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## Note

### **Murder and the Military Commissions: Prohibiting the Executive's Unauthorized Expansion of Jurisdiction**

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A building crumbled on July 27, 2002, in Afghanistan.<sup>1</sup> As the combat support aircraft roared away, a United States ground assault team entered the rubble to “clear the target.”<sup>2</sup> The soldiers tossed grenades while examining the ruins<sup>3</sup> when suddenly a grenade not thrown by the U.S. forces exploded nearby, killing Sergeant First Class Christopher Speer.<sup>4</sup> The soldiers, spotting a wounded fighter who had apparently thrown the grenade, opened fire and shot him several times in the chest.<sup>5</sup> That fighter, fifteen-year old Omar Khadr, a Canadian citizen, survived.<sup>6</sup>

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1. Defense Motion to Dismiss Charge I for Failure to State an Element of the Offenses in Violation of Due Process 2, *United States v. Khadr*, D071 (Ct. Mil. Comm'n Rev. July 11, 2008), available at <http://www.defenselink.mil/news/commissionsKhadr.html> (follow “Motion to Dismiss Charge I Due Process” hyperlink, posted Aug. 26, 2008).

2. *Id.*

3. *Id.*

4. See Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE, Aug. 10, 2006, <http://www.rollingstone.com/politics/story/11128331>. But see Jane Sutton, *Canadian's Battle Role Cast in Doubt at Guantanamo*, REUTERS, Dec. 13, 2008, <http://www.reuters.com/article/asiaCrisis/idUSN12458385> (relaying that SFC Speer may have been killed by friendly fire).

5. See Tietz, *supra* note 4 (describing Khadr's shooting); see also Sutton, *supra* note 4 (citing emerging evidence that Khadr was buried beneath rubble and could not have thrown the grenade).

6. See Clifford Krauss, *Canadian Teenager Held by U.S. in Afghanistan*

After nearly five years of detention in Afghanistan and Guantánamo Bay, the U.S. government charged Omar Khadr with, among other things, Murder in Violation of the Law of War.<sup>7</sup> Almost two years of pretrial wrangling in the Guantánamo military commissions followed, but it is now unclear when or where Khadr will be tried.<sup>8</sup> Nonetheless, the pretrial exchanges illustrated the problematic nature of the charges related to Murder in Violation of the Law of War: as the Guantánamo defense team protested, killing only violates the law of war when it is committed against protected persons who take no active part in the hostilities.<sup>9</sup> Omar Khadr, accused of throwing a hand grenade at an active soldier, committed no such offense. The military judge, however, denied the defense's motion to dismiss, concluding that the killing of an active combatant by an "unlawful combatant" violated the law of war.<sup>10</sup>

This assertion, which directly conflicts with the established law of war, could only have been reached by relying on language promulgated by the Secretary of Defense in the Manual for Military Commissions (MMC).<sup>11</sup> The MMC purports to comply with Congress's mandate in the Military Commissions Act of 2006 (MCA) to define elements of crimes consistently

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*in Killing of American Medic*, N.Y. TIMES, Sept. 14, 2002, at A8 (providing background about Khadr).

7. Referred Charges 4, *United States v. Khadr* (Ct. Mil. Comm'n Rev. Apr. 24, 2007), available at <http://www.defenselink.mil/news/Apr2007/Khadreferral.pdf>.

8. The trial date had been set for January 26, 2009, but President Obama promptly postponed all military commission trials and announced plans to close the Guantánamo detention facility. See Mark Mazzetti & William Glaberson, *Obama to Close Foreign Prisons and Guantanamo Bay*, N.Y. TIMES, Jan. 22, 2009, at A1.

9. See Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction 1, *United States v. Khadr*, D008 (Ct. Mil. Comm'n Rev. Dec. 7, 2007), available at <http://www.defenselink.mil/news/commissionsKhadr.html> (follow "Motions Sessions (Pleadings Filed by Counsel—Law Motions/Dec 2007)" hyperlink).

10. See Government's Response to the Defense's Motion to Dismiss Charge I for Failure to State an Element of the Offense in Violation of Due Process 1–2, *United States v. Khadr*, D071 (Ct. Mil. Comm'n Rev. July 25, 2008), available at <http://www.defenselink.mil/news/commissionsKhadr.html> (follow "Motion to Dismiss Charge I Due Process" hyperlink, posted Aug. 26, 2008; Government's Response attached at the end of the Defense's Motion) (referring to the Commission's prior ruling on an earlier motion to dismiss in Khadr's case).

11. U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at IV-11 to -12 (2007) [hereinafter MMC], available at <http://www.defenselink.mil/news/commissionsmanual.html> (follow "Manual for Military Commissions" hyperlink, posted Jan. 18, 2007).

with the MCA,<sup>12</sup> but instead impermissibly redefines the offense of Murder in Violation of the Law of War by focusing on the status of the accused rather than the victim.

The MMC's definition of when the law of war may be violated raises a number of troubling legal issues, from the conflation of independent elements of a crime to executive action devoid of statutory or constitutional authority. Although Congress entrusted the Secretary of Defense with the responsibility of defining the individual elements of the crimes,<sup>13</sup> Congress did not—and could not—delegate its constitutional authority to define offenses against the law of nations.<sup>14</sup>

This Note argues that the Secretary of Defense acted contrary to the MCA's explicit mandate and unconstitutionally arrogated Congress's legislative powers by redefining the crime of Murder in Violation of the Law of War. Part I outlines when murder violates the law of war by reviewing the MCA, the established law of war, and the MMC's novel definition. Part II examines the deficiencies in the MMC's definition and analyzes the lack of statutory and constitutional authority for the Secretary of Defense's redefinition. Part III contends that judges should apply the longstanding law of war and that the Obama Administration should ensure that future law-of-war prosecutions are constitutionally sound. This Note proposes that in prosecutions for Murder in Violation of the Law of War, judges should disregard the MMC's definition and apply the law as Congress intended: to commit Murder in Violation of the Law of War, one must violate the law of war. Further, the new administration should avoid executive interpretations of the law of war that violate the constitutional separation of powers, contravene the law of war, and facilitate potentially lethal criminal liability.

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12. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

13. See 10 U.S.C. § 949a(a) (2006) (“[E]lements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense . . .”).

14. See U.S. CONST. art I, § 8, cl. 10; *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (stating it is Congress's constitutional power to “defin[e] and punish[] offenses against the law of nations, including those which pertain to the conduct of war”); see also *Loving v. United States*, 517 U.S. 748, 771 (1996) (“Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“[T]he plain principle [is] that the power of punishment is vested in the legislative [branch] . . .”).

## I. MURDER IN VIOLATION OF THE LAW OF WAR

In the Military Commissions Act of 2006, which authorized trial by military commission for violations of the law of war, Congress defined the substantive offense of Murder in Violation of the Law of War.<sup>15</sup> While the Act does not define the “law of war,” widely established norms dictate that murder only violates the law of war when committed against persons taking no active part in the hostilities. Nonetheless, the Secretary of Defense, given the authority to outline individual elements of the crimes in the military commissions,<sup>16</sup> redefined when murder violates the law of war by focusing on the status of the offender rather than the victim.<sup>17</sup>

## A. THE MILITARY COMMISSIONS ACT OF 2006

In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commission convened by the President to try Guantánamo detainees was not a “regularly constituted court” required by Common Article 3 of the Geneva Conventions<sup>18</sup> with which the Executive must comply.<sup>19</sup> The Court suggested that congressional authorization could remedy the commissions’ deficiencies.<sup>20</sup> Congress responded by passing the Military Commissions Act of 2006,<sup>21</sup> which created a military commission system to try detainees held in Guantánamo Bay.<sup>22</sup>

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15. 10 U.S.C. § 950v(b)(15).

16. *See id.* § 949a(a).

17. *See* MMC, *supra* note 11, at IV-11 to -12.

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

19. 126 S. Ct. 2749, 2798 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in* Boumediene v. Bush, 128 S. Ct. 2229, 2241–42 (2008).

20. *Hamdan*, 126 S. Ct. at 2775–76; *id.* at 2799 (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

21. Military Commissions Act.

22. 10 U.S.C. § 948b(a) (2006).

