

THE MISUSE OF HISTORY: CONSPIRACY AND THE GUANTÁNAMO
MILITARY COMMISSIONS

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INTRODUCTION

The Guantánamo military commissions were at a crossroads at the end of 2013. Although President Obama personally supported their use to try suspected terrorists for violations of “the law of war,”¹ all seven convictions achieved to that time relied on charges lacking precedent as war crimes, and a federal appeals court was poised to invalidate convictions for “providing material support to terrorism,” “conspiracy,” and “solicitation.”² These charges formed the entire basis for five completed cases and substantial part of the other two.³ In an effort to save those convictions, the government had resorted to arguing that these charges, which it ultimately conceded are not violations of the international law of war, were justified by historic American commission practice applying what it termed a “U.S. common law of war,” an approach that this article, focused specifically on the inchoate crime of conspiracy, will argue is legally flawed.⁴

The military commission was indisputably a “common law” tribunal from its creation in 1847⁵ until the enactment of the Military Commissions

¹President Barack Obama, Remarks at the Nat’l Def. Univ. (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; *see* Press Release, The White House Office of the Press Sec’y, Fact Sheet: The President’s May 23 Speech on Counterterrorism (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism>).

²*See infra* Part I.

³*Infra* Part I. David Hicks, Salim Ahmed Hamdan, Ali Hamza al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, and Noor Uthman Mohammed were convicted only of these charges; Omar Khadr and Majid Khan pleaded guilty to several additional offenses as well. *Infra* Part I.

⁴Justice John Paul Stevens made a single reference to an “American common law of war” in his plurality opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (Stevens, J., plurality opinion). In 2012, the government based its (ultimately losing) argument to the D.C. Circuit on Hamdan’s subsequent post-conviction appeal on the existence of a “U.S. common law of war.” *See* Brief for the United States at 42–65, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (No. 11-1257).

⁵*See, e.g.*, David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 31–34 (2005).

Act (MCA) of 2006.⁶ As Army Judge Advocate General Enoch Crowder explained in 1916 Senate testimony, “A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.”⁷ The use of military-commission history was thus required to define their jurisdiction throughout that era.⁸ But the statutory grounding of the Guantánamo commissions in the 2006 MCA and its 2009 successor diminishes the legal significance of that record today.⁹

Nevertheless, the government now seeks to stretch the use of history beyond its credible limits. Although Congress included conspiracy as an offense triable by military commission in both iterations of the MCA, there is real doubt as to whether this charge can fairly be applied to conduct completed before the initial 2006 enactment, if at all.¹⁰ Most law-of-war scholars (and four Supreme Court justices) agree that the Anglo-American concept of conspiracy as an inchoate offense (as distinguished from holding participants in a conspiracy collectively liable for *acts* completed by one or more members, often called “Pinkerton liability” in U.S. federal practice¹¹), is not a recognized war crime under international law.¹² Even the government has now conceded this point.¹³ But rather than simply accepting the recommendation of its chief prosecutor, Brigadier General Mark Martins, and moving forward using more credible charges, the government has instead sought to justify conspiracy prosecutions based on unprecedented claims of authority sourced in a “U.S. common law of

⁶Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948–50 (2006)).

⁷S. REP. NO. 64–130, at 40 (1916).

⁸See Glazier, *supra* note 5, at 8–9.

⁹Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (codified as amended at 10 U.S.C. § 948a (2012)).

¹⁰Prosecuting acts completed before 2006 raises ex post facto concerns. But even prospective application may exceed congressional authority under the “define and punish clause” which arguably limits Congress to codifying offenses that are recognized violations of international law. See, e.g., Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT. SEC. L & POL 295, 309–13, 322–40 (2010).

¹¹This rule was established by the U.S. Supreme Court’s decision in *Pinkerton v. United States*, 328 U.S. 640, 645–47 (1946).

¹²See *infra* Part I.

¹³See, e.g., Supplemental Brief for the United States at 3, *Al Bahlul v. United States* (No. 11-1324), 2013 U.S. App. LEXIS 8120 (D.C. Cir. Jan. 9, 2013).

war.”¹⁴ Relying in part on historical arguments published by one of its own attorneys, the government essentially asserts that the Guantánamo commissions can prosecute conspiracy simply because U.S. military commissions did so in the past; the government asserts that prior use saves the current charge from *ex post facto* concerns.¹⁵ But this argument has several critical flaws, as well as potentially serious adverse consequences for American military personnel if it were to be adopted by U.S. appellate courts.

First, past practices in criminal law are insufficient to establish a crime’s contemporary validity. Any first year law student can identify a range of crimes, from witchcraft to homosexual sodomy, that were previously prosecuted in American courts but which are no longer recognized as valid offenses.¹⁶ The law of war has evolved even more dramatically than U.S. domestic law since the mid-19th century, so there is actually greater reason for skepticism about charges sourced in that body of law.¹⁷ The law of war was still in its infancy during the American Civil War, which is the source of most “precedents” claimed to justify conspiracy charges today.¹⁸ The majority of current war-crimes law dates back only to the post-World War II period, and has seen recent additional development in the practices and governing directives of modern international courts such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC).¹⁹ It is thus impossible to credibly assert that a charge from a prior age can be

¹⁴ See, e.g., Charlie Savage, *Who Decides the Laws of War?*, N.Y. TIMES, Jan. 26, 2013, <http://www.nytimes.com/2013/01/27/sunday-review/military-tribunals-and-international-war-crimes.html>.

¹⁵ See Petition of the United States for Rehearing en Banc at 7–9, *Al Bahlul v. United States* (No. 11-1324), 2013 U.S. App. LEXIS 8120 (D.C. Cir. Mar. 5, 2013); Brief for the United States at 62–63, *Al Bahlul v. United States* (No. 11-1324), 2013 U.S. App. LEXIS 8120 (D.C. Cir. July 10, 2013). The article the government relies upon is Haridimos V. Thravalos, *History, Hamdan, and Happenstance: “Conspiracy by Two or More to Violate the Laws of War by Destroying Life or Property in Aid of the Enemy,”* 3 HARV. NAT’L SEC. J. 223 (2012).

¹⁶ E.g., compare *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia statute making homosexual sodomy illegal), with *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding a Texas statute outlawing homosexual sodomy unconstitutional).

¹⁷ For a brief overview of this historical development, see David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 128–35 (2005); *infra* Part II.

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part II.

prosecuted today without engaging in a critical analysis of its continued legitimacy.

Second, the very notion of a “U.S. common law” contradicts the essential nature of the law of war, which has always been understood to be a subset of public international law.²⁰ Every credible legal commentator has clearly understood this fact; indeed, the United States relies on the law of war as a shield to protect its military personnel from non-conforming foreign national laws.²¹ After the Second World War, for example, the Army convicted enemy officers who had tried American personnel in compliance with a Japanese statute, the Enemy Airmen Act, for denial of a fair trial in violation of the international law of war.²²

Third, careful scrutiny of the historical record shows that it does not actually support the conclusion that past U.S. military commissions prosecuted inchoate conspiracies as a war crime.²³ This point was made by Justice Stevens in a portion of his 2006 opinion for the Court in *Hamdan v. Rumsfeld*, speaking for a four-justice plurality.²⁴ (Justice Kennedy, who cast the fifth overall vote for the majority, felt it unnecessary to reach the validity of the charge since the Court had already decided to halt Hamdan’s trial on other grounds.)²⁵ While Stevens’ arguments have been criticized,²⁶ his most important conclusions have not been persuasively rebutted.

Finally, judicial adoption of the government’s reliance on unilateral domestic precedents, effectively the “U.S. common law of war” argument, will put American service personnel at significant risk in future conflicts.²⁷ If the United States can hold foreign personnel criminally accountable for violating “national” laws of war, other nations can and will assert the same authority.²⁸ Suppose, for example, that the United States struck Iranian nuclear facilities and some U.S. aircrews were shot down and captured in

²⁰ See *infra* Part IV.

²¹ *Id.*

²² See U.N. WAR CRIMES COMM’N, *Trial of Lieutenant-General Shigeru Sawada and Three Others*, in 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948); U.N. WAR CRIMES COMM’N, *Trial of General Tanaka Hisakasu and Five Others*, in 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 66 (1948).

²³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 603–04 (2006) (Stevens, J., plurality opinion).

²⁴ *Id.*

²⁵ *Id.* at 655 (Kennedy, J., concurring in part).

²⁶ See, e.g., Thravalos, *supra* note 15, at 240–52.

²⁷ See *infra* Part IV.

²⁸ *Id.*

the process. Iran would then be able to claim entitlement to try, and even execute them, based on its ability to find examples of past “war crimes” in 2,500 years of Persian history.²⁹ The principle of estoppel, now recognized as a rule of customary international law, would logically bar U.S. objection to such trials.³⁰

A unique challenge in analyzing historical U.S. military commission jurisprudence is that these tribunals have been used in three distinct roles, each invoking separate legal authority.³¹ They were first used to prosecute ordinary crimes, such as such as murder and theft, falling outside the scope of U.S. military law in Mexican territory.³² Legal authority for this use was based on the invading commander’s responsibility to maintain order in occupied enemy territory, a role now termed “military government.”³³ The Civil War saw military commissions assume additional roles as martial law courts in U.S. territory and law-of-war tribunals.³⁴ In both the military government and martial-law roles, commissions apply forms of “domestic” law, while they have always applied actual international law in the law-of-war role.³⁵ Military government and martial-law courts are territorial in nature, exercising legal authority only in areas under the actual geographic responsibility of the commander directing their employment.³⁶

A further complication, as Justice Stevens’ noted in *Hamdan*, is that early military commissions often concurrently exercised multiple bases of jurisdiction.³⁷ Tribunals applying martial law or military-government

²⁹ *Id.*

³⁰ *See, e.g.*, ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 8 (2nd ed. 2010).

³¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–96 (2006) (Stevens, J., plurality opinion) (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831–46 (2nd ed. 1920), available at http://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf). Winthrop’s treatise is often pinpoint cited to the star “*” paging conforming to the second edition of 1896. For clarity, this article will follow the practice of other sources cited herein and pinpoint cite to the pages of the most widely available edition, the U.S. Government Printing Office’s 1920 reprint, which is available online from the Library of Congress.

³² *See, e.g.*, Glazier, *supra* note 5, at 31–34.

³³ This term seems to have been first used by Chief Justice Chase in his concurring opinion in *Ex Parte Milligan*, 71 U.S. 2, 142 (1866) (Chase, C.J., concurring). *See, e.g.*, WINTHROP, *supra* note 31, at 799 (crediting Chief Justice Chase as the source of the martial law/military government distinction).

³⁴ Glazier, *supra* note 5, at 40–46.

³⁵ *Hamdan*, 548 U.S. at 596 n.27.

³⁶ WINTHROP, *supra* note 31, at 836.

³⁷ *See, e.g.*, *Hamdan*, 548 U.S. at 596 n.27.

authority, in whole or in part, could have tried inchoate conspiracy under domestic law that placed the offender on notice of their liability to prosecution for this offense; dedicated law-of-war tribunals could not.³⁸

The Guantánamo commissions can only sit as law-of-war courts today, however.³⁹ They have no legitimate source of domestic legal jurisdiction since the Cuban naval base was acquired through an open-ended lease; the base is neither occupied enemy territory nor U.S. national territory under martial law.⁴⁰ And most of the conduct being tried there took place halfway around the world in areas well outside any U.S. territorial authority.⁴¹ So, while the law-of-war jurisprudence of prior commissions has largely been superseded due to the evolution of that law, the jurisprudence of military government and martial-law commissions is wholly inapposite to the current trials.

This article argues that the Guantánamo military commissions, as law-of-war tribunals, are legally limited to prosecuting offenses recognized by the international law regulating armed conflict and that conspiracy is thus outside the legitimate scope of their jurisdiction. Part I will briefly review the development of the list of charges authorized for trial by the Guantánamo military commissions, focusing on the origins and subsequent judicial consideration of the conspiracy charge. Part II will examine the overall evolution of the international law of armed conflict including specific issues related to the existence *vel non* of conspiracy as a war crime. Part III will critique the historical arguments made by the government in its filings together with the more detailed account offered by military commission researcher and prosecution staff member, Haridimos Thravalos, in a Harvard National Security Journal article.⁴² It will show that past commissions prosecuting conspiracy either did so based on domestic law alone, a combination of domestic law and outdated understandings of the law of war, or else used the term “conspiracy” with respect to completed, rather than inchoate, conduct. Finally, Part IV will identify the real dangers posed to US military personnel by judicial adoption of the government’s reliance on domestic precedents.

³⁸ See *infra* Part III.

³⁹ *Hamdan*, 548 U.S. at 597.

⁴⁰ *Id.*

⁴¹ E.g., Charge Sheet in *U.S. v. Hamdan*, Appellate Exhibits AE 1-25 at 1–8, available at <http://www.defense.gov/news/1%20AE%20001-025%20Redacted.pdf>.

⁴² Thravalos, *supra* note 1415.

The idea that Guantánamo military commissions today can prosecute inchoate conspiracy because prior American military commissions have essentially grandfathered the charge against ex post facto concerns is wrong on two counts.⁴³ First, the historical record simply does not support the claim that inchoate conspiracy was prosecuted as a distinct charge by dedicated law-of-war military commissions in the past.⁴⁴ Even if it had been, however, subsequent evolution of the law of war would have invalidated those precedents by the time of the conduct currently being charged.

I. CONSPIRACY AND THE GUANTÁNAMO MILITARY COMMISSIONS

The Authorization for the Use of Military Force (AUMF),⁴⁵ enacted a week after 9/11, provided the legal basis to invoke authority from the law of war for the preventative detention of America's adversaries and for their trial for any war crimes committed.⁴⁶ Two months later, President George W. Bush issued a military order authorizing the use of military commissions to try suspected terrorists.⁴⁷ He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary" to actually conduct trials.⁴⁸ On April 30, 2003, the Department of Defense (DOD) issued Military Commission Instruction No. 2 (MCI No.2), setting forth an "illustrative" list of offenses which the commissions could try.⁴⁹ It acknowledged that "[n]o offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."⁵⁰ But the order ignored the extensive scholarly commentary on war crimes and the enumeration of offenses in international agreements such as the

⁴³ *See id.*

⁴⁴ *Id.* at 281.

⁴⁵ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

⁴⁶ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066–72 (2005).

⁴⁷ Military Order of Nov. 13, 2001 Concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 919 (2002), *reprinted in* 10 U.S.C. § 801 (2006).

⁴⁸ *Id.* at 920.

⁴⁹ DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION 1 at 2 (2003) [hereinafter MCI No. 2], *available at* <http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf>.

⁵⁰ *Id.* at 1.

statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵¹ and the International Criminal Court (ICC)⁵² and simply listed offenses without any supporting justification or citations to legal authority.⁵³ The eighteen offenses listed as “war crimes” in part 6.A.⁵⁴ were not controversial, but some of the “other offenses triable by military commission” in part 6.B., such as “Murder by an Unprivileged Belligerent,”⁵⁵ lacked obvious precedent as war crimes.⁵⁶ Part 6.C. then intermixed forms of liability, such as “aiding and abetting” and “command/superior responsibility,” with separate inchoate offenses from the Anglo-American legal tradition, such as “solicitation” and “conspiracy,”⁵⁷ although the latter are not generally recognized by international law.⁵⁸

Salim Ahmed Hamdan, a Yemeni detained at Guantánamo, was charged with conspiracy in 2004.⁵⁹ He brought a federal habeas petition challenging the validity of both the military commission and the conspiracy charge.⁶⁰ District Judge James Robertson halted the commission in November 2004, ruling that its procedures violated both the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions.⁶¹ Eight months later, a D.C. Circuit Court of Appeals panel, which included current Chief Justice John Roberts, reversed that decision, holding that these issues should be deferred until the trial was completed.⁶²

The Supreme Court then granted certiorari and returned a 5-3 decision in Hamdan’s favor.⁶³ Justice Stevens penned the majority decision, which

⁵¹U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/RES/25704 (May 3, 1993) [hereinafter “ICTY statute”].

⁵²Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter “Rome Statute”].

⁵³See MCI No. 2, *supra* note 49, at 4–22.

⁵⁴*Id.* at 4–12.

⁵⁵*Id.* at 12–16.

⁵⁶See *infra* note 287 and accompanying text.

⁵⁷MCI No. 2, *supra* note 49, at 16–22.

⁵⁸The four Justices joining the plurality opinion in *Hamdan v. Rumsfeld* agreed, for example, that conspiracy was not a violation of the law of war. *Hamdan v. Rumsfeld*, 548 U.S.557, 598–613 (2006).

⁵⁹See *id.* at 569.

⁶⁰*Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

⁶¹*Id.* at 173.

⁶²*Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005).

⁶³*Hamdan*, 548 U.S. at 563.

noted that “trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure,”⁶⁴ before adopting Judge Robertson’s conclusion that the “commission convened to try Hamdan lacks power to proceed because its structure and procedure violate both the UCMJ and the Geneva Conventions.”⁶⁵ Four justices also concluded that conspiracy was not a war crime, but Justice Kennedy, who cast the overall deciding fifth vote, felt it unnecessary to reach that question since the Court had already agreed to halt the trial.⁶⁶ Writing for the remaining plurality on this point, Justice Stevens noted that the alleged conspiracy spanned 1996–2001, predating the conflict with al Qaeda, and that nothing in Hamdan’s alleged conduct actually violated the law of war.⁶⁷

At President Bush’s urging, Congress responded to Hamdan by enacting the MCA 2006, adding a new Chapter 47A to U.S. Code Title 10 immediately after the UCMJ to provide statutory rules for the military trial of “alien unlawful enemy combatants . . . for violations of the law of war and other offenses triable by military commission.”⁶⁸ The offenses codified by the MCA are logically derived from MCI No. 2, with the first eleven following the same unique order in which the charges are listed as in the instruction.⁶⁹ The MCA added several new crimes, however, including “providing material support for terrorism,” that lack obvious precedent in the law of war.⁷⁰ The MCA also makes more explicit the requirement that the offense of “aiding the enemy” requires a “breach of an allegiance or duty to the United States,” and included “conspiracy” as a stand-alone offense.⁷¹

The MCA was specifically intended to allow trial for conduct completed before its enactment, somewhat confusingly granting jurisdiction over offenses “before, on, or after September 11, 2001.”⁷² Like MCI No. 2

⁶⁴ *Id.* at 567.

