POLICING THE LINE: INTERNATIONAL LAW, ARTICLE III, AND THE CONSTITUTIONAL LIMITS OF MILITARY JURISDICTION

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This Article addresses an important but undertheorized question in existing jurisprudence and scholarship: the proper role of international law in determining the constitutional line between Article III courts and military commissions. This Article makes two principal arguments. First, it explains why, as a normative matter, international law should inform the permissible scope of military commission jurisdiction. Second, this Article describes the functional value of international law in resolving the difficult line-drawing problems between military and Article III courts compared with other possible regulatory tools.

Current litigation over military commission prosecutions at Guantánamo has focused on whether ex post facto principles prohibit military commissions from exercising jurisdiction over offenses such as material support for terrorism and conspiracy that do not violate international law and, therefore, were not prohibited by statute when committed. It leaves open the important question whether the United States can prosecute those offenses under the Military Commissions Act of 2006 based upon conduct that post-dates that statute's enactment. The U.S.'s position is that such prospective prosecution of non-international law violations is permissible because the offenses violate a separate body of jurisprudence known as the U.S. common law of war. This Article critiques this theory by providing a formal and functional analysis of the continuing relevance of international law as a constitutional limit on military jurisdiction. It further supplies a framework for understanding international law's role in constitutional analysis more generally.

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INTRODUCTION

Military commissions continue to surface important constitutional and international law issues, as illustrated by the D.C. Circuit's decisions in *Hamdan v. United States* (*Hamdan II*)[1] and *Al Bahlul v. United States*.[2] They have revived a debate, largely dormant since the end of World War II, regarding the proper relationship between civilian and military courts during wartime and the role of international law in determining that boundary. This debate transcends the present armed conflict with al Qaeda and the current slate of commission prosecutions of Guantánamo detainees, as the existing statutory framework established by the Military Commissions Act of 2006 (2006 MCA)

1. 696 F.3d 1238 (D.C. Cir. 2012).
2. No. 11-1324, 2014 WL 3437485 (D.C. Cir. July 14, 2014) (en banc).

envisions the military trial of enemy belligerents in future hostilities.[3] It thus raises questions that will linger long after the current military commission prosecutions at Guantánamo have concluded.

Today's military commissions are known as law-of-war commissions, the type upheld by the Supreme Court during World War II in *Ex parte Quirin*.[4] These commissions predicate their exception to Article III criminal jurisdiction not on exigency, as is the case with commissions operating under martial law or in occupied enemy territory, but rather on the status of the offender and nature of the offense. The government maintains that the offense category extends beyond violations of the international law of war—the violation sustained in *Quirin*—to encompass a separate body of domestic law known as the U.S. common law of war. Today, commission jurisdiction thus includes offenses such as material support for terrorism and conspiracy that are not recognized war crimes under international law. Jurisdiction over such offenses not only expands military commission jurisdiction beyond previously recognized limits, but also has significant implications for the prosecution of terrorism offenses in Article III courts and for the role of international law in constitutional analysis more generally.

This Article examines the role of international law in defining the constitutional limits of military commissions. It argues that military commissions not based on exigency should be restricted to trying recognized war crimes under international law. This Article makes two overarching arguments in defense of this international law-based limitation. First, it explains why, as a normative matter, international law should inform the permissible scope of military commission jurisdiction. Second, it describes the practical advantages of international law in resolving the often difficult line-drawing problems between military and Article III jurisdiction as compared with other possible tools.

Scholarship on military commissions initially paid relatively little attention to the question of their substantive scope. More recent commentary has begun to address this deficit. David Glazier, for example, has explained how in seeking to prosecute offenses such as material support for terrorism and conspiracy as war crimes, current commissions are inconsistent with international law and depart from tradition.[5] Professor Stephen Vladeck has highlighted how the assertion

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3. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

4. 317 U.S. 1 (1942).

5. David Glazier, *The Misuse of History: Conspiracy and the Guantánamo Military Commissions*, 66 BAYLOR L. REV. 295 (2014) [hereinafter Glazier, *The Misuse of History*] (addressing the proposition that military commissions have traditionally prosecuted offenses under a U.S. common law of war); *see* David Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration* (Loyola Law Sch. of L.A. Working Paper No. 2010-32) [hereinafter Glazier, *Still a Bad Idea*], *available at*

of commission jurisdiction over non-international law offenses raises important constitutional questions under Article III and the Fifth and Sixth Amendments as well as under the Define and Punish Clause of Article I.[6]

This Article responds to the suggestion that Congress may authorize commissions to prosecute offenses that are not defined as war crimes under international law but which have been traditionally triable as violations of a separate domestic common law of war. Until now, international law has been viewed as a constraint on military commissions mainly because of the ex post facto problems associated with prosecuting individuals for conduct committed prior to the passage of the 2006 MCA, which authorized commission jurisdiction over material support, conspiracy, and other offenses that are not war crimes under international law. This Article explores the constitutionality of prosecuting such non-international violations unencumbered by ex post fact constraints—a possibility endorsed by two D.C. Circuit judges.[7] It thus examines international law's relevance to challenges in pending cases that do not turn on ex post facto concerns and to any future commission prosecutions for post-2006 MCA conduct.

This Article further describes how functional considerations support an international law-based limit to military commission jurisdiction. In particular, it examines other possible methods federal courts might use to affect commission jurisdiction, from requiring stricter procedural safeguards in commissions to diluting protections in Article III criminal proceedings to encourage prosecutions there instead of in commissions. This Article concludes that requiring that the crime charged be a war crime under international law represents a more effective way to regulate commissions than other possible methods.

While this Article's primary focus is the jurisdictional boundary between Article III courts and military commissions, it also engages with larger questions about the role of international law in constitutional analysis. In particular, this Article explains how international law, despite being depicted as antithetical to U.S. tradition, can bolster the traditional primacy of Article III courts over specialized tribunals.

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http://ssrn.com/abstract=1658590 (discussing the use of military commissions to prosecution to offenses not defined as war crimes under international law).

6. *See* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419342; *see also* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y 295 (2010) [hereinafter Vladeck, *The Laws of War*].

7. *Bahlul*, 2014 WL 3437485, at *44–52 (Brown, J., concurring); *id.* at *61–64 (Kavanaugh, J., concurring in part and dissenting in part); *Hamdan II*, 696 F.3d 1238 (D.C. Cir. 2012) (opinion by Judge Kavanaugh).

Additionally, international law helps highlight the issues at stake when negotiating the boundary between Article III and military jurisdiction.

Part I surveys the categories of military jurisdiction as well as the rationales used to justify them. Part II describes the normative basis for an international law-based line in defining the constitutional limits of military commission jurisdiction outside situations of exigency. Part III offers a functional defense of this line by comparing it to other possible ways of affecting the flow of commission prosecutions and maintaining the predominance of Article III courts in terrorism cases.

I. THE MILITARY EXCEPTION TO ARTICLE III JURISDICTION

Article I provides the source of congressional power to create military tribunals.[8] Congress's authority to "make Rules concerning Captures on Land and Water" (Make Rules Clause)[9] has authorized the creation of courts-martial, used principally to try U.S. servicemembers of crimes.[10] Article I's Define and Punish Clause[11] has served as the source of authority to prosecute enemy soldiers for violations of the law of nations (or war crimes) in military commissions.[12]

Article I is not, however, the only constraint on congressional authority to subject individuals to trial in a military tribunal. Article III and the Fifth and Sixth Amendments limit Congress's power to allocate criminal prosecution in another forum.[13] Article III's Criminal Jury Clause provides that "the trial of all crimes, except in cases of impeachment, shall be by jury";[14] the Fifth Amendment's Grand Jury Indictment Clause provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury";[15] and the Sixth Amendment's Petit Jury Clause guarantees an accused the right to trial by "an impartial jury of the State wherein the crime shall have been committed."[16] Other constitutional provisions mandate specific procedural protections within

8. *See* U.S. CONST. art. I, § 8.

9. *Id.* cl. 11.

10. Vladeck, *The Laws of War*, *supra* note 6, at 298.

11. U.S. CONST. art. I, § 8, cl. 10 (providing that Congress shall have authority "[t]o define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations").

12. Vladeck, *The Laws of War*, *supra* note 6, at 298.

13. *Id.* at 336–38.

14. U.S. CONST. art. III, § 2, cl. 3.

15. *Id.* amend. V.

16. *Id.* amend. VI.

criminal trials, such as the rights of confrontation and compulsory process contained in the Sixth Amendment.[17]

The Supreme Court has recognized limited departures from these requirements for military tribunals created pursuant to Congress's Article I powers.[18] It has upheld an exception for courts-martial based on the Make Rules Clause[19] and on the Fifth Amendment Grand Jury Indictment Clause's exclusion of "cases arising in the land and naval forces."[20] The Court has also recognized an exception for military commissions to try individuals for domestic crimes committed during martial law[21] or in occupied territory[22] as well as to try enemy belligerents who violate the international law of war (sometimes referred to as a "law-of-war commission").[23]

This Part describes how these exceptions have been defined and the rationales used to justify them. Two points stand out for purposes of discussion here. First, the Supreme Court has emphasized the importance of ensuring the proper limits of military jurisdiction given the number of constitutional protections contingent on Article III criminal process. Second, the Court has looked to international law to help police those limits, particularly where, as in the case of the law-of-war commission, the tribunal is not designed to maintain internal discipline within the U.S. armed forces (courts-martial) or to fill a jurisdictional gap based on exigency (military tribunals conducted during martial law or in occupied territory).

A. Courts-Martial Jurisdiction

Military courts have a long history in the United States. In 1775, the Continental Congress adopted the Articles of War, which provided for

17. *Id.* (providing that "[i]n all criminal prosecutions" the accused shall have the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor").

18. The Court has recognized a limited number of other non-Article III courts created by Congress pursuant to its Article I powers. *See* Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1127–28 (2011) (describing various Article I courts). Other than military tribunals, Article I courts do not exercise jurisdiction over criminal matters, except for courts governing territories outside the boundaries of the states and in the District of Columbia. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 127–28 (1995).

19. U.S. CONST. art. I, § 8, cl. 11; *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

20. U.S. CONST. amend. V; *see also Ex parte Quirin*, 317 U.S. 1, 40–41 (1942).

21. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

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

23. *Quirin*, 317 U.S. 1.

trials of soldiers by courts-martial.[24] The main purpose of courts-martial jurisdiction under the Articles of War was to maintain "good order" and discipline within the military.[25] Under the Constitution's Make Rules Clause, Congress subsequently adopted the Articles of War in full, providing for jurisdiction over soldiers as well as civilians serving with the army in the field.[26] Courts-martial jurisdiction today is based on the Uniform Code of Military Justice (UCMJ).[27]

The principal rationale for courts-martial is to maintain internal discipline within the armed forces.[28] While the Court has permitted the expansion of this jurisdiction over time, it has also signaled a preference for a bright-line approach to determining the proper boundary between courts-martial and Article III courts.

1. COURTS-MARTIAL AND SERVICEMEMBERS

During the nineteenth century, the Supreme Court recognized the jurisdiction of courts-martial over individuals who were properly subject to military discipline under the Articles of War.[29] In *Dynes v. Hoover*,[30] the Court upheld the legitimacy of this separate criminal justice system for the military.[31] In holding that a court-martial had properly exercised jurisdiction over a sailor convicted of attempted desertion, the Court explained that this jurisdiction derived from Congress's authority under the Make Rules Clause.[32] The Court bolstered its textual analysis with several rationales. It suggested that civilian courts had less expertise on matters affecting the internal discipline and order of the military.[33] The expertise of what the Court described as "practical men in the navy and army" and others who have "studied the law of courts martial" not only supported vesting jurisdiction in a properly constituted military tribunal

24. American Articles of War of 1775, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953–59 (2d ed. 1920).

25. American Articles of War of 1776, § XVIII, art. 5, *reprinted in* WINTHROP, *supra* note 24, at 971.

26. American Articles of War of 1775, § XXXII, *reprinted in* WINTHROP, *supra* note 24, at 956.

27. Uniform Code of Military Justice, 10 U.S.C. §§ 801–941 (2012).

28. American Articles of War of 1776, § XVIII, art. 5, *reprinted in* WINTHROP, *supra* note 24, at 971.

29. *See, e.g.*, *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 34 (1827) (holding that plaintiff is properly subject to court-martial where he had been ordered to military duty); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (holding that a federal officer statutorily exempt from service in the militia is not subject to court-martial jurisdiction).

30. 61 U.S. (20 How.) 65 (1858).

31. *Id.* at 79.

32. *Id.*

33. *See id.* at 82.

but also supported exercising that jurisdiction where consistent with "the laws and customs of the sea," even if the offense itself was not defined precisely by statute.[34] The Court further observed that court-martial jurisdiction was both rooted in tradition and reflective of the contemporary practice of "civilized nations."[35]

The Court employed similar rationales in addressing constitutional challenges to court-martial jurisdiction after World War II.[36] In *Burns v. Wilson*,[37] for example, the Court held that a petitioner could challenge his court-marital conviction, even when he was detained overseas.[38] *Burns* underscored that the purpose of courts-martial was to ensure the "overriding demands of discipline and duty."[39] It also noted the separateness of military law itself as "a jurisprudence which exists separate and apart from the law which governs in [Article III courts]."[40]

The Court addressed the limits of courts-martial jurisdiction in *United States ex rel. Toth v. Quarles*,[41] a habeas corpus challenge by a former servicemember who had been convicted of an offense committed while serving in the Air Force in Korea, but who had not been arrested and prosecuted until after he was discharged.[42] The Court held that Congress had exceeded its power under the Make Rules Clause in authorizing courts-martial jurisdiction over ex-servicemembers who had returned to civilian life, even where the offense had been committed while serving in the armed forces.[43] In refusing to extend the Make Rules Clause to a civilian who had since severed his connection to military life, the Court emphasized the threat military jurisdiction posed to the protections afforded criminal defendants by Article III's guarantee of judicial independence and the procedural safeguards contained in the Bill of Rights.[44] Writing for the Court, Justice Black explained that the purpose of courts-martial jurisdiction—to maintain discipline and to strengthen the armed forces' primary function of fighting wars should

34. *Id.* In *Dynes*, the plaintiff had been charged with desertion, but convicted only of attempted desertion, which was not specifically referenced within the Articles of War. *Id.* at 77–78 ("[C]ourts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea.").

35. *Id*. at 79.

36. *See* Vladeck, *The Laws of War*, *supra* note 6, at 301 (describing the uptick in challenges to courts-martial jurisdiction).

37. 346 U.S. 137 (1953).

38. *Id.* at 137–39.

39. *Id.* at 140.

40. *Id.*

41. 350 U.S. 11 (1955).

42. *Id.* at 13.

43. *Id.* at 14–15.

44. *Id.* at 15–16.

occasion arise—was not served by exercising jurisdiction over former servicemembers.[45] While Black acknowledged the expertise of a military court in trying soldiers for infractions of military rules, he noted the competing value of having lay juries adjudicate guilt and innocence in criminal matters.[46] He further observed that even a potential gap in Article III jurisdiction did not alone warrant the exercise of court-martial jurisdiction.[47]

The Court maintained a cautious approach to membership as a basis for court-martial jurisdiction in *O'Callahan v. Parker*,[48] where it denied jurisdiction over current servicemembers where the offense itself was unrelated to military service.[49] The Court instead held that the offense must be "service connected" to fall within the Fifth Amendment's exception to Article III prosecution for "cases arising in the land or naval forces."[50]

The Court, however, subsequently overruled *O'Callahan*, rejecting its service-connection test in *Solorio v. United States*.[51] Writing for the majority, Chief Justice Rehnquist construed the Make Rules Clause to give courts-martial broad authority over crimes committed by soldiers.[52] *Solorio* made courts-martial jurisdiction turn solely on "the military status of the accused," regardless of the nature of the conduct in question and its nexus to the armed forces.[53] As in prior cases, the Court tethered its construction of Congress's authority under the Make Rules Clause to the need to maintain order and discipline within the armed forces.[54] It rejected the proposition, pressed by the dissent, that courts-martial jurisdiction should be narrowly construed even with respect to

45. *Id.* at 17.

46. *Id.* at 18.

47. *Id.* at 20–21.

48. 395 U.S. 258 (1969).

49. *Id.* at 273.

50. *Id.* at 272–73 (quoting U.S. CONST. amend. V). The Court found that O'Callahan's offense failed to meet the service connection test given that there "was no connection—not even the remotest one—between his military duties and the crimes in question." *Id.* at 273 (explaining that the crimes were not committed on a military post or enclave, the victim was not performing any military duties, and Hawaii, the locus of the crime, was not an armed camp under military control).

51. 483 U.S. 435 (1987).

52. *Id.* at 441.

53. *Id.* at 439.

54. *Id.* at 441 (explaining that military necessities and unforeseen exigencies required giving Congress wide latitude to regulate the conduct of members of the armed forces and deferring to its judgment in striking the balance between the needs of the military and the rights of servicemembers); *see also id.* at 448 (noting that civilian courts were "ill-equipped" to address matters affecting military discipline and emphasizing the comparative expertise of military judges) (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)).

servicemembers to preserve the guarantees of civilian criminal process under Article III and the Fifth and Sixth Amendments.[55] Courts-martial could exercise jurisdiction even where a federal court also had jurisdiction and there was accordingly no gap.[56]

By the same token, however, *Solorio* indirectly reinforced the availability of those guarantees to non-servicemembers. It also signaled a preference for the clarity of formal lines dividing military tribunals and Article III courts—in this case, a distinction based on membership in the armed forces.[57] While international law did not appear to play a role in *Solorio*, earlier decisions such as *Dynes* attempted to align the exercise of military jurisdiction with international norms and the practice of other nations.

2. COURTS-MARTIAL AND CIVILIANS SERVING WITH THE ARMED FORCES

Courts-martial have also historically provided a narrow exception to Article III jurisdiction for civilians accompanying the military in the field in time of war.[58] This exception is premised on the need to maintain internal discipline, while requiring a nexus to armed conflict not required for servicemembers.[59] In *McElroy v. Guagliardo*,[60] the Court barred court-martial jurisdiction over civilian employees of the military during peacetime, rejecting the government's broad construction of "in the field."[61] In *United States v. Averette*,[62] the U.S. Court of Military Appeals held that the UCMJ's grant of court-martial jurisdiction over civilian employees of the military "in time of war" applied only during declared war and thus did not provide for court-martial jurisdiction over a civilian contractor serving with the military during the Vietnam War.[63]

In 2006, Congress amended the UCMJ to provide for court-martial jurisdiction "[i]n time of declared war or contingency operation" over "persons serving with or accompanying an armed force in the field."[64] In

55. *Id.* at 450–51; *id.* at 456 (Marshall, J., dissenting).

56. *Id.* at 443–44.

