

## ON JURISDICTIONAL ELEPHANTS AND KANGAROO COURTS

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One need not look far these days to find proposals for how to “fix” U.S. detention policy, especially with respect to the non-citizens detained as “enemy combatants” at Guantánamo Bay, Cuba.<sup>1</sup> In the aftermath of the Supreme Court’s June decision in *Boumediene v. Bush*<sup>2</sup>—particularly its conclusion that the Guantánamo detainees have a constitutional right to judicial review<sup>3</sup>—such proposals have taken on an added sense of urgency, as commentators of all stripes grapple with the (now very real) possibility that such review will lead to the frustration and/or invalidation of existing policies.<sup>4</sup>

Within this burgeoning literature, though, the military tribunals convened at Guantánamo under the Military Commissions Act of 2006<sup>5</sup> (MCA) have received curiously short shrift. Part of the problem, I suspect, is that compared to the hundreds of individuals held at Guantánamo (and the thousands in U.S. custody elsewhere) who are not facing trial, the number of individuals potentially subject to trial by military commission is comparatively small. I also imagine that the relative neglect of the commissions is at least to some degree a result of the absolutism that pervades much of the commentary relating thereto: some view the Guantánamo

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<sup>1</sup> See, e.g., BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008); Jack L. Goldsmith & Neal Katyal, Editorial, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html> (link); see also Michael B. Mukasey, Editorial, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15, available at <http://www.opinionjournal.com/extra/?id=110010505> (link).

<sup>2</sup> 128 S. Ct. 2229 (2008).

<sup>3</sup> See *id.* at 2243–62.

<sup>4</sup> As just one example, consider a speech delivered by Attorney General Mukasey a little over a month after *Boumediene*, in which he called for a new legislative detention initiative. See Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research (July 21, 2008), available at <http://www.usdoj.gov/ag/speeches/2008/ag-speech-0807213.html> (link).

<sup>5</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.) (link).

commissions as categorically unconstitutional; some view them as both good policy and legally sound; some view them as the only way to deal with the thorny problems posed by international terrorism.

Fortunately, Professor McNeal falls into none of these camps. Rather, his thoughtful essay<sup>6</sup> balances a nuanced critique of the existing commission structure with an understanding of the difficulties Article III courts would face in trying the same defendants for the same offenses. Moreover, Professor McNeal is rightly skeptical of the increasingly common calls for a hybrid “national security court” to handle the prosecution of a class of terrorism-related offenses and offenders,<sup>7</sup> suggesting that there are significant obstacles in the way of any transition to such a model.

I do not disagree with Professor McNeal’s major critiques of the commissions—i.e., that they suffer from undue political influence, unsupervised delegation, and a lack of meaningful oversight. Nor do I disagree that there are obstacles yet to be fully appreciated that would frustrate any movement toward a “national security court” model. Rather, I fear only that his analysis is incomplete. Specifically, Professor McNeal neglects the sweeping personal and subject matter jurisdiction conferred upon the commissions by the MCA, and the potential repercussions of such dangerously overbroad authority. As I explain in this brief Response, this shortcoming is perhaps the single most serious defect in the proposals for a “national security court,” because any such institution would necessarily encounter analogous jurisdictional issues: namely *who* could be tried by such courts, and for *what*. Professor McNeal is unquestionably correct that major obstacles stand in the way of post-*Boumediene* reform, but any meaningful discussion of reforms must also focus on the broader—and perhaps more intractable—jurisdictional issues.

To unpack this argument, I begin in Part I by identifying the substantive limits that the Constitution imposes (and that the Supreme Court has recognized) upon the exercise of military jurisdiction. In Part II, I turn to an analysis of how the MCA transgresses those limits. Finally, in Part III, I suggest how many of the current reform proposals are largely oblivious to the significance of the jurisdictional issues discussed herein. In particular, as Part III concludes, resolving the scope of both whom may be subjected to less than the traditional Article III criminal process, and for which offenses, is a necessary prerequisite to any serious conversation about post-

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<sup>6</sup> Gregory S. McNeal, *Beyond Guantánamo: Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 28 (2008) (link).

