

THE LAWS OF WAR AS A CONSTITUTIONAL LIMIT ON MILITARY JURISDICTION

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In a June 2009 article,¹ Professor Michael Stokes Paulsen suggested that Congress’s Article I power “to define and punish . . . Offences against the Law of Nations”² is the constitutional source of its authority to enact statutes like the Military Commissions Acts of 2006³ and 2009,⁴ which authorize the trial by military commission of certain non-citizens detained in conjunction with the war on terrorism.⁵ The “Law of Nations” Clause,⁶ he explained, “empowers Congress to choose to write certain principles or rules of

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1. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1774 (2009).

2. U.S. CONST. art. I, § 8, cl. 10.

3. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 and 18 U.S.C.)

4. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.).

5. *See Paulsen, supra* note 1, at 1821.

6. Also known as the Offenses (or Offences) Clause or the Define and Punish Clause, the Law of Nations Clause has received increasing academic attention of late. *See, e.g.*, J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007); Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power To “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447 (2000); Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2003); Note, *The Offenses Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378 (2005). For one of the few older treatments, see Howard S. Fredman, Comment, *The Offenses Clause: Congress’ International Penal Power*, 8 COLUM. J. TRANSNAT’L L. 279 (1969).

international law into U.S. law But *Congress* must define the ‘Offences’; the regime of international law may not dictate to Congress what those offenses may or must be.”⁷ As Paulsen elaborated, “[i]t is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may *define* what *it understands to be* a violation of ‘the Law of Nations’ and use this judgment as the basis for legislative enactments.”⁸ Thus, so long as Congress *says* that it is defining offenses against the law of nations (as it has provided in both the 2006 and 2009 iterations of the MCA),⁹ Professor Paulsen’s thesis is that the actual content of the law of nations is entirely irrelevant; Congress’s authority to subject certain offenders and offenses to trial by military commission is constrained only by political considerations—if at all.¹⁰

The Article that follows has two goals: First, I aim to prove Professor Paulsen’s first assertion, *i.e.*, that the Law of Nations Clause is the basis for Congress’s constitutional authority to subject non-servicemembers to military jurisdiction.¹¹ Although it should seem obvious that Congress’s power to “define and punish” offenses against the law of nations allows it to proscribe

7. Paulsen, *supra* note 1, at 1820.

8. *Id.* at 1821.

9. See 10 U.S.C. § 950p(d) (“The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before [its enactment] . . . but rather codifies those crimes for trial by military commission.”).

10. Indeed, Paulsen doesn’t stop there. Later in the article, he argues that even when Congress acts pursuant to the Law of Nations Clause, such power is “best understood as bounded by the President’s power to command the nation’s military forces—to direct by the President’s power to command the nation’s military forces—to direct what actions the armed forces take.” Paulsen, *supra* note 1, at 1833. Thus, “If . . . a general definition of an offense against the Law of Nations contradicts a specific presidential military command concerning the use of force against enemies in time of constitutionally authorized war (including . . . the use of force to impose military punishment for violation of the laws of war), it is most doubtful that the general statute constitutionally may trump the Commander-in-Chief power of the President.” *Id.*

11. Professor Paulsen does not distinguish between our own servicemembers and others. As I will explain, though, other sources of constitutional authority come into play where the relevant offenders are members of (or, perhaps, certain individuals accompanying) our own military.

violations of the laws of war,¹² it is somewhat less intuitive (and, indeed, quite controversial) that Congress may use such authority to constitute military tribunals, rather than referring offenses against the laws of war to the ordinary criminal jurisdiction of the civilian courts.¹³ Nevertheless, as I will show, it is now established as a matter of constitutional law—whether or not it *should* be—that Congress may so act.

My second aim, however, is to prove the inaccuracy of Professor Paulsen’s second assertion, specifically his conclusion that Congress has plenary power under the Law of Nations Clause to give substantive content to the law of nations. Leaving aside the disturbing limitlessness of Paulsen’s view, especially its federalism implications,¹⁴ it is also fundamentally irreconcilable with both the original understanding of the Law of Nations Clause and the infrequent (but consistent) subsequent interpretations thereof.

The conclusion that Congress’s power under the Law of Nations Clause is not plenary is only one piece of a larger puzzle, however, for there remains the question of deference—of whether and to what extent Congress has *any* discretion to identify offenses against the law of nations. And whereas others have already covered this terrain in some detail,¹⁵ previous scholarship has entirely neglected the possibility that the answer may be different in the specific context of military jurisdiction, where other constitutional considerations (particularly the rights to grand jury indictment¹⁶ and to criminal trial by petit jury¹⁷) enter into play.

12. See, e.g., *al-Marri v. Pucciarelli*, 534 F.3d 213, 315 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part) (“The law of war represents a ‘distinct canon of the Law of Nations.’” (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 773 (2d ed. Beard Books 2000) (1896)); see also *In re Yamashita*, 327 U.S. 1, 7 (1946) (noting that the laws of war are part of the law of nations, offenses against which Congress has the power to define and punish). See generally Kent, *supra* note 6, at 845 (“Today’s customary international law is the closest modern analogue of the eighteenth-century ‘law of nations.’”).

13. See, e.g., War Crimes Act of 1996, 18 U.S.C. § 2441 (2000).

14. Under Paulsen’s view, for example, nothing would have stopped Congress from re-enacting the Gun-Free School Zones Act of 1990—struck down on Commerce Clause grounds in *United States v. Lopez*, 514 U.S. 549 (1995)—based on its determination that firearm possession near schools is an offense against the law of nations. *But see* Morley, *supra* note 6 (discussing the federalism-based considerations implicated by competing interpretations of the Clause).

15. See, e.g., Note, *supra* note 6 (surveying the competing approaches to deference).

16. U.S. CONST. amend. V.

17. *Id.* art. III, § 2, cl. 3; *id.* amend. VI.

Thus, this Article will also explain why whatever deference Congress may have in defining the law of nations is at its nadir in the context of subjecting offenses against the same to trial by military commission. Coupled with the extent to which international humanitarian law has continued to crystallize in recent years, this analysis yields the result that Congress has virtually no authority to subject to trial by military commission offenders who are not clearly subject to military jurisdiction under the laws of war for offenses that are not already clearly established violations of the laws of war. That is not to say that Congress lacks the authority to depart from the law of nations; clearly, it can use its *other* legislative powers in appropriate circumstances to abrogate customary international law.¹⁸ But to the extent that Paulsen's first assertion is correct—*i.e.*, that Congress may only subject non-servicemembers to military jurisdiction pursuant to its authority under the Law of Nations Clause—this Article concludes that Congress may not act in disregard of the law of nations in the context of military commissions, and that the laws of war are therefore a free-standing constitutional constraint on military jurisdiction.

To unpack this multi-step thesis, I begin in Part I with the constitutional limits that the Supreme Court has identified on both the personal and subject-matter jurisdiction of courts-martial. As Part I suggests, these cases are important not just in identifying the circumstances in which military jurisdiction is *ever* constitutionally appropriate, but also in illuminating the specific provisions of Article I that empower the creation of military courts, along with the specific exceptions to Article III and the Fifth and Sixth Amendments that allow for the deviation from the fundamental procedural prerequisites of civilian criminal trials.

In Part II, I turn to the less-developed jurisprudence regarding the constitutional limits on the personal and subject-matter jurisdiction of military commissions. Although the Court has had far fewer opportunities to address the jurisdictional questions routinely encountered in the context of courts-martial, Part II demonstrates that the Court has actually said more on this subject than most scholars (and subsequent jurists) have appreciated. In particular, although *Ex parte Quirin*¹⁹ is routinely understood today as a disturbing precedent centered on a “controversial” interpretation of an

18. *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. i (1987).

19. 317 U.S. 1 (1942).

ambiguous statute,²⁰ *Quirin* actually reached a number of significant (and thus-far neglected) conclusions about the *constitutional* law governing military commissions, both with respect to the Article I sources of Congress's power to subject certain offenses to military trial, and the Article III and Fifth and Sixth Amendment limits on such trials. To the extent that these discussions in *Quirin* remain good law—and, as Part II demonstrates, virtually all of them do—they create a constitutional analysis in which the “laws of war,” for better or worse, play a central role.

Part III turns to *Quirin*'s constitutional implications vis-à-vis the laws of war. The statute at issue in *Quirin* (as interpreted by the Court) authorized trials by military commissions for offenses and offenders triable by military commission under the laws of war, and thereby *incorporated* the laws of war as the relevant statutory constraint—as the Supreme Court later concluded in *Hamdan*. But that leaves open a question raised quite forcefully by the Military Commissions Acts of 2006 and 2009: what if Congress seeks to specifically subject to trial by military commission offenses or offenders *not* so triable under the laws of war?

To address this question, Part III begins with the ratification-era debate over the scope of the Law of Nations Clause, which provides strong evidence that Congress's power to “define and punish” offenses against the law of nations was meant to be extraordinarily narrow. Coupled with the crystallization of international humanitarian law in recent decades, alongside separate but equally significant arguments for lenity in the context of military commissions, Part III concludes that Congress's authority to subject certain offenses and offenders to trial by military commissions should be limited to those who are clearly so triable under the laws of war—to “the least possible power adequate to the end proposed.”²¹ Finally, Part III concludes by briefly noting some of the significant ways in which the Military Commissions Acts of 2006 and 2009 authorize both personal and subject-matter jurisdiction in contravention of this principle—jurisdiction that, if this Article's analysis is correct, military commissions cannot constitutionally exercise.

20. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006) (“We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions.”). See generally Carlos M. Vázquez, “*Not a Happy Precedent*”: *The Story of Ex parte Quirin*, in *FEDERAL COURTS STORIES* 219 (Judith Resnik & Vicki C. Jackson eds., 2009).

21. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

I. THE CONSTITUTION AND COURT-MARTIAL JURISDICTION

Military jurisdiction as an institution was hardly foreign to the drafters of the Constitution. The Articles of Confederation had expressly provided the Continental Congress with the power of “making rules for the government and regulation of the said land and naval forces, and directing their operations,”²² and the legislature had exercised that power in adopting in 1775 Articles of War (as amended in 1776 and 1786) providing for trial by court-martial.²³ The Constitution similarly empowered Congress to “make Rules for the Government and Regulation of the land and naval forces,”²⁴ and the First Congress promptly exercised that power, adopting in full the articles that had been inherited from the Confederation Congress.²⁵ And when a right to grand jury indictment or presentment was specifically included in the Bill of Rights, an exception was added for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”²⁶

Thus, the constitutional question of interest was never whether there *could* be a separate military justice system, but what the limits of that system’s jurisdiction would be. And although the Supreme Court had a number of occasions during the nineteenth century to pass upon whether a court-martial had acted within its statutory jurisdiction,²⁷ it was not until a series of cases after World War II that the Court would seriously begin to

22. Articles of Confederation of 1781 art. IX.

23. The 1775, 1776, and 1786 Articles are reprinted in WINTHROP, *supra* note 12, at 953–75.

24. U.S. CONST. art. I, § 8, cl. 14. The provision was included in the final draft of the Constitution without discussion or debate. *See Reid v. Covert*, 354 U.S. 1, 21 n.40 (1957) (plurality).