57. *Id.* at 448–49 (discussing the difficulty of administering *O'Callahan*'s service-connected test in comparison to a bright-line rule resting on status).

58. John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 779–81 (2010).

59. American Articles of War of 1776, § XVIII, art. 5, *reprinted in* WINTHROP, *supra* note 24, at 971.

60. 361 U.S. 281 (1960).

61. *Id.* at 284 (quoting 10 U.S.C. § 802(a)(1) (2012)).

62. 41 C.M.R. 363 (C.M.A. 1970).

63. *Id.* at 365.

64. § 802(a)(10).

its recent decision in *United States v. Ali*,[65] the U.S. Court of Appeals for the Armed Forces (CAAF) held that this provision authorized the trial of a civilian contractor accompanying U.S. forces in Iraq.[66] While CAAF's decision was unanimous on the result, the court divided in its reasoning. Two judges, Chief Judge James Baker and Judge Andrew Effron, each wrote separately, emphasizing that military jurisdiction over a civilian is an exceptional departure from the norm of federal criminal prosecution, raises serious constitutional questions, and should be narrowly construed.[67] Baker favored a functional approach that considered whether, during the context of armed conflict, it is "feasible or practicable to suspend military operations to pursue the transfer of persons back to the United States for trial"[68] as well as the nature of the connection between the civilian's duties and military operations.[69] Such considerations, he maintained, were important to determine whether military jurisdiction fell within the government's war powers, which authorize it both to maintain discipline in the military and to provide for criminal justice during combat operations.[70] Effron said that *Ali* raised the limited question of whether a court-martial could exercise armed conflict-based jurisdiction over a civilian contractor where there was no possibility of civilian court jurisdiction.[71] He emphasized that the Military Extraterritorial Justice Act (MEJA)[72] excludes host country nationals, such as the defendant in *Ali*, from federal court prosecution for crimes committed in the theater of operations.[73] Because there was no concurrent Article III jurisdiction over the defendant in *Ali*, Effron explained, the exercise of court-martial jurisdiction represented what *Toth* had characterized as the "least possible power adequate to the end proposed."[74] The case did not, he said, require the court to determine whether a court-martial could permissibly exercise jurisdiction over a civilian accompanying the armed forces outside a declared war where there was concurrent Article III jurisdiction.[75] Effron, however, did not

65. 71 M.J. 256 (C.A.A.F. 2012).

66. *Id.* at 258.

67. *Id.* at 271–78 (Baker, C.J., concurring); *Id.* at 279–82 (Effron, J. concurring).

68. *Id.* at 274 (Baker, C.J., concurring).

69. *Id.* at 275 (Baker, C.J., concurring).

70. *Id.* at 276 (Baker, C.J., concurring).

71. *Id.* at 281–82 (Effron, J., concurring).

72. 18 U.S.C. §§ 3261–67 (2012).

73. *Ali*, 71 M.J. at 279–80 (Effron, J., concurring) (noting that as an Iraqi citizen, the MEJA excluded the defendant from court-martial jurisdiction).

74. *Id.* at 280 (Effron, J., concurring) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955)).

75. *Id.* at 282 (Effron, J., concurring).

explain why using the UCMJ represented the "least possible power," when Congress had chosen not to sweep host-state nationals within Article III jurisdiction under the MEJA.[76]

Ali thus raises, but does not resolve, the question of more expansive court-martial jurisdiction over civilian contractors in contingency operations. It also underscores that maintaining internal discipline over those formally or functionally within the military remains a central basis for courts-martial, including over civilians accompanying the armed forces, although other considerations, such as necessity due to the absence of an alternative forum, have been cited to justify their use.

B. Military Commissions

While earlier incarnations of military tribunals date to the Revolutionary War, the United States did not formally employ military commissions until the Mexican-American War.[77] There, the commanding officer, General Winfield Scott, used commissions to prosecute American soldiers for crimes committed in Mexican territory occupied by the United States.[78] Scott feared that lawless behavior by U.S. troops would inflame opposition among the local populace; he turned to commissions because ordinary crimes, such as murder, were at that time beyond the statutory jurisdiction of courts-martial.[79]

Commissions were first used extensively during the American Civil War.[80] After the war's conclusion, the Supreme Court took up the question of their constitutionality in *Ex parte Milligan*.[81] *Milligan*—along with its later treatment in *Quirin* and cases that followed—remains central to understanding the constitutionally permissible scope of commission jurisdiction. Read together, these cases highlight two additional justifications for military jurisdiction beyond the

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76. *See id.* at 280 (Effron, J., concurring).

77. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 18–32 (2005).

78. David Glazier, *A Self-Inflicted Wound*: *A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 136 (2008).

79. *Id.*

80. John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2006 SUP. CT. REV. 83, 89 (2006); *see also* Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 29 (2006) ("[M]ost military commissions during the Civil War occurred in Union-occupied confederate territory and 'strife-torn border states.'").

81. 71 U.S. (1 Wall.) 2 (1866). Previously, in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), the Court had avoided addressing the constitutionality of military commissions established by President Lincoln, ruling that it could not review a commission's proceedings through a writ of certiorari. *See id. Milligan*, by contrast, reached the Supreme Court via a habeas corpus petition. *Milligan*, 71 U.S. (1 Wall.) at 2.

internal discipline rationale for courts-martial: exigency and punishment of violations of the law of war.

1. *MILLIGAN*: EXIGENCY AND THE "OPEN COURT" RULE

The Supreme Court provided its most forceful and sweeping critique of military commissions in *Milligan*. There, the Court invalidated the conviction and death sentence of Confederate supporter and sympathizer, Lambdin P. Milligan, who had aided the Confederacy and engaged in various acts of sabotage against the United States on behalf of a paramilitary organization known as the Sons of Liberty.[82] Writing for the majority, Justice Davis explained that military jurisdiction could not be extended to civilians in territory not under martial law or military occupation "where the courts are open and their process unobstructed."[83] The Constitution—and in particular, Article III's jury trial clause and the Fifth and Sixth Amendments—required that Milligan be prosecuted in a civilian court, if at all.[84]

Chief Justice Chase's four-justice concurrence took a narrower approach, refusing to disable Congress from exercising its Article I power to create military commissions outside the confines of martial law or military government in occupied territory.[85] Chase explained that the source of Congress's Article I authority to create military tribunals was not limited to the Make Rules Clause but also included its Article I war powers.[86] Under this authority, Congress could create military tribunals when the civilian courts were still open and functioning but faced significant operational difficulties due to war's exigencies. Chase recognized that Congress's authority to create military tribunals was circumscribed by the existence not only of armed conflict but also of a "great and imminent public danger" that necessitated the creation of these exceptional tribunals.[87] Chase thus articulated three sources of military jurisdiction: courts-martial jurisdiction over members of the armed forces; military tribunals in areas under military government or occupation; and martial law, where within certain districts or localities

82. *Milligan*, 71 U.S. (1 Wall.) at 16–17, 102.

83. *Id.* at 121–22.

84. *Id.* at 122–23.

85. *Id.* at 140 (Chase, C.J., concurring) ("[W]hen 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 districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.").

86. *Id.* at 138–39 (Chase, C.J., concurring).

87. *Id.* at 140 (Chase, C.J., concurring).

ordinary law no longer satisfies public rights and safety as a result of civil or foreign war.[88]

Chase's principal difference with Davis concerned the scope of the third category: whereas Davis viewed necessity through the lens of a categorical "open court" rule, Chase saw necessity as a more elastic concept, encompassing situations where courts were formally open, but compromised by the challenges war posed to the orderly administration of criminal justice. Both opinions, however, conditioned the exercise of military jurisdiction on exigency, at least outside the context of courts-martial jurisdiction over servicemembers; they differed only with respect to the degree of exigency required, with Chase permitting Congress to authorize commissions where the need was not absolute.

2. *QUIRIN* AND THE LAW OF WAR EXCEPTION TO ARTICLE III

The revival of military commissions during and after World War II provided the Supreme Court with an opportunity to revisit the legal principles governing their use. In *Quirin*, the Supreme Court recognized an additional basis for military jurisdiction: the authority to try by military commission enemy belligerents who violate the branch of international law known as the law of war.[89] In *Quirin*, the Court upheld a military commission's jurisdiction to try nine German saboteurs who, acting under the direction of the German High Command, had secretly entered the United States in 1942 to carry out military attacks.[90] The Court concluded that Congress had authorized their trial under Article 15 of the Articles of War, which stated that the Articles' provisions "conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals 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 . . . or other military tribunals."[91] The Court further concluded that Congress's incorporation of an evolving body of common-law war crimes under international law was both within its Article I power under the Define and Punish Clause[92] and consistent with the criminal jury trial guarantee of Article III and the Fifth and Sixth Amendments.[93] The Court assumed that the prosecution of an enemy belligerent for violating the law of war

88. *Id.* at 141–42 (Chase, C.J., concurring).

89. *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942).

90. *Id.* at 20–22. After their apprehension by the FBI, President Roosevelt ordered that the saboteurs be transferred to military custody to face trial in a military commission. *Id.* at 22–23.

91. *Id.* at 27 (quoting 10 U.S.C. § 1486 (1940)).

92. *Id.* at 28–29.

93. *Id.* at 38–46.

was not covered by the Fifth Amendment's textual exception for "cases arising in the land or naval forces."[94] But it maintained that no express exception was necessary because such cases did not fall within the original scope of the Constitution's criminal jury trial protections.[95] The Court cited a provision of the 1806 Articles of War sanctioning the imposition of the death penalty by a court-martial against alien spies[96] as well as examples of military trials of enemy spies dating back to the American Revolution.[97]

Quirin has encountered significant controversy over the years. Justice Scalia, for example, referred to *Quirin* as "not [the] Court's finest hour,"[98] while Justice Stevens described it as "the high-water mark of military power to try enemy combatants for war crimes."[99] Much scholarly commentary has likewise been critical.[100] Yet, *Quirin*'s holding—that the Constitution allows the exercise of military jurisdiction over enemy belligerents who violate the law of war[101]—remains intact. In upholding the law-of-war commission, *Quirin* thus acknowledges a third type of military exception to Article III—one that does not rely on the rationale of maintaining internal discipline over servicemembers (as with court-martials) or exigency (as with military commissions operating during martial law or in occupied territory). *Quirin*, moreover, does not appear to depend even on the type of qualified necessity outlined in Chief Justice Chase's concurrence in *Milligan*. Read broadly, it suggests that the president may choose between a civilian and military forum where an enemy soldier is charged with a crime under the law of war, even when prosecution in an Article III court is feasible.

The Court again sanctioned the law-of-war commission in *In re Yamashita*.[102] There, a U.S. military commission, convened in the Philippines, convicted and sentenced to death the Japanese general, Tomoyuki Yamashita, for his failure to prevent atrocities of civilians committed by soldiers under his command during the siege of Manila.[103] The Supreme Court upheld the conviction, finding, as in *Quirin*, that

94. *Id.* at 40–41 (quoting U.S. CONST. amend. V).

95. *Id.* ("No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms.").

96. *Id.* (citing Act of Apr. 10, 1806, ch. 20, art. 2, sec. 2, 2 Stat. 371).

97. *Id.* at 42 n.14.

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

99. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (Stevens, J., concurring).

100. *See, e.g.*, Michael R. Belknap, *Alarm Bells from the Past: The Troubling History of American Military Commissions*, 28 J. SUP. CT. HIST. 300, 305–07 (2003); David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61 (1996).

101. *Quirin*, 317 U.S. at 45–46.

102. 327 U.S. 1 (1946).

103. *Id.* at 5.

Congress had power under the Define and Punish Clause to punish violations of the law of war.[104] The *Yamashita* Court elaborated on the rationale:

> An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.[105]

Yamashita thus provided a functional gloss on the law-of-war commission, which not only punishes enemy belligerents who violate the law of war, but also advances U.S. military efforts through this system of military justice. Like *Quirin*, *Yamashita* understood the law of war to be part of international law.[106]

The Court employed similar reasoning in *Johnson v. Eisentrager*,[107] decided four years later.[108] *Eisentrager* upheld the conviction of 21 German soldiers by a U.S. military commission in Nanking, China, for continuing to engage in military activities after the surrender of Germany but before the surrender of Japan.[109] The bulk of the opinion addressed whether the petitioners, as enemy aliens tried, convicted, and detained outside sovereign U.S. territory, had the right to access U.S. courts and to claim constitutional protections.[110] Part IV of the opinion, however, concluded that because petitioners were enemy belligerents accused of violating the law of war, they could be tried by a military commission.[111]

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104. *Id.* at 15–16 (referencing Annex to the Fourth Hague Convention of 1907).

105. *Id.* at 11 (internal citation omitted).

106. *Id.* at 15–16; *Quirin*, 317 U.S. at 35.

107. 339 U.S. 763 (1950).

108. *Id.*

109. *Id.* at 765–66.

110. *Id.* at 777–85 (suggesting that the petitioners had no right to judicial access or constitutional protections).

111. *Id.* at 786–88 (noting that there was a "conventional and long-established" basis in the law of war for prosecuting the petitioners for breaching the terms of an act of surrender).

Milligan's open-court rule still retained force despite these decisions. In *Duncan v. Kahanamoku*,[112] the Court held that a statute authorizing Hawaii's governor to place that territory under martial law did not authorize the military trial of a civilian.[113] While Hawaii was in the theater of military operations, continuously under invasion, and "under fire" at the time,[114] the Court narrowly construed the statute to preserve the primacy of Article III courts as long as those courts were open and functioning.[115] Yet, *Duncan*, the Court noted, involved the trial of a civilian, not "the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war."[116] *Duncan* thus reaffirmed *Milligan*'s open court rule, but within its more limited, post-*Quirin* parameters, which allowed for military commission jurisdiction over enemy belligerents accused of committing war crimes under international law.

3. *MADSEN* AND THE MILITARY OCCUPATION COMMISSION

After *Quirin*, the Court also reaffirmed the authority of military tribunals to try individuals in U.S.-occupied enemy territory for violations of municipal law. In *Madsen v. Kinsella*,[117] the Court upheld the jurisdiction of a U.S. military commission in U.S.-occupied Germany to try the civilian wife of a U.S. servicemember for murder in violation of German law.[118] The Court explained that this jurisdiction rested both on longstanding practice and necessity, as such tribunals met "urgent government responsibilities related to war."[119] Those responsibilities not only included combating the enemy but also governing territory occupied by U.S. forces.[120] The same 1916 statute—preserving the concurrent jurisdiction of military commissions to try what "by statute or *by the law of war* may be triable by such military commissions"—provided the same congressional authority the Court had relied on in *Quirin*.[121]

In determining the scope of this authority, *Madsen* noted that the reference to the law-of-war "includes at least that part of the law of

112. 327 U.S. 304 (1946).
113. *Id.* at 324.
114. *Id.* at 340, 344 (Burton, J., dissenting).
115. *Id.* at 313.
116. *Id.* at 313–14.
117. 343 U.S. 341 (1952).
118. *Id.* at 342–43.
119. *Id.* at 346.
120. *Id.* at 348.
121. *Id.* at 354 (quoting 10 U.S.C. § 1486 (1940)).

nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government."[122] Thus, as in *Quirin*, *Yamashita*, and *Eisentrager*, international law recognized the authority of the military commission to try the particular offense in question—only in this case, it was the international law governing domestic offenses committed by civilians in occupied territory rather than that defining war crimes committed by enemy belligerents.

4. THE POST-9/11 MILITARY COMMISSIONS AND *HAMDAN I*

After a long hiatus, the United States revived military commissions after the terrorist attacks of September 11, 2011 (9/11). These commissions broke new ground in several respects.[123] In particular, they operated as law-of-war commissions—and thus independently of the exigency-based justifications underlying martial law and occupied territory commissions—while also asserting jurisdiction over offenses that did not constitute crimes under international law.[124]

In *Hamdan v. Rumsfeld* (*Hamdan I*),[125] the Supreme Court addressed the first incarnation of the post-9/11 military commissions established by President Bush's November 13, 2001, order.[126] The Court invalidated these commissions on separation-of-powers grounds, finding that they did not comply with the UCMJ.[127] Specifically, the Court found that Article 21 of the UCMJ (the successor to Article 15 of the Articles of War) confined military commission jurisdiction to offenders and offenses that by statute or the law of war were triable in such commissions.[128] The Court concluded that these presidentially created commissions lacked authority to proceed because their structure and procedure violated the UCMJ and Common Article III of the Geneva Conventions, which the UCMJ incorporated through its requirement that the commissions comport with the law of war.[129] In addition, a plurality of the Court found the commissions deficient because of their overly

122. *Id*. at 354–55.

123. *See, e.g.*, Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 92–103 (2006) (characterizing the unprecedented nature of President Bush's November 2001 order creating military commissions).

124. *Id.* at 97–103.

125. 548 U.S. 557 (2006).

126. Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

127. *Hamdan I*, 548 U.S. at 612–13.

128. *Id.* at 594–95, 612–13.

129. *Id.* at 560–63.

broad substantive scope.[130] Writing for the plurality, Justice Stevens concluded that the charge against the petitioner—the stand-alone offense of conspiracy (unconnected to the commission of a substantive war crime)—did not state an international law-of-war violation and thus did not fall within the jurisdiction of a military commission authorized by the UCMJ.[131]

Elaborating on Chief Justice Chase's typology in *Milligan*, Justice Stevens summarized three circumstances under which military commissions could be conducted: (i) pursuant to a declaration of martial law, where they function as substitutes for civilian courts; (ii) in occupied enemy territory under military government, where they provide domestic criminal-law authority in the absence of the regular civilian government; and (iii) to punish enemy fighters for violations of the international law of war.[132] He explained that the third category—the one at issue in *Hamdan I*—represents a wartime measure designed to discipline enemy forces that attempt to "thwart or impede" the military by transgressing the law of war.[133] Justice Stevens observed that the law-of-war category was further informed by necessity. He noted, for example, that such commissions had typically been limited not only temporally to offenses committed during time of war but also geographically to offenses committed in the theater of military operations.[134] Justice Stevens, however, avoided opining on whether the presidentially created commissions in *Hamdan I* fell within these additional parameters since the charge itself did not violate the law of war and therefore exceeded the authority granted under the UCMJ.[135]

Hamdan I, moreover, did not address how explicit congressional authorization for an offense that did not constitute a violation of international law would alter the calculus. That question would soon be

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130. *Id.* at 611–13.

131. *Id.* Since Congress had conditioned military commissions on compliance with the UCMJ, including the UCMJ's incorporation of law-of-war rules, the Court said that the president also could not rely on any inherent Article II powers he might have to convene military commissions. *Id.* at 593 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring)) ("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.").

132. *Id.* at 595–96.

133. *Id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)).

134. *Id.* at 596–97.

135. *Id.* at 600 (noting that the temporal and geographic deficiencies of the allegations against Hamdan "underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission").

raised by Congress's enactment of the 2006 MCA and addressed by the D.C. Circuit in *Hamdan II* and *Bahlul*.