<sup>7</sup> For a representative sampling, see Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT’L & COMP. L. 1 (2006); Amos Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008), available at <http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf> (link); Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (2006) (unpublished white paper submitted to American Enterprise Institute, on file with the Northwestern University Law Review).

*Boumediene* reform.

## I. THE SUBSTANTIVE LIMITS ON MILITARY JURISDICTION

In the court-martial system, it has long been black-letter law that both the Constitution and the Uniform Code of Military Justice (UCMJ),<sup>8</sup> successor to the Articles of War, condition the personal jurisdiction of military courts on the “military status of the accused.”<sup>9</sup> The constitutional limit, at least, comes from the language of Article I, Section 8, Clause 14, which grants Congress power “To make Rules for the Government and Regulation of the land and naval Forces,”<sup>10</sup> and thereby simultaneously constrains Congress’s power to subject individuals who are not members of “the land and naval Forces” to military jurisdiction.<sup>11</sup> Although the Supreme Court has abandoned any notion that the Constitution limits the subject matter of offenses triable by courts-martial,<sup>12</sup> the limitation on personal jurisdiction has remained sacrosanct.<sup>13</sup>

Military commissions, of course, are birds of a different feather.<sup>14</sup> Nevertheless, the Supreme Court has been careful to police the jurisdiction of such ad hoc courts as well. Moreover, and in sharp distinction to the court-martial context, the Court has repeatedly identified limits on both the personal *and* subject matter jurisdiction of such tribunals.

As Justice Stevens explained in *Hamdan v. Rumsfeld*,<sup>15</sup> military commissions have traditionally been used in three situations. The first category includes situations in which martial law is in force, where the commissions serve as substitutes for the non-functioning civilian courts.<sup>16</sup> The second (and related) category includes situations where a temporary military government is established to rule over occupied enemy territory.<sup>17</sup> Finally, the third category centers on the use of commissions to try combatants for violations of the laws of war.<sup>18</sup> With respect to the third category—the rele-

<sup>8</sup> 10 U.S.C. §§ 801–946 (2006) (link).

<sup>9</sup> *Solorio v. United States*, 483 U.S. 435, 439 (1987) (link); *see also* *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960) (link).

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>11</sup> *See, e.g., Reid v. Covert*, 354 U.S. 1, 19–20 (1957) (plurality opinion) (link).

<sup>12</sup> In *O’Callahan v. Parker*, 395 U.S. 258 (1969) (link), the Court enunciated a “service connection” test, requiring in addition that the substantive offense be related to the defendant’s military service. *Id.* at 272–73. *O’Callahan* was subsequently (and controversially) overruled by *Solorio*. As Chief Justice Rehnquist there explained, “determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen [is] a matter reserved for Congress.” *Solorio*, 483 U.S. at 440.

<sup>13</sup> *See, e.g., United States v. Hart*, 66 M.J. 273, 275 (C.A.A.F. 2008).

<sup>14</sup> *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006) (“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”) (link).

<sup>15</sup> 548 U.S. 557.

<sup>16</sup> *See id.* at 595.

<sup>17</sup> *See id.* at 595–96 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)).

<sup>18</sup> *See id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)).

vant subset for present purposes—Stevens quoted William Winthrop’s sic treatise on military law for the proposition that:

[A] military commission not established pursuant to martial law or an occupation may try only “[i]ndividuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war” and members of one’s own army “who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.”<sup>19</sup>

Winthrop’s understanding was first adopted by the Court in *Ex parte Quirin*, which upheld the military commissions convened by President Roosevelt to try Nazi saboteurs because “[b]y the Articles of War, . . . Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”<sup>20</sup> In other words, although *Quirin* interpreted the Articles of War as authorizing military tribunals for “offenders or offenses against the law of war,” the same passage suggested that Congress might not be able to go further—that the Articles of War may have conferred jurisdiction upon military commissions to their constitutional limit. As Chief Justice Stone concluded for the Court,

Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations 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, are cognizable by such tribunals.<sup>21</sup>

Thus, as Justice Stevens would later explain, “the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war.”<sup>22</sup> As “law-of-war courts,” military commissions were thus limited to exercising jurisdiction over those triable *by* the laws of war for offenses *against* the laws of war.<sup>23</sup> Critically, where military commissions were concerned, *Quirin* suggested not just that the Articles of War constrained both their personal and their subject matter jurisdiction to that recognized by the laws of war (as *Hamdan* acknowledged), but that the Constitution might itself impose the

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<sup>19</sup> *Id.* at 597–98 (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 838 (2d ed. 1920) (alteration in original)).

<sup>20</sup> *Quirin*, 317 U.S. at 28 (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> *Hamdan*, 548 U.S. at 593; *see also In re Yamashita*, 327 U.S. 1, 13 (1946) (“Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war.”) (link).

<sup>23</sup> *See Hamdan*, 548 U.S. at 641 (Kennedy, J., concurring in part) (echoing this understanding).

same limitation.

## II. THE LIMITLESSNESS OF THE MCA'S JURISDICTION

Notwithstanding the limits on military jurisdiction identified in *Quirin* and later cases,<sup>24</sup> the MCA, enacted in response to *Hamdan*, conferred broad jurisdiction upon military commissions with regard to both the offenders and offenses triable by such courts. After briefly outlining the background to the MCA, the rest of Part II examines the potential limitlessness of the MCA's personal and subject matter jurisdiction.

### A. *Hamdan and the MCA*

Applying *Quirin*'s formulation, the Supreme Court in *Hamdan* struck down the military commissions established by President Bush pursuant to a 2001 executive order.<sup>25</sup> Although the Court sidestepped the question of whether the commissions lacked personal jurisdiction over Hamdan,<sup>26</sup> a four-Justice plurality concluded that none of the particular acts the government alleged Hamdan to have committed violated the law of war<sup>27</sup> and, more fundamentally, that the offense with which Hamdan was charged—conspiracy—is not within the subject matter jurisdiction of a law-of-war military commission.<sup>28</sup>

Congress responded to *Hamdan* by enacting the MCA.<sup>29</sup> With regard to personal jurisdiction, new 10 U.S.C. § 948c provided that “[a]ny alien unlawful enemy combatant is subject to trial by military commission under this chapter,” and new 10 U.S.C. § 948a defined “unlawful enemy combatant” as, *inter alia*, “a person who has engaged in hostilities *or* who has purposefully and materially supported hostilities against the United States or its

<sup>24</sup> Indeed, *Quirin* is only the first of many Supreme Court decisions during and following World War II that emphasized the limits of military jurisdiction. Throughout the 1950s and early 1960s, the Court handed down dozens of important decisions further clarifying the statutory and constitutional limits on the offenses (and, more often, the offenders) properly triable before military courts in general, and courts-martial in particular. *See, e.g.*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960) (military jurisdiction cannot be extended to reach the wife of a soldier stationed in Germany for a noncapital offense); *Reid v. Covert*, 354 U.S. 1, 3–5 (1957) (plurality) (military jurisdiction cannot be extended to civilian dependents of servicemen overseas for capital offenses in times of peace); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14–17 (1955) (military jurisdiction cannot be extended to ex-servicemen with no ongoing relationship to the military) (link); *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality); *Madsen v. Kinsella*, 343 U.S. 341 (1952).

<sup>25</sup> The order in question was Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001) (link).

<sup>26</sup> *See Hamdan*, 548 U.S. at 585 n.16.

<sup>27</sup> *Id.* at 600 (plurality). Justice Kennedy did not join this Part—Part V—or Part VI-D-iv of Justice Stevens's opinion. *See id.* at 638 (Kennedy, J., concurring in part).

<sup>28</sup> *Id.* at 600 (plurality).

