

## The Laws of War as a Constitutional Limit on Military Jurisdiction

Stephen I. Vladeck\*

Two months after the attacks of September 11, President George W. Bush promulgated an executive order establishing military commissions.<sup>1</sup> These commissions, *ad hoc* trial courts staffed with military judges and governed entirely by rules subsequently issued by the Secretary of Defense, were intended to try non-citizens captured outside the territorial United States for various terrorism-related offenses,<sup>2</sup> although the executive order said nothing about what those offenses might be – let alone other subsidiary questions.<sup>3</sup> The November 2001 “military order” was controversial when it was handed down (publicly and within the Administration),<sup>4</sup> both because it seemed to lack statutory authorization and because it was arguably inconsistent with what few pre-9/11 precedents could be found on the subject.<sup>5</sup>

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\* Professor of Law, American University Washington College of Law. This article benefitted tremendously from comments received at the 2009-2010 Foreign Relations Colloquium at Georgetown University Law Center; the 2009 Workshop of the International Law in Domestic Courts Working Group of the American Society of International Law; and the University of Minnesota School of Law’s October 2009 conference on “Exceptional Courts and Military Commissions.” I owe particular thanks to Laura Donohue, Dave Glazier, Vicki Jackson, David Luban, Fionnuala Ní Aoláin, Beth van Schaack, Carlos Vázquez, and especially Ingrid Wuerth. Thanks also to Dean Claudio Grossman for generous research support, and to students in my Fall 2009 seminar on “The Constitution and Military Jurisdiction.”

In the interests of full disclosure, I should note that I played a recurring role on the legal team for the petitioner in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and that I have also been involved both formally and informally in much of the post-Military Commissions Act litigation before the D.C. district court and D.C. Circuit. Needless to say, the views expressed herein are mine alone.

1. See 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).

2. The original order included no territorial limitation. Nonetheless, to date, only one non-citizen - Ali Saleh Kahlah al-Marri – has been detained by the military without civilian criminal proceedings *within* the territorial United States. See Jane Mayer, *The Hard Cases: Will Obama Create a New Kind of Preventative Detention for Terrorist Suspects?*, NEW YORKER Feb. 23, 2009, available at [http://www.newyorker.com/reporting/2009/02/23/090223fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/02/23/090223fa_fact_mayer).

3. The offenses were subsequently articulated in “Military Commission Instruction No. 2.” See 32 C.F.R. §11.6(c)(6) (2005) (defining conspiracy as an offense); see also *Crimes and Elements of Trials by Military Commission*, 68 Fed. Reg. 39,381 (July 1, 2003).

4. For the internal controversy, see BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 162-176 (2008).

5. For early commentary on both sides, contrast Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002), with Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military*

Nine years, one Supreme Court decision,<sup>6</sup> two statutes,<sup>7</sup> and a veritable mountain of popular and academic discourse later, one might reasonably conclude that we've made distressingly little progress in resolving the myriad constitutional questions that such tribunals raise. These questions have become much *more* pressing over time, as (1) Congress has stepped in to provide the authorization that the Supreme Court in *Hamdan* found to be lacking (thereby squarely raising some of the underlying constitutional questions); (2) the debate over whether civilian courts or military tribunals are a more appropriate forum for trying the so-called "9/11 defendants" has raged both in public circles and behind the scenes within the current Administration;<sup>8</sup> (3) the nominal defendants before the military commissions have languished in various states of legal limbo;<sup>9</sup> and (4) most recently, the Supreme Court has upheld Congress's power to broadly prohibit the provision of "material support" to designated foreign terrorist organizations,<sup>10</sup> an offense that Congress has also made triable before a military commission.<sup>11</sup>

It is impossible to have a meaningful debate over whether a civilian court or a military commission is a more appropriate forum for trying terrorism suspects so long as serious questions remain over whether the commissions may constitutionally exercise jurisdiction over particular offenses and/or offenders.<sup>12</sup> And yet, although a number of defendants have attempted to challenge the jurisdiction of the military commissions –

*Commissions*, 5 GREEN BAG 2D 249 (2002).

6. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

7. See Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574-2614 (codified in scattered sections of 10 U.S.C.); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.). I use the acronym "MCA" throughout this article to refer to the scheme created by the two statutes together, and identify the specific version at issue only where necessary.

8. See, e.g., Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, at 52; see also Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501 (2010).

9. Thus, as one recent example, the D.C. Circuit lifted a stay that had been entered by the district court, holding that it was inappropriate to abstain from deciding the merits of a petitioner's challenge to his continuing detention simply because he had been slated for trial by a military commission. Until and unless he was actually *charged* and slated for trial, the Court of Appeals concluded, his habeas petition should go forward. See *Obaydullah v. Obama*, 609 F.3d 444 (D.C. Cir. 2010).

10. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

11. See, e.g., 10 U.S.C. §950t(25) (defining the offense of "providing material support" by reference to the federal criminal statute – 18 U.S.C. §2339A(b) – upheld in *Humanitarian Law Project*); see also *id.* §948a(7)(B) (defining as an "unprivileged enemy belligerent" any individual who "has purposefully and materially supported hostilities against the United States or its coalition partners").

12. See, e.g., Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. COLLOQUY 172 (2008) (critiquing a proposal to reform the military commissions for its failure to engage with the central jurisdictional questions at issue).

especially under the MCA – none of their cases have managed to produce a decision on the merits from any court higher than the Court of Military Commission Review (CMCR).<sup>13</sup> Instead, the federal courts have generally relied on “abstention” doctrine,<sup>14</sup> holding that challenges to the commissions, including to their jurisdiction, can – and should – be resolved on post-conviction appeal.<sup>15</sup> That’s not to say that the Article III courts won’t have the last word; they may well, yet. But in the interim, the time has long since passed for a careful explication of the issues, the relevant precedents, and the most likely answers.

In the article that follows, I attempt to provide a thorough introduction to – and analysis of – the constitutional limits on the jurisdiction of military commissions. By “jurisdiction,” I mean two distinct types of authority: jurisdiction over the offense, and jurisdiction over the offender.<sup>16</sup> The former determines whether the military court has the authority to try the charged offense; the latter whether the military court has the authority to try the charged defendant. There are some precedents on the scope of these two species of jurisdiction in the context of military commissions, but the law is far better settled in the closely analogous context of courts-martial, where similar issues routinely arise.

Thus, I begin in Part I by laying out the various ways in which the Constitution, as interpreted by the Supreme Court, imposes limits on the offender jurisdiction of courts-martial. In particular, Part I explains how the Court has consistently derived limits on such jurisdiction from the

13. Even the CMCR has been slow to get to the merits. Other than its decision on the trial court’s jurisdiction in the *Khadr* proceedings, see *United States v. Khadr*, 1 M.C. 443 (C.M.C.R. 2007), the court has not yet settled any major jurisdictional questions. In January 2010, it heard argument in the appeals in *Hamdan* and *al-Bahlul*, both of which include challenges to the jurisdiction of the commissions. Decisions in both cases remain pending as of this writing. For one of the few trial-court decisions rejecting a jurisdictional challenge on the merits, see *United States v. Hamdan*, 2 M.C. 1 (2008).

14. See, e.g., *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008) (rejecting appellate jurisdiction from the CMCR); *Khadr v. Obama*, No. 04-1136, 2010 WL 2814416 (D.D.C. July 20, 2010) (abstaining from deciding a pre-trial challenge to a military commission trial); *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008) (same); *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008) (same).

15. But see *Hamdan v. Rumsfeld*, 548 U.S. 557, 585 n.16 (2006) (“We do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant.”).

16. It is tempting to describe “jurisdiction over the offense” and “jurisdiction over the offender” as, respectively, “subject-matter” and “personal” jurisdiction (Indeed, the Supreme Court itself has done so in the past, see, e.g., *id.*). Nevertheless, they are, for relevant purposes, two different species of subject-matter jurisdiction, for reasons elaborated below. Moreover, this distinction is more than just a semantic one; whereas defects in personal jurisdiction are ordinarily subject to waiver (and do not necessarily implicate the underlying jurisdiction of the tribunal), defects in subject-matter jurisdiction are not – and are also open to collateral attack. I thank Ingrid Wuerth for suggesting this important clarification (among countless others).

“Make Rules” Clause of Article I,<sup>17</sup> the jury trial clauses of Article III and the Sixth Amendment,<sup>18</sup> and the Grand Jury Indictment Clause of the Fifth Amendment, which expressly exempts from its requirements “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>19</sup> Although courts and commentators have come to understand these provisions as strictly limiting the offender jurisdiction of courts-martial to members of our own military,<sup>20</sup> the Supreme Court has also embraced what Chief Justice Rehnquist claimed to be the negative implication of this logic – that Congress’s power over those individuals (and over the offense jurisdiction of courts-martial) is effectively plenary.<sup>21</sup>

More important than the specific rules that emerge from the cases surveyed in Part I, though, is the analytical framework. Congress’s power to generally define criminal offenses comes from its Article I authority under the Make Rules Clause, but Congress’s ability to subject servicemembers to military – rather than civilian – jurisdiction derives from the “land and naval forces” exception to the Fifth Amendment’s Grand Jury Indictment Clause. Put another way, in the context of courts-martial, Congress’s power over offense jurisdiction is circumscribed by Article I, and its power over offender jurisdiction is circumscribed by the Fifth Amendment.

With the framework articulated in the court-martial cases in mind, I turn in Part II to the handful of cases in which the Supreme Court has had the opportunity to expound on the constitutional limits on military commissions. Rather than break these cases out by type of jurisdiction, I take them chronologically, in an attempt to show how each case built upon – and, in some instances, modified – the rules that the Court had previously articulated. What emerges from the cases surveyed in Part II are a series of important – if somewhat counterintuitive – conclusions: Although the Court has been fairly vague about the constitutional limits on offense jurisdiction (as Part II notes, the issue has never been squarely presented),<sup>22</sup> it has

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17. U.S. CONST. art. I, §8, cl. 14 (empowering Congress “To make Rules for the Government and Regulation of the land and naval Forces”).

18. *Id.* art. III, §2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”).

19. *Id.* amend. V.

20. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957) (plurality); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

21. *See Solorio v. United States*, 483 U.S. 435, 441 (1987).

22. Until 2006, the relevant federal statute (as interpreted by the Supreme Court) authorized military commission jurisdiction over “offenders or offenses that by statute or by the law of war may be triable by such military commissions.” *Ex parte Quirin*, 317 U.S. 1, 27 (1942). Thus, unless the Constitution imposed stricter limits than the laws of war (a proposition that the *Quirin* Court rejected), the Court would not have occasion to reach the constitutional question until Congress (as it did in 2006) broadened the jurisdictional sweep

suggested that the limits may well come from Article I, which separately authorizes Congress to “define and punish . . . Offences against the Law of Nations,”<sup>23</sup> and to “make Rules concerning Captures on Land and Water.”<sup>24</sup> Leaving aside (for the moment) the Captures Clause,<sup>25</sup> the so-called “Law of Nations Clause”<sup>26</sup> may itself settle at least some of the issues by requiring that the defined offense itself be recognized *as* an offense against the Law of Nations.<sup>27</sup>

But in sharp contrast to its various dicta concerning the offense jurisdiction of military commissions, the Supreme Court has been rather explicit about the constitutional limits on *offender* jurisdiction. Indeed, as Chief Justice Stone wrote for the Court in *Ex parte Quirin*,

An express exception from Article III, §2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.<sup>28</sup>

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of the statute.

23. U.S. CONST. art. I, §8, cl. 10.

24. *Id.* cl. 11.

25. For a fantastic and thorough treatment thereof, see Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009).

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

27. In a recent article, Professor Michael Stokes Paulsen suggested that this is a meaningless constraint, since it is entirely up to Congress to give content to the law of nations. *See* Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1774, 1820 (2009) (“Congress must define the ‘Offences’; the regime of international law may not dictate to Congress what those offenses may or must be.”); *see also id.* at 1821 (“It is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may *define* what it *understands to be* a violation of ‘the Law of Nations’ and use this judgment as the basis for legislative enactments.”). As I explain below, whatever the answer is to the limits on Congress’s power to give content to the law of nations, the one thing that is clear is that Professor Paulsen’s view is limitless – if not altogether indefensible.