5. THE 2006 MCA, *HAMDAN II*, AND *BAHLUL*

Passed within four months of *Hamdan I*, the 2006 MCA provides that military commissions 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."[136] In addition to specifying the commissions' personal jurisdiction, the act defines a range of offenses as war crimes, including providing material support for terrorism (MST), conspiracy, and murder in violation of the law of war.[137] In an attempt to quell ex post facto objections, Congress noted that it was merely codifying offenses that had "traditionally been triable by military commissions" and, therefore, did "not establish new crimes that did not exist before [the 2006 MCA's] enactment."[138]

Congress subsequently enacted the Military Commissions Act of 2009 (2009 MCA), amending the 2006 statute.[139] Although the 2009 MCA provides additional procedural safeguards, including tighter restrictions on the admission of hearsay and additional protections against the use of coerced evidence, it maintains the same substantive offenses.[140] The 2009 MCA contains a similar ex post facto qualification, but clarifies that the listed offenses "have traditionally been triable under the law of war *or otherwise* triable by military commission,"[141] thus implicitly acknowledging that not all of those offenses constitute crimes under international law.

In 2008, a military commission convicted Salim Hamdan of providing MST under the 2006 MCA and sentenced him to an additional five-and-one-half-months in prison.[142] The following year, a commission

136. Military Commissions Act of 2006, Pub. L. No. 109-366, ch. 47A, § 948d(a), 120 Stat. 2603 (codified at 10 U.S.C. § 948d(a) (2006)). The statute defines an "unlawful enemy combatant" to include "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)." *Id.* § 948a(1)(A)(i).

137. *Id.* § 950v(b).

138. *Id.* § 950p(a).

139. Military Commissions Act of 2009, Pub. L. No. 111-84, ch. 47A, sec. 1802, 123 Stat. 2574 (codified at 10 U.S.C. ch. 47A (2012)).

140. *Id.* § 949a.

141. § 950p(d) (emphasis added).

142. William Glaberson, *Bin Laden Driver Sentenced to Short Term*, N.Y. TIMES, Aug. 7, 2008, http://www.nytimes.com/2008/08/08/washington/08gitmo.html?pagewanted=all&_r=1&.

convicted Ali Hamza Ahmad Suliman Al Bahlul, who had served as a propagandist for al Qaeda, on charges of conspiracy, solicitation, and MST, sentencing him to life imprisonment.[143] The Court of Military Commission Review (CMCR), the military appeals court created by the 2006 MCA, upheld both convictions.[144] It recognized that the crime must violate some international norm to be prosecuted in a military commission but concluded that the crimes charged against Hamdan and Al Bahlul met this requirement.[145]

In Hamdan's subsequent appeal to the D.C. Circuit, the government abandoned its contention that international law recognized MST as a war crime. It argued instead that a military commission could try this offense because it had long been recognized as a war crime under domestic law and practice.[146] In *Hamdan II*, the D.C. Circuit rejected this argument and reversed the conviction.[147] Pre-2006 MCA conduct, the D.C. Circuit explained, was controlled by Article 21 of the UCMJ, which authorized military commission jurisdiction over violations of the international law of war, not a separate domestic common law of war.[148] International law, however, did not recognize MST as a war crime at the time of Hamdan's alleged conduct, which occurred between 1996 and 2001.[149] Accordingly, the appeals court ruled that the 2006 MCA did not authorize Hamdan's prosecution for MST[150] and that to conclude otherwise would raise serious concerns under the Constitution's Ex Post Facto Clause.[151]

The D.C. Circuit subsequently vacated Bahlul's conviction for conspiracy and solicitation (as well as MST).[152] Since international law also does not recognize conspiracy and solicitation as war crimes, the court said, those offenses likewise could not be used to charge defendants for pre-2006 MCA conduct.[153] The government sought en banc review in *Bahlul*, although the gravamen of its challenge was to the D.C. Circuit's prior ruling in *Hamdan II* that commission jurisdiction

143. Press Release, U.S. Dep't of Def., Detainee Sentenced to Life in Prison (Nov. 3, 2008), http://www.defense.gov/releases/release.aspx?releaseid=12331.

144. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1157–58 (C.M.C.R. Sept. 9, 2011).

145. *Id.* at 1157, 1225, 1264.

146. *Hamdan II*, 696 F.3d 1238, 1252 (D.C. Cir. 2012).

147. *Id.* at 1241.

148. *Id.* at 1248–52.

149. *Id.* at 1241.

150. *Id.* at 1253.

151. *Id.* at 1247–48.

152. *Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485, at *21 (D.C. Cir. July 14, 2014).

153. *Id.* at *3.

over pre-2006 MCA conduct is limited to violations of international law under Article 21 of the UCMJ.[154] The D.C. Circuit granted the request.[155] In the interim, Brigadier General Mark Martins moved unsuccessfully for the dismissal of the conspiracy charges from all pending commission cases, including the cases of defendants charged in the 9/11 attacks and the destruction of the USS Cole in 2000.[156]

In July 2014, the D.C. Circuit issued its en banc opinion in *Bahlul*.[157] The fractured ruling contains five separate opinions, four of which address the government's domestic common law-of-war theory.[158] Writing for the majority, Judge Karen Henderson concluded that Bahlul's ex post facto challenge should be reviewed under a plain error standard because he had failed to properly preserve this challenge in the lower courts.[159] Applying plain error review, the majority overruled the D.C. Circuit's ruling in *Hamdan II* that the 2006 MCA authorized prosecution only of pre-MCA conduct that constituted a war crime under international law at the time it was committed.[160] As to Bahlul's ex post facto challenge, the majority (again applying plain error review) concluded that the relevant statute in effect at the time of Bahlul's conduct—Article 21 of the UCMJ—did not obviously limit commission jurisdiction to international law-of-war violations[161] and that it was not obvious that conspiracy was not traditionally triable by a law-of-war commission under Article 21.[162] The majority, however, affirmed the

154. *Id.*

155. *Id.* at *1–2, *27–28.

156. *See* Charlie Savage, *Military Prosecutor Battles to Drop Conspiracy Charge in 9/11 Case*, N.Y. TIMES, Jan. 18, 2013, http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html. The Convening Authority, which oversees the tribunal system, denied the request. *Id.*

157. *Bahul*, 2014 WL 3437485, at *21.

158. *Id.* at *1; *id*. at *24 (Rogers, J., concurring in the judgment in part and dissenting); *id.* at *41 (Brown, J., concurring in the judgment in part and dissenting in part); *id.* at *53 (Kavanaugh, J., concurring in the judgment in part and dissenting in part). The fifth opinion addressed the Ex Post Facto Clause's application to Guantánamo. *Id.* at *21 (Henderson, J., concurring).

159. *Id.* at *4.

160. *Id.* at *5 ("Because we conclude . . . that the 2006 MCA is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status—we now overrule *Hamdan II*'s statutory holding.").

161. *Id.* at *15 ("Ultimately, we need not resolve *de novo* whether [Article 21] is limited to the international law of war. It is sufficient for our purpose [on plain error review] to say that, at the time of this appeal, the answer to that question is not 'obvious.'") (citation omitted).

162. *Id.* at *17 ("We think the historical practice of our wartime tribunals is sufficient to make it not 'obvious' that conspiracy was not traditionally triable by law-of-war military commission under [Article 21]."). Again applying plain error review,

panel's reversal of Bahlul's convictions for MST and solicitation.[163] The majority remanded Bahlul's remaining challenges to his conspiracy conviction to the original appellate panel, including his claim that Article I's Define and Punish Clause limits military commission jurisdiction to violations of international law and his claim that exercising commission jurisdiction over non-international law offenses violates Article III.[164]

Judge Judith Rogers disagreed that plain error review should apply and said Bahlul's appeal should be reviewed de novo.[165] Rogers was the only judge of the seven on the en banc court who would have vacated Bahlul's conspiracy conviction as well as his MST and solicitation convictions.[166] She concluded that military commissions could not properly exercise jurisdiction over a separate body of domestic law-of-war offenses that were not recognized as crimes under international law. Rogers said that the 2006 MCA did not retroactively authorize punishment over non-international law-of-war violations, such as conspiracy,[167] and alternatively, that if the statute had done so, it would violate the Constitution's Ex Post Facto Clause.[168] Rogers explained how limiting military commission jurisdiction to offenses recognized as war crimes under international law helped avoid erosion of Article III criminal jurisdiction.[169]

Like Rogers, Judge Janice Brown would have reviewed Bahlul's conviction under a de novo standard.[170] Brown would have affirmed the

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the majority also rejected Bahlul's ex post facto challenge because his conduct was already criminalized under 18 U.S.C. § 2332(b) when he engaged in it, notwithstanding that § 2332(b) provides for prosecution only in an Article III court. *Id.* at *11–12.

163. *Id.* at *18–21.

164. *Id.* at *21.

165. *Id.* at *38 (Rogers, J., concurring in the judgment in part and dissenting).

166. *Id.* at *24.

167. *Id.* at *24–33. In addition, Rogers concluded:

> Even assuming, contrary to Supreme Court precedent, that a U.S. common law of war tradition could serve as an independent basis for sustaining convictions by law-of-war military commissions for offenses that are not recognized under the international law of war or by then-existing statute, the government fails to establish a domestic tradition to sustain Bahlul's inchoate conspiracy conviction.

Id. at *33.

168. *Id.* at *38–40.

169. *Id.* at *25 ("A statute conferring judicial power outside the Article III courts 'may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. Slight encroachments create new boundaries from which legions of power can seek new territory to capture.'") (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011)); *see also id.* at *27–30 (describing a well-settled understanding that the "law of war" means the international law of war).

170. *Id.* at *42 (Brown, J., concurring in the judgment in part and dissenting in part).

conspiracy conviction under this standard based on a domestic tradition of prosecuting non-international law offenses in military commissions.[171] Brown, moreover, would have reached the issue of Congress's Article I power to define and punish violations of the law of nations, one of the issues the en banc court remanded to the original panel.[172] Brown not only described international law as a "flexible . . . concept,"[173] but also argued that the U.S. should have latitude to mold international law to "advance its own national security interests."[174] As long as conspiracy had a rough analogue in international law, Brown reasoned, that would satisfy Article I concerns, and courts should defer to congressional judgments on the exercise of its Article I Define and Punish authority.[175] Brown concluded that a stand-alone offense of conspiracy was "sufficiently grounded in international law" because international law "recogniz[es] conspiracy as a stand-alone offense" for genocide and waging aggressive war (even if not for war crimes)[176] and because conspiracy is a mode of liability for all international law-of-war offenses.[177]

Judge Brett Kavanaugh, who likewise would have applied de novo review, concluded that the government could prosecute in a military commission offenses traditionally triable in that forum even if they did not constitute war crimes under international law.[178] Kavanaugh thus endorsed the notion of a separate body of domestic law-of-war crimes that included inchoate conspiracy and that could be prosecuted in a military commission.[179] Further, he addressed Bahlul's additional

171. *Id.* at *43 (Brown, J., concurring in the judgment in part and dissenting in part).

172. *Id.* at *44 (Brown, J., concurring in the judgment in part and dissenting in part).

173. *Id.* at *48 (Brown, J., concurring in the judgment in part and dissenting in part).

174. *Id.* at *45 (Brown, J., concurring in the judgment in part and dissenting in part).

175. *See id.* at *45, *50 (Brown, J., concurring in the judgment in part and dissenting in part).

176. *Id.* at *50–51 (Brown, J., concurring in the judgment in part and dissenting in part).

177. *Id.* at *50 (Brown, J., concurring in the judgment in part and dissenting in part).

178. *Id.* at *54, *57–58 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("[A]t the time of Bahlul's conduct, [Article 21] authorized military commissions to try offenses drawn from three bodies of law: federal statutes defining offenses triable by military commission, the international law of war, and historical U.S. military commission tradition and practice as preserved by Congress when it enacted [Article 21] in 1916 and 1950.").

179. *See id.* at *58–61 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

argument, which the majority remanded to the original panel, that the jury trial protections of Article III and the Fifth and Sixth Amendments prohibited Congress from authorizing trials by military commissions of offenses that are not recognized as war crimes under international law.[180] Kavanaugh rejected any such constraint on congressional authority, finding that the exception recognized in *Quirin* to the Constitution's guarantee of an Article III criminal trial swept more broadly than violations of the international law of war.[181]

Because the *Bahlul* majority addressed only the ex post facto issues, it did not consider the lurking constitutional questions raised by Congress's authorization of military commission trials of offenses that do not violate international law. Those questions will thus be addressed on remand in *Bahlul* as well as in other pending and future commission prosecutions. Yet, the separate opinions in *Bahlul* help crystalize the interplay between international law and military commission jurisdiction.

Both Brown and Kavanaugh view the U.S. as leading other nations in the fight against terrorism by militarizing the prosecution of terrorism suspects through a more expansive conception of war crimes than presently exists under international law. "Terrorism may be the global security challenge of the 21st Century, just like aggressive war was in the early 20th Century and genocide was in the half century following World War II," Brown asserts.[182] To be a leader in the international community, the U.S. must not be bound—at least not in any strict sense—by international law.[183] Kavanaugh, echoing the same themes he expressed in *Hamdan II*,[184] similarly describes the United States as leading the international community by "authorizing war and enacting war crimes triable by military commission."[185]

Rogers, by contrast, emphasizes the primacy of Article III courts and the exceptional nature of military commissions.[186] She suggests how maintaining a jurisdictional line based on international law helps to preserve Article III primacy and prevent further erosion of the

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180. *Id.* at *58–63 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

181. *Id.* at *63–64 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (discussing *Ex parte Quirin*, 317 U.S. 1 (1942)).

182. *Id.* at *51 (Brown, J., concurring in the judgment in part and dissenting in part).

183. *Id.* at *45 (Brown, J., concurring in the judgment in part and dissenting in part). Indeed, Brown suggests that Congress should have wide latitude to create military commissions to prosecute terrorism even outside armed conflict. *Id.* at *44 n.2.

184. *Hamdan II*, 696 F.3d 1238, 1246 n.6 (D.C. Cir. 2012).

185. *Bahlul*, 2014 WL 3437485, at *64 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

186. *Id.* at *24–25 (Rogers, J., concurring in part and dissenting).

constitutional safeguards provided by a federal criminal trial. In a sense, Brown, Kavanaugh, and Rogers appeal to tradition, but they conceptualize those traditions differently. Brown and Kavanaugh emphasize a domestic tradition of military commission prosecutions during wartime, including conspiracy as a stand-alone offense. Rogers, by contrast, stresses a domestic tradition in which Article III criminal jurisdiction is the norm and military commission jurisdiction is an extraordinary departure. They also view the role of international law differently. For Rogers, it helps preserve Article III jurisdiction. For Brown and Kavanaugh, it is a flexible construct that Congress should have broad latitude to interpret to advance U.S. security interests, including through broad criminal jurisdiction in military commissions.

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The law-of-war commission represents the least well-articulated—and most controversial—exercise of military jurisdiction. The rationale for law-of-war commissions differs from that of courts-martial, which rest primarily on maintaining internal discipline within the armed forces,[187] and from military commissions established during martial law or in occupied enemy territory, which rely on controlling necessity due to the absence of an effective civilian forum to prosecute domestic crimes.[188] The Supreme Court has provided different explanations for law-of-war commissions, including tradition[189] and the need to maintain the effectiveness of U.S. military efforts in the face of an enemy that does not adhere to the law of armed conflict. But this exception to Article III jurisdiction remains undertheorized. While precedents such as *Quirin* and *Yamashita* base the subject matter jurisdiction of law-of-war commissions on Congress's Article I power to define and punish violations of international law, those decisions alone do not explain why the jurisdiction of these commissions should necessarily exclude other offenses, at least where authorized by Congress, under the 2006 MCA. Nor do they grapple with implications for Article III courts of extending commission jurisdiction beyond international law

As the various opinions in *Bahlul* suggest, the MCA raises important questions concerning congressional authority to authorize military trials outside previously established parameters. Those questions will not only be addressed in further proceedings in *Bahlul* and other

187. American Articles of War of 1776, § XVIII, art. 5, *reprinted in* WINTHROP, *supra* note 24, at 971.

188. *See Madsen v. Kinsella*, 343 U.S. 341, 353–55 n.20 (1952).

189. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

ongoing military commission cases involving long-time Guantánamo detainees, but also will arise in any future use of commissions to prosecute terrorism in lieu of Article III courts. The remainder of this Article addresses these questions by exploring the normative and functional justifications for international law as a constitutional constraint on military commission jurisdiction.

II. INTERNATIONAL LAW AND MILITARY COMMISSION JURISDICTION

International law may be understood to inform the constitutional limits of military commissions in several ways. First, the Constitution's internationalist orientation not only provides a gloss on specific provisions that reference international law but also supports interpretations that advance the United States' standing in the community of nations. Second, limiting commissions to violations of international law reinforces Article III criminal process by providing a recognized constraint on military jurisdiction. Third, an international law-based line has strong roots in past practice. While that practice is not uniform, as a tradition of trying spying in military tribunals suggests, the exceptions are limited and provide only limited support for military jurisdiction over conspiracy and MST based on a theory of domestic war crimes.

A. The Internationalist Constitution

One explanation for aligning military commission jurisdiction with internationally recognized war crimes lies in the Constitution's internationalist orientation. Recent scholarship has placed renewed emphasis on the Founders' internationalist leanings. David Armitage, for example, has explained the international dimensions of the Declaration of Independence,[190] while David Golove and Daniel Hulsebosch have done the same for the Constitution.[191] In particular, Golove and Hulsebosch argue that the Constitution should be understood as a "fundamentally international document," one that reflects the Framers' concerns with integrating the United States into the community of civilized states through compliance with international law.[192] The Constitution's focus on foreign affairs, they suggest, was motivated not only by the need to defend the United States against external threats but

190. DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY (2007).

191. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

192. *Id.* at 934.

also by a desire to ensure the country's long-term security and prosperity through its integration into the international community of civilized states.[193] That integration and the larger project of nation-building, the Framers recognized, could be achieved only by designing the Constitution to facilitate compliance with and respect for the law of nations.[194] Anthony Bellia and Bradford Clark have similarly described how the Founders used terms drawn from international law in the Constitution partly "to enable the United States to fulfill its obligations under the law of nations."[195] Peter Margulies has recently emphasized the importance of Enlightenment thinkers on the Framers' view of membership in a community of nations as a means of constraining government through what he describes as salutary deliberation.[196]

The Constitution's internationalist dimensions are reflected throughout the text. The Supremacy Clause provides that all treaties as well as all federal laws are supreme over state law and have to be followed by state judges, even where they conflict with state law.[197] Article III authorizes federal jurisdiction over all cases arising under federal law and federal treaties.[198] Article III also authorizes federal courts to hear a range of disputes that have traditionally involved international law: through exercises of admiralty or maritime jurisdiction, which commonly required adjudication of the law of nations in prize cases;[199] in cases affecting ambassadors, other public ministers, and consuls, which similarly arose under the law of nations and which were of particular interest to foreign states;[200] and through suits between states or their citizens and foreign states or their citizens, which likewise commonly involved the law of nations and could trigger international controversy.[201] The Framers' decision to extend the judicial power to

193. *Id.* at 936–37.