<sup>29</sup> *See Boumediene v. Bush*, 476 F.3d 981, 986 (D.C. Cir. 2007) (“Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*.”), *rev'd*, 128 S. Ct. 2229 (2008) (link).

co-belligerents who is not a lawful enemy combatant.”<sup>30</sup>

In new 10 U.S.C. § 950v(b), the MCA conferred subject matter jurisdiction upon the new commissions with respect to twenty-eight separate offenses, including the offenses of conspiracy<sup>31</sup>—notwithstanding the plurality opinion in *Hamdan*—and providing material support to terrorism.<sup>32</sup> In so vigorously acting to define with precision the scope of the authority military commissions were to exercise, Congress necessarily implicated a host of difficult constitutional questions concerning the limits of that power.

### B. *The MCA's Personal Jurisdiction and the Laws of War*

First, with respect to personal jurisdiction, the critical language in new § 948a is the disjunction—suggesting that individuals subject to trial by military commission include those who have actually engaged in hostilities *or* those who “purposefully and materially supported hostilities against the United States or its co-belligerents.” In a vacuum, this language might seem relatively uncontroversial. However, in recent years, the U.S. government has repeatedly advanced an expansive interpretation of what it means to provide “material support” to terrorist organizations in *civilian* criminal prosecutions, as 18 U.S.C. § 2339B has become the Justice Department’s “antiterror weapon of choice.”<sup>33</sup>

<sup>30</sup> 10 U.S.C. § 948a(1)(a)(i) (emphasis added). The statute defines “lawful enemy combatant” as one who is “a member of the regular forces of a State party engaged in hostilities against the United States,” “a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war,” or “a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.” *Id.* § 948a(2).

<sup>31</sup> *Id.* § 950v(b)(28) (“Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”).

<sup>32</sup> *Id.* § 950v(b)(25)(A) (“Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in [10 U.S.C. § 950v(b)(24)]), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”).

<sup>33</sup> See Eric Lichtblau, *A Seldom-Used Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15; see also John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 774–75 (2007). Others have questioned the appropriateness (and even the constitutionality) of various applications of the material support provisions in Title 18. See, e.g., *United States v. Afshari*, 446 F.3d 915, 915–22 (9th Cir. 2006) (Kozinski, J., dissenting from the denial of rehearing en banc). The more relevant point here, though, is that the zeal with which the government has pursued an expansive view of what it means to provide material support in the civilian context suggests that a similarly expansive definition might be argued for in prosecutions under the MCA. Put another way, there is every reason to suspect that the government would exploit, rather than

In addition, and based in part on this understanding, the government suggested in a notorious exchange at oral argument in one of the Guantánamo cases that it could subject to military jurisdiction “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities.”<sup>34</sup> In other words, the provision of material support necessary to trigger military jurisdiction would include charitable donations lacking a specific intent to support hostilities against the United States. The “material support” language thus suggests that the MCA’s definition of “unlawful enemy combatant” might actually extend to individuals who, under the laws of war, are not even “combatants” in the first place—and who are therefore not subject to trial by military commission, even if they are properly subject to trial for civilian criminal offenses.<sup>35</sup>

Second, and related, even where a detainee is clearly a “combatant,” the distinction the MCA draws between “lawful enemy combatants” and “unlawful enemy combatants” differs in important respects from the comparable distinction made by the laws of war, as Professor Allison Danner has thoughtfully explained.<sup>36</sup> Just for starters, under the laws of war, being a combatant is not per se unlawful.<sup>37</sup>

My point here is not that the MCA categorically confers personal jurisdiction on military commissions in violation of the laws of war. Rather, it is just to suggest that the statute could easily support personal jurisdiction in at least *some* cases where the defendant would not be subject to military jurisdiction under the laws of war. In such cases, the constitutionality of the exercise of military jurisdiction would be in serious doubt.

### C. *The MCA’s Subject matter Jurisdiction and the Laws of War*

Although the MCA itself asserts otherwise,<sup>38</sup> there is also a strong ar-

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carefully police, the potential open-endedness of the definition.

<sup>34</sup> *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (alterations in original; internal quotation marks omitted).

