willing to say that on September 10th there would not be basis to apprehend and put someone in a military commission? If you do not agree with my September 10 example, then at that point I am probably not going to get your vote. But for those people who think that there perhaps would be a case in that circumstance to bring military commission charges, I would urge you to consider conceptually then why it is that you believe that and to ask how that same principle might apply to earlier conduct, including the *USS Cole* bombing, which was less than a year prior to 9/11, and which in many ways was, at least as alleged, was a dry run for the larger, broader scale attacks.

Most importantly, and I have two minutes to go, as I am being reminded, I would like to divorce the question that I am arguing from other challenges and other problems that I expect to be raised with the military commission system.

One is the question of remedy. Understandably, there is a grave concern about the idea that people could be caught up in the military commission system, which is not, shall we say, moving as expeditiously as many people would like—and that defendants will not find a way to get themselves out of that commission until after a trial on the merits and appeal and so forth, which we know has already taken much, much longer than those who designed that system would want. Here, I would simply point out that the question of whether there is a remedy in those circumstances should be divorced from the question of whether there is ultimately jurisdiction in the first place, and so even if you believe that someone should have some sort of mandamus or interlocutory remedy to get out from the commission system, if the facts are plainly not supportive of jurisdiction, that does not mean that you necessarily believe that pre-9/11 conduct is unavailable.

Second is the question of why there have been so many delays in that system, and what it is that is driving the source of delays? And I would submit that although certainly there is a weighty discussion to be had about the appropriateness of trying pre-9/11 conduct, that issue is beside the point in terms of why there have been so many delays in the military commission system. There have been delays in the system for innumerable reasons, many of which relate to legacy issues about how these individuals were brought to Guantánamo and what was done to them prior to that. And the question of whether pre-9/11 conduct should be triable—although it is an important question—is not the question that ultimately drives that delay.

Another question is about detention, and this is the point I wanted to end on: For those who are concerned that pre-9/11 conduct is being used as a basis to detain people who should not lawfully be detained, I would urge you to recognize that the U.S. government asserts detention authority over individuals irrespective of whether or not they are triable in a military commission. Indeed, in some respects, the military commission system operates as a safety valve and a higher level of proof for the government than the detention authority already asserted over those at Guantánamo who are not in the military commission system—and for many of the individuals at issue, they would be detained at Guantánamo regardless of the outcome of today’s question.

And with that, I will just say I reserve the rest of my time for rebuttal. I appreciate everyone listening to my question, and thank you.

**Remarks by Ashika Singh***

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Okay. I have been asked to address the second question, which is whether conspiracy, terrorism, and hijacking can lawfully be tried by these law of war military commissions. Well, in 2006 and then again in 2009, Congress passed the Military Commissions Act, which defined these offenses

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as triable by a military commission. Two different presidents from two different parties signed those bills into law. And subsequently the D.C. Circuit sitting en banc upheld the conspiracy conviction by military commission of Ali Hamza Ahmad Suliman al-Bahlul, who had been known as bin Laden’s media man. He had produced Al Qaeda recruitment videos and provided some support to the 9/11 hijackers in the run up to the operation.

Obviously, the answer to the question is yes, what is the big debate? Well, it is a little bit more complicated than that, because the federal courts actually have not yet really squarely addressed the underlying constitutional issues here, which relate to whether prosecuting these crimes in the commissions violates either Article I or Article III of the Constitution, or whether prosecuting these crimes for conduct committed before the statute was enacted, so before 2006, violates the *ex post facto* clause of the Constitution.

I will focus mainly on Article I and III with respect to conspiracy, and then speak a bit to *ex post facto* and terrorism and hijacking. So, how are we able to have these commissions at all? Is the judicial power of the government under Article III of the Constitution not vested in the federal courts? Yes, it is, but the Supreme Court has recognized an exception to that for military commissions, established pursuant to Congress’s Article I War Powers, or the Executive’s Article II War Powers. But then the question becomes what offenses can commissions established in that manner lawfully try? The defendants in the commissions have argued that these commissions can only try offenses that are war crimes under international law.

