Running Out of Options: Expiring Detention Authority and the Viability of Prosecutions in the Military Commissions under *Hamdan II*

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On May 23, 2013, President Obama delivered a major address on national security in which he outlined the future of the military commissions. While pledging to close Guantanamo, the President defended the “military justice system” as a place to “bring terrorists to justice” in the war on terrorism. Rather than shutting down the military commissions, the Administration is bringing new cases for the first time in years. Obama’s view of the military commissions, dating back to 2009, is that there are “detainees who violate the laws of war and therefore are best tried through military commissions.” Obama’s paradigm for charging detainees compels the question: what offenses constitute a violation of the laws of war and can therefore be tried at the military commissions?

In 2010, the Obama Administration’s Guantanamo Review Board estimated that there were thirty-six individuals in Guantanamo who had violated the laws of war and could be prosecuted. Until now, these individuals have been held without charge under the law-of-war authority that permits the detention of enemy combatants for the duration of hostilities.

In 2012, the D.C. Circuit issued its seminal decision in Hamdan v. United States (Hamdan II), holding that material support for terrorism—one of the most common charges used in the commissions—was not a violation of the laws of war. The D.C. Circuit therefore overturned Hamdan’s conviction for material support for terrorism, finding that the Military Commissions Act of 2006 authorized prosecutions only for conduct that violated the laws of war and occurred after 2006. As most of the conduct for which the government seeks to convict Afghan Guantanamo detainees occurred before 2006, this ruling significantly limits the scope of detainee prosecutions going forward. In Al-Bahlul v. United States, the D.C. Circuit is poised to rule that conspiracy, another common offense...
charge, is also not a violation of the laws of war and likewise cannot be brought against Guantanamo detainees. The Obama Administration has revised its estimates in light of these cases and now claims that there are only around twenty detainees who can be prosecuted.8

Thus, the government is left with a narrowing set of charges with which to prosecute the detainees who were captured in Afghanistan. Consequently, there has been increased interest in bringing charges of murder in violation of the law of war and spying, both of which are rooted in the rationale that the Taliban fight without uniforms. Given the D.C. Circuit’s ruling in Hamdan II, these charges now appear to be the most likely path forward for potential prosecutions of these detainees in military commissions. The basic theory behind these charges is that combatants who killed an American soldier while not wearing a uniform were guilty of murder in violation of the law of war, and that those who conducted reconnaissance while not wearing a uniform were guilty of spying. Congress included these charges as triable offenses in the Military Commissions Act of 20069 and again in the Military Commissions Act of 2009.10 Both the Bush and Obama Administrations have sought to prosecute fighters captured in Afghanistan who engaged in operations against U.S. forces without wearing uniforms, but it is unclear whether these charges actually constitute violations of the laws of war. Depending on the scope of the forthcoming opinion in Al Bahlul, prosecutors may find that they can no longer prosecute these charges. Problematically, because the charges of murder in violation of the law of war and spying have not been the subject of significant litigation, they have received little scrutiny.11 To date, no scholar has analyzed whether these charges would be valid in the wake of Hamdan II as violations of the international laws of war.

This Note argues that the government should refrain from bringing the charges of murder in violation of the law of war and spying because they lack a

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substantial basis in international law. Rather, this Note contends that the Administration should transfer these detainees into an Article III court for prosecution, where they can be tried for material support for terrorism and conspiracy. With the impending withdrawal of U.S. forces from Afghanistan and the corresponding loss of the international legal authority to hold combatants without charge, the Administration soon might be forced to either prosecute these detainees or release them. The clock is ticking.

This Note proceeds in five Parts. In Part I, we analyze the implications of the expected 2014 withdrawal from Afghanistan on the international legal authority to detain individuals that were captured in conflict in Afghanistan. We argue that after the withdrawal, the United States will no longer have authority to continue law-of-war detention for combatants captured in Afghanistan. This will force the Obama Administration to choose between prosecuting detainees in the military commissions, prosecuting them in an Article III court, or releasing them. Part II provides an overview of how the Administration prosecuted detainees caught in Afghanistan in the military commissions by bringing charges of murder in violation of the laws of war. This Part demonstrates that both the Bush and Obama Administrations have used this strategy. In Parts III and IV, the Note analyzes the charges of murder in violation of the law of war and spying, respectively. In each Part, the Note conducts an analysis based on *Hamdan II* to argue that the uniform-based crime is not a traditional violation of the laws of war. In addition, in Part III, the Note cautions that bringing the charge of murder in violation of the law of war might lead to retaliation against U.S. forces, making the charge a strategic liability. In Part V, the Note offers an alternative path forward, arguing that the prosecutions should be conducted in Article III courts and provides a potential way to do so despite congressional restrictions.

I. Expiring Power to Detain?

In 2014, the United States is set to withdraw most of its remaining troops from Afghanistan. With this withdrawal, the longest-running war in American history will come to a close. While there has been much political commentary on the changes this will herald, there has been little analysis of the withdrawal’s


14. Such commentary has focused on the political future of Afghanistan, the continuing relationship with Afghan President Hamid Karzai, and the likely implications for counterterrorism operations in Pakistan. See, e.g., Spencer Ackerman, *Afghanistan*
implications for the legal authority to imprison individuals who were captured during the conflict in Afghanistan. In this Part, we argue that after the withdrawal of troops, the war in Afghanistan, as conducted under the Authorization for the Use of Military Force (AUMF), will be over. The corresponding domestic and international authority to hold enemy combatants captured in Afghanistan under the laws of war will also expire, thereby compelling the Administration to choose between prosecuting these detainees in the military commissions, prosecuting them in Article III courts, or releasing them.

A. The End of Hostilities as the End of Detention Authority

The international legal authority to detain enemy combatants during wartime turns in large part on the domestic determination that the Afghan war has concluded. While several World War I and II cases suggest that certain war powers can outlast the end of hostilities, a close analysis of *Hamdi v. Rumsfeld*\(^5\) and *Boumediene v. Bush*\(^6\) reveals that the reasoning underlying these decisions does not extend to the power to detain combatants captured in Afghanistan. The withdrawal of troops from Afghanistan will mark the legal end of the congressionally authorized war, which in turn will terminate the government’s power to detain these individuals without charge under international law.

*Hamilton v. Kentucky Distilleries & Warehouse Co.*\(^7\) was the most significant World War I case on the termination of wartime powers. The case concerned the War-Time Prohibition Act, which Congress passed on November 21, 1918, ten days after the Allied Powers and Germany agreed to an armistice. The Act stipulated that “until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States . . . it shall be unlawful to sell for beverage purposes any distilled spirits . . .”\(^8\) Kentucky Distilleries challenged the Act as void because of the “changed circumstances” since its enactment—namely, the end of the war emergency.\(^9\) Yet the Court upheld the Act, establishing a distinction between the end of fighting and the legal end of the conflict. The Court

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9. *251 U.S. at 163.*
found that, by its own terms, the Act had not expired: “the period of war . . . extend[ed] to the ratification of the treaty of peace or the proclamation of peace”—notably, past the time “when actual hostilities ceased.”20

Following World War II, the Court built on this reasoning in Ludecke v. Watkins.21 The case centered on the Alien Enemy Act of 1798, which allows the President to expel aliens from a particular nation “whenever there is a declared war between the United States and [that] foreign nation.”22 In January 1946, more than eight months after Germany had surrendered and dissolved as a sovereign state, Kurt Ludecke was ordered removed and subsequently challenged the order. Building on the Hamilton distinction, the Court upheld the order to remove Ludecke, arguing that “[w]ar does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1789 is a process which begins when war is declared but is not exhausted when the shooting stops.”23

Hamilton and Ludecke suggest that the powers derivative of the war power—such as the authority to detain enemy combatants—might last beyond the end of hostilities or actual fighting. If true, the government could continue holding detainees under the laws of war even after the 2014 withdrawal of troops from Afghanistan. Indeed, executive branch officials have alluded to this possibility.24 Yet the Court’s more recent opinions indicate a very different view of the implications of the withdrawal and end of hostilities in Afghanistan for detention authority, which is substantially different from the kind of wartime authority in question in Hamilton and Ludecke.

First, the Court expressed particular concern in Hamdi about the extension of the power to detain enemy combatants.25 The oral argument for Hamdi foreshadowed this distinction, when Justice Souter raised the issue of the finiteness of the AUMF more broadly. He stated that “it is a congressional responsibility, and ultimately a constitutional right on [Hamdi’s] part, for Congress to assess

20. Id. at 165-66.
23. 335 U.S. at 167 (noting that “[t]he Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace”).
the situation and either pass a more specific continuing authorization or at least to come up with the conclusion that its prior authorization was good enough.”