⁶⁵ *Id.*

⁶⁶ *Id.* at 655 (J. Kennedy, concurring in part).

⁶⁷ *Id.* at 598–600 (plurality opinion).

⁶⁸ MCA 2006, *supra* note 6, § 948b, at 2602.

⁶⁹ *Compare id.* at 2625–27, with MCI No. 2, *supra* note 49, at 4–8.

⁷⁰ MCA 2006, *supra* note 6, § 950v(b)(25).

⁷¹ *Compare id.* § 950v(b)(26), with MCI No. 2, *supra* note 49, at 14–15 (defining aiding the enemy); *see id.* § 950v(b)(28) (defining conspiracy).

⁷² MCA 2006, *supra* note 6, § 948d(a).

before it, the statute recognized that commission jurisdiction might be challenged on ex post facto grounds.⁷³ Congress therefore declared:

§ 950p. Statement of substantive offenses

(a) PURPOSE.—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 before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.⁷⁴

The MCA crafted a two-tiered appellate process, creating an intermediate “Court of Military Commission Review” (CMCR) modeled on each service’s regular first-tier Court of Criminal Appeals, while relying on the Court of Appeals for the D.C. Circuit as the second level.⁷⁵

The first Guantánamo “conviction” was Australian David Hicks’s March 2007 guilty plea to a single charge of providing material support to terrorism.⁷⁶ Hicks had to renounce all appellate rights in exchange for a nine-month sentence.⁷⁷ This waiver departs from court-martial practice where a defendant cannot give up the right to appeal in a plea agreement.⁷⁸

⁷³ See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 45 (2013), available at <http://www.fas.org/sgp/crs/natsec/R41163.pdf>; see also MCI No. 2, *supra* note 49, at 22.

⁷⁴ MCA 2006, *supra* note 6, § 950p.

⁷⁵ MCA 2009, *supra* note 9, § 950(b–g); ELSEA, *supra* note 73, at 52–54.

⁷⁶ See generally Charge Sheet at 3, *United States v. Hicks*, available at <http://www.defense.gov/news/d20070301hicks.pdf>; see also *Hicks v. Bush*, Civil Action No. 02–299(CKK), 2007 WL 902303, at *1 (D.D.C. March 23, 2007) (*citing* *Hicks v. Bush*, 397 F. Supp. 2d 36, 38 (D.D.C. 2005)).

⁷⁷ See, e.g., Josh White, *Australian’s Plea Deal Was Negotiated Without Prosecutors*, WASH. POST, Apr. 1, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100976.html>.

⁷⁸ RULES FOR COURTS-MARTIAL (RCM) 705(c)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The second case to reach judgment, and first actual trial, was Hamdan's.⁷⁹ He was accused of both conspiracy and providing material support to terrorism, but was convicted only of the latter.⁸⁰ After confirming that Hamdan would be given credit for sixty-one months of time served, the trial panel sentenced him to a total of sixty-six months.⁸¹

The final Bush military commission case was that of Ali Hamza al Bahlul.⁸² Al Bahlul refused to mount a defense after being denied representation by counsel of his own nationality or the right of self-representation as a fallback.⁸³ He was convicted of "conspiracy," "providing material support for terrorism," and "solicitation to commit murder" and sentenced to life in prison.⁸⁴ Although al Bahlul freely admitted that he was a member of al Qaeda and worked for Osama bin Laden,⁸⁵ there is nothing in his role as an al Qaeda propagandist (helpfully described in a report by government witness Evan F. Kohlmann) which violates the law of war.⁸⁶

After President Barack Obama decided to continue commission use under his administration, Congress enacted the MCA 2009, essentially reenacting the 2006 law with some modest procedural improvements.⁸⁷ The 2009 version now clarifies that conduct must take place "in the context of and associated with hostilities" to be subject to military jurisdiction.⁸⁸

⁷⁹United States v. Hamdan, 801 F. Supp. 2d 1247 (USCMCR 2011).

⁸⁰See Charge Sheet at 1–8, United States v. Hamdan, 801 F. Supp. 2d 1247 (USCMCR 2011) (CMCR 09–002), available at <http://www.defense.gov/news/1%20AE%20001-025%20Redacted.pdf>; see also Carol Rosenberg, *Full Panel To Decide Bin Laden Driver's Appeal*, MIAMI HERALD, Sept. 4, 2010, <http://www.cageprisoners.com/learn-more/news/item/526-full-panel-to-decide-bin-laden-drivers-appeal?tmpl=component&print=1>.

⁸¹See Joe McMillan, *The United States on Trial*, in THE GUANTÁNAMO LAWYERS 182–83 (Mark P. Denbeaux & Jonathan Hafetz, ed., 2009).

⁸²United States v. Al Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011).

⁸³See Record of Trial: 1st Volume of Review Exhibits at 8–13, 66–68, United States v. Al Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011) (No. 04003) [hereinafter "al Bahlul transcript"].

⁸⁴*Al Bahlul*, 820 F. Supp. 2d at 1155–57, 1231.

⁸⁵See al Bahlul transcript *supra* note 83, at 148, 161.

⁸⁶Evan F. Kohlmann, *Inside As-Sahaab: The Story of Ali al-Bahlul and the Evolution of Al-Qaida's Propaganda* 1, 1–6 (Dec. 2008), <http://www.webcitation.org/query?url=http%3A%2F%2Fwww.nefafoundation.org%2Fmiscellaneous%2FFeaturedDocs%2Fnefabahluhsahaa%2Fb1208.pdf&date=2008-12-03>.

⁸⁷For a comparison of the 2006 and 2009 MCA versions, see ELSEA, *supra* note 73, at 36–52.

⁸⁸MCA 2009, *supra* note 9, § 950p(c).

The Obama commissions have resolved four cases, all by plea deals. Ibrahim Ahmed Mahmoud al Qosi pleaded guilty to conspiracy and providing material support to terrorism in exchange for a two-year sentence.⁸⁹ Second, Omar Khadr accepted a plea deal requiring him to admit to conspiracy, providing material support to terrorism, spying, and both “murder” and “attempted murder” “in violation of the law of war” in exchange for an eight-year sentence with an expectation of repatriation to serve most of it in Canada.⁹⁰ Third, Noor Uthman Mohammed pleaded guilty to conspiracy and providing material support to terrorism and agreed to testify against unspecified detainees in exchange for a thirty-four month sentence.⁹¹ Finally, Majid Khan, a Pakistani citizen whose parents are legal residents of Baltimore,⁹² pleaded guilty to the same five charges as Omar Khadr.⁹³

A. *Post-Conviction Review By the CMCR*

The only two commission cases formally amenable to appeal, the actual trial convictions of Hamdan and al Bahlul, made slow progress through the review process.⁹⁴ Hamdan was released in January 2009 after finishing his sentence in Yemen, but the initial Convening Authority review was not completed until July of that year.⁹⁵ The CMCR then heard oral arguments in

⁸⁹Jane Sutton, *U.S. Cuts Prison Sentence for Bin Laden's Cook*, REUTERS, Feb. 9, 2011, <http://www.reuters.com/article/2011/02/10/us-guantanamo-sudan-idUSTRE7190I120110210>.

⁹⁰See Andrew Mayeda & Juliet O'Neill, *Guantanamo Jury Slams Khadr with Symbolic 40-year Sentence*, POSTMEDIA NEWS, Oct. 31, 2010, <http://www.canada.com/news/Guantanamo+jury+slams+Khadr+with+symbolic+year+sentence/3755142/story.html>; Charge Sheet at 1–4, *United States v. Khadr*, 717 F. Supp. 2d 1215 (USCMCR 2007), available at <http://www.defense.gov/news/Nov2005/d20051104khadr.pdf>.

⁹¹See Carol Rosenberg, *Sudanese War Criminal Turns Government Witness*, MIAMI HERALD, Feb. 18, 2011, <http://www.miamiherald.com/2011/02/18/2074391/sudanese-war-criminal-at-guantanamo.html>.

⁹²See Carol Rosenberg, *Guantanamo Plea Deal Unveils New Trial Strategy*, MIAMI HERALD, Feb. 27, 2012, <http://www.miamiherald.com/2012/02/27/v-fullstory/2664336/guantanamo-plea-deal-unveils-new.html>.

⁹³See Peter Finn, *Guantanamo Detainee Majid Khan Pleads Guilty, Promises Cooperation*, WASH. POST, Feb. 29, 2012, http://www.washingtonpost.com/world/national-security/guantanamo-detainee-majid-khan-pleads-guilty-promises-cooperation/2012/02/29/gIQAVuIaiR_story.html.

⁹⁴See *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1323 (USCMCR 2011); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1264 (USCMCR 2011).

⁹⁵See *Hamdan*, 801 F. Supp. 2d at 1259–69 (providing chronology of Hamdan's trial and convening authority review).

January 2010, but after eight months without a decision from the initial panel, the five judges remaining on the full court announced that they would reconsider the case en banc, and new oral arguments for both al Bahlul and Hamdan were heard in March 2011.⁹⁶ The CMCR finally released an eighty-six page opinion upholding Hamdan's conviction in June 2011, nearly three years after the trial's conclusion and two and a half years after his release.⁹⁷

The fundamental issue before the CMCR in these cases was whether providing material support for terrorism and conspiracy were actual violations of the law of war.⁹⁸ If they were not, then their inclusion in the MCA in 2006 logically represented an impermissible ex post facto enactment; both men had been in custody long before the MCA was first passed.⁹⁹ The *Hamdan* decision took a shotgun approach, throwing out a number of, at best, loosely connected arguments.¹⁰⁰ It conflated treatment of terrorism under domestic laws with that under the law of war, and cited heavily to historical events without considering the fact that the rapidly evolving law may have subsequently rendered them moot.¹⁰¹ The CMCR seemed to give significant weight to the post-World War II International Military Tribunal and follow-on Nuremberg tribunals' treatment of membership in criminal organizations despite the fact that this was controversial at the time, was omitted from the recognized "Nuremberg Principles," and has not been included in subsequent international agreements on war crimes.¹⁰²

It took three more months for the CMCR to hand down its decision in *al-Bahlul*.¹⁰³ That decision essentially restated the content of the *Hamdan* opinion, addressing the validity of conspiracy as a war crime by relying on most of the same arguments used to justify the material support charges in

⁹⁶ Carol Rosenberg, *Full Panel To Decide Bin Laden Driver's Appeal*, MIAMI HERALD, Sept. 4, 2010, <http://www.cageprisoners.com/learn-more/news/item/526-full-panel-to-decide-bin-laden-drivers-appeal?tmpl=component&print=1>; *Hamdan*, 801 F. Supp. 2d at 1253 n.1; See Larkin Reynolds, *Summary of CMCR Al Bahlul Argument*, LAWFARE (Mar. 17, 2011, 10:50 PM), <http://www.lawfareblog.com/2011/03/summary-of-cmcr-al-balhul-argument/>.

⁹⁷ *Hamdan*, 801 F. Supp. 2d at 1323.

⁹⁸ See, e.g., *id.* at 1260, 1264; *Al Bahlul*, 820 F. Supp. 2d at 1220–30.

⁹⁹ See, e.g., *Hamdan*, 801 F. Supp. 2d at 1259.

¹⁰⁰ See *id.* at 1264–1322.

¹⁰¹ See, e.g., *id.* at 1265–1270 (trials of Nazi war criminals after WWII).

¹⁰² See *id.* at 1304–09.

¹⁰³ *Al Bahlul*, 820 F. Supp. 2d at 1141.

the earlier decision, supplemented by extensive discussion of various national anti-terrorism laws.¹⁰⁴

B. Post-Conviction Review by the D.C. Circuit Court of Appeals

The decisions in both *Hamdan* and *al Bahlul* were appealed to the D.C. Circuit.¹⁰⁵ The government curiously abandoned the legal positions it had used to win in the CMCR and argued instead that Congress can codify crimes based on a “U.S. common law of war” without having to conform its enactments to international law.¹⁰⁶ Oral arguments were heard in *Hamdan* in May 2012.¹⁰⁷ The panel handed down a 3-0 decision five months later,¹⁰⁸ commonly styled as “Hamdan II,”¹⁰⁹ overturning Hamdan’s conviction on the grounds that providing material support to terrorism was not a recognized war crime and that the MCA did not “authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred.”¹¹⁰

Although Hamdan II specifically addressed only material support, its logic seems equally applicable to conspiracy and solicitation, which law-of-war experts generally agree are not recognized war crimes either.¹¹¹ The government ultimately agreed, filing a brief arguing that Hamdan II had been wrongly decided, but conceding that the logic of its holding called for

¹⁰⁴ See *id.* at 1220–23.

¹⁰⁵ See *Hamdan v. United States*, 696 F.3d 1238, 1240–41 (D.C. Cir. 2012); *Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 8120 (D.C. Cir. Jan. 25, 2013).

¹⁰⁶ See, e.g., Steve Vladeck, *Government Brief in Hamdan: The Looming Article III Problem...*, LAWFARE (Jan. 17, 2012, 8:28 PM), <http://www.lawfareblog.com/2012/01/government-brief-in-hamdan-the-looming-article-iii-problem/>.

¹⁰⁷ *Hamdan*, 696 F.3d at 1238.

¹⁰⁸ The author submitted an amicus brief in support of Hamdan, arguing that there was no historical precedent or support in international law for the prosecution of providing material support to terrorism by military commissions. Brief of *Amicus Curiae* Professor David Glazier in Support of Petitioner and Reversal at 10–27, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2011) (No. 11-1257), 2011 WL 5871042.

¹⁰⁹ See, e.g., Alan Rozenshtein, *An Explainer on Hamden II, Al-Bahlul, and the Jurisdiction of the Guantanamo Military Commissions*, LAWFARE (April 26, 2013, 10:30 AM), <http://www.Lawfareblog.com/2013/04/an-explainer-on-hamdan-ii-al-bahlul-and-the-jurisdiction-of-the-guantanamo-military-commissions/>.

¹¹⁰ *Hamdan*, 696 F.3d at 1246–47.

¹¹¹ See *infra* Part III.B.3 for a discussion of the problematic nature of conspiracy as a LOW offense.

al Bahlul's verdict to be invalidated as well.¹¹² The court obliged, issuing a one-page per curiam order in January 2013, vacating al Bahlul's conviction.¹¹³ The government then petitioned for en banc reconsideration of *al-Bahlul*,¹¹⁴ arguing that Congress had simply codified offenses that "have been triable by U.S. military commissions since the Civil War."¹¹⁵ The brief provided four specific examples of past U.S. trials and a citation to an article by Haridimos Thralalos (an attorney in the military commission prosecution office although not identified as such in the brief) "citing numerous authorities establishing that conspiracy has traditionally and lawfully been triable in U.S. military commissions."¹¹⁶ These authorities are discussed in Part III *infra*. The court agreed to rehear *al Bahlul* en banc with oral arguments held on September 30, 2013.¹¹⁷

Although only the two defendants who actually went to trial, Hamdan and al Bahlul, preserved a right to appeal, these charges also provided the sole basis for conviction for Hicks, al Qosi, and Muhammad, and figured prominently against Khadr and Khan.¹¹⁸ If the full circuit reaches the same result as the initial panels, it will leave just two partial convictions to show for a decade of military commission prosecution efforts.

II. CONSPIRACY AND THE INTERNATIONAL LAW OF WAR

Despite frequent scholarly references to rules regulating warfare which date back to ancient civilizations and well known historic sources such as

¹¹²Supplemental Brief for United States at 9–22, *Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 8120 (D.C. Cir. Jan. 9, 2013) available at <http://www.lawfareblog.com/wp-content/uploads/2013/01/Government-Supplemental-Brief-Al-Bahlul.pdf>.

¹¹³*Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 8120 (D.C. Cir. Jan. 25, 2013).

¹¹⁴Petition of the United States, *supra* note 15, at 1.

¹¹⁵*Id.* at 1.

¹¹⁶*Id.* at 7–8.

¹¹⁷See Wells Bennett & Raffaella Wakeman, *Al-Bahlul v. United States: Oral Argument Recap*, LAWFARE (Sep. 30, 2013 9:09 PM), <http://www.lawfareblog.com/2013/09/al-bahlul-v-united-states-oral-argument-recap/>. The filing deadline for appealing Hamdan II elapsed without government action before the al Bahlul order was issued; the government now must prevail in the review of the latter case if it is to resurrect use of either charge.

¹¹⁸For a detailed critique of the charges in Khadr's case, see David Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr*, LOY.-LA LEGAL STUD. PAPER NO. 2010-37, Aug. 31, 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669946.

Sun Zi, the codification of the modern law of effectively dates back just to the mid-19th century.¹¹⁹ At the time of the United States' war with Mexico, for example, there was essentially no law governing military conduct in occupied territory; the policies adopted in that conflict as a matter of prudent discretion by Army commanding general Winfield Scott would evolve into legal mandates over the next six decades.¹²⁰ And the most common "war crime" Scott punished in Mexico, "encouraging opposing troops to desert," is clearly no longer recognized as such—the U.S. government engaged in large-scale psychological operations in the 1990 Gulf War trying to persuade Iraqi personnel to do just that.¹²¹

Law-of-war experts consider the 1856 Paris Declaration Respecting Maritime Law to be the oldest document still reflecting an "authoritative exposition of the law" in force today.¹²² The U.S. Civil War years, the era from which most of the claimed historic examples of the prosecution of conspiracy as a law-of-war offense are taken, thus marked the infancy of the modern development of the law of war.¹²³ It may seem a fine distinction, but serving officers and legal commentators of that day made as much, if not more, mention of "customs" or "usages" of war as they did "law."¹²⁴ When they did speak of the law and usages of war, it was typically in a much broader sense than the term "law of war" is used today, encompassing not just rules governing combatants, but also what we now recognize as martial law and military-government matters as well.¹²⁵ For example, Colonel William Winthrop's treatise on military law lists "offenses in violation of the laws and usages of war" tried during the Civil War, as including:

breaches of the law of non-intercourse with the enemy such as running or attempting to run a blockade; 'unauthorized contracting, trading or dealing with, enemies, or furnishing

¹¹⁹ See, e.g., GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 3–7 (2010).

¹²⁰ See Glazier, *supra* note 17, at 135–73.

¹²¹ See David Glazier, Note, *Kangaroo Court of Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2033 (2003).

¹²² See, e.g., ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 1, 47–49 (3d ed. 2000).