I would submit, on behalf of the government, although I am not speaking on behalf of the government, as Bec said earlier, nor am I speaking on behalf of myself, but this hypothetical me would submit that an offense being a war crime under international law is certainly a sufficient condition for that offense to be prosecuted by these military commissions, but it is not an exclusive condition. And that is because historically, military commissions in the United States, which by the way have a very deep history, which you can trace back to the Revolutionary War, this is not a concept that was Reme invented out of whole cloth by the Bush administration, historically military commissions have tried offenses that are not law of war offenses, in the sense that they are not violations of the international law of war, but they nevertheless may be related violations or violations committed in the context of hostilities that have been historically understood to be triable by military commissions.

So these three crimes, conspiracy, terrorism, and hijacking, as they are defined by the Military Commissions Act, do fall within the scope of that Article III exception, either because as I will argue for some of them, they are law of war offenses or they are sufficiently analogous to law of war offenses, even if the international law offense may not have the same name, the elements are sufficiently analogous, or otherwise, in the case of conspiracy, it has been historically triable by military commission.

As I am sure most of you know, the Supreme Court split on the question of conspiracy in the 2006 case *Hamdan v. Rumsfeld*. A plurality led by Justice Stevens concluded that inchoate conspiracy, meaning that you are not required to put forward proof that the underlying offense, the substantive object offense of the conspiracy, has been committed. The four-justice plurality held that that form of conspiracy is not triable by military commission because it is not a violation of international law. Justice Scalia and Justice Thomas, looking back at the historical practice, concluded that this form of conspiracy is triable by military commission. Justice Kennedy, ever trying to bring the sides together, in his concurrence, invited Congress to clarify this question. And he specifically noted that Congress, not the Court, is the branch in a better position to undertake the sensitive task of establishing a principle not inconsistent with the national interests or international justice. And so that is exactly what Congress did in 2006 and again in 2009. Again, like I said, blessed by the president.
But we can still look at the question. I think evidence of what Congress thinks is constitutional, what the president thinks is constitutional, still should also be weighed, but we can still look at the question and think about how the courts might address this once it is squarely presented to them. And the courts will look to historical practice. The Supreme Court accords significant weight to historical practice, particularly in separation of powers cases. And practice shows that conspiracy has been historically triable by military commission. In fact, as the last en banc panel sitting in *Bahlul*, the plurality opinion by Judge Kavanaugh, noted, the two most well-known and important U.S. military commissions trials tried and convicted the defendants of conspiracy, history matters.

And, of course, the two trials I refer to are the trial of the Lincoln conspirators after the Civil War, the men who were convicted of conspiracy to kill President Lincoln, and also the trial of the Nazis saboteurs during World War II, who were convicted of coming over to the United States, discarding their uniforms and coming onto U.S. territory with the intent to commit sabotage and other hostile warlike acts in the context of hostilities. Both of those were tried by military commissions. Both of those were convicted, and in the case of the Nazi saboteurs, their convictions were upheld by the Supreme Court in the ex parte *Quirin* case.

I can talk a lot more about the historical precedents for conspiracy, but I have been told I am onto my five minutes, but rest assured that those are not the only two. There are other Civil War precedents in which conspiracy was also tried and convicted in a military commission. There is another Nazi saboteur case somewhere around the same time after the *Quirin* case, *Colepaugh v. Looney*, also a military commission established by order of President Roosevelt, which featured saboteurs who were tried and convicted of conspiracy by military commission.

Now, does this mean that conspiracy is a war crime under international law? No. And the federal government has conceded this. This concept of inchoate conspiracy is not a war crime under international law, it was not recognized, for example, at Nuremberg, largely for the reason that it does not exist as a crime in civil law systems. When it came to establishing those tribunals and we were getting together with our French and other allies, they resisted the idea of an inchoate offense, so it was not included.