The Supreme Court has long recognized that military commission jurisdiction is limited to violations of the law of war.<sup>23</sup> The MCA recognizes this limited jurisdiction by only granting jurisdiction “to try any offense made punishable by [the MCA] or the law of war.”<sup>24</sup> According to Congress, the MCA codifies offenses traditionally triable by military commissions and does not establish new crimes.<sup>25</sup> One of the twenty-eight substantive offenses listed in the MCA is Murder in Violation of the Law of War, defined as the intentional killing of “one or more persons, including lawful combatants, in violation of the law of war.”<sup>26</sup>

The MCA grants the Secretary of Defense the authority to prescribe procedures and rules of evidence for the military commissions, as long as they are neither contrary to nor inconsistent with the MCA.<sup>27</sup> On January 18, 2007, the Secretary of Defense published the Manual for Military Commissions.<sup>28</sup> For each crime listed in the MCA, the MMC enumerates individual elements, lists maximum punishments, and provides explanatory comments.<sup>29</sup>

#### B. UNIVERSAL NORMS FOR WHEN MURDER VIOLATES THE LAW OF WAR

Defendants accused of murder are not normally tried in a military commission. Because the MCA declares that it creates no new offenses, the predicate jurisdictional hook for the military commissions is that an alleged murder must somehow violate the law of war.<sup>30</sup> The law of war is defined by looking to universal agreement and practice both in this country and

23. See *Hamdan*, 126 S. Ct. at 2777 (stating a law-of-war commission has jurisdiction to try two kinds of offenses: “violations of the laws of war cognizable by military tribunals” and certain “breaches of military orders”) (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 839 (2d ed. 1920)); *In re Yamashita*, 327 U.S. 1, 13 (1946) (asserting that to be tried in a military commission, the charge must be a violation of the law of war); *Ex parte Quirin*, 317 U.S. 1, 29 (1942) (discussing commissions’ authority to try “offenses against the law of war”).

24. 10 U.S.C. § 948d(a).

25. *Id.* § 950p.

26. *Id.* § 950v(b)(15).

27. *Id.* § 949a(a).

28. MMC, *supra* note 11.

29. See *id.* at IV-1 to -22.

30. See *Ex parte Quirin*, 317 U.S. 1, 29 (1942) (“We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal.”).

worldwide.<sup>31</sup> U.S. military law, U.S. federal law, and customary international law are in unanimous agreement: murder, or willful killing, constitutes a violation of the law of war only when committed against protected persons, who broadly include all who do not take an active part in the hostilities.<sup>32</sup>

According to the U.S. military, murder violates the law of war only when committed against a protected person.<sup>33</sup> The U.S. military defines a violation of the law of war as a war crime.<sup>34</sup> “Willful killing,” or murder, constitutes a war crime when committed against persons protected by the Geneva Con-

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31. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in* *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008); *Quirin*, 317 U.S. at 30 (explaining that Congress chose to adopt the common law system of the law of war applied by military tribunals to the extent courts deem applicable); *see also* L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 52–53 (2d ed. 2000) (“[T]he law of armed conflict is still governed by . . . international customary law . . .”).

32. Two distinctions must be made. First, killing through perfidy—the treacherous killing of another, BLACK’S LAW DICTIONARY 1173 (8th ed. 2004)—is a separate violation of the law of war. *See, e.g.*, GREEN, *supra* note 31, at 145–47. Second, killing using a prohibited weapon is another way to violate the law of war. *See, e.g.*, Bill Boothby, *The Law of Weaponry—Is It Adequate?*, in *INTERNATIONAL LAW AND ARMED CONFLICT* 297, 298 (Michael Schmitt & Jelena Pejic eds., 2007) (explaining the fundamental principles of the law of weaponry). The actual war crime, however, is employing a prohibited weapon, which is an independent crime from Murder in Violation of the Law of War. *See* Rome Statute of the International Criminal Court art. 8(2)(b)(xvii)–(xx), July 17, 1998, 2187 U.N.T.S. 90, 96. The U.S. military, largely in line with the international community, prohibits use of the following weapons: weapons calculated to cause unnecessary suffering, weapons that have an indiscriminate effect, poison, gases, and chemical or bacteriological warfare. *See* JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *OPERATIONAL LAW HANDBOOK* 18–20 (2007), [hereinafter OPLAW HANDBOOK], *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA469294&Location=U2&doc=GetTRDoc.pdf>; U.S. DEP’T OF THE AIR FORCE, *INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS: AIR FORCE PAMPHLET 110-31 §§ 6-3(b)–(c), 6-4* (1976) [hereinafter AFP 110-31] (rescinded in 2006 and not yet replaced); U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE: FIELD MANUAL 27-10 app. A-10 to -11* (1956) (as modified by Change No. 1, July 15, 1976), [hereinafter FM 27-10], *available at* <http://www.afsc.army.mil/gc/files/FM27-10.pdf>; U.S. DEP’T OF THE NAVY, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M §§ 9.1.1, 9.1.2, 10.3, 10.4* (2007), [hereinafter NAVAL HANDBOOK], *available at* [http://www.nwc.navy.mil/cnws/ild/documents/1-14M\\_\(Jul\\_2007\)\\_NWP.pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_NWP.pdf). Hand grenades are not prohibited. *See* FM 27-10, *supra*, app. A-11; NAVAL HANDBOOK, *supra*, § 9.5.

33. *See* OPLAW HANDBOOK, *supra* note 32, at 16–17; FM 27-10, *supra* note 32, app. A-118; NAVAL HANDBOOK, *supra* note 32, § 6.2.6.

34. FM 27-10, *supra* note 32, app. A-117; NAVAL HANDBOOK, *supra* note 32, § 6.2.6.

ventions.<sup>35</sup> Protected persons include civilians taking no active part in the hostilities, enemies *hors de combat*,<sup>36</sup> and survivors of ships and aircraft lost at sea.<sup>37</sup> Besides the war crime of killing those protected by the Geneva Conventions, the only other listed war crimes involving murder are summary executions of persons in custody and bombardment with the deliberate purpose of killing protected civilians.<sup>38</sup> Both of these crimes are still murder of protected persons—soldiers *hors de combat* and civilians taking no active part in the hostilities.<sup>39</sup>

Congress made war crimes a federal offense in 1996.<sup>40</sup> In 2006, in response to *Hamdan* and concerns that U.S. personnel could be prosecuted for war crimes, Congress narrowed the definition of a war crime through the MCA to include only a “grave breach” of the Geneva Conventions (previously any breach of the Geneva Conventions constituted a war crime).<sup>41</sup> The statute further defines murder as a grave breach when committed against one or more persons taking no active part in the hostilities, including those no longer able to participate in combat.<sup>42</sup>

35. OPLAW HANDBOOK, *supra* note 32, at 35; AFP 110-31, *supra* note 32, § 15-2(b) (defining “grave breaches” of the 1949 Geneva Conventions that constitute war crimes, including “willful killing”); FM 27-10, *supra* note 32, app. A-118; NAVAL HANDBOOK, *supra* note 32, § 6.2.6.

36. *Hors de combat*, a French term literally meaning “out of the fight,” refers to soldiers no longer able to take an active part in the hostilities due to injury. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 600 (11th ed. 2003).

37. See OPLAW HANDBOOK, *supra* note 32, at 28–30; NAVAL HANDBOOK, *supra* note 32, § 6.2.6 (listing examples of war crimes).

38. AFP 110-31, *supra* note 32, § 15-3(c) (listing other war crimes in addition to grave breaches); FM 27-10, *supra* note 32, app. A-118 (same).

39. See *In re Yamashita*, 327 U.S. 1, 15 (1946) (describing the purpose of the law of war as “protect[ing] civilian populations and prisoners of war from brutality”).

40. War Crimes Act of 1996, Pub. L. 104-192, 110 Stat. 2104 (codified at 18 U.S.C. § 2441 (2006)).

41. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1)(A), 120 Stat. 2600, 2633 (amending 18 U.S.C. § 2441(c)(3)); see MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS: THE WAR CRIMES ACT: CURRENT ISSUES, 1–2 (2007), available at <http://www.fas.org/sgp/crs/intel/RL33662.pdf> (detailing the amendments to the War Crimes Act as a result of *Hamdan*). The War Crimes Act names two other kinds of war crimes: conduct prohibited by designated articles of the Annex to the Hague Convention IV and conduct prohibited by the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices (Protocol II). 18 U.S.C. § 2441(c)(2), (4).

