

# A Military Justice Solution in Search of a Problem: A Response to Vladeck

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## INTRODUCTION

In “Military Courts and Article III,”<sup>1</sup> our colleague and fellow law professor Steve Vladeck has made an original and important contribution to the literature on the interaction of military tribunals with Article III of the U.S. Constitution. Professor Vladeck argues that what he calls the “military exception” to Article III’s requirements of a jury trial and life-time-tenured judge has “increasingly become untethered from any textual or analytical moorings.”<sup>2</sup> In particular, Professor Vladeck questions the power of military commissions to try suspected terrorists on charges that do not constitute international war crimes and the power of courts-martial to try civilian contractors and hear charges based on alleged “non-service-connected” conduct by members of the armed forces of the United States.<sup>3</sup>

Professor Vladeck views these perceived flaws as a problem that must be remedied by his counter-historical proposal: that international law should govern Congress’s power to establish both military commissions to

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We express our thanks to Professor Peter Margulies for his excellent contributions to this Essay, and to our research assistant, J. Bradley Vinson, South Texas College of Law, J.D. 2015.

1. Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015).
2. *Id.* at 937.
3. *Id.* pts. II, III.

try suspected terrorists and courts-martial to try members of the U.S. armed forces.<sup>4</sup> Our response, which centers on courts-martial, argues that Professor Vladeck has offered a solution in search of a problem. Moreover, Professor Vladeck's analysis fails to acknowledge the importance of deference to Congress's exercise of its war powers, and the resonance of U.S. and English history familiar to the Framers. We write to clarify the categories of military jurisdiction, their basis, and their rationale.

Although Professor Vladeck claims to advance a "relatively modest" thesis,<sup>5</sup> his argument actually is anything but modest. Professor Vladeck proposes a wholesale replacement of the foundation upon which court-martial jurisdiction has stood since the inception of the United States; a foundation with deep roots in the British experience that predates the nation itself. Moreover, in an effort to provide a unifying theory grounded in international law, Professor Vladeck fails to properly distinguish the jurisdiction established by Congress to regulate the armed forces from the jurisdiction established to punish violations of the laws of war.<sup>6</sup> This conflation yields confusion about military jurisdiction which ripples throughout the theory.

Part I of this response explores the conceptual confusion caused by the assertion that international law determines the permissible scope of all military jurisdiction. This section clarifies the extant categories of military jurisdiction and explains that, counter to Professor Vladeck's argument, general courts-martial jurisdiction is merely reverting to the mean, not expanding. Part I concludes with an endorsement of military jurisdiction based on the status of the accused as a member of the armed forces of the United States. This section highlights the folly, thankfully remedied by the Supreme Court in *Solorio v. United States*,<sup>7</sup> of tying military jurisdiction to the supposed "service connection" of offenses committed by members of the active-duty military.

Part II of this response discusses both the extent and the consequences of Professor Vladeck's historical underinclusiveness. This section begins by explaining the emphasis the Supreme Court has placed on historical

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4. *Id.* pt. IV.

5. *Id.* at 1001.

6. *See generally* GEOFFREY CORN, JIMMY GURULE, ERIC JENSEN & PETER MARGULIES, NATIONAL SECURITY LAW: PRINCIPLES AND POLICY 301–24 (2015) (discussing purposes and parameters of both military commissions and courts-martial).

7. 483 U.S. 435 (1987).

practice in assessing the constitutionality of military courts and jurisdiction. From there, the section provides historical context for military jurisdiction over certain offenses, namely spying, and over civilians serving with or accompanying the U.S. armed forces on missions abroad. Careful study of both historical practice and case law reveals the flaws in Professor Vladeck's thesis.

#### I. CONCEPTUAL AND HISTORICAL GAPS IN PROFESSOR VLADECK'S THESIS

Professor Vladeck's argument that international law governs *all* military jurisdiction rests on his claim that Congress has expanded this jurisdiction beyond constitutionally permissible limits. Professor Vladeck asserts early in his article that the 1987 *Solorio* decision and the statutory expansion of court-martial jurisdiction and the Military Commissions Act (both in 2006) have resulted in the "subtle but potentially dramatic expansion[] in the scope of military jurisdiction."<sup>8</sup> This assertion is misleading for two important reasons. First, it is based on a conflation of military criminal jurisdiction over the armed forces and military commission jurisdiction over alleged war criminals. Second, in the former category, the "dramatic expansion" he emphasizes is non-existent. In fact, the evidence he cites supports the opposite conclusion: that the scope of in personam and subject-matter jurisdiction of courts-martial for offenses established by Congress in the punitive articles of the Uniform Code of Military Justice (UCMJ) has been realigned with its historic tradition. All this in turn supports the current scope of court-martial jurisdiction.