¹²³ See *infra* Part III.

¹²⁴ See Gary Solis, *Review of Lincoln's Code: The Laws of War in American History*, 107 AM. J. INT'L L. 279, 281–82 (2013).

¹²⁵ See generally WINTHROP, *supra* note 31.

them with money, arms, provisions, medicines, [etc.]; conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit, or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, [etc.], assisting his people or friends to cross the lines into his country, acting as guide to his troops: aiding the escape of his soldiers held as prisoners of war,” secretly recruiting for his army, negotiating and circulating his currency or securities—as “confederate notes or bonds in the late war,” hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, [etc.]; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, [etc.]; acting as a spy, taking life or obtaining any advantage by means of treachery ; abuse or violation of a flag of truce; violation of a parole or of an oath of allegiance or amnesty, breach of bond given for loyal behaviour, good conduct, [etc.]; “ resistance to the constituted military authority, bribing or attempting to bribe officers or soldiers or the constituted civil officials; kidnapping or returning persons to slavery in disregard of the President’s proclamation of freedom to the slaves, of January 1, 1863.¹²⁶

Most of these offenses involve breaching a duty of loyalty to the United States, which could be prosecuted under “domestic” law (including both martial law and military government), but would hardly constitute “war crimes,” which are now recognized as being “serious violations” of the international law of war entailing individual criminal liability and subject to universal jurisdiction, meaning any state can try and punish their violation.¹²⁷ Out of this entire list of offenses, only “taking life or obtaining

¹²⁶WINTHROP, *supra* note 31, at 839–40.

¹²⁷*See, e.g.*, ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 53, 267 (2d ed. 2010).

any advantage by means of treachery; abuse or violation of a flag of truce” seems to correlate with any currently recognized war crime.¹²⁸

Francis Lieber, a Columbia University professor, made perhaps the most significant single contribution to the overall development of the law of war during the latter half of the nineteenth century.¹²⁹ Lieber drafted a progressive compilation of the laws and usages of war approved by President Lincoln in 1863 and distributed throughout the Union Army as the “Instructions for the Government of Armies of the United States in the Field,” under cover of General Order No. 100.¹³⁰ Commonly known as the “Lieber Code,” it profoundly influenced subsequent law-of-war development as it was copied by several other militaries and provided the substantive core of the codification of the laws of land warfare in multilateral agreements negotiated at The Hague in 1899 and 1907.¹³¹

Concurrent developments in Switzerland resulted in the founding of the organization which became the current International Committee of the Red Cross (ICRC) and the drafting of the first Geneva Convention in 1864.¹³² The convention provided the first formal humanitarian protections for the sick and wounded in the field, as well as making medical personnel immune from attack and establishing the red cross as an emblem for protected medical personnel and facilities.¹³³ This model of legal development continued through the twentieth century. In 1929, at the ICRC’s request, the Swiss government held conferences to update the existing Geneva Convention and approve a second agreement covering prisoners of war.¹³⁴

The treatment of conspiracy in war crimes tribunals in the aftermath of World War II – the era that really saw the major development of the entire body of war-crimes law – is particularly significant for understanding the

¹²⁸ WINTHROP, *supra* note 31, at 840. Compare, e.g., this list, with the extensive list of war crimes found in the Rome Statute, *supra* note 52, art 8.

¹²⁹ See, e.g., Francis Lieber, *A Biography That is a Thesis Upon His Work and Influence*, N.Y. TIMES, Jan. 27, 1900, <http://query.nytimes.com/gst/abstract.html?res=9A01E6D81239E733A25754C2A9679C946197D6CF>.

¹³⁰ See Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, THE AVALON PROJECT (May 12, 2014), [http://avalon.law.yale.edu/19th_century/lieber.](http://avalon.law.yale.edu/19th_century/lieber.asp)

asp.

¹³¹ See, e.g., Glazier, *supra* note 17, at 157–66.

¹³² *Id.* at 129.

¹³³ See Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 1, Aug. 22, 1864, 22 Stat. 940, 11 L.N.T.S. 440.

¹³⁴ See, e.g., Glazier, *supra* note 17, at 133.

current law. The London Charter of the International Military Tribunal at Nuremberg (IMT) authorized the trial of conspiracy to commit crimes against peace,¹³⁵ hardly an inchoate offense given the fact that Germany launched a World War resulting in some 20 million deaths. The charter did not, however, make mention of conspiracy in regard to war crimes.¹³⁶ The tribunal found no difficulty in holding that rules contained in the 1907 Hague Land Warfare Regulations had attained binding status as customary international law by 1939 and that their violation could be prosecuted as war crimes,¹³⁷ even though the treaty to which they are annexed only required states to make reparations for any breaches, saying nothing about criminal liability.¹³⁸ So the IMT certainly could have found conspiracy to commit war crimes to be a triable offense if the judges had considered it to be a recognized part of the customary law of war.

American prosecutors did endeavor to charge conspiracy in follow-on national trials conducted by the United States at Nuremberg.¹³⁹ But the American trial judges sitting in those cases met together in a joint session to consider the validity of the conspiracy charge and concluded that it did not constitute a recognized violation of the law of war that they could try.¹⁴⁰

Subsequent twentieth century development of international criminal law continued this trend. The international community did agree to adopt inchoate offenses in the context of the 1948 Genocide Convention because of the unique nature of this “crime of crimes.”¹⁴¹ But is important to note that the Convention constituted the original legal definition of this crime and so there was no claim that this reflected a codification of existing customary international law – it was a deliberate effort to create new law based on the consent of nations joining the treaty who were thus free to

¹³⁵ Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

¹³⁶ See *id.*

¹³⁷ *International Military Tribunal (Nuremberg), Judgment and Sentences*, October 1, 1946, 41 AM. J. INT'L L. 172, 218, 248 (1947).

¹³⁸ Convention Respecting the Laws and Customs of War on Land (Hague IV), art. 3, Oct. 18, 1907, in ROBERTS & GUELF, *supra* note 122, at 70.

¹³⁹ See U.N. WAR CRIMES COMM'N, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 90 (1949).

¹⁴⁰ *Id.*

¹⁴¹ See Convention on the Prevention and Punishment of the Crime of Genocide art. 3(b), Dec. 9, 1948, 78 U.N.T.S. 277, 280 (conspiracy to commit genocide).

create whatever law they saw fit.¹⁴² The four Geneva Conventions adopted the following year were the first international treaties to specifically define a range of war crimes (in the form of “grave breaches”) but make no mention of “conspiracy.”¹⁴³ No other subsequent international criminal law agreement, such as the statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have recognized conspiracy to commit war crimes.¹⁴⁴ Moreover, the Rome Statute of the International Criminal Court, which provides the most comprehensive listing of war crimes in any international agreement to date,¹⁴⁵ does not include the inchoate offenses of solicitation or conspiracy to commit war crimes.¹⁴⁶ It does not even include conspiracy to commit genocide in its coverage of that offense even though it could have based on the Genocide Convention.¹⁴⁷ Efforts by individual states to define war crimes lacking clear support in the Rome Statute or other modern international legal documents should thus be viewed very skeptically.

III. A CRITIQUE OF CURRENT CONSPIRACY JUSTIFICATIONS

The government provided its initial argument in support of conspiracy as a violation of an “American common law of war” in its comparatively short brief petitioning for en banc reconsideration of *al Bahlul*.¹⁴⁸ More helpfully, it cited a law review article on the subject by military commission

¹⁴²See, e.g., Steven R. Ratner, *The Genocide Convention After Fifty Years*, AM. SOC’Y INT’L L. PROC., 1998, at 1, 1–2 (“the General Assembly affirmed that genocide was a crime under international law and asked the Economic and Social Council to draft a treaty . . . [t]he resultant instrument . . . defines genocide, declares it a crime under international law, [and] obligates states to prevent and punish it under their domestic law or through an international court).

¹⁴³See, e.g., 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 IV]. Each of the four Geneva Conventions includes an article identifying “grave breaches,” that is to say, war crimes, which States are called upon to criminalize subject to universal jurisdiction. See, e.g., *id.* art. 146–47.

¹⁴⁴See ICTY statute, *supra* note 51; see also S.C. Res. 955, U.N. Doc. S/RES/955, at 2 (Nov. 8, 1994) (adopting the Statute of the International Criminal Tribunal for Rwanda) [hereinafter “ICTR statute”].

¹⁴⁵Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT’L L. 979, 990 (2005).

¹⁴⁶Rome Statute, *supra* note 52, art. 8, at 94–98.

¹⁴⁷Compare Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277, 280, with Rome Statute, *supra* note 52, art. 6, at 93.

¹⁴⁸Petition of the United States for Rehearing en Banc, *supra* note 15, at 12.

prosecution staff attorney Haridimos Thravalos.¹⁴⁹ In its subsequent full merits brief, it more fully developed the argument that unilateral historical U.S. commission practice justified the use of conspiracy, providing material support to terrorism, and solicitation charges, although it curiously downplayed the “U.S. common law of war” phraseology which it had baldly advanced in its petition for rehearing.¹⁵⁰ Because each of the historical examples the government relies upon are more fully explored in Thravalos’ article, this part focuses on assessing that work, although all its conclusions are equally applicable to the briefs.¹⁵¹

Thravalos first attracted public notice in March 2012 by arguing in favor of conspiracy as a legitimate military commission charge in a guest post on the national-security-focused Lawfare blog.¹⁵² He averred that the Hamdan plurality had concluded that conspiracy was not a valid military commission charge “based on bad history.”¹⁵³ Thravalos explained that:

[t]he Hamdan plurality found that conspiracy was not a violation of the law of war under domestic precedents for three reasons. First, the plurality noted that the Court in *Ex parte Quirin*, 317 U.S. 1 (1942), did not affirmatively decide whether conspiracy to violate the law of war was itself a violation of the law of war triable by law-of-war military commission, thus negating the case’s precedential value. Second, the plurality found that Captain Charles Roscoe Howland’s 1912 treatise—which listed conspiracy “to violate the laws of war by destroying life or property in aid of the enemy” as a violation of the law of war tried by law-of-war military commissions during the Civil War—was based upon faulty scholarship. Third, the plurality observed that Colonel William Winthrop, in his 1896 treatise (reprinted in 1920), recognized the error in Captain Howland’s earlier scholarship, and excluded “conspiracy of

¹⁴⁹ *Id.* at 8.

¹⁵⁰ See Brief for the United States, *supra* note 15, at iv (I.A. 3–5), 33–49.

¹⁵¹ See Thravalos, *supra* note 15.

¹⁵² See Benjamin Wittes, *Haridimos Thravalos on Hamdan, Conspiracy, and History*, LAWFARE (Mar. 25, 2012, 11:46 PM), <http://www.lawfareblog.com/2012/03/haridimos-thravalos-on-hamdans-conspiracy-and-history/>.

¹⁵³ *Id.*

any kind from his own list of offenses against the law of war.”¹⁵⁴

Thravalos went on to address these criticisms in detail, summarizing in the equivalent of a few printed pages most of the content of the full-length law journal article he published several months later under the same title as his Lawfare post.¹⁵⁵ He also provided a helpful link to a set of thirteen documents posted online that figured prominently in his analysis.¹⁵⁶

The arguments Thravalos chose to focus on about the validity of the conspiracy charge were addressed by the plurality because these were arguments offered in the government’s brief defending the charge.¹⁵⁷ But Thravalos’ work does not respond to the full scope of the plurality’s reasoning; it effectively ignores, for example, points Justice Stevens made with respect to the limits of international law and historical U.S. military commission conspiracy charges being based on completed acts rather than mere inchoate agreements.¹⁵⁸ Even a complete repudiation of Justice Stevens’ arguments on the points Thravalos addresses thus fails to definitively establish the validity of conspiracy as a military-commission charge against the full range of potential critique.

Despite the generous criticism Thravalos’ offers of the plurality opinion in the areas he has chosen to contest, careful scrutiny reveals that his own arguments are more problematic than those of Justice Stevens. While Thravalos may well have the better of several minor points, he falls substantially short of prevailing with respect to his larger goal of showing that conspiracy is validly triable by the Guantánamo military commissions.¹⁵⁹ The critique that follows responds to the more complete exposition of Thravalos’ arguments in his full-length article¹⁶⁰ (the “extended dance version” as Lawfare founder Ben Wittes playfully termed it¹⁶¹).

¹⁵⁴ *Id.*

¹⁵⁵ See Thravalos, *supra* note 15.

¹⁵⁶ See Haridimos V. Thravalos, *List of Attachments*, <https://webpace.utexas.edu/rmc2289/2012.03.25.pdf> (last visited Mar. 10, 2014).

¹⁵⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 604–05 (Stevens, J., plurality opinion).

¹⁵⁸ Compare Thravalos, *supra* note 15, with *id.* at 603–04.

¹⁵⁹ See generally Thravalos, *supra* note 15, at 224.

¹⁶⁰ See *id.*

¹⁶¹ Benjamin Wittes, *Readings: Haridimos Thravalos on Conspiracy and Military Commissions: The Extended Dance Version*, LAWFARE, (May 14, 2012, 4:00 PM),

A. *Constitutional Authority for Military Commissions*

Thravalos begins his article with a section on constitutional authority for conducting military commissions, stating without explanation, “[A]ny serious assessment of the legality of military commissions must begin by examining the Constitution of the United States”¹⁶² After identifying some (but far from all) of the challenges posed in locating and analyzing past military-commission jurisprudence,¹⁶³ he contends that “the precise constitutional source of military commission jurisdiction is an issue of contention today.”¹⁶⁴ He maintains that “[t]hree competing schools of thought have emerged over where the constitutional power to convene military commissions is lodged.”¹⁶⁵ Thravalos identifies these as the following: (1) congressional authority under the define-and-punish clause (Article I, Section 8, Clause 10); (2) congressional authority to declare war (Article I, Section 8, Clause 11); and (3) presidential authority as Commander in Chief.¹⁶⁶ He believes, however, that the best answer is an “amalgam” of congressional and executive authority.¹⁶⁷ He asserts that in practice “confusion plagued all three branches of government . . . as to the precise constitutional source of military commission jurisdiction,” citing a variety of sources including congressional hearings, a 2001 Bush Administration Office of Legal Counsel memo,¹⁶⁸ and several Supreme Court decisions.¹⁶⁹ He suggests that the courts themselves have been inconsistent based on differences between the 1866 *Ex Parte Milligan* concurring opinion, the World War II-era decisions in *Ex Parte Quirin* and *In re Yamashita*, and the subsequent 1952 holding in *Madsen v. Kinsella*.¹⁷⁰

<http://www.lawfareblog.com/2012/05/haridimos-thravalos-on-conspiracy-and-military-commissions-the-extended-dance-version/>.

¹⁶²Thravalos, *supra* note 15, at 225, 227.

¹⁶³Compare Thravalos, *supra* note 15, at 225–36, with Glazier, *supra* note 5, at 7–8; see also David Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration*, LOY.-LA LEGAL STUD. PAPER NO. 2010-32, at 11–12, December 13, 2010, available at <http://ssrn.com/abstract=1658590> (identifying problematic issues with relying on individual Civil War trials).

¹⁶⁴Thravalos, *supra* note 15, at 228.

¹⁶⁵Thravalos, *supra* note 15, at 230.

¹⁶⁶Thravalos, *supra* note 15, at 230.

¹⁶⁷Thravalos, *supra* note 15, at 230–31.

¹⁶⁸For a critique of this memo, see Glazier, *Still a Bad Idea*, *supra* note 163, at 29–31.

¹⁶⁹Thravalos, *supra* note 15, at 232–34.

¹⁷⁰Thravalos, *supra* note 15, at 233–34.

Aside from the fact that the *Milligan* concurrence lacks any legal effect, this conclusion fails to appreciate that these cases span three different types of commissions: *Milligan* dealt with a martial law tribunal sitting in Indiana when federal courts were open; *Quirin* and *Yamashita* dealt with law-of-war trials of enemy belligerents; and *Madsen* addressed the trial of a U.S. military wife by a military-government court deriving its authority from the law of belligerent occupation.¹⁷¹ The better answer is, thus, not that the Court has been inconsistent, but rather that the constitutional authority for military commissions varies according to the role being served.

The *Milligan* majority explicitly held that military-commission use as martial-law tribunals was constitutionally prohibited when regular civil courts were available.¹⁷² (The Supreme Court would also later overturn the use of martial-law commissions in Hawaii during World War II, although that decision was reached on statutory grounds, obviating the need to reach the constitutional question.¹⁷³)

Quirin and *Yamashita*, in contrast, addressed law-of-war commissions, holding that the tribunals at issue in those cases were justified on the basis of congressional authority.¹⁷⁴ While not ruling out the possibility of concurrent executive authority, the unanimous *Quirin* opinion upheld the military-commission trial of eight Nazi saboteurs on the basis that in “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.”¹⁷⁵ And in *Yamashita*, the Court reaffirmed the congressional basis for law-of-war commissions, confirming that *Quirin* had held that the constitutional authority was sourced in the “define and punish” clause:

In *Ex parte Quirin*, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to “define and punish . . .

¹⁷¹ See *Ex parte Milligan*, 71 U.S. 2, 7 (1866); *Ex parte Quirin*, 317 U.S. 1, 21–23 (1942); *In re Yamashita*, 327 U.S. 1, 9 (1946); *Madsen v. Kinsella*, 343 U.S. 341, 342–43 (1952).

¹⁷² 71 U.S. at 121.

¹⁷³ *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946).

¹⁷⁴ See *Quirin*, 317 U.S. at 28; *Yamashita*, 327 U.S. at 7.

¹⁷⁵ 317 U.S. at 28.

Offences against the Law of Nations . . .,” of which the law of war is a part, had by the Articles of War recognized the “military commission” appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.¹⁷⁶

It is only in the third category of military-commission jurisdiction, their use as military-government courts in occupied enemy territory, that the Court has found them to be sourced in executive authority under the Commander-in-Chief clause.¹⁷⁷ The Court first addressed these commissions in *Jecker v. Montgomery*, where it distinguished them from actual “courts”:

[N]either the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the law of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms.¹⁷⁸

After cursory passing acknowledgment of the validity of occupation courts in several intervening cases, the Court squarely considered their authority in the 1952 case *Madsen v. Kinsella*, dealing with a challenge to the validity of a military trial of an American dependent in occupied Germany.¹⁷⁹ As implied by the *Jecker* dicta, the Court found that this authority belonged in substantial part to the executive, holding that:

In the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief

¹⁷⁶ 327 U.S. at 7 (citations omitted).

