BALANCING SECURITY AND LIBERTY: TRYING FOREIGN ENEMY COMBATANTS IN MILITARY COMMISSIONS

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0. Introduction

On Dec. 31, 2011, despite widespread controversy, President Obama signed the National Defense Authorization Act into law. Among other things, this legislation codified the government’s practice of detaining foreign enemy combatants without charge, and reaffirmed its policy of trying them in military commissions. The signing of this legislation, along with evidence that the US held and tortured prisoners secret prisons, that it regularly uses of drones to engage in targeted killing, and news that the US government is engaged in indiscriminate monitoring of people’s phone and internet activity are stark examples of the extent to which the US government will ignore legal procedure in its prosecution of the “war on terrorism.”

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1 112th Congress, 1st Session, H1540CR.HSE.
There is no legal reason compelling the trial of foreign suspects in military commissions rather than federal courts; federal courts have the jurisdiction to try these foreigners accused of war crimes and terrorism suspects, and established rules for governing such trials. The primary justification that the government has offered is its need to “balance” Americans’ liberty against a heightened threat to security. In times of danger, the thought goes, the government must limit people’s liberty in light of this heightened threat in order to protect people from the increased risks to their security. I will call this the argument from balance. My aim in what follows is to evaluate its moral legitimacy with respect to the US government’s

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policy of trying enemy belligerents in military commissions rather than in federal courts.  

The government's emergency policies have naturally led to widespread controversy about their legitimacy or illegitimacy in the circumstances. One central line of debate has been the question of whether emergency can warrant extra-legal action, or whether a government must seek authorization of law even in times of war and emergency. This is an important question. If no legal basis can be found for the government's policies, then its actions constitute an exercise of arbitrary force, and a denial, rather than an affirmation of law. On the other hand, some argue that legal constraints unnecessarily fetter the state in times of war and emergency, hampering its ability to protect the nation against an enemy who demonstrates flagrant

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6 The US government is not necessarily limited to protecting the rights of Americans – it often claims to be making the world a safer place overall – but its primary interest is in protecting Americans' rights. I don't believe that anything in my argument changes if one interprets its argument more broadly.

disregard for the law. On this view, emergency licenses whatever it takes to secure people's safety, rule of law be damned.\footnote{8}{Justice Jackson's dissent in Korematsu v. United States (323 U.S. 214 (1944)) is typically taken as a clear articulation of this approach. See also Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?,” 112 Yale Law Journal, 1011 (2003), and Mark Tushnet, “Defending Korematsu?: Reflections on Civil Liberties in Wartime,” 2003 Wisconsin Law Review, 273.}

I will argue that it is permissible for the government to “balance” people’s rights against competing considerations, but when it does so, it is under a moral obligation to do so in accordance with the rule of law. This means, I shall argue, that questions of balancing people’s rights must be decided internally to a legal system, or in accordance with recognized rules and procedures governing such questions. On the other hand, I will argue that extra-legal or extra-judicial action is permissible in times of war or emergency, but that when it is it is not justified on the grounds of balance. Instead, I will argue, the justification for emergency measures is best understood on the model of self-defence. I will thus conclude that the US government's justification for its exercise of military commissions does not hold.

I argue for this conclusion by distinguishing between three senses of “balance.” First there is an abstract, non-institutional sense in which competing considerations are balanced directly. This intuitive sense is often thought to justify people’s establishment of an initial scheme of rights and duties, and their submission to a coercive governmental authority to enforce it.
Secondly, the government must “balance” people’s legal rights against competing aims and policies that a community might have once they have submitted to the rule of law. This can be understood as an internal sense, in that officials must "balance" people’s rights and duties, internally to legal and institutional constraints, and because it is normally a task for the judiciary. This notion of “balancing” raises conceptual difficulties because, unlike other aims and interests, rights are often thought to be immune from ordinary questions of balance. It is for this reason that I put this notion in scare-quotes. In what follows, I will argue that ordinarily, in a just system people's legal rights can only be balanced against competing considerations in accordance with established legal procedures, or internal to a legal system. I will argue that this is part of what it means to be governed by the rule of law.

I compare both of these senses of balance against a third, external sense of balancing the government’s duty to uphold the rule of law against an extraordinary threat to its security. Some might think of the U.S. government’s policy on military commissions as an exercise of this third, external sense. I will argue that it is indeed sometimes permissible for a government to abrogate its duty to uphold the law under threat or emergency. However, I will argue, when it is permissible, this is not

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9 Although there is some discussion of about resolving conflicts in rights, there is very little literature on balancing rights against other rights, or other considerations. This is one of the key problems I aim to address. Important contributions to this question include Ronald Dworkin, “Principle, Policy, Procedure,” in *A Matter of Principle*, (Oxford: Oxford University Press) 1985, 72-103 [hereinafter “Principle, Policy, Procedure”], and Jeremy Waldron, "Security and Liberty: The Image of Balance," *The Journal of Political Philosophy*, 11:2, 2003, 191-210.
so on grounds of balance. I thus offer an alternative justification for emergency powers, one based on the defence of self-defence.

Numerous writers have questioned the legitimacy of balancing people’s rights against concerns for security, and caution against loose use of the appealing rhetoric of “balance.” ¹⁰ I argue that the distinction between the internal and external senses is crucial to the moral significance of this line of reasoning, and that though “balancing” rights (in some sense) can be permissible when it is performed in accordance with accepted legal procedures, it fails as an emergency justification for restricting the rule of law. This marks a sharp break from existing analyses of balance. The solution I offer is a novel justification for emergency measures, one that upholds the government’s duties to respect people’s rights, but is not based on considerations of balance.

In arguing for these conclusions, I am advancing a moral argument for a government’s (moral) duty to uphold people’s legal rights. Specifically, I am arguing that government has a duty to uphold people’s legal rights in a relatively just legal system, that is justly enforced and normally regarded as relatively just, even in times of emergency. In ordinary, non-emergency circumstances, a government has a

¹⁰ Most notably, Jeremy Waldron raises this issue in “Security and Liberty: The Image of Balance.” See also the authors cited herein, especially footnote 46.
moral duty to uphold people’s legal rights even when so doing increases the risk to its people’s security in my view, and even when it is upholding the rights of those very people who pose the risk to its security. Emergency can warrant limiting people’s rights sometimes, but not on the grounds of balance.