194. *Id.* at 980, 989–90.

195. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 746 (2012).

196. 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, 11 (2013).

197. U.S. CONST. art. VI, cl. 2. The Supremacy Clause was motivated by the resistance of states, including state judges, to comply with treaties during the Confederation, particularly with the Treaty of Peace. *See generally* CHRISTOPHER R. DRAHOZAL, THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2004).

198. U.S. CONST. art. III, § 2, cl. 1.

199. *Id.*; Golove & Hulsebosch, *supra* note 191, at 1003–04.

200. U.S. CONST. art. III, § 2, cl. 1; Golove & Hulsebosch, *supra* note 191, at 1005–06.

201. U.S. CONST. art. III, § 2, cl. 1; Golove & Hulsebosch, *supra* note 191, at 1006–07.

disputes involving the law of nations was understood as a way to remove those disputes from the political process and enable the federal courts to remedy violations where appropriate.[202]

The Constitution's grant of authority to Congress under the Define and Punish Clause similarly reflects the Framers' concern with U.S. adherence to its international obligations. While the Define and Punish Clause provides the Constitution's only express mention of the law of nations, numerous clauses refer directly to "recognized principles, concepts, and institutions of the law of nations."[203] Congress's power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water[204] all concern matters that fall under the law of nations.[205] Scholars have accordingly looked to the law of nations to interpret the meaning of these terms, whether under the guise of originalist or textualist approaches.[206]

Most accounts have focused on the federalism underpinnings of the Constitution's attempt to ensure compliance with international law, stressing the Framers' desire to limit the risks that popular sovereignty in state legislatures posed to the United States' ability to act effectively on the world stage.[207] The Define and Punish Clause, for example, grew out of concerns that, during the Confederation, states had neglected to punish individuals who had violated the rights of foreign nationals, thus provoking diplomatic tensions and interfering with U.S. foreign

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202. Golove & Hulsebosch, *supra* note 191, at 1001–02; 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, 476–77 (2000) (noting that the Define and Punish Clause addresses the concern with unredressed violations of international law by "empower[ing] Congress to guarantee enforcement of international law within the United States").

203. Golove & Hulsebosch, *supra* note 191, at 1000.

204. U.S. CONST. art. I, § 8, cl. 11.

205. Golove & Hulsebosch, *supra* note 191, at 1000.

206. *See, e.g.*, Bellia, Jr. & Clark, *supra* note 195, at 735 (examining the original meaning of specific constitutional powers, such as the power to recognize foreign nations and the war power, against the background assumptions provided by the law of nations); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1545 (2002) (looking to international law at the time of the Constitution's framing to comprehend the textual meaning of provisions such as the Declare War Clause). *See generally*, Jean Gailbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 993–94 (2013) (describing the role international law plays in both textualist and originalist methodologies of constitutional interpretation).

207. The Constitution thus excluded states from foreign affairs. U.S. CONST. art. I, § 10, cls. 1, 3 (prohibiting states from making any "Treaty, Alliance, or Confederation," or, without congressional consent, from making an "Agreement or Compact" with a foreign nation); U.S. CONST. art. I, § 10, cl. 2 (prohibiting the states from regulating foreign commerce).

relations.[208] But fears about the impact of popular sovereignty were not limited to the states. The Framers sought to guard against the "impulse of sudden and violent passions" at the national level as well as in state legislatures.[209] Empowering a judicial role on matters involving the law of nations could help to check that impulse and demonstrate that the United States merited inclusion in what American jurists termed "the civilized world."[210]

Other doctrines, to be sure, cut against grounding constitutional constraints on Congress in international law. Treaties may constitute binding international commitments, but under the non-self-execution doctrine, a treaty is not binding federal law, notwithstanding the Supremacy Clause, unless Congress has implemented it through domestic legislation or the treaty itself demonstrates an intention that it be self-executing and is ratified on that basis.[211] Congress, moreover, may enact legislation that violates the law of nations subject to other constitutional constraints. While statutes should be construed where possible not to violate the law of nations under the *Charming Betsy* canon,[212] this remains a principle of statutory construction, not a constitutional limitation on legislative power.

The Constitution's internationalist orientation may nevertheless inform constitutional limits on military jurisdiction in several ways. It can provide a gloss on textual provisions that reference international law—whether directly, as in the Define and Punish Clause, or implicitly, as in the various clauses specifying Congress's war powers. This use of international law is a well-established method of constitutional

208. *See, e.g.*, Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310779; Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 860–61 (2006) (recounting the significance of the Marbois affair, which involved an attack on French diplomat in Philadelphia).

209. *See* THE FEDERALIST NO. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 63, at 382, 384 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that popular sentiment, inflamed by "the artful misrepresentations of interested men," would jeopardize compliance with the nation's international obligations).

210. 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (New York, O. Halsted 2d ed., 1832).

211. *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008); *Foster v. Nielson*, 27 U.S. (1 Pet.) 253, 314 (1829). Non-self-executing treaties may nonetheless play an interpretive function in construing federal statutes. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 781–82 (1988); *see also* Carlos Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 706 (1995).

212. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

interpretation,[213] one that the Supreme Court employed in *Quirin* in sustaining the exercise of military commission jurisdiction under the Define and Punish Clause.[214] The Court has also drawn upon international law in interpreting other constitutional provisions, including the Eighth Amendment's prohibition on "cruel and unusual punishment" in its death penalty jurisprudence.[215]

The Constitution's internationalist orientation may further serve as what Professor Sarah Cleveland has described as a "background principle" of constitutional interpretation.[216] International rules, Cleveland has explained, can similarly inform the Constitution's interpretation even with respect to concepts or terms not specifically referenced in the Constitution's text because they reflect shared values of the international community.[217] The Supreme Court has previously referenced such shared values in addressing the jurisdiction of military courts. As far back as *Dynes*, the Court observed that courts-martial of servicemembers conformed to the practice of other nations.[218] *Quirin* similarly noted universal practice in the treatment of enemy belligerents in upholding commission jurisdiction over law-of-war violations.[219] International norms can therefore provide an interpretive guide to concepts such as war crimes not only because they provide a gloss on the Constitution's text, but also because they implicate broader practices of the international community and demonstrate the United States' place within it.

A useful parallel might be drawn to the Court's consideration of policy implications in defining the permissible scope of Article I courts more generally. In *Thomas v. Union Carbide Agricultural Products*

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213. *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004) (acknowledging that international sources may provide "persuasive authority in certain types of constitutional analysis"); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82 (2004) (positing that international law provides "an essential resource for construing" terms that assume an international law background, such as the Declare War and Define and Punish Clauses).

214. *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) (interpreting the Constitution's Define and Punish Clause to authorize trials by military commissions of violations of international law).

215. *See Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (death penalty for juveniles); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (death penalty for "the mentally retarded").

216. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 7 (2006).

217. *Id.* at 63.

218. *See supra* text accompanying notes 34–35.

219. *Quirin*, 317 U.S. at 30–31.

Co.[220] and *Commodity Futures Trading Commission v. Schor*,[221] for example, the Court emphasized the need to consider practical consequences in evaluating the exercise of non-Article III jurisdiction by agencies.[222] By analogy, *Thomas* and *Schor* support incorporating pragmatic considerations when determining the permissible boundaries of military jurisdiction, including the impact on the U.S.'s international interests. Incorporating such concerns in jurisdictional line-drawing would not necessarily provide a one-way ratchet limiting commission jurisdiction. If broader commission authority served U.S. international interests—for example, by fulfilling U.S. international obligations to combat terrorism or demonstrating membership in the civilized body of nations—it could favor such jurisdiction. Presently, however, widening military commission jurisdiction through the novel construct of domestic war crimes places the U.S. at variance with key international institutions and actors regarding the scope of international criminal liability.

State practice is increasingly moving towards confining military jurisdiction.[223] U.N. Draft Principles Governing the Administration of Justice (Draft Principles), for example, call for limiting the jurisdiction of military courts "to offenses of a strictly military nature committed by military personnel," at least absent situations of exigency.[224] While the Draft Principles may not yet embody customary international law, they provide a strong indication of international law's direction and undercut arguments for broadly defining war crimes beyond those recognized under international law to expand military jurisdiction.

International jurisprudence similarly counsels against expanding the definition of war crimes as the MCA does.[225] The United Nations Security Council's creation of *ad hoc* tribunals to address atrocities

220. 473 U.S. 568 (1985).

221. 478 U.S. 833 (1986).

222. *Commodity*, 478 U.S. at 857; *Thomas*, 473 U.S. at 587 (explaining that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III").

223. *See* Special Rapporteur on the Independence of Judges and Lawyers, ¶¶ 53, 62, U.N. Doc. A/68/285, (Aug. 7, 2013) (describing a trend in State practice towards limiting military jurisdiction to criminal offenses and breaches of military discipline committed by military personnel, at least outside situations of exigency).

224. U.N. Comm'n. on Hum. Rts., Issue of the Administration of Justice Through Military Tribunals, ¶ 21, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) (prepared by Dr. Emmanuel Decaux).

225. *See generally* Allison Marston Danner, *When Courts Make Law: How International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 2–3 (2006); *see also Tindungan v. Canada (Citizenship and Immigration)*, [2013] F.C. 115, para. 80–93 (Can. Ont.) (finding that the U.S. military justice system does not meet international standards as recognized under the Canadian Charter of Rights and Freedoms).

committed during the conflicts in the former Yugoslavia and in Rwanda during the 1990s[226] and the establishment of a permanent international criminal tribunal under the Rome Statute[227] have transformed jurisprudence on war crimes. These tribunals have established more concrete norms governing war crimes and provide an important source for interpretations of international law.[228] Given these developments, the body of war crimes jurisprudence is far more developed now than when the Supreme Court decided *Quirin*. This solidification of international norms may support charging conduct as a war crime where it aligns with this jurisprudence, including for terrorist activity (although it still would not support prosecuting those offenses in specialized military courts where a nation's regular criminal tribunals are available). But it undermines the case for treating conduct as a war crime when it conflicts with statutes and decisions of international tribunals, which have rejected conspiracy liability[229] and never exercised jurisdiction over terrorism per se, let alone material support for it, unconnected to the commission of a war crime.[230] The type of inchoate liability under MCA-based offenses such as MST and conspiracy exceeds even the most liberal interpretations of vicarious liability by international tribunals.[231]

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226. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994). The international community's acceptance of conspiracy liability for genocide may be explained by the sheer magnitude of the wrongdoing and the intricate, elaborate, and systemic planning necessary to carry it out.

227. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 91 (entered into force July 1, 2002).

228. *Id.* at 98, 104.

229. *See* Kevin Jon Heller, *Why* Hamdan II *Dooms Conspiracy as Well as Material Support for Terrorism*, OPINIO JURIS (Oct. 17, 2012), http://opiniojuris.org/2012/10/17/why-hamdan-dooms-conspiracy-as-well-as-material-support/ (describing the consistent rejection of conspiracy liability by international tribunals since World War II); *see also* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 119–20 (2005) (discussing the criticism of and resistance to efforts to prosecute conspiracy at Nuremberg).

230. Alexandra Link, Note, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT'L L. 439, 444 (2013).

231. *Id.* at 469–71 (distinguishing MST under the MCA from joint criminal enterprise under the ICTY's jurisprudence). *But see* Margulies, *supra* note 196, at 4–9 (recognizing that military commissions do not have jurisdiction over conspiracy as a separate offense, but arguing they should have jurisdiction over conspiracy as a mode of liability for completed acts of violence based on a functional approach that examines the connection between the underlying conduct in past proceedings and the conduct alleged in current trials).

International jurisprudence thus instead supports continuing to treat these offenses as domestic crimes in Article III courts.

B. Structure, Military Commissions, and the Criminal Trial

The Constitution provides two structural constraints on military commissions. In providing for commission jurisdiction, Congress must both act within its Article I authority and not trench upon Article III's criminal process guarantees. This Section describes how international law informs these two limits on military jurisdiction.

1. ARTICLE I LIMITATIONS ON MILITARY COMMISSIONS

Congress's authority to create military commissions must fall within its Article I powers.[232] In *Quirin* and *Yamashita*, the Supreme Court based the authority to create law-of-war commissions—commissions conducted outside occupied enemy territory or martial law, which may prosecute domestic crimes—on the Define and Punish Clause.[233] Both cases suggest that the clause—and thus the scope of Congress's authority to create such commissions—is tied to international law.[234]

As Beth Stephens has observed, Congress's power under the Define and Punish Clause was intended to punish offenses that violate international law and not to provide additional authority to create new crimes.[235] The degree of deference that should be afforded to Congress in interpreting international law remains a subject of debate.[236] Some, for

232. U.S. CONST. art. I, § 8.

233. *In re Yamashita*, 327 U.S. 1, 7 (1946) (affirming Congress's authority to punish by military commissions offenses that violate the law of nations); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("Congress [under Article of War 15] has . . . exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, 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.").

234. *Yamashita*, 327 U.S. at 7; *id.* at 14 (noting that the charges "are recognized in international law as violations of the law of war"); *see also id.* at 35 (Murphy, J., dissenting) (disputing the Court's supposition that international law justifies the asserted charge against the defendant); *Quirin*, 317 U.S. at 26; *id.* at 35 (noting that the status of the offense charged under "the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as [triable by military commission]").

235. Stephens, *supra* note 202, at 474.

236. *Compare id.* at 545 (arguing for deference to congressional determinations about the content of international law under the Define and Punish Clause), *with* Charles D. Siegel, *Deference and its Dangers: Congress's Power to "Define . . .Offenses against the Law of Nations*," 21 VAND. J. TRANSNAT'L. L. 865 (1988) (arguing for non-deferential review).

example, argue for substantial deference, which would give Congress greater latitude to define violations of international law and, in turn, expand the jurisdiction of military commissions. Brown's separate opinion in *Bahlul*, for example, calls for extensive deference, stressing Congress's broad authority under the Define and Punish Clause and describing international law as a general guidepost for, rather than limitation on, that authority.[237] Notably, Brown's approach does not merely give Congress wide latitude to criminalize particular conduct but also, by allowing it to define that conduct as a violation of the law of nations, authorizes military jurisdiction over it. In *Bahlul*, international law did help limit commission jurisdiction as the court unanimously affirmed the dismissal of Bahlul's conviction for the non-law-of-war offenses of MST and solicitation.[238] But that ruling rested on ex post facto grounds, and Brown's and Kavanaugh's opinions suggest that even those offenses—which represent a clearer departure from international law on war crimes than conspiracy—could form the basis for prospective commission prosecutions.

The government has offered two sources for Congress's Article I authority to prosecute such domestic common law-of-war offenses in military commissions: the Define and Punish Clause, as bolstered by the Necessary and Proper Clause; and Congress's general war powers.[239] As to the former, the government argues that Congress's authority under the Define and Punish Clause is not limited to violations of international law, but also supports jurisdiction to help the U.S. satisfy its counterterrorism obligations to the international community.[240] Under this view, international law does not so much constrain military commission jurisdiction as enable it, allowing Congress to create military courts to enforce broadly defined international obligations, such as the duty to fight terrorism, even where those obligations have not crystalized into an internationally recognized norm of criminal liability.

The alternative Article I justification for commission jurisdiction based on Congress's war powers, by contrast, operates independently of international law. It posits that as long as the offense is one traditionally triable by military commission, Congress can prosecute individuals in that forum whether or not it facilitates compliance with the United States' international obligations let alone constitutes a crime under

237. *Al Bahul v. United States*, No. 11-1324, 2014 WL 3437485, at *44–48 (D.C. Cir. July 14, 2014) (Brown, J., concurring in the judgment in part and dissenting in part).

238. *Hamdan II*, 696 F.3d 1238, 1241 (D.C. Cir. 2012).

239. *See* Brief for the United States at 59–61, *Al Bahul v. United States*, No. 11-1324, 2014 WL 3437485 (D.C. Cir. July 14, 2014).

240. *Id.* at 60–61.

international law. This argument thus rests on an expansive conception of Article I authority that, as Kavanaugh described, is "not defined or constrained by international law."[241] It also relies on prior congressional authorization to try offenses such as spying and aiding the enemy that are not recognized as war crimes under international law, but that have nonetheless traditionally been subject to trial by military commission.[242]

In considering these arguments, it is important to distinguish between Congress's Article I authority to subject conduct to prosecution in a military commission and its broader Article I power to criminalize that conduct. The U.S. has increasingly sought to expand the reach of its criminal laws abroad—what Anthony Colangelo has termed an "energetic boom of extraterritorial jurisdiction."[243] Enhanced counter-terrorism efforts have helped fuel this growth. After 9/11, for example, Congress expressly expanded the federal MST statute to apply extraterritorially, thus bringing more terrorism-related activity within the purview of Article III courts.[244]

Congress's authority to apply federal counterterrorism laws extraterritorially draws on multiple sources. It derives not only from the Define and Punish Clause but also from the Foreign Commerce Clause, the Necessary and Proper Clause combined with the Treaty Power, and Congress's foreign affairs power.[245] The outer limit of Congress's Article I authority to punish extraterritorial conduct remains uncertain.[246] Eugene Kontorovich has argued, for example, that Congress's power under the Define and Punish Clause to criminalize extraterritorial conduct requires

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241. *Bahlul*, 2014 WL 3437485, at *62 (Kavanaugh, J., concurring in the judgment in part and dissenting in part); *Hamdan II*, 696 F.3d at 1246 (Kavanaugh, J., concurring).

242. Brief for the United States, *Bahlul*, *supra* note 239, at 14–15.

243. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. J. INT'L L. 121, 121 (2007).

244. USA PATRIOT Act, Pub. L. No. 107-56, § 805(1)(a)(A), 115 Stat. 272 (2001) (codified at 18 U.S.C. § 2339A (2012)) (making material support for terrorist acts an extraterritorial crime); Material Support to Terrorism Prohibition Enhancement Act of 2004, Pub. L. 108-458, § 6602, 188 Stat. 3761 (codified at § 2339D) (making material support for terrorist groups an extraterritorial crime).

245. Colangelo, *supra* note 243, at 146–58 (describing the contours of congressional power to extend federal criminal law extraterritorially).