28. 317 U.S. 1, 41 (1942).

Put another way, *Quirin* held that the Fifth and Sixth Amendments do not constrain offender jurisdiction of military courts so long as it is exercised over “enemy belligerents” charged with committing “offenses . . . against the law of war.” The constitutional limit on offender jurisdiction is inextricably linked with the constitutional limit on offense jurisdiction. As importantly, both stem directly, at least according to *Quirin*, from the laws of war.

With this conclusion in mind, Part III turns to a more structural analysis of how, in light of *Quirin*, the laws of war serve as a constitutional limit on military jurisdiction – and how other constitutional provisions fit into that analysis. In particular, Part III begins by carefully tracing the history of the Law of Nations Clause and its relationship to Congress’s power over both the offender and offense jurisdiction of military commissions. Although difficult questions remain about whether the laws of war affirmatively limit Congress’s Article I power (since other Section 8 authorities may do some of the work that the Law of Nations Clause does not), the one point that becomes clear in light of the case law examined in Parts I and II is that the *real* limits on offender and offense jurisdiction in military commissions come not from Article I, but from Article III and the Fifth and Sixth Amendments.<sup>29</sup>

In other words, whether or not Congress has the power to define as federal criminal offenses conduct not recognized as a violation of the laws of war, the grand- and petit-jury trial protections in Article III and the Bill of Rights prevent Congress from subjecting such conduct to trial by military commission unless the offense is committed (1) by our own servicemembers; or (2) by an enemy belligerent in violation of the laws of war. In light of this conclusion, Part III demonstrates how several of the more controversial provisions of the MCA face serious constitutional jeopardy, especially at their margins.

## I. THE CONSTITUTION AND COURT-MARTIAL JURISDICTION

Military jurisdiction as an idea was hardly foreign to the drafters of the Constitution. The Articles of Confederation had expressly provided the Continental Congress with the power of “making rules for the government and regulation of the said land and naval forces, and directing their operations,”<sup>30</sup> and the legislature had exercised that authority in 1775 by adopting Articles of War (as amended in 1776 and 1786) that provided for trial by court-martial.<sup>31</sup> The Constitution similarly empowered Congress to

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29. Critically, this point assumes that the jury trial protections in Article III and the Fifth and Sixth Amendments apply to non-citizens held (and presumably tried) outside the territorial United States. I defend this assumption – on which this article’s analysis depends – in Part III, *infra*.

30. Articles of Confederation of 1781 art. IX.

31. The 1775, 1776, and 1786 Articles are reprinted in WILLIAM WINTHROP, MILITARY

“make Rules for the Government and Regulation of the land and naval forces,”<sup>32</sup> and the First Congress promptly exercised that prerogative, adopting in full the Articles of War that had been inherited from the Confederation Congress.<sup>33</sup> And when a right to grand jury indictment or presentment was specifically included in the Bill of Rights, an exception was added for “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>34</sup>

Thus, the constitutional question of interest was never whether there *could* be a separate military justice system, but what the limits of that system’s jurisdiction would be. And although the Supreme Court had a number of occasions during the nineteenth century to pass upon whether a court-martial had acted within its statutory jurisdiction,<sup>35</sup> it was not until a series of cases after World War II that the Court seriously began to grapple with the constitutional limits on that authority.<sup>36</sup> Although the following analysis might seem tedious at times, one can see, as the Court’s jurisprudence evolved, a fairly clear movement toward a basic structural framework for military jurisdiction.

#### A. Offender Jurisdiction

For a host of reasons, the number of federal habeas petitions in which court-martial defendants sought collaterally to attack their convictions skyrocketed in the late 1940s and early 1950s,<sup>37</sup> especially after (and, to some degree, as a result of) the codification of the Uniform Code of Military Justice (UCMJ).<sup>38</sup> And in *Burns v. Wilson*,<sup>39</sup> the Supreme Court

LAW AND PRECEDENTS, 953-975 (2d ed. Beard Books 2000) (1896).

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

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

34. U.S. CONST. amend. V. The Supreme Court has long since rejected the argument that the “when in actual service” clause applies to the “land or naval forces” in *addition* to the militia. *See Johnson v. Sayre*, 158 U.S. 109, 115 (1895). *But see Solorio v. United States*, 483 U.S. 435, 451 n.2 (1987) (Marshall, J., dissenting) (suggesting that such a conclusion may be incorrect).

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

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

37. *See, e.g.,* Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1509-1515 (2007) (noting the proliferation of habeas petitions by individuals detained overseas filed after the end of World War II).

38. Act of May 5, 1950, ch. 169, 64 Stat. 108 (codified as amended at 10 U.S.C.

implicitly but unequivocally sustained the jurisdiction of the lower federal courts<sup>40</sup> to entertain such claims,<sup>41</sup> even in cases in which the petitioner was detained outside the territorial United States.<sup>42</sup> Thus, although collateral review was limited, at least initially, to “jurisdictional” challenges,<sup>43</sup> concerns over the “rough form of justice”<sup>44</sup> thought to be dispensed by the military courts may well have helped to precipitate a series of decisions identifying constitutional constraints on the scope of the offender jurisdiction that courts-martial could exercise.

The first such case to reach the Supreme Court was that of ex-servicemember Robert W. Toth, who was court-martialed for an offense committed while serving in the Air Force in Korea even though he was not arrested until five months after he was honorably discharged. Because Article 3(a) of the UCMJ expressly authorized such trials,<sup>45</sup> the Court was

§§801 *et seq.*)

39. 346 U.S. 137, 139 (1953) (plurality) (“In this case, we are dealing with habeas corpus applicants who assert – rightly or wrongly – that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications.”). Although Chief Justice Vinson’s opinion was only for a plurality, Justice Frankfurter was alone among the other Justices in raising any question as to the federal courts’ jurisdiction to entertain the petitions. *See infra* note 42.

40. The Court had previously expressed doubt as to its jurisdiction to entertain such petitions as an “original” matter, *see, e.g., Ex parte Betz*, 329 U.S. 672 (1946) (mem.), and had instead implicitly suggested that the proper forum was the federal district court, *see In re Bush*, 336 U.S. 971 (1949) (mem.). *See generally* Vladeck, *supra* note 37, at 1514-1515 & n.94.

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

42. As Justice Frankfurter noted in an unusual dissent from the denial of rehearing in *Burns*, it was not at all clear that the federal courts had statutory jurisdiction to entertain habeas petitions where the petitioner was held outside the territorial jurisdiction of any district court – indeed, *Ahrens v. Clark*, 335 U.S. 188 (1948), had suggested to the contrary. *See Burns v. Wilson*, 346 U.S. 844, 851-852 (1953) (Frankfurter, J., dissenting from the denial of rehearing).

43. *See, e.g., Hiatt v. Brown*, 339 U.S. 103, 111 (1950). *Burns* itself adopted the slightly broader “full and fair consideration” standard, *see, e.g., Sanford v. United States*, 586 F.3d 28, 31-33 (D.C. Cir. 2009), although several of the Justices believed that the scope of collateral review in court-martial cases should be even more sweeping, *see, e.g., Burns*, 346 U.S. at 153-154 (Douglas, J., dissenting); *id.* at 848-849 (Frankfurter, J., dissenting from the denial of rehearing).

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

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

confronted with the question whether Congress could constitutionally subject former servicemembers to trial by court-martial. For a 6-3 Court, Justice Black answered that question in the negative. After asserting that Article 3(a) “cannot be sustained on the constitutional power of Congress ‘To raise and support Armies,’ ‘To declare War,’ or to punish ‘Offenses against the Law of Nations,’”<sup>46</sup> Black turned to the Make Rules Clause. As he explained,

This Court has held that the [Make Rules Clause] authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial. It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions. To allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on. For given its natural meaning, the power granted Congress “To make Rules” to regulate “the land and naval Forces” would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.<sup>47</sup>

Black thereby relied expressly on the language of Article I, perhaps because he would have had a more difficult time resting his analysis on the Fifth Amendment, which expressly excepted “cases *arising in* the land or naval forces.” Since Toth’s alleged crime was committed while he was in the service, it might well have “arisen” in the land and naval forces. Black dismissed that possibility, however, noting that “This provision does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces.”<sup>48</sup> In other words, the crux of the holding in *Toth* was a

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46. *Id.* at 13-14 (citation and footnote omitted).

47. *Id.* at 14-15 (footnotes omitted).

48. *Id.* at 14 n.5.

limitation on the scope of the Make Rules Clause to “persons who are actually members of part of the armed forces.”<sup>49</sup>

So understood, *Toth* called into question the constitutionality of court-martial jurisdiction over *any* non-servicemember, including dependents of soldiers and civilian employees of the military. And yet, just over one year after *Toth*, the Court distinguished that decision in *Kinsella v. Krueger* and *Reid v. Covert*, holding that the UCMJ provision authorizing courts-martial in certain circumstances for non-servicemembers “accompanying the armed forces without the continental limits of the United States” did not violate the right to trial by jury protected by both Article III and the Sixth Amendment, on the ground that those protections did not apply extraterritorially.<sup>50</sup> Writing for a 5-3 Court in both cases,<sup>51</sup> Justice Clark upheld the court-martial convictions of two wives of servicemembers for the murders of their husbands, reasoning that:

Having determined that one in [such] circumstances . . . may be tried before a legislative court established by Congress, we have no need to examine the power of Congress “To make Rules for the Government and Regulation of the land and naval Forces” under Article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained.<sup>52</sup>

With the dissenters (and, apparently, Justice Harlan) objecting that the cases had been decided too quickly,<sup>53</sup> the Court took the extraordinary step of granting – over three dissents – a petition for rehearing,<sup>54</sup> and setting the now consolidated cases for re-argument the following Term. On re-argument, the Court reversed itself,<sup>55</sup> with a plurality holding that the Constitution did not countenance the trial by court-martial of civilians for *any* offenses, and with Justices Harlan and Frankfurter separately noting

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49. *Id.* at 15; Justices Reed, Burton, and Minton, dissented, with Reed and Minton both penning separate opinions. *See id.* at 23-44 (Reed, J., dissenting); *id.* at 44-45 (Minton, J., dissenting). Both dissents harped on the extent to which *Toth*'s crime was committed while in the military service (and so “ar[ose] in the land or naval forces”), along with the difficulties of exercising civilian criminal jurisdiction in such cases.

50. *Kinsella v. Krueger*, 351 U.S. 470, 471 (1956); *Reid v. Covert*, 351 U.S. 487, 490 (1956).

51. Justice Frankfurter wrote separately in both cases to note that he was “reserv[ing] for a later date an expression of [his] views.” *Krueger*, 351 U.S. at 481-485 (Frankfurter, J.); *Covert*, 351 U.S. at 492 (Frankfurter, J.).

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

53. *Id.* at 485-486 (Warren, C.J., dissenting).

54. *See Reid v. Covert*, 352 U.S. 901 (1956) (mem.); *see also Kinsella v. United States ex rel. Singleton* 361 U.S. 234, 250-252 & n.3 (1960) (Harlan, J., dissenting) (explaining the reasons for his – and the Court’s – about-face).

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

their concurrence in the judgment on the narrower ground that the Constitution barred such trials for capital offenses during peacetime.