The primary target of my argument is the US government’s policy of trying enemy belligerents in military commissions. The exercise of military commissions in wartime raises an important question of the role of the judiciary in times of war and emergency that have not received significant philosophical attention. I distinguish between two functions of the state, which I call the protective and juridical functions, and argue that the state’s power to determine guilt and issue criminal sentences are an aspect of its juridical function. As I argue, however, it is distinctive of this juridical function that it not be made subordinate to the state’s protective role. I will argue that it follows from this that the emergency exercise of military commissions cannot be justified on grounds of balance.

In developing this analysis, I hope to address what George Fletcher calls a “core conceptual problem[1]” that remains systematically unaddressed in scholarly

11 There has been much discussion about the legitimacy or illegitimacy of the US government’s limiting constitutional rights in the name of security. However, there is very little philosophical discussion of its use of military commissions to try enemy belligerents. More generally, the specific question of the role of procedure in times of emergency is not frequently made explicit. Notable exceptions to these are George Fletcher, “The Law of War and Its Pathologies” (38 Columbia Human Rights Law Review 517 (2007), 519) (arguing that the exercise of military commissions, and targeted assassinations, elide the distinction between war and crime. [Herinafter, “Fletcher, ‘The Law of War and Its Pathologies’”], and David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge University Press: Cambridge, UK, 2006) (arguing for a substantive conception of procedure in upholding the rule of law).
literature, namely, the distinction between war and crime and how it bears on political questions. The US government’s policy on military commissions brings this problem to the fore. Although law scholars and political commentators have widely criticized the US government’s policy on military commissions, there is little sustained philosophical discussion about the government’s policy, or the ways in which the exercise of military commissions illuminates deeper and more general questions of balancing rights, the role of the state, and the value of the rule of law. I aim to fill this gap, and, in so doing, deepen our understanding of these key political notions. As mentioned above, I also propose a novel justification for a state’s adoption of emergency measures in times of heightened threat, one that upholds the value of the rule of law and the state’s role as a guardian of justice, and that does not depend on the notion of “balance” at all.

The US involvement in targeted killings and the indefinite detention of captives are more serious wrongs than the trial of enemy combatants in military commissions. They are greater departures from the rule of law, and they cause greater harm to their victims. For these very reasons, however, they poorly illustrate the conceptual point that I aim to make. I will thus focus my argument on the government’s policies

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13 Fletcher also lists questions of the permissibility of targeted assassinations as raising similar issues. ibid.
14 Many of whom are cited herein.
on military commissions, although I believe that the point likely generalizes to other emergency procedures that the government has adopted.

I begin with a brief overview of military commissions and the U.S. government’s policies on their current exercise, and the government’s justification for this policy. I then turn to the notion of balance, and examine the conditions under which a government can balance people’s rights. I distinguish between three senses of “balance,” and argue that the government can “balance” its duty to uphold people’s rights only on the second, internal sense of balance. Questions of the enforcement of people’s rights must be decided in accordance with the rule of law on my view. This does not mean that the state must enforce people’s rights at all costs or that it must uphold the rule of law come what may. In the next section I argue that emergency measures can be justified under a heightened threat to security. But, I argue, when they are, the justification does not rest on grounds of balance. Here I introduce my alternative justification for emergency measures by way of contrast to the argument from balance, and in support of this general moral conclusion. Finally, I conclude that the US government’s policy fails to satisfy this justification as well.

I. Military Commissions

In November, 2001, President Bush issued a military order declaring the attacks of September 11th to be illegal acts of war, and enemy combatants in the ensuing hostilities illegal combatants, triable in military commissions for violations of the
laws of war. Military commissions are a kind of war-court. They are tribunals established by Congress to prosecute enemy forces accused of violating the laws of war. They are presided over by military officials, they are governed by a distinct set of rules and procedures, and they are separate from ordinary civil and criminal courts, and from military courts-martial. The policy was modified under a series of orders under both Presidents Bush and Obama, and it was reaffirmed by President Obama in 2011. The Obama administration is currently struggling to resolve the cases of the remaining detainees.

Under the original order establishing the military commissions, they had the authority to try all non-US citizens whom the President believed have ever engaged in any acts relating to international terrorism, anywhere, at any time, including before Sept. 11, 2001, and for violations of “all other applicable laws.”

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16 Courts martial are generally used to try members of domestic forces accused of war crimes.
20 M.O. (2001) s.2(a)(1) and (2).
Defendants had no presumption of innocence; guilt needn't be established beyond a reasonable doubt; the government had the right to withhold any evidence that it deemed classified or classifiable (i.e., material that is unclassified, but could be considered classified at the discretion of the government), for the sake of national security, and “national security” was left undefined. The government had the power to hold the entire hearing in secret, including from the accused, even when the death penalty was available. The Department of Defence appointed the judge, the prosecutor, the defence, laid the charges, and set the procedures, and it expressly prohibited any right of appeal to an independent tribunal.

The revised military commission regulations are much improved from the virtually unlimited power that President Bush originally gave them. They include greater procedural safeguards protecting the rights of the accused to be presumed innocent,²³ and mount a defence;²⁴ they are more independent from the executive branch,²⁵ they impose higher standards for withholding evidence from the public and defendants,²⁶ and they include a provision specifically excluding evidence obtained through torture and cruel or inhumane treatment.²⁷ Defendants can now challenge the findings of the commissions in the federal courts.²⁸ Nonetheless, the

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²² M.O. (2001), s. 1(e).
²³ MCA 2009, ch.IV, s.949(l).
²⁴ MCA 2009, ch. IV, s.949(a)(2).
²⁵ They include provisions prohibiting "unlawful influence" over the commissions, as well as prohibiting taking adverse actions in performance reviews against members of the commissions or military counsel. MCA 2009, ch.IV, s.949(b). CRS 2010, 17.
²⁷ MCA 2009, ch. III, s. 948r(a).
Department of Defence still has the authority to decide which charges to bring, to name the judges and counsel, and to approve or disapprove of the military commissions’ findings. The standards for withholding evidence are still much lower than in ordinary criminal courts, allowing hearsay evidence, including involuntary statements from persons other the accused (which can be included under the hearsay rules) to be admitted.