25. *See* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96; *see also* *Loving v. United States*, 517 U.S. 748, 752 (1996).

26. U.S. CONST. amend. V. The Supreme Court has long-since rejected the argument that the “when in actual service” clause applies to the “land or naval forces” in addition to the militia. *See Johnson v. Sayre*, 158 U.S. 109 (1895). *But see Solorio v. United States*, 483 U.S. 435, 451 n.2 (1987) (Marshall, J., dissenting) (suggesting that such a reading may not be correct).

27. *See, e.g., Ex parte Reed*, 100 U.S. 13 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820); *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806).

grapple with the constitutional limits on that authority,²⁸ as Congress for the first time sought systematically to subject individuals outside of military service²⁹ to court-martial jurisdiction.

A. Personal Jurisdiction

For a host of reasons both obvious and otherwise, the number of cases on the Supreme Court's docket in which court-martial defendants sought collaterally to attack their convictions skyrocketed in the late-1940s and early 1950s,³⁰ especially after the codification of the Uniform Code of Military Justice (UCMJ).³¹ And in *Burns v. Wilson*,³² the Court implicitly but unequivocally sustained the jurisdiction of the lower federal courts³³ to

28. In one exceptional decision, the U.S. Circuit Court for the District of Kentucky invalidated a Civil War-era Act of Congress that subjected military contractors to court-martial jurisdiction for fraud related to their governmental contracts. *See Ex parte Henderson*, 11 F. Cas. 1067 (C.C.D. Ky. 1878) (No. 6349).

29. Although questions had previously arisen about whether individuals conscripted into the military could be subjected to military jurisdiction, courts had routinely treated the validity of the conscription as dispositive of whether the conscript was subject to court-martial. *See, e.g.*, *The Selective Draft Law Cases*, 245 U.S. 366 (1918); *see also Martin*, 25 U.S. (12 Wheat.) at 33–37 (sustaining court-martial jurisdiction over a militiaman who failed to enter into service when so called by the President).

30. *See, e.g.*, Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1509–15 (2007) (noting the proliferation of habeas petitions by individuals detained overseas filed after the end of World War II).

31. Act of May 5, 1950, ch. 169, 64 Stat. 108 (codified as amended at 10 U.S.C. §§ 801 *et seq.*).

32. 346 U.S. 137, 139 (1953) (plurality) (“In this case, we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications.”). Although Chief Justice Vinson’s opinion was only for a plurality, Justice Frankfurter was alone among the other Justices in raising any question as to the federal courts’ jurisdiction to entertain the petitions. *See infra* note 35.

33. The Court had previously expressed doubt as to its jurisdiction to entertain such petitions as an “original” matter, *see, e.g., Ex parte Betz*, 329 U.S. 672 (1946) (mem.), and had instead implicitly suggested that the proper forum was the federal district court, *see In re Bush*, 336 U.S. 971 (1949) (mem.). *See generally* Vladeck, *supra* note 30, at 1514–15 & n.94.

entertain such claims,³⁴ even in cases in which the petitioner was detained outside the territorial United States.³⁵ Thus, although collateral review was limited, at least initially, to “jurisdictional” challenges,³⁶ concerns over the “rough form of justice”³⁷ thought to be dispensed by the military courts may well have been responsible for a series of decisions identifying constitutional constraints on the scope of the personal jurisdiction that courts-martial could exercise.

At least chronologically, the first such case to reach the Court was that of ex-servicemember Robert W. Toth, who was court-martialed for an offense committed while serving in the Air Force in Korea even though he was not arrested until five months after he was honorably discharged. Because Article 3(a) of the UCMJ expressly authorized such trials,³⁸ the Court was confronted with the question whether Congress could constitutionally subject former servicemembers to trial by court-martial. For a 6-3 Court, Justice

34. See *Ex parte* Hayes, 414 U.S. 1327, 1328–29 (Douglas, Circuit Justice 1973) (noting that *Burns* appeared to hold “sub silentio and by fiat . . . that at least a citizen held abroad by federal authorities has access to the writ in the District of Columbia” (quoting PAUL M. BATOR ET AL. HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 n.52 (2d ed. 1973))).

35. As Justice Frankfurter noted in an unusual dissent from the denial of rehearing in *Burns*, it was not at all clear that the federal courts had statutory jurisdiction to entertain habeas petitions where the petitioner was held outside the territorial jurisdiction of any district court—indeed, *Abrens v. Clark*, 335 U.S. 188 (1948), had implied to the contrary. See *Burns v. Wilson*, 346 U.S. 844, 851–52 (1953) (Frankfurter, J., dissenting from the denial of rehearing). See generally Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 298–300 (2007) (discussing this issue in detail).

36. See, e.g., *Hiatt v. Brown*, 339 U.S. 103, 111 (1950). *Burns* itself adopted the slightly broader “full and fair consideration” standard, see, e.g., *Sanford v. United States*, No. 08-5402, 2009 WL 3790011, at *3–4 (D.C. Cir. Nov. 13, 2009), although several of the Justices believed that the scope of collateral review should be even more sweeping, see, e.g., *Burns*, 346 U.S. at 153–54 (Douglas, J., dissenting); *id.* at 848–49 (Frankfurter, J., dissenting from the denial of rehearing).

37. *Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality).

38. Specifically, Article 3(a) provided that, “Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 n.2 (1955).

Black answered that question in the negative. After asserting that Article 3(a) “cannot be sustained on the constitutional power of Congress ‘To raise and support Armies,’ ‘To declare War,’ or to punish ‘Offenses against the Law of Nations,’”³⁹ Black turned to the Make Rules Clause. As he explained,

This Court has held that the [Make Rules Clause] authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial. It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions. To allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on. For given its natural meaning, the power granted Congress ‘To make Rules’ to regulate ‘the land and naval Forces’ would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.⁴⁰

Black thereby relied expressly on the language of Article I, perhaps because he would have had a more difficult time resting his analysis on the Fifth Amendment, which expressly excepted “cases *arising in* the land or naval forces.” Since Toth’s alleged crime was committed while he was in the service, it might well have arisen in the land and naval forces. Black dismissed that possibility, however, noting that “This provision does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces.”⁴¹ In other words, the crux of the holding in *Toth* was a

39. *Id.* at 13–14 (citation and footnote omitted).

40. *Id.* at 14–15 (footnotes omitted).

41. *Id.* at 14 n.5.

limitation on the scope of the Make Rules Clause to “persons who are actually members of part of the armed forces.”⁴²

So understood, *Toth* called into question the constitutionality of court-martial jurisdiction over *any* non-servicemembers, including dependents of servicemembers and military employees. And yet, just over one year after *Toth*, the Court distinguished that decision in *Kinsella v. Krueger* and *Reid v. Covert*, holding that the UCMJ provision authorizing the court-martial in certain circumstances of persons “accompanying the armed forces without the continental limits of the United States” did not violate the right to trial by jury protected by both Article III and the Sixth Amendment on the ground that those protections did not apply extraterritorially.⁴³ Writing for a 5-3 Court in both cases,⁴⁴ Justice Clark upheld the court-martial convictions of two wives of servicemembers for the murders of their husbands, reasoning that:

Having determined that one in the circumstances of Mrs. Smith may be tried before a legislative court established by Congress, we have no need to examine the power of Congress “To make Rules for the Government and Regulation of the land and naval Forces” under Article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained.⁴⁵

With the dissenters (and, apparently, Justice Harlan) objecting that the cases had been decided too quickly,⁴⁶ the Court took the extraordinary step of granting—over three dissents—a petition for rehearing,⁴⁷ and setting the

42. Justices Reed, Burton, and Minton, dissented, with Reed and Minton both penning separate opinions. *See id.* at 24–44 (Reed, J., dissenting); *id.* at 44–45 (Minton, J., dissenting). Both dissents harped on the extent to which Toth’s crime was committed while in the military service, and the difficulties of exercising civilian criminal jurisdiction in such cases.

43. *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956).

44. Justice Frankfurter wrote separately in both cases to note that he was “reserv[ing] for a later date an expression of [his] views.” *Krueger*, 351 U.S. at 481–85 (Frankfurter, J.); *Covert*, 351 U.S. at 492 (Frankfurter, J.).

45. *Krueger*, 351 U.S. at 476 (footnote omitted).

46. *Id.* at 485 (Warren, C.J., dissenting).

47. *See Kinsella v. Krueger*, 352 U.S. 901 (1956) (mem.); *see also McElroy v. United States ex rel. Guagliardo*, 361 U.S. 234, 250–52 & n.3 (1960) (Harlan, J., dissenting) (explaining the reasons for his—and the Court’s—about-face).

now-consolidated cases for re-argument the following Term. On re-argument, the Court reversed itself,⁴⁸ with a plurality holding that the Constitution did not countenance the trial by court-martial of civilians for *any* offenses, and with Justices Harlan and Frankfurter separately noting their concurrence in the judgment on the narrower ground that the Constitution barred such trials for capital offenses during peacetime.

For the plurality, Justice Black centered his reasoning on three different strands of argument: that the Bill of Rights protected citizens even when overseas,⁴⁹ that such protections could not be overridden by treaty,⁵⁰ and that Article I constrained the scope of military jurisdiction, per his opinion for the Court in *Toth*.⁵¹ As he argued with respect to the last point, “The wives of servicemen are no more members of the ‘land and naval Forces’ when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.”⁵² Black then rejected the government’s contention that the Make Rules Clause should be read together with the Necessary and Proper Clause, concluding that

the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—“the land and naval Forces.” . . . Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.⁵³

Writing separately, Justice Frankfurter concurred in the judgment,

48. *Reid v. Covert*, 354 U.S. 1 (1957) (plurality).

49. *See id.* at 5–14.

50. *See id.* at 15–19.

51. *Id.* at 19–21.

52. *Id.* at 20.