This concern about the prospect of perpetual detention under the AUMF ultimately was reflected in Justice O’Connor’s plurality opinion. While holding that the detention of enemy combatants is embedded in the authorization to use force, Justice O’Connor found it troubling that “[i]f the Government does not consider this unconventional war won for two generations . . . then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.” While recognizing the “broad and malleable . . . national security underpinnings of the ‘war on terror,’” the Court affirmed that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.” Accordingly, the Court implied that the executive may at some point lose its authority to detain under the AUMF, stating:

If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. . . . If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.

Under this reasoning, the U.S. government’s authority to detain will expire after the 2014 troop withdrawal, after which point U.S. troops will no longer be engaged in active combat against Taliban fighters in Afghanistan.

Boumediene v. Bush lends further credence to this analysis. Observing that the war on terror is “already among the longest wars in American history,” the Court hinted that it might need to impose limits on the executive branch’s war powers as the war drags on. Justice Kennedy’s opinion stated that, “[b]ecause our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.” These two cases suggest that with the war in Afghanistan finally winding down well after any of the Justices then expected, the end of the conflict will trigger an analogous change in executive war powers, particularly with respect to detention, with the possibility for judicial review.

27. 542 U.S. at 520.
28. Id.
29. Id. at 521.
31. Id. at 771.
32. Id. at 797-98.
While these recent cases appear at odds with the Court’s earlier holdings in Hamilton and Ludecke, a closer look reveals that they are not inconsistent; rather, the current situation is different from those earlier instances in two significant ways. First, the Court’s rulings in Hamilton and Ludecke were grounded in the specific and unique facts of the post-World War I and post-World War II periods. In the case of Ludecke, despite the ceasefire, the U.S. still had “armies abroad exercising our war power and [had] made no peace terms with our allies not to mention our enemies.” Demobilization from the war was ongoing at the time of litigation; the Court observed that “the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close.” In contrast, after 2014, the bulk of U.S. troops will be withdrawn from Afghanistan. Moreover, there will be no outstanding, still-to-be-negotiated proclamation of peace or surrender—and given the nature of the enemy, it is unlikely that we will ever arrive at this kind of end. More meaningful in this case is the fact that we will withdraw having transferred full sovereignty and responsibility for keeping the peace to the armed forces of Afghanistan.

Second, the earlier statutes were quite explicitly designed to address unique problems created by the wars that continued to exist during the period of demobilization—namely, the need to consolidate scarce resources and the risk of German nationals conducting sabotage within the United States. This rationale was reflected in a similar case following World War II, Woods v. Cloyd W. Miller Co., which challenged the validity of a 1947 rent control law. In Woods, the Court held that the war power could last longer than the end of hostilities to correct problems caused by the war. In that case, the shortage of housing caused by returning veterans. In contrast, the detention of enemy combatants is intrinsic to hostilities. Therefore, the considerations that animate the authority to detain enemy combatants during wartime—namely, the desire to prevent them from returning to the battlefield and taking up arms in opposition—expire with the end of hostilities.

Given these differences, the Court’s holdings in post-World War I and II cases are distinguishable from the current situation. As indicated by the Hamdi and Boumediene opinions, the end of hostilities in Afghanistan will likely mark

34. Id. at 170 (quoting Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 163 (1919)).
35. It is possible that a residual training force, likely under 10,000 soldiers, will remain, but even this is currently uncertain. See Thom Shanker, Military Plans Reflect Afghanistan Uncertainty, N.Y. TIMES, Jan. 29, 2014, http://www.nytimes.com/2014/01/30/world/asia/us-and-nato-afghanistan.html.
37. Id. at 141 (“[T]he war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues for the duration of that emergency.”(quoting Hamilton, 521 U.S. at 161)).
the end of the executive’s power to detain without charge, even if other war powers may outlast the end of the war. Accordingly, the authority to detain combatants captured in Afghanistan under the international laws of war will expire after the withdrawal of U.S. troops in 2014.

B. Continuing Authority from the War on Terror?

A plausible counterargument to this analysis is that, even if the withdrawal of troops from Afghanistan marks the end of that conflict, the government’s legal authority to indefinitely detain enemy combatants captured in Afghanistan will endure because of the ongoing, broader war on terror. However, closer analysis of the AUMF and the international laws of war on repatriation and co-belligerency undermine this argument.

The 2001 AUMF states that the President shall have the power to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” Since 2001, the executive branch has interpreted this to authorize military force against “al-Qaeda, the Taliban and their associated forces.” The Obama Administration has affirmed this view numerous times, and has defined “associated forces” as “(1) an organized, armed group that has entered the fight alongside al-Qaeda, and (2) is a co-belligerent with al-Qaeda in hostilities against the United States or its coalition partners.”

Based on this interpretation, the 2001 AUMF has provided the legal authority for not only the war in Afghanistan, but also targeted killing operations in Yemen, Somalia, and Pakistan. These operations have reflected a change in the nature of the threat since 2001. While the al-Qaeda core has been “decimated,” offshoot groups such as al-Qaeda in the Arabian Peninsula (AQAP) and al-Qaeda in the Islamic Maghreb (AQIM) have grown increasingly active. In coming years, the greatest risk of terrorism is likely to come from these smaller groups and other similar entities that may evolve.
Based on these circumstances, many argue that, even once the war in Afghanistan is over, the broader war on terror will be ongoing by virtue of the targeted killings that have increased over the years and likely will remain a critical feature of U.S. counterterrorism policy. These operations are conducted against “associated forces” of al-Qaeda and the Taliban; therefore, the conflict authorized by the AUMF has not concluded. And, accordingly, neither has the authority to detain enemy combatants. By this reasoning, the government is permitted under international law to detain combatants without charge as long as targeted killings of “associated forces” are ongoing, which could be decades. Even predicting the duration of such operations is highly uncertain, because the Pentagon has classified the list of al-Qaeda affiliates considered “associated forces.”

Yet this argument has several critical weaknesses. While holding hostile forces captive during wartime to prevent them from returning to the battlefield and taking up arms is a well-established feature of war, holding them without charge after the enemy in question has been defeated is unprecedented under international law. In the context of the Afghanistan conflict, the enemy is essentially the Taliban, and the conflict against the Taliban will soon be winding down with the troop withdrawal. Article 118 of the Third Geneva Conventions provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.” Active hostilities in non-international armed conflict are defined by the International Committee for the Red Cross as requiring a “minimum level of intensity” against parties that possess organized armed forces “under a certain command structure and have the capacity to sustain military operations.” The offshoots of al-Qaeda are dispersed and decentralized


entities, with uncertain membership and leadership. Moreover, under customary international law, because of their decentralized structure, these groups do not constitute the kind of fighting force against which “war” can be waged despite their similar branding. Though they certainly pose a genuine risk, the sporadic measures that the United States’ targeted operations have taken against them in scattered geographic areas fail to constitute “active hostilities.” Accordingly, the kinds of targeted operations conducted against al-Qaeda’s offshoot groups cannot be considered a continuation of the Afghanistan war and therefore also cannot trigger continued detention authority of combatants captured in that conflict.

Additionally, while the government has argued that AQAP and AQIM constitute “associated forces,” it is unclear whether other offshoot groups would meet the criteria for co-belligerency. Though they may profess the same goals as al-Qaeda, groups that have not actually coordinated with al-Qaeda against the United States fail to qualify under the Administration’s own test. Moreover, these groups likely have no connection with the September 11 attacks, with which the original AUMF is concerned. As the al-Qaeda core in Afghanistan and Pakistan comes closer to defeat, it will be increasingly difficult to demonstrate that offshoot groups are in fact fighting alongside it and can therefore be treated as “associated forces.”

Thus, even as the threat of terrorism continues in the form of dispersed offshoots of al-Qaeda, the kinds of targeted killing operations that are likely to be conducted in response will not constitute a continuation of active hostilities in the Afghanistan context, which is required for continued detention of enemy combatants. As a result, the government’s authority to detain combatants captured in Afghanistan under the laws of war will expire with the expected end of the war in 2014.

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47. See Schindler, supra note 46.


II. Non-Uniformed Combatants in the Military Commissions

When the authority to hold these detainees without charge expires after the withdrawal of U.S. troops from Afghanistan, the Obama Administration will be faced with a difficult choice: prosecute detainees or release them. Thus far, it has opted to begin prosecuting these detainees in military commissions. However, the commissions’ convictions based on the charges of material support for terrorism and conspiracy are likely to be overturned in light of the D.C. Circuit’s ruling in *Hamdan II* (and its likely forthcoming ruling in *Al-Bahlul*). Anticipating this, the Administration has tried to find other charges to prosecute fighters captured in Afghanistan, and it has turned to murder in violation of the law of war and spying—both of which are rooted in the opposing forces’ lack of uniform.°

Before analyzing the legal basis for these charges in Parts III and IV, this Part provides a brief overview of how the Bush and Obama Administrations have used these charges in the military commissions thus far, highlighting the uniform-based roots of these prosecutions.