The traditional justification for the exercise of military commissions is exigency or public emergency. They are a means for enforcing rule of law amid the “din of arms” when the Constitution is silent. When the heat of battle or an imminent threat makes the full enforcement of people’s constitutional right impractical or impossible, the government is justified in establishing more modest judicial institutions protecting limited rights until such time as the full operation of the constitution can be restored. The majority in Ex Parte Milligan explain,

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a

29 MCA 2009, ch.III, s.948q.
30 MCA 2009, ch.II, s.948j-k.
32 MCA 2009, ch.IV, s.949(3)(D).
33 Varner v. Arnold, 83 No. Ca., 210, cited in Winthrop, 773, fn. 2, saying of the Constitution during the civil war that “its voice was hushed and its power suspended amid the din of arms.”
necessity to furnish a substituted for the civil authority, thus overthrown, to
preserve the safety of the army and society; and as no power is left but the
military, it is allowed to govern by martial rule until the laws can have their
free course.\textsuperscript{34}

Military commissions need not literally be built on the battlefield and access to
ordinary courts need not be physically impossible. There is precedent for their
exercise on US soil when federal courts are functioning.\textsuperscript{35} Nonetheless, the basic
justification for resort to military commissions remains for the trial of alien
combatants for violations of the laws of war when access to full procedural
protections is unavailable.\textsuperscript{36}

\textsuperscript{34} \textit{Ex Parte Milligan}, 71 U.S. 2, 127; 18 L. Ed. 281, 297f, holding that the trial of American
civilians living outside the field of war by military commissions when ordinary courts are
functioning in that area is unconstitutional.

\textsuperscript{35} Most notably in \textit{Ex Parte Quirin} (317 U.S. 1, 45 (1942), the Supreme Court upheld the
conviction of German saboteurs tried in military commissions after hostilities had ceased
and while federal courts were functioning. This decision largely serves as a basis for the
current exercise of military commissions. However, it can be distinguished from the current
exercise on the grounds that in \textit{Quirin}, on the conceded facts the defendants were members
of enemy forces charged with offences that were widely recognized as war crimes. The
resort to military commissions in this case was symbolic rather than strategic.

\textsuperscript{36} The restriction of the jurisdiction of the military commissions to non-citizens has been
widely discussed, and criticized. See, e.g., Jordan J. Paust, “Still Unlawful: The Obama
Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit,” 45
\textit{Cornell International Law Journal} 367 (2012); Devon Chaffee, “Military Commissions
Detention in the ‘War on Terrorism’: Normalizing the Exceptional After 9/11,” 112
\textit{Columbia Law Review Sidebar} 31 (2012); and Owen Fiss, “A Predicament of His Own
Making,” \textit{Boston Review} (online May 3, 2011),
http://www.bostonreview.net/BR36.3/owen_fiss_guantanamo_bay_military_tribunals.php
(last checked, July 25, 2012).
The primary justification that the US government has offered the exercise of the current military commissions is the increased risk to national security. In the preamble to his Order, President Bush states:

having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

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37 This is not the only justification for the use of military commissions for trying enemy belligerents. It has also been argued that military commissions better protect the participants to the proceedings and sensitive information that must be kept secret for security reasons. So, e.g., President Obama’s remarked that military commissions “allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.” President Barack Obama, “Remarks by the President on National Security” (May 21, 2009) available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09 (last checked July 13, 2012). This justification has been widely questioned on the grounds that federal courts have well-established procedures for protecting sensitive information and maintaining the security of participants in trials. For an analysis of why federal courts are better equipped to protect sensitive information and trial participants, see, e.g., Joanne Mariner, “Military Commissions: Round Three,” Findlaw (May 18, 2009) http://writ.news.findlaw.com/mariner/20090518.html (last checked July 13, 2012). See also Chaffee, “Persisting Problems,” arguing for the advantages of trying violations of laws of war in federal courts rather than military commissions.


President Obama reiterated these thoughts in his 2009 speech on national security, outlining his policy on the treatment of detainees. There, he said my single most important responsibility as President is to keep the American people safe. It’s the first thing that I think about when I wake up in the morning. It’s the last thing that I think about when I go to sleep at night. And this responsibility is only magnified in an era when an extremist ideology threatens our people, and technology gives a handful of terrorists the potential to do us great harm.
The thought here is that, unlike ordinary criminals, who might harm ten, or maybe 20 people, terrorists threaten to destroy hundreds, if not thousands of lives. The original scheme of liberties imposed some level of risk on people, that, say, a certain number of criminals (ten) would remain free so that the state could ensure that no one is falsely imprisoned. In the case of ordinary criminals, Americans are willing to take these risks for the sake of procedures that they take to be fair. But, the thought goes, when the criminals are potential terrorists threatening hundreds (or thousands) rather than tens of lives, the government is justified in adjusting these procedures and “striking a new balance” between security and liberty. Does the US government’s need to “balance” the liberty of enemy combatants with the security of Americans satisfy the emergency justification underlying the exercise of military commissions?

The idea that the government must “balance” liberty and security seems natural enough. We know from Hobbes that liberty and security can be in tension with each other. When everyone has the untrammeled liberty to do whatever she wants, then no one is secure, making enjoyment of one’s liberty, and security, virtually impossible. The solution to this difficulty is to establish a scheme of rights and duties and submit to a coercive authority charged with upholding and enforcing this initial scheme. Establishing this scheme and enforcing people’s rights and duties

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against each other, and the state, is one way in which one might think that a government must “balance liberty and security.” It might thus seem sensible to think that, when the threat to people’s security increases, it is permissible for the government to change the existing scheme, limiting the amount of liberty people enjoy in order to restore people’s security.\textsuperscript{39}

Although this might seem plausible in the abstract, outside an institutional context, when people’s liberty and security are being balanced directly, once people have established a scheme of rights and duties and submitted to an authoritative state, it is no longer open to a community (or the state) to constrain people’s rights whenever the threat to people’s security increases. Ordinarily, once a community has established an authoritative scheme of rights and duties, and people have submitted to the rule of law, it is thought to be impermissible for the government to engage in such calculations any time the cost of enforcing people’s rights increases; the mere fact that there is a change in the circumstances of enforcing people’s rights does not, on its own, warrant changing the initial scheme. This does not mean that the government can never adjust this scheme, or that it can never weigh questions of upholding and enforcing people’s rights against the overall cost to the community. A community is not bound to uphold people’s rights come what may. So holding would make the function of government virtually impossible. The question then is, when is it permissible for the government to limit the enforcement of people’s rights in the face of an increased threat to the community? This question is complicated. This is

\textsuperscript{39} See Waldron, “Liberty and Security: The Image of Balance” for a discussion of the difficulties involved with this approach.
because, as I shall argue, the government is both a guardian of rights and a protector of security.\textsuperscript{40}

\textit{II. Two Functions of the State}

In one of its foundational decisions regarding military commissions, the Supreme Court wrote,

\begin{quote}
    an important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law.\textsuperscript{41}
\end{quote}

The Court is here distinguishing between two important wartime functions: the capture and detention of enemy combatants, and the trial and punishment of war criminals. These correspond to two important functions of the state. The capture

\textsuperscript{40} Jeremy Waldron makes the important distinction between balancing liberty and security in the abstract, and balancing people's rights (or civil liberties) against an increased threat to security in "Security and Liberty: The Image of Balance."