##### A. CONFLATION OF DISPARATE MILITARY TRIBUNALS

The conflation of court-martial and military commission jurisdiction in Professor Vladeck's thesis obscures more than it illuminates. We certainly agree that the scope of subject-matter jurisdiction vested in the military commissions created after the September 11th terrorist attacks has been controversial. Indeed, both of us have criticized what we consider the unjustified expansion of military commission "war crimes" jurisdiction into heretofore unknown territory. But this issue is quite distinct from the permissible scope of court-martial jurisdiction for violations of the punitive

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8. Vladeck, *supra* note 1, at 937.

articles of the UCMJ applicable primarily to members of our armed forces—criminal proscriptions established by Congress to regulate our own armed forces and associated personnel.

The general principle of military commission jurisdiction over war crimes and alleged war criminals is in no way controversial. This jurisdiction has been a feature of U.S. military law since the inception of the nation, resurrected periodically through our history to deal with the challenge of enemy wartime misconduct in violation of the laws and customs of war. The true focus of the current controversy is whether the individuals currently subjected to this jurisdiction were in fact engaged in an armed conflict subject to this body of international law, and, if so, whether the offenses enumerated by Congress in the Military Commission Act are derived from that body of law. There are no easy answers to either of these questions, the latter being the focal point of ongoing litigation between the government and Commission defendants. But if Congress has in fact engaged in impermissible jurisdictional overreach, that overreach has absolutely nothing to do with the constitutional validity of court-martial jurisdiction over offenses by U.S. service members.

However, this is not Professor Vladeck's view. He argues that the expansion of military commission jurisdiction is simply the most recent manifestation of congressional overreach, a symptom of a more pervasive tendency to expand the "military exception" into territory reserved for Article III jurisdiction. Unfortunately, he offers no evidence to support the causal relationship between these two distinct sources of military jurisdiction. Nothing in his article indicates that court-martial jurisdiction somehow provided the springboard to justify expansive military commission jurisdiction. And for good reason: no such evidence exists. In fact, a proper understanding of court-martial jurisdiction indicates that Congress has never considered UCMJ jurisdiction analogous to, or conflated with, war crimes jurisdiction. Instead, these two sources of criminal proscriptions, and the jurisdiction applicable to each, are distinct and separate.

### 1. Categories of Military Jurisdiction

Professor Vladeck attempts to unify what he characterizes as three categories of American military adjudication: court-martial jurisdiction over offenses enumerated by Congress in the UCMJ; military commission jurisdiction over offenses in violation of the laws and customs of war; and

the jurisdiction of military occupation courts.<sup>9</sup> It is arguable that the latter two categories are in fact unified, as occupation military tribunals derive their authority from the law of war.<sup>10</sup> Irrespective of whether occupation military tribunals are distinct from other law of war military commissions, the attempt to unify these latter two asserted categories of military jurisdiction with court-martial jurisdiction reveals a misunderstanding of the UCMJ's division of jurisdiction between offenses arising under the punitive articles of the Code and offenses arising under the laws of war.

## 2. Basis for General Court-Martial Jurisdiction

Article 18 of the UCMJ establishes the jurisdiction of general courts-martial,<sup>11</sup> and supersedes an identical provision of the predecessor Articles of War.<sup>12</sup> Professor Vladeck fails to even mention Article 18 in an article on military courts. This omission colors Professor Vladeck's flawed conception of military jurisdiction.

As a prelude, we believe the assertion that military justice is an "exception" to Article III is erroneous.<sup>13</sup> The Supreme Court held over 150

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9. There may be a very limited third category of martial law jurisdiction, but this is not analogous to occupation jurisdiction.

10. Use of military tribunals to enforce martial law, unlike use of such courts in the context of a belligerent occupation, is not based on law of war authorities. Both Article 43 of the Regulations Annexed to the Hague Convention IV of 1907 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provide the legal authority for the use of military tribunals during occupation. *See* Hague Convention Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. This is reflected in the *Manual for Courts-Martial*, which, in the discussion to Rule for Courts-Martial 307(c)(2), addressing the form of charges for trial by court-martial, provides, "(D) Charges under the law of war. In the case of a person subject to trial by general court-martial for violations of the law of war (*see* [UCMJ] Article 18), the charge should be: 'Violation of the Law of War'; or 'Violation of \_\_\_\_\_,' referring to the local penal law of the occupied territory." JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL II-27, UNITED STATES (2012 ed.). There is no analogous discussion for martial law courts.