For the plurality, Justice Black centered his reasoning on three different strands of argument: that the Bill of Rights protected citizens even when overseas,<sup>56</sup> that such protections could not be overridden by treaty,<sup>57</sup> and that Article I constrained the scope of military jurisdiction, per his opinion for the Court in *Toth*.<sup>58</sup> As he argued with respect to the last point, “The wives of servicemen are no more members of the ‘land and naval Forces’ when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.”<sup>59</sup> Black then rejected the government’s contention that the Make Rules Clause should be read together with the Necessary and Proper Clause, concluding that

the Necessary and Proper Clause cannot operate to extend military jurisdiction to *any group of persons* beyond that class described in Clause 14 – “the land and naval Forces.”. . . Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.<sup>60</sup>

Writing separately, Justice Frankfurter concurred in the judgment, emphasizing that “it is only the trial of civilian dependents in a capital case in time of peace that is in question.”<sup>61</sup> Although Frankfurter did not see the issue as being nearly as straightforward as Justice Black described it, he agreed that the government’s policy arguments for extending court-martial jurisdiction over the dependents of servicemembers in such cases were unconvincing.<sup>62</sup> Justice Harlan also concurred in the result, resting his separate opinion, like Justice Frankfurter, on the fact that the offenses charged in both cases were capital.<sup>63</sup> Unlike Frankfurter, though, Harlan

56. *See id.* at 5-14.

57. *See id.* at 15-19.

58. *Id.* at 19-21.

59. *Id.* at 20.

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

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

62. *Id.* at 46-49.

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

devoted his opinion to the relationship between the Make Rules Clause and the Fifth and Sixth Amendments. And although he believed that the Make Rules Clause, read together with the Necessary and Proper Clause, *could* justify the exercise of military jurisdiction over non-servicemembers accompanying the armed forces,<sup>64</sup> he also concluded that the right to trial by jury was too significant in capital cases to tolerate a territoriality-based exception. In his words,

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is “due” an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death.<sup>65</sup>

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

The issue was largely settled less than three years later when, on January 18, 1960, the Court handed down three decisions clarifying the scope of *Reid*'s constitutional constraint on court-martial jurisdiction over non-servicemembers. In *Kinsella v. United States ex rel. Singleton*, a 7-2 Court (with Justices Frankfurter and Harlan in dissent) held that the Constitution barred the peacetime exercise of military jurisdiction over the dependents of servicemembers for *non-capital* offenses.<sup>66</sup> In *Grisham v. Hagen*, a 7-2 Court held that the Constitution barred the peacetime exercise of military jurisdiction over civilian employees of the military for *capital* offenses, reasoning that such a result followed squarely from *Reid*<sup>67</sup> (a point in which Harlan and Frankfurter concurred).<sup>68</sup> And in *McElroy v. United States ex rel. Guagliardo*, a 5-4 Court filled in the last square of the two-by-

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64. *See id.* at 67-73.

65. *Id.* at 77 (citations omitted). Harlan's analysis of the extraterritorial scope of constitutional rights was heavily relied upon by Justice Kennedy in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), in which he concluded that the Constitution's Suspension Clause applies to non-citizens detained at Guantánamo Bay. *See id.* at 2255-2257.

66. 361 U.S. 234 (1960).

67. 361 U.S. 278 (1960).

68. *See Singleton*, 361 U.S. at 249-259 (Harlan, J., dissenting).

two matrix, holding that civilian employees also could not be subjected to military jurisdiction during peacetime for *non-capital* offenses.<sup>69</sup>

Justice Clark – author of the dissent in *Reid* – wrote for the Court in all three cases, concluding that *Reid's* constitutional analysis couldn't countenance the capital/non-capital distinction urged by Justices Harlan and Frankfurter. Instead, "The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"<sup>70</sup> Moreover, "since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses."<sup>71</sup>

The January 18 trilogy was the last time the Supreme Court would speak directly to the scope of Congress's power to subject non-servicemembers to trial by court-martial. Although a number of cases testing the outer boundaries of *Toth*, *Reid*, and their progeny have subsequently arisen in the lower courts, most have raised largely technical questions concerning the termination of military service and the status of active and inactive reservists.<sup>72</sup> The one exception of note is *United States v. Averette*, a Vietnam-era case in which the U.S. Court of Military Appeals (the forerunner to today's U.S. Court of Appeals for the Armed Forces) considered whether *Guagliardo's* bar on courts-martial for civilian employees of the military also applied during "wartime."<sup>73</sup> Raising the specter of *Reid* and its progeny, the Court of Military Appeals construed the UCMJ's provision authorizing such trials "in time of war" to only apply during "a war formally declared by Congress,"<sup>74</sup> which Vietnam most pointedly was not. As Judge Darden noted for the court, "A broader construction of Article 2(10) would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs."<sup>75</sup>

Although *Averette's* construction of the UCMJ thus squarely avoided deciding whether Congress *could* constitutionally subject civilian employees of the military to trial by court-martial during "wartime," it

69. 361 U.S. 281 (1960).

70. *Singleton*, 361 U.S. at 240-241.

71. *Id.* at 248.

72. For modern examples, see *Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009); and *United States v. Erickson*, 63 M.J. 504, 510-512 (A.F. Ct. Crim. App. 2006).

73. 41 C.M.R. (19 U.S.C.M.A.) 363 (1970). The decision is more easily available via Westlaw, at 1970 WL 7355.

74. *Id.* at 365.

75. *Id.*; *cf.* *Latney v. Ignatius*, 416 F.2d 821, 823 (D.C. Cir. 1969) (per curiam) (construing Article 2(10) as not applying to a civilian seaman because "the spirit of *O'Callahan v. Parker*, 395 U.S. 258 (1969)], and of the other Supreme Court precedents there reviewed, precludes an expansive view of Article 2(10)").

certainly suggested that Congress would run into grave constitutional difficulties if it did so during any conflict other than a formally declared war. The question remains open today, though, especially in light of a 2006 amendment to the UCMJ sponsored by Senator Lindsay Graham that authorizes courts-martial for “persons serving with or accompanying an armed force in the field” “[i]n time of declared war *or a contingency operation*.”<sup>76</sup>

Leaving aside the merits of the above decisions, their upshot is both straightforward and significant: at least in the context of courts-martial, it is now black-letter law that the primary (if not exclusive) source of Congress’s constitutional authority over the offender jurisdiction of such tribunals is the Make Rules Clause of Article I. Similarly, that provision, along with the rights to grand jury indictment and trial by petit jury secured by Article III and the Fifth and Sixth Amendments, serves to limit the scope of the offender jurisdiction of courts-martial to servicemembers – at least in the absence of a formal declaration of war. In other words, these cases do not just support the conclusion that Congress only has the authority to “make rules” for individuals in the armed forces; they establish the equally important idea that the validity of military (versus civilian) jurisdiction turns on the *inapplicability* of the grand- and petit-jury trial rights in Article III and the Fifth and Sixth Amendments. In understanding the constitutional constraints on the jurisdiction of military commissions, the constraints the Supreme Court has identified in the related context of courts-martial will provide useful illumination.

### B. Offense Jurisdiction

The Supreme Court’s jurisprudence evolved episodically with regard to constitutional constraints on the offender jurisdiction of courts-martial. Its jurisprudence with regard to such tribunals’ *offense* jurisdiction has only two relevant polestars: the 1969 decision in *O’Callahan v. Parker*,<sup>77</sup> and the 1987 decision in *Solorio v. United States*,<sup>78</sup> in which the Court overruled *O’Callahan*.

In *O’Callahan*, the Court rejected what the government offered as the negative implication of the *Toth/Reid* line of offender jurisdiction decisions

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76. 10 U.S.C. §802(a)(10) (emphasis added). The italicized text was added by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, §552, 120 Stat. 2083, 2217 (codified at 10 U.S.C. §802(a)(10)). The Air Force attempted to convene a court-martial pursuant to the new provision in late 2008, only to dismiss the charges once the defendant – a civilian contractor – sought habeas corpus relief in the U.S. District Court for the District of Columbia. See *Petition for a Writ of Habeas Corpus*, Price v. Gates, No. 09-106 (D.D.C. filed Jan. 16, 2009) (on file with author). See generally Megan McCloskey, *Civilian from Vegas Won’t Face Court Martial, Will Return Home*, LAS VEGAS SUN, Jan. 23, 2009.

77. 395 U.S. 258 (1969).

78. 483 U.S. 435 (1987).

– that “[t]he fact that courts-martial have no jurisdiction over nonsoldiers, whatever their offense,” should “imply that they have unlimited jurisdiction over soldiers, regardless of the nature of the offenses charged.”<sup>79</sup> Instead, Justice Douglas, writing for a 6-3 Court, conducted an extensive (if controversial)<sup>80</sup> canvas of English and early American history, concluding from that history that

the crime to be under military jurisdiction must be service connected, lest “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,” as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.<sup>81</sup>

Although the majority left for another day the articulation of specific criteria to be used in determining whether a particular offense was “service connected,”<sup>82</sup> and stressed a number of other limitations upon its holding,<sup>83</sup> it had no trouble concluding that O’Callahan’s offense was too far removed from his military service,<sup>84</sup> as a result of which his court-martial was constitutionally precluded.

The “service connection” test lasted for 17 years, but it received substantial and withering criticism along the way,<sup>85</sup> culminating in its overruling by the Court in *Solorio*. What is telling about *Solorio* is not so

79. *O’Callahan*, 395 U.S. at 267.

80. A central feature of Justice Harlan’s dissent was his suggestion that the majority had badly misread history. *See id.* at 276-280 (Harlan, J., dissenting).

81. *Id.* at 272 (majority) (footnote omitted).

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

83. *See O’Callahan*, 395 U.S. at 273-274 (“[W]e deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.”).

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

85. *See, e.g.*, Norman G. Cooper, *O’Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165, 186-87 (1977); Jonathan P. Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O’Callahan v. Parker*, 25 AIR FORCE L. REV. 1, 9-35 (1985); *see also* United States v. Alef, 3 M.J. 414, 416 n.4 (Ct. Mil. App. 1977); United States v. McCarthy, 2 M.J. 26, 28 n.1 (Ct. Mil. App. 1976).

much the fact that the Court overruled *O'Callahan*, but the manner in which it did so.

Writing for a 5-3 majority,<sup>86</sup> Chief Justice Rehnquist began with the proposition that “In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.”<sup>87</sup> These decisions made sense, Rehnquist explained, because “Whatever doubts there might be about the extent of Congress’ power under Clause 14 to make rules for the ‘Government and Regulation of the land and naval Forces,’ that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services.”<sup>88</sup> Moreover, the history recounted by the *O'Callahan* majority appeared to be far more ambiguous than *O'Callahan* itself had suggested,<sup>89</sup> and the “service connection” test had, according to the majority, proven inordinately difficult to administer. Thus,

When considered together with the doubtful foundations of *O'Callahan*, the confusion wrought by the decision leads us to conclude that we should read Clause 14 in accord with the plain meaning of its language as we did in the many years before *O'Callahan* was decided. That case’s novel approach to court-martial jurisdiction must bow “to the lessons of experience and the force of better reasoning.” We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged.<sup>90</sup>

Justice Marshall, joined by Justices Brennan and Blackmun, dissented, arguing that the majority misunderstood *O'Callahan*. Specifically, Marshall suggested that *O'Callahan* had rested on Article III and the Fifth and Sixth Amendments more than on a limited reading of the Make Rules Clause, and that Congress’s otherwise plenary power under the latter could not override the constraints resulting from the former. In his words, “[T]he exception contained in the Fifth Amendment is expressed – and applies by

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86. Justice Stevens concurred in the judgment on the ground that he believed Solorio’s offense was “service connected” under *O'Callahan*. As such, he saw no need to decide whether *O'Callahan* should be overruled. See *Solorio*, 483 U.S. at 451-452 (Stevens, J., concurring in the judgment).

87. *Solorio*, 483 U.S. at 439 (majority).

88. *Id.* at 441.

89. See *id.* at 445-446.

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

its terms – only to *cases arising in* the Armed Forces.”<sup>91</sup> Thus, as Marshall explained, “*O’Callahan* addressed not whether [the Make Rules Clause] empowered Congress to create court-martial jurisdiction over all crimes committed by service members, but rather whether Congress, in exercising that power, had encroached upon the rights of members of Armed Forces whose cases did not ‘arise in’ the Armed Forces.”<sup>92</sup>

Marshall went on to suggest that *O’Callahan* had not proven unworkable,<sup>93</sup> and that traditional principles of stare decisis compelled fidelity to precedent.<sup>94</sup> But with one possible exception,<sup>95</sup> Chief Justice Rehnquist’s analysis remains the law today, and with it, the notion that Congress’s power over the subject-matter jurisdiction of courts-martial is, thanks to the Make Rules Clause, plenary.