\textsuperscript{41} \textit{Ex Parte Quirin}, 317 U.S. 1, 28. The Court continued,

\begin{quote}
    By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. (317 U.S. 1, 31, footnotes omitted)
\end{quote}

There is an important qualification to the Court's remark. The Court here mistakenly collapsed the distinction between the \textit{status} of being an unlawful combatant with the \textit{crime} of unlawful combatancy. An act that reduces a person to the \textit{status} of unlawful combatant is not necessarily a crime under domestic or international law. See Yoram Dinstein, \textit{The Conduct of Hostilities Under the Law of International Armed Conflict} (Cambridge University Press, Cambridge UK, 2004) and George Fletcher, "The Law of War and Its Pathologies." This mistake is reproduced in the government's legislation governing the military commissions. I will return to the significance of this point below.
and detention of enemy combatants is an important means to succeeding in military aims and repelling and defeating the enemy. On the other hand, the trial and punishment of war criminals brings to justice those who, in the course of combat, have acted illegally. It is important to notice the distinction in these two functions. The exercise of military commissions in times or war or emergency is justified as a way for the state to uphold its duties of justice under exigent circumstances. It is not itself a weapon used for combat.

I will call these the \textit{protective} and \textit{juridical} functions of the state. The state’s protective function derives from its role as the keeper of the peace; it is part of our ordinary understanding of the state that it must keep its people and its borders safe. On the other hand the state also has a juridical function. It is a guardian of justice and a vindicator of people’s rights. It is charged with establishing and upholding the rule of law, and it alone has the authority to back these legal rules with the threat of force, and to punish violations.\footnote{I am not arguing is not to say that this is the purpose of law, or that law always or necessarily protects people’s rights (or that the state always or necessarily punishes violations of rights). My argument is not one about the proper aim or function of law, and I am not making a conceptual point about the nature of law and its connection with moral rights. My claim just that it is ordinarily taken to be part of the function or role of the state to establish and uphold the rule of law and to do so in a way that protects people’s moral rights.} The state’s authority to raise armies and wage war are primarily protective, as are the capture and detention of enemy soldiers; the central aim in these cases is to defend the state and its citizens from attack. Its authority to establish law and punish violations is juridical; the primary aim in the
exercise of this authority is the pursuit of justice.\textsuperscript{43} This includes the state’s authority to try and punish criminals. The issuing of a verdict and the imposition of a penalty are what distinguishes trial and punishment from mere detention. 

One thing that people might mean when they say that the government must “balance liberty and security” then, is that they must reconcile these two functions. The state must not only to keep its subjects safe, but it must do so in a fair and just manner. This way of putting the problem should already point to the limitations of the notion of balance in this context. The problem is that not just any “balance” between security and liberty will do. It is distinctive of the juridical role of the state that it cannot be made subordinate to the state’s protective aims: the state cannot secure peace at the expense of justice. When people’s liberties are protected by legal rights, their direct balancing against concern for security violates the state’s juridical role as the protector of people’s rights and guardian of justice; it is generally part of the structure of rights that they be immune from such calculations. As we have seen, however, this does not mean that the state can \textit{never} adjust people’s rights or limit them in the face of competing considerations or that it must uphold people’s rights come what may. But, when it does so, it must reconcile these

\textsuperscript{43} I say “primary” but not “sole” aim in these cases because although war is \textit{primarily} defensive and crime primarily juridical, neither is uniquely one or the other. Wars can be waged in the name of justice, and states are under a duty to conduct wars fairly, and, as we shall see below, rules governing criminal trials and punishment are also guided by concern for public safety. Note that in this respect, my view differs from those that distinguish between war and crime. See Noah Feldman, “Choices of Law, Choices of War,” 25 \textit{Harvard Journal of Law & Public Policy}, 457 (2002), and Fletcher, “The Law of War and Its Pathologies,” for the latter distinction.
competing aims in a way that upholds, rather than denies, the juridical role of the state.

Emergency measures pursued in times of a heightened threat, then, must reconcile these two functions of government. They cannot protect security at the cost of being just. A complete evaluation of the US government's policies on military commissions must therefore determine when the limitation of people's rights for the sake of security is a vindication, rather than a denial of the state's juridical role as guardian of justice.  

III. Striking a Balance

The initial establishment of a scheme of rights and duties can itself be thought of as the product of a balance, namely a balance between the liberty of each and the liberty of all. But, as we have seen, it is not the only way in which a government must balance competing considerations. Once a community has submitted to the rule of law, questions of the enforcement of people's rights and their reconciliation with competing considerations and aims of the community continue to arise. So, e.g., a state must decide questions of the scope and content of people's rights in changing

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44 To be more precise, the question is, when is the limitation of people's rights for the sake of security a vindication of the juridical role of the state, in an otherwise just society, when the legal system in force is a just one, it is fairly upheld and enforced, people ordinarily accept the authority of its officials, and so on. This question is a normative question about the moral duties a state has to uphold the rule of law in emergency circumstances, when the society in question is otherwise a just one.
circumstances; it must resolve conflicts between people’s rights when their exercise conflicts; it must determine the amount of resources to devote to their enforcement as against competing claims on the community’s resources and the overall interests of the community, and so on. One might also think of these as questions “balance” as well.45

The difficulty in addressing these further questions of “balance” is that the government cannot decide these policies on the basis of what’s best for the community overall, on a case-by-case basis. That is, it cannot decide questions of the enforcement of people’s rights by weighing the advantages and disadvantages of particular courses of action directly, in the circumstances in which they arise. So doing, Dworkin writes, would “make the boast that society honors claims of right, even at the expense of general welfare, an idle gesture easily subverted by denying the procedures necessary to enforce these rights for no better reason than that same public interest.”46 So, e.g., if people have a right to free speech, questions of the scope and exercise of this right cannot be decided on the basis of the benefits of its expression to the community or how valuable or disadvantageous the speech in


46 Dworkin, “Principle, Policy, Procedure,” 77.
question is. Instead, the government must take into account people’s right of free speech. It must weigh this in its deliberations about the extent to which people are free to voice their opinions, over and above the costs or benefits to society of people’s expression on a given occasion. Alternately, if people have, say, a right to a fair trial, the content of this right – that is, the particular procedures to which people are entitled – cannot be determined by the advantages and disadvantages of particular procedures to the community on a given occasion. Like the right to free speech, once certain procedures have been enshrined as rights, people are entitled to their systematic enforcement, and that they be immune from change each time the prevailing winds change, or the cost of their enforcement changes on particular occasions. Questions of their enforcement must be decided on the basis of the initial scheme of rights. This just follows from the nature of rights. Holding otherwise risks denying the existence of the initial right in the first place. If decisions about the scope and enforcement of people’s rights were decided on the basis of the benefits of their exercise compared to the overall costs to the community of their protection, then this would be tantamount to denying the right to begin with. The community may as well revert to the initial act of “balancing” competing considerations against each other directly.