53. *Id.* at 20–21 (footnote omitted); *see also id.* at 22–23 (“We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category, even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government.”).

emphasizing that “it is only the trial of civilian dependents in a capital case in time of peace that is in question.”⁵⁴ Although Frankfurter did not see the issue as being as straightforward as Justice Black saw it, he agreed that the government’s policy arguments for extending court-martial jurisdiction over the dependents of servicemembers in such cases were unconvincing.⁵⁵ Justice Harlan also wrote separately to concur in the result, resting, like Justice Frankfurter, on the fact that the offenses charged in both cases were capital.⁵⁶ Unlike Frankfurter, though, Harlan devoted his opinion to the relationship between the Make Rules Clause and the Fifth and Sixth Amendments. And although he believed that the Make Rules Clause, read together with the Necessary and Proper Clause, *could* justify the exercise of military jurisdiction over non-servicemembers accompanying the armed forces,⁵⁷ he also concluded that the right to trial by jury was too significant in capital cases to tolerate a territoriality-based exception. In his words,

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is “due” an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, nor is it negligible, being literally that between life and death.⁵⁸

Thus, *Reid* established at a minimum that the Constitution proscribed courts-martial for non-servicemembers for capital offenses committed during peacetime. It would remain for future cases to consider whether the bar extended any further afield—and, perhaps unsurprisingly, such claims quickly reached the Court.

As it turns out, the issue was largely settled less than three years later when, on January 18, 1960, the Court handed down three decisions clarifying the scope of *Reid*’s constitutional constraint on court-martial jurisdiction over

54. *Id.* at 45 (Frankfurter, J., concurring in the result).

55. *Id.* at 46–49.

56. *Id.* at 65 (Harlan, J., concurring in the result).

57. *See id.* at 67–73.

58. *Id.* at 77 (citations omitted).

non-servicemembers. In *Kinsella v. United States ex rel. Singleton*, a 7-2 Court held that the Constitution barred the peacetime exercise of military jurisdiction over the dependents of servicemembers for *non-capital* offenses, with Justices Frankfurter and Harlan in dissent.⁵⁹ In *Grisham v. Hagen*, a 7-2 Court held that the Constitution barred the peacetime exercise of military jurisdiction over civilian employees of the military for *capital* offenses, reasoning that such a result followed squarely from *Reid*⁶⁰ (a point in which Harlan and Frankfurter concurred).⁶¹ And in *McElroy v. United States ex rel. Guagliardo*, a 5-4 Court filled in the last square of the two-by-two matrix, holding that civilian employees also could not be subjected to military jurisdiction during peacetime for *non-capital* offenses.⁶²

Justice Clark—author of the dissent in *Reid*—wrote for the Court in all three cases, concluding that *Reid*'s constitutional analysis couldn't countenance the capital/non-capital distinction urged by Justices Harlan and Frankfurter. Instead, "The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"⁶³ Moreover, "since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses."⁶⁴

The January 18 trilogy was the last time the Supreme Court would speak directly to the scope of Congress's power to subject non-servicemembers to trial by court-martial. Although a number of cases testing the outer boundaries of the decisions have subsequently arisen in the lower courts, most raised largely technical questions concerning the termination of military service and the status of active and inactive reservists.⁶⁵ The one exception is *United States v. Averette*, a Vietnam-era case in which the U.S. Court of Military Appeals considered whether *Guagliardo*'s bar on courts-

59. 361 U.S. 234 (1960).

60. 361 U.S. 278 (1960).

61. See *Singleton*, 361 U.S. at 249–59 (Harlan, J., dissenting).

62. 361 U.S. 281 (1960).

63. *Singleton*, 361 U.S. at 240–41.

64. *Id.* at 248.

65. For modern examples, see *Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009); and *United States v. Erickson*, 63 M.J. 504, 510–12 (A.F. Ct. Crim. App. 2006).

martial for civilian employees of the military also applied during “wartime.”⁶⁶ Raising the specter of *Reid* and its progeny, the Court of Military Appeals construed the Uniform Code of Military Justice’s provision authorizing such trials “in time of war” to only apply during “a war formally declared by Congress,”⁶⁷ which Vietnam most pointedly was not. As Judge Darden noted for the court, “A broader construction of Article 2(10) would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs.”⁶⁸

Although *Averette*’s construction of the UCMJ thus squarely avoided deciding whether Congress *could* constitutionally subject civilian employees of the military to trial by court-martial during “wartime,” it certainly suggested that Congress would run into grave constitutional difficulties if it did so during any conflict other than a formally declared war. The question remains open today, though, especially in light of a 2006 amendment to the UCMJ sponsored by Senator Lindsay Graham that authorizes courts-martial for “persons serving with or accompanying an armed force in the field” “[i]n time of declared war *or a contingency operation*.”⁶⁹

* * *

Leaving aside the merits of the above decisions, though, their upshot is both straightforward and significant: at least in the context of courts-martial, it is now black-letter law that the primary (if not exclusive) source of Congress’s constitutional authority to convene such tribunals is the Make Rules Clause of Article I. Similarly, that provision, along with the rights to grand jury indictment and trial by petit jury secured by Article III and the Fifth and Sixth Amendments, serves to limit the scope of the personal jurisdiction of courts-martial to servicemembers—at least in the absence of a

66. 41 C.M.R. (19 U.S.C.M.A.) 363 (1970). The decision is more easily available via Westlaw, at 1970 WL 7355.

67. *Id.* at 365.

68. *Id.*

69. 10 U.S.C. § 802(a)(10) (emphasis added). The italicized text was added by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, § 552, 120 Stat. 2083, 2217 (codified at 10 U.S.C. § 802(a)(10)). The Air Force attempted to convene a court-martial pursuant to the new provision in late 2008, only to dismiss the charges once the defendant—a civilian contractor—sought habeas corpus relief in the U.S. District Court for the District of Columbia. *See* Petition for a Writ of Habeas Corpus, Price v. Gates, No. 09-106 (D.D.C. filed Jan. 16, 2009) (on file with author). *See generally* Megan McCloskey, *Civilian from Vegas Won’t Face Court Martial, Will Return Home*, LAS VEGAS SUN, Jan. 23, 2009.

declaration of war. In other words, it is not just the notion that Congress only has the authority to “make rules” for individuals in the armed forces; it is the equally important idea that the validity of military (versus civilian) jurisdiction turns on the *inapplicability* of the grand- and petit-jury trial rights in Article III and the Fifth and Sixth Amendments. In understanding the constitutional constraints on the jurisdiction of military commissions, the constraints the Supreme Court has identified in the related context of courts-martial will provide useful illumination.

B. Subject-Matter Jurisdiction

For as episodically as the Supreme Court’s jurisprudence evolved with regard to constitutional constraints on the personal jurisdiction of courts-martial, its jurisprudence with regard to such tribunals’ *subject-matter* jurisdiction has only two relevant polestars: its 1969 decision in *O’Callahan v. Parker*,⁷⁰ and its 1987 decision in *Solorio v. United States*,⁷¹ in which it overruled *O’Callahan*.

In *O’Callahan*, the Court rejected what the government offered as the negative implication of its personal jurisdiction decisions—*i.e.*, that “[t]he fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense,” should “imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged.”⁷² Instead, Justice Douglas, writing for a 6-3 Court, conducted an extensive (if controversial)⁷³ canvas of English and early American history, concluding from that history that

the crime to be under military jurisdiction must be service connected, lest “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,” as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits on an indictment by a grand jury and a trial by a jury of his peers.⁷⁴

70. 395 U.S. 258 (1969).

71. 483 U.S. 435 (1987).

72. *O’Callahan*, 395 U.S. at 267.

73. A central feature of Justice Harlan’s dissent was his suggestion that the majority had badly misread history. *See id.* at 276–80 (Harlan, J., dissenting).

74. *Id.* at 271 (majority) (footnote omitted).

Although the majority left for another day articulation of what it meant for an offense to be “service connected,”⁷⁵ and stressed a number of other limitations upon its holding,⁷⁶ it had no trouble concluding that O’Callahan’s offense was too far removed from his military service,⁷⁷ as a result of which his court-martial was constitutionally precluded.

The “service connection” test lasted for 17 years, but it received substantial and withering criticism along the way,⁷⁸ culminating in its overruling by the Court in *Solorio*. But what is telling about *Solorio* is not so much the fact that the Court overruled *O’Callahan*, but the manner in which it did so.

Writing for a 5-3 majority,⁷⁹ Chief Justice Rehnquist began with the proposition that “In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.”⁸⁰ These decisions made sense, Rehnquist explained, because “Whatever doubts there might be about the extent of Congress’ power under

75. The Court would provide elaboration in *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971).

76. *See O’Callahan*, 395 U.S. at 273–74 (“[W]e deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.”).

77. *See id.* at 273 (“[P]etitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.”).

78. *See, e.g.*, Norman G. Cooper, *O’Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 186–87 (1977); Jonathan P. Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O’Callahan v. Parker*, 25 AIR FORCE L. REV. 1, 9–35 (1985); *see also* *United States v. Alef*, 3 M.J. 414, 416 n.4 (Ct. Mil. App. 1977); *United States v. McCarthy*, 2 M.J. 26, 29 n.1 (Ct. Mil. App. 1976).

79. Justice Stevens concurred in the judgment on the ground that he believed *Solorio*’s offense *was* “service connected” under *O’Callahan*. As such, he saw no need to decide whether *O’Callahan* should be overruled. *See Solorio*, 483 U.S. at 451–52 (Stevens, J., concurring in the judgment).

80. *Id.* at 439 (majority).

Clause 14 to make rules for the ‘Government and Regulation of the land and naval Forces,’ that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services.”⁸¹ Moreover, the history recounted by the *O’Callahan* majority appeared to be far more ambiguous than *O’Callahan* itself had suggested,⁸² and the “service connection” test had, according to the majority, proven difficult to administer. Thus,

When considered together with the doubtful foundations of *O’Callahan*, the confusion wrought by the decision leads us to conclude that we should read Clause 14 in accord with the plain meaning of its language as we did in the many years before *O’Callahan* was decided. That case’s novel approach to court-martial jurisdiction must bow “to the lessons of experience and the force of better reasoning.” We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged.⁸³

Justice Marshall, joined by Justices Brennan and Blackmun, dissented, arguing that the majority misunderstood *O’Callahan*. Specifically, Marshall suggested that *O’Callahan* had rested on Article III and the Fifth and Sixth Amendments more than on a limited reading of the Make Rules Clause, and that Congress’s otherwise plenary power under the latter could not override the constraints resulting from the former. In his words, “[T]he exception contained in the Fifth Amendment is expressed—and applies by its terms—only to *cases arising in the Armed Forces*.”⁸⁴ Thus, as Marshall explained, “*O’Callahan* addressed not whether [the Make Rules Clause] empowered Congress to create court-martial jurisdiction over all crimes committed by service members, but rather whether Congress, in exercising that power, had encroached upon the rights of members of Armed Forces whose cases did not

81. *Id.* at 441.

82. *See id.* at 445–46.

83. *Id.* at 450–51 (citation omitted). Phrased slightly differently, *Solorio* stands for the proposition “[i]mplicit in the military status test” that “determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen [are] a matter reserved for Congress.” *Id.* at 440.

84. *Id.* at 454 (Marshall, J., dissenting).