### C. The Constitutional Structure of Court-Martial Jurisdiction Today

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

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

92. *Id.*

93. *See id.* at 462-466.

94. *See id.* at 466-467.

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

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

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

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

## II. THE CONSTITUTION AND MILITARY COMMISSION JURISDICTION

Although scattered examples of irregular military courts – shorthanded as “military commissions” – can be found in the years leading up to the Civil War,<sup>96</sup> the first judicial decisions passing upon the relevant constitutional limits on such tribunals have the “War Between the States” as their backdrop.<sup>97</sup> To be sure, the Supreme Court bypassed its first opportunity to review a military commission convened by President Lincoln, holding in *Ex parte Vallandigham* that it lacked the statutory authority to review, by writ of certiorari, the proceedings of a military commission.<sup>98</sup> But when Lambdin Milligan brought a habeas petition challenging his conviction by a military commission established by the Union military commander for Indiana, the lower-court judges certified a division of authority,<sup>99</sup> triggering the Court’s jurisdiction to reach the merits – and to decide the circumstances under which trials by military commission might be constitutional.

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96. Most now agree that the first systematic use of such tribunals by the U.S. government took place during the Mexican War. See WINTHROP, *supra* note 31; Erika Myers, *Conquering Peace: Military Commissions as a Warfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 205 n.23 (2008) (“The Mexican War was indisputably the first time a separate military court system was created to hear cases not cognizable by courts-martial.”); see also David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 18-40 (2005) (surveying the Mexican War precedent). See generally LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005); Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT’L L. 35, 37-43 (2007).

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

98. 68 U.S. (1 Wall.) 243 (1864). For the background to *Vallandigham*, see Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* 93, 104-105 (Christopher H. Schroder & Curtis A. Bradley eds., 2009).

99. See Bradley, *supra* note 98, at 108-109.

### A. *Milligan*

Justice Davis's opinion for the majority in *Ex parte Milligan* was absolute from the outset.<sup>100</sup> Noting that "[n]o graver question was ever considered by this court,"<sup>101</sup> Davis first rejected the possibility that authority for the commissions might derive from the "laws and usages of war," which, in his view, "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."<sup>102</sup> More fundamentally, though, Davis concluded that the critical consideration was whether Milligan had a right to trial by jury:

[I]f ideas can be expressed in words, and language has any meaning, this right – one of the most valuable in a free country – is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.<sup>103</sup>

And although situations of martial law might justify derogation from the protections of the Bill of Rights, Davis went on to conclude, famously, that "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."<sup>104</sup> Thus, irrespective of whether Congress *had* authorized Milligan's trial (it had not), the majority maintained that it *could* not, thanks to the jury trial provisions of Article III and the Fifth and Sixth Amendments.

Writing separately for himself and Justices Wayne, Swayne, and Miller, Chief Justice Chase agreed with the majority that the commission that tried

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

101. *Id.* at 118.

102. *Id.* at 121; see also *id.* at 121-122 ("[N]o usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise.").

103. *Id.* at 123.

104. *Id.* at 127.

Milligan was unlawful (largely because of the absence of congressional authorization), but disagreed with what he saw as unnecessary dicta in Davis's opinion to the effect that Congress *couldn't*, in appropriate circumstances, subject certain offenses and offenders to trial by military commission.<sup>105</sup> Instead, as Chase explained, "We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana."<sup>106</sup> Chase then proceeded to consider the possible sources of such legislative power, rejecting the Make Rules Clause as a candidate.<sup>107</sup> Instead,

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

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or district such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.<sup>108</sup>

Thus, as Chase would conclude two pages later, "We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."<sup>109</sup> When Chase's opinion was heavily (if implicitly) incorporated by the Supreme Court the next time it confronted the constitutionality of military commissions three-quarters of a century later,<sup>110</sup> this passage would be entirely forgotten.

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

106. *Id.* at 137.

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

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

109. *Id.* at 142.

110. For a fascinating take on the implications of *Milligan* during World War I (and prior to *Quirin*), see *Trial of Spies By Military Tribunals*, 31 OP. ATT'Y GEN. 356 (1918), in

### B. *Quirin*

It was probably no understatement when, in 2004, Justice Scalia referred to the Supreme Court's 1942 decision in *Ex parte Quirin*,<sup>111</sup> as "not this Court's finest hour."<sup>112</sup> *Quirin* upheld the constitutionality of a military tribunal established by President Roosevelt to try eight Nazi saboteurs caught within the United States. Even Justice Frankfurter, who joined Chief Justice Stone's opinion for the unanimous Court in *Quirin* in its entirety, later referred to the decision as "not a happy precedent."<sup>113</sup> And popular and academic commentaries on the decision have been nearly uniform in their withering criticism of both the merits of the Court's analysis and the unusual means by which it disposed of the case.<sup>114</sup>

*Quirin* is perhaps most controversial to the extent that it was inconsistent with *Milligan*, which it sidestepped in two significant ways. First, the *Quirin* Court found congressional authorization for military commissions (which had been lacking in *Milligan*) in a statute that was, charitably, ambiguous.<sup>115</sup> Specifically, the Court relied upon what was then Article 15 of the Articles of War (as enacted by Congress in 1916 and amended in 1920), which provided that "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions."<sup>116</sup> In Chief Justice Stone's view, Article 15 reflected Congress's affirmative desire to allow the President to convene

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which Attorney General Gregory advised President Wilson that a military commission could not try a Russian national seized at the Mexican border attempting to enter the United States to commit acts of sabotage on behalf of the German government. *See id.* at 357-361.

111. 317 U.S. 1 (1942).

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

113. *See* G. Edward White, *Felix Frankfurter's "Soliloquy" in Ex parte Quirin: Nazi Sabotage's Constitutional Conundrums*, 5 GREEN BAG 2D 423, 436 (2002).

114. For useful pre-September 11 accounts, see EUGENE RACHLIS, *THEY CAME TO KILL* (1961); David Danelski, *The Saboteurs' Case*, 1996 J. S. CT. HIST. 61; Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); and Robert E. Cushman, *Ex Parte Quirin et al. – The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942). *Quirin* has been the subject of at least three post-September 11 books, *see* MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (1st ed. 2004); LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2d ed. 2005); PIERCE O'DONNELL, *IN TIME OF WAR* (2005), and a bevy of shorter treatments, of which the best is Carlos M. Vázquez, "Not a Happy Precedent": *The Story of Ex parte Quirin*, in *FEDERAL COURTS STORIES* 219 (Judith Resnik & Vicki C. Jackson eds., 2009).

115. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006); *see also* Vázquez, *supra* note 114, at 239 n.79.

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

military commissions in any cases that, under the laws of war, could be subjected to military jurisdiction.<sup>117</sup>

Separate from whether Article 15 actually *did* authorize the saboteurs' trial by military commission, *Quirin* also reflected upon the source of Congress's authority to so provide – an aspect of the Court's analysis that has received far less attention than its statutory parsing. As Chief Justice Stone explained, Article 15 was proof that “Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”<sup>118</sup> In so acting, Congress had not used its power under the Raise Armies, Declare War, or Make Rules Clauses (as Chief Justice Chase had suggested it might in *Milligan*), but had

exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limits, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.<sup>119</sup>

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

[A] majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that – even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to “commissions” – the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

*Id.* at 47-48. See generally Jack L. Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 223 (2006). For more on Jackson's draft concurrence in *Quirin* and his internal agonizing over the proper judicial role in wartime, see Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, in WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 183 (Austin Sarat & Nasser Hussain eds., 2010).

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

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

In other words, in sanctioning Congress's implicit authorization of the trial of offenses against the laws of war by military commissions, *Quirin* held that the power to so provide came from the Law of Nations Clause – and not any other source of Article I authority. To be sure, Congress had chosen to “adopt[] the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts,” rather than “crystallizing in permanent form and in minute detail every offense against the law of war,”<sup>120</sup> but the critical point was that its authority to adopt *either* alternative came from only one provision of Article I: the Law of Nations Clause.<sup>121</sup>

This point is reinforced by *Quirin*'s second – and more fundamental – departure from *Milligan*: its conclusion that the constitutional rights to grand jury indictment and to trial by petit jury in criminal cases, which had been so central to Justice Davis's analysis in *Milligan*,<sup>122</sup> were simply inapplicable. As Stone explained,

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one “arising in the land . . . forces,” when the accused is not a member of or associated with those forces. But even so, the exception [in the Grand Jury Indictment Clause] cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, §2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, §2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, *offenses committed by enemy belligerents against the law of war.*<sup>123</sup>

In other words, the rights to grand jury indictment and trial by petit jury enmeshed within Article III and the Fifth and Sixth Amendments included a

120. *Id.* at 30.

121. *See id.* at 29-30 (“It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing ‘the crime of piracy as defined by the law of nations’ is an appropriate exercise of its constitutional authority, ‘to define and punish’ the offense since it has adopted by reference the sufficiently precise definition of international law.” (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

122. *See supra* text accompanying note 102.

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

categorical exception for “offenses committed by enemy belligerents against the law of war,” a carve-out the existence of which, however normatively persuasive,<sup>124</sup> Stone traced to precisely *one* isolated statutory authority.<sup>125</sup>

As for *Milligan*, Stone maintained that Justice Davis’s majority opinion “was at pains to point out that Milligan . . . was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents.”<sup>126</sup> Thus, whereas the Constitution’s jury protections (as interpreted in *Milligan*) barred the trial of civilians by military commission when civil process was available, it did not bar such trials for “enemy belligerents” charged with violating the laws of war irrespective of the availability of civil courts, and Congress had in fact authorized such trials through Article 15 of the Articles of War. *Quirin* thus converted *Milligan*’s apparently categorical constitutional ban on military commissions in areas not under martial rule into a circumstance-specific rule that turned on the status of the offender and the nature of the charged offense. To that end, the Court in *Quirin* proceeded to devote nine pages to the specific question of whether the offenses with which the saboteurs were charged actually *were* violations of the laws of war, answering that question – predictably – in the affirmative.<sup>127</sup>

Whether *Quirin* was fair to *Milligan* in its distinguishing of the earlier case is a matter of considerable dispute – and continuing debate.<sup>128</sup> What matters for present purposes, though, is that *Quirin* necessarily reached two forward-looking *constitutional* holdings in addition to its construction of Article 15: *First*, *Quirin* established that Congress had the constitutional authority, under the Law of Nations Clause, to subject to trial “offenders or

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

125. Stone’s only support was a provision in the 1806 Articles of War authorizing the death penalty for alien spies “according to the law and usage of nations, by sentence of a general court martial.” *Id.* at 41. As he wrote, “This enactment must be regarded as a contemporary construction of both Article III, §2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces.” *Id.*; *see also id.* at 42 (“It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.” (footnote omitted)).

126. *Id.* at 45.

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

128. *See, e.g.*, Vázquez, *supra* note 114, at 236-241.

offenses that by statute or by the law of war may be triable by such military commissions.” *Second*, *Quirin* established that such trials could be conducted by military commissions not because of Congress’s Article I powers, but because the rights to grand jury indictment and trial by petit jury – which would otherwise bar the exercise of military jurisdiction – simply did not apply to offenses committed by enemy belligerents against the law of war. Whatever the logic or convincingness of these holdings, or the myriad questions that they left unanswered, subsequent decisions would solidify their vitality as precedent.

### C. *Quirin’s Subsequent History: Yamashita to Madsen*

Indeed, the Court adhered quite closely to (and quoted heavily from) *Quirin* in its next military commission case – *In re Yamashita*, decided in February 1946.<sup>129</sup> Yamashita was convicted of war crimes and sentenced to death by an American military commission for his failure to prevent a flood of abuses committed by Japanese soldiers under his command as the United States overran the Philippines.<sup>130</sup> The Court affirmed Yamashita’s conviction and sentence (albeit this time over strong dissents),<sup>131</sup> relying largely on *Quirin*. As Chief Justice Stone described,

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

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129. 327 U.S. 1 (1946).