42. 18 U.S.C. § 2441(d)(1)(D). In a hearing prior to amending the War Crimes Act, the Acting Assistant Attorney General in the Office of Legal Counsel responding to whether murder was a war crime, stated: “If committed in circumstances of an armed conflict against a protected person under the

The Geneva Conventions, the international touchstone for defining violations of the law of war,<sup>43</sup> state that the willful killing of a protected person constitutes a grave breach.<sup>44</sup> Protected persons are those taking no active part in the hostilities, such as civilians, wounded members of armed forces, and medical and religious personnel.<sup>45</sup> The International Criminal Court entertains jurisdiction over various murder crimes, which require that the perpetrator kill a person protected by the Geneva Conventions.<sup>46</sup> The International Committee of the Red Cross, in its comprehensive review of international humanitarian law, states that murder is a war crime if the victim is a person protected under the Geneva Conventions.<sup>47</sup> Customary international humanitarian law protects the following people, so long as they do not participate in the hostilities: medical personnel, religious personnel, humanitarian relief personnel, personnel involved in peacekeeping missions, journalists, and per-

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laws of war internationally, it can be a war crime, yes." *The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2006) (statement of Steven Bradbury, Acting Asst. Att'y Gen.).

43. See, e.g., GREEN, *supra* note 31, at 43 (describing the Geneva Conventions as "one of the most significant developments in the law of armed conflict").

44. Geneva Convention I, *supra* note 18, art. 50; Geneva Convention II, *supra* note 18, art. 51; Geneva Convention III, *supra* note 18, art. 130; Geneva Convention IV, *supra* note 18, art. 147.

45. Geneva Convention I, *supra* note 18, arts. 3, 12, 24; Geneva Convention II, *supra* note 18, arts. 3, 12, 30; Geneva Convention III, *supra* note 18, arts. 3, 33; Geneva Convention IV, *supra* note 18, arts. 3, 16, 20. For a discussion of the appropriate application of the individual Geneva Conventions and international law to Guantánamo detainees, see David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 356–61 (2008).

46. See Rome Statute of the International Criminal Court art. 8(2)(a), (c), July 17, 1998, 2187 U.N.T.S. 90, 94–95, 97; PREPARATORY COMM'N FOR THE INT'L CRIMINAL COURT, ELEMENTS OF CRIMES arts. 8(2)(a)(i), 8(2)(b)(vi), 8(2)(c)(i)-1, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000), available at <http://untreaty.un.org/cod/icc/prepcomm/report/prepreportdocs.htm> (follow "E" hyperlink next to "Elements of Crimes") (listing the elements of the war crimes of willful killing, killing a person *hors de combat*, and murder, respectively). A fourth murder crime is perfidy. PREPARATORY COMM'N FOR THE INT'L CRIMINAL COURT, *supra*, art. 8(2)(b)(xi); see also *supra* note 32.

47. 1 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 311 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005).

sons *hors de combat*.<sup>48</sup> Other scholars reach the same conclusions.<sup>49</sup>

Significantly, the U.S. military, federal law, and international sources all refer to the Geneva Conventions to state that murder only violates the law of war when it is committed against protected persons, who broadly include those taking no active part in the hostilities. In all of these sources, the offense is defined in relation to the victim: if the victim is a protected person, then the murderer violates the law of war, regardless of the offender's status.

### C. THE MANUAL FOR MILITARY COMMISSIONS: A NOVEL DEFINITION

Given the unanimous agreement regarding when murder violates the law of war, it seems logical that the MCA crime, Murder in Violation of the Law of War, would require that murder be committed against those taking no active part in the hostilities. When the Secretary of Defense enumerated the individual elements of the crime in the MMC, however, he gave an expansive and unprecedented definition for when the law of war may be violated.<sup>50</sup>

The MMC "provides guidance" with respect to the MCA crimes.<sup>51</sup> According to the MMC, Murder in Violation of the Law of War requires that the killing be unlawful and that the killing violate the law of war.<sup>52</sup> A comment in the MMC, purporting to explain the element of violating the law of war, states that an accused may violate the law of war simply by

48. *Id.* at 79, 88, 105, 112, 115, 164.

49. *See, e.g.*, HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 240 (2005); GREEN, *supra* note 31, at 124–25; Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 237, 256 (Dieter Fleck ed., 2d ed. 2008); Jann. K. Kleffner, *Protection of the Wounded, Sick, and Shipwrecked*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra*, at 325, 329–30, 346–49; Nilendra Kumar, *Religious Personnel*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra*, at 419, 427.

50. *See* 10 U.S.C. § 949a(a) (2006) (enabling the Secretary of Defense to define elements of crimes triable by military commissions); MMC, *supra* note 11, at IV-11 to -12 (defining the elements of the crime of Murder in Violation of the Law of War).

51. MMC, *supra* note 11, at IV-1.

52. *Id.* at IV-12.

taking acts as an “unlawful combatant.”<sup>53</sup> The MMC provides no legal authority to support the comment.<sup>54</sup> This definition, unlike U.S. military law, U.S. federal law, and customary international law, considers only the status of the offender, rather than the status of the victim as a protected person taking no active part in the hostilities.

## II. (RE)DEFINING THE LAW OF WAR

The comment in the MMC, by defining a violation of the law of war in relation to the status of the accused rather than the victim, inverts the established law of war and broadens the scope of the offense.<sup>55</sup> The redefinition presents more than academic concern: if judges continue to apply the Secretary of Defense’s definition, more detainees could face prosecution for Murder in Violation of the Law of War apparently without having violated the law of war.<sup>56</sup> Since the military commissions have multiple procedural shortcuts,<sup>57</sup> and since a conviction of Murder in Violation of the Law of War can carry the death penalty,<sup>58</sup> it is a matter of fundamental justice that the military commission—or any substitute tribunal<sup>59</sup>—must possess legitimate jurisdiction over those charged with this crime.

This Part first examines the deficiencies in the MMC’s re-

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53. *Id.* (referring to the comment to the crime of intentionally causing serious bodily injury); *id.* at IV-11 (commenting on the meaning of “acting in violation of the law of war”).

54. *Id.*

55. *Compare id.* (defining violations of the law of war based on whether the accused is a lawful combatant), *with* Geneva Convention I, *supra* note 18, art. 50 (defining grave breaches as prohibited acts “committed against persons or property protected by the Convention”), Geneva Convention II, *supra* note 18, art. 51 (same), Geneva Convention III, *supra* note 18, art. 130 (same), *and* Geneva Convention IV, *supra* note 18, art. 147 (same).

56. The U.S. government has charged multiple detainees with some form of Murder in Violation of the Law of War. *See* U.S. Dep’t of Defense, Military Commissions, <http://www.defenselink.mil/news/commissions.html> (last visited Apr. 15, 2009) (follow hyperlinks for individual names to view the charges of each) (charging al Bahlul, al Hawsawi, Al-Nashiri, Aziz Ali, Binalshibh, Bin ‘Attash, Ghailani, Jawad, Khadr, and Mohammed). At least some of these charges allege facts similar to Khadr. *See id.* (listing the charges and specifications leveled against Khadr and each of the other listed detainees).

57. *See* Weissbrodt & Templeton, *supra* note 45, at 400 (noting the lack of procedural safeguards to guarantee fair trials under the MMC).

58. 10 U.S.C. § 950v(b)(15) (2006).

59. *See* Joby Warrick & Karen DeYoung, *Obama Reverses Bush Policies on Detention and Interrogation*, WASH. POST, Jan. 23, 2009, at A6 (stating that some detainees may be prosecuted in “special national security courts or even revised military commissions”).

definition. It then analyzes statutory and constitutional bases for the MMC's definition, concluding that the Secretary acted without legal authority to redefine the offense.

A. AN INVERTED, CONFLATED, AND EXPANSIVE DEFINITION

The MMC's definition drastically broadens the scope of Murder in Violation of the Law of War by conflating two elements of the crime.<sup>60</sup> The MMC requires as two independent elements that the killing be unlawful and that the killing violate the law of war.<sup>61</sup> Killing unlawfully is not the same as violating the law of war.<sup>62</sup> During armed conflict, lawful combatants receive combatant immunity for killing other combatants.<sup>63</sup> The converse is that an unprivileged belligerent—or an “unlawful enemy combatant” in the MCA's terminology<sup>64</sup>—does not receive combatant immunity for killing other combatants.<sup>65</sup> If an unprivileged belligerent commits murder, he or she has not de facto violated the law of war, but also does not enjoy combatant immunity and may be subject to criminal prosecution for murder.<sup>66</sup> For this reason, the second sentence in the MMC's comment, which states it is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses such as murder,<sup>67</sup> while technically correct, is specious. It is true that unprivileged belligerents can face prosecution, but such a prosecution does not alone establish a violation of the law of war or, consequently, military commission jurisdiction.