‘arise in’ the Armed Forces.”⁸⁵

Marshall went on to suggest that *O’Callahan* had, in any event, not proven unworkable,⁸⁶ and that traditional principles of stare decisis compelled fidelity to precedent.⁸⁷ But with one possible exception,⁸⁸ Chief Justice Rehnquist’s analysis remains the law today, and with it, the notion that Congress’s power over the subject-matter jurisdiction of courts-martial is, thanks to the Make Rules Clause, plenary.

C. The Constitutional Structure of Court-Martial Jurisdiction Today

Although Chief Justice Rehnquist’s opinion for the Court in *Solorio* is routinely understood as significant only with respect to the rights of servicemember defendants, his analysis may have broader structural consequences that have, to date, not been fully fleshed out. Specifically, the notion that the Make Rules Clause confers plenary authority upon Congress to subject servicemembers to court-martial jurisdiction comes with a significant negative implication. For if the Make Rules Clause is the primary—if not exclusive—source of Congress’s authority to subject particular offenses to trial by court-martial, such authority is therefore limited to those individuals who are properly subject to congressional

85. *Id.*

86. *See id.* at 462–66.

87. *See id.* at 466–67.

88. In *Loving v. United States*, 517 U.S. 748 (1996), four Justices suggested in a separate concurrence that *Solorio* had not only left open the possibility that capital offenses must still be “service connected,” but that the Constitution might itself require such a rule. As Justice Stevens explained,

Solorio’s review of the historical materials would seem to undermine any contention that a military tribunal’s power to try capital offenses must be as broad as its power to try noncapital ones. Moreover, the question is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.

Id. at 774 (Stevens, J., concurring in the judgment). Stevens nevertheless concurred in Justice Kennedy’s opinion upholding *Loving*’s sentence of death because he believed that the underlying offense *was* service-connected. *See id.* at 775. To date, the Court of Appeals for the Armed Forces has agreed with Justice Stevens that *Solorio*’s application to non-service-connected capital offenses may well present an open question, *see, e.g.*, *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999), but has yet to squarely confront it.

authority under the Clause, *i.e.*, members of *our* land and naval forces. Put another way, the logic of *Solorio*, pursuant to which our servicemembers may be tried for virtually any offense, cuts very much against congressional power to subject individuals outside the scope of the Make Rules Clause to military jurisdiction, unless another source of such legislative authority can be identified. And even then, the constitutional rights to grand jury indictment and trial by petit jury may furnish their own constraint.

II. THE CONSTITUTION AND MILITARY COMMISSION JURISDICTION

Although scattered examples of irregular military courts—which I will shorthand as “military commissions”—can be found in the years leading up to the Civil War,⁸⁹ the first judicial decisions passing upon the relevant constitutional limits on such tribunals all have the War Between the States as their backdrop.⁹⁰ To be sure, the Supreme Court bypassed its first opportunity to review a military commission convened by President Lincoln, holding in *Ex parte Vallandigham* that it lacked the statutory authority to review, by writ of certiorari, the proceedings of a military commission.⁹¹ But when Lambdin Milligan brought a habeas petition challenging his conviction by a military commission, the lower-court judges certified a division of

89. Most now agree that the first systematic use of such tribunals by the U.S. government took place during the Mexican War. See Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 205 n.23 (2008) (“The Mexican War was indisputably the first time a separate military court system was created to hear cases not cognizable by courts-martial.”); see also David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 18–40 (2005) (surveying the Mexican War precedent). See generally LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005); Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT’L L. 35, 37–43 (2007).

90. For a fascinating and overlooked example of a military commission employed during (but not the least bit related to) the Civil War, see Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990). As Chomsky notes, “As the Civil War progressed, Congress specifically authorized trial by military commission for various offenses, but in 1862 there was virtually no congressional recognition of that form of tribunal.” *Id.* at 62 (footnote omitted).

91. 68 U.S. (1 Wall.) 243 (1864). For the background to *Vallandigham*, see Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* 93, 104–05 (Christopher H. Schroder & Curtis A. Bradley eds., 2009).

authority,⁹² triggering the Court’s jurisdiction to reach the merits—and to decide the circumstances under which trials by military commission might be constitutional.

A. *Milligan*

Justice Davis’s opinion for the majority in *Milligan* was absolute from the outset.⁹³ Noting that “[n]o graver question was ever considered by this court,”⁹⁴ Davis first rejected the possibility that authority for the commissions might derive from the “laws and usages of war,” which, in his view, “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”⁹⁵ More fundamentally, though, Davis concluded that the critical consideration was whether Milligan had a right to trial by jury:

if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, “excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;” and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.⁹⁶

And although situations of martial law might justify derogation from the

92. See Bradley, *supra* note 91, at 108–09.

93. See 71 U.S. (4 Wall.) 2 (1866).

94. *Id.* at 118.

95. *Id.* at 121; see also *id.* at 121–22 (“[N]o usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise.”).

96. *Id.* at 123.

protections of the Bill of Rights, Davis went on to famously conclude that “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”⁹⁷ Thus, irrespective of whether Congress *had* authorized Milligan’s trial (it had not), the majority maintained that it *could* not so provide, thanks to the jury-trial provisions of Article III and the Fifth and Sixth Amendments.

Writing separately for himself and Justices Wayne, Swayne, and Miller, Chief Justice Chase agreed with the majority that the commission that tried Milligan was unlawful (largely because of the absence of congressional authorization), but disagreed with what he saw as unnecessary dicta in Davis’s opinion to the effect that Congress *couldn’t*, in appropriate circumstances, subject certain offenses and offenders to trial by military commission.⁹⁸ Instead, as Chase explained, “We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.”⁹⁹ Chase then proceeded to consider the possible sources of such legislative power, rejecting the Make Rules Clause as a candidate.¹⁰⁰ Instead,

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences

97. *Id.* at 127.

98. *See id.* at 136 (Chase, C.J.) (“[T]he opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it We cannot agree to this.”).

99. *Id.* at 137.

100. *See id.* at 139 (“[W]e do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.”).

against the discipline or security of the army or against the public safety.¹⁰¹

Thus, as Chase would conclude two pages later, “We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.”¹⁰² When Chase’s opinion was heavily (if implicitly) incorporated by the Supreme Court the next time it confronted the constitutionality of military commissions three-quarters of a century later,¹⁰³ this passage would be entirely forgotten.

B. *Quirin*

It was probably no understatement when, in 2004, Justice Scalia referred to the Supreme Court’s 1942 decision in *Ex parte Quirin*,¹⁰⁴ which upheld the constitutionality of a military tribunal established by President Roosevelt to try eight Nazi saboteurs caught within the United States, as “not this Court’s finest hour.”¹⁰⁵ Even Justice Frankfurter, who joined Chief Justice Stone’s opinion for the unanimous Court in *Quirin* in its entirety, later referred to the decision as “not a happy precedent.”¹⁰⁶ And popular and academic commentaries on the decision have been nearly uniform in their withering

101. *Id.* at 140; *see also id.* at 139–40 (“Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.”).

102. *Id.* at 142.

103. For a fascinating take on the implications of *Milligan* during World War I (and prior to *Quirin*), see Trial of Spies By Military Tribunals, 31 OP. ATT’Y GEN. 356 (1918), in which Attorney General Gregory advised President Wilson that a military commission could not try a Russian national seized at the Mexican border attempting to enter the United States to commit acts of sabotage on behalf of the German government. *See id.* at 357–61.

104. 317 U.S. 1 (1942).

105. Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

106. *See* G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex parte Quirin: Nazi Sabotage’s Constitutional Conundrums*, 5 GREEN BAG 2D 423 (2002).

criticism of both the merits of the Court's analysis and the unusual means by which it disposed of the case.¹⁰⁷

Quirin is perhaps most controversial to the extent that it was inconsistent with *Milligan*, which it sidestepped in at least two significant ways: First, the *Quirin* Court found congressional authorization for military commissions (which had been lacking in *Milligan*) in a statute that was, charitably, ambiguous.¹⁰⁸ Specifically, the Court relied upon what was then Article 15 of the Articles of War (as last re-adopted by Congress in 1916), which provided that “the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions.”¹⁰⁹ In the Court's view, Article 15 reflected Congress's affirmative desire to allow the President to convene military commissions in any cases that, under the laws of war, could be subjected to military jurisdiction.¹¹⁰

107. For useful pre-September 11 accounts, see EUGENE RACHLIS, *THEY CAME TO KILL* (1961); David Danelski, *The Saboteurs' Case*, 1996 J. S. CT. HIST. 61; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); and Robert E. Cushman, *Ex Parte Quirin et al.—The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942). *Quirin* has been the subject of at least three post-September 11 books, see MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (2004); LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2d ed. 2005); PIERCE O'DONNELL, *IN TIME OF WAR* (2005), and a bevy of shorter treatments, of which the best is Vázquez, *supra* note 20.

108. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006); see also Vázquez, *supra* note 20, at 239 n.79.

109. *Quirin*, 317 U.S. at 27.

110. Justice Jackson apparently took issue with the Court's statutory analysis, even though he agreed with the bottom line. He nevertheless chose not to file a draft concurrence he had prepared, however, once Chief Justice Stone added a passage noting that the Justices were divided over the significance of Article 15. As Stone wrote,

[A] majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to “commissions”—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been

And yet, separate from whether Article 15 actually *did* authorize the saboteurs' trial by military commission, *Quirin* also reflected upon the source of Congress's authority to so provide—an aspect of the Court's analysis that has received far less attention than its statutory parsing. As Chief Justice Stone explained, Article 15 was proof that “Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”¹¹¹ In so acting, Congress had not used its power under the Raise Armies, Declare War, or Make Rules Clauses (as Chief Justice Chase had suggested it might in *Milligan*), but had

exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limits, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.¹¹²

In other words, in sanctioning Congress's implicit authorization of the trial of offenses against the laws of war by military commissions, *Quirin* held that the power to so provide came from the Law of Nations Clause—and not any other source of Article I authority. To be sure, Congress had chosen to “adopt[] the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts,” rather than “crystallizing in permanent form and in minute detail every offense against the law of war,”¹¹³ but the critical point was that its authority to adopt *either* alternative came from only one provision of Article I: the Law of Nations Clause.¹¹⁴

employed by the Commission in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Id. at 47–48. *See generally* Jack L. Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223 (2006).

111. *Quirin*, 317 U.S. at 28 (emphasis added).

112. *Id.*; *see also id.* at 30 (“Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction.” (citation omitted)).

113. *Id.* at 30.