130. For more on the background to (and problems with) *Yamashita*, see RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); and A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949). See also Bruce D. Landrum, Note, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 150-174 (2006); John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUP. CT. HIST. 54, 60 (2003).

131. See *Yamashita*, 327 U.S. at 26-41 (Murphy, J., dissenting); *id.* at 41-81 (Rutledge, J., dissenting). Justices Murphy and Rutledge also dissented from the Court’s decision one week later to turn away – as controlled by *Yamashita* – an appeal in a separate military commission case. See *In re Homma*, 327 U.S. 759, 759-761 (1946) (Murphy, J., dissenting); *id.* at 761-763 (Rutledge, J., dissenting).

appropriate tribunal for the trial and punishment of offenses against the law of war.<sup>132</sup>

Thus, Stone explained, Congress “adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.”<sup>133</sup> *Yamashita* thereby reasserted the Law of Nations Clause rationale articulated in *Quirin*, distinguishing *Milligan* (as had *Quirin*) on the ground that Yamashita’s commission had authority “only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war.”<sup>134</sup> Concluding that the laws of war tolerated the continued use of military commissions after the formal cessation of hostilities;<sup>135</sup> that Yamashita was properly charged with offenses against the laws of war;<sup>136</sup> and that his trial had not run afoul of any constitutional or treaty-based procedural protections;<sup>137</sup> the Court affirmed his conviction and death sentence.<sup>138</sup>

Just three weeks later, though, the same Court reinforced the narrowness of the *Quirin* exception to *Milligan* in *Duncan v. Kahanamoku*.<sup>139</sup> There, a 6-2 Court invalidated the use of “provost courts” to try two civilians for petty offenses in Hawaii in August 1942 and March 1944, respectively, even though the territory was still technically under martial law at the time of the defendants’ crimes.<sup>140</sup> Justice Black’s opinion for the majority rested on statutory interpretation, reading the “martial law” authorized by Section 67 of Hawaii’s Organic Act<sup>141</sup> as not including the power to subject civilians to military trial for non-military offenses – at least partially in light of *Milligan*, a decision with which Congress would have been familiar at the time the Organic Act was enacted.<sup>142</sup> What was implicit in Black’s majority opinion, though, was made explicit by Justice

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

133. *Id.* at 8.

134. *Id.* at 9.

135. *See id.* at 11-13.

136. *See id.* at 13-18.

137. *See id.* at 18-25.

138. *See id.* at 26.

139. 327 U.S. 304 (1946).

140. *See id.* at 324.

141. Act of Apr. 30, 1900, ch. 339, §67, 31 Stat. 141, 153 (authorizing the Governor of Hawaii “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known”).

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

Murphy's concurrence: that the Constitution barred the trials in Hawaii whether or not the Organic Act permitted them, and that *Milligan's* "open court" rule survived *Quirin* (indeed, Murphy's opinion does not cite *Quirin* once).<sup>143</sup> Instead, *Duncan* suggested that, where the defendant was unquestionably a "civilian," *Milligan* remained good law: where the civilian courts were open and functioning, military jurisdiction was constitutionally foreclosed.

*Duncan* was not the Court's last word on World War II-era military commissions. In *Hirota v. MacArthur*,<sup>144</sup> the Court turned away for lack of jurisdiction a series of "original" habeas petitions filed by Japanese citizens seeking to challenge their convictions by the International Military Tribunal for the Far East.<sup>145</sup> In *Johnson v. Eisentrager*,<sup>146</sup> the Court held that non-citizens held outside the territorial United States who had been properly convicted by a duly-convened military commission had no right to pursue habeas corpus relief in the United States.<sup>147</sup> And in *Madsen v. Kinsella*,<sup>148</sup> the Court sustained the use of a military commission in what was then occupied Germany to try the civilian wife of a servicemember for her husband's murder, in violation of the German Criminal Code. Writing for an 8-1 Court in *Madsen*, Justice Burton explained that the law of war "includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government,"<sup>149</sup> and so Madsen's military commission trial for ordinary crimes in occupied territory was consistent with Article 15, at least as interpreted in *Quirin* and *Yamashita*.<sup>150</sup>

In none of these cases, however, did the Court revisit *Quirin's* constitutional analysis as to the sources of Congress's authority to subject specific offenses to trial by military commission, or the limits imposed by the Constitution's grand- and petit-jury protections. Because Article 15 merely incorporated whatever the laws of war authorized, *Quirin's* statutory and constitutional analyses of whether a military commission was legally authorized merged into a single, law-of-war-based question that went to the jurisdiction of military commissions over both the offender and the offense.

143. *Duncan*, 327 U.S. at 324-335 (Murphy, J., concurring).

144. 338 U.S. 197 (1948) (per curiam).

145. See generally Vladeck, *supra* note 37 (summarizing the background and implications of *Hirota*).

146. 339 U.S. 763 (1950).

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

148. 343 U.S. 341 (1952).

149. *Id.* at 354-355 (footnote omitted).

150. See *id.* at 351-352.

*D. Hamdan*

Thus, when President Bush created military commissions pursuant to the November 2001 Military Order,<sup>151</sup> one of the central questions became whether the commissions were consistent with what Congress had authorized – whether they were only empowered to try offenses and offenders triable by military commission under the laws of war.<sup>152</sup> Acting under the order, the President designated six unnamed detainees for trial by military commission in July 2003.<sup>153</sup> The first formal charges were revealed a little over one year later, when Salim Hamdan was charged with the crime of “conspiracy.”<sup>154</sup> Hamdan subsequently brought a habeas petition challenging the legality of his impending trial.<sup>155</sup> After the lower courts divided on the merits of Hamdan’s claims,<sup>156</sup> the Supreme Court granted certiorari in November 2005, and heard argument in March 2006.<sup>157</sup>

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151. See 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). Several years before September 11, the former Chief Judge of the U.S. Court of Military Appeals had specifically advocated the creation of military tribunals to punish violations of the laws of war. See Robinson O. Everett, *Possible Use of American Military Tribunals To Punish Offenses Against the Law of Nations*, 34 VA. J. INT’L L. 289 (1994).

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

153. See Press Release, Dep’t of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), available at <http://www.defense.gov/releases/release.aspx?releaseid=5511>.

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

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

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

157. After certiorari was granted, Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.), section 1005(e)(1) of which purported to remove the jurisdiction of the federal courts – including the Supreme Court – over suits such as Hamdan’s. In its ruling on the merits, though, the Supreme Court concluded that the DTA’s

On the merits, the Court held that the commissions created pursuant to President Bush's Military Order exceeded the authority that Congress had delegated through Article 21 (Article 15's successor) of the UCMJ. As Justice Stevens explained at the outset of Part IV of his lengthy opinion, "We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions."<sup>158</sup> After all, "even *Quirin* did not view the authorization as a sweeping mandate for the President to 'invoke military commissions when he deems them necessary.'"<sup>159</sup> Instead, as Stevens explained, *Quirin* "recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions – with the express condition that the President and those under his command comply with the law of war."<sup>160</sup>

In Hamdan's case, then, the question became whether "conspiracy" was properly triable by a military commission. And since "[t]here is no suggestion that Congress has, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' positively identified 'conspiracy' as a war crime,"<sup>161</sup> the inquiry instead devolved into whether such an offense was generally recognized as a violation of the laws of war. This inquiry, Stevens, reasoned, must turn on the existence of clearly established precedent. In his words,

When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.<sup>162</sup>

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jurisdiction-stripping provision did not apply to "pending" cases, including Hamdan's. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 572-584 (2006).

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

159. *Id.* (citation omitted).

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

161. *Hamdan*, 548 U.S. at 601-602 (plurality) (footnote omitted). Justice Kennedy, who otherwise provided the fifth vote in support of Justice Stevens's opinion, did not deem it necessary to reach the question whether conspiracy was triable as a war crime. See *id.* at 655 (Kennedy, J., concurring in part).

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

Indeed, even in those jurisdictions that still recognize common-law crimes,<sup>163</sup> Stevens explained, “an act does not become a crime without its foundations having been firmly established in precedent,”<sup>164</sup> a caution that is “all the more critical when reviewing developments that stem from military action.”<sup>165</sup>

With these admonitions in mind, Stevens turned to the specific offense of conspiracy, noting that it “has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war.”<sup>166</sup> After reviewing and rejecting various examples offered by the government (and by Justice Thomas in dissent),<sup>167</sup> Stevens went on to explain that “international sources confirm that the crime charged here is not a recognized violation of the law of war,”<sup>168</sup> citing various treaties and decisions of international courts,<sup>169</sup> including the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>170</sup> As such, “Because the charge does not support the commission’s jurisdiction, the commission lacks authority to try Hamdan.”<sup>171</sup>

163. The Supreme Court has rejected the power of the U.S. federal courts to try common-law crimes since shortly after the Founding. *See* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

164. *Hamdan*, 548 U.S. at 602 n.34 (plurality) (citations omitted).

165. *Id.*

166. *Id.* at 603-04 (footnotes omitted).

167. *See id.* at 604-09 & n.37.

168. *Id.* at 610.

169. *See id.* at 610-611 & nn.38-40.

170. As Stevens explained, the ICTY in the *Tadić* case adopted “joint criminal enterprise” (“JCE”) as a theory of enterprise liability rather than a “crime on its own,” and the Appeals Chamber in the *Milutinović* case reiterated that “[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes.” *Id.* at 611 n.40 (quoting *Prosecutor v. Milutinović, Decision on Dragoljub Ojđanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise*, Case No. IT-99-37-AR72, ¶26 (ICTY App. Chamber, May 21, 2003) (alteration and omission in original)); *see also* *Prosecutor v. Tadić, Judgment*, Case No. IT-94-1-A (ICTY App. Chamber, July 15, 1999). *See generally* BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 758-782* (2007) (summarizing and quoting from debates over the meaning and scope of JCE in the ICTY’s jurisprudence).

The ICTY’s jurisprudence has since been criticized by the ECCC – the Cambodian war crimes tribunal investigating the abuses of the Pol Pot regime. *See* Kevin Jon Heller, *The ECCC Issues a Landmark Decision on JCE III*, OPINIO JURIS, May 23, 2010, available at <http://opiniojuris.org/2010/05/23/the-eccc-issues-a-landmark-decision-on-jce-iii>. The disagreement over JCE notwithstanding, though, neither decision calls into question the *Hamdan* plurality’s conclusion that international criminal law does not recognize a standalone offense of conspiracy.

171. *Hamdan*, 548 U.S. at 611-612. Curiously, Stevens had also hinted much earlier in the opinion that the commission might lack what he called “personal” jurisdiction (here, “offender” jurisdiction) over Hamdan, as well – but only in the context of identifying, rather than resolving, Hamdan’s arguments. *See id.* at 589 n.20 (“Hamdan raises a substantial

Justice Stevens went on in Part VI of his opinion to identify additional infirmities in Hamdan's trial arising out of the lack of conformity between the commission's procedures, on the one hand, and the UCMJ and the Geneva Conventions, on the other.<sup>172</sup> As relevant here, though, his analysis of whether the offense of conspiracy is triable as a violation of the laws of war takes *Quirin* to its logical stopping point (if not a bit beyond). Where Congress has only authorized military commissions consistent with the laws of war, *Hamdan* seems to establish that the President has very little authority to deviate from what those laws have been held to proscribe.

#### *E. The Military Commissions Acts of 2006 and 2009*

The Court in *Hamdan* went out of its way to suggest that Congress could provide at least some of the statutory authority for military commissions that the Court had found lacking.<sup>173</sup> Four months later, Congress obliged, enacting the Military Commissions Act of 2006.<sup>174</sup> In addition to providing sweeping substantive authority for military commission trials,<sup>175</sup> the MCA also purported to bar invocation of the Geneva Conventions as a "source of rights" in any litigation,<sup>176</sup> and to preclude the federal courts from entertaining *any* lawsuits challenging the detention *or* trial by military commission of non-citizens held as "enemy

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argument that, because the military commission that has been convened to try him is not a 'regularly constituted court' under the Geneva Conventions, it is ultra vires and thus lacks jurisdiction over him.").