The focus on the potential legal implication of the Taliban’s lack of uniforms began soon after the U.S. invasion of Afghanistan. Speaking at Guantanamo Bay, Secretary of Defense Donald Rumsfeld told reporters that, “I’m not a lawyer, but there isn’t any question in my mind but that [the Taliban] are not, they would not rise to the standard of a prisoner of war” in part because they “did not wear uniforms, they did not have insignia” in their fighting with American troops.°

The Department of Justice issued a legal opinion during the Bush Administration arguing in part that, because Taliban fighters lacked uniforms, they were not entitled to prisoner of war (POW) status and, therefore, were also not entitled to the protections of the Geneva Conventions—thereby making all of their combatant acts violations of the laws of war.

In a memorandum entitled “The Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949,” the Office of Legal Counsel relied heavily on the lack of uniforms by Taliban fighters to contend that these forces did not deserve protection under the Geneva Conventions. Assistant Attorney General Jay Bybee argued that “there is no indication that the Taliban military wore any distinctive uniform or other insignia” and that “the Taliban wore the same clothes they wore to perform other daily functions, and hence they would have

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50. Observers widely expect the government to lose in the case. See, e.g., Rafaella Wakeman & Wells Bennett, *Al-Bahlul v. United States: Oral Argument Recap*, LAWFARE (Sep 30, 2013, 9:09 PM) (discussing the “widely-shared view[ that] the question probably isn’t whether the government is going to lose its appeal to the full circuit court,” but rather “how it will lose”).


been indistinguishable from civilians." Jack Goldsmith later recounted in his book *The Terror Presidency* that President Bush had "embraced the traditional American view that the Geneva Conventions did not give POW protections to combatants who fought out of uniform and failed to comply with the laws of war," a view he emphatically disputed. Ari Fleischer, the White House press secretary from 2001 to 2003, summarized the Administration's position similarly: "They [the Nazis] followed the law of war. They wore uniforms and they fought us on battlefields. These people [terrorists] are fundamentally, totally by design different. And they need to be treated in a different extrajudicial system."

Though many of the lawyers within the Judge Advocate Corps rejected these arguments, this aggressive interpretation of the status of prisoners in Afghanistan nonetheless remained firmly in place. Even as the Bush Administration came under criticism, the State Department defended the legal position because the Taliban "do not have a fixed distinctive sign" and they are "promoting barbaric philosophies" in their combat. It was based on this line of reasoning that administration officials concluded that captured fighters in Afghanistan could be held as unlawful enemy combatants.

The government began charging captured Taliban combatants in military commissions for uniform-based offenses, such as murder in violation of the law of war and spying. The most famous such case was that of Omar Khadr. A 15-year-old Canadian, Khadr was captured in Afghanistan in 2002 after throwing a grenade at an American soldier and killing him. After transferring him to Guantánamo, the United States began preparing to prosecute him in newly created

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53. *Id.*


56. Pierre-Richard Propser, Ambassador-at-Large for War Crimes Issues, Status and Treatment of Taliban and al-Qaida Detainees, Remarks at Chatham House (Feb. 20, 2002) ("[A] careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status.").

military commissions. In response to the Court's ruling in *Hamdi*, the government charged him in 2005 with murder in violation of the laws of war on the grounds that Khadr was wearing plainclothes at the time of the grenade attack. The charge sheet elaborated that Khadr's actions had been conducted "without enjoying combatant immunity" due to his lack of uniform. On the same theory, and as will be discussed below in Part IV, the United States later charged him with spying for his observations of U.S. troops. After years of legal battles, Khadr pleaded guilty to these and other charges in 2010; he remains in a Canadian prison today.

The Obama Administration, largely continuing the Bush Administration's prosecution strategy, carefully preserved the possibility of bringing charges against Afghan captives who had engaged in hostilities without uniforms. During the 2009 reformation of the Military Commissions Act, the Obama Administration lobbied Congress as it was drafting the new statute to ensure that murder in violation of the law of war and spying remained triable by military commission. The Act specifies that murder in violation of the law of war occurs when a combatant "intentionally kills one or more persons, including privileged belligerents, in violation of the law of war"—for instance, if the individual commits such a killing while not wearing a uniform—and that such a violation can be tried in the military commissions. Spying is similarly defined as occurring when a combatant tries to "collect information by clandestine means or while acting under false pretenses" in order to gain information that would be harmful to the United States.

Moreover, the Administration defended the conviction of Omar Khadr for spying and murder in violation of the law of war on appeal. Even in the ongoing

64. *Id.* § 950t(27).
litigation in *Al-Bahlul*, the Obama Administration has made clear that it consi-

ders spying a prosecutable offense in the commissions; the government’s brief

maintained that “spying has been an offense punishable by military tribunal.” 66

In the following two Parts, we analyze the charges of murder in violation of the

law of war and spying under international law in order to assess the validity of

the Bush and Obama Administration’s efforts to prosecute detainees in the mili-
nary commissions using these uniform-based offenses.

III. MURDER IN VIOLATION OF THE LAW OF WAR

In forthcoming cases at the military commissions, the government will have

to consider whether to continue to try fighters captured in Afghanistan for mur-
der in violation of the law of war. Though fighting, and occasionally killing, is an

inherent element of war, the charge of murder in violation of the law of war is

premised on the idea that Taliban fighters not wearing uniforms were not entitled

to attack U.S. soldiers and can be held criminally responsible for doing so.

The Military Commissions Act has designated “murder in violation of the

law of war” as a triable offense and the government has sought to bring charges

against various individuals for attacks in Afghanistan in which they accuse the

defendant of violating the laws of war.

In this Part, we argue that this charge is untenable under the international

laws of war and therefore fails the *Hamdan II* standard for being a violation of

the laws of war before 2006. Moreover, continuing to bring the charge would be

a strategic mistake for the United States, because it could invite retaliation against

U.S. soldiers and intelligence operatives who frequently fight without a uniform.

We contend that murder in violation of the law of war should not be used for

further prosecutions against detainees captured in Afghanistan and currently

held in indefinite detention.

A. Criminalizing Combat Without a Uniform

The United States has sought to criminalize by statute the direct participa-
tion in hostilities by combatants not wearing a uniform throughout the war in

Afghanistan. 67 These charges have evolved from “murder by an unprivileged bel-
ligerent” to “murder in violation of the law of war” as the statutory framework

has developed, but the underlying conduct at issue has remained rooted in the

belief that not wearing a uniform disqualifies belligerents from combatant im-
munity. The November 13, 2001 Executive Order that originally established the


military commissions specified that a charge of “murder by an unprivileged belligerent” could apply to any fighter who did not “enjoy combatant immunity.” The Military Commissions Act of 2006 adopted a similar approach, but updated the charge to “murder in violation of the law of war.” The regulation implementing the charge specified that in order to be tried for the offense, “the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.” Congress preserved this charge, despite making many other reforms in the Military Commissions Act of 2009, stating that if someone “other than a privileged belligerent” has “engaged in hostilities against the United States or its coalition partners,” that person can be tried for a violation of the laws of war. Department of Defense interpretations of this provision clarified that “[e]ven an attack on a soldier would be a crime if the attacker did not enjoy ‘belligerent privilege’ or ‘combatant immunity.’”

Drawing on this statutory framework, the U.S. government has used these charges to prosecute a number of the cases involving Guantánamo detainees. As discussed earlier, Omar Khadr was charged for murder in violation of the laws of war in 2002 because he was not wearing a uniform when he threw a grenade at U.S. soldiers. Khadr’s case drew attention to the implications for enemy combatants who failed to wear a uniform, but several other commissions convictions stemmed from this charge. As a result, he conducted the attack, the charge sheet argued, “without enjoying combatant immunity.”

In another series of cases, the United States government charged individuals who fought in Afghanistan as non-privileged belligerents because they were not part of a recognized military. Mohammad Jawad, an Afghan citizen who threw a hand-grenade at U.S. soldiers in Kabul in December 2002, faced similar charges based on attempt liability. David Hicks, an Australian captured at an al-Qaeda training camp in Afghanistan, also was prosecuted for participating in hostilities against U.S. soldiers without the protections of a privileged belligerent. Salim Hamdan, who served as Osama Bin Laden’s driver and aide in Afghanistan, was

70. Frakt, supra note 67, at 738.
73. Savage, supra note 59.
74. Khadr Charge Sheet, supra note 60.
75. Frakt, supra note 67, at 745.
76. Id.
77. Id. at 742.
78. Id. at 743.
convicted in part because he "[t]ransported weapons or weapons systems . . . to Taliban or al Qaeda members and associates" while he lacked the protected status of a privileged combatant.\textsuperscript{79} While Khadr's case became the most prominent in drawing attention to the implications for enemy combatants who failed to wear a uniform, all of the charges listed above were in fact rooted in this issue.