246. In its recent decision in *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013), the D.C. Circuit affirmed the dismissal in a federal criminal case of the charge of conspiracy to commit piracy against a Somali national. *Id.* The court concluded that because international law does not recognize universal jurisdiction over conspiracy to commit piracy, U.S. courts lacked jurisdiction over the defendant absent an express statement by Congress to override international law. *Id.* at 942. The court thus did not need to confront the question of whether the exercise of such congressionally sanctioned extraterritorial jurisdiction would be constitutional.

some effect on the United States, unless the crime falls within the limited category of offenses subject to universal jurisdiction.[247] Most courts have looked to the Fifth Amendment's Due Process Clause for possible limitations on a criminal law's extraterritorial reach.[248] These courts have suggested that the Due Process Clause requires a sufficient nexus between the defendant and the United States, such that application of the statute would not be arbitrary or fundamentally unfair to the defendant.[249] While some extraterritorial applications of the federal MST statute might fail to satisfy that test, no court has so held in a particular case and Congress's authority to extend federal criminal law outside the United States remains broad.[250]

By defining offenses such as MST and conspiracy as war crimes under a domestic common law of war—and not merely as offenses under federal criminal law—the MCA seeks to provide concurrent jurisdiction in a military commission.[251] The statute thus not only raises questions about the scope of Congress's Article I authority to criminalize particular conduct. It also implicates the structural protections of Article III, which limit Congress's authority to allocate criminal jurisdiction in a military forum.[252] Assuming that the Constitution imposed no territorial constraint on Congress's authority to punish conduct amounting to MST, there would still be a difference of constitutional dimensions between prosecuting that conduct in a military tribunal rather than in an Article III court. That difference, as described more fully below, is rooted in the Criminal Jury Clause of Article III and the associated criminal process protections of the Fifth and Sixth Amendments.

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247. Eugene Kontorovich, *The 'Define and Punish' Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 154–55 (2009).

248. *Ali*, 718 F.3d at 943–44 (discussing cases). *But see* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 328 (expressing skepticism towards the argument that a defendant "could rely on what could be characterized as an extraterritorial application of the U.S. Constitution in an effort to block the extraterritorial application of U.S. law").

249. *See, e.g.*, *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378–79 (11th Cir. 2011); *United States v. Yousef*, 327 F.3d 56, 111–12 (2d Cir. 2003) (per curiam); *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). *See generally*, Colangelo, *supra* note 243, at 162–65 (discussing various tests used by courts to assess extraterritorial application of U.S. criminal law under the Due Process Clause of the Fifth Amendment).

250. *See* Colangelo, *supra* note 243, at 176–77 (arguing that while the United States may apply its law without constitutional qualification for federal terrorism offenses that track those set forth in treaties, it is subject to constitutional constraints for "[terrorism] offenses that are not the subject of widely held international prohibitions, like providing material assistance to, or receiving military training from a foreign terrorist organization").

251. 10 U.S.C. § 950(t)(25) (2012).

252. Vladeck, *The Laws of War*, *supra* note 6, at 336–39.

2. ARTICLE III LIMITATIONS ON MILITARY COMMISSIONS

The Constitution does not expressly require Article III criminal process for a defined category of offenses.[253] Nor does it specifically exempt any offenses from such process other than the Fifth Amendment Grand Jury Clause exception for "cases arising in the land and naval forces."[254] Apart from this textual exception, the Constitution—and particularly Article III and the Fifth and Sixth Amendments—focuses on the requirements for criminal prosecution, from indictment to the conduct of the trial itself, once the state has commenced such prosecution. Together, however, they provide a further limitation on Congress's authority to create trials in military tribunals—one rooted in what Akhil Amar might describe as a constitutional architecture supporting Article III trials.[255] Limiting military trials serves this structural design not only by ensuring that the Constitution's criminal process guarantees are maintained within criminal prosecutions once initiated, but also by constraining Congress's authority to bring a criminal prosecution in other fora, including military tribunals, where those guarantees may not apply or apply selectively and with less force.[256] Article III and the Constitution's criminal procedure amendments thus operate both as endogenous and exogenous constraints on federal prosecutorial power.

Historically, military-based exceptions to Article III criminal process have mainly been confined to exigent circumstances, where military tribunals filled a gap in civilian court jurisdiction, and to court-martial jurisdiction over servicemembers, which rests on unique concerns about maintaining internal discipline within the armed forces.[257] *Quirin* recognized an additional exception in the form of the law-of-war

253. The Supreme Court has focused on the severity of the crime in addressing the scope of the jury trial mandate of Article III and the Sixth Amendment, recognizing an atextual exception for petty offenses, which it has defined as those punishable by six months or less, and which may include contempt. *See, e.g.*, *Bloom v. Illinois*, 391 U.S. 194, 196–97 (1968); Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the 'Petty Offense' Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 108–11 (2013) (discussing the origins of the "petty offense" exception).

254. U.S. CONST. amend. V.

255. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 138–39 (1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

256. Order Denying Motion to Recognize that the Constitution Governs the Military Commissions, *United States v. Mohammed*, AE 057C, Jan. 15, 2013, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE057C(KSM%20et%20al)).pdf (declining to decide whether or which provisions of the Constitution apply to military commissions at Guantánamo absent a specific challenge).

257. *Ex parte Quirin*, 317 U.S. 1, 26–27 (1942).

commission, although the Court studiously avoided opining on this exception's permissible scope.[258] The more strictly this exception is construed, the securer the civilian criminal-process guarantees under Article III and the Fifth and Sixth Amendments are from potential circumvention. Vladeck has thus argued that this exception should be confined to its "narrowest defensible terms" by requiring that the international law-of-war violation be clear.[259] This proposed limitation would not only bar Congress from establishing military jurisdiction over non-international law violations, as in *Hamdan II* and *Bahlul*, but would also preclude such jurisdiction over arguable international law violations. Professor Chad DeVeaux proposes placing even more stringent limitations on military commissions by requiring that the defendant both be part of a state-affiliated military unit and admit his combatant status.[260] DeVeaux would therefore effectively limit *Quirin* to its facts, allowing only a small sub-category of international-law violations to be tried by military commission and largely precluding the commissions' application to the war on terror, where the offender typically is not part of a state-affiliated military unit. Instead, commission jurisdiction would be confined to international armed conflicts, defined under international law as conflicts between state parties.[261]

These proposals suggest the various ways international law can inform and impact Article III's structural protections by limiting Congress's authority to subject offenses to criminal trial by military commission. Those protections encompass not only Article III's guarantees of judicial independence but also the umbrella of procedural protections afforded individuals subject to federal prosecution. International law's relationship to Article III-based criminal process guarantees may be understood both formally and functionally. As described below, the Supreme Court's jurisprudence addressing the line between Article I and Article III courts in the context of agency and bankruptcy proceedings provides an additional perspective on international law's possible role in defining the permissible boundary of military commission jurisdiction.

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258. *Id.* at 46 ("We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. . . . We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.").

259. Vladeck, *The Laws of War*, *supra* note 6, at 337.

260. Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and Dubious Legacy of* Ex parte Quirin, 42 AKRON L. REV. 13, 21 (2009). Professor DeVeaux would further require that any crimes prosecuted by a military commission have been committed during a congressionally declared war. *Id.*

261. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

In *Stern v. Marshall*,[262] the Court privileged a formalist approach in finding that Article III prohibits bankruptcy judges from exercising jurisdiction over a state law tortious interference counterclaim.[263] Chief Justice Roberts' opinion for a divided court expressed support for the public/private rights distinction to cabin exceptions to Article III to definable categories. Echoing concerns previously articulated in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[264] Roberts suggested a discomfort with any doctrinal framework that does not impose clear boundaries on congressional power to move disputes outside of Article III courts.[265] Such a framework must instead, as Justice Scalia previously described, be "anchored in rules" to preserve the essential functions of Article III courts.[266] Roberts thus voiced concern about encroachments on Article III authority, which although seemingly limited at first, could expand over time.[267] He also expressed little sympathy for the argument that denying bankruptcy court jurisdiction would lead to significant delays, additional costs, and other deleterious consequences.[268]

Requiring that the offense constitute a crime under international law provides the type of formal boundary marker that *Stern* suggests is necessary to prevent an erosion of Article III authority. Even if international law is evolving, it provides a discernable line—one applied frequently by international criminal tribunals in war crimes prosecutions. By the same token, the government's U.S. common law-of-war theory might be characterized as the type of innovation of which *Stern* seemed skeptical, a point Rogers alluded to in her opinion in *Bahlul*.[269] If one views *Stern* as signaling the triumph of formalism over functionalism, it would seem anomalous to relax one margin of Article III jurisdiction on pragmatic grounds while insisting on rigidity elsewhere.

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262. 131 S. Ct. 2594 (2011).

263. *Id.*

264. 458 U.S. 50, 68–72 (1982) (holding that bankruptcy judges could not decide a state-law contract claim). Although the Court did not agree on its scope, it relied on the "public rights" doctrine to determine which cases Congress could assign to non-Article III courts. *See id.* at 69–72 (plurality opinion); *id.* at 90–91 (Rehnquist, C.J., concurring in the judgment).

265. *Stern*, 131 S. Ct. at 2605, 2619.

266. *Granfinanciera v. Nordberg*, 492 U.S. 33, 70 (1989) (Scalia, J., concurring).

267. *Stern*, 131 S. Ct. at 2620 ("Slight encroachments [on Article III] create new boundaries from which legions of power can seek new territory to capture.") (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion)).

268. *Id.* at 2619.

269. *Al Bahul v. United States*, No. 11-1324, 2014 WL 3437485, at *25 (D.C. Cir. July 14, 2014) (Rogers, J., concurring in the judgment in part and dissenting).

Stern notwithstanding, the Court's jurisprudence in this area is hardly uniform. The Court has previously approached Congress's authority to create non-Article III tribunals more pragmatically. In *Thomas*, the Court emphasized that "practical attention to substance rather than doctrinal reliance on formal categories should inform application of Article III" to agency adjudications.[270] *Schor* endorsed a similar approach, cautioning against "bright-line rules . . . [that] yield broad principles applicable in all Article III inquiries" and focusing on practical consequences of jurisdictional rules.[271]

Attention to such consequences might, on the one hand, favor relaxing the requirement of Article III jurisdiction to accommodate the demands of armed conflict and the pressures transnational terrorism generates for a more flexible adjudicatory system like military commissions. Both Brown and Kavanaugh note the potential value of more robust military commission jurisdiction in addressing today's global security threat by terrorist actors.[272] The expansion of military commission jurisdiction based on a domestic common law theory of war crimes—as opposed to a crisp international-law-based line—would be warranted under their approach if it mitigated those threats by facilitating the more effective prosecution of inchoate offenses such as MST and conspiracy.

But focusing on practical consequences could also yield the opposite conclusion. Military commissions have thus far proven notoriously inefficient in delivering outcomes. Military commissions have to date generated only eight convictions,[273] while costing the U.S. more than $600 million since 2007.[274] Not surprisingly, empirical studies acknowledge the comparative advantages of Article III prosecutions over military commissions in obtaining convictions without sacrificing fair trial guarantees.[275] Further, commissions have failed to achieve

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270. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

271. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986).

272. *Bahlul*, 2014 WL 3437485, at *51 (Brown, J., concurring in the judgment in part and dissenting in part); *id.* at *64 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

273. *Myth v. Fact: Trying Terror Suspects in Federal Courts*, HUM. RTS. FIRST, http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Federal_Court_Myth_vs_Fact.pdf (last visited Sept. 18, 2014).

274. Letter from Secretary of Defense Adam Smith, Ranking member, Committee on Armed Services, U.S. House of Representatives (June 27, 2013), http://democrats.armedservices.house.gov/index.cfm/files/serve?File_id=ac9bd462-786e-42ef-ae54-1da2ceb6c3c9.

275. *See, e.g.*, Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court*, HUM. RTS. FIRST, May 2008, http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf. Even commentators who recognize a place for the military commissions in U.S.

widespread acceptance or legitimacy after more than a decade.[276] Rather than leading the international community by militarizing the prosecution of terrorism offenses and generating a more expansive definition of war crimes, commissions have made the U.S. an outlier and generated criticism by the international community.[277]

Moreover, the current absence of commission prosecutions outside the limited set of Guantánamo legacy cases and the continued reliance on Article III courts for newly seized terrorism suspects suggests that the cost of cabining commission jurisdiction based on an offense's status under international law would be insignificant. By the same token, the relatively limited use of military commissions might also suggest that they do not pose a significant threat to Article III courts. But by providing jurisdiction over commonly charged federal terrorism offenses, such as MST and conspiracy, commissions exert a powerful shadow effect on the administration of criminal justice, one with the potential to alter forum allocation decisions.[278] Past experience shows how these decisions can be influenced by the increased likelihood of obtaining a conviction in military commissions, the heightened secrecy surrounding commissions, and commissions' association in the public eye with being tough on terrorism.[279] The jurisdictional overlap over terrorism offenses provided by military commissions might, as Aziz Huq has argued, be understood as a safety valve, providing an alternative venue for cases that present evidentiary or procedural hurdles for Article III courts, thereby preserving rigorous Article III adjudication for the bulk of other

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counter-terrorism policy recognize various advantages of Article III courts. *See* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 50 (2011) (describing the "body of established procedures and years of precedent and experience to guide the parties and the judges" in federal courts).

276. *See, e.g.*, Dana Carver Boehm, *Guantanamo Bay and the Conflict of Ethical Lawyering*, 117 PENN. ST. L. REV. 283 (2012) (describing how the institutional, ethical, and professional pressures at work on the lawyers involved in the Guantánamo military commissions help undermine their legitimacy); Mason C. Clutter, *Guantanamo: Ten Years After 9/11*, 38 HUM. RTS. 2 (Winter 2011) (noting the continued problems with military commissions); Joshua L. Dratel, *Military Commission Mythology*, 41 U. TOL. L. REV. 783, 787–88 (2009) (describing how the commissions' failure to prescribe satisfactory rules or standards has undermined their legitimacy).

277. Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U. N.H. L. REV. 237, 239 (2011).

278. *See* Aziz Huq, *Forum Choice for Terrorism Suspects,* 61 DUKE L.J. 1416, 1459 (2012) (noting the jurisdictional overlap that would be created by the acceptance of MST as a viable military commission charge).

279. Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer (describing the factors that prompted the Obama administration to abandon its original plan to try the 9/11 defendants in federal court rather than in a military commission).

cases.[280] But this overlap also poses an ongoing risk of forum diversion, allowing for cases to be channeled to a non-Article III forum in a manner inconsistent with the protections of Article III criminal trials, including judicial independence and public access. Further, commissions have additional, second-order effects, such as helping perpetuate the existence of a war paradigm in combating terrorism—a paradigm the president has said is not in the country's long-term strategic interest.[281]

The potential breadth of military commissions could erode Article III jurisdiction if commissions were used in the manner Brown and Kavanaugh suggest going forward.[282] Jurisdiction under the MCA to try offenses such as MST and conspiracy not only lacks any geographic constraint but also extends indefinitely into the future, providing a permanent military forum to prosecute a wide swath of terrorism offenses in current and future hostilities. It thus poses durational issues distinct from the traditional international armed conflict paradigm that informed *Quirin*'s exception to Article III jurisdiction for law-of-war violations with its more sharply defined temporal parameters.[283] The MCA's broadly worded grant of personal jurisdiction over "unprivileged enemy belligerents" does little to alleviate these concerns. The statute defines that category to include not only members of al Qaeda but also any individual who has "engaged in . . . [or] purposefully and materially supported hostilities against the United States or its coalition partners," as long as they are not lawful combatants.[284] While not all individuals prosecuted under the federal MST statute could be charged in a military commission under this language, a significant portion could, particularly

280. Huq, *supra* note 278, at 1460–61.

281. *See Remarks by the President at the National Defense University*, WHITE HOUSE (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war -- through drones or Special Forces or troop deployments -- will prove self-defeating, and alter our country in troubling ways."); *see also* Harold Hongju Koh, *Ending the Forever War: One Year After the President's NDU Speech*, JUST SECURITY (May 23, 2014, 8:01 AM), http://justsecurity.org/10768/harold-koh-forever-war-president-obama-ndu-speech/.

282. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

283. The trigger for the end of armed conflict—the cessation of hostilities—is easier to determine in a traditional armed conflict against states than in a conflict against a non-state actor such as al Qaeda. *See generally* Jonathan Hafetz, *Detention Without End?: Reconsidering the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 U.C.L.A. L. REV. 326 (2014) (comparing the temporal parameters of international and noninternational armed conflicts).

284. 10 U.S.C. § 948a(7) (2012). The MCA defines hostilities to include "any conflict subject to the laws of war." *Id.* § 948a(9).

if the term "hostilities" were read expansively.[285] Moreover, the difficulty of obtaining pretrial review of commission jurisdiction militates in favor of articulating sharp *ex ante* constraints on commission jurisdiction since prosecutorial forum decisions are likely subject to challenge only ex post, after trial and conviction.[286]

Limiting the law-of-war commissions to violations of international law would help cabin this military exception to Article III jurisdiction to a narrow band of offenses that are widely recognized as exceptional because they violate international norms. To qualify, the offense would need to be of such a nature that it overcomes the strong presumption in favor of civilian court prosecution and justifies a carve-out from the ordinary requirements of an Article III criminal trial. It would constrict the state's ability to create overlapping jurisdiction over terrorism offenses and minimize the potential seepage from Article III courts to military tribunals.

C. Past Practice and International Law

Tradition and past practice also highlight international law's relevance in defining the constitutional line between civilian and military jurisdiction. Past practice has frequently been recognized as a principle of constitutional interpretation. David Strauss' common law approach to constitutional interpretation, for example, views past practice as significant for its manifestation of humility and restraint.[287] Such practice, as Curtis Bradley and Trevor Morrison have observed, can "reflect collective wisdom generated by the judgments of numerous actors over time."[288] The Supreme Court has often interpreted the

285. It would likely include, for example, the recent prosecution of Ahmed Abdulkadir Warsame, a Somali national, who was charged in federal court with providing assistance to al Shabab in Somalia. *See* Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 6, 2011, at A1. It arguably would also cover Dzhokhar Tsarnaev, the suspect in the Boston Marathon bombing, who was likewise charged in federal court. *See* Katharine Q. Seelye & Michael S. Schmidt, *Boston Bombing Suspect Indicted on 30 Counts*, N.Y. TIMES, June 28, 2013, at A12.

286. *See Hamdan v. Gates*, 565 F. Supp. 2d 130, 136–37 (D.D.C. 2008) (denying Hamdan's motion to enjoin his commission trial for lack of personal and subject matter jurisdiction because Congress had clearly channeled review to a post-conviction appeal process).

287. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) ("[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.").

288. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 426 (2012).