11. Uniform Code of Military Justice art. 18, 10 U.S.C. § 818 (2012).

12. American Articles of War of 1775 art. 8, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920).

13. Professor Vladeck acknowledges in a footnote that it is "something of a misnomer to refer to a unitary 'military exception' to Article III" and that "military courts have not typically been viewed as 'exceptions' to Article III so much as they have been viewed as existing wholly *apart* from Article III." Vladeck, *supra* note 1, at 936 n.10. But he then

years ago that the “trial and punishment of military and naval offences” is not, as Professor Vladeck would have it, an “exception” to Article III’s guarantees of judicial tenure and trial by jury.<sup>14</sup> Rather, the Court made clear that such power lacked “*any connection*” to Article III, and was instead derived from Congress’s enumerated authority to make rules for the land and naval forces.<sup>15</sup> The Court has long recognized the distinct nature of tribunals established pursuant to this authority and that these tribunals perform a specialized purposes altogether different from those that animate the system of civilian justice governed by Article III.

Under Article 18, jurisdiction is divided between two distinct categories of offenders and offenses. The first category is limited to individuals subject to the Code<sup>16</sup>—in other words, individuals who fall within the in personam jurisdiction established by the UCMJ itself. That jurisdiction is established by Article 2 of the UCMJ and includes members of the armed forces and other associated individuals. For these individuals, a general court-martial has jurisdiction to try any offense made criminal by the Code. In other words, only individuals Congress subjects to military jurisdiction may be tried by a general court-martial for offenses proscribed by Congress in the punitive articles of the Code.

Article 18 also vests general courts-martial with jurisdiction to try *any* individual, even if that individual is not subject to U.S. military criminal jurisdiction by operation of Article 2. However, these individuals may only be tried for offenses in violation of the law of war triggering military tribunal jurisdiction. In other words, this grant of jurisdiction is purely in personam in nature, as the criminal proscriptions falling within this juris-

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adopts the term “military exception” for what he calls “descriptive simplicity.” *Id.* As discussed above, labelling military justice as a military exception to Article III is not only incorrect, it leads to a problematic analytical distortion: analyzing military jurisdiction through the lens of Article III instead of the more appropriate lens of Article I and Congress’ enumerated authority to make rules for the land and naval forces.

14. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

15. *Id.* (emphasis added). The Supreme Court has repeatedly recognized since *Dynes* that courts-martial are not tribunals that the Framers intended to include within the protections provided by Article III. For example, writing for the Court in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982), Justice Brennan noted that “courts-martial . . . are founded upon the Constitution’s grant of plenary authority over the Nation’s military forces to the Legislative and Executive Branches,” and hence are not subject to Article III. *See also Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (noting that “firmly established historical practice” supports not subjecting courts-martial to the strictures of Article III).

16. Uniform Code of Military Justice art. 18, 10 U.S.C. § 818 (2012).

diction are not those established by Congress in the form of punitive articles, but are instead those consistent with the international law of war. Trial by general court-martial of this distinct category of offenses—offenses established by international law—is not contingent on the individual being subject to the UCMJ at the time of the offense. Thus, unlike the first category of jurisdiction established by Article 18, Congress has in no way defined the offenses subject to general court-martial jurisdiction, but merely provided a forum for the adjudication of violations of international law obligations applicable to all participants in armed conflict.

Professor Vladeck’s article omits any analysis of Article 18’s grant of these two distinct categories of criminal jurisdiction. The division between jurisdiction over Code violations and war crimes demonstrates that these two categories of military jurisdiction have always been considered quite distinct. The nature of each category of offenses also supports this conclusion: Code offenses are intended to contribute to good order and discipline of the armed forces in order to enhance their efficiency and effectiveness; war crimes jurisdiction—whether exercised by military commissions or by general courts-martial pursuant to Article 18—deters enemy war crimes and punishes individuals for violating internationally mandated norms of battlefield conduct. Nonetheless, Professor Vladeck conflates these categories to bolster his jurisdictional overreach thesis. Ultimately, this conflation, and the failure to explain the historically distinct treatment of these categories of military tribunal jurisdiction, is misleading.

This conflation is also essential to Professor Vladeck’s ultimate “solution” to the problem he perceives: reliance on international law as the foundation for military jurisdiction. This proposal is a plausible approach to military commission jurisdiction, which is inherently derived from international law itself. But why would our Founders have specifically granted Congress power to “make rules” for the armed forces<sup>17</sup> if they believed that this crucial sovereign power derived from the law of nations? Professor Vladeck provides no evidence that supplies a convincing answer to that question. Indeed, there is substantial evidence that the Framers intended to adopt the British method of regulating the Crown’s armed forces.<sup>18</sup> Only through this conflation will the logic of looking to international

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17. U.S. CONST. art. I, § 8, cl. 14.