Indeed, if the government need only prove the combatant was unlawful, the crime would be better labeled as Murder by an Unprivileged Belligerent, which was a crime in the pre-MCA

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60. MMC, *supra* note 11, at IV-11 to -12.

61. *Id.* at IV-12.

62. See George P. Fletcher, *On the Crimes Subject to Prosecution in the Military Commissions*, 5 J. INT'L CRIM. JUST. 39, 44 (2007) (“If an unprivileged combatant kills someone, it is not clear why the homicide should be regarded as violation of the law of war.”).

63. See Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 212 (2005).

64. 10 U.S.C. § 948a(1) (2006).

65. Jensen, *supra* note 63, at 212–13 (describing combatant status as an “all-or-nothing proposition”).

66. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 437–38 (2004); Audrey Macklin, *The Omar Khadr Case: Redefining War Crimes*, JURIST, Oct. 31, 2008, <http://jurist.law.pitt.edu/forumy/2008/10/omar-khadr-case-redefining-war-crimes.php>.

67. See MMC, *supra* note 11, at IV-11.

version of the military commissions.<sup>68</sup> That crime required only that the accused commit murder as an “unlawful combatant” and did not mention the law of war.<sup>69</sup> When Congress passed the MCA, it incorporated all but two of the substantive offenses in the pre-MCA military commissions, leaving out Murder by an Unprivileged Belligerent and Destruction of Property by an Unprivileged Belligerent.<sup>70</sup> These omissions were likely intentional because Congress recognized that committing acts as an “unlawful combatant” does not in and of itself violate the law of war.<sup>71</sup>

By stating that any action taken by an “unlawful combatant” violates the law of war, the comment in the MMC conflates the separate elements of unlawfulness and violating the law of war.<sup>72</sup> Cogently, in the words of the U.S. Air Force: “Unlawful combatants’ is a term used to describe only . . . lack of standing to engage in hostilities, not whether a violation of the law of armed conflict occurred or criminal responsibility accrued.”<sup>73</sup>

The charges against Omar Khadr illustrate the point: Khadr is accused of killing an active soldier, which—according to U.S. military, federal, and international standards—is not a protected person.<sup>74</sup> Therefore, Khadr’s alleged actions would not have violated the law of war, since the victim was not a protected person. Nonetheless, because Khadr was not a privileged combatant, he could have been tried under U.S. criminal law in U.S. federal court for murder.<sup>75</sup> The MMC’s definition, howev-

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68. U.S. DEP’T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2, § 6(B)(3) (Apr. 30, 2003), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/milcomm43003inst2.pdf>.

69. *Id.*

70. Compare *id.* § 6(B)(3)–(4), with 10 U.S.C. § 950v (2006).

71. See Noman Goheer, Comment, *The Unilateral Creation of International Law During the “War on Terror”: Murder by an Unprivileged Belligerent Is Not a War Crime*, 10 N.Y. CITY L. REV. 533, 546 (2007) (“A war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity.”).

72. See Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56, 61 (2007) (“[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Conventions.”).

73. AFP 110-31, *supra* note 32, § 3-3.

74. See, e.g., Geneva Convention I, *supra* note 18, arts. 3, 12 (protecting only soldiers that have laid down their arms, are *hors de combat*, or are wounded or sick).

75. See OPLAW HANDBOOK, *supra* note 32, at 17 (“Unprivileged bellige-

er, by drastically broadening the scope of the offense and, by consequence, the commission's jurisdiction, allows the government to try Khadr in a military commission. This result illustrates the fundamental difference in the MMC's approach: by defining a violation in terms of the combatant's status, *any* action taken by an "unlawful combatant" can be held to violate the law of war.<sup>76</sup>

The accused's combatant status, however, has no bearing on whether the accused killed a protected person. In place of a carefully delineated and internationally accepted law of war protecting those taking no active part in the hostilities, the MMC transforms the expression "violation of the law of war" to include those who have killed without combatant immunity, which only establishes unlawfulness, not a violation of the law of war.

In defense of the MMC, one could argue that Congress explicitly addressed protected persons in the MCA's substantive offense of Murder of Protected Persons.<sup>77</sup> The MCA defines "protected persons" as those protected under the Geneva Conventions.<sup>78</sup> In other words, the crime of Murder of Protected Persons seems to be the same as the appropriate interpretation of Murder in Violation of the Law of War. Nothing appears in the legislative history concerning the two substantive offenses, leaving the reason for the existence of two separate offenses to divination.

The simplest explanation is that Congress tried to remedy the untenable pre-MCA crime of Murder by an Unprivileged Belligerent by adding the appropriate jurisdictional hook of a violation of the law of war and, at the same time, kept Murder of Protected Persons intact between both versions.<sup>79</sup> Another possible explanation is that because Murder of Protected Per-

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rents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor."); Macklin, *supra* note 66.

76. As one commentator ironically notes, "Khadr would have the legal status of a deer during hunting season—fair game for coalition forces to kill at will yet possessing no right to fight back." David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 186 (2008).

77. 10 U.S.C. § 950v(b)(1) (2006). For a discussion of the differences between the MCA and the MMC's definition of this crime, see Geoffrey S. Corn, *Questioning the Jurisdictional Moorings of the Military Commissions Act*, 43 TEX. INT'L L.J. 29, 36–38 (2007).

78. 10 U.S.C. § 950v(a)(2).

79. Compare U.S. DEP'T OF DEFENSE, *supra* note 68, § 6(B)(3), with 10 U.S.C. § 950v.

sons does not reference the law of war, Murder in Violation of the Law of War could be broader in certain applications, since it facially incorporates the entire law of war corpus. For example, killing with a prohibited arm violates the law of war,<sup>80</sup> but the MCA crime Employing Poison or Similar Weapons provides a narrower definition for prohibited weapons than the standard law of war.<sup>81</sup> Therefore, it is possible that a person could kill with a weapon, such as projectiles filled with glass, prohibited by the law of war but not by the MCA,<sup>82</sup> and the U.S. government would be able to establish jurisdiction in the military commission through Murder in Violation of the Law of War.

Regardless, the existence of Murder of Protected Persons neither affects the legal standards for when murder violates the law of war nor remedies the deficiencies in the MMC's definition. If anything, it strengthens the established norm that a military commission only has jurisdiction over violations of the law of war, such as the murder of protected persons.

## B. STATUTORY AND CONSTITUTIONAL TRANSGRESSIONS

Given that the MMC redefines when the law of war may be violated, the crucial inquiry is whether the Secretary of Defense has the statutory or constitutional authority to do so. The scope of the Secretary's authority to redefine when the law of war may be violated turns on the location of military commissions in the constitutional system, the specific statutory authorization in the MCA, and a broader separation of powers question over who is authorized or qualified to define violations of the law of war.<sup>83</sup>

### 1. Military Commissions in a Tripartite Government

Military commissions "born of military necessity" are strange creatures that lie somewhere between the Constitution

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80. See, e.g., Rome Statute of the International Criminal Court art. 8(2)(b)(xvii)–(xx), July 17, 1998, 2187 U.N.T.S. 90, 96.

81. Compare 10 U.S.C. § 950v(b)(8) (defining a prohibited weapon as one that kills or produces serious, lasting harm through "asphyxiating, bacteriological, or toxic properties"), with *supra* note 32 (noting that the standard law of war prohibits weapons calculated to cause unnecessary suffering and those that have an indiscriminate effect).

82. See FM 27-10, *supra* note 32, at 17–19.

83. See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) ("[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.").

and statutory authorization.<sup>84</sup> The Supreme Court has never decided whether the President has the constitutional power to convene military commissions without congressional authorization.<sup>85</sup> In *Hamdan*, however, the Court found the lack of “military necessity” to be a basic shortcoming to the Executive’s alternative argument that he could establish a military commission without congressional authorization.<sup>86</sup> Instead, the Court required the Executive to seek congressional authorization to create a military commission,<sup>87</sup> which he received when Congress passed the MCA in 2006.<sup>88</sup> Therefore, it will primarily be a matter of statutory interpretation to ascertain whether the Secretary of Defense exceeded his delegated authority when defining the elements of Murder in Violation of the Law of War.