¹⁷⁷ See generally, *Madsen v. Kinsella*, 343 U.S. 341, 346 n.9 (1952) (citing WINTHROP, *supra* note 31, at 831. *Id.* at 346–47).

¹⁷⁸ 54 U.S. 498, 515 (1851).

¹⁷⁹ See 343 U.S. at 346–47 (list of some intervening cases can be found in n.9).

of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.¹⁸⁰

B. Thravalos' Analysis of Justice Stevens Opinion

Thravalos follows his introductory discussion of the constitutional basis for military commissions with a detailed assessment of Justice Stevens' Hamdan plurality opinion on the invalidity of conspiracy as a law-of-war violation.¹⁸¹ He notes that the "plurality bifurcated its analysis between domestic and international law precedents," but relegates addressing the international-law issues to a single, long footnote that states that the text of his article "is limited to an analysis of the domestic law precedents that demonstrate historic U.S. practice."¹⁸² While it is certainly the prerogative of authors to frame or limit their analyses as they see fit, it is imperative to recognize that there is no precedential authority for the idea that a U.S. military commission may prosecute a law-of-war offense without demonstrating that it constitutes a recognized violation of the international law of war.¹⁸³

1. Is there an "American common law of war?"

Although Justice Stevens uses the term "American common law of war" once in the introduction to Part VI of the *Hamdan* decision, it is the only place that this term appears in Supreme Court jurisprudence.¹⁸⁴ Stevens' supporting citation refers to the page in the unanimous *Quirin* decision where the Court declares:

Congress . . . 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

¹⁸⁰ *Id.* at 348 (emphasis added).

¹⁸¹ See Thravalos, *supra* note 15, at 236.

¹⁸² Thravalos, *supra* note 15, at 237–38, n.56.

¹⁸³ See *supra* Part II.

¹⁸⁴ 548 U.S. 557, 613 (citing to *Ex parte Quirin*, 317 U.S. 1, 28).

particularly the law of war, are cognizable by such tribunals.¹⁸⁵

This “American” law thus only differs from the international law in that it may not be fully coextensive with the latter; *Quirin* suggests that there may be constitutional limitations which would preclude U.S. military tribunals from applying the full body of the international law; it does not even hint that the United States can *exceed* international law by defining its own war crimes not recognized by the international community.¹⁸⁶ The international law of war thus serves as an outer limit on the potential scope of U.S. military tribunal war crimes prosecutions, much as the cases and controversies defined by Article III of the U.S. Constitution serve as an outer limit on the potential jurisdiction of the federal courts.

2. *Quirin* and Conspiracy – Precedential or Not?

Thralalos launches his detailed critique of the *Hamdan* plurality opinion by addressing the fact that Justice Stevens discounted the precedential value of the conspiracy charge leveled against the Nazi saboteurs in 1942 (one of four counts against them).¹⁸⁷ But Stevens was correct in noting that the *Quirin* decision did *not* endorse the validity of this charge.¹⁸⁸ Instead, Chief Justice Stone’s opinion held that military-commission trials had been implicitly authorized by Congress in Article 15 of the Articles of War with respect to “offenders or offenses that by statute or by the law of war may be triable by such military commissions.”¹⁸⁹ Because judicial review of military trials was considered to be limited to the single issue of jurisdiction in that era,¹⁹⁰ it was only necessary for the *Quirin* Court to establish that one of the offenses with which the saboteurs were charged constituted a recognized violation of the law of war to uphold the trial. Chief Justice

¹⁸⁵ 317 U.S. at 28.

¹⁸⁶ *See, e.g., id.* at 29 (“[T]here are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are out of that class of offenses constitutionally triable only by jury.”).

¹⁸⁷ Thralalos, *supra* note 15, at 240.

¹⁸⁸ *See Hamdan*, 548 U.S. at 605 (citing to *Quirin*, 317 U.S. at 23).

¹⁸⁹ *See Quirin*, 317 U.S. at 27.

¹⁹⁰ *See* U.N WAR CRIMES COMM’N, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 121 (1947) [hereinafter “UNWCC 1”].

Stone expediently did so by focusing solely on the first specification of the first charge which alleged that the petitioners:

[B]eing enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities, and war materials within the United States.¹⁹¹

After upholding the validity of this specification, thus determining that the saboteurs were liable to military-commission trial, the Court explicitly noted that it had no need to consider the validity of the other charges, and it dutifully refrained from commenting on them.¹⁹²

Thravalos' argues that, given the Court's failure to consider the validity of the conspiracy charge, the views of the Executive Branch should receive significant deference on this point, noting that President Roosevelt personally reviewed and approved the convictions.¹⁹³ He claims that there are also other "plain and unambiguous World War II-era precedents" in favor of conspiracy that the plurality failed to note, including the case of whom he calls "the so-called '1944 Nazi Saboteurs,'" American William Curtis Colepaugh and German Erich Gimpel.¹⁹⁴ He notes their February 1945 convictions were also upheld by senior military officials, including the Judge Advocate General of the Army, Myron C. Cramer, and President Harry S. Truman.¹⁹⁵

Several issues, ranging from minor to quite problematic, can be raised with this account. First, a relatively fine point: the 1944 defendants were widely regarded as "spies" and not "saboteurs."¹⁹⁶ Referring to them as "so-

¹⁹¹ 317 U.S. at 36 (quoting the saboteurs' charges and specifications).

¹⁹² *See id.* at 47–48.

¹⁹³ Thravalos, *supra* note 15, at 240–41.

¹⁹⁴ *Id.* at 241.

¹⁹⁵ *Id.* at 241–42.

¹⁹⁶ *See* FRANCIS BIDDLE, IN BRIEF AUTHORITY 325–43 (1962). (Having read extensively on this case in the course of discussing it in three prior law review articles dating back to 2003, I have only encountered one other source which ever refers to Colepaugh and Gimpel as saboteurs rather than spies. Then-Attorney General Francis Biddle exercised artistic license in titling Chapter

called . . . saboteurs,” seems to be a strategic ploy to suggest substantial legal commonality between the events of 1942 and 1944/45 and imply that the *Quirin* precedent should be dispositive of any question with regard to the later trial.¹⁹⁷ Unlike the 1942 infiltration, however, which was aimed at sabotaging American war production, Gimpel and Colepaugh’s primary mission was espionage.¹⁹⁸ Contemporary accounts consistently described their role as spying and referred to the men as “spies,” not “saboteurs.”¹⁹⁹

Although the trial was conducted in secret with no outside observers permitted, the Army provided regular sanitized summaries to the media.²⁰⁰ According to a report from the first day of the trial, the defense challenged the validity of the conspiracy charge based on its failure to state any overt acts, but the government duplicitously argued that this charge was used in the 1942 saboteur case and upheld by the Supreme Court, so it must also be valid in this case.²⁰¹ The commission apparently accepted this logic.²⁰²

Twenty-one of his autobiography, which deals largely with the 1942 case before devoting less than one page to the 1944–45 incident as “The Ten Saboteurs.” *Id.* at 325. But in his actual discussion of Gimpel and Colepaugh on page 342 at the end of that chapter, he describes them as “espionage agents.” *Id.* at 342. So the reference is only an implicit one made for the sake of crafting a concise chapter heading.)

¹⁹⁷ See Thravalos, *supra* note 15, at 241.

¹⁹⁸ See, e.g., *Spy Suspect Told of Trip by U-Boat*, N.Y. TIMES, Feb. 8, 1945, at 34 (reporting that Colepaugh “frankly and voluntarily admitted that he came to this country in a Nazi submarine in order to gather information and transmit to the Reich by short-wave radio, but he denied any intention of committing sabotage); *Spy Suspects Had 2-Year Task Here*, N.Y. TIMES, Feb. 10, 1945, at 7 (reporting that they were tasked with “[t]he transmission of war information of value to Germany, especially in the engineering field, including data on shipbuilding, airplanes and rockets”). Given the total secrecy associated with the Manhattan Project at the time, it is not surprising that the military commission reporting said nothing about Gimpel’s actual mission focus.

¹⁹⁹ See, e.g., Richard Willing, *The Nazi Spy Next Door*, USA TODAY, Feb. 27, 2002, <http://usatoday30.usatoday.com/news/nation/2002/02/28/usatcov-traitor.htm>.

²⁰⁰ See *Two Spy Suspects on Trial for Lives*, N.Y. TIMES, Feb. 7, 1945, at 15 (reporting that “[a]lthough the proceedings were conducted in the strictest secrecy, the Second Service Command released summaries of the proceedings after both morning and afternoon sessions of the trial. These summaries, written by an Army captain detailed to the task, and censored by the seven officers of the commission, were the sole source of information).

²⁰¹ See, e.g., *id.* (reporting on the initial motion at the start of the trial challenging conspiracy); *2 Spies Sentenced to Die By Hanging*, N.Y. TIMES, Feb. 15, 1945, at 1, 7 (reporting the Government’s reliance on *Ex parte Quirin* to counter the challenge to the conspiracy charge).

²⁰² See *Two Spy Suspects on Trial for Lives*, *supra* note 200, at 15 (Col. Clinton J. Harrold, president of the commission, denied the two motions).

Since the primary source documents constituting the Executive branch review of this case can only be found in the National Archives, Thravalos has helpfully posted excerpts online labeled as a series of “attachments.”²⁰³ But careful reading shows that they do not really support his arguments. His Attachment No. 1, for example, which is the report of the Special Board of Review established in the Army Judge Advocate General’s office to examine the spies’ record of trial, deceptively implies that *Ex parte Quirin* upheld all four charges against the saboteurs, including conspiracy, when in fact the Court quite pointedly stopped after validating the offense of passing through the U.S. lines.²⁰⁴ Interestingly, the Board also took pains to note that “there was abundant evidence of overt acts committed by Colepaugh and Gimpel in pursuance of the conspiracy,” suggesting that they were not really comfortable with the holding that an inchoate conspiracy charge was a sufficient basis for prosecution in a law-of-war military commission.²⁰⁵

While Thravalos also calls for deference to the judgment of Judge Advocate General Cramer and President Truman, there is nothing in the supporting documents indicating that either man actually focused on the validity of the conspiracy charge.²⁰⁶ Cramer’s endorsement restates the commission charges but says *nothing* about their validity, addressing only the sufficiency of the evidence and the issue of clemency for Colepaugh.²⁰⁷ The General Order reporting the President’s action merely states that he received a record of the trial and ultimately commuted the sentences of both men to life at hard labor; there is no evidence that he actually read the record or gave any consideration to the validity of the charges.²⁰⁸

²⁰³ See Thravalos, *supra* note 156.

²⁰⁴ United States v. Colepaugh, Opinion of Special Board of Review, Mar. 27, 1945, in Thravalos, *supra* note 156, attachment 1, at 29. The memo ends its substantive discussion of *Quirin* case by stating, “The court, in its per curiam opinion of July 31, 1942, held: “That the charges preferred against petitioners * * * allege an offense or offenses which the President is authorized to order tried before a military commission.” *Id.* at 29.

But as anyone who had read the Court’s full opinion, issued several months later would know, the Court only upheld the first charge against the saboteurs and did not address the validity of the conspiracy count. *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

²⁰⁵ *Id.*

²⁰⁶ See Thravalos, *supra* note 15, at 241–42.

²⁰⁷ See Memorandum from JAG Myron C. Cramer to Secretary of War (Apr. 23, 1945), in Thravalos, *supra* note 156, attachment 2, at 32.

²⁰⁸ See War Dep’t, General Orders No. 52, Jul. 7, 1945, in Thravalos, *supra* note 156, attachment 3.

After Thravalos' article was published,²⁰⁹ the government provided a March 12, 1945 memorandum that it had "just discovered at the St. Louis Branch of the National Archives" to the D.C. Circuit Court of Appeals where al Bahlul's appeal was pending.²¹⁰ The vintage memorandum was prepared by the Attorney General's office "[u]pon request of the board which [was] reviewing the proceedings had against Erich Gimpel and William Curtis Colepaugh" to address the validity of the charge of conspiracy "to commit an offense against the laws of war" and was forwarded to the Army by Tom C. Clark, who signed it as "Assistant Attorney General."²¹¹ Given Clark's position and the common understanding that this was a military trial, one might conclude that this memo should be given the stature reserved for objective Department of Justice analysis, such as that ascribed to the Office of Legislative Counsel (OLC) today. Neither the 1945 memo itself nor the modern government correspondence forwarding it to the D.C. Circuit discloses that Clark formally headed the prosecution team, even though the courtroom proceedings were handled by two Army officers, Major Robert Carey and First Lieutenant Kenneth Graf.²¹² The fact that the Board even requested this opinion reinforces the suspicion that its members had real concerns about the conspiracy charge. The memo provides a series of short excerpts

²⁰⁹The Harvard National Security Journal is an online publication but posts formal semiannual "volumes" consisting of Articles and Essays in .pdf format which look exactly like traditional print journal pieces at periodic intervals and are accessible via Hein Online and Westlaw, in addition to shorter "features" published individually on an ongoing basis. See *Submissions*, HARV. L. SCH. NAT'L SEC. J., <http://harvardnsj.org/submissions/> (last visited April 7, 2014).

²¹⁰Raffela Wakeman, *Bahlul Update: Age-Old Memorandum on the Gimpel and Colepaugh Military Commission*, LAWFARE (Aug. 24, 2012, 3:29 PM), <http://www.lawfareblog.com/2012/08/bahlul-update-age-old-memorandum-on-the-gimpel-and-colebaugh-military-commission/>. The "full-blown law review article" was released May 13, 2012. See Wittes, *supra* note 161.

²¹¹Memorandum from Tom C. Clark, Assistant Attorney General, to Myron C. Kramer, Army Judge Advocate General, LAWFARE (Mar. 12, 1945), <http://www.lawfareblog.com/wp-content/uploads/2012/08/Gimpel-Colepaugh-1945-Memorandum-of-Law.pdf>.

²¹²See MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE 80 (1st ed. 2010); *Spy Trials Open Today*, N.Y. TIMES, Feb. 6, 1945, at 5 (identifying Clark as the first named member of the prosecution team); *Two Spy Suspects on Trial for Lives*, *supra* note 200, at 15 (identifying military attorneys conducting courtroom proceedings); ERICH GIMPEL, AGENT 146, 198 (1st U.S. ed. 2003) (identifying the Army officers as conducting the prosecution case but reporting that the "leading Public Prosecutor of the USA . . . attended as observer and advisor"). Clark was Assistant Attorney General heading the Criminal Division at this time.

from the work of earlier U.S. military-justice commentators, several of which will be discussed in more detail below, before falsely implying that the *Quirin* Court had upheld the conspiracy charge using the precise language that the Board ended up repeating.²¹³ Clark's forwarding memorandum is addressed only to the government, with no indication that the defense was provided a copy.²¹⁴ The Board does not mention the memo's existence in its review, nor is there any evidence that the defense was offered any opportunity to provide its own views or to comment on the Justice Department's submission.²¹⁵

It is hard to see how government officials who either did not specifically address the validity of conspiracy as a law-of-war-violation or who baldly misrepresented the plain holding of a precedential U.S. Supreme Court decision should be given any meaningful deference by the courts on this issue. And it seems questionable whether an apparent *ex parte* filing of which key points are subsequently incorporated into the reported decision of the Board should really be considered as an independent source of additional authority. Indeed, these facts would suggest the need for more careful judicial scrutiny of arguments relying on such evidence rather than grounds for any significant deference.

Thravalos also states, "Colepaugh and Gimpel had their convictions upheld by the U.S. Court of Appeals for the Tenth Circuit".²¹⁶ This is not quite accurate either; only Colepaugh's conviction was reviewed.²¹⁷ More

²¹³ Memorandum from Tom C. Clark, *supra* note 211, at 5. The memo ends its substantive discussion of the validity of the conspiracy charge by stating, "The court, in its per curiam opinion of July 31, 1942, held: That the charges preferred against petitioners. . . allege an offense or offenses which the President is authorized to order tried before a military commission." *Id.* (internal quotation marks omitted). But as anyone who had read the Court's full opinion, issued several months later, would know, the Court only upheld the first charge against the saboteurs and did not address the validity of the conspiracy count. *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

²¹⁴ See Memorandum from Tom C. Clark, *supra* note 211, at 1; Opinion of Special Board of Review, *supra* note 204, at 26.

²¹⁵ See Opinion of Special Board of Review, *supra* note 204.

²¹⁶ Thravalos, *supra* note 15, at 242.

²¹⁷ See *Colepaugh v. Looney*, 235 F.2d 429, 429 (10th Cir. 1956). Tom C. Clark (appointed by Harry S. Truman to the Court in 1949, on what he later identified as the greatest mistake of his presidency: "It isn't so much that he's a bad man. It's just that he's such a dumb son of a bitch. He's about the dumbest man I think I've ever run across") implicitly acknowledged his previous participation in the case by recusing himself from the cert petition. See *Colepaugh v. Looney*, 352 U.S. 1014, 1014 (1957) (reporting that "Mr. Justice CLARK took no part in the consideration . . . of this application"); *Tom C. Clark*, NNDB (last visited Feb. 22, 2014, 7:17 PM),

to the point, the Tenth Circuit relied extensively on the Supreme Court's *Quirin* opinion to uphold Colepaugh's trial for having passed surreptitiously behind American lines without addressing the validity of the conspiracy charge.²¹⁸ And the Tenth Circuit found that the trial was justified because U.S. courts had recognized "a body of international common law known as the law of war."²¹⁹ The decision thus offers no support for the claim that there is a separate American common law of war, and highlights the centrality of the misrepresentations of the actual scope of the *Quirin* decision in subsequent discussions of the validity of conspiracy charges.

Thravalos goes on to assert that Douglas MacArthur issued guidance for post-World War II Pacific theater trials that allowed conspiracy to be charged even after the major post-World War II trials had questioned the validity of doing so, but Thravalos provides no evidence that such charges were ever actually levied.²²⁰ He cites MacArthur's September 24, 1945 order providing regulations for military commission trials, which does seem to specifically identify conspiracy to violate the law of war as a stand-alone offense when it includes "participation in a common plan or conspiracy to accomplish any of the foregoing" at the end of a list of specific offenses.²²¹ The order then goes on to say, "Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."²²² So MacArthur's guidance clearly anticipated the role of conspiracy as a mode of liability in addition to any possible use as a standalone offense.