These prosecutions were part of a general effort by the Bush Administration to take away the protected status of individuals who directly participated in hostilities without donning a uniform, thereby making all of their conduct criminal. David Frakt, defense counsel for Omar Khadr, summarized these charges in congressional testimony: "In other words, the mere status of being an unlawful combatant . . . converted any act of fighting, any act of attempt to kill U.S. soldiers, into a war crime."\textsuperscript{80} In the cases above, the military commissions' defense counsel continually challenged the Bush Administration's theory that any actions taken by Taliban fighters lacking uniforms were inherently violations of international law, to little avail.

B. The Hamdan II Test and International Law

The charge of murder in violation of the law of war lacks a basis in international law and thus fails the Hamdan II test. Since Hamdan II came down, the military commissions have not considered a case of murder in violation of the law of war. The government's claim that participating in an armed conflict without a uniform is a punishable offense is rooted in the historic ability of states to convict those who fought against them using irregular tactics, such as guerrilla warfare. However, as resistance movements became increasingly regarded as legitimate over the twentieth century—triggering a corresponding change in attitudes toward irregular tactics—that dynamic has dramatically changed. Under the Additional Protocol to the Geneva Convention, a central development in international law of war, the lack of uniform is not considered a violation of the law of war. In this Part, we trace the development of how international law has treated combatants who lack a uniform. We also demonstrate why the lack of uniform is only a violation of the law of war if it is utilized in the context of an "underlying direct participation" in a war crime such as killing civilians.\textsuperscript{81}

The historical disregard for guerrilla warfare extends back to the international law scholars of antiquity, who sought to abolish it. Early international jurists such as Ayala, Grotius, Gentili, and Pufendorf agreed that guerrilla fighters should be "considered to be the common enemy of all," in the same way that

\begin{thebibliography}{9}
\bibitem{79} Id.
\bibitem{80} Id. at 749.
\bibitem{81} Michael N. Schmitt, \textit{Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees}, 5 CHI. J. INT'L L. 511, 520-21 (2005).
\end{thebibliography}
pirates were the enemy of all mankind. In this vein of thinking, "[r]esistance warfare carried out by civilians was considered illegal; partisan fighters were essentially bandits who were not entitled to any form of protection or recognition under the laws and customs of war at that time." This consensus around disapproval of guerilla activities gave rise to a legal framework that did not recognize the right of guerilla fighters to wage war.

Political theorists in the nineteenth century supported this position. Henry Wheaton argued in 1836 that "regular bands of marauders are liable to be treated as lawless bandits, not entitled to the protection of the mitigated usages of war as practiced by civilised nation[s]." Henry Halleck took a similar view in his canonical 1861 work International Law. He noted that "in modern warfare, partisan and guerilla bands, such as we have here described, are regarded as outlaws, and, when captured, may be punished the same as free-booters and banditti." According to Halleck, a killing conducted by a guerilla fighter who was not wearing a uniform was the same as murder. This understanding of the legitimacy of guerilla activity cohered during a period in which the nature of warfare took a very particular form—generally, massive state armies, clad in national insignia, facing off against each other. Accordingly, the Lieber Code, the first major attempt to codify the laws of war, only extended combatant protections to regular soldiers, not irregular fighters.

In line with this view, the U.S. military courts after World War II acquitted German generals charged with executing guerillas in the "Hostages Trial." During the Balkans campaign, the Germans shot prisoners who were captured while fighting for the resistance forces. The commanding officers were charged at the military courts for both the murder and ill-treatment of prisoners of war and

85. HENRY HALLECK, INTERNATIONAL LAW: RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 387 (1861).
86. Id. at 386-87.
arbitrarily designating combatants as “partisans,” thereby denying them the status of prisoners of war.99 The case directly raised the question of whether the “partisans” were entitled to the protections of the laws of war. If they were, their treatment and killing would likely constitute a war crime. Yet the courts looked to the civilian clothing generally worn by the resistance fighters and ruled that they were not legitimate combatants and therefore could be executed without violating the laws of war. The court stated that the partisans “were not shown by satisfactory evidence to have met the requirements” for being lawful belligerents; they “had no common uniform” and “[n]either did they carry their arms openly except when it was to their advantage to do so.”90 From these facts, the court concluded that, “captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.”91

In the Hostages Trial, the Court relied on Prussia’s decision to execute the Francs-Tireurs, French guerilla fighters, as precedent. During the nineteenth and early twentieth centuries, major powers sought to delegitimize resistance movements that challenged their rule. In fact, throughout history, stemming from similar strategic considerations, it has generally been the case that “major military powers have argued that only regular, uniformed and disciplined combatants who distinguish themselves clearly from the civilian population should have the right to participate directly in hostilities.”92 The Franco-Prussian War illustrates this tendency, when the German hostility toward guerilla tactics was motivated in large part by a desire to suppress a French rebellion that was disadvantageous to the German campaign.93 Prussia executed the Francs-Tireurs for engaging in hostilities without a uniform.94

The Hostages Trial built on the treatment of the Francs-Tireurs and, in turn, it has been cited over the past decade by those defending the U.S. government’s

89. The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47), 8 L. RPTS. OF TRIALS OF WAR CRIMINALS 34, 35-36 (U.N. War Crimes Comm. 1948).
90. Id. at 57 (internal citations omitted).
91. Id.
ability to prosecute detainees whose crimes originate from the fact that they engaged in combat without wearing any uniforms. However, this reading ignores the broad changes in international law concerning the treatment of non-uniformed fighters that have taken place since World War II.

After World War II, the Geneva Convention of 1949 and Additional Protocols of 1977 expanded protections for non-uniformed fighters. Though the U.S. military courts acquitted the Germans in the Hostages Trial for executing guerillas, the brutality of the Nazi treatment of partisans profoundly influenced the drafters of the Geneva Convention. The Convention moved toward a greater recognition of the validity of guerillas in warfare—in part by requiring that guerilla fighters obey the rules of warfare, including wearing some type of insignia. The growth of non-international armed conflicts after World War II led to a further change in the laws of armed conflict, as the United Nations increasingly recognized the legitimacy of resistance movements, which fought without uniforms. Accordingly, these non-uniformed combatants came to be seen as soldiers who were also deserving of protections under the international laws of war.

This gradual recognition of guerilla fighters culminated in the passage of the Additional Protocols of 1977. In particular, Article 44 on Combatants and Prisoners of War states:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

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96. Crawford, supra note 83, at 173.


98. Id.

This protocol afforded much greater protection to guerilla fighters than had historically been the case.\textsuperscript{100} It was premised on the recognition that there were conflicts in which it might be expected that soldiers would operate without uniform or insignia. The Protocol also established that while guerilla fighters may not be entitled to the full range of protections afforded to uniformed combatants, participating in hostilities without uniform is not in and of itself a war crime. As George Fletcher, a scholar of the laws of war has noted, it is a "giant leap" to reason from someone's failure to qualify as a lawful combatant that that person is guilty of being an unlawful combatant.\textsuperscript{101}

Thus, the ability of guerilla fighters to participate in combat against an occupying force is now recognized as deserving of some protection under international law. It is no longer acceptable for soldiers such as the Francs-Tireurs to be executed for fighting without a uniform. Thus, under a \textit{Hamdan II} analysis, it seems very unlikely that convictions against detainees that stem from their participation in hostilities without a uniform would survive on appeal.

\textbf{C. Risk of Retaliation and the \textit{Tu Quoque} Defense}

The fact that U.S. forces and intelligence operatives regularly engage in combat without uniforms poses particular risks and legal hurdles with the murder in violation of the law of war charge, which further highlights why it should not be used by the military commissions.