172. *See id.* at 613-635. Justice Kennedy concurred in most of this discussion, save for the question of whether the commission was consistent with that part of Common Article 3 of the Geneva Conventions that required the commission's procedures to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." *See id.* at 633-635; *see also id.* at 653-655 (Kennedy, J., concurring in part).

173. *See, e.g., id.* at 636 (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *id.* at 636-637 (Kennedy, J., concurring in part) ("This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority.").

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

175. *Id.* §3(a), 120 Stat. at 2600-2631.

176. *Id.* §5(a), 120 Stat. at 2631. The only case to date in which section 5 has figured prominently had nothing to do with the war on terrorism. *See Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010). For a discussion of some of the difficult questions section 5 raises, see *Noriega*, 130 S. Ct. at 1002-1010 (Thomas, J., dissenting from the denial of rehearing en banc).

combatants,” other than the narrow statutory appeals already provided by the Detainee Treatment Act of 2005 (DTA).<sup>177</sup>

Of particular salience here, the MCA of 2006 specifically defined the offender *and* offense jurisdiction of the commissions it established. To that end, the 2006 MCA created 10 U.S.C. §948d(a), which provided that “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.” And 10 U.S.C. §948a(1) defined “unlawful enemy combatant” as, *inter alia*, “a person who has engaged in hostilities *or* who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”<sup>178</sup>

As various international law scholars have explained, though, “emerging international standards appear to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals [with exceptions not here relevant].”<sup>179</sup> That statement does little to elucidate the critical line *between* “direct” and “indirect” participation,<sup>180</sup> but at least where it is clear that the individual in question is at most an indirect participant, the laws of war seem to preclude trial by military commission. Thus, while the first clause of §948a(1) is superficially untroubling, the second clause raises the very distinct possibility that individuals who are (at *most*) indirect participants in hostilities might still

177. *Id.* §7(a), 120 Stat. at 2635-2636. This provision was invalidated as applied to the Guantánamo detainees in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and as applied to three non-citizens detained at Bagram Air Base in Afghanistan in *al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010). A separate provision, codified at 10 U.S.C. §950j(b), purported to preclude collateral challenges to military commissions. *See* MCA of 2006 §3(a), 120 Stat. at 2623-2624. That provision, though, was deleted by the Military Commissions Act of 2009.

178. 10 U.S.C. §948a(1)(A)(i) (2006) (emphasis added); *see also id.* §948c (providing that “alien unprivileged enemy combatants” can be tried by military commissions established under the MCA). *See generally* Michael Montañó, Note, *Who May Be Tried Under the Military Commissions Act of 2006?*, 61 STAN. L. REV. 1281 (2009).

179. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 59 (2009); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2115 & n.304 (2005).

180. For much more on this point, *see* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 202-206 (2010). *See also* INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *reprinted in* 872 INT’L REV. RED CROSS 991, 1016-1028 (2008); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5 (2010). Solis and Schmitt both note the difficulties inherent in the concept of “direct participation” in a non-international armed conflict, and both critique the ICRC’s response – to articulate an intermediate concept of “continuous combat function.” As relevant here, though, what matters is that none of these authorities suggest that *indirect* participants can be subjected to trial by military commission for violations of the laws of war.

be subjected to trial by military commission.<sup>181</sup> This possibility was only heightened by the Military Commissions Act of 2009,<sup>182</sup> which expanded the definition of those subject to trial to include any non-citizen who “was a part of al Qaeda at the time of the alleged offense under this chapter,”<sup>183</sup> without elaborating on what it means to be “a part of al Qaeda.”

In addition to its sweeping definition of who could be tried by military commissions, the 2006 MCA also codified 28 separate substantive offenses triable by military commissions.<sup>184</sup> Before defining the specific crimes, though, the statute set forth its “purpose” to “codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.”<sup>185</sup> And to reinforce the point, the next subsection (which was 10 U.S.C. §950p(b)) provides that “the provisions of this subchapter . . . are declarative of existing law,” and so “do not preclude trial for crimes that occurred before the date of the enactment of this chapter.”<sup>186</sup> These two provisions seem particularly curious given that, in addition to traditional war crimes, the 2006 MCA also included as substantive offenses the crimes of “terrorism,”<sup>187</sup> “providing material support for terrorism,”<sup>188</sup> and, notwithstanding *Hamdan*, “conspiracy.”<sup>189</sup> And although the 2009 MCA slightly tweaked some of the language, it reenacted as standalone offenses the same three crimes (along with 26 others).<sup>190</sup>

The Military Commissions Acts of 2006 and 2009 have thereby raised in sharp relief two questions that the Supreme Court has not yet had to answer: May Congress define a violation of the law of nations not recognized by the law of nations itself? Even if the answer is yes, may

181. See Goodman, *supra* note 179, at 60-63 (discussing the inappropriateness of including indirect participants within the scope of the “enemy combatant” definition).

182. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574-2614 (codified in scattered sections of 10 U.S.C.).

183. *Id.* §1802, 123 Stat. at 2575 (codified at 10 U.S.C. §948a(7)(C)). The full offender jurisdiction provision now authorizes the trial of any alien who is not a “privileged belligerent” (as defined in 10 U.S.C. §948a(6)), and who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.” *Id.*

184. See 10 U.S.C. §950v(b) (2006).

185. *Id.* §950p(a).

186. *Id.* §950p(b).

187. *Id.* §950v(b)(24).

188. *Id.* §950v(b)(25).

189. *Id.* §950v(b)(28).

190. See Military Commissions Act of 2009, Pub. L. No. 111-84, §1802, 123 Stat. 2190, 2610-2611 (codified at 10 U.S.C. §950t(24), (25), and (29)). One important improvement in the 2009 MCA is the requirement that certain offenses be committed “in violation of the law of war.” See *e.g.*, 10 U.S.C. §§950t(13)(A), (15), (16), (17), (19), (27).

Congress subject such violation to trial by military commission?<sup>191</sup> It is to these questions that this article now turns.<sup>192</sup>

### III. THE LAWS OF WAR AS A CONSTITUTIONAL CONSTRAINT

Parts I and II established a series of distinct but related propositions that bear rehashing here: *First*, Congress's power over the offense jurisdiction of military courts generally derives from Article I, Section 8. As with any federal crime, Congress must have the constitutional authority to proscribe the relevant underlying conduct. *Second*, Congress's power over the offender jurisdiction of military courts also derives from Article I, Section 8. Although many of the powers in Article I, Section 8 impose no constraints on *who* can be subjected to trial, some, like the Make Rules Clause, have been held to do so. *Third*, Congress's powers over both the offense and offender jurisdiction of military courts are constrained not only by the internal textual limits of Article I, but also by the external limits imposed by the grand- and petit-jury requirements of Article III and the Sixth Amendment, at least when they apply.

With these points in mind, the question becomes two-fold: How, if at all, does Article I, Section 8 constrain the offense and offender jurisdiction of military commissions? And how, if at all, do the grand- and petit-jury requirements of Article III and the Fifth and Sixth Amendments constrain the offense and offender jurisdiction of military commissions?

At least with regard to the Article I, Section 8 issue, the Supreme Court's case law provides no definitive resolution, but important clues. As *Quirin* itself recognized, Congress's power to subject to trial offenses against the law of war by non-servicemembers comes from the Law of Nations Clause – and not any other source of Article I authority. Although other powers might be implicated with regard to the use of military tribunals in other contexts (for example, occupation courts, as in *Madsen v. Kinsella*), Congress's authority to enact statutes like the MCA comes entirely from the Law of Nations Clause.<sup>193</sup>

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191. A third question raised by the Military Commissions Acts, but beyond the scope of this Article, goes to the retroactive aspect of these definitions. Even if Congress *could* authorize military commissions for offenses or offenders not so triable under the laws of war, there is the separate issue of whether Congress may so act retrospectively, and subject individuals to trial for conduct undertaken prior to the enactment of the 2006 MCA.

192. These questions have arisen, but not yet been decided, in a series of challenges to military commissions convened under the MCA – including a petition for a writ of mandamus to the D.C. Circuit in *In re bin al Shibh*, No. 09-1238 (D.C. Cir. filed Sept. 9, 2009), and appeals to the Court of Military Commission Review in *United States v. al Bahlul*, No. 09-001 (Ct. Mil. Com'n Rev. argued Jan. 26, 2010), and *United States v. Hamdan*, No. 09-002 (Ct. Mil. Com'n Rev. argued Jan. 26, 2010).

193. Even some of the staunchest defenders of the MCA have assumed this point. See, e.g., Paulsen, *supra* note 27, at 1821.

That conclusion, though, only begs another question: Does Congress have the authority under the Law of Nations Clause to “define” offenses that are not generally understood by the international community to constitute violations of the laws of war? As this Part will demonstrate, whether Congress has the power to subject to trial by military commission offenses or offenders that are not clearly triable under the laws of war depends both on the degree of deference to which Congress is entitled in exercising such Article I authority and the relevance *vel non* of other constitutional constraints on the exercise of military jurisdiction. Thus, even though there is some room for disagreement about the deference to which Congress is entitled under the Law of Nations Clause, and even though it is possible that there might be other sources of authority for conferring offense and offender jurisdiction upon military commissions, the grand- and petit-jury requirements of Article III and the Fifth and Sixth Amendments do more of the work in constraining those powers than has previously been appreciated.

#### A. “Define and Punish”: The Original Understanding

Perhaps unsurprisingly, questions as to the scope of Congress’s power “To define and punish . . . Offences against the Law of Nations” arose almost as soon as the language was proposed at the 1787 Constitutional Convention. As is clear from historical sources, after the Convention entertained a series of proposals relating to the need for a legislative power to punish piracy (and other maritime offenses), counterfeiting, and offenses against the law of nations, the Committee on Style reported out the following provision: “The Congress . . . shall have power . . . To define and punish piracies and felonies committed on the high seas, and punish offenses against the law of nations.”<sup>194</sup> As Professor Beth Stephens has explained, “This language, with the distinction between the power to ‘define and punish’ piracy and felonies on the high seas, but only ‘punish’ offenses against the law of nations, produced the only substantive debate on the offenses section of the Clause.”<sup>195</sup> Specifically,

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

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194. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 594-595 (Max Farrand ed., 1937) (Committee of Style and Arrangement).

195. Stephens, *supra* note 26, at 473.

replied by suggesting that “define” was intended to suggest the need to provide detail, not to create offenses where none had previously existed: “The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule.” The change was accepted by a vote of six to five, and the Clause adopted as it now stands, granting Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and offenses against the law of nations.”<sup>196</sup>

Thus, “The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”<sup>197</sup>

Early interpretations of comparable provisions appeared to reinforce this view. For example, in *United States v. Furlong*,<sup>198</sup> the Court considered whether “murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner upon a foreigner.”<sup>199</sup> The 1790 Crimes Act made it a criminal offense for “any person or persons [to] commit upon the high seas . . . murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death,”<sup>200</sup> and the question in *Furlong* was whether Congress had the power to so provide pursuant to its Article I authority “to define and punish Piracies and Felonies committed on the high Seas.” Writing for a unanimous Court, Justice Johnson answered that question in the negative:

Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent.<sup>201</sup>

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196. *Id.* (footnotes omitted; third alteration in original); see also Kent, *supra* note 26, at 899 (providing a similar account of the debate).

197. *Id.* at 474.

198. 18 U.S. (5 Wheat.) 184 (1820).

199. *Id.* at 194 (emphasis omitted). For a cogent discussion of *Furlong* (placing it in the broader context of the Court’s contemporaneous jurisprudence regarding crimes committed on the high seas), see Kontorovich, *supra* note 26, at 189-191.

200. Act of Apr. 30, 1790, ch. 9, §8, 1 Stat. 112, 113-114.

201. *Furlong*, 18 U.S. at 198.