Nonetheless, because the Secretary of Defense operates under the President and exercises authority, direction, and control over the Department of Defense,<sup>89</sup> any contradiction between the MMC and the MCA also raises fundamental separation-of-powers issues over which branch of the government is constitutionally empowered to define the law of war.<sup>90</sup> Guaranteeing the appropriate separation of powers is significant: myriad are the high Court’s cases that discuss the division of the government as fundamental to securing individual liberty.<sup>91</sup>

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84. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008).

85. *Id.* at 2774.

86. *Id.* at 2785 (plurality opinion).

87. *Id.* at 2799 (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

88. See *supra* notes 19–22 and accompanying text.

89. U.S. Dep’t of Defense, Top Civilian and Military Leaders, <http://www.defenselink.mil/home/top-leaders> (last visited Apr. 15, 2009).

90. See Corn, *supra* note 77, at 38 (asking, but not answering: “[W]hat branch of our government is best suited to decide which crimes are heard by the military commission?”).

91. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008); *Loving v. United States*, 517 U.S. 748, 756 (1996); see also THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”).

## 2. Congress's Expressed Intent Precludes the Secretary of Defense from Redefining the Law of War

The Constitution sets forth the war powers of the legislative and executive branches in broad terms,<sup>92</sup> but more often, “the question of presidential power in the context of war and terrorism is one of statutory interpretation.”<sup>93</sup> Recognizing that the Guantánamo military commissions are statutory creations,<sup>94</sup> Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* provides the appropriate framework for interpreting the validity of executive action, particularly in the context of war.<sup>95</sup> The tripartite framework divides executive action into three zones—with congressional authorization, in the absence of congressional action, and contrary to the will of Congress—to determine how much deference the Court should grant the Executive’s action.<sup>96</sup> In the first zone, the President’s authority is at its maximum and supported by the strongest presumption of validity.<sup>97</sup> The second zone of Jackson’s framework is inapplicable, since Congress acted by passing the MCA.<sup>98</sup> In the third zone, courts can sustain executive action only if it is beyond the scope of all congressional power.<sup>99</sup> Such executive claims, however, must be closely scrutinized, as the “equilibrium” of the “constitutional system” is at stake.<sup>100</sup>

While it appears that the Secretary of Defense acted with congressional authorization because he promulgated the MMC

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92. Congress’s war powers are found in Article I, § 8, U.S. CONST. art. I, § 8. The executive’s constitutional war power is to “be the Commander in Chief of the Army and Navy.” *Id.* art. II, § 2, cl. 1.

93. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1169 (2006); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2133 (2005) (“[I]t is essential to determine what Congress has, and has not, authorized.”).

94. See 10 U.S.C. § 948b(b) (2006).

95. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 107 (2002); see also Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 351–52 (1986).

96. *Youngstown*, 343 U.S. at 635–38.

97. *Id.* at 635–37.

98. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.); *Youngstown*, 343 U.S. at 637.

99. *Youngstown*, 343 U.S. at 637–38.

100. *Id.* at 638.

pursuant to the MCA, Congress required that the elements of proof not be contrary to or inconsistent with the MCA,<sup>101</sup> and therefore, by redefining when the law of war may be violated, the Secretary of Defense acted contrary to the expressed will of Congress.

Congress only authorized the Secretary of Defense to enact elements of proof that would be consistent with the MCA.<sup>102</sup> The MCA declares that it does not establish new offenses, and only purports to codify previously existing crimes.<sup>103</sup> If the MCA had created new crimes, detainees could only be tried for offenses occurring after the passage of the MCA, something that Congress explicitly avoided.<sup>104</sup> While there is substantial skepticism that Congress did not create new crimes in the MCA,<sup>105</sup> as a matter of statutory interpretation, the Secretary of Defense was not authorized to act contrary to the explicit will of Congress by creating a new crime.<sup>106</sup> Altering when the law of war may be violated redefines the crime of Murder in Violation of the Law of War.

Another canon of statutory interpretation, known as the *Charming Betsy* doctrine, weighs against allowing the Secretary of Defense to craft a new definition for when the law of war may be violated. In *Murray v. Charming Betsy*, the Court declared that an act of Congress should never be construed to violate the law of nations if any other possible construction remains.<sup>107</sup> Since the law of war is defined by looking to international practice,<sup>108</sup> interpreting the MCA to allow the Secretary of Defense to redefine the law of war unilaterally would be choosing a construction of the MCA that would defy the international definition and application of the law of war. Instead, it would be reasonable to interpret the MCA as conforming to the

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101. 10 U.S.C. § 949a(a) (2006).

102. *Id.*

103. *Id.* § 950p.

104. *Id.* § 950p(b) (stating the offenses are declarative of existing law and “do not preclude trial for crimes that occurred before the date” of enactment).

105. See Weissbrodt & Templeton, *supra* note 45, at 364 (“[T]he MCA adds new crimes to those previously known in international law.”); see also Gabor Rona, *Legal Issues in the “War on Terrorism”—Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger*, 9 GERMAN L.J. 711, 731 (2008) (same).

106. See 10 U.S.C. §§ 949a(a), 950p.

107. 6 U.S. (2 Cranch) 64, 118 (1804).

108. See *supra* note 31 and accompanying text.

international law of war by not creating a new offense for when murder violates the law of war.

Additionally, Congress does not “hide elephants in mouseholes.”<sup>109</sup> Congress mentions “law of war” no less than nineteen times in the MCA, but never defines the expression.<sup>110</sup> If Congress meant the “law of war” to mean anything other than the traditional expression, or if Congress wanted the Secretary of Defense to interpret or define the law of war, it easily could have so stated.<sup>111</sup> As a matter of statutory interpretation, the Secretary of Defense acted contrary to Congress’s express will and, consequently, without statutory authorization.<sup>112</sup>

This reasoning places the Secretary of Defense’s actions into the third zone of the Jackson framework, where the executive branch’s constitutional powers only pass muster if they are beyond the reach of Congress’s constitutional powers.<sup>113</sup> In other words, even though the Secretary of Defense acted contrary to congressional authorization, the MMC’s definition is valid if the Secretary possessed the constitutional power to redefine the offense.

### 3. The Constitutional Separation of Powers

The Secretary of Defense’s action raises three distinct constitutional inquiries. First, since defining when murder violates the law of war was an act of a legislative nature,<sup>114</sup> could Congress have delegated such law-making authority to the Executive? Second, even if Congress could not delegate such authority, are the Executive and the Secretary of Defense constitutionally empowered to make such decisions? Third, if

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109. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

110. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

111. *See, e.g., Burgess v. United States*, 128 S. Ct. 1572, 1578 (2008) (stating if Congress wanted “felony drug offense” to incorporate the definition of felony, it “easily could have” written the statute to say so); *Idaho v. United States*, 533 U.S. 262, 277 (2001) (“Congress was free to define the reservation boundaries however it saw fit.”).

112. Another commentator, considering the separate offense of Murder of Protected Persons, reaches the same conclusion. *See* Corn, *supra* note 77, at 38 (“There is no authority in the MCA for the Department of Defense to redefine and lessen the proof requirements of the statute.”).

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

114. *See* BLACK’S LAW DICTIONARY 399, 919 (8th ed. 2004) (defining crime as “[a]n act that the law makes punishable,” and legislative as “[o]f or relating to lawmaking”).

not, do concerns of national security and terrorism allow the relaxation of constitutional safeguards in order for the executive branch to act effectively?

*a. The Nondelegation Doctrine Prohibits Congress from Delegating Authority to Define the Law of War*

In areas of delegation, the constitutional separation of powers between Congress and the Executive is not firmly moored.<sup>115</sup> As an outer boundary, Congress cannot constitutionally delegate its legislative powers to another branch under the nondelegation doctrine.<sup>116</sup> Congress may, however, delegate authority to the executive branch to secure the effect intended by the legislation, so long as Congress creates “an intelligible principle” to which the person or body authorized to execute the delegated authority is directed to conform.<sup>117</sup> The Supreme Court declined to answer whether a higher standard applies when Congress delegates the authority to define criminal conduct.<sup>118</sup> The nondelegation doctrine, although still good law,<sup>119</sup> has proven largely theoretical in practice because courts are reluctant to invalidate legislation.<sup>120</sup> Courts have upheld dele-

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115. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409 (1928) (“[T]he extent and character . . . [of permissible delegation] must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”).