<sup>35</sup> To be sure, definitions of “combatancy” implicate a host of related—and complex—questions. *See, e.g.*, INGRID DETTER, *THE LAW OF WAR* 135–50 (2d ed. 2000); *see also* *al Marri v. Pucciarelli*, 534 F.3d 213, 312–25 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part) (surveying the difficulties inherent in defining “combatancy”) (link). My goal here is not to suggest an exhaustive definition of who may be treated as a combatant under international humanitarian (and U.S.) law. Rather, it is to suggest that the breadth of the personal jurisdiction contemplated by the MCA seems to include individuals who have *not* been traditionally treated as combatants under *any* prevailing definition.

<sup>36</sup> *See* Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 *TEX. INT’L L.J.* 1 (2007), available at [http://tilj.org/docs/J43-1\\_Danner.pdf](http://tilj.org/docs/J43-1_Danner.pdf) (link).

<sup>37</sup> Robert K. Goldman & Brian D. Titemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, ASIL TASK FORCE PAPERS (Am. Soc’y of Int’l Law), Dec. 2002, at 7, available at <http://www.pegc.us/archive/Journals/goldman.pdf> (link).

<sup>38</sup> *See* 10 U.S.C. § 950p(a) (“The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist

gument that at least some of the substantive offenses over which it confers jurisdiction are not recognized by the laws of war. Indeed, as noted above, a four-Justice plurality in *Hamdan* concluded that conspiracy is not an independent substantive offense under the laws of war.<sup>39</sup> As Justice Stevens summarized:

The crime of “conspiracy” has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.<sup>40</sup>

The trial judge in *Hamdan* nevertheless concluded that “conspiracy” under the MCA is an offense recognized by the laws of war.<sup>41</sup> Its analysis, though, is hardly convincing since it relies on the argument that, in the MCA (and notwithstanding *Hamdan*), Congress so recognized—that Congress could make a particular crime an offense against the law of war on Day 1 when it was not so recognized on Day 0. It simply cannot follow, though, that Congress’s power “To define and punish . . . Offences against the Law of Nations”<sup>42</sup> includes the power to define the “Law of Nations” (of which the law of war is a part) *itself*.<sup>43</sup>

More controversially, the MCA also defines as a war crime “material support for terrorism,” even though there is simply no evidence that such an offense has ever been treated as a violation of the laws of war by anyone other than the United States.<sup>44</sup> As with the conspiracy charges against

before its enactment, but rather codifies those crimes for trial by military commission.”).

<sup>39</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 603–12 (2006) (plurality).

<sup>40</sup> *Id.* at 603–04 (footnotes omitted); see also George P. Fletcher, *On the Crimes Subject to Prosecution in Military Commissions*, 5 J. INT’L CRIM. JUST. 39, 46 (2007).

<sup>41</sup> See *United States v. Hamdan*, No. D012, slip op. at 6–7 (Mil. Comm’n. July 14, 2008), available at <http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf> (link).

<sup>42</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>43</sup> Indeed, an old—but still viable—Supreme Court decision seems to prohibit exactly that. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 195–97 (1820) (holding that Congress can not redefine piracy to encompass any murder on the high seas in order to bring those crimes within its enumerated powers) (link); see also Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses against the Law of Nations”*, 42 WM. & MARY L. REV. 447, 474 (2000) (“The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”). In *Hamdan*’s case, at least, this point was largely mooted when *Hamdan* was acquitted on the conspiracy charges. See Jerry Markon, *Hamdan Guilty of Terror Support*, WASH. POST, Aug. 7, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/08/06/ST2008080601313.html> (link).

<sup>44</sup> See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 177 (2008), available at [http://www.lclark.edu/org/lclr/objects/LCB\\_12\\_1\\_Art7\\_Glazier.pdf](http://www.lclark.edu/org/lclr/objects/LCB_12_1_Art7_Glazier.pdf) (“[W]hile providing material support to terrorism is clearly an offense against U.S. federal law, its trial as a war crime seems unprece-

Hamdan, the trial judge's analysis of whether material support for terrorism has been recognized as an offense against the law of war is rather conclusory,<sup>45</sup> and may well form the substance of a potential appeal of Hamdan's conviction.