At various points during the global war on terrorism, U.S. forces disguised themselves in local garb to fight more effectively. In the early stages of the war, fighting was led by "Army Delta and Special Forces soldiers, [who] wore civilian clothing in the combat zone—jeans, tee shirt, and baseball cap; in Afghanistan, they occasionally wore the flowing \textit{abah} of local males."\textsuperscript{102} This practice emerged in response to the Taliban's bounty for killing uniformed U.S. soldiers fighting with the Northern Alliance.\textsuperscript{103} To protect U.S. forces, the Pentagon allowed them to operate with Northern Alliance fighters in local garb instead of wearing traditional U.S. military uniforms.\textsuperscript{104}

Even after the initial invasion, U.S. Special Forces in Afghanistan have continued to operate in civilian attire in certain regions to allow them to blend in with the local population. This is particularly essential in remote areas where the U.S. Army has only limited reach and uniformed U.S. troops would quickly be

\begin{footnotesize}
\textsuperscript{100} See \textit{Aleena Angelovicova, The Significance of the Distinction Between Lawful and Unlawful Combatants} 14 (2007).
\textsuperscript{102} Gary Solis, \textit{The Law of Armed Conflict: International Humanitarian Law in War} 221 (2010).
\textsuperscript{104} Id.
\end{footnotesize}
Moreover, when military forces have participated in humanitarian missions, they have opted to wear civilian clothes, a practice that aid workers have protested. Similarly, the significant number of contractors who have fought alongside U.S. forces have often failed to wear a uniform, and there is no military supervision of this practice. Private contractors did not always wear the Massoud scarf that identified them as part of the Northern Alliance fighters; others even concealed their weapons.

The military defended its practice of deploying some forces in Afghanistan without uniforms by appealing to the historical distinction between troops that operated without uniforms and those that fought without uniforms. General Stanley McChrystal argued, “[i]f a force is going to engage in combat, it’s going to fight, it must wear a uniform or some kind of uniform—law of land warfare says arm bands or some distinctive marking that allows combatants to be identified from civilians.” As per the military’s framework, it is legal for forces to operate without a uniform, but they had to put on some insignia before engaging in combat. This legal distinction has roots in the Skorzeny precedent that came out of World War II. In the midst of the Battle of the Bulge, the Nazi army ordered a group of soldiers to disguise themselves in U.S. uniforms and sneak behind U.S. lines. The Nazi soldiers were commanded by Otto Skorzeny, and were tried for perfidy after World War II. The court acquitted them because they only used the disguise to move into position to launch an assault, rather than using the disguise as part of an assault.

However, the reality in Afghanistan and Iraq, as well as future conflicts in which the United States may engage, is that without clear lines of battle, it is unpredictable when a unit may find itself involved in a hostile engagement. U.S. forces wearing civilian clothes may not actively seek out combat operations, but

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108. Parks, supra note 103, at 500 n.12.


111. Id.
they do regularly engage in combat while in civilian dress because of the unpredictability of warfare.112 Consequently, even though U.S. forces may be abiding by the Skorzeny precedent in wearing civilian clothes, these forces have nonetheless regularly engaged in combat while in nonstandard uniforms.113 Yet with the exact nature of many of these engagements classified, there is no way to ascertain to what degree U.S. Special Forces utilize uniforms or insignia even during the combat phase of their operations.

As such, prosecuting enemy combatants for charges such as murder in violation of the law of war, which rest on failing to wear a uniform, creates two major problems: First, it jeopardizes U.S. forces and, second, it empowers a tu quoque defense, which further endangers the prosecution’s case.

First, these prosecutions set a troubling precedent and create a serious risk for U.S. forces operating without uniforms. If the United States builds a theory of international law according to which a uniform is required for combatant immunity, then the United States is also building a legal case that can be used against any captured American who lacks a uniform. This risk would certainly be present in the current conflict, but it is unlikely that Taliban or al-Qaeda forces in Afghanistan would provide any type of legal protection to U.S. forces, regardless of whether they were uniformed or non-uniformed. The more acute risk posed by this development is in unknown future conflicts. In future operations, the United States will, once again, want to be able to use intelligence operatives and Special Forces in nonstandard uniforms based on military necessity. The treatment of those U.S. citizens if they are captured may hinge significantly on the legal norms that the United States builds in its treatment of detainees charged for crimes hinging on their lack of a uniform.114 While there is no guarantee that a future enemy will treat captured U.S. citizens any better because the United States opted not to advance a charge, such as murder in violation of the law of war, that is based on lack of uniform, the United States will undoubtedly be in a better position to vehemently object to the prosecution of non-uniformed U.S. forces for war crimes if it has itself refrained from that practice.

Second, current U.S. practice empowers defendants charged with murder in violation of the law of war to make a tu quoque defense. Latin for “you also,” a tu quoque defense rests on the accused turning the accusation back against the prosecution. Admiral Karl Doenitz successfully utilized such a defense after World War II. A German naval commander, Doenitz was accused of waging unrestricted submarine warfare in violation of the laws of war and failing to rescue survivors of attacks.115 Doenitz enlisted the assistance of U.S. Admiral Nimitz and...

114. Parks, supra note 103, at 513.
members of the British Admiralty to testify that this had also been their policy.\footnote{Id.} The defense's claim was not that the United States had also violated international law, but rather that neither the United States nor Doenitz had violated international law because the common-place actions demonstrate that the law was not widely obeyed. Nimitz stated, "I in no way wish to prove or even maintain that the American admiralty in its U-boat warfare against Japan broke international law. On the contrary, I am of the opinion that it acted strictly in accordance with international law."\footnote{Id.} While Doenitz was ultimately convicted of other charges, the Nuremberg Tribunal accepted this argument and did not convict him for that conduct.\footnote{Id.} The \textit{tu quoque} defense was later enshrined in another German war crimes trial, in which the court held that "no State may accuse another State of violations of international law and exercise criminal jurisdiction over the latter's citizens in respect of such violations if it is itself guilty of similar violations against the other State or its allies."\footnote{Id.}

Based on these rulings, and the abundant available evidence of U.S. forces wearing non-standard uniforms in Afghanistan, including during actual combat operations, prosecuting detainees for uniform-based offenses such as murder in violation of the law of war would strongly empower a \textit{tu quoque} defense. The defense counsel in the Khadr case raised this argument at trial, but a plea deal was struck soon after and the issue was never fully litigated.\footnote{Defense Motion to Dismiss for Lack of Authority to Prosecute or Punish for the Offense Alleged in Charge 2 Under the Principle of \textit{Tu Quoque}, United States v. Khadr, No. 05-008 (Apr. 28, 2006), http://www.mc.mil/Portals/0/pdfs/KhadrMCO1/d20060512RoT_Khadr_v8.pdf.} In a future case, the defense could use the \textit{tu quoque} argument in hopes of acquitting the detainee of the relevant charges. Moreover, even if it did not succeed in doing so, litigating the issue would prove highly embarrassing for the government—the defense would have an opportunity to call in U.S. Special Forces and intelligence operatives to testify about their use of nonstandard uniforms. Like Admiral Nimitz's testimony at the Donitz trial, the testimony of U.S. operatives would be used to determine whether or not to convict the defendant. In such a scenario, while the prosecution would seek to draw distinctions between the non-standard uniforms of U.S. soldiers and those of the Taliban, and showcase an attempt to adhere to the Skorzeny distinction, the defense's argument would likely be powerful and could significantly undermine the claims and credibility of the prosecution.

Thus, on both legal and strategic grounds, using the charge of murder in violation of the law of war to prosecute detainees at Guantanamo is misguided. As illustrated by the above analysis, using this charge to prosecute detainees based
on their lack of uniform—as both Administrations have done—is untenable un-
der international law, as codified by the Geneva Conventions and the Additional
Protocol, and exposes U.S. forces to significant risk in future operations. Accord-
ingly, it should not serve as the basis for prosecution of detainees in military com-
misions.

IV. SPYING

The United States has also sought to use the charge of spying to prosecute
detainees in military commissions. When the United States has captured individ-
uals who conduct surveillance of United States military positions, they have
sought to charge them as spies. In the Khadr case, for instance, the United States
sought to prosecute the defendant for observing U.S. troops and then reporting
what he had witnessed back to Taliban fighters to help prepare for a strike, all
while Khadr was not wearing a uniform. The Department of Justice has con-
tinued to defend the legitimacy of the spying charge. In their brief for the en banc
appeal of the Al-Bahlul case, the DOJ argued that “spying has been treated as a
crime subject to trial by military tribunal.”

While the Department of Justice has maintained that spying is a violation of
the law of war, and therefore meets the Hamdan II standard, this Part disputes
that view. It argues that spying without a uniform is not a violation of the tradi-
tional international laws of war and therefore should not be used to try detainees
captured in Afghanistan.

A. History of Spying in the Military Commissions

The charge of spying has deep roots in the military commissions, dating back
to the Revolutionary War. The first conviction of a spy by a military commission
took place during the Revolutionary War. Commander John André had signed
up with the British army in Canada and was sent by General Henry Clinton to
work with Benedict Arnold on a mission that required him to pass through en-
emy lines in a civilian disguise. During the mission, he wore a civilian coat over
his military garb, but was captured by American forces and eventually executed.
A board summoned by General George Washington convicted him of spying and
ordered that “agreeably to the laws and usages of nations he ought to suffer
death.”