114. *See id.* at 29–30 (“It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law

This point is reinforced by *Quirin*'s second—and more fundamental—departure from *Milligan*: its conclusion that the constitutional rights to grand jury indictment and to trial by petit jury in criminal cases, which had been so central to Justice Davis's analysis in *Milligan*,¹¹⁵ were simply inapplicable. As Stone explained,

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one “arising in the land . . . forces,” when the accused is not a member of or associated with those forces. But even so, the exception [in the Grand Jury Indictment Clause] cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, *offenses committed by enemy belligerents against the law of war*.¹¹⁶

In other words, the rights to grand jury indictment and trial by petit jury enmeshed within Article III and the Fifth and Sixth Amendments included a categorical exception for “offenses committed by enemy belligerents against the law of war,” a carve-out the existence of which, however normatively persuasive,¹¹⁷ Stone traced to precisely *one* isolated statutory authority.¹¹⁸

condemns. An Act of Congress punishing ‘the crime of piracy as defined by the law of nations’ is an appropriate exercise of its constitutional authority, ‘to define and punish’ the offense since it has adopted by reference the sufficiently precise definition of international law.” (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

115. *See supra* text accompanying note 96.

116. *Quirin*, 317 U.S. at 41 (omission in original; emphasis added).

117. It might indeed be odd if the Constitution conferred *greater* rights with regard to indictment and trial by civilian juries upon enemy soldiers (who conceded their status as such) than it does upon our own servicemembers, who otherwise have a greater (or, at the very least, equal) entitlement to constitutional protection. *See id.* at 44–45 (“We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military

As for *Milligan*, Stone maintained that Justice Davis’s majority opinion “was at pains to point out that Milligan . . . was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents.”¹¹⁹ Thus, whereas the Constitution’s jury protections (as interpreted in *Milligan*) barred the trial of civilians by military commission when civil process was available, it did not bar such trials for “enemy belligerents” charged with violating the laws of war irrespective of the availability of civil courts, and Congress had in fact authorized such trials through Article 15 of the Articles of War. *Quirin* thus converted *Milligan*’s apparently categorical constitutional bar on military commissions in areas not under martial rule into a circumstance-specific rule that turned on the status of the offender and the nature of the charged offense. To that end, the Court in *Quirin* proceeded to devote nine pages to the specific question of whether the offenses with which the saboteurs were charged actually *were* violations of the laws of war, concluding—predictably—that they were.¹²⁰

Whether *Quirin* was fair to *Milligan* in its distinguishing of the earlier case is a matter of considerable dispute—and continuing debate.¹²¹ What matters for present purposes, though, is that *Quirin* necessarily reached two forward-looking *constitutional* holdings in addition to its construction of Article 15: *First*, *Quirin* established that Congress had the constitutional authority, under the Law of Nations Clause, to subject to trial “offenders or offenses that by statute or by the law of war may be triable by such military commissions.” *Second*, *Quirin* established that such trials could be conducted

commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death.”).

118. Stone’s only support was a provision in the 1806 Articles of War authorizing the death penalty for alien spies “according to the law and usage of nations, by sentence of a general court martial.” *Id.* at 42. As he wrote, “This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces.” *Id.*; *see also id.* at 42 (“It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.” (footnote omitted)).

119. *Id.* at 45.

120. *See id.* at 30–38. *But see* Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 339–40 (1951) (offering contrary analysis).

121. *See, e.g.,* Vázquez, *supra* note 20, at 236–41.

by military commissions, because the rights to grand jury indictment and trial by petit jury, which would otherwise bar the exercise of military jurisdiction, simply did not apply to offenses committed by enemy belligerents against the law of war. Whatever the logic or convincingness of these holdings, or the myriad questions that they left unanswered, subsequent decisions would solidify their vitality as precedent.

C. *Quirin's* Subsequent History: *Yamashita*, *Duncan*, and *Madsen*

Indeed, the Court adhered quite closely to (and quoted heavily from) *Quirin* in its next military commission case—*In re Yamashita*, decided in February 1946.¹²² *Yamashita* was convicted of war crimes and sentenced to death by an American military commission for his failure to prevent a flood of abuses committed by Japanese soldiers under his command as the United States overran the Philippines.¹²³ The Court affirmed the conviction and sentence (albeit this time over strong dissents),¹²⁴ relying heavily on *Quirin*. In *Quirin*, as Chief Justice Stone described,

we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to “define and punish . . . Offenses against the Law of Nations . . .,” of which the law of war is a part, had by the Articles of War recognized the “military commission” appointed by military command, as it had previously existed in United States

122. 327 U.S. 1 (1946).

123. For more on the background to (and problems with) *Yamashita*, see RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); and A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949). See also Bruce D. Landrum, Note, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 150–74 (2006); John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUP. CT. HIST. 54, 60 (2003).

124. See *Yamashita*, 327 U.S. at 26–41 (Murphy, J., dissenting); *id.* at 41–81 (Rutledge, J., dissenting). Justices Murphy and Rutledge also dissented from the Court’s decision one week later to turn away—as controlled by *Yamashita*—an appeal in a separate military commission case. See *In re Homma*, 327 U.S. 759, 759–61 (1946) (Murphy, J., dissenting); *id.* at 761–63 (Rutledge, J., dissenting).

Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.¹²⁵

Thus, Stone explained, Congress “adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.”¹²⁶ *Yamashita* thereby reasserted the Law of Nations Clause rationale articulated in *Quirin*, distinguishing *Milligan* (as had *Quirin*) on the ground that Yamashita’s commission had authority “only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war.”¹²⁷ Concluding that the laws of war tolerated the continued use of military commissions after the formal cessation of hostilities;¹²⁸ that Yamashita was properly charged with offenses against the laws of war;¹²⁹ and that his trial had not run afoul of any constitutional or treaty-based procedural protections;¹³⁰ the Court affirmed his conviction and death sentence.¹³¹

Just three weeks later, though, the same Court reinforced the narrowness of the *Quirin* exception to *Milligan* in *Duncan v. Kahanamoku*.¹³² There, a 6-2 Court invalidated the use of “provost courts” to try two civilians for petty offenses in Hawaii in August 1942 and March 1944, respectively, even though the territory was still technically under martial law at the time of the defendants’ crimes.¹³³ Justice Black’s opinion for the majority rested on statutory interpretation, reading the “martial law” authorized by section 67 of Hawaii’s Organic Act¹³⁴ as not including the power to subject civilians to

125. *Yamashita*, 327 U.S. at 7 (citations omitted; omission in original).

126. *Id.* at 8.

127. *Id.* at 9.

128. *See id.* at 11–13.

129. *See id.* at 13–18.

130. *See id.* at 18–25.

131. *See id.* at 26.

132. 327 U.S. 304 (1946).

133. *See id.* at 324.

134. Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 153 (authorizing the Governor of Hawaii “in case of rebellion or invasion, or imminent danger thereof, when the public safety

military trial for non-military offenses—at least partially in light of *Milligan*, a decision with which Congress would have been familiar at the time the Organic Act was enacted.¹³⁵ What was implicit in Black’s majority opinion, though, was made explicit by Justice Murphy’s concurrence: that the Constitution barred the trials in Hawaii whether or not the Organic Act permitted them, and that *Milligan*’s “open court” rule survived *Quirin* (indeed, Murphy’s opinion does not cite *Quirin* once).¹³⁶ Instead, *Duncan* suggested that, where the defendant was unquestionably a “civilian,” *Milligan* remained good law: where the civilian courts were open and functioning, military jurisdiction was constitutionally foreclosed.

Duncan was not the Court’s last word on World War II-era military commissions. In *Hirota v. MacArthur*,¹³⁷ the Court turned away for lack of jurisdiction a series of habeas petitions filed by individuals convicted by the International Military Tribunal for the Far East.¹³⁸ In *Johnson v. Eisentrager*,¹³⁹ the Court held that non-citizens held outside the territorial United States who had been properly convicted by a duly-convened military commission had no right to pursue habeas corpus relief in the United States.¹⁴⁰ And in *Madsen v. Kinsella*,¹⁴¹ the Court sustained the use of a military commission in what was then occupied Germany to try the civilian wife of a servicemember for her husband’s murder, in violation of the German Criminal Code. Writing for an 8-1 Court in *Madsen*, Justice Burton explained that the law of war “includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy

requires it, [to] suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known”).

135. See *Duncan*, 327 U.S. at 319–24. See generally John P. Frank, *Ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 COLUM. L. REV. 639 (1944).

136. *Duncan*, 327 U.S. at 324–35 (Murphy, J., concurring).

137. 338 U.S. 197 (1948) (per curiam).

138. See generally Vladeck, *supra* note 30 (summarizing the background and implications of *Hirota*).

139. 339 U.S. 763 (1950).

140. For a detailed deconstruction of Justice Jackson’s majority opinion—and the difficulties inherent in deciphering what it actually held—see Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 595–600 (2009).

141. 343 U.S. 341 (1952).

territory pending the establishment of civil government,”¹⁴² and so Madsen’s military commission trial for ordinary crimes in occupied territory was consistent with Article 15, at least as interpreted in *Quirin* and *Yamashita*.¹⁴³ In none of these cases, however, did the Court revisit *Quirin*’s constitutional analysis as to the sources of Congress’s authority to subject specific offenses to trial by military commission, or the limits imposed by the Constitution’s grand- and petit-jury protections. Because Article 15 merely incorporated whatever the laws of war authorized, *Quirin*’s statutory and constitutional analyses of whether a military commission was legally authorized merged into a single, law-of-war-based question.

D. *Hamdan*

Thus, when President Bush created military commissions pursuant to an Executive Order issued two months after the terrorist attacks of September 11,¹⁴⁴ one of the central questions became whether the commissions were consistent with what Congress had authorized—*i.e.*, whether they were only empowered to try offenses and offenders triable by military commission under the laws of war.¹⁴⁵ Acting under the order, the President designated six unnamed detainees for trial by military commission in July 2003.¹⁴⁶ The

142. *Id.* at 354–55 (footnote omitted).

143. *See id.* at 351–52.

144. *See* Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001). Several years before September 11, the former Chief Judge of the U.S. Court of Military Appeals had specifically advocated for the creation of military tribunals to punish violations of the laws of war. *See* Robinson O. Everett, *Possible Use of American Military Tribunals To Punish Offenses Against the Law of Nations*, 34 VA. J. INT’L L. 289 (1994).

145. The Military Order appears to have been drafted in substantial reliance upon a 38-page memorandum prepared by the Office of Legal Counsel (OLC). *See* Memorandum Opinion for the Counsel to the President: Legality of the Use of Military Commissions To Try Terrorists (Nov. 6, 2001). Although the OLC memo relied heavily upon arguments that the President had the inherent authority to try suspected terrorists before military commissions, it also repeatedly relied upon *Quirin*’s statutory and constitutional analysis. *See, e.g., id.* at 4–6, 11–14; *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 595 (2006) (“Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether *Hamdan*’s military commission is so justified.”).