In addition, and as with conspiracy, the analysis of whether material support has been recognized as an offense against the law of war dovetails with whether its inclusion as a substantive offense violates the Constitution's Ex Post Facto Clause.<sup>46</sup> After all, even if Congress *does* have the power to give substantive content to the law of nations (including the law of war), there is a strong argument that Congress cannot apply that power retroactively so as 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.<sup>47</sup>

Thus, whether or not the limitation on the personal jurisdiction of military commissions is constitutionally grounded, there can be little question that the challenges to the subject matter jurisdiction thereof are inextricably intermixed with constitutional questions of the highest order. Again, I do not mean to suggest that the commissions are therefore categorically unconstitutional, but only that there are serious questions as to the scope of their jurisdiction that, at least as of this writing, remain unanswered.<sup>48</sup>

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dented.") (footnote omitted) (link).

<sup>45</sup> See *Hamdan*, No. D012, slip op. at 6 ("In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so it has not enacted a 'new crime[] that did not exist before its enactment,' the Commission is inclined to defer to Congress's determination."); see also Posting of Kevin Jon Heller to OpinioJuris, <http://opiniojuris.org/2008/08/07/why-hamdans-material-support-convictions-violate-the-ex-post-facto-clause> (Aug. 7, 2008, 8:19 a.m. EST) (arguing that material support for terrorism has not been considered a war crime) (link); Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2008/08/what-are-war-crimes-for-which-hamdan.html> (Aug. 6, 2008, 1:13 p.m. EST) (arguing that Hamdan's alleged conduct was not a violation of the laws of war at the time he engaged in the acts) (link).

<sup>46</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>47</sup> This is not an open-and-shut argument. Using Hamdan's case as an example, the crime of providing material support to terrorist organizations *was* a federal crime at all relevant times; it was just not triable by a military commission until the MCA was enacted. Thus, the question would be whether the Ex Post Facto Clause bars the subjecting of an individual to military jurisdiction for an offense that was only triable in civilian courts at the time of its commission. I think the answer is yes, based on Justice Chase's discussion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389–91 (1796) (Chase, J.) (defining ex post facto laws). In particular, Chase included as an example of an ex post facto law a statute that altered the rules of evidence to either lower the government's burden of proof or to reduce the amount of evidence necessary to convict for an offense committed before the law was enacted. See *id.* The Court has accepted Chase's account as authoritative. See *Stogner v. California*, 539 U.S. 607, 611–12 (2003) (link). I admit that the ex post facto issue is open to question, but that is exactly the point.

<sup>48</sup> Cf. *Hamdan v. Gates*, 565 F. Supp. 2d 130, 134–37 (D.D.C. 2008) (declining to reach merits of Hamdan's pre-trial challenge to the commission's jurisdiction) (link).

*D. The Absence of Collateral Review*

Finally, I would be remiss not to highlight one last jurisdictional flaw in the commissions created under the MCA: the absence of collateral review. Since shortly after the founding, the Supreme Court has recognized the authority—indeed, the obligation—of the Article III courts to entertain collateral challenges to the exercise of military jurisdiction.<sup>49</sup> And since the end of the Civil War, the Court has recognized habeas corpus as the appropriate procedural vehicle through which to vindicate such claims.<sup>50</sup> Notwithstanding this venerable line of precedent, the MCA bars habeas petitions relating to military commission trials, both pre- and post-judgment. As provided by the new 10 U.S.C. § 950j(b),

Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.<sup>51</sup>

Because the MCA also bars interlocutory appeals by military commission defendants (but not by the government)<sup>52</sup>—even where the appeal challenges the jurisdiction of the trial court<sup>53</sup>—the statute thus appears to preclude *any* collateral attack on the exercise of military jurisdiction.<sup>54</sup>

<sup>49</sup> See, e.g., *In re Grimley*, 137 U.S. 147, 150 (1890) (“It cannot be doubted that the civil courts may in any case inquire into the jurisdiction into the jurisdiction of a court martial.”) (link). Before the Civil War, the civilian courts entertained such challenges in various forms, including in the context of actions for trespass, see, e.g., *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (link); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806) (link); and *replevin*, see, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (link).