121. Savage, supra note 57.
122. Brief for Respondent at 30, 41, Bahlul v. United States, No. 11-1324 (D.C. Cir. July 10,
2013).
123. 3 EDWARD CUST, ANNALS OF THE WARS OF THE EIGHTEENTH CENTURY 256 (1862)
(“His change of dress was adduced as fatal to the character of a mere military
messenger, although it was only a great-coat over his half-uniform.”).
124. David A. Anderson, Spying in Violation of Article 106, UCMJ: The Offense and the
During the Civil War, the use of the spying charge grew increasingly frequent. In 1862, Congress passed legislation specifying that, "in time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such, . . . shall suffer death by sentence of a general court-martial."  

Based on this legislation, the charge of spying became one of the most common crimes tried by a military commission during the Civil War. Reflecting on the war, William Winthrop noted:

During the recent war the majority of the persons tried and convicted as spies were officers or soldiers of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian; and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being prima facie a spy.  

Winthrop's description of the illicit conduct reveals an understanding of spying that is rooted in the act of disguising oneself as a civilian and using this to attempt to infiltrate enemy lines.  

Other statements and decisions from the period further reveal the degree to which these elements were essential to spying and characteristic of all prosecuted cases during the war. In 1865, the Judge Advocate General issued a ruling that stated:

[A]n officer or soldier of the rebel army [who] comes within our lines disguised in the dress of a citizen is prima facie evidence of his being a spy. The disguise, so assumed, strips him of all claim to be treated as a prisoner of war. But such evidence may be rebutted by proof that he had come within the lines to visit his family, and not for the purpose of obtaining information as a spy.  

General Sherman displayed a similar perspective in treating two captured cavalrymen as spies because they were caught in civilian clothing. He noted:

These men have no uniform, no marks of a soldier's dress; are not even dressed alike, and are clothed as citizens. We should not treat such men as soldiers. We should insist on their soldiers wearing a uniform—something to distinguish them from the common citizen.  

The conviction of John Yates Beall by a prominent military commission during the Civil War also stemmed from the fact that he was in civilian clothes when he crossed into Ohio to conduct a sabotage raid. In coming to its conclusion, the commission reasoned: "The accused was in citizen's dress, showing no insignia

126. 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 767 (2d ed. 1920).
of his rank or profession, embarking as an ordinary passenger, and representing himself to be on a pleasure trip to Kelley's Island, in Lake Erie, within the jurisdiction of the State of Ohio."

While the frequency of the use of the spying charge in the Civil War military commissions seems to indicate that it has long been understood as a viable charge under international law, a closer analysis reveals that these rulings from eighteenth- and nineteenth-century American history are not good precedent for the current question of how to treat Guantanamo detainees. The kinds of charges being contemplated against detainees accused of spying on U.S. forces in Afghanistan are significantly different from those used in the Revolutionary and Civil Wars. The charge of spying as currently formulated is consequently untenable under international law.

The charges during the Revolutionary and Civil Wars required two critical elements: an attempt to cross enemy lines and an attempt to actively disguise oneself. Neither of these elements is consistently present in the conflict in Afghanistan.

The importance of the first of these elements is illustrated by Commander Andre's case. His conviction hinged on his attempting to pass through American lines. These earlier wars almost always featured clear lines of battle; that is no longer the case today. Recent conflicts, and certainly the war in Afghanistan, have wholly abandoned that notion of fixed lines of opposing soldiers. Rather, hostilities generally take place in a sporadic and unpredictable manner, with boundaries between forces unclear and constantly shifting. Accordingly, the spying charge's historic requirement that the accused have attempted to infiltrate enemy lines is essentially impossible in Afghanistan, where there are no clear U.S. lines for spies to sneak across.

Moreover, the second requirement for spying, that the accused have attempted to actively disguise himself, is also inapplicable in Afghanistan. Confederate soldiers had a regular uniform. Their convictions rested on the fact that they had specifically chosen to abandon these uniforms and wear civilian clothing. Winthrop's summary of the Civil War military commissions highlighted the importance of the fact that the individuals had "abandoned their proper uniform for the dress of a civilian" for determining that the combatant was a spy. Winthrop provided an expanded definition of the concealment involved in spying, which emphasized


130. See generally Max Boot, The Savage Wars of Peace: Small Wars and the Rise of American Power (2002) (discussing the rise of "small wars" that are fought by guerrillas rather than by fixed units).

131. While Confederate soldiers may have lacked a regular uniform, some had uniforms that marked them as combatants. See Francis A. Lord, Uniforms of the Civil War 135 (1970).

132. Winthrop, supra note 126, at 767.
[t]he concealment is in general contrived by his disguising himself by a change of dress, by assuming the enemy's uniform, by coloring the hair, removing the beard or wearing a false one, assuming a false name; as also by false representations, by personating another individual, or by any other false pretence or form of fraud.\textsuperscript{133}

The U.S. government cannot demonstrate that the type of conduct at issue in Afghanistan meets this definition of spying because the "disguise" that individuals such as Khadr are accused of wearing is simply their everyday clothes. Combatants in Afghanistan have no "proper uniform," so in wearing civilian clothes while conducting reconnaissance, they are not "chang[ing] dress" or actively attempting to disguise themselves.\textsuperscript{134}

Thus, while the spying is a traditional charge in the military commissions, the charges being contemplated today are substantially different from those brought in the Revolutionary and Civil Wars. The Afghan detainees have neither snuck behind enemy lines nor employed a disguise, and therefore do not meet either of the critical elements of the Revolutionary or Civil War prosecutions for spying. In the case of Khadr, the government argued that "spies—like Khadr—who conduct their activities clandestinely, without wearing a uniform, with the sanction of a State, and under the guise of a civilian are triable by military commission and are punishable up to and including death."\textsuperscript{135} The government then cited the history of military commission cases dating back to Commander Andre's case as the basis for these charges.\textsuperscript{136} Yet, examination of these spying precedents has demonstrated that these earlier cases in fact cut against the government's argument that spying is a viable charge for individuals captured in Afghanistan.

\textbf{B. Quirin, Spying, and International Law}

The Supreme Court considered the propriety of charging spies under the military commissions in \textit{Ex parte Quirin}. The Supreme Court ruled in \textit{Quirin} that eight German saboteurs could be tried in military commissions because they entered the United States without military uniforms and thus violated the laws of war as spies.\textsuperscript{137}

The Court's decision in \textit{Quirin} largely turned on the decision by the Germans to bury their uniforms after they landed ashore in the United States. The Court noted that "[w]hile landing they wore German Marine Infantry uniforms or parts

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{136} Id.
\textsuperscript{137} \textit{Ex parte Quirin}, 317 U.S. 1, 4 (1942).
of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City.” This act of removing uniforms was critical in finding that the Germans should be treated as unlawful combatants instead of lawful combatants entitled to prisoner of war status. Elaborating on this distinction, the Court held that soldiers who “discard[] their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.”

While the court’s holding does provide support for the view that spying is a violation of the laws of war, it does not encompass the variety of activity the Administration considers to be spying today. More crucially, the Quirin Court’s interpretation of international law was critically flawed.

The Court failed to articulate how the German saboteurs’ spying was a violation of international law. The Quirin decision mistook the fact that the combatants were not protected under combatant immunity as itself a violation of international law. The Hague Regulations of 1899 set forward the “Qualifications of Belligerents” as:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

To be commanded by a person responsible for his subordinates;
To have a fixed distinctive emblem recognizable at a distance;
To carry arms openly; and
To conduct their operations in accordance with the laws and customs of war.

Though the saboteurs failed to meet the second criterion because they lacked any uniform or insignia, the Supreme Court misread the international law. George Fletcher noted, “In one of the greatest legal fallacies I have ever encountered, the Quirin court makes the giant leap from the status of failing to qualify as a lawful combatant to the crime of being an unlawful combatant.” He compared this to “reasoning from someone’s driving a Chevrolet without a license to the liability of General Motors for a violation of the criminal law.” The Hague Regulations did not criminalize the lack of insignia as itself a violation of international law; it was only the Court’s reinterpretation that made this a cause to remove protections provided by the laws of war. Thus, the ability to remove the protections of

138. Id. at 21.
139. Id. at 35.
140. Fletcher, supra note 101, at 541.
142. Fletcher, supra note 101, at 541.
143. Id.
144. Id. at 522.
prisoner of war status from those who lack a uniform is not a recent invention; "the idea of cracking POW immunity originates in Quirin." 145

The military commissions have relied on Quirin to support charges of spying, but this use of precedent is misguided. In the case of Omar Khadr, the defense argued that the military commissions lacked jurisdiction because spying is not a violation of the laws of war, but Judge Peter Brownback rejected their claim. 146 Judge Brownback relied on the Quirin decision to rule that "[t]he congressional decision to enact the spying provision was not a decision to create a new crime and Congress did not create a new crime." 147 The judge went on to clarify that "[s]ending out spies is not a violation of the law of war; however, a captured spy may be executed for the act of spying for violating the law of war." 148 This argument, however, fails to address the basic point brought forward by the defense—that the charge of spying itself cannot be a violation of the laws of war. Just as in Hamdan II, in which the D.C. Circuit ruled that "[t]here is no international-law proscription of material support for terrorism," 149 there is no international law basis against spying.