146. *See* Press Release, Dep’t of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), available at <http://www.defenselink.mil/releases/2003/nr20030703-0173.html>.

first formal charges were revealed a little over one year later, when Salim Hamdan was charged with the crime of “conspiracy.”¹⁴⁷ Hamdan subsequently brought a habeas petition challenging the legality of his impending trial.¹⁴⁸ After the lower courts divided on the merits of Hamdan’s claims,¹⁴⁹ the Supreme Court granted certiorari in November 2005, and heard argument in March 2006.¹⁵⁰

On the merits, the Court held that the commissions created pursuant to President Bush’s Military Order exceeded the authority that Congress had delegated through Article 21 (Article 15’s successor) of the UCMJ. As Justice Stevens explained at the outset of Part IV of his lengthy opinion, “We have no occasion to revisit *Quirin*’s controversial characterization of Article of War 15 as congressional authorization for military commissions.”¹⁵¹ After all, “even *Quirin* did not view the authorization as a sweeping mandate for the President to ‘invoke military commissions when he deems them necessary.’”¹⁵² Instead, as Stevens explained, *Quirin* “recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under

147. See Dep’t of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, available at <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>. The elements of “conspiracy” were detailed in “Military Commission Instruction No. 2,” a regulation promulgated by the Secretary of Defense. See 32 C.F.R. § 11.6(c)(6) (2005); see also 68 FED. REG. 39,381 (July 1, 2003).

148. Hamdan initially filed his suit in the U.S. District Court for the Western District of Washington. After the Supreme Court decided *Rasul v. Bush*, 542 U.S. 466 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), however, the case was transferred to the U.S. District Court for the District of Columbia. Cf. *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004).

149. Compare *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (ruling for Hamdan on the merits), with *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (reversing the district court).

150. After certiorari was granted, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.), section 1005(e)(1) of which purported to remove the jurisdiction of the federal courts—including the Supreme Court—over suits such as Hamdan’s. In its ruling on the merits, though, the Supreme Court concluded that the DTA’s jurisdiction-stripping provision did not apply to “pending” cases, including Hamdan’s. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006).

151. *Hamdan*, 548 U.S. at 593 (citation omitted).

152. *Id.* (citation omitted).

his command comply with the law of war.”¹⁵³

In Hamdan’s case, then, the question became whether “conspiracy” was properly triable by a military commission. And since “[t]here is no suggestion that Congress has, in exercise of its constitutional authority to ‘define and punish . . . Offences against the Law of Nations,’ positively identified ‘conspiracy’ as a war crime,”¹⁵⁴ the inquiry instead devolved into whether such an offense was generally recognized as a violation of the laws of war. This inquiry, Stevens, reasoned, must turn on the existence of clearly established precedent. In his words,

When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.¹⁵⁵

Indeed, even in those jurisdictions that still recognized common-law crimes, Stevens explained, “an act does not become a crime without its foundations having been firmly established in precedent,”¹⁵⁶ a caution that is “all the more critical when reviewing developments that stem from military action.”¹⁵⁷

With these admonitions in mind, Stevens turned to the specific offense of conspiracy, noting that it “has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of

153. *Id.* (citations and footnote omitted). In a footnote to this passage, Justice Stevens explained that, “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.” *Id.* at 593 n.23. For the significance of this statement—and its possible incompleteness—see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 933 (2007).

154. *Hamdan*, 548 U.S. at 601–02 (plurality) (footnote omitted). Justice Kennedy, who otherwise provided the fifth vote in support of Justice Stevens’s opinion, did not deem it necessary to reach the question whether conspiracy was triable as a war crime. *See id.* at 655 (Kennedy, J., concurring in part).

155. *Id.* at 602 (plurality) (citations omitted).

156. *Id.* at 602 n.34 (citations omitted).

157. *Id.*

jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.”¹⁵⁸ After reviewing and rejecting various examples offered by the government (and by Justice Thomas in dissent),¹⁵⁹ Stevens went on to explain that “international sources confirm that the crime charged here is not a recognized violation of the law of war,”¹⁶⁰ citing various treaties and decisions of international courts,¹⁶¹ including the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁶² As such, “Because the charge does not support the commission’s jurisdiction, the commission lacks authority to try Hamdan.”¹⁶³

Justice Stevens went on in Part VI of his opinion to identify additional infirmities in Hamdan’s trial arising out of the lack of conformity between the commission’s procedures, on the one hand, and the UCMJ and the Geneva Conventions, on the other.¹⁶⁴ As relevant here, though, his analysis of

158. *Id.* at 603–04 (footnotes omitted).

159. *See id.* at 604–09 & n.37.

160. *Id.* at 610.

161. *See id.* at 610–11 & nn.38–40.

162. As Stevens explained, the ICTY in the *Tadić* case adopted “joint criminal enterprise” (“JCE”) as a theory of enterprise liability rather than a “crime on its own,” and the Appeals Chamber in the *Milutinović* case reiterated that “[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes.” *Id.* at 611 n.40 (quoting *Prosecutor v. Milutinović, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise*, Case No. IT-99-37-AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003) (alteration and omission in original)); *see also* *Prosecutor v. Tadić, Judgment*, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999). *See generally* BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS* 758–82 (2007) (summarizing and quoting from debates over the meaning and scope of JCE in the ICTY’s jurisprudence).

163. *Hamdan*, 548 U.S. at 611–12. Curiously, Stevens had also hinted much earlier in the opinion that the commission might lack *personal* jurisdiction over Hamdan, as well—but only in the context of identifying, rather than resolving, Hamdan’s arguments. *See id.* at 589 n.20 (“Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a ‘regularly constituted court’ under the Geneva Conventions, it is *ultra vires* and thus lacks jurisdiction over him.”).

164. *See id.* at 613–35. Justice Kennedy concurred in most of this discussion, save for the question of whether the commission was consistent with that part of Common Article 3 of the Geneva Conventions that required the commission’s procedures to afford “all the

whether the offense of conspiracy is triable as a violation of the laws of war takes *Quirin* to its logical stopping point (if not a bit beyond). Where Congress has only authorized military commissions consistent with the laws of war, *Hamdan* seems to establish that the President has very little authority, indeed, to deviate from what those laws have been held to proscribe.

E. The Military Commissions Acts of 2006 and 2009

The Court in *Hamdan* went out of its way to suggest that Congress could provide at least some of the statutory authority for military commissions that the Court had found lacking.¹⁶⁵ Four months later, Congress obliged, enacting the Military Commissions Act of 2006.¹⁶⁶ In addition to providing sweeping substantive authority for military commission trials,¹⁶⁷ the MCA also purported to bar invocation of the Geneva Conventions as a “source of rights” in any litigation,¹⁶⁸ and to preclude the federal courts from entertaining *any* lawsuits challenging the detention *or* trial by military commission of non-citizens held as “enemy combatants,” other than the narrow statutory appeals already provided by the DTA.¹⁶⁹

judicial guarantees which are recognized as indispensable by civilized peoples.” *See id.* at 633–35; *see also id.* at 653–55 (Kennedy, J., concurring in part).

165. *See, e.g., id.* at 636 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”); *id.* at 636–37 (Kennedy, J., concurring in part) (“This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President’s authority.”).

166. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.).

167. *Id.* § 3(a), 120 Stat. at 2600–31.

168. *Id.* § 5(a), 120 Stat. at 2631.

169. *Id.* § 7(a), 120 Stat. at 2635–36. This provision was invalidated as applied to the Guantánamo detainees in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and as applied to three non-citizens detained at Bagram Air Base in Afghanistan in *al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009). A separate provision, codified at 10 U.S.C. § 950j(b), purported to

Of particular salience here, the MCA of 2006 specifically defined the personal *and* subject-matter jurisdiction of the commissions it established. To that end, the 2006 MCA created 10 U.S.C. § 948d(a), which provided that “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.” And 10 U.S.C. § 948a(1) defined “alien unlawful enemy combatant” as, *inter alia*, “a person who has engaged in hostilities *or* who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”¹⁷⁰ As Professor Ryan Goodman has explained, though, “emerging international standards appear to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals [with exceptions not here relevant].”¹⁷¹ Thus, while the first clause of § 948a(1) seems untroubling, the second clause raises the very distinct possibility that individuals who are (at *most*) indirect participants in hostilities might still be subjected to trial by military commission.¹⁷² This possibility was only heightened by the Military Commissions Act of 2009,¹⁷³ which expanded the definition of those subject to trial to include any alien who “was a part of al Qaeda at the time of the alleged offense under this chapter,”¹⁷⁴ without elaborating on what it means to be “a part of al Qaeda.”

In addition to its sweeping definition of who could be tried by military

preclude collateral challenges to military commissions. *See* MCA of 2006 § 3(a), 120 Stat. at 2623–24. That provision, though, was deleted by the Military Commissions Act of 2009.

170. 10 U.S.C. § 948a(1)(A)(i) (2006) (emphasis added).

171. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 59 (2009).

172. *See id.* at 60–63 (discussing the inappropriateness of including indirect participants within the scope of the “enemy combatant” definition).

173. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.).

174. *Id.* § 1802, 123 Stat. at 2575 (codified at 10 U.S.C. § 948a(7)(C)). The full personal jurisdiction provision now authorizes the trial of any alien who is not a “privileged belligerent” (as defined in 10 U.S.C. § 948a(6)), and who “(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.” *Id.*

commissions, the 2006 MCA also codified 28 separate substantive offenses triable by military commissions.¹⁷⁵ Before defining the specific crimes, though, the statute set forth its “purpose” to “codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.”¹⁷⁶ And to reinforce the point, the next subsection (which was 10 U.S.C. § 950p(b)) provided that “the provisions of this subchapter . . . are declarative of existing law,” and so “do not preclude trial for crimes that occurred before the date of the enactment of this chapter.”¹⁷⁷ These two provisions seem particularly curious given that, in addition to traditional war crimes, the 2006 MCA also included as substantive offenses the crimes of “terrorism,”¹⁷⁸ “providing material support for terrorism,”¹⁷⁹ and, notwithstanding *Hamdan*, “conspiracy.”¹⁸⁰ And although the 2009 MCA slightly tweaked some of the language, it reenacted as standalone offenses the crimes of “terrorism,” “providing material support for terrorism,” and “conspiracy.”¹⁸¹

The Military Commissions Acts of 2006 and 2009 thereby raised in sharp relief two questions the Supreme Court has never had to answer: May Congress define a violation of the law of nations not recognized by the law of nations itself? Even if the answer is yes, may Congress subject such violator to trial by military commission?¹⁸² It is to these questions that this Article now turns.

175. *See* 10 U.S.C. § 950v(b) (2006).

176. *Id.* § 950p(a).

177. *Id.* § 950p(b).

178. *Id.* § 950v(b)(24).

179. *Id.* § 950v(b)(25).

180. *Id.* § 950v(b)(28).

181. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2610–11 (codified at 10 U.S.C. § 950t(24), (25), and (29)).

182. A third question raised by the Military Commissions Acts, but beyond the scope of this Article, goes to the retroactive aspect of these definitions. Even if Congress *could* authorize military commissions for offenses or offenders not so triable under the laws of war, there is the separate issue of whether Congress may so act retrospectively, and subject individuals to trial for conduct undertaken prior to the enactment of the 2006 MCA. For more on this point, see Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 180 & n.47 (2008).