What Thravalos does not point out is that the September order was short-lived. MacArthur replaced it in December 1945 with regulations issued in his role as Supreme Commander of the Allied Powers (SCAP) that, in fact, conformed much more closely to the format of those prescribed for the International Military Tribunals at Nuremberg and Tokyo.²²³ In the December regulations, conspiracy is only identified as an offense in conjunction with "[t]he planning, preparation, initiation or waging of a war

<http://www.nndb.com/people/337/000167833/> (emphasis omitted) (quoting MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 225–26 (1973)).

²¹⁸ Colepaugh, 235 F.2d at 431–32.

²¹⁹ *Id.*

²²⁰ Thravalos, *supra* note 15, at 242–43 n.73.

²²¹ *Id.*; UNWCC 1, *supra* note 190, at 114 (quoting General Douglas MacArthur).

²²² *Id.* at 115.

²²³ *See id.* at 113–15.

of aggression or a war in violation of international treaties”²²⁴ Since wars of aggression were actually launched in both Europe and Asia, this “conspiracy” was not an inchoate crime. There is no provision in the December order for trying conspiracy to commit a war crime.²²⁵

Curiously, the U.S. commander in China issued regulations for military-commission trials in January 1946 patterned on the superseded September order.²²⁶ It also included the same language quoted above about “[l]eaders, organizers, instigators [etc.]” identifying conspiracy as a mode of liability.²²⁷ As Thravalos correctly observes, U.S. commissions in China would have necessarily been law-of-war commissions, since the United States was not an occupying power there as it was in Germany and Japan, nor did it have any claim to sovereignty as it did in the Philippines.²²⁸ Once again, however, it would be a mistake to assume that any support can be drawn from this order for the existence of an “American” law of war.

The United States prosecuted Lothar Eisentrager and twenty-six other German nationals for continuing to assist the Japanese war effort in China after the Nazi capitulation²²⁹ in a case that eventually reached the U.S. Supreme Court as *Johnson v. Eisentrager*.²³⁰ The defendants argued that the United States could not validly exercise criminal jurisdiction over them in China, but the U.S. military commission disagreed because, as the United Nations War Crime Commission summarized the commission’s decision in the case, it concluded:

[A] war crime, however, is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction

²²⁴ *Id.* at 114 (citing General Douglas McArthur, Supreme Commander Allied Powers, Regulations Governing the Trials of Accused War Criminals, Dec. 5, 1945).

²²⁵ *See id.*

²²⁶ Compare the quoted jurisdictional wording from the China Regulations at *id.* at 115, with those of the Sept. and Dec. regulations. *Id.* at 114–15.

²²⁷ *Id.* at 115.

²²⁸ Thravalos, *supra* note 15, at 242–43 n.73.

²²⁹ U.N. WAR CRIMES COMM’N, 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 8 (1949) [hereafter “UNWCC 14”].

²³⁰ 339 U.S. 763, 763 (1950). This case later played a key role in the Bush administration’s decision to locate the post-9/11 detention facility at Guantanamo Bay, Cuba.

and that only the *lex loci* can be applied are therefore without any foundation.²³¹

Thravalos reports that MacArthur issued another directive permitting trial of conspiracy as war crime in 1950 in his role as Commander-in-Chief of the United Nations Command during the Korean conflict.²³² Unlike the other orders he cites from this era, this document does clearly post-date the significant post-World War II trials, but the Supreme Court's 1948 holding that MacArthur was acting as an Allied rather than an American commander in his role as the Supreme Allied Commander in Japan applied with equal, if not even greater, force to his U.N. role in Korea.²³³ Although seeming to depart from the international-law rules as they had come to be recognized by that day, this action logically has no direct relevance as precedent for an "American common law of war" because it addresses United Nations rather than United States tribunals.

Thravalos also shows that the Army's "1956 Field Manual governing The Law of Land Warfare, [] explicitly stated that conspiracy to commit 'war crimes' was 'punishable.'"²³⁴ This would seem to be more significant than MacArthur's actions because, although Thravalos does not say this, the 1956 manual was still in effect as of mid-2013.

The drafters of the manual arguably got the law wrong as it stood by the time of publication with respect to the validity of inchoate war crimes.²³⁵ But in any event, this source undermines the government's larger claims about the ability to rely on unilateral American practice in a law-of-war tribunal. Thravalos cites only to one of the consecutively numbered paragraphs in the manual, (¶ 500), neglecting to mention that it appears in Section II of Chapter 8.²³⁶ Chapter 8 is titled "Remedies for Violation of International Law: War Crimes"²³⁷ while Section II bears the heading "Crimes Under International Law."²³⁸ A subsequent paragraph, (¶ 498), identifies "war crimes" as one of three categories of acts "which constitute[]

²³¹ UNWCC 14, *supra* note 229, at 15.

²³² Thravalos, *supra* note 15, at 243.

²³³ Hirota v. MacArthur, 338 U.S. 197, 199 (1949).

²³⁴ Thravalos, *supra* note 15, at 243 (citing DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 500 (July 1956)).

²³⁵ See discussion *supra* Part II.

²³⁶ DEP'T OF THE ARMY, *supra* note 234, at 178.

²³⁷ *Id.* at 176.

²³⁸ *Id.* at 178.

a crime under international law,²³⁹ while another subsequent paragraph, (¶ 505.e.), explicitly states that “enemy personnel charged with war crimes *are tried directly under international law* without recourse to the statutes of the United States.”²⁴⁰ Given that the United States government now concedes that conspiracy is *not* a violation of the international law of war (confirming that the inclusion of this offense in FM 27-10 was erroneous), the manual effectively repudiates the idea that conspiracy can be tried by law-of-war military commissions today.

3. Issues Related to Historical Military Justice Commentary

Thravalos next turns to a critical examination of Justice Stevens’ treatment of conspiracy in the work of two late-19th/early-20th century military-justice commentators, Charles Roscoe Howland and William Winthrop.²⁴¹ Given the larger issue of the validity of conspiracy under the modern international law of armed conflict, it seems like an unnecessary and unproductive diversion for the Supreme Court to have spent so much time and effort trying to make sense of historical minutiae from this era of much less developed law. Even if U.S. commentators believed in good faith that conspiracy was a recognized war crime in the 19th century, that fact would do little to establish its continued vitality today as noted in Part II above. The vast majority of offenses that the commentators (cited by the plurality and discussed at length by Thravalos) identify as violations of the law of war are no longer recognized as such today, even *if* they were violations at the time these authors wrote. Nevertheless, the fact that the Court elected to go down this path makes it relevant to assess these arguments.

Much dispute centers on text and supporting citations in the digests of opinions the Army Judge Advocate General published between 1865 and

²³⁹ *Id.*

²⁴⁰ *Id.* at 180–81 (emphasis added).

²⁴¹ Thravalos, *supra* note 15, at 244. Howland is really a minor legal figure; as West Point graduate, he served five years in the Judge Advocate General’s office and later commanded a U.S. military prison, but spent most of his career (both before and after his JAG service) as an Infantry officer. See, e.g., H. LaT. C., *Charles R. Howland 1895*, W. POINT ASS’N OF GRADUATES (Sept. 21, 1946), <http://apps.westpointaog.org/Memorials/Article/3644/> (providing an obituary by a West Point classmate). The 1912 digest was apparently his only significant legal writing. *Id.* Winthrop, by comparison, is a widely known military justice commentator who has been called “the Blackstone of American military law” by the U.S. Supreme Court. *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957).

1912. As Thravalos explains, in 1865 then-Major William Winthrop put together a formal digest of written legal opinions that had been produced by the Army Judge Advocate General up to that date.²⁴² (Winthrop's biography indicates he did so at the direction of the Judge Advocate General, Joseph Holt.²⁴³) Several updated editions were subsequently produced, each expanding on the previous work by adding more recent opinions. Winthrop authored the editions published in 1866, 1868, 1880, and 1895 (the year of his retirement as a Colonel), while Major Charles McClure produced a 1901 edition and Captain Howland one in 1912.²⁴⁴

Winthrop's 1880 edition was the first to include a representative list of "offences against the laws and usages of war . . . passed upon and punished by military commissions" "during the late war."²⁴⁵ The list included twenty-six specific crimes, ranging from unauthorized trading with the enemy to violating a flag of truce, and ended with "[c]onspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy."²⁴⁶ Support for the use of each of these charges was provided by cryptic citations to a volume and page number of the Record Books of the Office of the Judge Advocate General of the Army (JAG Record Books), which contained a relevant legal opinion or trial review providing persuasive support for one or more of the offenses included in the digest.²⁴⁷ The citation "XXI, 280," for example would be a reference to page 280 of volume 21.²⁴⁸ A side-by-side comparison of language from the relevant editions, which Thravalos prepared, shows that the precise language from Winthrop's 1880 edition detailing offenses triable by military commissions was carried forward verbatim in each subsequent version published through 1912.²⁴⁹ The *only* changes during this thirty-two year span were the insertion of dates for the supporting documents and replacement of the words "late war" with "civil war" (necessitated by the intervening 1898 Spanish-American War) in McClure's 1901 edition, and the conversion of

²⁴² Thravalos, *supra* note 15, at 247.

²⁴³ See JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW* 148–49 (2009).

²⁴⁴ Thravalos, *supra* note 15, at 247–48.

²⁴⁵ *Id.* at 231 n.37, 244, 248 (quoting BVT. COLONEL W. WINTHROP, *A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY* 328 (1880)).

²⁴⁶ See WINTHROP, *supra* note 245, at 329.

²⁴⁷ Thravalos, *supra* note 15, at 250.

²⁴⁸ *Id.*

²⁴⁹ See *Comparison of 1880, 1895, 1901 and 1912 JAG Digests: Offenses Tried by Military Commissions During the Civil War*, in Thravalos, *supra* note 156, attachment 8, at 1.

the JAG Record Book volume numbers from Roman to Arabic numerals in Howland's 1912 update.²⁵⁰

There are two significant areas of contention between Thravalos and Stevens: (1) whether there is in fact historical support from the Civil War era JAG Record books for the charge of conspiracy as a law of war violation and (2) whether Winthrop subsequently concluded that conspiracy was not a war crime, effectively superseding the content of the digests.

Citing to the last of the digests, Howland's 1912 edition, Justice Stevens apparently examined each of the twenty-four specific citations to the JAG Record Books listed as providing precedential support for the list of twenty-six charges asserted to be triable under the law of war.²⁵¹ These citations are common to every edition, starting with Winthrop's 1880 volume. As a result of this review, Stevens concluded that the Record Books supported all the offenses mentioned in the digest *except* conspiracy as a violation of the law of war—an offense for which no prior example seemed to appear in any of the cited cases.²⁵² Stevens noted that Winthrop identifies conspiracy either as an offense prosecutable by martial-law or military-government commissions or as combined ordinary and war crimes, but not as a stand-alone war crime, in his treatise *Military Law and Precedents*.²⁵³ Stevens then made a leap of faith in concluding that Winthrop likely did so as a result of discovering this presumed lack of support in the JAG Record books for this offense.²⁵⁴

Thravalos concludes that Stevens must have been fooled by the fact that Winthrop's treatise was reprinted in 1920 and erroneously believed that the Colonel was still alive at the time of Howland's edition (he had died in 1899).²⁵⁵ In what is definitely a fine piece of archival detective work, Thravalos discovered that the apparent reason for the confusion over whether the digests support the conspiracy charge was an accidental transposition of the labels of two volumes of the JAG Record Books in the Archives at some point after Howland's digest was published, making it impossible to find the requisite support at the cited volume and page.²⁵⁶

²⁵⁰ *Id.* at 2.

²⁵¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 607–08 (2006).

²⁵² *Id.*

²⁵³ *Id.* at 608 (citing to WINTHROP, *supra* note 31, at 839–40 n.5).

²⁵⁴ *Id.*

²⁵⁵ Thravalos, *supra* note 15, at 244–46.

²⁵⁶ *Id.* at 250–52. Thravalos found that the labels of volumes 16 and 21 were switched, resulting in all citations to either volume failing to match up the text present on those pages. *Id.*

Thravalos provides compelling evidence that the actual case relied upon by Winthrop in initially compiling the digests' treatment of this subject was that of William Murphy, who was tried by a military commission at Saint Louis, Missouri in September 1865 for charges relating to the burning of Union steamboats.²⁵⁷ Annotations in the Murphy case file correlate it with the citation to the JAG Record Books in the digests.²⁵⁸

It is nevertheless an open question about where Winthrop actually comes down on the issue of conspiracy as a war crime. Although Thravalos is almost certainly correct that Winthrop had initially used the Murphy case as the basis for including conspiracy in his original 1880 version of the digest, it is entirely possible that by the time of the publication of his final major work during his living years, the 1896 edition of *Military Law and Precedents*, Winthrop had come to conclude that conspiracy was not a proper law-of-war charge. Winthrop may thus have deliberately omitted it from his list of the "violation[s] of the laws and usages of war" commonly made the subject of charges in previous conflicts in that treatise.²⁵⁹ The fact that the 1896 list varies significantly from that in the digests in terms of the substantive offenses listed, the order in which they appear, the names used to describe particular crimes even when they clearly are the same offense, and the citations to actual military orders rather than to pages in the JAG Record Books proves that Winthrop put substantial original work into this section of his treatise.²⁶⁰ If Winthrop did change his mind about conspiracy after producing his last digest, it is entirely predictable that his prior digest language would nevertheless have been carried over into the 1901 and 1912 editions. The authors of those volumes, McClure and Howland, were just updating the work to add JAG opinions issued since the publication of the last prior edition. They could not reasonably have been expected to meticulously scrub all of the pre-existing text concerning historical matters that had not been the subject of further official commentary to see if there were any external developments, such as the publication of a new treatise by a retired military officer, which called those matters into question.

²⁵⁷ *Id.* at 251–55.

²⁵⁸ *Id.*

²⁵⁹ See WINTHROP, *supra* note 31, at 839–40. The list of these offenses in the treatise is similar, but not identical to that in the digest, including more offenses and a different order, and moreover, Winthrop provides supporting citations to specific military orders rather than the JAG Record Books.

²⁶⁰ Compare *id.*, with WINTHROP, *supra* note 31, at 328.

The more important question for the credibility of Thravalos' analysis is whether the rediscovery of the Murphy case actually bolsters the claim for the validity of conspiracy as a modern military-commission charge. The better argument seems to be that it does not.

C. *Murphy and Other "Precedents" Through the Turn of the Century*

Thravalos uses the Murphy case as the launching pad for his discussion of a number of cases dating from the mid-19th century American Civil War through the Philippine Insurrection and Boer War at the turn of the 20th century.²⁶¹ He contends that each of the examples he cites provides support for military-commission prosecution of conspiracy.²⁶² For a number of different reasons, however, it seems that none of these cases actually provide an unqualified example of the prosecution of an inchoate conspiracy offense by a dedicated law-of-war military commission. This means that they really fail to support the validity of conspiracy under *any* purported law of war, "American" or international, today.

Perhaps not surprisingly, given Thravalos' evident pride of discovery, *Murphy* gets by far the lion's share of attention given to these examples.²⁶³ *Murphy* is discussed initially over a span of four pages and then revisited later on in a dozen-page discussion of what Thravalos contends was Supreme Court Justice Samuel Freeman Miller's erroneous overturning of Murphy's military-commission conviction in response to a habeas challenge he heard while riding circuit.²⁶⁴

1. Cases Prosecuting Conspiracy Under Domestic Law

The core issue with respect to the relevance of Murphy's conspiracy charge to modern military commissions is whether or not it was even lodged as an alleged violation of the law of war at the time. Thravalos mistakenly concludes that Murphy's "military commission was a pure law-of-war commission because martial law did not prevail in Missouri during the . . . trial, nor was Missouri enemy-occupied territory subject to military

²⁶¹ See Thravalos, *supra* note 15, at 252–267.

²⁶² See *id.*

²⁶³ Thravalos, *supra* note 15, at 252–55, 268–80.

²⁶⁴ *Id.*

government.”²⁶⁵ He reaches this conclusion despite the contrary opinion of Supreme Court Justice Samuel F. Miller who both participated in the original consideration of *Ex parte Milligan* and then reviewed Murphy’s case while riding the circuit in 1868.²⁶⁶ Thravalos’ logic works today—it is one of the reasons that commentators agree that the Guantanamo commissions today must draw their legal basis from the law of war. But it does not work with respect to the Civil War era, pre-dating the Supreme Court’s decisions in *Ex parte Milligan* and *Quirin* discussed *infra*. The problem with applying Thravalos’s logic to *Murphy* is that it is an ex-post rationalization. At the time of Murphy’s trial, U.S. military commissions frequently exercised martial-law jurisdiction in areas where U.S. courts were open. The initial martial-law order issued by Major General John C. Frémont in Missouri in August 1861, for example, plainly declared that “this is not intended to suspend the ordinary Tribunals of the Country, where the Law will be administered by Civil officers in the usual manner, and with their customary authority.”²⁶⁷ Frémont said this even while specifically authorizing military trials for various categories of offenders, including “All persons engaged in Treasonable correspondence, in giving or procuring aid to the Enemies of the United States, in fomenting tumults, in disturbing the public tranquility by creating and circulating false reports or incendiary documents.”²⁶⁸ President Lincoln went so far as to issue a decree allowing military commissions to try persons interfering with the draft anywhere in the Union before Congress overruled him.²⁶⁹ And Winthrop identifies in the initial 1865 version of his digest, written the year before *Milligan* was decided, a number of opinions allowing the military commission to try U.S. civilians where federal courts were open.²⁷⁰ Even

²⁶⁵ *Id.* at 255. (Martial law had been proclaimed in St. Louis previously, but apparently ended on March 10, 1865. WINTHROP, *supra* note 31, at 824 n.31).

²⁶⁶ Thravalos, *supra* note 15, at 268–73.

²⁶⁷ John C. Fremont, Order of Martial Law Throughout Missouri, Aug. 30, 1861, CIVIL WAR INTERACTIVE (Feb. 23, 2014), <http://www.civilwarinteractive.com/DocsFremontMartialLaw.htm>.

²⁶⁸ *Id.* The controversy over Fremont’s order stemmed from the fact that it endeavored to unilaterally emancipate the slaves of any Missourian taking an active part in the insurrection; that provision of the order proved too forward leaning for the Lincoln administration at this early stage of the war and was quickly countermanded by the President. See BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN’S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 72–73 (2007).