<sup>50</sup> See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (finding that a military commission did not have jurisdiction to try the petitioner) (link); see also *Ex parte Reed*, 100 U.S. 13, 16 (1879) (“If a reasonable doubt exists whether [the petitioner is] subject to the jurisdiction of a court-martial, the petitioner is entitled to the writ.”) (link).

<sup>51</sup> 10 U.S.C. § 950j(b) (2006).

<sup>52</sup> Compare *id.* § 950f (Review by Court of Military Commission Review), with *id.* § 950d (Appeal by the United States). To be sure, it is not uncommon to allow the government—but not the defendant—to take certain interlocutory appeals in criminal cases, given that the government cannot generally appeal acquittals (because of double jeopardy concerns), while the defendant *can* appeal convictions. But even in the court-martial system, which creates just such a regime for interlocutory appeals, see *United States v. Lopez de Victoria*, 66 M.J. 67, 68–69 (C.A.A.F. 2008) (describing the creation of interlocutory appeals by the Military Justice Act of 1983) (link), there is *no* barrier whatsoever to the defendant collaterally attacking the jurisdiction of the trial court, see, e.g., *Watada v. Head*, 530 F. Supp. 2d 1136, 1145–49 (W.D. Wash. 2007) (noting that petitioner must meet only custody and exhaustion requirements to pursue habeas relief on collateral issue of double jeopardy).

<sup>53</sup> See *Khadr v. United States*, 529 F.3d 1112, 1117–19 (D.C. Cir. 2008) (link). The intermediate appeals court under the MCA—the “Court of Military Commission Review”—had reversed the trial court’s conclusion that it lacked jurisdiction over Khadr. See generally *United States v. Khadr*, No. 07-001 (C.M.C.R. Sept. 24, 2007), available at <http://www.scotusblog.com/movabtype/archives/CMCR%20ruling%209-24-07.pdf> (link).

<sup>54</sup> Cf. *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136–37 (D.D.C. 2008) (refusing to issue a preliminary

The Supreme Court has never expressly held that the scope of the Constitution's Suspension Clause (which, thanks to *Boumediene*,<sup>55</sup> now covers the Guantánamo detainees) includes a detainee's right to contest their amenability to military jurisdiction. Such a reading may logically follow, though, since the civilian courts generally do not exercise supervisory jurisdiction over military courts,<sup>56</sup> and so collateral review of military jurisdiction is, in effect, review of a form of extrajudicial *executive* detention. In any event, if a detainee ever claims a right not to be tried by a military court in the first place—as the Supreme Court in *Hamdan* concluded with respect to Hamdan himself—such a right is necessarily frustrated by the MCA, which, at most,<sup>57</sup> allows for vindication of such a right only after the fact.<sup>58</sup>

### III. NATIONAL SECURITY COURTS AS JURISDICTIONAL PROXIES

I doubt very much that Professor McNeal disagrees with the above discussion and analysis. Even the quickest perusal of his cogent essay reveals that his focus was elsewhere, and a criticism of a paper as not covering a topic that the author consciously neglected necessarily rings hollow. However, inasmuch as Professor McNeal suggests how the flaws he identifies might be fixed by policymakers going forward, I felt the need to pen this response to emphasize that there are bigger problems lurking that would *have* to be addressed first—problems of which the above analysis only begins to scratch the surface.

Indeed, although I discuss this issue in more detail elsewhere,<sup>59</sup> one of the remarkable points about another set of reforms—proposals for so-called “national security courts”—is how light they are on the details of just *who* will be subject to trial before such tribunals, and for *what*. Instead, for those proposals focusing on the problem of criminal prosecution (some focus only on the related issues of detention and review thereof), the grava-

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injunction to bar Hamdan's trial pending the resolution of his collateral challenges thereto, but not deciding whether the MCA actually precluded jurisdiction over such claims).