18. *See Loving v. United States*, 517 U.S. 748, 761–68 (1996) (discussing history of military justice in England and its influence on the Framers).

law for the scope of military jurisdiction extend beyond war crimes tribunals to courts-martial.

#### B. NON-EXISTENT EXPANSION OF MILITARY JURISDICTION

Contrary to Professor Vladeck's assertion, there has been no significant recent expansion of offenses and offenders subject to trial for violation of the punitive articles of the UCMJ. These are the articles of the UCMJ that establish the criminal offenses applicable to the armed forces and a small category of individuals associated with the armed forces. From the inception of the nation, Congress has exercised its enumerated Article I authority to establish courts-martial to maintain good order, discipline, and reputation of the armed forces.<sup>19</sup> If anything, the trend has been towards more precise enumeration of offenses, moving from a very general prohibition of neglects and disorders to a range of specific offenses.

Professor Vladeck builds his argument on two primary sources: first, the Supreme Court's decision in *Solorio v. United States* that eliminated the "service-connection" limitation on military criminal jurisdiction established by the Court in *O'Callahan v. Parker*;<sup>20</sup> second, the 2006 amendment to the UCMJ that resurrected court-martial jurisdiction over civilians accompanying the armed forces in the field.<sup>21</sup> These were indeed significant changes to military law; however, characterizing them as "expansions" is misleading. In fact, these changes *restored* military jurisdiction to its historical scope, reversing what were in fact recent constrictions of military jurisdiction. As a result, they provide no support for the overall assertion of congressional overreaching. Instead, they reveal that the scope of military jurisdiction continues to align with its historic foundation.

Professor Vladeck introduces the *Solorio* decision by noting that the Supreme Court, "unceremoniously overruled *O'Callahan*."<sup>22</sup> Whether the decision to overrule *O'Callahan* was "unceremonious" is not particularly relevant to the much more significant message of the decision: that the

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19. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78–79 (1858); see also Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 45–49 (1958).

20. See *Solorio v. United States*, 483 U.S. 435, 449–51 (1987) (overruling requirement established in *O'Callahan v. Parker*, 395 U.S. 258, 272–74 (1969), that a crime must be "service connected" to fall within military jurisdiction).

21. Uniform Code of Military Justice art. 2, 10 U.S.C. § 802(a)(10) (2012).

22. See Vladeck, *supra* note 1, at 956.

Court had deviated from the constitutional foundation of military criminal jurisdiction when it imposed the service-connection requirement in *O'Callahan*, which required burdensome mini-trials on the service-connection issue prior to the main trial on the merits. Professor Vladeck artfully weaves together an argument to diminish the significance of the *Solorio* holding by emphasizing what he concludes are analytical omissions from the decision, most notably the failure to adequately address the significance of the “jury-trial provision.”<sup>23</sup> He fails to acknowledge that it was *O'Callahan*, and not *Solorio*, that deviated from the longstanding tradition of allowing Congress to establish the scope of military jurisdiction. So much is established by the *Solorio* Court’s assessment of the history of military criminal jurisdiction.

As the *Solorio* Court noted, “[i]n 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.”<sup>24</sup> Quoting from a 1960 case, the court added:

Without contradiction, the materials . . . show that military jurisdiction has always been based on the “status” of the accused, rather than on the nature of the offense. To say that military jurisdiction “defies definition in terms of military ‘status’” is to deny the unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.<sup>25</sup>

The Court in *Solorio* rejected the holding in *O'Callahan* and characterized that decision as relying on a “dearth of historical support,”<sup>26</sup> stating that “[t]he *O'Callahan* Court’s representation of English history . . . is less than accurate.”<sup>27</sup> Specifically, “the *O'Callahan* Court erred in suggesting that, at the time of the American Revolution, military tribunals in England

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23. *Id.* at 989.

24. *Solorio*, 483 U.S. at 439.

25. *Id.* at 439–40 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 243 (1960)).

26. *Id.* at 447.