²⁶⁹ See Glazier, *supra* note 121, at 2035–36; Glazier *supra* note 5, at 44–45.

²⁷⁰ See WAR DEP’T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL (1865) (detailing opinions holding U.S. citizens amenable to trial by military commissions during the

more famously, the two military-commission cases heard by the Supreme Court from the war years were both attempts at conducting martial-law trials of civilians in areas where regular courts were open.

The first of these involved Clement L. Vallandigham, “a resident of the State of Ohio and a citizen of the United States, [who] was arrested at his residence and taken to Cincinnati” where he was imprisoned and tried for making a speech critical of the President.²⁷¹ The prosecution was based on the determination that the speech constituted a violation of a “special” order issued by Major General Burnside, who was then the commander of the Military Department of Ohio.²⁷² A petition for habeas corpus was quickly filed on Vallandigham’s behalf, but it was denied after the government defended the validity of Burnside’s use of military authority.²⁷³ Vallandigham later attempted to appeal the trial, but his petition for certiorari was denied by the Supreme Court, which held it had no direct appellate jurisdiction over military commissions.²⁷⁴ The Supreme Court had reached exactly the same result with respect to actual courts-martial before the war.²⁷⁵ But the important takeaway is that the only way that a Union general could issue an order intended to bind American civilians in their own territory and prosecute them for violating that order would have been under the belief that he or she could apply martial-law authority and conduct military trials concurrently with the operation of the state and federal courts that remained open throughout the war.

The more famous and important case was that of Lambdin P. Milligan, a U.S. citizen and long-term resident of Indiana who was arrested at his home for alleged disloyal activity, tried by military commission, and sentenced to hang.²⁷⁶ Milligan was able to get his case before the Supreme Court via a petition for habeas corpus (vice the unsuccessful attempt Vallandigham had made to obtain direct appellate review).²⁷⁷ The Court considered at length the nature of and authority for imposing martial law before concluding that, while martial law “could have been enforced in Virginia, where the national

Civil War). *See also* Thravalos, *supra* note 15, at 247–48 (documenting Winthrop as the author of this edition).

²⁷¹ *Ex parte Vallandigham*, 68 U.S. 243, 244 (1 Wall. 1863).

²⁷² *Id.* at 243–45.

²⁷³ *See, e.g.*, ROBERT BRUCE MURRAY, *LEGAL CASES OF THE CIVIL WAR* 59–70 (2003).

²⁷⁴ *Id.* at 243.

²⁷⁵ *Dynes v. Hoover*, 61 U.S. 65, 74 (20 How. 1857).

²⁷⁶ *Ex parte Milligan*, 71 U.S. 2, 6–7 (4 Wall. 1866).

²⁷⁷ *Id.* at 3.

authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered.²⁷⁸ It is thus unmistakably clear that the Court treated Milligan's prosecution as an exercise of martial law and not as a law-of-war tribunal. (Law-of-war commissions would be upheld even when courts were otherwise open eight decades later by *Ex parte Quirin*, the first case to reach the merits of that specific issue).²⁷⁹ The justices reached this result despite the fact that Milligan was tried by the commission on five separate charges:

1. "Conspiracy against the Government of the United States";
2. "Affording aid and comfort to rebels against the authority of the United States";
3. "Inciting insurrection";
4. "Disloyal practices"; and
5. "Violation of the laws of war."²⁸⁰

Based on this slate of charges, the Supreme Court had to have concluded that the presence of an actual law-of-war charge was insufficient to remove a commission from the martial-law realm when it was mixed with other counts, such as "Conspiracy against the Government of the United States," "Inciting insurrection," and "Disloyal practices," which are logically domestic rather than international violations.²⁸¹ Winthrop was critical of the Court's *Milligan* decision in his treatise and argued for a wider scope of martial-law application than the majority permitted.²⁸² But Winthrop did acknowledge that some Civil War military commissions had gone too far in endeavoring to exercise martial-law jurisdiction in areas too far from any legitimate theater of the war.²⁸³

Winthrop held that there were four categories of persons subject to military-commission jurisdiction:

²⁷⁸ *Id.* at 127.

²⁷⁹ *See Ex parte Quirin* 317 U.S. 1, 29 (distinguishing *Ex parte Milligan* on its facts).

²⁸⁰ *Ex parte Milligan*, 71 U.S. at 58–59.

²⁸¹ *Id.*

²⁸² WINTHROP, *supra* note 31, at 817–18.

²⁸³ *Id.* at 837.

(1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; [and] (4) Officers and soldiers of our own army, or persons serving with it in the field, 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.²⁸⁴

Neither Vallandigham or Milligan can logically fit into any category other than “[i]nhabitants of places or districts under martial law,” providing further evidence that military officials had to have believed that martial law could co-exist with functioning civilian courts prior to *Milligan*.²⁸⁵

While Thravalos seeks to use the fact that Murphy can be classified as an unprivileged belligerent to classify his trial as a law-of-war commission, that finding is far from dispositive.²⁸⁶ The difference between a privileged and unprivileged belligerent is that the former is granted immunity from ordinary domestic law for his acts of violence on behalf of a state, which are judged for compliance with the law of war rather than ordinary national criminal laws.²⁸⁷ The unprivileged belligerent, by comparison, enjoys no such immunity and remains fully liable for prosecution for such common crimes as murder and robbery for any acts of violence or depredation he or she commits.²⁸⁸ This view, which is widely recognized as the law of war today, was clearly emerging even at the time of the Civil War.²⁸⁹ Henry Halleck, the Army's senior general from 1862–64, had touched on this issue in his own treatise on International Law, published in 1861 before his return to active duty.²⁹⁰ Halleck explained that he wrote this book because his Mexican War service had shown that military officers needed to have a ready source of information “on questions of international law growing out

²⁸⁴ *Id.* at 838.

²⁸⁵ *Id.*

²⁸⁶ See Thravalos, *supra* note 15, at 271.

²⁸⁷ See, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 30–31 (2004).

²⁸⁸ See *id.*

²⁸⁹ See, e.g., *id.*

²⁹⁰ See H. W. HALLECK, INTERNATIONAL LAW IV (1861).

of the operations of the war.”²⁹¹ Halleck was later instrumental in the development and publication of the Lieber code. Indeed, his book was an important (although generally under-appreciated) resource for Lieber’s work.²⁹²

Halleck wrote in his treatise that those who carry on war without “commissions or enlistments . . . as any part of the military force of the state” cannot “plead the laws of war in their justification, but they are robbers and murderers, and, as such may be punished” even if the enemy government “winks at their crimes.”²⁹³ Ironically, this same language was cited by the defense in the case of John Y. Beall, one of the cases Thravalos cites in passing. Beall had led a group of southern personnel who infiltrated the North in “citizens dress” and commandeered a Great Lakes steamboat in an unsuccessful attempt to liberate Confederate prisoners held at Johnson’s Island, Ohio.²⁹⁴ He then attempted to derail a passenger train before being captured trying to reach safe haven in neutral Canada.²⁹⁵ Beall wrote south for a copy of his officer’s commission, failing to appreciate that he was not being prosecuted for the *status* of being an unlawful belligerent, but rather for *conduct* violating the laws of war.²⁹⁶ It was his Confederate affiliation which distinguished him from a common criminal and justified the military trial; producing his commission actually supplied a required element of proof.²⁹⁷

An actual unlawful belligerent, however, as Thravalos shows Murphy to be, could only be tried by a law-of-war tribunal by producing evidence of some aspect of his conduct that brought it within the ambit of the law of war. It would have been fully consistent with Murphy’s unprivileged belligerent status for him to have been prosecuted under either ordinary domestic law in a civilian court for any violence he committed or under martial law by a military commission.

²⁹¹ See *id.* (introductory remarks in preface dated May 1861).

²⁹² See Glazier, *supra* note 17, at 155–59.

²⁹³ HALLECK, *supra* note 290, at 386.

²⁹⁴ *Military Execution: Execution of John Y. Beall, the Lake Erie Pirate and Rebel Spy*, N.Y. TIMES, Feb. 25, 1865, <http://www.nytimes.com/1865/02/25/news/military-execution-execution-john-y-beall-lake-erie-pirate-rebel-spy-details.html>.

²⁹⁵ *Id.*

²⁹⁶ See MILITARY COMM’N, TRIAL OF JOHN Y. BEALL 89–91 (1865).

²⁹⁷ See *id.* Exhibits A–C, E, at 43–44, 48. Copies of Beall’s letters and a certificate from the Confederate government were admitted as evidence. *Id.*

Winthrop also addressed the categories of crimes that military commissions could try in his treatise, classifying them as:

- (1) Crimes and statutory offences cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting;
- (2) Violations of the laws and usages of war cognizable by military tribunals only; [or]
- (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.²⁹⁸

While this precise formulation leaves it open to interpretation whether Winthrop is implying that the domestic offenses in his first category can only be tried when civilian courts are closed, it must be remembered that this language is from his treatise, first published two decades after Milligan was decided.²⁹⁹ So, even if one reads the treatise to limit these prosecutions in the presence of open civilian courts, this interpretation would not logically reflect the view held by Winthrop or other military officers at the time of the Civil War. What is more directly relevant is that, immediately after identifying these three classes of offenses, the treatise provides a list of examples of crimes prosecuted under each category.³⁰⁰ “Criminal conspiracies” is listed only under the first class, domestic law offenses; the term “conspiracy” does *not* appear anywhere in the list of offenses under what Winthrop calls the second class, “offences in violation of the laws and usages of war.”³⁰¹

Even more telling, Winthrop includes a footnote immediately following the offense “criminal conspiracies” in the list of domestic law offenses that begins, “Among the conspiracies of this class, or of the first and second class combined, may be noted the following”³⁰² In other words, Winthrop observed that Civil War military commissions prosecuted conspiracy when the charges were based entirely on domestic law, or when based on domestic law *and* the law of war combined, but *not* under the latter category standing alone. He gives an example of a conspiracy charge in subsequent discussion of military-commission procedure, “conspiracy, in violation [of the laws of war],” but *only* after identifying its applicability as

²⁹⁸ WINTHROP, *supra* note 31, at 839.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 839–40.

³⁰¹ *Id.*

³⁰² *Id.* at n.5.

being limited to cases that were “both a crime against society and a violation of the laws of war.”³⁰³ Even then, there is reason to doubt that he believed that conspiracy as a truly inchoate offense could be prosecuted, for he had explicitly stated on the previous page under the bolded heading “Offences not cognizable,” “[I]t may be added that the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, i.e., in unlawful commissions or actual attempts to commit, and not in intentions merely.”³⁰⁴

The list of specific cases that Winthrop provides in his footnote identifying mixed domestic and law-of-war prosecutions includes, *inter alia*, those of Milligan, the Lincoln assassination conspirators, the Andersonville POW camp commander Henry Wirz, William Murphy, and G. St. Leger Grenfel.³⁰⁵ Each of these is an individual who Thravalos claims has been tried exclusively for conspiracy as a violation of the law of war.

When the charges and specifications are read together, Murphy’s case provides a clear example of how Civil War military commissions could combine charges from the two classes in a single trial. The charges and specifications against Murphy were as follows:

1st Conspiracy to burn and destroy steamboats and other property belonging to, or in the service of the United States of America or available for such service with intent to aid the Rebellion against the United States.

Specification: In this, that he, William Murphy, *a citizen of the United States*, did willfully, maliciously, unlawfully and traitorously, and with intent, purpose and common design to aid the then existing Rebellion against the United States of America, on or about the first day of July 1863, and on divers (sic) other days between that day and the first day of January 1865, at the city of Mobile, Alabama and at divers (sic) other places within the United States, combine, confederate and conspire with one Joseph W. Tucker . . . and Jefferson Davis, James A. Seddon, Judah B. Benjamin . . . to burn and destroy steamboats and other property belonging to, or in the service of the United States,

³⁰³ *Id.* at 842.

³⁰⁴ *Id.* at 841 (emphasis in original).

³⁰⁵ *Id.* at 839 n.5.

or available there for the same being within the lines of the military forces of the United States.

2nd Violation of the laws and customs of war.

Specification 1st. In this, that he, William Murphy, a citizen of the United States, *and a rebel enemy thereof*, did willfully, unlawfully, maliciously and with intent thereby to hinder and embarrass the military authorities of the United States in their efforts to suppress the then existing Rebellion against the United States, set on fire and caused to be burned and destroyed, a steamboat then plying on the waters of the Mississippi River within the lines of the military forces of the United States and known as the “Champion.”

This at or near the City of Memphis, Tenn. on or about the 21st day of Sept. 1863.³⁰⁶

There are two important points discernible from this language. First, it is clear from the facial language of the charges that it is the second count that alleges violations of the law of war; yet conspiracy is only addressed in the separate first charge. Further, note carefully the different descriptions of the defendant with respect to elements establishing jurisdiction.³⁰⁷ In the first charge, which we can conclude is a domestic-law offense based on the language in Winthrop’s treatise discussed above, Murphy is identified simply as a “citizen of the United States” and his conduct is characterized by the adjective “traitorously.”³⁰⁸ The charge does seem to fairly be an effort to prosecute conspiracy as an inchoate offense, but it is done as a violation of ordinary domestic criminal law applied under martial-law authority, not the law of war.³⁰⁹ In other words, he is being prosecuted for breaching a duty he owes to the United States as a citizen, a matter of domestic rather than international concern. In the second charge, by comparison, which is specifically identified as “violation of the laws and

³⁰⁶Letter from Joseph Holt, Army Judge Advocate General, to the Secretary of War, Mar. 21, 1866, in Thravalos, *supra* note 156, attachment 10 (reviewing the military trial of William Murphy and recommending approval of his sentence) (emphasis added). The second and third specifications of the second charge are omitted for the sake of brevity.

³⁰⁷*Id.*

³⁰⁸*Id.*

³⁰⁹*See id.*

customs of war,” Murphy is not just identified as a U.S. citizen, but also as “rebel enemy” of the United States, which logically brings him within the ambit of the law of war.³¹⁰

Despite Thravalos’ historical coup in working through the mislabeling of the JAG Record Books and finding the Murphy case records, the case itself nevertheless fails to establish conspiracy as an offense historically prosecuted by the U.S. under the law of war. It appears, rather, that Murphy was prosecuted by the U.S. military for a combination of inchoate conspiracy in violation of domestic law and the physical destruction of steamboats in violation of the law of war.³¹¹

The next case Thravalos cites is “Robert Loudon—a Mississippi River ‘boat-burner’ like Murphy—[who] was tried by a law-of-war military commission convened at Saint Louis, Missouri” in December 1863.³¹² At first blush, this case does seem to support the idea that conspiracy has previously been prosecuted as a law-of-war violation, but this conclusion is not unequivocal.³¹³ Indeed, the superior ultimate conclusion appears to be that the conspiracy charge levied against Loudon, like that against Murphy, was based on domestic law.

Louden’s trial took place in Saint Louis at a time when martial law was formally in effect, so it indisputably could have been, in whole or at least in part, a martial-law trial.³¹⁴ As Thravalos notes, Loudon faced three charges:

(1) transgressing the law of war, (by coming “within the lines of the military forces of the United States” with rebel messages), (2) spying, and (3) “Conspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river.”³¹⁵

Curiously, the charges found in the National Archives folder containing the records of the case (which Thravalos does not cite) identify Loudon as being “formerly a citizen of the City of St. Louis and State of Missouri and

³¹⁰ *Id.*

³¹¹ *See id.*

³¹² Thravalos, *supra* note 15, at 256.

³¹³ *Id.* at 256–57.

³¹⁴ *See* WINTHROP, *supra* note 31, at 824 n.31.

³¹⁵ Thravalos, *supra* note 15, at 256 (citing to War Dep’t, General Orders No. 102, Mar. 15, 1864).

owing allegiance to the Constitution and Government of the United States.” This language is contained in the first specification of the first charge alleging that he violated the laws of war by crossing through the Union lines, bringing “a large number of letters written by rebels in arms . . . to their friends and relatives residing in the State of Mo.”³¹⁶ In the third charge, alleging “conspiring with the rebel enemies . . .” he is described just as “a rebel enemy of the United States.”³¹⁷ It is hard to fathom either how the description of Loudon as a citizen brings him within the ambit of the law of war or how a rebel enemy would commit a war crime by conspiring with other rebel enemies to “embarrass and impede the Military Authorities of the United States in the suppression of the existing rebellion.”³¹⁸ That is precisely what enemies are supposed to do! It would, however, logically be a violation of U.S. domestic law for an individual owing allegiance to the United States to conspire with rebel enemies, suggesting that perhaps the individual who drew up the charges, Captain S.S. Burdett, the Assistant Provost Marshall General for the Department of the Missouri, made an error and inadvertently transposed jurisdictional elements between the first and third charges. Given this possible confusion, it becomes highly relevant to note that on the summary sheet documenting the post-trial review and disposition of the charges after they were forwarded to Washington, D.C. for higher level scrutiny, Loudon is described by the single word “citizen,” which would clearly place him under the jurisdiction of a martial-law tribunal and implies that the conspiracy charge was ultimately considered by the reviewing authorities to be grounded on that basis.³¹⁹

In a footnote, Thravalos asserts that Lincoln’s “decision to enforce Loudon’s death sentence is especially notable,” since Lincoln favored leniency for some Union deserters.³²⁰ It is hard to see how there is any logical linkage, however, between Lincoln’s decisions with respect to Union soldiers in cases of desertion, where the sentence of death is optional and with whom he sympathized based on his own experiences,³²¹ and a

³¹⁶ Charges and Specifications, Robert Loudon, Court Martial case file NN 1074, Box 1627, Record Group 153, National Archives, Washington D.C.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See Proceedings of Military Commission in the Case of Robert Loudon, citizen, in case file NN 1074, Box 1627, Record Group 153, National Archives, Washington D.C.

³²⁰ Thravalos, *supra* note 15, at 257 n.128.

³²¹ See *id.*

convicted spy (the second charge against Loudon) for which death is mandatory.³²²

From Loudon, Thravalos moves on to John D. Cambron, whom he states “was tried by a law-of-war military commission convened at Saint Louis, Missouri,” this time citing to the actual case file.³²³ Once again this trial took place at a time when Saint Louis was under martial law.³²⁴ Moreover, Thravalos neglects to mention that the type-set, six-page Department of the Missouri General Orders No. 205 (which he cites) not only reports the results of the trial of Cambron on the two charges of “Violation of the Laws of War” and “Conspiracy,” but also documents four other men tried by the *same* commission on such charges as “Disloyalty,” “Violation of Special Order No. 4,” “larceny,” and “violation of the Oath of Allegiance” as well.³²⁵ These other charges clearly depend upon martial-law authority, so the commission obviously did not consider itself to be limited to the law of war, as Thravalos presumes it was.