116. See *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital . . .”).

117. *J.W. Hampton*, 276 U.S. at 409; see also *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 Congress.”).

118. See *Touby v. United States*, 500 U.S. 160, 165–66 (1991). *But see United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity.”).

119. See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–88 (1980) (Rehnquist, J., concurring) (contending that the Court should apply the nondelegation doctrine to invalidate a legislative provision).

120. See *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (stating that the doctrine has “been driven by a practical understanding” and noting that no statute has been found unconstitutional for delegating too much authority since 1935).

gated authority to define crimes provided adequate notice exists for the defendant.<sup>121</sup>

In the MCA, Congress only delegated to the Secretary of Defense the ability to define procedures and rules consistent with the MCA.<sup>122</sup> This delegation does not violate the nondelegation doctrine because the legislation provides an intelligible principle: to define procedures and rules not contrary to or inconsistent with the legislation.<sup>123</sup> Rather, this delegation reasonably recognized the Department of Defense's expertise for defining procedures related to such delicate matters as treatment of confidential information.<sup>124</sup>

Interpreting the delegated authority to allow the Secretary of Defense to craft new definitions of when the law of war may be violated, however, rapidly approaches the boundaries of permissible constitutional delegation. First, it is not clear that Congress even has the power to *redefine* the law of war.<sup>125</sup> In *United States v. Schultz*, the Court of Military Appeals held that negligent vehicular homicide was not a cognizable crime under the law of war.<sup>126</sup> Relying on *Ex parte Quirin*, the court looked to "customs and usages of civilized nations" and whether Congress had "codified" or "defined" universally accepted violations of the law of war.<sup>127</sup> This language, alongside the constitutional power to "*define* offenses against the law of nations,"<sup>128</sup> suggests that Congress can only codify existing offenses against the law of war, not create new or redefine existing ones. If Con-

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121. See *Loving v. United States*, 517 U.S. 748, 768 (1996); David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 26 n.175 (2002). *But see* B.H. v. State, 645 So. 2d 987, 991–92 (Fla. 1994) (criticizing the federal courts' failure to read the Constitution textually and prevent Congress from delegating authority to define crimes).

122. 10 U.S.C. § 949a(a) (2006).

123. *Id.* *But see* Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. 29, 40 (2008) (noting that the broad delegations in the MCA to the Secretary of Defense are problematic).

124. 10 U.S.C. § 949a(b).

125. See *In re Yamashita*, 327 U.S. 1, 13 (1946) (stating congressional action could not authorize trial in a military commission unless the charge was a violation of the law of war); George P. Fletcher, *The Law of War and its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 546 (2007) (describing the constitutional interpretation of *Hamdan* as holding the law of war is incorporated into the constitutional structure and "cannot be redefined by a simple law of Congress").

126. *United States v. Schultz*, 1 C.M.A. 512, 522–23 (C.M.A. 1952).

127. *Id.*

128. U.S. CONST. art I, § 8, cl. 10 (emphasis added).

gress cannot redefine the law of war, it cannot delegate a power that it lacks.<sup>129</sup>

Even if Congress has the power to redefine the law of war, it is Congress, not the Executive, which has the constitutional power to define offenses against the law of nations, including the law of war.<sup>130</sup> The Constitution separates this congressional power from domestic lawmaking.<sup>131</sup> While the “present-day federal conception of administrative involvement in defining crimes remains rife with unresolved tensions,”<sup>132</sup> the ability to define offenses against the law of nations implicates a separate constitutional congressional power, which the Supreme Court indicated cannot be exercised by the Executive.<sup>133</sup>

Additionally, permitting the Secretary of Defense to define violations of the law of war raises issues of notice. The Supreme Court allowed Congress to delegate crime definition provided adequate notice exists for the defendant, as required by the Constitution.<sup>134</sup> Allowing the Secretary of Defense to redefine the law of war for jurisdiction in a military commission designed to try detainees for acts committed prior to the legislation contravenes basic norms of notice: before the MMC, there was no basis to believe that murder would violate the law of war based on the offender’s, rather than the victim’s, status.<sup>135</sup>

Furthermore, at least theoretically, by limiting the authority Congress may delegate, the nondelegation doctrine may also intrinsically limit the authority the executive branch can exercise.<sup>136</sup> Logically, if Congress lacked the constitutional authori-

129. See, e.g., Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 573–74 (2000) (“[I]f Congress itself lacks that interpretive power, then Congress cannot delegate that power to an administrative agency.”).

130. U.S. CONST. art I, § 8, cl. 10; see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779–80 (2006) (plurality opinion), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), as recognized in *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008); *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

131. Compare U.S. CONST. art I, § 8, cl. 10 (“To define . . . Offences against the Law of Nations”), with *id.* cl. 1 (the Spending Clause), and *id.* cl. 3 (the Commerce Clause).

132. *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1994).

133. See *Hamdan*, 126 S. Ct. at 2779–80.

134. See *Loving v. United States*, 517 U.S. 748, 768 (1996).

135. See Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. 172, 180 (2008) (stating it is an *ex post facto* violation to “subject a defendant to trial for a violation of the law of war that was not a violation of the law of war at the time the unlawful conduct took place”).

136. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315,

ty to delegate the definition of the law of war, then that authority rests solely with Congress and the Secretary of Defense constitutionally cannot define the law of war, regardless of what the statute says.

Reading the MCA to delegate to the Secretary of Defense the ability to define violations of the law of war approaches and likely encroaches on the constitutional limits of congressional delegation. Such an interpretation indicates that the MCA is unconstitutional for impermissibly delegating Congress's constitutional powers. After all, it is Congress—not the Secretary of Defense—that is constitutionally empowered to define offenses against the law of nations. Instead, reading the MCA to not delegate the ability to define the law of war upholds clear constitutional roles and eschews constitutional uncertainty.

*b. The Executive Lacks Inherent Constitutional Powers to Define the Law of War*

Even if statutes and congressional delegation preclude the Secretary of Defense from redefining the law of war, the executive branch might argue that its inherent constitutional wartime powers extend beyond the reach of Congress. The Supreme Court formally invokes deference to the political branches in war<sup>137</sup> and national security matters,<sup>138</sup> but the

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317–18 (2000) (“The most convincing claim on behalf of the conventional [non-delegation] doctrine is . . . that certain highly sensitive decisions should be made by Congress . . .”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 446 (2007) (stating the result of the largely toothless nondelegation doctrine has nonetheless “not been unlimited discretion for agencies”). *But see* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (emphasizing that the nondelegation doctrine acts solely as a limit on Congress).

137. There is considerable skepticism that the “war on terror” constitutes an actual war. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1034 (2004) (“[T]he ‘war on terrorism’ is merely a metaphor without decisive legal significance, more like the ‘war on drugs’ or the ‘war on crime’ . . .”); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002) (“We are fighting an international criminal organization . . . . But we have declared war on no nation.”); Adam Roberts, *The “War on Terror” in Historical Perspective*, 47 SURVIVAL 101, 125 (2005) (arguing a better description would be “international campaign against terrorism”). Nonetheless, recent Supreme Court cases demonstrate a concern for national security and recognition of some form of conflict. *See* *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (referring to “active hostilities”), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in* *Boumediene*, 128 S. Ct. at 2241–42.

138. *See Boumediene*, 128 S. Ct. at 2276.

specific constitutional boundaries between the executive and legislative branches are far from clear.<sup>139</sup> At one end, the Bush Administration argued for strong, inherent constitutional war powers beyond the control of Congress.<sup>140</sup> At the other end, the concept of an Executive wielding “virtually unlimited powers,” has been repeatedly rebuked as fundamentally at odds with the constitutional separation of powers.<sup>141</sup> Nonetheless, the Supreme Court refrains from drawing clear lines around the Executive’s constitutional wartime powers.<sup>142</sup>

There are several arguments that defeat a claim of inherent executive power to define the law of war. First, Congress has the explicit constitutional power to define offenses against the law of nations.<sup>143</sup> In contrast, the Commander-in-Chief power solely grants the President the ability to command and direct the armed forces.<sup>144</sup> This explicit congressional power makes claims of inherent executive power to define when the law of war may be violated difficult to substantiate.<sup>145</sup> Even if one were to claim that somehow the executive branch may redefine the law of war, it is “well-established” that some of the President’s substantive constitutional powers are permissible

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139. See Kinkopf, *supra* note 93, at 1169; Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2672 (2005); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2675 (2005).