27. *Id.* at 442.

were available ‘only where ordinary civil courts were unavailable.’”<sup>28</sup> Also significant to the *Solorio* court was how *O’Callahan* ignored the history of early American military justice practices—history that “furnishe[d] even less support to *O’Callahan’s* historical thesis.”<sup>29</sup> Ultimately, the *Solorio* Court concluded that “the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 which *O’Callahan* imported into it.”<sup>30</sup>

This framing of *O’Callahan* deflates the “problem” of expanding court-martial jurisdiction that Professor Vladeck posits. It is certainly valid to criticize the deference to Congress that lies at the core of the *Solorio* decision. However, any critique of *Solorio* should concede that the Court was merely reverting to the mean from which *O’Callahan* had departed. Indeed, as the Supreme Court noted in *Solorio*, it was precisely because *O’Callahan* deviated so significantly from the historic foundation of military criminal jurisdiction that its foundation was too weak to sustain its long-term impact.

Criticism of the *Solorio* Court’s elimination of a service-connection check on military criminal jurisdiction is certainly understandable. Some experts have, since that decision, continued to question both the necessity and legitimacy of vesting courts-martial with jurisdiction over service-members based exclusively on their status, when their offenses seem much more “civilian” in nature than military. But as the Court noted in *Solorio*, Congress, acting on advice from our military leaders, is best suited to make this necessity judgment, and there is nothing inherently arbitrary or invalid about vesting courts-martial with purely status-based jurisdiction.

### C. VALIDITY OF STATUS-BASED JURISDICTION

Our own experience as former military officers who prosecuted and defended cases in the military justice system persuades us that the current scope of court-martial jurisdiction serves precisely the purposes that the Framers intended.<sup>31</sup> Unlike Professor Vladeck, we fail to see the inherent

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28. *Id.* at 443.

29. *Id.* at 444.

30. *Id.* at 445.

31. *See* *Loving v. United States*, 517 U.S. 748, 765 (1996) (noting that, “[a]s many [of the Framers] were themselves veterans of the Revolutionary War . . . they . . . knew the imperatives of military discipline”).

invalidity of the current scope of court-martial jurisdiction over offenses enumerated in the punitive articles. For Congress to link status as a member of the armed forces with the Constitutional language of “cases arising in the land or naval services” seems appropriate and reasonable.<sup>32</sup>

More concretely, our experience suggests that *any* felony offense committed by a member of the armed forces—on or off duty; on or off post; common law or military-specific in nature—adversely affects the command. Even where this detrimental impact results from harm to the reputation of the armed forces in the communities that host our military installations, it is not insignificant. Indeed, the “General Article”—a provision of the Code that finds its roots in the very origins of U.S. military law—penalizes any disorder of a nature “to bring discredit upon the armed forces.”<sup>33</sup> Professor Vladeck’s theory of jurisdictional overreach fails to address this reputational interest in deterring current service members’ criminal conduct. As we observe in the next subsection, Professor Vladeck also overlooks the role of historical practice and the impact of that practice on how courts assess military jurisdiction.

## II. HISTORICAL UNDERINCLUSIVENESS

Professor Vladeck’s failure to acknowledge the teachings of history also yields a mischaracterization of the basis for military tribunal jurisdiction over certain offenses, namely spying, and over civilians serving with or accompanying the armed forces on missions abroad. He views over 230 years of military justice practice through a soda straw, the narrow aperture provided by the twenty-eight years since Solorio. That view then skews the proposed solution. Where Professor Vladeck looks through the soda straw and sees a “potentially dramatic expansion[] in the scope of military jurisdiction,”<sup>34</sup> we look more broadly and see a reversion to long established jurisdiction. We do so as the result of considering U.S. historical

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32. Indeed, if not on the basis of status, how else could Congress justify extending military jurisdiction to a retired service member receiving military retirement pay? The authors are living proof that retirees do nothing for the military, yet Congress allows for us to be recalled to active duty to be court-martialed based solely on our status as retirees. *See* 10 U.S.C. § 688 (2012).

33. Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (2012).

34. Vladeck, *supra* note 1, at 937.

practice, which we consider to be critically significant when assessing the Constitutionality of the exercise of military jurisdiction.

#### A. HISTORICAL GLOSS

Any discussion on the constitutional basis of military courts should include *Weiss v. United States*, the Supreme Court decision holding that the lack of a fixed term for military judges does not violate due process.<sup>35</sup> Professor Vladeck cites to the case for that proposition but overlooks its broader significance. In *Weiss*, the Court acknowledged what Professor Vladeck cannot bring himself to recognize: that the congressional scheme upheld there ensures that “men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.”<sup>36</sup>

*Weiss* also underscores the significance of historic gloss on the scope of Congress’s power under the Make Rules Clause to shape the military justice system. The *Weiss* Court placed great weight on the fact that

[a]lthough a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition. The early English military tribunals, which served as the model for our own military justice system, were historically convened and presided over by a military general. No tenured military judge presided.<sup>37</sup>

Indeed while the majority of the Court in *Weiss* considered historical practice a factor, Justice Scalia referred to it as “utterly conclusive.”<sup>38</sup> Historic practice dovetails with another principle affirmed in *Weiss* but slighted by Professor Vladeck: the constitutional signal sent in the Make Rules Clause indicating the need for deference to Congress regarding the “delicate task of balancing the rights of servicemen against the needs of the military.”<sup>39</sup>

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35. *Weiss v. United States*, 510 U.S. 163, 181 (1994).