But moving on from conspiracy, just to touch briefly on hijacking and on terrorism, I actually think that this is an easier case than even conspiracy. Because I do not have to prove that even though conspiracy is not a law of war crime, it is still triable by military commissions. I think hijacking and terrorism, as they are defined by the Military Commissions Act, are actually law of war offenses, or at least they are sufficiently analogous to offenses that have been recognized under the law of war, that they are therefore clearly triable by these commissions.

Unlike standalone conspiracy, committing acts of terrorism has been recognized as a law of war violation under both the Geneva Conventions and in international tribunals. The Fourth Geneva Convention, for example, in Article 33 prohibits all measures of intimidation or terrorism against protected persons. Additional Protocol 1, Article 51.2 prohibits acts or threats of violence, the primary purpose of which is to spread terror among civilian population. The ICTY and the *Galić* case, convicted a Bosnian Serb commander of crimes of terror for terrorizing the civilian population of Sarajevo. Even if there is no standalone crime called “terrorism” under international law, the elements of the crime in the MCA are sufficiently analogous to a law of war offense that is still triable.

And the same goes for hijacking, as codified in the Military Commissions Act. It is just codification of a long-standing law of war offense. The elements are that in the context of hostilities, you intentionally seize control or endanger the safe navigation of an aircraft or a vessel that is not a legitimate military objective. Some variant of this crime has been long recognized as an offense under international law and triable by military commissions dating back at least to the Civil War.
For example, there was a case called the Murphy case, where the individual was convicted of burning steamboats, civilian steamboats that were operating up and down the Mississippi River, for the confederacy.

Again, a history of being triable by military commission, sufficiently analogous to a crime that is recognized as a crime under the international law of war. And in my remaining thirty seconds, I would just briefly address the policy proposition about whether these commissions are still worth it. And the one point I want to make there is when we are talking about the commissions as they are currently going on today and the current situation, we have to recognize that a major roadblock here has been Congress. Congress has still made it unlawful for the federal government to spend any funds to bring these detainees to the United States to prosecute them in an Article III court. Until that roadblock is removed, really the only way to pursue justice for these individuals, and for the victims of the crimes for which they are accused, is to move forward with these commissions proceedings.

REBECCA INGBER

All right. And with that let us get to the defense.

REMARKS BY MICHEL PARADIS
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Thank you. I am going to start with the policy question, and particularly how it is framed in the title of the panel, the broader question presented, which is “military commissions, are they lawful and are they worth it?” I think the second part is slightly the wrong question, because it should not just be are they worth it, it should not just be whether they are more convenient, whether they are useful to conceal evidence of torture, whether they are useful to satisfy Congress’s Not In My Backyard inclinations. It is is they necessary?

Because as a matter of human rights law, we do not generally allow countries to revert to special military tribunals, irregularly constituted tribunals that are subject to political interference, that lack any real meaningful independence, like the military commissions in Guantánamo do, where the judges are essentially appointed by the same authority that appoints the prosecution, where you do not struggle with questions of legality. We do not want to ordinarily think about crime by analogy, that old Soviet chestnut of, well you did not commit a crime on the books but it at least sounds and smells and feels a little bit like something that we do not like. We do not want to ordinarily accept compromised rules of evidence, where the purpose of truth finding in a criminal trial is compromised for the sake of broader accountability. And so that is why I think it is important to ask if our military commissions are necessary, because that is what the Supreme Court has historically asked.

Turning then to the specific question of pre-9/11 conduct, I think that is probably one of the most important questions we can think about in this context because it goes to the question of necessity. Since at least the Civil War, the Supreme Court has said that the test of a military commission’s jurisdiction is military necessity on the battlefield, in areas of hostilities. And why is that? Well, it is because hostilities are clouded by the fog of war. We accept all of these various compromises. We accept that we might not be able to use courts that are not open due to hostilities. We accept that some of the evidentiary issues we are going to have to deal with are going to be a little more complicated under the fog of war. We accept that we may not want to provide Miranda warnings to people we capture on the battlefield. And so we require that kind of necessity. We require those