More directly on point, Attorney General James Speed, in an 1865 opinion concerning the legality of trying the Lincoln assassination conspirators before military tribunals,<sup>202</sup> reached a similar conclusion about the limits on Congress's power to give substantive content to the law of nations. After rejecting the possibility that Congress could use its power under the Make Rules Clause to create military commissions,<sup>203</sup> Speed turned to the Law of Nations Clause:

That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that 'Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations.' To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy.<sup>204</sup>

But perhaps the most sustained consideration of the scope of Congress's power under the Law of Nations Clause came in *United States v. Arjona*,<sup>205</sup> an 1887 decision in which the Supreme Court upheld a federal statute criminalizing the counterfeiting of foreign government securities.<sup>206</sup> As Chief Justice Waite explained, "the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized [under the law of nations]."<sup>207</sup> To that end,

This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. . . . Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.<sup>208</sup>

As one commentator recently observed, *Arjona* thereby established three significant propositions about the Law of Nations Clause: First,

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

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

204. *Id.* at 299.

205. 120 U.S. 479 (1887).

206. See Act of May 16, 1884, ch. 52, §§3, 6, 23 Stat. 22, 22-24.

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

208. *Id.* at 488.

Congress does not need to expressly invoke the Law of Nations Clause when legislating pursuant thereto. Second, the Law of Nations Clause turns on the scope of the Law of Nations *at the time* of the relevant statute, and not as it existed at the Founding. Third, the Clause “not only allows Congress to act against direct violations of the law of nations, but also allows Congress to criminalize acts a step removed from the demands of international law.”<sup>209</sup> After all, “An individual counterfeiter is not violating international law, since the duty to prevent counterfeiting rests with states, not individuals.”<sup>210</sup>

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

### B. Competing Views on the Degree of Legislative Latitude

The Supreme Court has provided no further guidance as to Congress’s leeway under the Law of Nations Clause in the 122 years since *Arjona* was decided, leaving to the academics the debate over the amount of deference to which Congress is entitled.<sup>211</sup> In an exhaustive article in 2000, Professor Beth Stephens concluded that the deference due Congress under the Law of Nations Clause was comparable to the deference (in the form of the rational basis test) that Congress ordinarily receives in identifying appropriate circumstances for the exercise of its other enumerated powers – such as, for example, its power “To regulate Commerce . . . among the several States.”<sup>212</sup> As Stephens put it, “in deciding what falls within the reach of the Clause, Congress’s decisions are entitled to significant deference from the judiciary.”<sup>213</sup> Professor Eugene Kontorovich has advanced a comparable claim, concluding that “Congress’s Article I authority under the Define and Punish Clause requires that the conduct it punishes either have some connection to the United States, or else be piracy or some other offense clearly treated as universally cognizable through the general consent of nations.”<sup>214</sup>

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209. Note, *supra* note 26, at 2386-2387.

210. *Id.* at 2387.

211. For an interesting – if controversial – recent district court decision taking up this issue in the context of Congress’s power to define piracy (and concluding that Congress had gone further than international law allowed), see *United States v. Said*, No. 10-57 (E.D. Va. Aug. 17, 2010).

212. U.S. CONST. art. I, §8, cl. 3.

213. Stephens, *supra* note 26, at 545.

214. Kontorovich, *supra* note 26, at 203.

In marked contrast, Professor Charles Siegal argued in an influential 1988 article that Congress is entitled to little or no deference in identifying the substantive content of the law of nations when exercising its authority under the Law of Nations Clause.<sup>215</sup> As Siegal explained,

[J]udicial consideration of the congressional definition of an offense is based on the principle implicit in the offenses clause itself, that an international norm exists. The [Law of Nations Clause] differs from many other constitutional provisions in that it contains not only its own standard against which to measure congressional action, but a specifically legal standard at that. Similarly, there is an obvious distinction between Congress' decision to impose criminal sanctions on the violation of an established norm, such as slavery, and its decision that there is a norm. Finally, the congressional determination that a certain act constitutes an offense against the law of nations contains nothing of the political character of the executive determinations that supported the discretion given to the President in [cases like] *Zemel v. Rusk*, *Haig v. Agee* and *Regan v. Wald*. Accordingly, a deferential standard of review will almost never be appropriate.<sup>216</sup>

Rejecting the seeming absolutism of both Stephens's and Siegal's approaches, a recent student note<sup>217</sup> offered an intermediate position based largely on the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.<sup>218</sup> Specifically, the note advocated a multi-faceted approach: "A court would first examine the degree of international consensus behind the rule, momentarily disregarding the United States' stance on the rule."<sup>219</sup> Then, courts "would examine the context and character of Congress's action to determine whether the statute can be seen as a means of conforming to or advancing a rule of international law."<sup>220</sup> At that step, evidence that the United States had previously accepted the rule as a binding rule of international law would counsel in favor of having it fall

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

216. *Id.* at 941-42 (footnotes omitted); *cf.* Morley, *supra* note 26, at 143 ("The immutable principles comprising the law of nations were thought to govern only certain discrete areas including navigation, war, commerce, and diplomatic interactions with other nations. It is only with regard to these subjects that Congress may legislate under the Offenses Clause.").

217. Note, *supra* note 26.

218. 542 U.S. 692 (2004) (holding that the arbitrary detention of a Mexican national for less than one day violated no norm of customary international law sufficiently well-established as to support a cause of action under the Alien Tort Claims Act, 28 U.S.C. §1350).

219. Note, *supra* note 26, at 2395.

220. *Id.* at 2396.

within the scope of the Law of Nations Clause, whereas evidence that the United States had rejected such a rule would militate against such a conclusion.<sup>221</sup> Courts would then consider “the combined weight of the conclusions it reached in its separate examinations of the strength of international consensus and the character of Congress’s actions.”<sup>222</sup>

The note then illuminated the proposal with three slightly more specific examples, reasoning that (1) a “firmly entrenched rule of customary international law would almost always support legislation under the [Law of Nations] Clause”;<sup>223</sup> (2) a rule based on a “moderately strong international consensus” would “stand or fall depending on the character of Congress’s action”;<sup>224</sup> and (3) “an international law rule that was backed by only a slim international consensus could not support an exercise of Offences Clause power, even if it was clear that the statute committed the United States to the rule of international law.”<sup>225</sup> Of course, much would depend on the particular category into which specific legislation falls, since Congress would presumably believe that virtually every exercise of its Law of Nations Clause power was to codify a “firmly entrenched rule of customary international law.”

Yet, whatever the merits of these competing views on the appropriate latitude to which Congress is entitled in defining offenses against the law of nations as a general matter, *none* of the commentators considered two specific variations of prominence here: Congress’s power to proscribe offenses against the laws of war – a body of customary international law that has developed and substantially crystallized over the past half-century; and the additional limitations that might constrain Congress’s power to subject such offenses to *military*, rather than civilian, jurisdiction.

### C. *The Crystallization of International Humanitarian Law*

One need not be a scholar of international humanitarian law (IHL) to recognize the degree to which that subset of customary international law has become far more concrete in decades since the end of World War II, beginning with the drafting and ratification of the four Geneva Conventions of 1949. Indeed, although Professor Roger Alford described the period from 1944 to 1959 as the “humanitarian period,” during which norms of

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221. *See id.*

222. *Id.* at 2397.

223. *Id.*

224. *Id.* at 2398. In this regard, consider Congress’s decision to codify “conspiracy” as an offense triable by military commission in the MCA notwithstanding *Hamdan*, and even as federal courts, rejecting claims under the Alien Tort Claims Act, 28 U.S.C §1350, continue to rely on the legal conclusion that international law does not recognize conspiracy as a form of inchoate liability. *See, e.g.,* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259-260 (2d Cir. 2009). This kind of dichotomy may well be what the student author had in mind in referring to “the character of Congress’s action.”

225. Note, *supra* note 26, at 2398.

IHL began rapidly to crystallize,<sup>226</sup> it is more recent developments, especially the creation of *ad hoc* (and now permanent) international criminal tribunals, that has helped accelerate the move toward positive law in the context of the laws of war, rather than a series of loosely articulated – if universally accepted – norms.<sup>227</sup> Thus, as Professor Allison Danner recently explained, the past fifteen years have witnessed “the judicialization of international relations,” as “[i]nternational judicial decisionmaking has increased dramatically,” thanks largely to the tacit delegation of lawmaking authority by states to *ad hoc* international criminal tribunals via the United Nations Security Council, and to the International Criminal Court (ICC) via the Rome Statute.<sup>228</sup> The emerging jurisprudence of these bodies has allowed for the slow – but steady – development of a jurisprudence articulating and refining distinct principles of international criminal law (including violations of international humanitarian law).<sup>229</sup>

From the United States’ perspective, the effects of this crystallization is perhaps nowhere better manifested than in Congress’s enactment of the War Crimes Act of 1996,<sup>230</sup> which was intended specifically to incorporate our obligations under the 1949 Geneva Conventions to provide penal sanctions for violations thereof.<sup>231</sup> Citing *Quirin* and *Yamashita* for the proposition that “[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes,”<sup>232</sup> Congress created civilian criminal jurisdiction for “grave breaches” of the Geneva Conventions, authority it expanded in 1997 to cover an even wider class of “war crimes.”<sup>233</sup> Such authority was necessary, Congress suggested, both to provide a mechanism for prosecuting perpetrators of war crimes *against* Americans, and to provide a means of

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

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

228. See *id.* at 4-6.

229. See *id.* at 49 (“The legal decisions rendered by the Tribunals . . . are widely viewed as an authoritative source for interpretations of international humanitarian law. The Tribunals’ caselaw has been cited as persuasive authority by other international criminal courts, by domestic courts, by international organizations, by NGOs, and by scholars. These sources treat the Tribunals’ jurisprudence as law – not merely proposals for what international law should be. . . . Whatever the reason [for this development], it is clear that the legal decisions issued by the ICTY are considered more authoritative than statements from other actors, such as NGOs or international legal scholars. They are treated as relevant articulations of the law, even if their precedents do not formally bind other courts.” (footnotes omitted)).

230. 18 U.S.C. §2441 (2000).

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

232. *Id.* at 7.

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

redressing war crimes committed by American servicemembers who are discharged prior to being charged.<sup>234</sup>

The War Crimes Act is instructive in at least two respects: First, it helps to demonstrate how the crystallization of international law in general (and the laws of war in particular) affects Congress's power under the Law of Nations Clause, albeit affirmatively, in this case, rather than as a constraint. Second, as the House Report accompanying the statute pointed out, it was not entirely clear that Congress's power to proscribe the offenses prohibited by the War Crimes Act automatically meant that it could subject such conduct to trial by court-martial or military commission.<sup>235</sup> The safer route, then, was to empower the civilian criminal courts to hear such cases, leaving questions about the propriety of military jurisdiction for another day.

#### *D. The Forgotten Significance of the Jury Trial Protections*

Separate from the increasing crystallization of international law, which would serve generally to constrain Congress's deference under the Law of Nations Clause,<sup>236</sup> is the specific question as to the circumstances in which Congress may use the Law of Nations Clause to subject particular offenses to *military* jurisdiction. Put another way, whether or not Congress can proscribe particular conduct pursuant to the Law of Nations Clause as a general matter, under what circumstances may it subject such offenses to the criminal jurisdiction of military – rather than civilian – courts?

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

The exception for "cases arising in the land and naval forces" is perhaps the easiest to deal with. Although it appears only in the Grand Jury Indictment Clause of the Fifth Amendment, the *Milligan* Court, albeit in dicta, read such an exception into the Sixth Amendment's right to trial by petit jury, as well,<sup>237</sup> and the Supreme Court has long since confirmed that reading as authoritative.<sup>238</sup> Congress can almost surely subject to trial by

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

235. See *id.* at 5-6.

236. See, e.g., Stephen I. Vladeck, *Terrorism and International Criminal Law After the Military Commissions Acts*, 8 SANTA CLARA J. INT'L L. 101 (2010).

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

238. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); see also *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 272-273 (1960) (Whittaker, J., dissenting).