III. THE LAWS OF WAR AS A CONSTITUTIONAL CONSTRAINT

Whether Congress has the power under the Law of Nations Clause to subject to trial by military commission offenses or offenders that are not clearly triable under the laws of war depends on the degree of deference to which Congress is entitled in exercising such Article I authority. As the following discussion suggests, it is clear, *contra* Professor Paulsen, that there are *some* constraints on Congress's authority to so act. The harder task is to identify the scope of such constraints—and whether they have particular force in the context of military jurisdiction.

A. “Define and Punish”: The Original Understanding

Perhaps unsurprisingly, questions as to the scope of Congress's power to “To define and punish . . . Offences against the Law of Nations” arose almost as soon as the language was proposed at the 1787 Constitutional Convention. As is clear from historical sources, after the Convention entertained a series of proposals relating to the need for a legislative power to punish piracy (and other maritime offenses), counterfeiting, and offenses against the law of nations, the Committee on Style reported out the following provision: “The Congress . . . shall have power . . . To define and punish piracies and felonies committed on the high seas, and punish offenses against the law of nations.”¹⁸³ As Professor Beth Stephens has explained, “This language, with the distinction between the power to ‘define and punish’ piracy and felonies on the high seas, but only ‘punish’ offenses against the law of nations, produced the only substantive debate on the offenses section of the Clause.”¹⁸⁴ Specifically,

[Gouverneur] Morris moved to strike the word “punish” before “offenses agst. the law of nations,” so that the laws would “be definable as well as punishable, by virtue of the preceding member of the sentence.” [James] Wilson argued against the change, stating: “To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous.” Morris replied by suggesting that “define” was intended to suggest the need to provide

183. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 594–95 (Max Farrand ed., 1937) (Committee of Style and Arrangement).

184. Stephens, *supra* note 6, at 473.

detail, not to create offenses where none had previously existed: “The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule.” The change was accepted by a vote of six to five, and the Clause adopted as it now stands, granting Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and offenses against the law of nations.”¹⁸⁵

Thus, “The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”¹⁸⁶

Early interpretations of comparable provisions appeared to reinforce this view. For example, in *United States v. Furlong*,¹⁸⁷ the Court considered whether “murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner upon a foreigner.”¹⁸⁸ A 1790 statute made it a crime for “any person or persons [to] commit upon the high seas . . . murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death,”¹⁸⁹ and the question in *Furlong* was whether Congress had the power to so provide pursuant to its Article I authority “To define and punish Piracies and Felonies committed on the high Seas.” Writing for a unanimous Court, Justice Johnson answered that question in the negative:

Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with

185. *Id.* (footnotes omitted; third alteration in original); *see also* Kent, *supra* note 6, at 899 (providing a similar account of the debate).

186. *Id.* at 474.

187. 18 U.S. (5 Wheat.) 184 (1820).

188. *Id.* at 194 (emphasis omitted).

189. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14.

the governments of other nations might be defended on the precedent.¹⁹⁰

More directly on point, Attorney General James Speed, in an 1865 opinion concerning the potential trial of the Lincoln assassination conspirators before military tribunals,¹⁹¹ reached a similar conclusion about the limits on Congress's power to give substantive content to the law of nations. After rejecting the possibility that Congress could use its power under the Make Rules Clause to create military commissions,¹⁹² Speed turned to the Law of Nations Clause:

That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that 'Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations.' To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy.¹⁹³

But perhaps the most sustained consideration of the scope of Congress's power under the Law of Nations Clause came in *United States v. Arjona*,¹⁹⁴ an 1887 decision in which the Supreme Court upheld a federal statute criminalizing the counterfeiting of foreign government securities.¹⁹⁵ As Chief Justice Waite explained, "the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized [under the law of nations]."¹⁹⁶ To that end,

190. *Id.* at 198.

191. Military Commissions, 11 U.S. OP. ATT'Y GEN. 297 (1865).

192. *See id.* at 298 ("I do not think that Congress can, in time of war or peace, under this clause of the Constitution, create military tribunals for the adjudication of offences committed by persons not engaged in, or belonging to, [the land or naval] forces.").

193. *Id.* at 299.

194. 120 U.S. 479 (1887).

195. *See* Act of May 16, 1884, ch. 52, §§ 3, 6, 23 Stat. 22, 22–24.

196. *Arjona*, 120 U.S. at 484.

This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. . . . Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.¹⁹⁷

As one commentator recently observed, *Arjona* thereby established three significant propositions about the Law of Nations Clause: First, Congress does not need to expressly invoke the Law of Nations Clause when legislating pursuant thereto. Second, the Law of Nations Clause turns on the scope of the Law of Nations *at the time* of the relevant statute, and not as it existed at the Founding. Third, the Clause “not only allows Congress to act against direct violations of the law of nations, but also allows Congress to criminalize acts a step removed from the demands of international law.”¹⁹⁸ After all, “An individual counterfeiter is not violating international law, since the duty to prevent counterfeiting rests with states, not individuals.”¹⁹⁹

Even in *Arjona*, though, there was no quarrel with Chief Justice Waite’s central legal conclusion, *i.e.*, that the counterfeiting of foreign currency was a violation of the law of nations. *Arjona* had no need to address the true question raised by the Law of Nations Clause: how much leeway does Congress have in deciding that a particular offense *is* a violation of the law of nations?

B. Competing Views on the Degree of Legislative Latitude

The Supreme Court has provided no further guidance as to the meaning of the Law of Nations Clause in the 122 years since *Arjona* was decided, leaving the debate over the amount of deference to which Congress is entitled up to the academics. In her exhaustive 2000 article on the Law of Nations Clause, Professor Stephens concluded that the answer was comparable to the deference (in the form of the rational basis test) that Congress ordinarily receives in identifying appropriate circumstances for the exercise of its other enumerated powers—*e.g.*, its power “To regulate Commerce . . . among the several States.”²⁰⁰ As Stephens put it, “in deciding what falls within the reach

197. *Id.* at 488.

198. Note, *supra* note 6, at 2386–87.

199. *Id.* at 2387.

200. U.S. CONST. art. I, § 8, cl. 3.

of the Clause, Congress's decisions are entitled to significant deference from the judiciary."²⁰¹

In marked contrast, Professor Charles Siegal argued in an influential 1988 article that Congress is entitled to little or no deference in identifying the substantive content of the law of nations when exercising its authority under the Law of Nations Clause.²⁰² As Siegal explained,

judicial consideration of the congressional definition of an offense is based on the principle implicit in the offenses clause itself, that an international norm exists. The [Law of Nations Clause] differs from many other constitutional provisions in that it contains not only its own standard against which to measure congressional action, but a specifically legal standard at that. Similarly, there is an obvious distinction between Congress' decision to impose criminal sanctions on the violation of an established norm, such as slavery, and its decision that there is a norm. Finally, the congressional determination that a certain act constitutes an offense against the law of nations contains nothing of the political character of the executive determinations that supported the discretion given to the President in [cases like] *Zemel v. Rusk*, *Haig v. Agee* and *Regan v. Wald*. Accordingly, a deferential standard of review will almost never be appropriate.²⁰³

Rejecting the seeming absolutism of both Stephens's and Siegal's approaches, a recent student note²⁰⁴ offered an intermediate position based largely on the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.²⁰⁵ Specifically, the note advocated a multi-faceted approach: "A court would first examine the degree of international consensus behind the rule, momentarily disregarding the United States' stance on the rule."²⁰⁶ Then, courts "would

201. Stephens, *supra* note 6, at 545.

202. Charles D. Siegal, *Deference and Its Dangers: Congress' Power To "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865 (1988).

203. *Id.* at 941–42 (footnotes omitted).

204. Note, *supra* note 6.

205. 542 U.S. 692 (2004) (holding that the arbitrary detention of a Mexican national for less than one day violated no norm of customary international law sufficiently well-established as to support a cause of action under the Alien Tort Claims Act, 28 U.S.C. § 1350).

206. Note, *supra* note 6, at 2395.

examine the context and character of Congress's action to determine whether the statute can be seen as a means of conforming to or advancing a rule of international law."²⁰⁷ At that step, evidence that the United States had previously accepted the rule as a binding rule of international law would counsel in favor of having it fall within the scope of the Law of Nations Clause, whereas evidence that the United States had rejected such a rule would militate against such a conclusion.²⁰⁸ Courts would then consider "the combined weight of the conclusions it reached in its separate examinations of the strength of international consensus and the character of Congress's actions."²⁰⁹

The author then illuminated the proposal with three slightly more specific examples, reasoning that (1) a "firmly entrenched rule of customary international law would almost always support legislation under the [Law of Nations] Clause";²¹⁰ (2) a rule based on a "moderately strong international consensus" would "stand or fall depending on the character of Congress's action";²¹¹ and (3) "an international law rule that was backed by only a slim international consensus could not support an exercise of Offences Clause power, even if it was clear that the statute committed the United States to the rule of international law."²¹² Of course, much would depend on the particular category into which specific legislation falls, since Congress would presumably believe that virtually every exercise of its Law of Nations Clause power was to codify a "firmly entrenched rule of customary international law."

Yet, whatever the merits of these competing views on the appropriate latitude to which Congress is entitled in defining offenses against the law of nations as a general matter, *none* of the commentators considered two

207. *Id.* at 2396.

208. *See id.*

209. *Id.* at 2397.

210. *Id.*

211. *Id.* at 2398. In this regard, consider Congress's decision to codify "conspiracy" as an offense triable by military commission in the MCA notwithstanding *Hamdan*, and even as federal courts rejecting claims under the Alien Tort Claims Act, 28 U.S.C. § 1350, continue to rely on the legal conclusion that international law does not recognize conspiracy as a form of inchoate liability. *See, e.g.,* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259–60 (2d Cir. 2009). This kind of dichotomy is probably what the author had in mind in referring to "the character of Congress's action."