Constitution's provisions in light of past practice—or what Justice Frankfurter termed the "gloss that life has written upon them."[289]

Past practice includes prior reliance on international law as a tool of constitutional interpretation. Professor Jean Gailbraith has explained how past uses of international law can provide a method for interpreting the separation of powers,[290] while Cleveland has noted how "historical practice answers the legitimacy objection that international law is 'foreign' to the American constitutional tradition."[291]

In many instances, prior treatment of international law has been cited in service of broad claims of presidential power. As Gailbraith notes, the Solicitor General has relied on past practice dating to the Washington administration in arguing for exclusive presidential power to recognize foreign governments.[292] In *Quirin*, the Court cited past practice—in particular, the prosecution of enemy spies—as authority for prosecuting enemy saboteurs in military commissions during World War II.[293] Past practice has likewise been invoked in connection with the current military commissions on both sides of the debate.[294] While past practice provides some support for extending military commission

289. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). For examples of how past practice can influence constitutional interpretation, see *District of Columbia v. Heller*, 554 U.S. 570, 605–09 (2008) (examining post-ratification history from the 1800s in interpreting the Second Amendment).

290. Gailbraith, *supra* note 206, at 1046.

291. Cleveland, *supra* note 216, at 7.

292. Gailbraith, *supra* note 206, at 1044. Professor Gailbraith also cautions, however, that it "is important to look beneath the surface and see if past practice really supports what it is said to support and, if so, whether the reasons underlying this practice remain true today." *Id.* at 1045. In the case of the recognition power, for example, she notes that the absence of congressional statutes proclaiming recognition more likely demonstrates respect "for the international legal principle that states conduct their official business through a single representative authority." *Id.* at 1044.

293. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) ("The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.").

294. *Hamdan II*, 696 F.3d 1238, 1252–53 (D.C. Cir. 2012) (describing government arguments). *Compare Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485, at *26 (D.C. Cir. July 14, 2014) (Rogers, J., concurring in the judgment in part and dissenting) ("A 'tradition [ ]' is readily identified and found in established practices; it is not based on a 'few scattered . . . anomalies.'") (quoting *NLRB v. Noel Canning*, No. 12–1281, slip op. at 21 (U.S. June 26, 2014)), *with id.* at *62 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("[H]istorical practice strongly supports the conclusion that international law is not a constitutional constraint when Congress proscribes war crimes triable by military commission.").

jurisdiction beyond crimes under international law, it does not support a line as broad as has been proposed.

The historical case for commission jurisdiction over offenses such as MST and conspiracy and against international law as a constraint on such jurisdiction is essentially two-fold. First, it rests on several examples where the United States sought to prosecute offenses as violations of a domestic common law of war, particularly during the American Civil War.[295] Second, it relies on longstanding congressional authority to prosecute spying and aiding the enemy in military tribunals even though those offenses do not violate international law, as well as the numerous instances in which military tribunals prosecuted offenders for spying.[296] Neither suggests a robust tradition recognizing violations of a domestic common law of war as a separate offense category, although for different reasons.

In a recent article, Haridimos Thravalos maintains that military commissions have historically exercised jurisdiction over a subset of domestic law-of-war violations independent of international law.[297] Much of the evidence cited in the article, however, involves military commissions that exercised a different type of jurisdiction than the current commissions.[298] While hundreds of individuals were prosecuted in military commissions during the Civil War, these commissions, as David Glazier has emphasized, typically exercised concurrent jurisdiction over domestic criminal offenses based on martial law and over war crimes.[299] Because the precise basis for the commissions' jurisdiction was not always clear, Justice Stevens noted, in *Hamdan I*, these Civil War precedents "must . . . be considered with caution."[300]

The *Bahlul* en banc decision placed particular emphasis on the military commission prosecution of the individuals responsible for the assassination of President Lincoln who were charged with the offense of

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295. *See* Fisher, *supra* note 80, at 29; Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1032 n.114 (2007).

296. Brief for the United States, *Bahlul*, *supra* note 239, at 30–31.

297. *See* Haridimos Thravalos, *History,* Hamdan*, and Happenstance*, 3 HARV. NAT'L SEC. J. 223, 281 (2012) (arguing, based on Civil War and World War II precedent, that "'conspiracy to violate the law of war' is, and has been since the Civil War, a violation of the law of war triable by law-of-war military commission under the American common law of war").

298. *Id.* at 259–60 ("These three military commission trials, contrary to the *Hamdan* plurality's assertions, can therefore fairly be described as pure law-of-war military commissions that tried law-of-war violations.").

299. Glazier, *The Misuse of History*, *supra* note 5, at 335, 341–44.

300. *Hamdan I*, 548 U.S. 557, 596 n.27 (2006) (plurality opinion).

conspiracy.[301] But, as Rogers observed, the Lincoln assassination, like most other Civil War precedents, is of limited value because the charges there alleged participation in a completed war crime, not inchoate conspiracy.[302] Both the *Bahlul* en banc majority and Kavanaugh also stressed that the defendants in *Quirin* were charged with conspiracy.[303] But the *Quirin* Court upheld that commission's jurisdiction based on the separate charge that the petitioners had violated the law of war by removing their uniforms and crossing enemy lines to commit sabotage.[304] The Court thus not only referenced the international law of war in its analysis but also upheld the charge that alleged a completed law-of-war violation."[305]

Perhaps most significantly, the Civil War commissions, as well as the World War II-era commissions, predated major developments in the law of war. The modern law of war and the various international criminal tribunals that have regularly applied it have refused to recognize conspiracy or MST as war crimes.[306] They have instead adopted joint criminal enterprise as a theory of vicarious liability for completed law-of-war offenses and required the defendant's participation in the commission of the crime, finding that mere membership or conspiring to commit crimes is insufficient.[307] Thus, while there may be past instances

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301. *Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485, at *16–17 (D.C. Cir. July 14, 2014); *id*. at *58 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("I base th[e] conclusion [that U.S. military commission precedents treated conspiracy as an offense triable by military commission] in substantial part on the 1865 military commission conviction of the conspirators who plotted to assassinate President Lincoln.").

302. *See id.* at *34 (Rogers, J., concurring in the judgment in part and dissenting); *see also Mudd v. Caldera*, 134 F. Supp. 2d 138, 147 (D.D.C. 2001) (affirming, on later federal court review, the original military commission's determination that the defendant, Dr. Samuel Mudd, was properly convicted under the law of war for having "aided and abetted President Lincoln's assassins").

303. *Bahlul*, 2014 WL 3437485, at *17; *id.* at *59 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

304. *Ex parte Quirin*, 317 U.S. 1, 38 (1942).

305. *Id.* ("The offense was complete when with [hostile] purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification.").

306. *See, e.g.*, Jonathan Hafetz, *Diminishing the Value of War Crimes Prosecutions: A View of the Guantanamo Military Commissions from the Perspective of International Criminal Law*, CAMBRIDGE J. INT'L & COMP. L. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405704; Link, *supra* note 230, at 455–56 (discussing the ICTY).

307. *Bahlul*, 2014 WL 3437485, at *31 (Rogers, J., concurring in the judgment in part and dissenting) (citing *Prosecutor v. Milutinovic,* Case No. IT–99–37–AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003); *Rwamakuba v. Prosecutor,* Case No. ICTR–98–44–AR72.4, Decision on Interlocutory Appeal

where military commissions appeared to prosecute offenses without reference to international law, these examples diverge from contemporary war crimes jurisprudence, which is based on international law. Indeed, the notion of domestic war crimes appears less a distinct body of law than a novel conceptual framework superimposed over conduct that international law has not seen fit to criminalize and designed to overcome the ex post facto objections raised in *Hamdan II* and *Bahlul*.

Military jurisdiction to try spying—recognized by statute since 1776[308]—provides stronger evidence of a tradition of prosecuting non-international law-of-war offenses in military commissions. Longstanding military jurisdiction to try the offense of aiding the enemy, also triable by statute since 1776[309] and not a war crime under international law, offers additional evidence of this tradition.[310]

One explanation, suggested by Justice Stone in *Quirin*, is that the military's authority to try these offenses may be regarded as "a contemporary construction" of exceptions to the criminal trial guarantees of Article III and the Fifth and Sixth Amendments.[311] A related explanation is that these exceptions are supported by historical practice.[312] By contrast, military jurisdiction over offenses such as MST and conspiracy runs counter to a past practice of prosecuting inchoate terrorism offenses in federal court.

Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 30 (Oct. 22, 2004)).

308. WINTHROP, *supra* note 24, at 22; David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 4 (1990); *see also* Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 13 (2005) (discussing statutory revisions). The Articles of War of 1806 authorized the death penalty against alien enemy spies sentenced by general courts-martial. American Articles of War of 1806, art. 101, § 2, *reprinted in* WINTHROP, *supra* note 24, at 985.

309. Ohman, *supra* note 308, at 13.

310. Jordan J. Paust, *Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit*, 45 CORNELL INT'L L.J. 367, 376–78 (2012).

311. *Ex parte Quirin*, 317 U.S. 1, 41 (1942); Vladeck, *The Laws of War*, *supra* note 6, at 318 n.125.

312. David Glazier offers the additional explanation that these offenses were specifically authorized by Congress and thus do not share the common law basis of later tribunals created to extend U.S. jurisdiction over individuals who were not otherwise subject to military justice. David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2027 (2003). But this explanation would address only the retroactive prosecution of MCA-based offenses that were not previously covered by statute and not the prospective prosecution of offenses such as conspiracy and MST that are now specifically authorized by statute.

Spying and aiding the enemy, moreover, are by definition restricted in scope. Historically, to be prosecuted as a spy, an individual had to be caught behind enemy lines, and his "successful return to friendly forces [served as] a bar to punishment."[313] Aiding the enemy has traditionally been understood to include a breach of duty, thus confining its application to individuals who, by virtue of their citizenship or residence, enjoy the protection of the injured state.[314] Aiding the enemy could not therefore be applied broadly to an opposing force, in contrast to MCA-based offenses such as MST or conspiracy. Thus, to the extent spying and aiding the enemy support a constitutional line more elastic than one bounded by international law, those offenses are limited in scope, thus mitigating the risks of a significant intrusion on traditional Article III criminal jurisdiction.

Additionally, while spying may not violate international law,[315] judicial acknowledgment of military jurisdiction over spying in *Quirin* was premised on the assumption that spying does in fact constitute such a violation.[316] Thus, even though the Supreme Court may have misconstrued the content of international law in addressing spying, it validated a mode of interpretation that looks to international law to define the constitutional boundaries of military commission jurisdiction.

Spying, moreover, may be viewed as an offense that international law allows to be tried by military commission, even if it does not constitute a crime under international law. Reframing the jurisdictional line in this manner would potentially allow for wider military commission jurisdiction since it would not require that the offense actually violate international law. But it still would not encompass MST and conspiracy since international law does not recognize them as offenses triable by the military.[317]

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313. Glazier, *Still a Bad Idea*, *supra* note 5, at 84 (discussing murder of a privileged belligerent in violation of the law of war).

314. Glazier, *supra* note 78, at 154 (stating that in order to commit the crime of aiding the enemy, "one must logically be a citizen or resident of the U.S., or a resident of territory occupied by U.S. military forces who owes a temporary duty of allegiance to the occupier in exchange for its protection"); *see also* Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 135 (2011).

315. Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 621–22 (2012); Samuel Kleiner & Reema Shah, Note, *Running Out of Options: Expiring Detention Authority and the Viability of Prosecutions in the Military Commissions Under* Hamdan II, 32 YALE L. & POL'Y REV. (forthcoming 2014).

316. *Quirin*, 317 U.S. at 41 (noting that statutory authorization to try enemy spies in a general court-martial was based on "the law and usage of nations") (quoting the American Articles of War of 1806, *reprinted in* WINTHROP, *supra* note 24.

317. *See supra* notes 223–24 and accompanying text.

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International law can thus inform the permissible limits of military commissions in several ways. First, the Constitution's internationalist orientation provides support for drawing a jurisdictional line between military and civilian courts in light of international law. Not only do Congress's Article I powers to create commissions reference international law, but international law also advances a U.S. strategic interest in demonstrating membership in the civilized body of nations. Second, by imposing a limitation on military jurisdiction, international law helps maintain the structural protections provided by Article III and its umbrella of criminal process guarantees. Third, past practice supports drawing a jurisdictional line based on international law. Although commissions have previously been used to prosecute spying and aiding the enemy, offenses that are not crimes under international law, these two counter-examples provide only limited support for recognizing a separate body of domestic war crimes triable by military commission.

III. INTERNATIONAL LAW'S RELATIVE ADVANTAGES AS A MEANS OF CABINING MILITARY COMMISSION JURISDICTION

International law is not the only way to regulate the jurisdiction of military commissions. This Part examines other possible methods. It concludes that these methods lack important advantages of an international law-based limit on the commissions' subject matter jurisdiction.

A. Regulating Commissions Through Procedure

In a series of pathmarking articles,[318] as well as in a posthumously published book,[319] the late Professor William Stuntz focused much-needed attention on the problems of regulating criminal law through procedure without a corresponding attempt to address criminal law's substance. Stuntz painted a bleak picture of the U.S. criminal justice system, with discriminatory policing, grossly one-sided prosecutorial power, draconian punishments, and widespread inequality in its treatment of racial minorities and the poor.[320] Stuntz blamed this

318. *See, e.g.*, William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) [hereinafter Stuntz, *The Uneasy Relationship*].

319. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

320. *Id.* at 7.

situation partly on Warren-era reforms to constitutional criminal procedure that strengthened the rights of criminal defendants under the Fourth, Fifth, and Sixth Amendments.[321] As Stuntz observes, those reforms initially sought to address problems stemming from racial bias in the criminal justice system.[322] But Stuntz argues that they ultimately failed because they did not establish any substantive limit on the state's prosecutorial power. Worse, he says, the reforms had the perverse effect of giving the government an incentive to generate bad substantive rules as means of avoiding the additional costs associated with judicially created procedural safeguards.[323] As Stuntz observes, "[t]he greater the procedural hurdles the government must overcome, the greater the incentive to widen the criminal net to evade them."[324] Rather than achieving their desired goal of protecting defendants, he argues, criminal procedure reforms had the unintended consequence of prompting expansions in criminal law's substantive scope and harsher sentences, which disproportionately harmed the same racial minorities the reforms were intended most to protect.[325]

Stuntz accompanied his critique with a call to reform.[326] He insisted that courts correct this imbalance by addressing criminal law's substance.[327] He saw in Supreme Court decisions such as *Papachristou v. City of Jacksonville*[328] and *Lambert v. California*[329] the promise of a path

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321. *See* Stuntz, *The Uneasy Relationship*, *supra* note 318, at 62. In addition, Professor Stuntz faults the diminished local control over policing. STUNTZ, *supra* note 319, at 7.

322. Stuntz, *The Uneasy Relationship*, *supra* note 318, at 6.

323. Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 318, at 7–8.

324. *Id.* at 19; *see also* Stuntz, *The Uneasy Relationship*, *supra* note 318, at 7 ("In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing.").

325. Stuntz, *The Uneasy Relationship*, *supra* note 318, at 28, 75.

326. *See* Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 318, at 31–37.

327. *Id.* (describing substantive limitations based on a constitutional mens rea requirement and on a constitutionalized desuetude doctrine, which would prevent the government from criminalizing behavior an ordinary person might engage in or that ordinary citizens might not expect to be treated as a crime). Other scholars have proposed a constitutional proportionality principle as a means of reining in criminal law's substance by ensuring that particular offenses are sufficiently severe to warrant punishment. *See, e.g.*, Ronald Jay Allen, Mullaney v. Wilbur*, the Supreme Court, and The Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 295–300 (1977); John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1365–87 (1979).

328. 405 U.S. 156 (1972) (striking down a Florida statute on void-for-vagueness grounds).

not taken, one where the Court sought to apply constitutional limitations to the government's authority to criminalize conduct rather than grafting additional procedural requirements onto its ability to enforce existing prohibitions.[330] Only substantive legal regulation, Stuntz argued, could reform or address the criminal justice system's increasing tilt towards expansive liability, harsh punishments, and an excessive focus on process rather than factual adjudication that harmed innocent defendants.[331]

Stuntz's work, while extraordinarily influential, is not without its critics. Professor Stephen Schulhofer, for example, has challenged Stuntz's assertion that Warren-era reforms led to over-criminalization and harsher sentences.[332] Schulhofer views the surge in America's punitive policies in the 1980s and 1990s as a response to the widespread "disillusionment with rehabilitation and the parole system," the "crack epidemic" of the 1980s, and media focus on "sensational crimes by repeat offenders" during the 1990s.[333] Moreover, Schulhofer observes,[334] legislatures enacted harsher sentencing policies during a period when courts had cut back on key Warren-era procedural decisions, such as *Mapp v. Ohio*[335] and *Miranda v. Arizona*.[336]

Even Schulhofer, however, accepts Stuntz's conclusion that Warren-era reforms failed to halt the expansion of substantive criminal liability.[337] Stuntz's work highlights procedure's limitations as a regulatory tool as well as the risks of neglecting criminal law's widening substantive net.[338] While focused on the criminal justice system, it offers insights into attempts to regulate military commissions and the military treatment of terrorism suspects more generally.

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329. 355 U.S. 225 (1957) (invalidating a conviction for nonregistration by a felon where no mens rea was required as to the need to register).

330. Stuntz, *Substance, Process, and the Civil-Criminal Line*, *supra* note 318, at 21, 33–34.

331. *Id.*

332. Stephen J. Schulhofer, Review, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045 (2013).

333. *Id.* at 1077.

334. *Id.*

335. 367 U.S. 643 (1961).

336. 384 U.S. 436 (1966).

337. Schulhofer, *supra* note 332, at 1073–76 (challenging Stuntz's assertion that procedural reforms harmed the defense of the poor and the innocent); *see also* David Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 60–64 (2006) (suggesting that it is "unlikely" that "legislators would feel more responsibility to regulate policing across the board if the Supreme Court had stayed completely out of the picture" and that poor and minority defendants might be even worse off today without the Warren-era criminal procedure reforms Stuntz critiques).

338. Schulhofer, *supra* note 332, at 1048.

Review of the government's authority to detain terrorism suspects in military custody since 9/11 has focused more intensely on procedure than substance.[339] In the Guantánamo detainee litigation, for example, federal courts delayed confronting the scope of the president's authority to hold prisoners indefinitely in military custody, focusing instead on the availability of habeas corpus jurisdiction and associated procedural safeguards once that authority was exercised.[340] The result is a patchwork of jurisprudence on the procedural and evidentiary rules governing detainee habeas proceedings[341] that has largely left in place broad substantive detention authority.[342] Meanwhile, in the shadow of judicial acquiescence, this substantive authority has become entrenched through practice across two administrations[343] and through legislation ratifying the executive's authority to detain indefinitely based on membership in or support for al Qaeda or associated forces.[344]

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339. Jenny S. Martinez, *Process and Substance in the "War on Terror*," 108 COLUM. L. REV. 1013 (2008) (describing the Supreme Court's focus on procedural issues at the expense of attention to fiercely contested questions around the substantive scope of the president's war-on-terrorism detention authority).