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

The far harder – and more important – exception is the one for the grand- and petit-jury rights identified in *Quirin*, for “offenses committed by enemy belligerents against the law of war.”<sup>239</sup> As Chief Justice Stone elaborated, “[Section 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.”<sup>240</sup>

And yet, the existence of an exception for “offenses committed by enemy belligerents against the law of war” says nothing as to its scope. Indeed, one might well wonder if the analysis of the two questions merges into one answer – that the power to define a violation of the law of nations is itself the power to identify an “offense[] committed by [an] enemy belligerent[] against the law of war.” If we had no further elaboration, that answer might well prove tempting. But consider in this light the Court’s discussion of the significance of the jury trial right in *Toth*. As Justice Black there suggested, “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>241</sup> Thus, the Court concluded, “Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘the least possible power adequate to the end proposed.’”<sup>242</sup>

What *Toth* and the other court-martial decisions suggest is the appropriateness of a lenity-based approach to the jury trial exception identified in *Quirin*. That is to say, wholly separate from the scope of Congress’s power to define offenses against the law of nations, the Supreme Court’s understanding of the circumstances in which military jurisdiction will be appropriate calls for the narrowest construction of those circumstances as is fairly possible. It is not that the Law of Nations Clause itself should be carefully circumscribed, but that the law-of-war-based exception to Article III and the Fifth and Sixth Amendments should be limited to the narrowest defensible terms – that *Quirin*’s holding that the Constitution does not bar the trial by military commission of “offenses committed by enemy belligerents against the law of war” should be strictly construed. The defendants should clearly be “belligerents” under the laws

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

240. *Id.* at 40.

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

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

of war, and the offense should clearly be a recognized violation of the laws of war.<sup>243</sup>

Congress may have some leeway to subject less well established offenses (or offenses committed by less well established belligerents) to prosecution in the civilian criminal courts, but fundamental principles of American constitutional law, as articulated in numerous Supreme Court decisions construing the constitutional limits of military jurisdiction, compel the conclusion that any exception justifying trial in a military court be founded on the clearest of precedent. To borrow once more from Justice Stevens's opinion in *Hamdan*, "The caution that must be exercised in the incremental development of common-law crimes by the judiciary is. . . all the more critical when reviewing developments that stem from military action."<sup>244</sup>

This conclusion – that the jury trial protections in Article III and the Fifth and Sixth Amendments are the vital constraints on military jurisdiction – also helps to explain why arguments for other potential sources of governmental authority are beside the point. Thus, although some might argue that Congress could use the "Captures" Clause of Article I to define particular offenses,<sup>245</sup> or that the President might have inherent authority under Article II to create military commissions,<sup>246</sup> both of these claims run into the same jury trial constraints identified above. Although either of these sources may be argued to provide authority in at least some cases for creating offense or offender jurisdiction, neither can overcome the constraints of Article III and the Fifth and Sixth Amendments – at least in cases in which those constraints apply.

Even the government's arguments in the current military commission cases have neglected these concerns, focusing instead on the claim that Congress has the power to codify offenses based upon the "*domestic*

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243. Of course, there might be additional means by which international humanitarian law might prohibit the trial even if the offender and offense are triable by military commission under the laws of war. The point of this article is not exhaustively to survey the ways in which the laws of war constrain military commissions, but merely to explain why, in appropriate circumstances, they constrain the *jurisdiction* of such commissions, a result that follows directly from the Constitution.

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

245. For much more on the Captures Clause debate, see Wuerth, *supra* note 25. For some examples of arguments that the Captures Clause may provide such authority, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 319-321 (2008); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1240 (2005). See also JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 147 (2005).

246. See, e.g., Paulsen, *supra* note 27, at 1833 ("If . . . a general definition of an offense against the Law of Nations contradicts a specific presidential military command concerning the use of force against enemies in time of constitutionally authorized war (including . . . the use of force to impose military punishment for violation of the laws of war), it is most doubtful that the general statute constitutionally may trump the Commander-in-Chief power of the President.").

common law of war.”<sup>247</sup> Whether that argument is persuasive in the abstract – as going to Congress’s power to create offenses triable in civilian courts – it is hardly responsive to the concerns articulated herein.

*E. Revisiting the Military Commissions Acts of 2006 and 2009*

With a rule of interpretive lenity as the governing consideration, the flaws in the Military Commissions Acts of 2006 and 2009 come into stark relief. Both Acts authorize the exercise of offender jurisdiction over individuals who are either indirect participants or nonparticipants in hostilities, even though IHL today appears to prohibit their prosecution before a military commission.<sup>248</sup> The MCA of 2009 authorizes the trial of an individual who “was a part of al Qaeda at the time of the alleged offense under this chapter,”<sup>249</sup> but there is no requirement anywhere in the statute that an individual be a “belligerent” under IHL in order to be “part of al Qaeda.”

Even more troubling are many of the substantive offenses defined by the 2006 and 2009 statutes. Justice Stevens’s analysis in *Hamdan* calls into serious question whether conspiracy is sufficiently well-established to satisfy the high standard articulated above, and there is even *less* precedent at the international level for categorically treating “terrorism” or “providing material support for terrorism” as violations of the laws of war.<sup>250</sup> Indeed, one need only observe the widespread and ongoing debate over whether terrorism as a standalone offense should be included within the jurisdiction of the International Criminal Court to see just how open a question it is – and how divided foreign and international authorities are.<sup>251</sup> To support Congress’s power to both proscribe terrorism as a violation of the law of nations *and* to subject it to trial by military commission is to run roughshod over the constraints that the Supreme Court has identified over decades of case law on the limits of military jurisdiction – and with potentially grave consequences. After all, as Justice Black warned in *Toth*, “There are dangers lurking in military trials which were sought to be avoided by the

247. See, e.g., Reply to Defense Response to Government’s Supplemental Brief at 1, *United States v. Khadr*, No. P009 (Aug. 2, 2010), available at [http://www.defense.gov/news/AE-295-AE295-E\(P009\).pdf](http://www.defense.gov/news/AE-295-AE295-E(P009).pdf).

248. See, e.g., Goodman, *supra* note 179, at 59 n.63 (citing sources).

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

250. In *Prosecutor v. Galić*, the ICTY *did* hold that terror against a civilian population can in fact be a war crime. See *Prosecutor v. Galić*, Judgment, Case No. IT-98-29-T, ¶¶ 86-138 (ICTY Trial Chamber Dec. 5, 2003); see also VAN SCHAACK & SLYE, *supra* note 170, at 555-572 (discussing *Galić*). But the conclusion that terrorism can be a war crime under certain circumstances hardly compels the conclusion that it is always such.

251. See generally Naomi Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT’L L. 11 (2010).

Bill of Rights and Article III of our Constitution.”<sup>252</sup> Whatever the merits of the exception to those protections identified by the Court in *Quirin*, there is every reason to construe that exception narrowly, and to require more than just scattershot support in historical practice before allowing Congress to subject to trial by military commission offenses that have not yet crystallized as violations of the laws of war.

Two last points bear consideration. *First*, for as significant as the Constitution’s grand- and petit-jury protections are to the above analysis, I suspect that some will argue that non-citizens detained outside the territorial United States (whether or not that category includes those still detained at Guantánamo) are not entitled to the protections of these constitutional provisions, and so all of this analysis is much ado about nothing. Just as Chief Justice Rehnquist’s plurality opinion in *Verdugo-Urquidez* suggested that the Fourth Amendment does not protect non-citizens outside the United States,<sup>253</sup> might it not be suggested for the Fifth Amendment<sup>254</sup> – and perhaps even the Sixth?<sup>255</sup>

My responses to this argument are brief. *Quirin* itself declined to rest on the fact that the defendants were not “legally” present within the United States (having surreptitiously crossed enemy lines – indeed, that was the entire point), relying instead on the exception of such central significance here. Moreover, whether a non-citizen in U.S. custody is protected by the Fourth and Fifth Amendments while detained without charges strikes me as a far different question from whether constitutional protections going to the fundamental fairness of a trial attach once the U.S. government affirmatively decides to commence criminal proceedings.<sup>256</sup>

Of course, one who falls within the law-of-war exception identified in *Quirin* will not find those protections to be particularly useful, but the critical point here is that it is *that* exception, and not a categorical rule based upon citizenship and location, that provides the essential prerequisite to the proper exercise of military jurisdiction.

*Second*, there is one important counterexample to the analysis contained herein: the Supreme Court’s recognition in *Quirin* that spying behind enemy lines during wartime, although not a violation of the laws of war per se, had traditionally been triable by military commissions – and

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

253. See United States v. Verdugo-Urquidez, 494 U.S. 259, 270-275 (1990) (plurality).

254. See, e.g., Kiyemba v. Obama, 555 F.3d 1022, 1026-1027 (D.C. Cir. 2009) (“[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”), *vacated and remanded*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

255. See, e.g., United States v. Wanigasinghe, 545 F.3d 595, 597 (7th Cir. 2008).

256. To be sure, the Court in *Verdugo-Urquidez* expressly rejected this argument, but that was in the context of a Fourth Amendment claim. Such analysis would hardly control with regard to provisions that, unlike the Fourth Amendment, see, e.g., *Stone v. Powell*, 428 U.S. 465 (1976), have been held to be fundamental to the underlying fairness of the proceedings, see, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

without a jury.<sup>257</sup> One possible response is that spying behind enemy lines is unique; a *sui generis* offense that, although not technically a war crime, can only take place in contexts in which military jurisdiction is far less controversial. But whether that is a convincing rejoinder or not, the conclusion that spying behind enemy lines is an offense triable by military commission is a modest one, and hardly requires the result that Congress can therefore subject virtually *any* offense to trial by military jurisdiction. For better or worse, the Supreme Court has never accepted the proposition that Congress can subject to trial (let alone to trial by military commission) offenses that only it believes are violations of the law of nations. If anything, *Quirin* hints strongly to the contrary.

#### CONCLUSION

None of the above analysis is meant to suggest that *Quirin* got it right – that the constitutional rights to grand jury indictment and trial by petit jury *should* tolerate an atextual exception for “offenses committed by enemy belligerents against the laws of war.” *Quirin* is rightly criticized by virtually all who study it as an unfortunate decision borne out of unique and fortuitous circumstances, and one should not take its signal importance to the present analysis as signifying any endorsement of the underlying validity of its reasoning. To my mind, there is much to commend the “open court” rule of *Milligan*, and the burden should be on the government, as a policy matter at least if not a constitutional one, to explain why trial by ordinary civilian criminal processes is inadequate even in those cases in which there *is* a plausible claim that the defendants are properly subject to the laws of war.<sup>258</sup> Otherwise, the government leaves the impression that the resort to military process is but the means to a predetermined end, “an impression,” to paraphrase another decision in a post-9/11 detention case, that I “would have thought the government could ill afford to leave extant.”<sup>259</sup>

This article is about the contemporary reality created by the Supreme Court’s military jurisdiction jurisprudence, rather than a view as to what the law *should* be. And within that jurisprudence, there are lessons that have been lost – and that it would behoove us to revisit – about the relationship between Congress’s power to subject offenses to trial by military courts and the Constitution’s limits on such jurisdiction. Notwithstanding suggestions to the contrary,<sup>260</sup> the constitutionality of the Military Commissions Acts of

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257. See *supra* note 125 and accompanying text.

258. For a thoughtful contemporary discussion of this point, see *al-Marri v. Pucciarelli*, 534 F.3d 213, 230-233 & nn.14-15 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment).

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

260. See, e.g., *Khadr v. Obama*, No. 04-1136, 2010 WL 2814416, at \*7 (D.D.C. July

2006 and 2009 is not settled by Congress's self-serving *ipse dixit* in each statute that it was doing nothing new. Even if Article I tolerates such a naked arrogation of power, Article III and the Fifth and Sixth Amendments do not – and never have.

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20, 2010) (“The Supreme Court . . . has already concluded that, consistent with the Constitution, Congress may authorize trial by military commission of enemy combatants accused of law of war violations. The fact that Congress did so here, then, raises no substantial constitutional question.” (citations omitted)).