36. *Id.* at 194 (Ginsburg, J., concurring).

37. *Id.* at 178 (citing David A. Schlueter, *The Court Martial: An Historical Survey*, 87 MIL. L. REV. 129, 135, 136–144 (1980)).

38. *Id.* at 199 (Scalia, J., concurring).

39. *Id.* at 177 (quoting *Solorio v. United States*, 483 U.S. 435, 447–48 (1987)).

That need for deference, coupled with the lessons of history, also plays a role in assessing Congress's power to designate charges to be tried in military commissions.

### B. SPYING

Congress's authority to establish military commissions during or after an armed conflict<sup>40</sup> to either try enemy belligerents or contribute to the administration of a belligerent occupation stems from an amalgam of Congress's constitutional war powers, including the Make Rules Clause<sup>41</sup> and Define and Punish Clause.<sup>42</sup> A measure of deference and appreciation for historical practice aid in understanding the scope of Congress's power. We agree with Professor Vladeck that this deference is not absolute. Particularly when the conduct at issue occurred *before* a congressional enactment establishing military commissions, as has been the case for all of the dispositions reached thus far in post-9/11 cases, the Constitution's Ex Post Facto Clause imposes significant constraints.<sup>43</sup> However, when Congress

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40. Scholarship on military commissions has proliferated after 9/11. Some of the commentary has been cautionary in nature. Professor Vladeck's past work fits under this rubric. See Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Commission Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295 (2010); Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172, 179–80 (2008); see also David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005) (offering critical look at history of military commissions); David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957 (2009) (same). Other scholars have been more open to the purposes served by military commissions and the deference to Congress that should inform consideration of their legality and scope. See Peter S. Margulies, *Detained Suspected Terrorists: Trial in Military Courts or Civilian Courts?*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 157 (2015); Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT'L L. 289, 294–97 (2009); Peter Margulies, *Justice at War: Military Tribunals and Article III* (Roger Williams Univ. Sch. of Law, Legal Studies Research Paper No. 159, 2015), available at <http://ssrn.com/abstract=2572375>.

41. U.S. CONST. art. I, § 8, cl. 14.

42. *Id.* cl. 10.

43. U.S. CONST. art. I, § 9, cl. 3. The Ex Post Facto Clause bars punishment based on laws enacted after the conduct at issue. This prohibition ensures that individuals subject to penal laws have notice of applicable norms and an opportunity to conform their conduct. See *Hamdan v. United States*, 696 F.3d 1238, 1247 (D.C. Cir. 2012). In *Hamdan*, the D.C. Circuit examined a military commission conviction for material support of terrorism. The conduct at issue had occurred no later than November 2001. The conviction was based on the 2006 Military Commissions Act, which authorized prosecution of offenses prior to the effective date of the Act when the conduct at issue violated the “law of

legislates *prospectively* in this exigent area, deference and historic practice should usually trump the Article III concerns raised by Professor Vladeck, as long as the offense charged has a reasonable relationship to international law.

Professor Vladeck's analysis of Congress's power to vest military tribunals with jurisdiction to try accusations of wartime espionage could benefit from a clearer acknowledgment of the importance of both U.S. historical practice and deference to Congress. Congress could reasonably take into account the importance of deterring espionage in a time of war, when disclosure of military secrets can pose an imminent risk of loss of life. As the Supreme Court pointed out in *Ex parte Quirin*, military commissions have tried defendants for violations of both the law of war *per se* and offenses which, under international "rules and precepts," are amenable to trial in that forum.<sup>44</sup> Those trials have not been arid exercises in international adjudication; rather, they have been "important incident[s]" of the power to initiate and wage war, designed to check adversaries who would "thwart or impede our military effort[s]."<sup>45</sup> This crucial language from *Quirin* does not appear in Professor Vladeck's piece.