Cambron’s charges appear to follow the same coherent pattern as Murphy’s. The law-of-war charge asserts that Cambron, “not belonging to any authorized or organized forces at war with the United States” instead belonged to “a band of marauders, outlaws, insurgents, guerrillas, or rebel enemies of the United States.”³²⁶ The conspiracy charge, in comparison, simply stated that John D. Cambron (who was already identified as “a citizen of Henderson county, Illinois” in the order immediately above the charges) “did unlawfully combine, confederate, and conspire” with three named individuals to release “one Zack Baxter, confined in prison at Monticello, charged with being a bushwhacker and horse stealing.”³²⁷ It is uncertain whether the 19th century military commission use of the hendiatis “combine, confederate, and conspire” was really equivalent to the inchoate crime of conspiracy. But assuming *arguendo* that it was, the lack of any mention of Cambron’s enemy status or any reference to the law of war in the charge suggests that this was in fact a martial-law charge. Indirect evidence for this conclusion is found in Francis Lieber’s noted work on guerilla parties which the War Department had “printed for distribution in

³²² American Articles of War of 1806, § 2, in WINTHROP, *supra* note 31, at 985.

³²³ Thravalos, *supra* note 15, at 257.

³²⁴ See WINTHROP, *supra* note 31, at 825.

³²⁵ Maj. Gen. W. S. Rosecrans, Saint Louis, Mo., Dep’t of the Army, Gen. Orders No. 205 (Nov. 10, 1864).

³²⁶ Thravalos, *supra* note 15, at 257–58.

³²⁷ See *id.*

the Army.”³²⁸ Lieber defines a bushwhacker as an individual “armed prowler” enjoying no protection or status under the law of war³²⁹ (consistent with Halleck’s treatise discussed above), so the conspiracy to free Baxter from prison was most likely considered a martial-law rather than a law-of-war offense.

Thravalos’ next citation is to the case of the colorful Colonel George St. Leger Grenfell.³³⁰ Thravalos reports that he was charged with “(1) ‘Conspiring, in violation of the laws of war, to release the rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Illinois’ and (2) ‘Conspiring, in violation of the laws of war, to lay waste and destroy the city of Chicago, Illinois.’”³³¹ While this sounds like two counts of conspiracy charged as war crimes, Winthrop specifically cites this case as an example of a mixed charge involving both martial law and law of war elements.³³² Winthrop, whose credentials are extolled by Thravalos in two lengthy footnotes,³³³ was the consummate insider at the

³²⁸FRANCIS LIEBER, *GUERRILLA PARTIES* (1862) (incorporating the cited language on the cover page).

³²⁹*Id.* at 17.

³³⁰Thravalos, *supra* note 15, at 258. Grenfell is clearly one of the most interesting characters involved with the U.S. Civil War. British by birth, he was something of a hellion; by the time he made his way to the Confederate south in 1862 he had experienced a series of adventures (which he substantially embellished in recounting them to anyone who would listen) in France, North Africa, Turkey, and South America. See STEPHEN Z. STARR, *COLONEL GRENFELL’S WARS* 8–12 (1971). After openly serving in the Confederate cavalry as a leading aide to several prominent southern commanders, Grenfell resigned his commission and hopped a blockade runner to the Bahamas, ostensibly as the first leg of the return to his native England. *Id.* at 8–43. Instead, he booked a passage to New York where he boldly reported to the local military commander, General John Dix, declared himself to be a former Confederate officer, and requested permission to openly travel in the Union states. *Id.* at 126–31. Unwilling to take responsibility for making that decision, Dix referred Grenfell to Washington where he ultimately “put [himself] in the tiger’s jaws,” by having a personal audience with Secretary of War Edwin M. Stanton in which he proclaimed that he had severed all ties with the Confederacy and promised that he would provide them with no further assistance. *Id.* Grenfell did not honor his promise, however, becoming involved with a plot by Confederate agents and sympathizers including Union “Copperheads” to liberate prisoners of war held by the Union in Illinois and foment insurrection which became known as the “Chicago Conspiracy.” *Id.*

³³¹Thravalos, *supra* note 15, at 260–61.

³³²See WINTHROP, *supra* note 31, at 839 n.5.

³³³See *id.* at 239 n.61, 245 n.83.

JAG office when this case was reviewed, so he was certainly well placed to know the government's official position on the matter.³³⁴

The reason for Winthrop's assertion is quite straightforward. When the commission defendants, who included several prominent northern Democratic politicians in addition to Grenfell,³³⁵ challenged the legitimacy of the military's jurisdiction over them, the government defended the trial on the grounds that martial law applied "throughout the United States and the territories during the continuance of the war" and that it suspended ordinary statutes enacted by Congress "so far as this class of offenders was concerned."³³⁶ Three members of the trial panel in Grenfell's commission and the prosecuting judge advocate, Henry L. Burnett, were reprising roles they had played a month prior in the infamous martial-law conviction of other leading Copperheads, including Lambdin P. Milligan, which would be overturned by the Supreme Court after the war ended.³³⁷ Judge advocate Burnett's arguments in favor of the commission's martial-law jurisdiction reportedly took up 119 pages of handwritten text that were read to the commission in full over two days of court sessions.³³⁸ Grenfell's trial was

³³⁴ *Id.* Ironically one criticism levied against Winthrop's work by another judge advocate, Lieutenant William Birkhimer, was that Winthrop placed extensive reliance on JAG opinions as legal authority when he had written most of them himself during his years of service in Washington. See William R. Hagan, *Introduction* to WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2000 report). Birkhimer's observation arguably does more to add credibility to Winthrop's insights into the law and facts underlying the cases he cites rather than offering an effective criticism of the merits of his work, however.

³³⁵ See STARR, *supra* note 330, at 4–5.

³³⁶ See Transcript of Record, Jan. 17, 1865 3–4. National Archives Record Group 153, Box 1113, trial MM2185; STARR, *supra* note 330, at 218–19.

³³⁷ STARR, *supra* note 330; *Ex Parte Milligan*, 71 U.S. 2, 61 (4 Wall. 1866).

³³⁸ Transcript of Record, Jan. 17, 1865 3–4. National Archives Record Group 153, Box 1113–15, trial MM2185. The late Stephen Z. Starr, author of a 1971 biography of Grenfell (reissued in paperback in 1995) accessed the full text of the Judge Advocate's statement, which was curiously omitted from the printed record of the trial contained in U.S. House Executive Documents, 39th Congress, 2nd Sess., No. 50. See STARR, *supra* note 330, at 219 n. 16 (1971). Starr found the case records at the National Archives in Washington D.C. in the records of the Office of the Judge Advocate General Courts Martial 1812-1938, listed as case MM2185 in Boxes 675–7. See *id.* Those records were apparently reorganized sometime between 1971 and 2013; today the file is found in Boxes 1113–15 and is complete except for a single document, the argument by the judge advocate with respect to jurisdiction which is identified as Exhibit K and listed on the cover sheet of the fifth set of trial documents as being bound with Exhibit L. Unfortunately that set of pages includes only the text of Exhibit L. The author and a professional archival researcher, Jonathan Webb Deiss, both independently searched the complete archives trial file for the judge advocate's argument without success in July 2013, although its existence and the fact that it argued in favor

thus explicitly conducted on the basis that this was a martial-law tribunal and that the accused were subject to martial-law jurisdiction rather than being members of the enemy forces subjected to prosecution under the law of war.

2. Conspiracy as a Completed Act Rather Than an Inchoate Offense

The final two Civil War cases Thravalos cites, those of the eight Lincoln assassination conspirators and Captain Henry Wirz, the commander of the horrific Andersonville, Georgia prisoner of war camp,³³⁹ have generated countless books, articles, and other forms of legal and historical discussion, but can nevertheless be disposed of quite quickly for purposes of this analysis. Both were formally billed as law-of-war commissions and both included what might be considered to be conspiracy charges—“Combining, confederating and conspiring together . . .” was actually the only charge levied in the Lincoln case.³⁴⁰ But as already documented, Winthrop identifies both of these proceedings as being mixed tribunals rather than true law-of-war trials.³⁴¹ And perhaps even more importantly, neither were actually inchoate crimes. Lincoln had been murdered, after all, and Union prisoners were horrifically mistreated at Andersonville. This suggests that the hendiatis “combining, confederating and conspiring” used by Civil War commissions was not truly equivalent to traditional conceptions of inchoate conspiracy, but rather reflects an effort to establish criminal liability for completed conduct on the basis of participation in a conspiracy.

Implying the existence of a conspiracy served two purposes in the Lincoln case. First, by alleging ties between the conspirators and Confederate leadership, the government asserted that Lincoln was killed as part of the conduct of the war which justified a military rather than civilian trial.³⁴² Second, it laid the groundwork for the possible future prosecution of Confederate leaders, particularly including Jefferson Davis. After being convicted and sentenced to death, Wirz was told the night before his

of the commission’s martial law jurisdiction is established by the other documents present in the file.

³³⁹Thravalos, *supra* note 15, at 261–63.

³⁴⁰See PROCEEDINGS OF A MILITARY COMMISSION, CONVENEED AT WASHINGTON D.C. (1865), *reprinted in* THE TRIAL (Edward Steers, Jr., ed. 2003).

³⁴¹WINTHROP, *supra* note 31, at 839 n.5.

³⁴²THE TRIAL, *supra* note 340, at 19.

execution that he could save his life by implicating Jefferson Davis.³⁴³ But Wirz insisted that, aside from the question of honor, he simply had no information to implicate Davis.³⁴⁴

In a footnote to his discussion of the Lincoln “conspiracy,” Thravalos cites both 19th and 21st century judicial review of the conviction of one of the eight conspirators, Dr. Samuel Mudd.³⁴⁵ But the 19th century case, considering a petition for habeas corpus by Dr. Mudd while imprisoned at Fort Jefferson in the Dry Tortugas, did not address the validity of the conspiracy charge as such.³⁴⁶ It focused on two specific issues: (1) whether the trial was precluded by the subsequent Milligan decision and (2) whether Mudd fell within the scope of a subsequent general pardon issued by President Andrew Johnson.³⁴⁷ The trial was not precluded by Milligan, the court held because “It was not Mr. Lincoln who was assassinated, but the Commander in Chief of the army for military reasons,” and the general pardon was held applicable to treason per se but not to other specific offenses such as Lincoln’s killing.³⁴⁸ The 21st century case was an ironic judicial exercise initially brought by Dr. Mudd’s grandson, represented by the great-granddaughter of Mudd’s original trial counsel.³⁴⁹ But it was ultimately decided by the D.C. Circuit on the grounds that Mudd’s descendants lacked standing,³⁵⁰ so any comments made by the courts about the substantive merits are pure dicta.

3. Cases in Which Conspiracy Is Not Actually Charged

Curiously, several of the cases that Thravalos cites in support of the existence of inchoate conspiracy to violate the law of war as a military commission charge did not actually charge this offense at all.

For example, the second Philippine case that Thravalos cites is that of Capt. Juan Buenafe, who was charged with one specification each of

³⁴³ Statement published April 4, 1867, by Louis Schade, “Attorney at Law, Washington D.C., Who Defended Wirz in his Trial,” in PEGGY SHEPPARD, *ANDERSONVILLE, GEORGIA, USA*, 27 (1973).

³⁴⁴ *Id.*

³⁴⁵ Thravalos, *supra* note 15, at 262 n.144.

³⁴⁶ *See generally* Ex parte Mudd, 17 F. Cas. 954 (S.D. Fl. 1868).

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *See* Glazier, *supra* note 121, at 2041 n.151.

³⁵⁰ *Mudd v. White*, 309 F.3d 819, 824 (D.C. Cir. 2002).

“Lurking as a Spy,” and “Violations of laws of war.”³⁵¹ Thravalos provides quoted language stating that the accused violated the law of war by “conspir[ing] to carry on an unlawful method of warfare against the supreme authority of the United States,” which does not appear in the cited document.³⁵² Although Buenafe was convicted of the law-of-war violation by the military commission, it was disapproved upon review because “The evidence of record [did] not show the commission of the offenses charged with that certainty which the law requires.”³⁵³

Assuming *arguendo* that Thravalos retrieved more complete case documents from the National Archives that contain the words he quotes and cited to the congressional document for the convenience of his readers, he still does not carry the point. The brief phrases quoted in the general order in Buenafe’s case from the specifications, e.g., “select and prepare places of ambuscade” and “he, the said Juan Buenafe, did secretly further advise and commit divers (sic) acts of hostility and perfidy”³⁵⁴ strongly imply that the charge was based on substantial conduct and not merely reaching an inchoate agreement. But even more to the point, the actual charge levied against Buenafe was “violation of the law of war,” not “conspiracy.”³⁵⁵ Certainly it is reasonable to conclude that the American officers levying these charges were familiar with the crime of conspiracy, and that they would have used that term as the charge if that was the substantive offense they sought to prosecute.

The documentation is clearer with respect to Thravalos’ third Philippine example, charges against two Filipinos for “murder in violation of the law of war,” although no more help to his cause.³⁵⁶ This time the cited general order reprints the full specification, which states that the two accused were part of a band of approximately six armed outlaws who murdered two American Army privates by “cutting and stabbing them with bolos

³⁵¹ Thravalos, *supra* note 15, at 265 (citing to Maj. Gen. Arthur MacArthur, Headquarters Div. of the Phil. Manila, P. I., Gen. Orders, No. 69 (Aug. 11, 1900), *reprinted in* S. DOC. NO. 57-205, pt. 2 at 20–21 (1st Sess. 1902)).

³⁵² *Id.*

³⁵³ See MacArthur, *supra* note 351, at 20–21.

³⁵⁴ *Id.* at 21.

³⁵⁵ *Id.* at 20.

³⁵⁶ Thravalos, *supra* note 15, at 265 (citing to Maj. Gen. Adna R. Chaffee, Headquarters Div. of the Phil., Manila, P. I., Gen. Orders No. 334 (Oct. 29, 1901), *reprinted in* S. DOC. NO. 57-205, pt. 2 at 366 (1st Sess. 1902)).

[knives].”³⁵⁷ There is no mention of a “conspiracy” in either the charge or the specification; the word only appears in the reviewing officer’s comments, which say, “[T]he facts established show that there was a conspiracy to commit the murder, and that beyond a reasonable doubt these accused were active participants therein.”³⁵⁸ Mere use of the word “conspiracy,” (particularly on review *after* the trial is over) does not, of course, equate to the crime of “conspiracy.” This is clearly a case in which “conspiracy” was used in reference to the mode of liability rather than the substantive offense. The defendants were charged with the crime of murder and shown to have participated in an actual killing as members of a group (i.e., “the conspiracy”).³⁵⁹ But the *crime* prosecuted was murder.³⁶⁰

This same basic fallacy recurs in Thravalos’ final Philippine Insurrection citation to a November 1901 case in which a group of seven natives were tried for a series of murders in which all the victims were themselves fellow Filipinos.³⁶¹ An interesting historical coincidence is that the judge advocate assigned to prosecute the case was Lieutenant Charles R. Howland, who would go on to author the 1912 edition of the JAG Digest discussed above.³⁶² The defendants are identified as “natives” and “an armed band of outlaws.”³⁶³ Each specification states that the offense took place in a place “occupied by the armed forces of the United States of America, and during a time then, as now, of insurrection against the United States of America.”³⁶⁴ These facts indicate that the trial was conducted as a military-government prosecution of ordinary crimes and not as law-of-war violations.³⁶⁵ Military government is only effective in occupied territory and during the time of armed conflict (whereas war crimes can be prosecuted wherever they occur). So the fact that the commission took the trouble to establish these jurisdictional facts; describing the perpetrators as “outlaws”

³⁵⁷ See Chaffee, *supra* note 356, at 366.

³⁵⁸ *Id.* at 367.

³⁵⁹ *Id.* at 366.

³⁶⁰ *Id.*

³⁶¹ Thravalos, *supra* note 15, at 266 (citing to Maj. Gen. Adna R. Chaffee, Headquarters Div. of the Phil., Manila, P. I., Gen. Orders No. 339 (Nov. 6, 1901), *reprinted in* S. DOC. NO. 57-205, pt. 2 at 290 (1st Sess. 1902)).

³⁶² See *Comparison of 1880, 1895, 1901 and 1912 JAG Digests: Offenses Tried by Military Commissions During the Civil War*, in Thravalos, *supra* note 156, attachment 8, at 1–2.

³⁶³ Chaffee, *supra* note 361, at 290.

³⁶⁴ *Id.* at 291.

³⁶⁵ *Id.*

rather than soldiers or insurgents; classified the victims as natives (who would not enjoy any protections under the law of war of that day from co-nationals); and, most specifically described the charge only as murder and not “murder in violation of the law of war” as it did in other cases drawing on that corpus juris, all demonstrate to the informed reader that these were domestic law prosecutions.³⁶⁶

What appears to have led Thravalos to cite this case is the fact that the prosecution argued to the commission that each of the accused was a participant in a conspiracy and on that basis was liable for the killings regardless of their precise role. The reviewing authority then provided a detailed discussion of the basic rules governing conspiracies for the edification of officers who might be assigned a role in future trials of this type.³⁶⁷ But this does nothing more than establish that occupation-law courts can try conspiracy under applicable domestic law and that participation in a conspiracy can result in prosecution for overt acts committed by other members of the scheme. It says nothing about the validity of inchoate conspiracy as a violation of the law of war.

4. British Examples from the Boer War

The final cases Thravalos cites are two British examples from the Boer War, which was contested in South Africa at the same time that the United States was fighting the Philippine Insurrection.³⁶⁸ As a matter of logic, isolated examples of the conduct of one foreign nation in territory in which it enjoyed broad, domestic-law authority does nothing to establish either the existence or content of an American law of war, particularly where the facts do not establish the basis on which that foreign power conducted the prosecution. In one case, Thravalos reports that “two Orange River Colony residents were tried and convicted of ‘conspiring to communicate with the enemy’”; in the other, “a Transvaal soldier and paroled prisoner of war was

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 292.