140. See Memorandum from Jay S. Bybee, Asst. Att’y Gen., Dep’t of Justice, to Alberto Gonzales, Counsel to the President 37–39 (Aug. 1, 2002), [hereinafter *Torture Memo*], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (arguing that the President has “an unenumerated ‘executive power,’” and that Congress cannot regulate “the Constitution’s sole vesting of the Commander-in-Chief authority in the President”).

141. *Dames & Moore v. Regan*, 453 U.S. 654, 661–62 (1981); see also *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (“Congress has not issued the Executive a ‘blank check.’”).

142. See *Boumediene*, 128 S. Ct. at 2277 (“Our opinion does not undermine the Executive’s powers as Commander in Chief.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“Presidential powers are not fixed but fluctuate . . .”).

143. U.S. CONST. art I, § 8, cl. 10.

144. See, e.g., Elizabeth L. Hillman, *Franklin D. Roosevelt, Commander in Chief*, 29 CARDOZO L. REV. 1037, 1041 (2008) (noting that Alexander Hamilton deprecated the commander-in-chief power).

145. See *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (stating the President has the power to carry into effect all laws passed by Congress “defining and punishing offenses against the law of nations, including those which pertain to the conduct of war”).

only until superseded by statute.<sup>146</sup> If the executive branch were to possess some inherent constitutional power to define violations of the law of war, such a power would be “provisional”<sup>147</sup> and would have been superseded by passage of the MCA.

Second, the Supreme Court already indicated that Congress has the power to define the jurisdiction and procedures of military commissions.<sup>148</sup> Subject matter jurisdiction in a military commission revolves around the nature of the offense,<sup>149</sup> so defining the offense is an essential component of defining jurisdiction. Stating that the executive branch has the constitutional authority to define jurisdiction over military commissions by defining the predicate substantive offenses would ignore one of the central pillars of *Hamdan*: in the realm of military commissions, the Executive only exercises authority subordinate to Congress.<sup>150</sup>

Third, the Secretary of Defense is not the President. The Executive’s constitutional power is to be the Commander in Chief.<sup>151</sup> Claims for expansive executive power center on the President as an individual, who acts with purpose and energy as the military commander of the nation’s forces.<sup>152</sup> While the Secretary of Defense certainly plays an important role as the principal defense policy advisor to the President,<sup>153</sup> claims of strong constitutional executive power lose relevance when applied to a subordinate acting within, not leading, the executive branch.<sup>154</sup>

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146. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 742 (2008); see also *id.* at 742–43 n.167 (citing examples of commander-in-chief powers superseded by statute).

147. *Id.* at 742.

148. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), as recognized in *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008).

149. See cases cited *supra* note 23.

150. See *Hamdan*, 126 S. Ct. at 2774–75 (noting the lack of congressional authorization for military commissions); *id.* at 2799 (Breyer, J., concurring) (adding that the Executive must seek congressional authorization to create military commissions); *id.* at 2808 (Kennedy, J., concurring) (stating that Congress, not the Executive, prescribes the limits for military commissions).

151. U.S. CONST. art. II, § 2, cl. 1.

152. See Torture Memo, *supra* note 140, at 37.

153. U.S. Dep’t of Defense, *supra* note 89.

154. See Barron & Lederman, *supra* note 146, at 696–97 (stating that the President must retain control over military discretion in armed conflict and

The argument that the executive branch possesses some form of inherent power to redefine the law of war is constitutionally bankrupt. Without the constitutional power to define the law of war, the Secretary of Defense can only claim that given the potential devastation of terrorist attacks, national security concerns mandate loosening constitutional formalities.

*c. No Emergency Necessitates Relaxing Constitutional Safeguards*

As a final defense to redefining the law of war, the executive branch could claim that somewhat apart from constitutional boundaries, it alone is best qualified to address issues of national security and terrorism, and that defining when and how detained persons should be tried is a necessary component of that power.<sup>155</sup> This argument, however, is a variant on the one rejected in *Hamdan*, where the Court decided that no emergency prevented the executive branch from consulting with Congress.<sup>156</sup> Moreover, in *Boumediene v. Bush*, the Court again rebuked similar claims of exigency in the face of potential terrorist attacks, stating that the political branches could engage in a “genuine debate” about how to preserve constitutional values while protecting the country from terrorism.<sup>157</sup> In *Youngstown*, during a national emergency, the Court rejected unilateral executive action.<sup>158</sup>

Both *Hamdan*, which rejected the constitutional ability of the Executive to convoke military commissions in the absence of an emergency, and *Boumediene*, which prohibited the Executive and Congress from suspending habeas corpus for detai-

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that “Congress may not assign such ultimate decisionmaking discretion to anyone else (including subordinate military officers)”).

155. Cf. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 16 (2007) (“The reason for relaxing constitutional norms during emergencies is that the risks to civil liberties inherent in expansive executive power . . . are justified by the national security benefits.”).

156. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in* *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008). In Justice Kennedy’s observation: “The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment. These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules.” *Id.* (Kennedy, J., concurring in part).

157. *Boumediene*, 128 S. Ct. at 2277.

158. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

nees, considered broad legal questions addressing terrorism.<sup>159</sup> The definition of a crime within a military commission, in contrast, presents a subsidiary legal question in the larger approach to countering terrorism and protecting national security. Therefore, the logic of both cases should extend to denying the Secretary of Defense the ability to redefine when murder violates the law of war. In the absence of a national emergency, the Executive simply has no claim on arrogating congressional powers.<sup>160</sup> General concerns of national security do not override constitutional safeguards.<sup>161</sup>

Additionally, Congress already passed the MCA, which creates a tribunal system specifically tailored to prosecuting detainees in the context of terrorism and national security.<sup>162</sup> The existence of this legislation further derails any claim that the executive branch needs to act beyond or contrary to congressional authorization in the face of national security. The Executive received statutory authorization to prosecute individuals in a system specifically designed to meet policy concerns in the “war on terror.”

Congress fulfilled its constitutional role by defining offenses against the law of nations, and the executive branch is left to implement the law, not redefine it. The executive branch possesses no constitutional power to amend or contravene Congress in the realm of defining the law of war.

### III. ENSURING FAIR PROSECUTIONS FOR VIOLATIONS OF THE LAW OF WAR

Because the Secretary of Defense conclusively lacked statutory or constitutional authority to redefine Murder in Violation of the Law of War, those accused of the crime should only be convicted if the government proves every element of the offense, including that the accused violated the law of war. Although President Obama has announced that Guantánamo will

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159. See *Boumediene*, 128 S. Ct. at 2274–75; *Hamdan*, 126 S. Ct. at 2798.

160. See *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring); see also *Youngstown*, 343 U.S. at 587 (holding that even during a national emergency, “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).

161. See Stephen Reinhardt, *Weakening the Bill of Rights: A Victory for Terrorism*, 106 MICH. L. REV. 963, 968 (2008) (stating that deference to the executive does not mean abdication of constitutional protections).

162. See James Nicholas Boeving, *The Right to Be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL’Y 463, 570–71 (2007).

be closed within the first year of his presidency,<sup>163</sup> the debate over closing Guantánamo has focused largely on placing the detainees in detention facilities and tribunal systems.<sup>164</sup> An important and overlooked question concerns the substantive offenses available for prosecution. Will future prosecutions transfer wholesale the offenses and their elements from the MCA and MMC? Will prosecutors instead utilize existing federal crimes? Will Congress enact modified MCA crimes?

If former detainees are charged with some form of Murder in Violation of the Law of War, judges present before such prosecutions will have the duty to ensure an actual violation of the law of war occurred. Yet the MMC's problematic definition also presents larger issues concerning the rule of law that the Obama Administration must heed. Before employing or borrowing from the MCA and MMC, the new administration must carefully scrutinize executive interpretations of MCA crimes and ensure that prosecutions of former Guantánamo detainees abide by the Constitution and the law of war.