Similarly, although Professor Vladeck cites historical practice as a basis for arguing that international law "would reconcile *Quirin*, *Madsen*, and spying,"<sup>46</sup> he fails to cite a tell-tale episode from U.S. history noted by the *Quirin* Court: the *first* military commission in our history, convened by then-General George Washington in 1780 to try British Army Major John Andre for spying during the Revolutionary War.<sup>47</sup> This episode is notable not only as an example of historical practice, but as a salient event con-

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war" applicable at the time of the conduct. The court determined by reference to international treaties, case law, and commentary that material support of terrorism was not a violation of the law of war as of November 2001. *Id.* at 1248–54. For that reason, the court held, the defendant's conviction was not authorized by the statute. Any other reading of the statute, the court reasoned, would have required a finding that the statute violated the Ex Post Facto Clause. *Id.* at 1246–48.

44. *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

45. *Id.*

46. Vladeck, *supra* note 1, at 992.

47. *Quirin*, 317 U.S. at 31 n.9. American forces captured Andre "wearing civilian clothes and carrying the defensive schematics for West Point" which he had obtained from then Continental Army General Benedict Arnold. The court of inquiry found Andre guilty and he was executed. The fledging Americans at least held a court of inquiry, while the British executed Continental Army soldier Nathan Hale the day following his capture. See Major Michael O. Lacey, *Military Commissions: A Historical Survey*, THE ARMY LAWYER, Mar. 2002, at 41, 42.

nected with the notorious treason of U.S. General Benedict Arnold. Because of Washington's role and the link to Arnold's treachery, it is plausible to assume that the incident was familiar to many of the Framers, including, of course, Washington himself, who served as president of the 1787 Constitutional Convention in Philadelphia. It is true, as Professor Vladeck indicates, that international law and practice have never *precluded* the trial of espionage charges in commissions, although the status of espionage as a war crime was uncertain, even at the time *Quirin* was decided during World War II.<sup>48</sup> However, international law's countenancing of trying spying charges in commissions is just one element in the inquiry, which occurs against a backdrop of deference to Congress and specific U.S. practice known to the Framers. Professor Vladeck's failure to acknowledge the importance of deference and specific U.S. practice deprives his analysis of necessary context.

### C. CIVILIANS

Professor Vladeck contends that the basis for military jurisdiction does not derive from the Constitution's text, "it derives from international law and practice, as reflected in several scattershot textual clues."<sup>49</sup> But on the question of the permissibility of the U.S. military prosecuting civilians, Professor Vladeck considers some clues while ignoring others, all the while mischaracterizing belligerent occupation as a separate category of military jurisdiction, which it is not.

The legacy of misunderstanding Article 18 of the UCMJ and overlooking historical practice is highlighted when the article "reconceiv[es]"<sup>50</sup> military jurisdiction. The article discusses *Madsen v. Kinsella*, in which the Supreme Court upheld the U.S. military commission prosecution of a U.S. civilian citizen, Madsen, for the murder of her U.S.-service-member husband in occupied Germany in 1949.<sup>51</sup> The article incorrectly states that Madsen "did not commit a war crime"<sup>52</sup>—she did, because she violated

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48. See Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 *FORDHAM INT'L L.J.* 1, 47–51 (2013).

49. Vladeck, *supra* note 1, at 993 (emphasis removed).

50. *Id.* at 990.

51. *Madsen v. Kinsella*, 343 U.S. 341 (1952).

52. Vladeck, *supra* note 1, at 991.

local law<sup>53</sup> incorporated into the law of occupation by the law of war. She did not commit a battlefield war crime, but she committed a crime subject to the proscriptions of the law of war. As previously explained, Article 18—like its predecessor, the Articles of War, in force in 1949—vests the general court-martial with jurisdiction over any offense subject to trial by military tribunal pursuant to the law of war. And the discussion section of the Rules for Court Martial, in explaining how to actually charge a law of war violation for trial by court-martial, includes charging someone with a violation of the local penal law of an occupied territory.<sup>54</sup>

The article claims that *Madsen* “suggested” that international law is the “underlying principle uniting occupation courts and law-of-war commissions.”<sup>55</sup> This claim is simultaneously an under- and overstatement. It is an understatement in that international law is, of course, at issue: an occupation court derives its authority from the law of war and is thus, in this sense, a law of war court. And it is an overstatement in that, while international law certainly animates both occupation courts and military commissions, the authority which unifies them is that of Congress providing for sanctions by military tribunal for war crimes.

Professor Vladeck then makes the overbroad assertion that the “Supreme Court ha[s] never endorsed courts-martial of civilians.”<sup>56</sup> As Professor Vladeck notes, in *Reid v. Covert*, the Court found the exercise of court-martial jurisdiction over civilian dependents during peacetime unconstitutional.<sup>57</sup> In so ruling, however, the Court stated:

We recognize that there might be circumstances where a person could be “in” the armed services for purposes of [Congress’s authority to “make rules for the government and regulation of the land and naval forces”] even though he had not formally been inducted into the military or did not wear a uniform. . . .

