging in conduct that has been traditionally triable by military commissions, military commissions convened pursuant to the 2009 MCA may try and punish these acts. Because commissions have traditionally had jurisdiction over individuals' accused of spying, Section 950t(27) of the 2009 MCA must be valid.

[131] MMC 2010, IV-22 [Electronic copy provided at Source 7].