The Quirin Court erred in its interpretation of international law because there is no international legal prohibition on spying. As we assess the question today of whether spying is a violation of the laws of war, we should discard the faulty conclusions in Quirin.

C. Scouts, Not Spies

The Uniform Code of Military Justice offers a helpful explanation of how to distinguish the conduct of a spy from that of scouts, who have legally protected status as combatants. It notes that "members of a military organization or civilians" who are engaged in scouting mission are not spies and that a "person living in occupied territory who, without lurking, or acting clandestinely or under false pretense, merely reports what is seen or heard ... may not be charged under this article as being a spy." 150 Winthrop himself categorized the act of "mere observing of the enemy" as distinct from spying, and stated that it was a legally protected element of war. 151

145. Id. at 543.
147. Id.
148. Id.
150. MANUAL FOR COURT MARTIALS art. 106(6) (2012).
151. WINTHROP, supra note 126, at 768.
In using this framework to assess the charge sheet against accused spies, it becomes clear that the type of activity the government sought to prosecute in these cases was scouting, not spying. In Khadr's charge sheet, Charge V accuses him of spying because he "conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, [and] time and direction of the convoys." Yet this is exactly the kind of behavior that constitutes "observing the enemy," as per Winthrop's description. It has none of the distinctive elements of spying, such as crossing enemy lines or disguise. Of course, scouts may provide information useful to their commanders, but that does not make them spies. In the Civil War, General Robert E. Lee said that Major General Jeb Stuart, who commanded a group of cavalry that would often deploy to the flank of the Union Army to gain intelligence, "never brought me a piece of false information." However, this type of activity was what Winthrop would have termed "merely observing" and did not make him a spy. While the information he provided to his commanders was valuable, and certainly resulted in the death of Union troops, his conduct was that of a scout, rather than a spy. Merely gaining valuable intelligence about the enemy through observation is not enough to make one a spy. The other two requirements must be met as well.

V. PROSECUTING CASES IN ARTICLE III COURTS

The Obama Administration is considering the continued use of the charges of murder in violation of the law of war and spying to prosecute detainees in the military commissions. Parts III and IV, respectively, have demonstrated that these charges have little standing in international law and thus fail the Hamdan II test. While the option to move detainees into Article III trial courts has high political costs, particularly as Congress has attempted to prevent such action through appropriations restrictions, we argue in this Part that this is the best course of action. Rather than pursue these cases in the military commissions, where they will likely be overturned at the appellate level, the government should charge the detainees who were captured in Afghanistan in Article III courts. This is especially urgent since the legal basis for the United States' power to detain these individuals as enemy combatants under the laws of war may be coming to an end in 2014.

A. Available Alternative Options

The foregoing analysis of the military commissions' ability to charge detainees for murder in violation of the law of war and spying has revealed that any such prosecutions would likely be overturned. Given that the United States' legal

152. Khadr Charge Sheet, supra note 60.

authority to detain individuals without charge under the laws of war is soon expiring (and assuming that the government is unwilling to release these detainees), it is left with only a few justifications for continued detention, all of which are dubious under domestic and international law.

One option that could make continued detention more tenable under domestic law is for the President to rely on his Article II commander-in-chief authority. The Bush Administration adopted this view following the September 11th attacks. It argued that the President’s power to detain combatants stemmed directly from his authority as commander-in-chief and did not depend on any statutory authorization conferred by the AUMF. Yet this position was widely criticized by legal commentators and academics. The general consensus is that, while the President does have some independent authority to use military force in certain instances, the President usually shares war powers with Congress. Consequently, the President also shares detention authority. The Article II-derived detention authority argument has come to be associated with the excesses of the Bush Administration. Any attempt by the President to justify indefinite detention separate from the AUMF’s grant of authority would be not only highly unlikely and legally suspect, but also politically toxic. Accordingly, President Obama has explicitly rejected the argument that his use of military force derives from Article II powers, maintaining that his powers derive from the 2001 AUMF passed by Congress.

An alternative is for the President to seek a new AUMF. Such an AUMF could be better tailored to counter new kinds of terrorist threats, such as smaller offshoot groups, and could provide authority to continue targeted military operations against these entities. This option, however, presents two problems. First,
under international law, the authority to detain an enemy belligerent lasts only as long as it is necessary, or while there exists a risk that the individual will take up arms and re-join hostile forces.¹⁵⁹ Even if a new AUMF authorized detention under the law of war for newly captured combatants, it would be difficult to show that current detainees, who were picked up on the battlefield in Afghanistan, continue to pose a risk of joining enemy forces given that the new enemy forces may be smaller radical groups in Africa.¹⁶⁰ Accordingly, even under a new AUMF, continuing to hold captured Afghan detainees after 2014 would violate international law. A new AUMF cannot justify continued detention without charge for individuals picked up as part of an earlier conflict.

Secondly, even if this option were legally viable, the current level of political dysfunction in Congress makes it highly unlikely that it would be able to agree on and pass a new AUMF to address emerging threats. And, even if Congress managed to pass a new authorization, it is very unlikely to be effective and adeptly tailored. Bearing in mind these difficulties, President Obama has voiced an interest in refining the current AUMF before eventually repealing it, rather than trying to pass any new legislation to counter terrorism through Congress.¹⁶¹

Thus, with the impending withdrawal from Afghanistan, it seems unlikely that either the President’s Article II powers or a new AUMF will authorize continued detention of the individuals captured in Afghanistan under international or domestic law. Assuming that releasing these individuals would pose a security threat, prosecuting these detainees is the only way forward.

B. Advantages of Federal Courts

While prosecution is necessary, as discussed in Parts III and IV, these individuals should not be tried in military commissions; the uniform-based crimes that the government is charging, murder in violation of the law of war and spying, are untenable under international law and are consequently likely to be overturned on appeal. The best option to reduce the population of Guantanamo detainees is therefore to try detainees in Article III courts. Several critical reasons make this approach the correct one to reducing the population of Guantanamo

¹⁵⁹. See Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.”).


detainees held under the laws of war: the legitimacy of federal courts, their track record of success, and, most fundamentally, their ability to try these detainees with crimes under domestic law.

Federal courts are the foundation of the American judicial system and are well-respected both domestically and internationally as fair arbiters. Military commissions also have a historical role in the American system of justice, but they have in many ways become tainted since 2001. It is true that the Military Commissions Act of 2009 ushered in significant reforms, and the military commissions re-started since 2010 are dramatically different from those of the early years of the Bush Administration.

Yet it is difficult to counter the argument that the use of military commissions in the war on terror has become indelibly tainted by the Bush Administration. For years, they lacked sufficient procedural safeguards under constitutional and international law and were considered to be largely illegitimate


163. There are protections in place to ensure that prisoners receive due process and these procedures have benefited from hindsight and years of court opinions. For instance, evidence obtained through "coerced testimony" is inadmissible; defendants have the right to cross-examine witnesses, view all evidence to be used against them, and call their own witnesses in support; defendants must be provided with adequate counsel; and there are limitations on the admissibility of hearsay testimony. See Josh Gerstein, Obama Signs Military Commissions Reforms, POLITICO, Oct. 28, 2009, http://www.politico.com/blogs/joshgerstein/2009/Obama_signs_Military_commissions_reforms.html; Legal System Comparison, OFFICE OF MILITARY COMM’N, http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx (last visited Mar. 23, 2014).


165. See Hamdan, 548 U.S. at 629-635 (discussing the commissions’ lack of compliance with Common Article 3 of the Geneva Conventions).
and rebuked by human rights groups, individuals involved in the commissions, and the Supreme Court. Despite the reforms instituted by the Obama Administration, and the appointment of highly-respected General Mark Martins as Chief Prosecutor, it is difficult for the commissions to overcome the reputational harm suffered for almost a decade. It therefore would be more useful for the United States to try detainees in Article III courts in order to begin to restore our moral standing in the eyes of both allies and enemies. This is also advantageous from a strategic perspective; trying detainees in Article III courts would undercut the recruiting narrative of terrorist groups who for years have pointed to Guantanamo and its affiliated commissions as a symbol of U.S. hypocrisy. Article III courts are widely perceived as legitimate, due to the many procedural protections in place, and using them to try detainees would ensure that these prosecutions do not become a similar symbol.