212. Note, *supra* note 6, at 2398.

specific variations of prominence here: Congress's power to proscribe offenses against the laws of war—a body of customary international law that has developed and largely crystallized over the past half-century; and the additional limitations that might constrain Congress's power to subject such offenses to *military*, rather than civilian, jurisdiction

C. The Crystallization of International Humanitarian Law

One need not be a scholar of international humanitarian law to recognize the degree to which that subset of customary international law has become far more concrete in decades since the end of the Second World War, beginning with the four Geneva Conventions of 1949. Indeed, although Professor Roger Alford described the period from 1944 to 1959 as the “humanitarian period,” during which norms of IHL began rapidly to crystallize,²¹³ it is more recent developments, especially the creation of *ad hoc* (and now permanent) international criminal tribunals, that has helped accelerate the move toward positive law in the context of the laws of war, rather than a series of loosely articulated—if universally accepted—norms.²¹⁴

From the United States' perspective, the effects of this crystallization is nowhere more clearly manifested than in Congress's enactment of the War Crimes Act of 1996,²¹⁵ which was intended specifically to incorporate our obligations under the 1949 Geneva Conventions to provide penal sanctions for violations thereof.²¹⁶ Citing *Quirin* and *Yamashita* for the proposition that “[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes,”²¹⁷ Congress created civilian criminal jurisdiction for “grave breaches” of the Geneva Conventions, authority it expanded in 1997 to cover an even wider class of “war crimes.”²¹⁸ Such authority was necessary, Congress suggested, both to provide a mechanism for prosecuting perpetrators of war crimes *against*

213. See Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT'L L. 61, 92–108 (2008).

214. See generally Allison Marsten Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

215. 18 U.S.C. § 2441 (2000).

216. See generally War Crimes Act of 1996, H.R. REP. NO. 104-698 (1996).

217. *Id.* at 7.

218. See 18 U.S.C. § 2441(c) (defining “war crime”).

Americans, and to provide a means of redressing war crimes committed by American servicemembers who are discharged prior to being charged.²¹⁹

The War Crimes Act is instructive in several respects: First, it helps to demonstrate how the crystallization of international law in general (and the laws of war in particular) affects Congress's power under the Law of Nations Clause, albeit affirmatively, in this case, rather than as a constraint. Second, as the House Report accompanying the statute pointed out, it was not entirely clear that Congress's power to proscribe the offenses prohibited by the War Crimes Act automatically meant that it could subject such conduct to trial by court-martial or military commission.²²⁰ The safer route, then, was to empower the civilian criminal courts to hear such cases, leaving questions about the propriety of military jurisdiction for another day.

D. Toward a Rule of Interpretive Lenity for Military Jurisdiction

Separate from the increasing crystallization of international law, which would serve *generally* to constrain Congress's deference under the Law of Nations Clause, there is the specific question as to the circumstances in which Congress may use the Law of Nations Clause to subject particular offenses to *military* jurisdiction. Put another way, whether or not Congress can proscribe particular conduct pursuant to the Law of Nations Clause as a general matter, under what circumstances may it subject such offenses to the criminal jurisdiction of military—rather than civilian—courts?

It is here that the case law extensively surveyed in Parts I and II figures so prominently, for the Supreme Court's jurisprudence with respect to the constitutional limits on military jurisdiction reveals a point largely lost to contemporary commentators: Article I actually has very little to say about the appropriateness of military versus civilian jurisdiction; instead, the critical analysis must center on the jury-trial protections of Article III and the Fifth and Sixth Amendments, and the scope of the exceptions thereto identified by the Supreme Court.

The exception for "cases arising in the land and naval forces" is perhaps the easiest to deal with. Although it appears only in the Grand Jury Indictment Clause of the Fifth Amendment, the *Milligan* Court, albeit in dicta, read such an exception into the Sixth Amendment's right to trial by petit jury, as well,²²¹ and the Supreme Court has long-since confirmed that

219. See H.R. REP. NO. 104-698, at 6–7.

220. See *id.* at 5–6.

221. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

reading as authoritative.²²² As such, Congress can almost surely subject to trial by court-martial any offense it could subject to trial in the civilian courts under the Law of Nations Clause where the offender is a servicemember. (Of course, thanks to *Solorio*, Congress could just as easily so provide under the Make Rules Clause.)

Indeed, the far harder—and more important—case is the exception to the grand- and petit-jury rights identified in *Quirin*, *i.e.*, for “offenses committed by enemy belligerents against the law of war.”²²³ As Chief Justice Stone elaborated, “§ 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.”²²⁴

And yet, the existence of an exception for “offenses committed by enemy belligerents against the law of war” says nothing as to its scope. Indeed, one might well wonder if the analysis of the two questions merges into one—whether the power to define a violation of the law of nations is itself the power to identify an “offense[] committed by [an] enemy belligerent[] against the law of war.” If we had no further elaboration, that answer might well prove tempting. But consider in this light the Court’s discussion of the significance of the jury-trial right in *Toth*. As Justice Black there suggested, “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”²²⁵ Thus, the Court concluded, “Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘the least possible power adequate to the end proposed.’”²²⁶

What *Toth* and the other court-martial cases suggest is the appropriateness of a lenity-based approach to the jury-trial exception identified in *Quirin*. In other words, wholly separate from the scope of Congress’s power to define offenses against the law of nations, the Supreme Court’s understanding of the circumstances in which military jurisdiction will

222. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 40–41 (1942); see also *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 234, 272–73 (1960) (Whittaker, J., dissenting).

223. *Quirin*, 317 U.S. at 41.

224. *Id.* at 40.

225. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 n.22 (1955).

226. *Id.* (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)).

be appropriate call for the narrowest construction of those circumstances as is fairly possible. Thus, *Quirin's* holding that the Fifth and Sixth Amendments do not bar the trial by military commission of “offenses committed by enemy belligerents against the law of war” should be narrowly construed. The defendants should clearly be “belligerents” under the laws of war, and the offense should clearly be a recognized violation of the laws of war. Congress may have some leeway to subject less-well-established offenses (or offenses committed by less-well-established belligerents) to prosecution in the civilian criminal courts, but fundamental principles of American constitutional law, as articulated in numerous Supreme Court decisions construing the constitutional limits of military jurisdiction, compel the conclusion that any exception justifying trial in a military court be founded on the clearest of precedent. To borrow once more from Justice Stevens’s opinion in *Hamdan*, “The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.”²²⁷

E. Revisiting the Military Commissions Acts of 2006 and 2009

With a rule of interpretive lenity as the governing consideration, the flaws with the Military Commissions Acts of 2006 and 2009 come into stark relief. It seems abundantly clear that both Acts authorize the exercise of personal jurisdiction over individuals who are either indirect participants or nonparticipants in hostilities, even though IHL today appears to prohibit their prosecution before a military commission.²²⁸ Thus, whereas the MCA of 2009 authorizes the trial of an individual who “was a part of al Qaeda at the time of the alleged offense under this chapter,”²²⁹ there is no requirement anywhere in the statute that an individual be a “belligerent” under IHL in order to be “part of al Qaeda.”

Even more troubling are various of the substantive offenses defined by the 2006 and 2009 statutes. Justice Stevens’s analysis in *Hamdan* calls into serious question the case for conspiracy being sufficiently well-established to satisfy the high standard articulated above, and there is even *less* precedent at the international level for categorically treating “terrorism” or “providing

227. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 n.34 (2006) (plurality).

228. *See, e.g.*, Goodman, *supra* note 171, at 59 n.63 (citing sources).

229. Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948a(7)(C)).

material support for terrorism” as violations of the laws of war.²³⁰ Indeed, one need only observe the widespread and ongoing debate over whether terrorism as a standalone offense should be included within the jurisdiction of the International Criminal Court to see just how open a question it is—and how divided foreign and international authorities are.²³¹ To support Congress’s power in that context to both proscribe terrorism as a violation of the law of nations *and* to subject it to trial by military commission is to run roughshod over the constraints that the Supreme Court has identified over decades of case law on the limits of military jurisdiction—and with potentially grave consequences. After all, as Justice Black warned in *Toth*, “There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.”²³² Whatever the merits of the exception to those protections identified by the Court in *Quirin*, there is every reason to construe that exception narrowly, and to require more than just passing support before allowing Congress to subject to trial by military commission offenses that have not yet crystallized as violations of the laws of war.

* * *

One last point bears consideration: For as significant as the Constitution’s grand- and petit-jury protections are to the above analysis, I suspect that some will argue that non-citizens detained outside the territorial United States (whether or not that category includes those still detained at Guantánamo) are not entitled to the protections of these constitutional provisions, and so all of this analysis is much ado about nothing. Just as Chief Justice Rehnquist’s plurality opinion in *Verdugo-Urquidez* suggested that the Fourth Amendment does not protect non-citizens outside the United States, so too for the Fifth Amendment—and perhaps even the Sixth.

My responses to this objection are brief. First, *Quirin* itself declined to rest on the fact that the defendants were not “legally” present within the United States (having surreptitiously crossed enemy lines—indeed, that was the entire point), relying instead on the exception of such central significance

230. In *Prosecutor v. Galić*, the ICTY *did* hold that terror against a civilian population can in fact be a war crime. See *Prosecutor v. Galić*, Judgment, Case No. IT-98-29-T, ¶¶ 86–138 (ICTY Trial Chamber Dec. 5, 2003); see also VAN SCHAACK & SLYE, *supra* note 162, at 555–72 (discussing *Galić*). But the conclusion that terrorism can be a war crime under certain circumstances hardly compels the conclusion that it is always such.

231. See generally Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT’L L. (forthcoming 2010).

232. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

here. Second, whether a non-citizen in U.S. custody is protected by the Fourth and Fifth Amendments while in executive detention strikes me as a far different question from whether constitutional protections attach once the U.S. government affirmatively decides to commence criminal proceedings. Of course, one who falls within the law-of-war exception identified in *Quirin* will not find those protections to be particularly useful, but the critical point here is that it is *that* exception, and not a categorical rule based upon citizenship and location, that provides the essential prerequisite for the exercise of military jurisdiction.

CONCLUSION

None of the above analysis is to suggest that *Quirin* got it right—that the constitutional rights to grand jury indictment and trial by petit jury *should* tolerate an atextual exception for “offenses committed by enemy belligerents against the laws of war.” *Quirin* is rightly criticized by virtually all who study it as an unfortunate decision borne out of fortuitous circumstance, and one should not take my endorsement of its signal importance to the present analysis as signifying any belief that its analysis was, all things being equal, correct. To my mind, there is much to commend the “open court” rule of *Milligan*, and the burden should be on the government, as a policy matter if not a constitutional one, to make the case for why trial by ordinary civilian criminal processes is inadequate even in those cases in which there is a plausible claim that the defendants are properly subject to the laws of war. Otherwise, the government leaves the impression that the resort to military process is but means to a predetermined end, “an impression,” to paraphrase a federal appellate judge in a post-9/11 detention case that I “would have thought the government could ill afford to leave extant.”²³³

All of that being said, this Article is more about the contemporary reality created by the Supreme Court’s military jurisdiction jurisprudence than it is about a view to what the law *should* be. And within that jurisprudence, there are lessons that have been lost—and that it would behoove us to revisit—about the relationship between Congress’s power to subject offenses to trial by military courts and the Constitution’s limits on such jurisdiction. There is simply no question that Professor Paulsen is deeply, terribly wrong to claim that the constitutionality of the Military Commissions Act of 2006 is settled by Congress’s self-serving ipse dixit to the effect that it was doing nothing new. Even if Article I tolerates such a naked arrogation of power, Article III and the Fifth and Sixth Amendments do not.

233. *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005) (mem.).