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53. *Madsen*, 343 U.S. at 344 & n.2 (describing Section 211 of the German Criminal Code).

54. See JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL II-27, UNITED STATES (2012 ed.) (discussion to Rule for Courts-Martial 307(c)(2)).

55. Vladeck, *supra* note 1, at 990.

56. *Id.* at 993.

57. *Reid v. Covert*, 354 U.S. 1 (1956).

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There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces “in the field” during time of war. To the extent that these cases can be justified, insofar as they involved trial of persons who were not “members” of the armed forces, they must rest on the Government's “war powers.” In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. *From a time prior to the adoption of the Constitution* the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.<sup>58</sup>

In addressing the more contemporary issue of modifying the categories of individuals subject to the UCMJ to include civilian contractors accompanying the military, Professor Vladeck suggests an expansive interpretation. Prior to 2006, Article 2 of the UCMJ subjected persons accompanying an armed force in the field to the UCMJ in time of war.<sup>59</sup> Before the 1972 landmark decision by the Court of Military Appeals in *United States v. Averette*,<sup>60</sup> this provision was invoked frequently to assert military criminal jurisdiction over civilians associated with the armed forces, including contractors, civilian employees, and even journalists.<sup>61</sup> *Averette* altered this practice when it held that “time of war” required a declaration of war, functionally nullifying this source of military jurisdiction.<sup>62</sup>

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58. *Id.* at 22–23, 33 (emphasis added) (footnotes omitted).

59. Uniform Code of Military Justice art. 2(a)(10), 10 U.S.C. § 802(10) (2000) (“The following persons are subject to this chapter: . . . (10) In time of war, persons serving with or accompanying an armed force in the field.”).

60. *United States v. Averette*, 41 C.M.R. 363 (1970).

61. See John F. O’Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 771–72 (2010); see also Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 500 (2008).

62. *Averette*, 41 C.M.R. at 365.

Interestingly, *Reid* did not even implicate this provision of the UCMJ. Instead, the civilians were tried pursuant to a different grant of jurisdiction over any person made subject to court-martial jurisdiction pursuant to an international agreement. Accordingly, *Reid* never reached the issue of the propriety of military jurisdiction over civilians accompanying the armed forces in the field, a point emphasized by the quotation cited above.

However, in an obvious effort to resurrect this jurisdiction and reverse the functional nullification produced by *Averette*, amendments to the UCMJ in 2006 added the words “or a contingency operation,”<sup>63</sup> which Professor Vladeck takes to mean that the military could exercise jurisdiction over contractors in “any number of peacetime deployments.”<sup>64</sup> However, a contingency operation, which can involve engagement with an armed adversary or other exigencies, is not exactly analogous to “peacetime” as Professor Vladeck uses the term, and certainly would not resurrect the broader scope of jurisdiction over civilian dependents struck down in *Reid*. Clearly, Congress added this language to emphasize the importance of effective disciplinary options for civilians associated with our armed forces “in the field” during such perilous engagements. Moreover, the new language signaled that Congress perceived the phrase “in time of war” as overly restrictive, as the U.S. and other nations no longer rely on formal declarations of war. Here, too, Professor Vladeck magnifies the problem to promote a theory that is unmoored from the foundations of military justice.

#### CONCLUSION

We fail to see a need to unify the different categories of military jurisdiction. These categories are different for a reason. We do not question the logic of invoking international law as a foundation for military commission jurisdiction, which always been linked to that body of law as the result of the class of crimes these distinct military tribunals are convened to adjudicate. But there is no reason to conflate this class of military jurisdiction with the jurisdiction established by Congress to regulate the armed forces (and a limited number of associated personnel). Perhaps if this con-

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63. Uniform Code of Military Justice art. 2(a)(10), 10 U.S.C. § 802(10) (2012) (“The following persons are subject to this chapter: . . . (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”).

64. Vladeck, *supra* note 1, at 955.

flation were necessary and logical, then the search for a unifying foundation for these two distinct categories of military jurisdiction would be understandable. However, Professor Vladeck, despite the originality of his analysis, has not demonstrated this necessity. Moreover, Professor Vladeck's focus on international law obscures the importance of both deference to Congress's war powers and U.S. practice's connection to the Framers' intent. Ultimately, this leads to the unavoidable conclusion that Professor Vladeck offers an international law-based solution to a problem that really does not exist.