#### A. JUDGES SHOULD APPLY THE (ACTUAL) LAW OF WAR

The first and most direct remedy to the MMC's statutory and constitutional inadequacies involves the judiciary. If some form of MCA substantive offenses and MMC procedural rules are transferred to future prosecutions, the former military commissions illustrate the importance of the judge's role: it will fall on the judge in the first instance to appropriately interpret when the law of war may be violated by disregarding the MMC's comment as deficient in any legal basis and contrary to express congressional intent. The MMC only purports to "provide[] guidance,"<sup>165</sup> and judges would not overstep their judicial authority by declining to apply the MMC's definition.

Instead, judges presiding over prosecutions for Murder in Violation of the Law of War must require juries to find as an independent element that the accused violated the law of war.<sup>166</sup> The MMC itself requires that for each offense, the instructions on findings must contain a description of the indi-

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163. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

164. See Mark Mazzetti & Scott Shane, *Where Will Guantánamo Detainees Go?*, N.Y. TIMES, Jan. 24, 2009, at A13 (explaining that finding a prison willing and able to accommodate detainees will be difficult).

165. MMC, *supra* note 11, at IV-1.

166. *Id.* at IV-12.

vidual elements,<sup>167</sup> and the government bears the burden of proving “beyond a reasonable doubt the elements of each substantive offense charged.”<sup>168</sup> Accordingly, judges should present juries with a specific findings instruction that the alleged killing violated the law of war. To find that the accused violated the law of war, the judge must ask the jury to consider the status of the victim and not whether the combatant was lawful or not. The jury must find beyond a reasonable doubt that the victim was a protected person, one who was taking no active part in the hostilities.<sup>169</sup>

Should judges fail to apply the correct definition of when murder violates the law of war, the lawyers defending those accused of the crime will likely appeal. The Secretary of Defense’s interpretation will be difficult to uphold, as the MMC contains no citations to legal authority and the great weight of existing law-of-war interpretations indicate that the MMC’s definition is incorrect. While an appellate court should overturn any application of the Secretary of Defense’s definition, the consequence would be another trial with appropriate jury instructions. Those instructions would require the jury to find as two independent elements that the killing was unlawful (i.e., committed without combatant immunity) and that the killing violated the law of war (i.e., committed against a protected person). Since trials of detainees are already cumbersome due to evidentiary and procedural difficulties,<sup>170</sup> and since many detainees from Guantánamo already have been held upwards of six years,<sup>171</sup> as a matter of fairness and systemic efficiency, it would be preferable for the judge to get it right the first time.

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167. *Id.* at II-114 to -115. The Rules for Military Commissions, contained within the MMC, provide the procedural rules for the military commissions. *Id.* at I-3; U.S. DEP’T OF DEFENSE, RULES FOR MILITARY COMMISSIONS § 101 (2007).

168. MMC, *supra* note 11, at II-14; U.S. DEP’T OF DEFENSE, *supra* note 167, § 202.

169. See 18 U.S.C. § 2441(d)(1)(D) (2006); Geneva Convention I, *supra* note 18, arts. 3, 12, 24; NAVAL HANDBOOK, *supra* note 32, § 6.2.6.

170. See William Glaberson & Eric Lichtblau, *Guantánamo Detainee’s Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12.

171. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

B. THE OBAMA ADMINISTRATION MUST ENSURE FUTURE PROSECUTIONS FOR VIOLATIONS OF THE LAW OF WAR ARE CONSTITUTIONALLY SOUND

More fundamentally, however, there is something disturbing in the MMC's redefinition of when murder violates the law of war. Surely it is a reasonable presumption that Secretary of Defense Gates was familiar with U.S. military law, federal law, and the law of war when he promulgated the MMC. Why then does the MMC attempt to define Murder in Violation of the Law of War in a manner contrary to all three?

Without delving into subjective intent, the objective effect of the MMC's redefinition is a drastic expansion of substantive jurisdiction for the military commissions. While the law of war serves the purpose of protecting civilians and soldiers *hors de combat*,<sup>172</sup> by focusing on the accused's status rather than the victim's, the MMC twists the law of war to serve a prosecutorial function.<sup>173</sup> According to the MMC, the U.S. government needs to prove only that the accused acted unlawfully and gets a free pass on proving a violation of the law of war.<sup>174</sup> Yet such an approach ignores the corpus of military commission jurisprudence: violating the law of war is the essential predicate for establishing substantive jurisdiction.<sup>175</sup> Deliberately redefining the law of war to facilitate jurisdiction and convictions over detainees like Omar Khadr, who have not violated the law of war, offends basic notions of fairness and justice. Even the Executive is bound to comply with the rule of law.<sup>176</sup>

As the Obama Administration moves forward with prosecutions of former Guantánamo detainees, regardless of where they occur, it must be mindful that only Congress can define or codify violations of the law of war. Whether in Guantánamo, federal court, or some variation of the two,<sup>177</sup> Congress cannot delegate to the Secretary of Defense the authority to invent new ways to violate the law of war in order to facilitate convic-

172. See *In re Yamashita*, 327 U.S. 1, 15 (1946).

173. See Macklin, *supra* note 66 (illustrating the "heads I win; tails you lose" quality of the prosecution's interpretation of the law of war).

174. See MMC, *supra* note 11, at IV-11.

175. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.), *as recognized in Boumediene*, 128 S. Ct. at 2241-42; *In re Yamashita*, 327 U.S. at 13; *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

176. See *Hamdan*, 126 S. Ct. at 2798.

177. See Warrick & DeYoung, *supra* note 59.

tions of detainees. Further, if the administration transposes substantive offenses from the MCA to other tribunals, it must scrutinize each one to determine whether the Secretary of Defense has attempted to modify, expand, or—in the case of Murder in Violation of the Law of War—completely invert the law of war.<sup>178</sup>

President Obama also should issue an executive order reaffirming the government's commitment to abiding by the law of war. His first two executive orders related to Guantánamo detainees invoke the Geneva Conventions as providing a minimum baseline for U.S. activity.<sup>179</sup> An additional executive order should affirm—as federal law and the U.S. military already do<sup>180</sup>—the Geneva Conventions as the starting point for determining violations of the law of war for any relevant substantive offense. Such an order would prohibit “creative” interpretations of the law of war within the executive branch, thereby creating an additional check on the constitutionality of law-of-war prosecutions.

If the Obama Administration were to simply transfer the substantive offenses and their corresponding elements from the MCA and MMC to prosecutions of former Guantánamo detainees and future defendants accused of terrorist acts, it would continue to grant the prosecutors a free pass on proving an essential element of the crime. Inside or outside of a military commission, if the charge alleges a violation of the law of war, the government must prove that such a violation occurred. Allowing the executive branch to redefine violations of the law of war in order to cast a large net of potentially lethal criminal liability around detainees violates fundamental constitutional barriers separating the powers of the government.

### CONCLUSION

When the Secretary of Defense, pursuant to the Military Commissions Act of 2006, promulgated the elements of the crime of Murder in Violation of the Law of War, he included a comment that taking acts as an “unlawful combatant” in and of itself violates the law of war. By focusing on the status of the offender rather than the victim, this definition of Murder in Vi-

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178. See Corn, *supra* note 77, at 38 (finding that the MMC lessens proof requirements for the offense of Murder of Protected Persons).

179. See Exec. Order No. 13,492 § 3, 74 Fed. Reg. 4897 (Jan. 22, 2009); Exec. Order No. 13,491 § 6, 74 Fed. Reg. 4893 (Jan. 22, 2009).

180. See *supra* notes 35, 40–41 and accompanying text.

olation of the Law of War is irreconcilable with the widely established standard that murder only violates the law of war when committed against a protected person, who is someone taking no active part in the hostilities. This definition impermissibly expands the limited jurisdiction of the military commissions to allow prosecution of those who have not violated any law of war, such as Omar Khadr, the then-fifteen-year old charged with throwing a grenade at a U.S. soldier while under attack. The Secretary of Defense lacked both statutory and constitutional authority to redefine when the law of war may be violated.

Judges presiding over prosecutions for Murder in Violation of the Law of War should disregard the Secretary's definition and require that juries find an actual violation of the law of war. The Obama Administration, in future law-of-war prosecutions, must not transpose the substantive offenses of the MCA without carefully scrutinizing the Secretary of Defense's interpretations of those crimes. To do otherwise would violate the constitutional separation of powers, disregard the law of war, and pave the way for easier and unfair convictions for crimes that carry the death penalty.