How should a state weigh people’s rights against competing considerations when deciding further questions of “balance?” This is a difficult question, and I do not

\footnote{Consider, e.g., the recent case of Snyder v. Phelps (131 S. Ct. 1207 (2011)). There, the Court held that that members of the Westboro Baptists Church had a right to shout homophobic and anti-war epithets at a soldier’s funeral even if they are hurtful or distasteful.}
propose to offer a complete answer. It is worth making two observations, however. First, when deciding further questions of the enforcement of people’s rights, the government must take into account the fact that people have rights at stake in its deliberations and weigh them accordingly. There are multiple ways that the government might do this. It might treat rights as trumps\textsuperscript{48} or side constraints.\textsuperscript{49} It might accord them lexical priority\textsuperscript{50} in its reasoning. The important point is that it cannot decide questions of enforcement by weighing the advantages and disadvantages to the community directly, as it would had it not established a scheme of rights.

Secondly, once this initial scheme of rights and duties is in place, the state must accord people’s rights \textit{due consideration} when deciding further questions of balance. That is, once this initial scheme of rights and duties is in place, people have a right that their rights carry equal weight in the state’s deliberations. The state cannot arbitrarily weigh the rights of some differently from the rights of others when deciding questions of balance. So, for example, the state cannot decide how to balance people’s right to speech against others’ right to privacy on the basis of, e.g., the importance of the people whose rights are at stake, or the salaciousness of the speech expressed (or the prurience of people’s interest in it). This holds for procedural rights as well. A state cannot, e.g., determine the cost it is willing to

\textsuperscript{49} Robert Nozick, \textit{Anarchy, State and Utopia} (Basic Books, USA 1974).
impose on the community for the sake of upholding people's criminal procedural rights on the basis of, say, the political influence of the defendant, or the benefit to the community of obtaining a conviction in a given case. Where it grants a right, the state must weigh it equally for all holders of the right when deciding questions of balance.

This duty can be very robust. It can hold even when it is to the overall disadvantage to the community to uphold some people's rights, and even when people have no substantive right to the thing in question. The mere fact that the enforcement of a person's right imposes some cost on the community is not, on its own, sufficient reason to deny it. Where people have a right, e.g., to free speech, the state must protect it even if the speech is false or offensive; where they have a right to be presumed innocent, they have a right to its enforcement even if it means some criminals will go free, etc. The duty to accord people's rights due consideration when deciding questions of balance can also give people the right to a fair distribution of communal benefits, even if they have no antecedent right to the benefit in question. Even if people have no initial right to, e.g., smooth roads or libraries, they can have a right that the state not arbitrarily or systematically divert funds away from road repair so that others can have better libraries.51

51 My aim here is simply to argue that there is some difference between deliberating about people’s rights and competing considerations, and simply weighing considerations against each other directly. This doesn’t mean that just because people have been granted a right, they entitled to its full exercise in all contexts. One difference is that once a scheme of rights and duties is in place, people have standing to assert their rights as against the community in virtue of their membership to the scheme. See generally Larry Alexander, “Constitutional
And so on. In all these respects then, once a people have established a public power and submitted to a scheme of rights and duties, all further state actions must be governed by this scheme. This is part of what it means to be governed by the rule of law.

My suggestion is that the US policy of trying foreign enemy belligerents under reduced procedural protections in military commissions rather than federal courts fails to accord due consideration to their rights of criminal procedure, in violation of the government’s juridical duty to decide questions of right in accordance with the rule of law. The US government’s policy limits the criminal procedural rights of foreign enemy combatants for the sake of the security of Americans (and others). Foreign enemy combatants can now appeal to federal courts to review verdicts issued by military commissions. This is a significant advance in the rights of these defendants. However, a right of appeal is a far cry from full procedural protections. Determinations of guilt and moral desert are individualized judgments, dependent on the specific circumstances of an act (and actor). Perhaps God is able to perfectly match each punishment to a crime. But given humans’ finite abilities to determine a

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52 Indeed, once this initial scheme is in place, people might even have a right to participate in the procedures by which the state determines questions of policy. So, e.g., in Bushell v. Secretary of State for the Environment ([1981] AC 75), a group contesting the building of a highway through Birmingham objected to the department of the environment’s denial of the opportunity to challenge the data upon which their decision was based. The Court of Appeal upheld their claim, though it was eventually struck down at the House of Lords. See Dworkin, “Principle, Policy, Procedure” p. 78f and passim for a discussion of this case.

person’s moral guilt or innocence, the correct measure for determining whether a punishment “fits” a crime, imperfect factual knowledge of the circumstances of a crime, etc. the best people can do is to ensure that guilt and punishment are determined in accordance with fair procedures. One aspect of fair procedures requires that they are applied systematically, or that even if they are imperfect, that each person be subject to the same antecedent risk of suffering a moral harm. Relaxing these procedures for some for the sake of the good of others violates the right to fairness in the application of procedures, even if the procedures themselves are imperfect.

IV. Terrorists Don’t Deserve Procedural Protections

One might object that the argument above proves too much. In establishing a scheme of rights and duties and enshrining them in the Constitution, Americans did not mean to confer them on the world at large. The US is not under an obligation to extend its benefits to everyone in the world, including its enemies, once it extends them to Americans. Surely this overstates the notion of government by rule of law. It must be permissible for a government to treat its own citizens differently from non-citizens. One might thus agree that a government has a duty to accord those people whose rights fall under the initial scheme due consideration; but, they might dispute the claim that foreign enemy combatants fall under this initial scheme to begin with.