³⁶⁸ Oddly, the cases are styled as “Great Britain v. Wantenaar” and “Great Britain v. Cordua” in Thravalos’ footnote. Thravalos, *supra* note 15, at 267 n.154–55. The term Great Britain was replaced with the United Kingdom in 1800, and in any event British criminal prosecutions are conducted in the name of the crown and styled “R v. [name of defendant]” with the “R” standing for “Rex” if a king and “Regina” if a queen. *See, e.g.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION T2.14 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

tried and convicted of ‘Treacherously conspiring against British authority.’³⁶⁹

The very title of Thravalos’ source, ‘Papers Relating to the Administration of Martial Law,’ casts immediate doubt as to whether these were actually law-of-war tribunals.³⁷⁰ The first case cited, involving the trial of C.J. Wantennar and R.W. Fockens, took place on October 24, 1900 in Orange River Colony, the British name for the Boer Orange Free State, which it occupied from May 28, 1900 until it was formally incorporated into South Africa as a result of the 1902 Treaty of Vereeniging ending the war.³⁷¹ The second case, the trial of Hans Cordua, took place in British occupied Pretoria in the Transvaal in August 1900. In both of these cases, the British military trial was thus a military-government court and could have applied domestic law rather than law of war. This fact can readily be discerned by some of the other cases prosecuted by these courts, which included “[r]ape of a white woman, stealing cattle, treason, and forgery.”³⁷²

It is simply not possible from the information provided in the cited sources, including a brief narrative account of Cordua’s actions, to determine definitively whether the charges were based on breach of a duty of loyalty owed to the British government as an occupying power under the “domestic” law enforced by the military government or the law of war directly.³⁷³ The narrative’s author quotes Boer War doctor and historian Arthur Conan Doyle (better known as the creator of Sherlock Holmes³⁷⁴) as contending that the real British concern leading to the decision to execute Cordua was his disloyalty after having taken a neutrality oath. Moreover, even *if* the United Kingdom—the original source of Anglo-American common law—had claimed to prosecute conspiracy as an actual law-of-war violation at the turn of the 20th century, it is quite clear that it no longer considers it legitimate to do so.³⁷⁵ The current UK law-of-war manual

³⁶⁹ Thravalos, *supra* note 15, at 266–67.

³⁷⁰ *Id.* at 267 (citing to COLONIAL OFFICE, PAPERS RELATING TO THE ADMINISTRATION OF MARTIAL LAW IN SOUTH AFRICA 122, 160 (1902)).

³⁷¹ COLONIAL OFFICE, *supra* note 370, at 160 (documenting trial of Wantennar and Fockens).

³⁷² *See id.* at 122, 160.

³⁷³ *See id.* at 122; *see also* GRAHAM JOOSTE & ROGER WEBSTER, INNOCENT BLOOD 179–81 (Michael Collins ed. 2002).

³⁷⁴ Conan Doyle *Dead from Heart Attack*, N.Y. TIMES, Jul. 8, 1930, <http://www.nytimes.com/learning/general/onthisday/bday/0522.html>.

³⁷⁵ *See* UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT §§ 16.20–16.50 (2004).

includes an extended discussion of war crimes, but makes no provision for any prosecution of inchoate acts.³⁷⁶

D. Overall Assessment of Military Commission Conspiracy Charges

A careful review of the history cited in support of the ability of the current Guantánamo tribunals to prosecute “conspiracy” shows that charges involving this nomenclature have been levied by prior American military commissions under a variety of circumstances. Some of these charges were clearly prosecuted under forms of “domestic” law under either martial law or military government, or by “mixed tribunals” rather than as dedicated law-of-war offenses.³⁷⁷ It is not always clear what is being prosecuted in these cases, but frequently it seems to be acts constituting a breach of a duty of loyalty rather than a mere agreement to commit a crime.³⁷⁸ Other cases, such as the Lincoln assassination trial, use the term “conspiracy” in the context of a mode of attaching liability to co-perpetrators for a completed crime rather than an actual prosecution for an inchoate offense.³⁷⁹ Sometimes the word conspiracy, or even just a form of the word, is used in a compound phrase such as “combining and conspiring . . .” so that the actual charge is not conspiracy per se. And in at least one case cited, no form of the word “conspiracy” even appears in the charges and specifications at all; it appears only in the comments of a post-trial reviewer, suggesting just how much of a stretch has been made to find these examples.³⁸⁰

Mere quantity does not a winning argument make. The bottom line is that the cited examples fail to show that American military commissions have previously prosecuted the inchoate crime of conspiracy to commit war crimes under either an “American,” or any other, law of war. Yet, even if they had prosecuted conspiracy under such law in the past, the subsequent evolution of the law of war, in particular the general international rejection of inchoate conspiracy to commit war crimes as a war crime itself in the post-World War II period, would undermine the validity of this charge in the twenty-first century.

³⁷⁶ *Id.*

³⁷⁷ *See supra* discussion Part III.C.1.

³⁷⁸ *See supra* discussion Part III.C.3.

³⁷⁹ THE TRIAL, *supra* note 340, at 18.

³⁸⁰ *See* Proceedings of Military Commission in the Case of Robert Loudon, *supra* note 319.

IV. CONSEQUENCES OF AN “AMERICAN COMMON LAW OF WAR”

The argument for the existence of a unique “American” law of war is both unprecedented and poses actual dangers to U.S. military personnel in any future conflict. American commanders and jurists have always asserted that the legal authority for their enforcement of the law of war was based on international and not U.S. law. U.S. courts, called upon hundreds of times to judge the legitimacy of naval captures in America’s wars, have always recognized the obligation to do so under “the law of nations.” Indeed it is the holding in one of the last of these cases, *The Paquete Habana* in 1900, that U.S. courts and legal commentators typically cite for the Court’s declaration that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented.”³⁸¹ General Winfield Scott, the creator of the military commission and a lawyer himself before becoming the Army’s commanding general, asserted authority to punish Mexican fighters who killed or captured Americans because such conduct “violate[d] every rule of warfare observed by civilized nations.”³⁸² Henry Halleck wrote his international-law treatise—fully two-thirds of which was devoted to the law of war—and later sponsored Professor Francis Lieber’s authorship of his famous “Code” because of the need he discerned for U.S. officers afloat and ashore to have a ready resource to consult on this topic.³⁸³ In each actual U.S. prosecution for law-of-war violations, the source relied upon was always international law.³⁸⁴ The Supreme Court made this quite clear in each military-commission case it considered, looking to international law in *Quirin*,³⁸⁵ *Yamashita*,³⁸⁶ and *Eisentrager* to verify that the tribunal had jurisdiction based on having charged an offense violating international law.³⁸⁷ Since World War II a huge body of scholarship and jurisprudence has arisen in the field of “international criminal law,” with all sources including “war crimes” as a major subset of this law, together with crimes

³⁸¹ 175 U.S. 677, 700 (1900).

³⁸² WINFIELD SCOTT, 2 MEMOIRS OF LIEUT.-GENERAL WINFIELD SCOTT 574–75 (1864).

³⁸³ See, e.g., Glazier, *supra* note 17, at 149, 153–57.

³⁸⁴ See *supra* Part II.

³⁸⁵ Ex Parte Quirin, 317 U.S. 1, 28 (1942).

³⁸⁶ In re Yamashita, 327 U.S. 1, 7 (1946).

³⁸⁷ See *Johnson v. Eisentrager*, 339 U.S. 763, 787 (1950); see also, *supra* notes 229–231 and accompanying text.

against humanity, genocide, and in some formulations, the crime of aggression.³⁸⁸ In 1996 Congress enacted the War Crimes Act permitting criminal trials in regular federal court; every offense included in the statute is defined in terms of a violation of an international agreement.³⁸⁹ There is particular irony in the fact that in the weeks after 9/11, the government relied on its interpretation of *Eisentrager* in the hope that it would foreclose judicial oversight of Guantánamo detentions when both the government's arguments at that trial, and the Supreme Court's review, established that the trial's legality depended on it being based on international law.³⁹⁰

Indeed, rather than asserting any unilateral authority to prosecute enemy personnel under unique American law, the United States has, to the contrary, asserted international law as a shield protecting our own personnel from the invocation of foreign national law which we believed to be invalid. In two substantial cases following World War II, for example, the United States prosecuted and convicted Japanese officers involved with trying American pilots under the provisions of Japan's Enemy Airman Act—the functional equivalent of today's MCA.³⁹¹ These trials held that national law could not depart from the standards of the law of war, and that individuals who followed that national law could not rely upon it as a defense when prosecuted for violation of the international law of war.³⁹²

There are two different ways that pushing ahead with conspiracy prosecutions under an “American common law of war” theory can redound to the detriment of American service personnel should either the D.C. Circuit or the Supreme Court uphold the charge against the overwhelming weight of legal authority against it.

First, given the very high probability that the international community as a whole would not change its view about the invalidity of the charge, there is a risk that commission participants, including prosecutors, judges, trial panel members, and convening/reviewing authorities, could be tried by other nations for the war crime of denial of a fair trial if they persist in trying conspiracy or any other offenses not recognized by international law. Denial of a fair trial was recognized as a violation of customary

³⁸⁸ See, e.g., CRYER, *supra* note 127, at 3–5.

³⁸⁹ War Crimes Act, 18 U.S.C. § 2441 (2013).

³⁹⁰ See Memorandum for William J. Haynes, II, General Counsel, Department of Defense, at 1–2 (Dec. 28, 2001), <http://www.torturingdemocracy.org/documents/20011228.pdf>.

³⁹¹ See U.N. WAR CRIMES COMM'N, *Trial of Lieutenant-General Shigeru Sawada and Three Others*, *supra* note 22, at 2–3.

³⁹² See *id.* at 7.

international in prosecutions of Axis personnel by the United States and other nations including Australia, Britain, and Norway after World War II and was applied to both the trials of military and civilian personnel.³⁹³ Of particular note to this issue is the fact that compliance with national law was not considered a defense, only a mitigating factor.³⁹⁴ The Rome Statute now codifies two related offenses.³⁹⁵ “Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” is made a crime during international armed conflicts.³⁹⁶ “The passing of sentences and the carrying out of executions without previous judgement (sic) pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable” is criminalized during non-international conflicts falling within the ambit of Common Article 3 of the 1949 Geneva Conventions.³⁹⁷ The U.S. Supreme Court held in its *Hamdan* decision that, at a minimum, Common Article 3 was applicable to the U.S. conflict with al Qaeda and its protections therefore extended to the Guantánamo detainees,³⁹⁸ so the U.S. would logically be estopped from denying the liability of U.S. personnel to prosecution by any nation that determines that the military commissions fall short of international standards of justice.³⁹⁹ Since war crimes are considered to be subject to universal jurisdiction, any nation able to get personal jurisdiction over an alleged offender would be free (and in the case of a grave breach of a Geneva convention perhaps obligated) to prosecute them.⁴⁰⁰

An even greater risk is the possibility that future U.S. adversaries would seize upon the logic argued by the government that there can be a

³⁹³ See U.N. WAR CRIMES COMM’N, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 99–100, 113, 162 (1949).

³⁹⁴ *Id.* at 160–61.

³⁹⁵ Rome Statute, *supra* note 52, art. 8, § 2(a)(vi).

³⁹⁶ *Id.*

³⁹⁷ *Id.* art. 8, § 2(c)(iv).

³⁹⁸ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 562–63 (2006).

³⁹⁹ International law commentators generally recognize “estoppel” as one of several concepts that have been incorporated into contemporary international law based upon the widespread recognition of this principle in national legal systems, i.e., as a “general principle of law recognized by ‘civilized’ nations. See, e.g., AUST, *supra* note 30, at 8.

⁴⁰⁰ See, e.g., UK MINISTRY OF DEFENCE, *supra* note 375, § 16.30 (providing the official views of the UK government on the liability of war criminals to universal jurisdiction). Denial of a fair trial to a “protected person” is considered a grave breach in an international armed conflict, but only a “regular” war crime with respect to violations of Common Article 3 in non-international conflicts. See, e.g., *id.* §§ 16.24, 16.26, 16.34.

“national” common law of war to assert the right to try captured American personnel under their own conceptions of what is impermissible in war. If the U.S. is entitled to go back through its own history and prosecute foreign nationals for conduct outside its territory simply based on the fact that it has previously conducted prosecutions for the same offenses in the past, other nations will surely claim the same authority. Even if the international community writ large considers this approach invalid, the United States would still logically be estopped from objecting vis-à-vis a conflict opponent.

The particular risks involved are quite significant when one considers some of the nations that the United States could conceivably end up fighting in a future armed conflict, such as Iran or China.⁴⁰¹ Suppose, for example, that the United States were to conduct a pre-emptive strike against Iranian nuclear facilities and some American aircrews ended up in Iranian custody. Iran could then plausibly assert the right to go back through some 2,500 years of Persian history looking for precedential examples of punishing national “law of war” violations and would logically be able to draw upon a wide range of Islamic legal precedents as well.⁴⁰² China would be even more daunting, having historical records dating back some 4,000 years that it can consult. Going back through this history would not be an abstract risk; there is substantial modern familiarity, for example, with Sun Zi’s *The Art of War*, dating back to approximately 500 B.C., and China’s population is well-versed in the warfare of the late Han and Three Kingdoms period (168–280 A.D.), thanks to a widely read massive historical novel about this epoch.⁴⁰³ China could thus almost certainly find many convenient historical examples of having punished conduct not currently proscribed by the international law of war but for which it could claim legal authority to imprison or even execute U.S. service personnel.

The willingness of military commission and Department of Justice officials to expose our personnel to this risk seems almost perverse in light of another recent development in U.S. law. The Bush Administration and

⁴⁰¹ See, e.g., Stephen Harner, *China, Japan, and U.S. DoD’s Asia-Pacific “Rebalancing” Strategy*, FORBES, Jan. 11, 2012, <http://www.forbes.com/sites/stephenharner/2012/01/11/china-japan-and-u-s-dods-asia-pacific-rebalancing-strategy/>.

⁴⁰² See, e.g., *Iran Profile*, BBC NEWS MIDDLE EAST, Apr. 9, 2013, <http://www.bbc.com/news/world-middle-east-14542438> (tracing the history of Iran back to the first Persian Empire of 550–330 B.C.).

⁴⁰³ See generally LUO GUANZHONG, *THREE KINGDOMS* (Moss Roberts trans., Univ. of Cal. Press, 2014).

Congress were so concerned about the potential exposure of U.S. military personnel to “politically” motivated prosecutions by the International Criminal Court that they enacted the American Service-Members’ Protection Act (ASPA) in 2002.⁴⁰⁴ The ASPA, colloquially referred to as the “Hague Invasion Act,” called for the U.S. to stop providing military aid to countries joining the ICC’s Rome Statute and refrain from participation in United Nations peacekeeping operations unless provisions were made to grant American personnel immunity from ICC prosecution.⁴⁰⁵ Yet the ICC can prosecute only a finite set of war crimes, which the U.S. participated in drafting and recognizes as well-defined war crimes.⁴⁰⁶ Opening the door to virtually unconstrained application of “national” laws of war is surely a far more dangerous prospect.

As a nation supposedly committed to the rule of law, it is disheartening to see the cavalier approach the government has taken in trying to justify prosecutions logically unsupportable by reference to established legal authority. Even if the government is not inclined to faithfully uphold the rule of law in the interests of doing justice, one would hope that at least the consequentialist realization of the future risks this course of action poses for American military personnel will result in the abandonment of effort to prosecute charges which are not clearly supported by the existing international law of war.

CONCLUSION

The government belatedly recognizes that the argument advanced for more than a decade by law-of-war scholars and military-commission critics—that conspiracy to commit a war crime is not recognized under international law—is correct. Rather than give up on the use of this charge

⁴⁰⁴ See, e.g., U.S.: “Hague Invasion Act” Becomes Law, HUMAN RIGHTS WATCH, Aug. 4, 2002, <http://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>.

⁴⁰⁵ *Id.*

⁴⁰⁶ See, e.g., William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT’L L.J. 477, 478–88 (1999) (describing U.S. insistence on detailed elements of crimes for the offenses it had helped negotiate). Ironically Lietzau, who was a member of the U.S. delegation which participated in the Rome Statute negotiations, later participated in the early implementation of the Guantánamo military commissions and currently serves as Deputy Assistant Secretary of Defense (Rule of Law and Detainee Policy). See William K. Lietzau: Deputy Assistant Secretary of Defense (Rule of Law and Detainee Policy), U.S. DEP’T OF DEFENSE, <http://www.defense.gov/bios/biographydetail.aspx?biographyid=246> (last visited Mar. 21, 2014).

at Guantanamo, however, it now advances the wholly unprecedented idea that there is a unique American common law which can form the basis for these trials. The government cites to a number of examples of claimed historical military-commission prosecutions for conspiracy in support of the idea that the current Guantanamo tribunals, which are limited to trying violations of the law of war, can try this inchoate offense today. None of these examples actually provide the claimed support, however. Close examination shows that each trial either involved the application, in whole or in part, of martial or military-government law, which apply forms of domestic law rather than the law of war; dealt with completed conduct rather than an inchoate offense; or used the term “conspiracy” in reference to collective criminal liability rather than reflecting a prosecution for the act of reaching an agreement to participate in future criminal conduct. Colonel William Winthrop, a man whom the Supreme Court has called “the Blackstone of American military law” and who was indisputably the leading expert on 19th century military trials, demonstrated in his seminal treatise, *Military Law and Precedents*, that conspiracy was charged in martial-law tribunals and in trials drawing mixed authority from martial law and the law of war, but not as a pure law of offense per se. And even if past U.S. military commissions had charged this offense during the 19th century infancy of the modern law of war, that result would have been superseded by the rapid evolution of that law in general, and international criminal law in particular, which saw its full development in the post-World War II era.

The argument now advanced by the government with respect to conspiracy is not merely wrong, however. It is also dangerous, laying the groundwork for potential U.S. adversaries to prosecute American personal captured in future conflicts for violations of self-proclaimed offenses under their own domestic laws of war.

Whether one comes to this realization by the high road—recognizing that military commission prosecutions for conspiracy are contrary to the rule of law—or by the low road—recognizing that this practice puts American servicemen at future risk—the bottom line result should be the same. The Guantánamo military commissions should not be prosecuting conspiracy as an inchoate offense, and their previous convictions for this crime should be acknowledged as invalid.