Moreover, the history of successful terrorism prosecutions by Article III courts in many ways stands in contrast to the commissions' track record. The conviction rate for terrorism-related cases in federal courts is estimated to be close to 91 percent, and the sentences have generally been much longer than have those coming from commissions' convictions. While some have claimed

166. See, e.g., Revisions Can't Fix Military Commissions, HUM. RIGHTS WATCH (July 8, 2009), http://www.hrw.org/news/2009/07/08/us-revisions-can-t-fix-military -commissions ("The discredited military commissions should have been abandoned long ago.").


172. Salim Hamdan, for instance, was sentenced to 66 months imprisonment, of which 61 months the judge was planning to credit as time served, despite the prosecution's efforts to get 30 years to life imprisonment. William Glaberson, Bin Laden Driver Sentenced to a Short Term, N.Y. TIMES, Aug. 7, 2008, http://www.nytimes.com/2008/ 08/08/washington/08gitmo.html. David Hicks received 9 months imprisonment in
that the rules of procedure and evidence applicable in civilian trials cannot handle the sensitive national security information at stake in these cases and fail to take into account the realities of detention in an active conflict zone, these arguments are incorrect. Courts have developed careful procedures for precisely such situations, and have been remarkably successful at convicting terrorism suspects who are tried in their jurisdictions for an array of offenses.

With respect to the objection about rules of procedure and evidence, the Classified Information Procedures Act (CIPA) creates a system of procedures that allows judges to conduct in camera review to determine if classified evidence needs to be disclosed to the defense. These procedures have been used effectively in a number of cases in which the government possessed evidence bearing on the defendant’s guilt, but which could have been detrimental to national security concerns if made public. Leaks stemming from these classified procedures are incredibly rare, and through CIPA, “courts have proved, again and again, that they are up to the task of balancing the defendant’s right to a fair trial, the government’s desire to offer relevant evidence, and the imperative of protecting national security.” Article III courts are fully equipped to handle the sensitive national security information that would be at issue in trials involving Afghan detainees.

Moreover, the argument that evidentiary standards in federal courts are prohibitive for these cases is also misplaced. While it is true that military commissions allow for the admission of some kinds of hearsay, whereas civilian courts generally do not, flexibility is built into the Federal Rules of Evidence. In fact, studies have suggested that in no terrorism case has “an important piece of evidence [] been excluded on authentication or other grounds.” Courts have also been able to admit evidence against terrorism suspects, even when those suspects may have been detained and subject to harsh treatment before their trial. For

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176. Hathaway et al., supra note 174, at 173.

177. See Zabel & Benjamin, supra note 171, at 8.

178. Id. at 10. See Hathaway et al., supra note 174, at 176.
instance, in a 2005 case, United States v. Abu Ali, a court concluded that inculpatory statements made to Saudi Arabian interrogators while the defendant was detained were voluntary and admissible in light of the situation. Thus, through procedural creativity, federal courts have proven themselves to be adept at handling complex national security cases and have a history of successful convictions.

Beyond these general reasons in favor of using Article III courts instead of military commissions to try terrorism cases, there is a special advantage of doing so for Guantanamo detainees who have been held without charge under the laws of war. The government is unable to charge many of these individuals with war crimes. Though the government may possess intelligence linking the detainees to terrorist activities, the individuals may not have directly participated in the preparation or carrying out of discrete attacks or the evidence linking them to such attacks may be too tenuous. In these situations, charges such as “material support for terrorism” and “conspiracy to commit terrorism” are highly useful for prosecutors. These charges are much easier to prove at trial and encompass a much broader range of conduct. Material support for terrorism includes providing “training, expert advice or assistance, service and personnel” to terrorist groups. Critically, the defendant’s acts need not be tied to any particular terrorist attacks—rather, the defendant can be convicted by demonstrating that he or she acted to support a terrorist group in a multitude of different ways. Similarly, conspiracy to commit terrorism is another powerful charge the government can use to convict individuals who cannot be directly tied to an attack.

These charges are wholly valid under domestic law and can be brought in Article III courts. Moreover, the statutes criminalizing conduct constituting material support or conspiracy to commit terrorism date back to the mid-1990s. Congress enacted these provisions as part of the Violent Crime Control and Law Enforcement Act of 1994 and the Antiterrorism and Effective Death Penalty Act of 1996. While the statutes have undergone several modifications since their original enactment, prosecutions in federal courts for these charges do not raise any ex post facto concerns.

179. 395 F. Supp. 2d 338, 373 (E.D. Va. 2005); see United States v. Salameh, 152 F.3d 88, 112 (2d Cir. 1998) (upholding the trial court’s admission into evidence of materials seized from defendant that considered “the desirability of attacking enemies of Islam” and “how to produce and use explosives”).

180. See Benjamin & Zabel, supra note 171, at 26 fig.7 (noting that 90.625 percent of terrorism cases have resulted in some kind of a conviction).


182. Id. § 2332b(a)(2).


Thus, these cases should be tried in Article III courts instead of military commissions, because the charges of material support for terrorism and conspiracy are wholly permissible in federal courts, unlike in the commissions. This Note has demonstrated that spying and murder in violation of the law of war will not satisfy the Hamdan II for trying cases in the military commissions. Instead, the government should turn to alternative charges that are available within the Article III system.

C. Bringing Article III Courts to Guantanamo

Though congressional restrictions on the use of appropriated funds to transfer Guantanamo detainees seem to make trying these individuals in Article III courts infeasible, bringing the courts to Guantanamo could be a way to get around this. In 2009, after the President and Attorney General Eric Holder announced their decision to try Khalid Sheikh Mohammed and his co-conspirators in federal court in Manhattan, a firestorm broke out, and the Administration was ultimately forced to abandon the plan because of “bipartisan opposition.” In the wake of this, Congress included in the National Defense Authorization Act for 2011 a provision stating that no authorized funds were to be used for the transfer of detainees at the Guantanamo Bay prison, either to the United States or to other countries to be repatriated. This restriction has remained in place every year since, and, despite President Obama’s signing statements insisting that he can disregard this restriction if it interferes with his commander-in-chief powers, it has effectively blocked any attempts by the Administration to bring the detainees to the United States for trial in federal court.

An alternative option exists to try the Guantanamo detainees in Article III courts despite congressional restrictions on their transfer: trying them in an Article III court in Guantanamo. While this proposal is unconventional, several Congressmen have recently proposed it as a potential option. A closer look reveals that is in fact plausible. The jurisdiction of federal district courts can be amended by statute, within certain constitutional boundaries. Congress could

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amend the territorial jurisdiction of, for instance, the District Court for the Southern District of New York, to include Guantanamo Bay, Cuba. Such an approach has, in fact, already been used to extend jurisdiction to other islands, including Midway Atoll, Wake Island, Johnston Island and Kingman Reef. By statute, each of these are characterized as falling within the jurisdiction of federal district courts. Extending jurisdiction of a federal district court to cover Guantanamo similarly would not only give it the authority to hear cases arising out of Guantanamo but would also provide authority for the court to hold trials there.

While the costs of flying down jurors, assembling courtrooms, and coordinating logistics would be significant, they are far smaller than the costs of adequately securing a high-profile courthouse in the middle of downtown Manhattan. Moreover, holding a trial in Guantanamo would enable the Administration to get around the congressional restriction on funds, which concerns only the transfer of detainees. Perhaps even more fundamentally, it would nullify the arguments that congressional members often make against trying detainees in federal courts—namely, that it would be costly, endanger public safety, and become a media spectacle. By holding the trials in Guantanamo, the cost would be far smaller, there would be no extra risk to homeland security, and the public backlash that followed the announcement about Khalid Sheikh Mohammed’s trial would be avoided. Thus, given that the best option to successfully prosecute the detainees captured in Afghanistan is in Article III courts, this proposal could be a way to get around congressional restrictions and ensure that these detainees face justice despite the difficult political realities.

CONCLUSION

The Obama Administration will soon be forced to either prosecute combatants captured in Afghanistan or release them. As the President contemplates whether to bring charges of murder in violation of the law of war and spying

against the non-uniformed combatants captured in Afghanistan, this Note provides an important analysis. We argue that these charges are not violations of the laws of war and should not be brought in military commissions. Under *Hamdan II*, they will likely be reversed on appeal. Rather than trying detainees in military commissions, we argue that the Administration should instead transfer them to Article III courts, where other advantageous charges are available to prosecutors.