54 A moral harm is roughly speaking, the violation of a moral right, like, e.g., the right not to be falsely convicted of a crime. See Dworkin’s discussion of this notion in “Principle, Policy, Procedure.”
Perhaps, then, the US has no further legal obligation beyond those that it extends to its own citizens. One might hold that it need not take the liberty of suspected terrorists into account when calculating the balance between security and liberty.

On this view, the enjoyment of the basic rights afforded by the US Constitution, and the protection of the US government is a privilege afforded to Americans and members of their community; they are not benefits that Americans owe to the world at large. The community has no antecedent duty to protect the rights of enemy belligerents, and so it owes no further justification for altering the scheme of liberties, other than that so doing increases its security. This is a tempting argument when the rights in question are rights of procedural justice, which are expensive to uphold, and the individuals in question are suspected terrorists, the very people who pose a threat to the security of Americans. The idea that “terrorists don’t deserve procedural protections” is a version of this argument.55 This argument, however, rests on a misunderstanding.

55 A Nation Challenged: The Presidential Order, Senior Administration Officials Defend Military Tribunals for Terrorist Suspects,” Elizabeth Bumiller and Steven Lee Myers, New York Times, Nov. 15, 2001, quoting Vice President Dick Cheney saying that foreign combatants “don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.” See also then-Attorney General John Ashcroft (“A Nation Challenged: Civil Liberties; White House Push on Security Steps Bypasses Congress,” Robin Toner and Neil A. Lewis, The New York Times, Nov. 15, 2001), arguing that “foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protections of the American Constitution, particularly when there could be very serious and important reasons related to not bringing them back to the United States for justice. I think it's important to understand that we are at war now.”
First, military commissions have the power to try all non-US citizens, including landed immigrants, permanent residents, and all other non-US citizens who are legally in the US. Even if they are not American citizens, these groups are clearly members of the community who are entitled to have their rights, or liberty and security included in the “balance.”

Secondly, the Supreme Court has long held that Constitutional criminal protections hold for citizens and non-citizens alike, and that the state may not inflict punishment without a fair trial procedures presided over by an impartial deliberator.\(^{56}\) This is precisely because punishment is distinct from detention or deportation in its individualized moral nature.

More importantly, however, it is true that it is a privilege in the sense of a “fortunate accident” that that people in the US are able to enjoy the broad range of rights that they do, as compared, say, to people living in more oppressive regimes. However, it is not a privilege in the sense of a benefit conferred by society as a matter of policy, like, say, social security or, e.g., public libraries.\(^{57}\) That is, it is not a privilege in the sense of being something that some people can enjoy by virtue of their more fortunate circumstances or an accident of birth (or citizenship), but not others. Rather, rights of procedural justice (like, e.g., a right to a fair trial, right to hear the evidence against you, right to be presumed innocent, right to respond, etc.) are

\(^{56}\) *Wong Wing v. US*, 163 U.S. 228 (1896).

rights that people have just by virtue of being subject to the power of the state.

Rights of criminal procedure: are there to ensure that the state’s determination of guilt (or innocence) is fair and accurate. These rights check the power of the state as against an accused in deciding these questions.

In enshrining these rights in the Constitution, American society has expressed its commitment to upholding and enforcing them, and its continued adherence to the Constitution expresses its continued commitment to this. As we saw above, this does not mean that it must enforce these rights come what may. Nor does it mean that Americans can never draw distinctions between those people who are entitled to the full benefit of Constitutional rights, and those who are not. American society can, and does, make these distinctions. But, when it does, this cannot be on the basis of the fact that someone is not a member of the community and so excluded from the balance in the first instance, and so has no rights at all against the exercise of state power. Americans have already decided (justifiably) that the arbitrary exercise of state force is prohibited. This is what it means to enshrine these procedures as rights. This holds for the exercise of state force against citizens and non-citizens alike. As a result, the government’s policies cannot be justified on the basis of excluding enemy combatants from the community, or, the community’s balance of considerations (including people’s rights), in the first instance.

Does this mean that the government can never limit people’s rights in times of emergency? Must a government uphold the rule of law come what may? Not
necessarily. But it does mean that when it does, it cannot do so on the grounds of balance. Consider then an alternative justification for emergency measures and the exercise of military commissions.

V. Emergencies: The Constitution is not a Suicide Pact

The foregoing discussion might seem overly legalistic. In times of emergency, one might argue, it is permissible for the state to limit people’s rights for the sake of national security. Holding otherwise risks overly constraining government action. The slogan “the Constitution is not a suicide pact” reflects this line of thinking.\(^{58}\) Perhaps, then, the US government aims to balance its juridical duty to uphold the law against an increased threat to security. This suggestion thus raises the third, “external” sense of balance. The question then is, is the policy justified on this third sense of “balance?”

The paradigm structure of a justification for emergency measures under a threat of harm is the justification for the use of force in self-defence.\(^{59}\) Ordinarily, people are prohibited from using violence in pursuit of their ends. The exception to this is when people are under a threat of imminent harm, and resort to ordinary procedures to settle one’s disputes is unavailable. Under such circumstances, and only under such circumstances, people are permitted to use violence in order to

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58 See footnote 8, above.
59 This thought is reflected in the fact that self-defence remains the only instance in international law in which nations are permitted to wage war without UN authorization. *U.N. Charter*, art. 51.
repel the threat. The use of violence under these conditions, though not good, is permissible, and justified. But violence is permitted only so long as one is under an imminent threat, and the permission ends once the threat is averted.

Notice, however, this argument does not represent a general retreat from peaceful means for resolving disputes. Being subject to the threat of harm does not give one a general right to resort to violence. The right to use violence in self-defence is highly constrained. Violence in self-defence is only justified so far as it is necessary to repel the attack, it is the minimum amount needed to repel the attack, and it is committed with the intention of defending oneself from attack; one cannot, say, use the attack as an opportunity to settle accounts, exact punishment or revenge, to further some public purpose, etc. It is only so far as force is used to thwart an immediate attack that it is justified. And, as noted above, the use of violence must end as soon as the threat has passed.