340. The Guantánamo detainee habeas litigation began in early 2002. *See Rasul v. Bush*, 542 U.S. 466 (2004) (describing the history of the detainee habeas litigation). Courts did not begin to address the scope of the government's detention authority until after the Court's 2008 decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), affirming detainees' constitutional right to habeas corpus under the Suspension Clause and describing in broad contours the procedural protections detainees must be afforded in challenging their detention. *Id.* at 783; *see also id.* at 779 (suggesting that the scope of the president's substantive legal authority to detain would be addressed on remand).

341. *See generally* Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus after* Boumediene, 57 WAYNE L. REV. 99 (2011); Stephen I. Vladeck, *The D.C. Circuit after* Boumediene, 41 SETON HALL L. REV. 1451 (2011).

342. *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (holding that the president may detain under the Authorization for Use of Military Force (AUMF) a person who was part of or who purposefully and materially supported enemy forces engaged in hostilities against the United States or its coalition partners). Decided in 2010—more than eight years after the first habeas petitions were filed on behalf of Guantánamo detainees—*Al-Bihani* marked the first appellate decision on the scope of the government's substantive authority to detain prisoners at Guantánamo.

343. The Obama administration continued the prior administration's policy of indefinite war-on-terrorism detention with only minor and largely cosmetic modifications. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, 624 F. Supp. 2d 27 (D.D.C. Mar. 13, 2009) (Nos. 05-0763, 05-1646, 05-2378) (requiring that the president's detention authority under the AUMF be informed by law-of-war principles but maintaining that this authority encompasses the detention of those who were part of or substantially supported al Qaeda, the Taliban, or an associated force).

344. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1562 (2011) (codified at 10 U.S.C. § 801 note (Supp. 2011)) (authorizing the president to detain indefinitely "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in

By contrast, courts initially focused more on the president's authority to hold detainees arrested in the U.S. in military custody. Admittedly, this is a small sample set, consisting of a class of two.[345] Courts, moreover, never definitively ruled on the validity of this domestic military detention authority, with the Supreme Court repeatedly declining to resolve divisions in lower courts over the issue.[346] Yet, the strong judicial sentiment against the existence of such detention authority arguably contributed to its disuse.[347]

Stuntz's work suggests that the detainee habeas litigation may have had the perverse effect of solidifying the government's substantive detention power by providing an incentive to counteract judicially created procedural protections. Jack Goldsmith goes further, arguing that the habeas litigation has helped legitimate and institutionalize executive-branch power to detain without charge by imposing procedural constraints on the exercise of that power.[348]

Judicial review of military commissions has followed a similar trajectory—at least until recently. Although Justice Stevens' plurality opinion in *Hamdan I* addressed the commissions' substantive scope, rejecting the government's conspiracy charge,[349] the Court's holding centered on the commissions' procedural shortcomings.[350] The Court struck down the military commissions established under President Bush's November 2001 executive order because they did not comply with the procedural requirements imposed by Congress under the

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hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces").

345. The two prisoners arrested in the United States and held in military custody were Jose Padilla and Ali al-Marri. *See* JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM 73–74 (2011).

346. *See Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam) (holding the president has authority to detain indefinitely a non-citizen arrested in the United States), *vacated as moot sub nom. Al-Marri v. Spagone*, 555 U.S. 1220 (2009); *Padilla v. Rumsfeld*, 352 F.3d 695, 718 (2d Cir. 2003) (holding that the president has no authority to detain indefinitely a U.S. citizen arrested in the United States), *rev'd on other grounds sub nom. Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

347. The U.S. has not exercised military detention authority over a person arrested in the United States since June 2003. *See Al-Marri*, 534 F.3d at 217. The Obama administration, while not denying it lacks such authority, has nonetheless disavowed its use. *See Remarks of John O. Brennan, Strengthening Our Security by Adhering to Our Values and Laws*, WHITE HOUSE (Sept. 16, 2011), http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

348. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 106–08 (2012) (explaining how the detainee habeas litigation has helped empower the president and the military).

349. *Hamdan I*, 548 U.S. 557, 595–600 (Stevens, J., plurality opinion).

350. *Id.* at 611–12.

UCMJ.[351] The Court emphasized the commissions' power to exclude the defendant from the courtroom and the lack of restrictions on the use of hearsay, which heightened the risk of allowing evidence obtained through torture and other coercion.[352] The Court also found that procedural flaws rendered the commissions invalid under international law, as incorporated by the UCMJ.[353] *Hamdan I* prompted Congress to enact the 2006 MCA, which sought to provide a comprehensive system for prosecuting terrorism-related crimes in military commissions. Although the statute improved the tribunal's basic fairness, it also expressly authorized the trial by military commission of a long list of offenses, including MST and conspiracy.[354] When Congress amended the MCA in 2009, it again strengthened the commissions' procedural safeguards but left their substantive authority intact.[355] Indeed, Congress refused to eliminate MST from the list of offenses in its 2009 amendments despite concerns expressed by Obama administration officials that an MST conviction by a commission would be vulnerable on appeal since MST is not a war crime under international law.[356]

Procedural reforms have thus accompanied, if not contributed to, the substantive expansion of military commission jurisdiction. The solidification of commission jurisdiction over offenses such as MST and conspiracy not only affects prosecutorial decisions about current detainees. It also hangs over decisions regarding future prisoners given the MCA's possible prospective application, including those held in connection with hostilities beyond the current armed conflict against al Qaeda and its affiliates. The trajectory of the post-9/11 military commissions suggests the limited capacity of procedure to cabin their use.

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351. *Id.* at 614.

352. *Id.* at 622–25.

353. *Id.* at 631–33 (concluding that the commissions violated Common Article 3's requirement of "a regularly constituted court," which in the U.S. military justice system is a courts-martial); *id.* at 644 (Kennedy J., concurring). A plurality further found that the military commissions' procedures violated Common Article 3 of the Geneva Conventions, which requires a trial by "a regularly constituted court" to "afford all the judicial guarantees which are recognized as indispensable by civilized peoples.'" *Id.* at 633–34 (Stevens, J., plurality opinion) (quoting 6 U.S.T. 3316, 3320 (1949) (Art. 3, ¶ 1(*d*))).

354. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1031 (2009).

355. Janet Cooper Alexander, *Military Commissions: A Place Outside the Law's Reach*, 56 ST. LOUIS U. L.J. 1115, 1132 (2012) (noting that the amendments tightened hearsay rules; barred the use of testimony obtained by cruel, inhuman, or degrading treatment; and provided increased resources for the defense).

356. *Military Commissions: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. (2009) (statement of Assistant Att'y Gen. David Kris).

Constraints on federal appellate review further limit the ability to affect the volume and flow of military commission prosecutions through procedural tinkering. The MCA does not authorize interlocutory review by defendants but instead vests the D.C. Circuit with exclusive jurisdiction to review final commission convictions once the defendant has exhausted review in the commission's appellate tribunal—the Court of Military Commission Review (CMCR).[357] Since Congress enacted the MCA in 2006, federal courts have rejected attempts by defendants to obtain pretrial judicial review of their commission prosecution, finding that the commissions now contain sufficient protections to warrant abstention.[358] While the 2009 MCA eliminates the 2006 MCA's express bar on federal jurisdiction except as provided under the statute itself,[359] defendants at most will be able to obtain pretrial review of issues that cannot be addressed through the MCA's structured review process.[360] Given the expanded scope of appellate review under the 2009 MCA,[361] claims of deficiencies in commission procedure will almost certainly fall within that review process, thus requiring case-by-case adjudication in

357. 10 U.S.C. § 950g(a) (2006) (stating that the D.C. Circuit has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission"). The MCA further provides for discretionary review to the U.S. Supreme Court. *Id.* § 950g(d).

358. *See Khadr v. Obama*, 724 F. Supp. 2d 61 (D.D.C. 2010) (rejecting a pre-trial habeas challenge to a military commission trial on abstention grounds); *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136–37 (D.D.C. 2008) (same). In both cases, the district judges relied on the comity-based abstention doctrine recognized in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), which requires the challenger to "submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well" before obtaining federal judicial review. *Id.* at 759–60.

359. Military Commissions Act of 2009, Pub. L. No. 111-84, ch. 47A, sec. 1802, 123 Stat. 2574 (2009) (repealing § 950j(b)). The repealed provision had stated:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

§ 950j(b).

360. *See* Steve Vladeck, *A Guide to Appellate and Collateral Review Under the Military Commission Acts*, LAWFARE (Apr. 4, 2013, 2:42 PM), http://www.lawfareblog.com/2013/04/a-guide-to-appellate-and-collateral-review-under-the-military-commissions-acts/.

361. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, ch. 47A, sec. 1802, § 950f, 123 Stat. 2574 (codified at 10 U.S.C. § 950f (2012)) (defining the scope of appellate review in the CMCR); *id.* § 950g(c) (defining the scope of appellate review in the D.C. Circuit); *see also* Vladeck, *supra* note 360.

the MCA's post-conviction appeals process, first before the CMCR and then before the D.C. Circuit. To the extent courts impose further procedural requirements, they will likely do so incrementally and without significantly impacting the government's ability or desire to bring prosecutions in commissions.

Focusing on substance, by contrast, has greater potential to cabin commission jurisdiction. While challenges to the commissions' substantive scope might be subject to the same limitations on pretrial judicial review as procedural-based challenges—as Hamdan's failed pretrial challenge to his post-MCA prosecution indicates—they can impact a broad category of cases in a way that retail litigation of procedural challenges cannot. Following the D.C. Circuit panel decisions in *Hamdan II* and *Bahlul*, Brigadier General Mark Martins, the commissions' chief prosecutor, recommended withdrawal of the conspiracy charges in pending commission cases.[362] While the Convening Authority denied the request,[363] Martins estimated at the time that the decisions, if upheld, would decrease the number of detainees who could be tried in commissions from approximately 36 to 20.[364] Other offenses, such as spying and murder (or attempted murder) of a privileged belligerent in violation of the law of war, would similarly be vulnerable if commission jurisdiction were limited to war crimes under international law.[365] *Hamdan II* and *Bahlul* may also lead to the reversal of convictions in cases where the defendants originally pleaded guilty to crimes, such as MST, that were not traditionally triable by military commission.[366]

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362. Charlie Savage, *Military Prosecutor Battles to Drop Conspiracy Charge in 9/11 Case*, N.Y. TIMES, Jan. 18, 2013, http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html. The chief prosecutor did, however, retain conspiracy as a theory of liability for substantive offenses in a manner that has been upheld in federal, military, and international law under the doctrine of joint criminal enterprise. *See* Wells Bennett, *Chief Prosecutor Statement on This Week's Hearing in the 9/11 Case*, LAWFARE (Jan. 28, 2013, 3:26 PM), http://www.nytimes.com/2013/01/19/us/pentagon-wont-drop-conspiracy-charge-against-khalid-shaikh-mohammed.html.

363. Savage, *supra* note 362.

364. Jess Bravin, *Guantánamo Detainee Begs to Be Charged as Legal Limbo Worsens*, WALL ST. J., July 15, 2013, at A1.

365. Glazier, *Still a Bad Idea*, *supra* note 5, at 68–78, 83–86 (discussing murder of a privileged belligerent in violation of the law of war); Kleiner & Shah, *supra* note 315 (same). If the charge was traditional spying—as opposed to the more expansive definition of spying in the MCA—it could be upheld based on prior authorization under the UCMJ and past practice. *See supra* text accompanying notes 308–14.

366. Helen Davidson, *David Hicks Launches Appeal Against Terrorism Conviction*, GUARDIAN (Nov. 5, 2013, 3:20 PM), http://www.theguardian.com/world/2013/nov/06/david-hicks-launches-appeal (noting appeal of David Hicks' conviction for MST); *see also* Michelle Shephard, *Omar Khadr Seeks to Overturn*

By precluding prosecutors from bringing MST charges, *Hamdan II* and *Bahlul* could significantly limit the use of military commissions for the present detainee population. It is possible that conspiracy charges would be vulnerable as well, based on an ex post facto challenge evaluated under de novo review (as opposed to the plain error review applied in *Bahlul*). But rulings on retroactivity grounds in cases from the current detainee pool—whether for MST, conspiracy, or other non-international law-of-war offenses—leave open the possibility of commission jurisdiction over future prisoners based on conduct that post-dates the 2006 MCA. Requiring that the offenses violate international law would impose a significant constraint on such prospective commission prosecutions. It would also have a signaling effect, cautioning against widening exceptions to Article III under a theory of domestic war crimes—precisely the type of norm entrepreneurship Brown and Kavanaugh advocate for in *Bahlul*. By contrast, the alternative path of regulation through procedural fine-tuning is unlikely to affect the flow of cases into military commissions and could lead to further attempts to solidify, if not expand, the existing grounds of substantive liability to counteract additional procedural enhancements.

B. Personal Jurisdiction and the Hostilities Requirement

The focus thus far has been on military commissions' subject matter jurisdiction. Another way to control commissions' authority is through their personal jurisdiction. As *Quirin* explained, the defendant must be an offender properly subject to trial by military commission.[367] The 2009 MCA currently provides for jurisdiction over "unprivileged enemy belligerents."[368] It defines that term as anyone who is not part of a state's regular armed forces (or a militia-type group obeying the traditional conditions of lawful belligerency) and who is either a member of al Qaeda *or* has "engaged in . . . [or] purposefully and materially supported hostilities against the United States or its coalition partners."[369] This

Guantanamo Conviction, TORONTO STAR, Nov. 8, 2013, http://www.thestar.com/news/world/2013/11/08/omar_khadr_seeks_to_overturn_guantanamo_conviction.html (noting appeal of Omar Khadr's conviction for murder and attempted murder in violation of the law of war and for spying). Courts have yet to address whether murder and attempted murder in violation of the law of war and spying are offenses triable in military commissions based on pre-2006 MCA conduct.

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

368. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, ch. 47A, sec. 1802, § 948c, 123 Stat. 2574 (codified at 10 U.S.C. § 948c (2012)).

369. *Id.* § 948a(7); *see also* Robert M. Chesney, *Military Detention Through the Habeas Lens: Who May Be Held*, 52 B.C. L. REV. 769, 791–92 (2011).

provision potentially applies to all non-state actors who engage in hostilities against the U.S. or its partners, including hostilities beyond the current armed conflict with al Qaeda and associated forces. The MCA defines hostilities as "any conflict subject to the laws of war."[370]

The personal jurisdiction of law-of-war commissions might conceivably be restricted to members of the armed forces of an enemy state. DeVeaux has proposed a restriction along these lines, which tracks traditional definitions of a combatant under international law.[371] This proposal would impose a bright-line limit and make *Quirin* the outer limit of commission jurisdiction, at least absent the type of exigency described in *Milligan*. Yet, this restriction on personal jurisdiction would sweep too broadly if, as the Supreme Court suggested in *Hamdan*, the U.S. can be engaged in an armed conflict with a non-state organization and, relatedly, that members of that enemy organization who commit war crimes may be tried by a properly constituted military commission.[372] Further, given the changing nature of armed conflict—from one waged between nation states to one waged between states and non-state actors—such a bright-line rule would effectively preclude any future use of commissions.

Another way to modulate commission jurisdiction would be through construction of the MCA's "hostilities" requirement. Courts could demand that the government demonstrate the existence of hostilities under international law, thus excluding terrorist activity that lacks a sufficient nexus to armed conflict.[373] While the hostilities requirement could help constrain commission jurisdiction,[374] it has several limitations. Courts would likely defer to the executive's determination of whether

370. § 948a(9).

371. *See supra* text accompanying note 260.

372. *Hamdan I*, 548 U.S. 557, 628–30 (2006) (suggesting the possible existence of an armed conflict between the United States and al Qaeda).

373. The ICTY, for example, has defined armed conflict as the "resort to armed force between States or protracted armed violence between" State and non-state entities. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

374. *See* Marty Lederman, *An al Qaeda Armed Conflict with France or Malaysia?: The Legal Question at the Heart of the al Darbi Case*, JUST SECURITY (Feb. 6, 2014, 8:26 AM), http://justsecurity.org/2014/02/06/al-qaeda-armed-conflict-france-malaysia-legal-question-heart-al-darbi-case/ (explaining that a military commission cannot proceed against detainee Ahmed Mohammed Ahmed Haza al Darbi unless the government demonstrates that the detainee's alleged role in the October 2002 bombing of a civilian oil tanker off the coast of Yemen occurred in connection with an armed conflict based on the MCA's "hostilities" requirement).

hostilities exist.[375] Most importantly, the hostilities requirement provides only a threshold hurdle; it would not deter or prevent commission jurisdiction over offenses such as MST and conspiracy once the required nexus to hostilities had been established.

C. Article III Underbidding

Another possible way to affect the flow of terrorism prosecutions into military commissions is to make federal courts a more attractive forum for prosecutors. Federal courts already have a competitive advantage in terms of experience, institutional capability, and legitimacy.[376] The development of specialized rules governing the discovery and use of classified information have strengthened federal courts' ability to address the challenges posed by terrorism prosecutions, which often involve sensitive national security information.[377] In addition, federal judges have a track record of imposing substantial and often severe sentences on individuals convicted of terrorism crimes, including inchoate offenses such as conspiracy and MST.[378] Yet these comparative strengths, from the government's perspective, are offset by federal courts' more robust procedural safeguards and greater transparency, which, despite enhancing federal courts' legitimacy, can make them a less attractive forum for terrorism prosecutions than military tribunals in some cases. For Guantánamo detainees, long delays in bringing charges and the prior use of torture and other harsh interrogation methods have been perceived as obstacles to Article III prosecutions.[379] One way federal courts might seek to compensate is by

375. *See The Prize Cases*, 67 U.S. (2 Black) 635, 670–71 (1862) (sustaining the president's power, without prior legislative approval, to recognize the commencement of hostilities by secessionist southern states as an act of war).

376. *See generally, e.g.*, Zabel & Benjamin, Jr., *supra* note 275.

377. *See* Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2012) (CIPA). CIPA provides, for example, for *in camera* review of classified evidence before its disclosure to the defense and permits the use of substitutions where classified evidence must be disclosed to minimize security risks as long as they are deemed adequate. *Id.* § 6; *see also* Zabel & Benjamin, Jr., *supra* note 275, at 85 (explaining that Congress intended for CIPA to give "federal district judges, and thus the criminal justice system [the authority] 'to fashion creative and fair solutions to' . . . the problems raised by the use of classified information in trials") (quoting S. REP. NO. 96-283, at 7 (1980)).

378. *See* Kris, *supra* note 275, at 14–16 (noting that defendants have received long sentences for terrorism offenses both before and since 9/11).

379. *See* Barack Obama, President of the United States, *Remarks by the President on National Security*, WHITE HOUSE (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter *Remarks by the President on National Security*]. The Obama administration has described military commissions as providing the government with additional flexibility needed to prosecute detainees in some cases. *Id.* (explaining

interpreting trial protections flexibly to make Article III courts more attractive to the government. Such underbidding, however, not only carries significant risks to the integrity of Article III terrorism prosecutions but also appears to have only a limited effect on charging decisions.