<sup>55</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (“We hold that [the Suspension Clause] has full effect at Guantanamo Bay.”) (link).

<sup>56</sup> See, e.g., *Hiatt v. Brown*, 339 U.S. 103, 110–11 (1950) (link).

<sup>57</sup> Even then, there are reasons to doubt the scope of the post-conviction review provided for by the statute in 10 U.S.C. §§ 950b, 950c, 950f, and 950g(c) (2006). But I'll assume here for the sake of argument that post-conviction review is plenary, at least as to questions of law.

<sup>58</sup> I take up the potential unconstitutionality of the MCA's preclusion of collateral review in Stephen I. Vladeck, *Military Jurisdiction, the Right Not To Be Tried, and the Suspension Clause After Boumediene*, HUM. RTS. BRIEF (forthcoming Fall 2008) (manuscript at 3, on file with the Northwestern University Law Review).

<sup>59</sup> See Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. (forthcoming 2009) (manuscript on file with the Northwestern University Law Review) [hereinafter Vladeck, *The Case Against National Security Courts*]; see also THE CONST. PROJECT, A CRITIQUE OF “NATIONAL SECURITY COURTS” 2–3 (2008), (noting the “intrinsic and inescapable problem” of setting details for the definitions of the scope of national security court powers, available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf) (link)).

men of the analysis tends to be nothing more than a sustained critique of how Article III courts have handled terrorism prosecutions.<sup>60</sup> Such critiques are difficult to reconcile with a recent Human Rights First report concluding to the contrary that the Article III courts have ably handled the myriad challenges posed by terrorism cases.<sup>61</sup> But even if these critiques were convincing, they hardly ask the question of how we'll decide the scope of these new courts' jurisdiction, let alone provide an answer thereto.

As the above discussion suggests, questions as to the personal and subject matter jurisdiction of these new hybrid courts are more than just curiosities of policy. The more the procedural and evidentiary rules of these new courts *differ* from traditional Article III trials, the more that the scope of their jurisdiction might implicate serious constitutional concerns, especially if there is no meaningful way to collaterally challenge their jurisdiction in an Article III court. The more closely these new courts *resemble* traditional Article III courts in their rules of procedure and evidence (thereby alleviating some of these jurisdictional issues), the less powerfully arguments for their utility and their necessity will resonate. My own view is that this lacuna is precisely why national security courts are neither useful nor necessary.<sup>62</sup> At the very least, though, even supporters of such reforms must concede the centrality of the jurisdictional questions to any evaluation of the proposals' merits.

And that, ultimately, is the conundrum faced by policymakers looking for creative solutions to the military commission morass after *Boumediene*. At least with respect to criminal trials, the Constitution forces the issue, and narrowly circumscribes the class of individuals who can be subjected to anything less than the full protections enjoyed by defendants in Article III courts. As Justice Black explained for the plurality in *Reid v. Covert*:<sup>63</sup>

Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional

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<sup>60</sup> See, e.g., McCarthy & Velshi, *supra* note 7.

<sup>61</sup> See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008) (white paper for Human Rights First), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (link).

<sup>62</sup> See generally Vladeck, *The Case Against National Security Courts*, *supra* note 59.

<sup>63</sup> 354 U.S. 1 (1957).

protections.<sup>64</sup>

That is why definitions matter, and why it is mostly pointless to have a conversation about “national security courts” or other hybrid criminal tribunals until and unless there is some consensus—or at least some clarity—as to the scope of the jurisdiction that those courts will exercise. Professor McNeal is rightly to be commended for moving the ball forward by identifying other weaknesses in the process created by the MCA, but my own view, for better or worse, is that those weaknesses pale in comparison to the structural and potentially insurmountable jurisdictional flaws enmeshed within that statute.

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<sup>64</sup> *Id.* at 21 (plurality opinion) (footnote omitted); *see also id.* at 30 (“There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.”).