The reason self-defence is so constrained is because for all other purposes, one has a duty to settle one’s disputes peacefully, and not by violence. In civil society, this

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61 These are not necessarily the only factors influencing the justifiability of defensive force, but they are standardly accepted as among the attendant conditions of justified force. See the discussions of self-defence in fn. 57, above. See also the Model Penal Code, Article 3.
means resort to law. Ordinarily, when a society is a just one, and the law in question is fair and ordinarily enforced (the legal rules governing the society are mostly fair, they are fairly imposed and upheld, the members of the community generally regard them as fair and respect the authority of the officials, and so on), people have a duty to use lawful means to settle their disputes, and avoid violence. The promotion of public aims, the punishment of wrongs, settling of accounts, and so on, are the duties of the state; there is no private right to pursue these ends once people have entered the civil condition.

The same holds for resort to war. For the most part, the justification for war and justified behaviour in war are very closely modeled on the justification for self-defence. This is not to say that self-defence is a, or is the only, justification for war. It might be, but, e.g. humanitarian intervention is arguably a justified reason for resort to war, and it is not the same thing as self-defence. The justification for humanitarian interventions nonetheless bears many similarities to the justification for self-defence. It is a highly structured justification, and resort to violence is

\[\text{62 See Arthur Ripstein, "Proportionality Without Balancing," (unpublished manuscript), for a defence of this idea, and for the idea that procedure is opposed to force more generally.}\]

\[\text{63 A humanitarian intervention occurs when one country forcibly enters another's territory in order to prevent the latter from massacring or enslaving its own people, or some sub-community of them. This is often confused with third-party self-defence. But, unlike third-party self-defence, there are only two parties in humanitarian intervention. Nor is it strictly speaking a legally recognized ground for war under the UN Charter. (The Charter of the United Nations (1945), Ch. VII, Art.s 42 and 51 recognizes self-defence and authorization by the Security Council as the only legitimate grounds for war.) Notwithstanding this, there are strong moral and political reasons for recognizing it as legitimate grounds for aggression and it is gaining legal acceptance. See, e.g., Michael Walzer, Just and Unjust Wars, 4th ed. (Basic Books, New York, 2006) pp. 101-8 for a discussion of humanitarian intervention as a legitimate moral ground for war. [Hereinafter Walzer, Just and Unjust Wars.]}\]
justified only so far as it is necessary, and it is committed with the intention to thwart an imminent attack of a sovereign on its own people.  

In general, however, resort to war is only justified under very narrow circumstances. These include, e.g., self-defence or, say to prevent a widespread massacre by a sovereign of its own people. Moreover, even if resort to war is justified, justified conduct in war is also highly constrained. Evils, like physical violence, or restrictions in people’s liberties, etc. are only justified so far as they are necessary for furthering these ends. This thought structures all thinking about conduct in war; all thought about justified conduct in war centres around the importance of avoiding harm to innocents, and minimizing the harm committed in order to thwart the threat. These constraints are both moral and legal: virtually all of military law exists in order to uphold and enforce these norms. The reason for these constraints is the same as the reason for the constraints on self-defence: short of the immediate need to repel an imminent attack (or thwart a threat against

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64 My point here is not that self-defence, or that self-defence and humanitarian interventions are necessarily just causes for war. There may indeed be no just cause for war, making it always impermissible, or individual self-defence and national self-defence might have so little in common that the analogy is unhelpful. Rather, my point is that, when (or if) war is justified, the justification for the use of force in the national context bears structural similarities to justified individual self-defence. In particular, as I shall argue below, both justifications include a duty to return to order and settle one’s disputes peacefully. For discussions of self-defence as a justification for war see, e.g., David Rodin, *War and Self-Defense* (Clarendon Press: Oxford, 2002); Seth Lazar, “Necessity in Self-Defense and War,” *Philosophy and Public Affairs*, 40:1, 3-44 (2012) and “Responsibility, Risk, and Killing in Self-Defense,” *Ethics* 119:4 (July 2009); and Jeff McMahan, *Killing in War* (Clarendon Press: Oxford, 2009).

65 They must also meet further restrictions, including being proportional to the harm threatened; there must be no reasonable avenue of escape, they must cause the least harm possible for achieving these ends, etc.
innocent civilians, etc.), one has a duty to settle one’s disputes peaceably, and avoid violence.

We are now in a position to see what is wrong with the suggestion that the state is justified in limiting its juridical duty for the sake of security. The foregoing discussion suggests that a generalized threat to a nation’s security does not give it a blanket permission to resort to violence, or commit some evil or harm, in order to protect itself. The defence of military necessity does not give a nation an open door to do whatever it takes to increase security; it licenses an evil only under highly constrained circumstances. As a result, the brute appeal to a “heightened risk to security,” even if true – i.e. even if the risk really exists – is not, on its own, sufficient to justify just any measures that might increase people’s security. And it is limited by a duty to return to order and procedure as soon as the threat is averted.

The appeal to security to justify limitations on the procedures used to settle disputes turns this justification on its head. It denies the basic idea behind the justification, which supposes that a harm or evil committed in self-defence is justified in service of the aim of returning to peaceful means of settling disputes; it is not itself the settling of the dispute. As we have seen, military commissions are a means for enforcing rule of law amid the “din of arms” when the Constitution is silent.66 They provide a way for upholding law and order, and bringing violators to justice under

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66 Varner v. Arnold, 83 No. Ca., 210, cited in Winthrop, 773, fn. 2, saying of the Constitution during the civil war that “its voice was hushed and its power suspended amid the din of arms.”
emergency circumstances. Emergency might prevent the full exercise of the law, allowing the state to provide only limited protections to enemy defendants. But, this is permissible in the circumstances since, like the permission to use violence in self-defence, such restrictions are necessary for the sake of upholding justice under exigent circumstances.

Limiting the procedures that uphold the justice of the state’s use of force for the sake of increased security subverts the aim of these procedures. So doing subordinates the state’s juridical functions to its protective ends, and reverses the ordinary structure of the justification. Military commissions are not themselves defensive instruments used to “repel and defeat the enemy.”67 Their aim is not primarily protective, denying enemy defendants access to full protection of the law so as better to achieve military success. The suggestion that the state is justified in limiting the procedural rights of enemy belligerents on the grounds of balance is therefore unwarranted. It subsumes the state’s juridical duty to try and convict criminal defendants only under procedures that are taken to be fair to its pursuit of military ends. And this, as we have seen, is illegitimate.

Understood as an emergency measure for securing convictions under a heightened threat to security, the government’s policy is unjustified. It subordinates the government’s juridical duties to its protective aims, arbitrarily limiting the rights of some for the sake of the security of others. Concern for security can warrant the

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67 Ex Parte Quirin, (317 U.S. 1), 28. See discussion above.
capture and detention of enemy belligerents until such time as they no longer pose a threat.\textsuperscript{68} This, however, is very different from relying on the increased threat to security posed by these defendants to justify affording them fewer trial rights. This justification as we have seen, illegitimately uses the state’s juridical institutions as weapons to “repel and defeat the enemy” rather than for the promotion and pursuit of justice.