Measuring the impact of a parallel military commission system on how federal courts handle terrorism cases is difficult. Federal prosecution of detainees formerly in military custody nonetheless provides a useful starting point. While the sample set is tiny,[380] these cases offer a window into how commissions and the specter of commission prosecution can affect prosecutions in Article III courts.

The best example is the prosecution of Ahmed Khalfan Ghailani, thus far the only detainee transferred from Guantánamo to an Article III court.[381] Ghailani was originally indicted in the Southern District of New York for his role in the 1998 U.S. Embassy bombings in East Africa.[382] When the United States initially took Ghailani into custody in 2004, he was held for more than two years at a secret CIA black site.[383] In 2006, the United States transferred Ghailani to Guantánamo where it prepared to prosecute him in a military commission.[384] In 2009, however, the United States brought Ghailani to the Southern District to face trial on the original 1998 indictment.[385] At trial, Ghailani was convicted and sentenced to life imprisonment.[386] That sentence was affirmed on appeal.[387]

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that commissions "allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts"); *see also* U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT, GUANTANAMO REVIEW TASK FORCE 7–8 (2010), http://www.justice.gov/ag/Guantánamo-review-final-report.pdf (comparing criteria used in determining whether to charge detainees and the forum in which such charges should be brought).

380. To date, three individuals detained in the war on terror have been transferred from military custody to civilian court for criminal prosecution: Jose Padilla, Ali al-Marri, and Ahmed Khalfan Ghailani. Memorandum from the Center for National Security Studies 3, 5 (Apr. 12, 2010). Padilla and al-Marri were held as enemy combatants in the United States before being transferred for federal prosecution; Ghailani was transferred from Guantánamo to the United States for prosecution. *Id.*

381. Jonathan Hafetz, *The Potential Pitfalls of Refusing to Reopen the Article III Door for Guantanamo Detainees*, JUST SECURITY (Dec. 11, 2013, 9:30 AM), http://www.thestar.com/news/world/2013/11/08/omar_khadr_seeks_to_overturn_guantanamo_conviction.html.

382. *United States v. Ghailani*, 733 F.3d 29, 36 (2d Cir. 2013).

383. *Id.* at 38–39.

384. *Id.* at 39–40.

385. *Id.* at 40.

386. *Id.* at 40–41.

387. *Id.* at 55–56.

Ghailani's case suggests how federal courts may interpret existing criminal law rules to ensure the availability of an Article III forum and facilitate prosecution there for individuals otherwise subject to military authority. Before trial, Ghailani moved to dismiss the indictment on the ground that his five-plus-year detention—including two-plus years in incommunicado confinement at a CIA secret prison—violated the Constitution's Speedy Trial Clause.[388] The district court rejected that challenge, concluding that, while lengthy, Ghailani's pretrial detention in CIA custody and at Guantánamo did not "materially infringe" on any interest protected by the Speedy Trial Clause, particularly given "the lack of significant prejudice of the sort that the . . . Clause was intended to prevent."[389] In affirming the conviction, the Second Circuit adopted the district court's view, effectively carving out pretrial detention conducted for intelligence purposes from the speedy trial analysis.[390] As long as such detention was related to national security intelligence-gathering and did not adversely affect the defendant's ability to mount a defense, the appeals court signaled, it would not constitute a speedy trial violation.[391] The Second Circuit also found that Ghailani's subsequent detention at Guantánamo, which it said more closely resembled traditional pretrial detention (and not detention for intelligence-gathering purposes), weighed against the government, but not sufficiently to tilt the balance in favor of a speedy trial violation.[392] The appeals court thus validated the dual-track approach to national security detention, which not only permits the government to hold terrorism suspects indefinitely without charge under the 2001 Authorization for Use of Military Force (AUMF)[393] but also allows it to bring criminal charges against those suspects should it later elect to do so, even after years of national security detention and interrogation.[394]

Federal courts have likewise rejected claims that a defendant's prior mistreatment in military custody alone warrants dismissal. Jose Padilla, a U.S. citizen, was detained by the military as an enemy combatant in the United States for more than three years before he was transferred to

388. U.S. CONST. amend VI; *Ghailani*, 733 F.3d at 40.

389. *United States v. Ghailani*, 751 F. Supp. 2d 515, 541 (S.D.N.Y. 2010).

390. *Ghailani*, 733 F.3d at 46–48 (discussing national security detention); *see also id.* at 47–48 ("[W]e observe nothing in the text or history of the Speedy Trial Clause that requires the government to choose between national security and an orderly and fair justice system.").

391. *Id.* at 49, 51–52.

392. *Id.* at 49–50.

393. Pub. L. No. 107-40, 115 Stat. 224.

394. *Ghailani*, 733 F.3d at 46–49.

federal court on terrorism-related charges.[395] Padilla moved to dismiss the indictment on the ground that his prior mistreatment constituted outrageous government conduct in violation of the Due Process Clause.[396] The district court rejected his challenge, arguing that while Padilla's abuse might justify the exclusion of evidence obtained as a result of unlawful interrogation methods, it did not warrant dismissal of the indictment, at least absent some proof that the government itself was involved in the alleged criminal activity.[397] This ruling, which was affirmed on appeal,[398] relied on the *Ker-Frisbie* doctrine, which provides that a court's jurisdiction over a defendant is not affected by the defendant's prior treatment or the manner in which the defendant is brought before the court.[399]

Two recent, albeit less extreme, examples further highlight the willingness of federal courts to permit transfers from military custody to Article III prosecution. In both cases, the government held suspects aboard Navy ships at sea—in one case for more than two months—after seizing them in transborder counterterrorism operations and before bringing them to the United States for prosecution.[400] Courts have not yet had occasion to decide speedy trial or related challenges arising out of this form of national security detention.[401] Yet, *United States v.*

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395. *United States v. Padilla*, No. 04-60001-CR, 2007 WL 1079090, at *1 (S.D. Fla. Apr. 9, 2007).

396. *Id.*

397. *Id.* at *4–5.

398. *United States v. Jayyousi*, 657 F.3d 1085, 1111–12 (11th Cir. 2011).

399. *Padilla*, 2007 WL 1079090, at *5 & n.11; *see* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1414 (2007). The doctrine traces its roots to a pair of Supreme Court decisions—*Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952)—which held that the defendants' illegal renditions did not deprive the court of jurisdiction over their criminal prosecution.

400. *See* Wells Bennett, *What Happens When an Al Qaeda Suspect Is Detained at Sea?*, NEW REPUBLIC (Oct. 8, 2013), http://www.newrepublic.com/article/115066/abu-anas-al-liby-captured-al-qaeda-suspect-detained-sea; Benjamin Weiser et al., *Qaeda Suspect Is Brought to New York for a Hearing*, N.Y. TIMES, Oct. 15, 2013, at A19.

401. In one case, the defendant, Ahmed Abdulkadir Warsame, who was held for more than two months on a Navy ship in the Gulf of Aden, pled guilty and cooperated with the government, thus averting a challenge to his pretrial detention. *See* Benjamin Weiser, *Terrorist Has Cooperated with U.S. Since Secret Guilty Plea in 2011, Papers Show*, N.Y. TIMES, Mar. 26, 2013, at A21. In the other case, the defendant, Abu Anas al-Libi, was held only for eight days before being transferred to federal court, where he pled not guilty. Jonathan Hafetz, *Abu Khattalah and the Evolution of Ship-Based Detention*, JUST SECURITY (June 28, 2014), http://justsecurity.org/12395/abu-khattalah-evolution-ship-based-detention/. His case is still pending. *See id.* In a third, and more recent, case, the government seized a terrorism suspect abroad and held him on a navy ship before bringing him to the United States for federal prosecution. *Id.* Unlike the prior two ship-based detention cases, that suspect, Ahmed Abu Khattalah, was held pursuant to law enforcement authority while detained on the ship. *See id.*

Ghailani[402]—where the delay in bringing the defendant to trial was much longer and the defendant's treatment in military custody much harsher—suggests speedy trial or outrageous government conduct challenges to such temporary law-of-war detention will likely fail.[403] The latitude to engage in even lengthy pretrial detention for intelligence-gathering purposes, without foregoing the possibility of eventual Article III prosecution, suggests federal courts' willingness to accommodate the government's interest in shifting between a law-of-war and criminal law paradigm.

Other accommodations have concerned the conduct of the trial itself. In *United States v. Moussaoui*,[404] for example, the Fourth Circuit held that it would not violate the defendant's rights under the Sixth Amendment Compulsory Process Clause to allow the government to prepare written summaries to the defense of the statements of detainee-witnesses in place of depositions of those witnesses because of national security concerns.[405] In *Moussaoui*, the district court also held that the defendant could be denied access to classified discovery as long as his standby counsel had the opportunity to review that discovery and participate in any proceedings held pursuant to the Classified Information Procedures Act.[406] In multiple cases, prosecutors have successfully used the government's unreviewable authority to classify information to effectively block a defendant's access to large amounts of evidence, including the intercepts of the defendant's own conversations, facsimile transmissions, or electronic mail obtained pursuant to electronic surveillance authorized under the Foreign Intelligence Surveillance Act.[407]

Federal courts, to be sure, will relax ordinary rules only to a point. In *Ghailani*, for example, the district judge excluded a key government witness, concluding that the witness's testimony was the direct result of the government's coercive interrogations of Ghailani while in CIA custody and was not sufficiently attenuated from that coercion.[408] But while judges may draw a line with respect to the use of coerced evidence

402. 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

403. *See* Jennifer Daskal & Steve Vladeck, *The Case of Abu Anas al-Libi: The Domestic Law Issues*, JUST SECURITY (Oct. 10, 2013, 9:00 AM), http://justsecurity.org.

404. 382 F.3d 453 (4th Cir. 2004).

405. *Id.* at 476–78.

406. *United States v. Moussaoui*, No. 01-455-A, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002).

407. *See* Joshua L. Dratel, *Sword or Shield?: The Government's Selective Use of Its Declassification Authority for Tactical Advantage in Criminal Prosecutions*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 171, 175–77 (2006).

408. *United States v. Ghailani*, 743 F. Supp. 2d 261, 264–65 (S.D.N.Y. 2010).

in Article III courts,[409] they appear willing to make other accommodations to encourage Article III prosecutions. Those accommodations not only risk diluting the protections of federal criminal trials but also can have spillover effects, as exceptions created in terrorism prosecutions seep into other areas, causing rules to be loosened in non-terrorism cases.[410] Concern about spillover effects is one factor cited by proposals to create a separate national security court to handle terrorism cases.[411]

Article III underbidding, moreover, seems incapable of ending reliance on military commissions. In both *United States v. Ghailani* and *United States v. Padilla*,[412] the courts refused to bar federal prosecution even though the defendants had been held incommunicado and claimed they had been tortured and grossly mistreated.[413] Both defendants, moreover, were ultimately convicted and received lengthy sentences.[414] Yet, despite the demonstrated ability of federal courts to obtain convictions under challenging circumstances, Congress has still repeatedly barred the transfer of Guantánamo detainees to the United States for prosecution.[415] While recent developments suggest that support for this prohibition may be waning,[416] the bar's passage and maintenance through several appropriation cycles reflects the strength of the

409. *Id.* at 288 ("[W]e must adhere to the basic principles that govern our nation not only when it is convenient to do so, but when perceived expediency tempts some to pursue a different course.").

410. *Cf.* MARK SIDEL, MORE SECURE, LESS FREE? (2007) (describing broader spillover effects of post-9/11 counterterrorism measures on civil liberties).

411. *Cf.* Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617 (2009); Kevin E. Lunday & Harvey Rishikof, *Due Process as a Strategic Choice: Legitimacy and the Establishment of a National Security Court*, 39 CAL. W. INT'L L.J. 87, 129 (2008).

412. No. 04-60001-CR, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007).

413. *Ghailani*, 733 F.3d at 37, 49; *Padilla*, 2007 WL 1079090.

414. *Ghailani*, 733 F.3d at 54–55 (affirming Ghailani's sentence of life imprisonment); *United States v. Jayyousi*, 657 F.3d 1085, 1117–19 (11th Cir. 2011) (reversing Padilla's sentence of 208 months and remanding for resentencing; finding the trial court's sentence "substantively unreasonable" because, *inter alia*, "it does not adequately reflect [Padilla's] criminal history, does not adequately account for his risk of recidivism, [and] was based partly on an impermissible comparison to sentences imposed in other terrorism cases"); Warren Richey, *The Strange Saga of Jose Padilla: Judge Adds Four Years*, CHRISTIAN SCIENCE MONITOR, Sept. 9, 2014, http://www.csmonitor.com/USA/Justice/2014/0909/The-strange-saga-of-Jose-Padilla-Judge-adds-four-years-video.

415. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1566–67 (2011).

416. *See* Charlie Savage, *Bill Allowing Detainees to be Moved Advances*, N.Y. TIMES, June 25, 2013, at A13 (describing the Senate Armed Services Committee's approval of a bill that would allow the U.S. to send Guantánamo detainees to the United States for prosecution in Article III courts).

legislative and popular backlash against prosecuting terrorism cases in Article III courts, even as judges seek to facilitate prosecution in that forum. This backlash, for example, derailed the Obama administration's effort to transfer the most significant terrorism trial in U.S. history—that of Khalid Sheikh Mohammed and his alleged coconspirators for their role in the 9/11 attacks—from military commissions to federal court.[417] It also underlies the continued calls by some to prosecute newly seized terrorism suspects in military commissions rather than federal court.[418] In the politically charged atmosphere surrounding terrorism cases, efforts by federal courts to demonstrate their dependability as a forum for prosecutors to obtain convictions can still be insufficient to overcome public pressure to subject suspects to military justice.

In short, by demonstrating their flexibility, judges may help channel cases to Article III courts rather than to military commissions in some situations. But the adjustments courts make to stay competitive—where the principal metric for success is a conviction and lengthy sentence rather than the fairness of the proceeding—risk diluting safeguards. Meanwhile, the shadow system of criminal justice embodied by military commissions remains in place, continuing to impact the behavior of federal courts and public discourse, as proponents use each new terrorism case to clamor for military prosecution.

CONCLUSION

The future of the post-9/11 military commissions remains uncertain. It may be that the government does not pursue prosecutions beyond the existing and slowly dwindling population of Guantánamo detainees. The number of possible prosecutions among the current detainee pool has already been reduced by the decisions in *Hamdan* and *Bahlul*, which take MST and solicitation charges off the table for pre-2006 MCA conduct. The eligible pool may be further reduced depending on how the viability of conspiracy charges is adjudicated on remand in *Bahlul* or in other pending commission cases when it is evaluated under de novo review. If

417. *See* Jonathan Hafetz, *Reconceptualizing Federal Courts in the War on Terror*, 56 ST. LOUIS U. L.J. 1055, 1064–65 (2012); Mayer, *supra* note 279, at 63.

418. *See, e.g.*, Jennifer Steinhauer & Charlie Savage, *U.S. Defends Prosecuting Benghazi Suspect in Civilian Rather Than Military Court*, N.Y. TIMES, June 18, 2014, at A10 (describing conservative lawmakers' criticism of the Obama administration's decision to prosecute the suspected leader of the 2012 attack in Benghazi, Libya, in federal court rather than the military); Bradley Klapper, *GOP to Obama: Send Libyan Suspect to Guantanamo*, ASSOCIATED PRESS (Oct. 8, 2013), http://bigstory.ap.org/article/gop-obama-send-libyan-suspect-Guantánamo (describing calls by conservative lawmakers for the Obama administration to send Abu Anas al-Libi, the suspect arrested for his role in the 1998 U.S. embassy bombings in East Africa, to Guantánamo to face military justice).

the government pursues commission charges only against some remaining detainees, the constitutional issues that surfaced in *Hamdan II* and *Bahlul* will play out in a handful of legacy cases.

But it may also be that the post-9/11 military commissions continue into the future and that newly seized terrorism suspects are prosecuted there rather than in Article III courts. Congress has enacted—and once amended—a statute providing for commission jurisdiction over a wide range of terrorism-related offenses, including inchoate offenses commonly prosecuted by federal courts, such as MST and conspiracy. [419] The U.S. has developed an extensive physical and legal infrastructure—at considerable financial cost[420]—to carry out trials in this new forum. President Obama, moreover, has endorsed military commissions as a lawful and legitimate option for prosecuting terrorism suspects—a complement to Article III courts rooted in historical practice.[421]

Indeed, one case potentially involving the prospective application of the MCA is already underway. The United States recently added a conspiracy charge to its prosecution of a current Guantánamo detainee based on allegations that post-date the enactment of the 2006 MCA.[422] The addition of this charge sets up a possible test case for the prospective prosecution of offenses that are not crimes under international law and, therefore, for the future role of military commissions in U.S. counter-terrorism policy. Other cases could arise were the U.S. to prosecute in military commissions individuals seized in connection with hostilities against new threats, such as the Islamic State in Iraq and Syria (ISIS).

This Article has articulated normative and policy rationales for looking to international law as a constitutional constraint on military jurisdiction, where that jurisdiction is exercised outside courts-martial or the type of exigent circumstances presented by martial law or

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419. 10 U.S.C. ch. 47A (2012).

420. *See* Letter from Def. Sec'y Hagel to Representative Adam Smith (June 27, 2013), http://democrats.armedservices.house.gov/index.cfm/files/serve?File_id=ac9bd462-786e-42ef-ae54-1da2ceb6c3c9 (citing a Defense Department report estimating the total cost of the Guantánamo military commissions to be $600 million since 2007).

421. *Remarks by the President on National Security*, *supra* note 379.

422. Charlie Savage, *Guantánamo Bay Prosecutors Accuse Detainee of Conspiracy*, N.Y. TIMES, Feb. 15, 2014, at A12 (reporting that military commission prosecutors added a charge of conspiracy against Guantánamo detainee Abd al Hadi al Iraqi); Charge Sheet of Abd al Hadi al-Iraqi, *United States v. Abd al Hadi Al-Iraqi* (Feb. 3, 2014), *available at* https://www.documentcloud.org/documents/1018505-chargingdocumentabdalhadialiraqifeb2014.html (describing the allegations against the defendant); Steve Vladeck, *Military Commissions, Conspiracy, and al-Iraqi*, LAWFARE (Feb. 18, 2014, 7:20 AM), http://www.lawfareblog.com/2014/02/military-commissions-conspiracy-and-al-iraqi/#more-32494.

prosecutions in occupied enemy territory. This constraint is rooted not only in precedent and past practice but also in the relative utility of a line based on international law in policing the boundary between military and civilian jurisdiction and limiting encroachments on the criminal process guarantees of Article III and the Fifth and Sixth Amendments to the Constitution.