\textit{VI. Military Commissions, Revisited}

Can there be a non-emergency justification for the exercise of military commissions? Is it possible to justify them on internal, juridical grounds? Perhaps, but this is not the circumstance that the US is in now.

The current regulations confer very broad scope over the range of persons subject to their authority. Under the 2009 regulations, military commissions have the power to try all “unprivileged enemy belligerents” in the global “war on terrorism.” An unprivileged enemy belligerent is defined as anyone who is not a privileged belligerent who engages in hostilities against the US or its allies, who “purposefully and materially” supports the hostilities, or who is a member of al Qaeda.\textsuperscript{69}

\textsuperscript{68} Though this does not justify the US government’s current policies on detention. See e.g., “U.S. Administration Encounters Difficulties in Effort to End Guantanamo Bay Detentions,” John R. Crook, \textit{American Journal of International Law}, (103:3, July, 2009), 575-79.

\textsuperscript{69} S. 948(a)(7) of the \textit{Military Commissions Act of 2009} defines unprivileged enemy belligerents as follows: (7) Unprivileged Enemy Belligerent: The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—
Membership to al Qaeda is notoriously vexed. The loose structure of the organization and the ever-changing nature of its boundaries make questions of its membership both indistinct and unstable. The inclusion of persons who “purposefully and materially” support hostilities likewise departs from traditional understanding of the laws of war, marking the first time that supporting those who engage in illegal hostilities can be treated like participation in the hostilities and prosecuted as a war crime. By so extending the definition of illegal combat, the US government strips all those falling under this definition of combatant immunity and denies them the benefit of prisoner of war status. As David Frakt remarks, the regulations “essentially criminalized being an enemy.”

The US government has also expanded what count as war crimes, listing new war crimes not previously recognized by international law. These include “murder in

(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

MCA 2009, s.948a (7).


See Robert Chesney, “Who May Be Held? Military Detentions Through the Habeas Lens,” 52 Boston College Law Review 769 (2011) for the difficulties that the courts have encountered in settling this question.


violation of the laws of war,” 73 and “providing material support for terrorism.” 74

Murder “in violation of the laws of war” has been interpreted to mean murder of a privileged person or military target by an unlawful combatant. 75 Defining war crimes in terms of the status of the attacker not only criminalizes being an enemy, but makes it a war crime. The military commissions are thus effectively exercising jurisdiction over “invented war crimes for invented war criminals.” 76

This problem is exacerbated by the loose nature of the “war on terrorism.”

Ordinarily, armed conflict occurs between two (or more) belligerent forces (armies, etc.), between certain dates, and on specific territory. There is a clear distinction between combatants and civilians, warring and neutral states, and war- and peacetime. The law of war governs the conduct of those persons participating in (this time- and territory-bounded) hostilities, and no one else. The war on terror does not conform to these constraints. Belligerents come from the civilian population of countries that both are and are not at war with the US. This makes virtually all acts of aggression against the US, committed anywhere, “combat,” and virtually all of them illegal because they are not perpetrated by recognized forces.

73 *MCA 2009* s.950(t)(15). The *Act* also makes it a crime to destroy property in violation of the law of war. (s.950(t)(16))

74 *MCA 2009* s.950(t)(25)(a) reads “any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”

75 See Chaffee, ”Persisting Problems” discussing this interpretation of this provision, and the difficulties arising from it.

76 Frakt, "Mohammed Jawad."
Though Sept. 11, 2001 marks a natural start date for the war, the regulations governing the military commissions expressly state that hostilities committed before this date fall under their jurisdiction.\textsuperscript{77} And, unlike traditional war, there is no clear way of marking an end to the war on terror; there is no party with whom to, e.g., sign a peace treat or agreement to lay down arms. There are therefore no temporal boundaries to the war on terror either.\textsuperscript{78}

Even under the revised regulations, the current military commissions therefore mark a sharp break from their traditional exercise. In principle, military commissions exercise authority over alien combatants for violations of the laws of war.\textsuperscript{79} They have jurisdiction to try enemy forces engaging in illegal combat for these violations, but not for ordinary acts of combat; combatants generally enjoy combatant immunity for ordinary acts of aggression that occur in the course of combat. A civilian who kills a lawful combatant can be tried for murder. But, this is


not normally considered a war crime. Rather, civilians are normally subject to
civilian criminal law.\textsuperscript{80}

The worry with the exercise of military commissions in the current context is that
they arbitrarily deny foreign belligerents accused of war crimes full benefit of the
law so as better to defend the US from its enemies. This is very different from
providing a means for upholding the rule of law “amid the din of arms,” when
federal courts are unavailable. The current exercise of military commissions makes
the trial of enemy belligerents in military commissions under reduced procedures
more like a weapon the US uses to prosecute the war, rather than an emergency
measure for upholding the rule of law in exigent wartime circumstances, as they are
originally intended. And this, in turn, looks more like an abrogation of the rule of law
and a denial of justice, rather than something that justice demands for the sake of
increased security.

\textit{VII. Conclusion}

Despite its intuitive force, the idea that a state must "balance" liberty and security is
not at all straightforward. Once it has established the rule of law, a government
cannot balance people’s liberties against their security (or the security of others)
directly. It must take into account the fact that people have rights, and it must
formulate its policies in a way that upholds, rather than ignores this fact. This does

\textsuperscript{80} or martial law, where it is in place.
not mean that the government must protect people’s rights at all costs, or that unilateral emergency action is never permissible. However, as I have argued, self-defense, or an end that functions like self-defence (in that it includes a duty to return to order to settle ones disputes once the threat is averted) provides a better justification for such policies. Arguments from balance, I have argued, are illegitimate on this justification. They subvert the state’s role as a protector of rights and a guardian of justice. True, the state may well secure gains in people's security by limiting the rights of some. But, I have argued, absent an intention to thwart an immediate threat and the aim of returning to order to settle its disputes, this fact alone is insufficient to justify its policies. Instead, under the existing justification, the trial of enemy belligerents in military commissions rather than federal courts, while the courts are open and functioning, and when there is no guiding legal justification requiring the policy, is arbitrary and opportunistic. This makes the trials of enemy belligerents in military commissions rather than federal courts a form of victor’s justice.