

# Military Courts and Article III

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	934
I. MILITARY JUSTICE AND ARTICLE III: ORIGINS AND CASE LAW . . . . .	939
A. A BRIEF INTRODUCTION TO U.S. MILITARY COURTS . . . . .	941
1. Courts-Martial . . . . .	941
2. Military Commissions . . . . .	945
B. THE NORMATIVE JUSTIFICATIONS FOR MILITARY JUSTICE . . . . .	948
C. THE SUPREME COURT’S CONSTITUTIONAL DEFENSE OF COURTS-MARTIAL . . . . .	951
D. THE SUPREME COURT’S CONSTITUTIONAL DEFENSE OF MILITARY COMMISSIONS . . . . .	957
II. RECENT EXPANSIONS TO MILITARY JURISDICTION . . . . .	961
A. <i>SOLORIO</i> AND THE SERVICE-CONNECTION TEST . . . . .	962
B. <i>ALI</i> AND CHIEF JUDGE BAKER’S BLURRING OF <i>SOLORIO</i> ’S BRIGHT LINE . . . . .	963
C. THE MCA AND THE “U.S. COMMON LAW OF WAR” . . . . .	965
D. ARTICLE III AND THE CIVILIANIZATION OF MILITARY JURISDICTION . . . . .	966
E. RECONCILING THE MILITARY EXCEPTION WITH CIVILIANIZATION . . . . .	968

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\* Professor of Law, American University Washington College of Law. © 2015, Stephen I. Vladeck. For helpful discussions and feedback, I owe deep thanks to Zack Clopton, Jen Daskal, Mike Dorf, Gene Fidell, Barry Friedman, Amanda Frost, Dave Glazier, David Golove, Tara Leigh Grove, Ed Hartnett, Harold Koh, Marty Lederman, Peter Margulies, Jim Pfander, Zach Price, Judith Resnik, Gabor Rona, Carlos Vázquez, Adam Zimmerman, students in my Fall 2013 seminar on military courts, participants in the Hauser Globalization Colloquium at NYU and Northwestern’s Public Law Colloquium, and colleagues in faculty workshops at Cardozo, Cornell, DePaul, FIU, Hastings, Loyola, Rutgers-Camden, and Stanford. Thanks also to Cynthia Anderson, Gabe Auteri, Gal Bruck, Caitlin Marchand, and Pasha Sternberg for research assistance; and to Dean Claudio Grossman for his generous and unstinting support of this project.

Although the views expressed herein are mine alone, readers should know that I was co-counsel to the Petitioner in *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557 (2006), and have coauthored amicus briefs in support of the appellant in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), the litigation in both of which figure prominently herein.

III. MILITARY JUSTICE AND THE NON-ARTICLE III CANON . . . . .	969
A. TERRITORIAL COURTS AND CONGRESS’S POLICE POWERS . . . . .	970
B. PUBLIC RIGHTS ADJUDICATION AND “BALANCING” . . . . .	974
C. THE JURY-TRIAL THESIS . . . . .	981
D. THE APPELLATE REVIEW MODEL . . . . .	984
E. MILITARY COURTS AS “INFERIOR TRIBUNALS” . . . . .	986
IV. RETHINKING MILITARY JUSTICE AND ARTICLE III . . . . .	988
A. RECONCEIVING THE MILITARY EXCEPTION: FROM <i>MADSEN</i> TO <i>DYNES</i> . . . . .	990
B. AN INTERNATIONAL LAW EXCEPTION TO ARTICLE III? . . . . .	993
C. THE INTERNATIONAL LAW OF MILITARY JURISDICTION . . . . .	996
CONCLUSION . . . . .	1001

#### INTRODUCTION

Few areas of the Supreme Court’s federal courts jurisprudence raise as many questions—and provide as few coherent answers—as the permissible scope of Congress’s power to invest the “judicial [p]ower of the United States” in actors other than judges who enjoy Article III’s tenure and salary protections,<sup>1</sup> and, in the case of criminal trials, to do so without the protections (especially the right to a local jury) enshrined in Article III, Section 2, Clause 3.<sup>2</sup> Historically, the Court has identified three categories in which such “non-Article III” federal adjudication is permissible: (1) all adjudication by federal “territorial” courts;<sup>3</sup> (2) certain criminal prosecutions before military judges; and (3) resolution of “public rights” disputes by non-Article III federal courts or federal administrative agencies.<sup>4</sup> But it has never sought to explain whether the decisions articulat-

1. See U.S. CONST. art. III, § 1.

2. See *id.* § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”).

3. See, e.g., *Palmore v. United States*, 411 U.S. 389, 402–03 (1973). At present, there are four federal territorial trial courts and one federal territorial appellate court: the District Court of Guam, see 48 U.S.C. § 1424(a)(1) (2012); the District Court for the Northern Mariana Islands, see *id.* § 1821(a); the District Court of the Virgin Islands, see *id.* § 1611(a); and the District of Columbia Superior Court and Court of Appeals, see D.C. CODE §§ 11-701(a), 11-901 (2012). The U.S. District Court for the District of Puerto Rico is an Article III court, see 28 U.S.C. § 119 (2012), and there is no “federal” court in American Samoa, see *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 384–86 (D.C. Cir. 1987).

4. In addition to the Article I U.S. Court of Federal Claims, U.S. Tax Court, and U.S. Court of Appeals for Veterans Claims—the jurisdiction of which are exclusively public rights disputes—such

ing these principles “in fact support a general proposition and three tidy exceptions . . . or whether instead they are but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night.”<sup>5</sup>

And although the Justices have often opined more narrowly on the permissible scope of the public rights exception to Article III,<sup>6</sup> it has been decades since they have reconsidered either the territorial or military species of non-Article III adjudication. The same period has seen a concomitant decline in academic attention to these tribunals,<sup>7</sup> perhaps reflecting acquiescence in the sentiment expressed by Justice Brennan in 1982—that, whatever their merits, these are longstanding exceptions to Article III whose bounds are both well understood and well settled, and therefore in no need of judicial or academic reexamination.<sup>8</sup>

Even if the territorial exception could properly be described in this manner,<sup>9</sup> the military exception cannot be. For starters, there has never been a truly unitary carve-out from Article III for “military” courts. Instead, in different cases, the Supreme Court has articulated different normative, historical, and textual rationales to justify three different classes of military adjudication:

cases may also be resolved by U.S. bankruptcy courts and administrative adjudicators. *See generally* *Crowell v. Benson*, 285 U.S. 22 (1932).

A fourth category of non-Article III federal adjudication involves those disputes that are resolved by “adjuncts” to district judges with the consent of the parties. *See, e.g.*, 28 U.S.C. § 157(c)(2) (authorizing bankruptcy judges to adjudicate certain “non-core” bankruptcy matters “with the consent of all of the parties to the proceeding”); *id.* § 636(c) (authorizing federal magistrate judges to adjudicate certain civil actions with the parties’ consent). Whether consent in such circumstances is sufficient to justify a departure from Article III is currently before the Supreme Court. *See* *Wellness Int’l Network, Ltd. v. Sharif*, No. 13-935 (U.S. argued Jan. 14, 2015); *cf.* *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014) (sidestepping the consent issue raised in *Sharif*). Otherwise, such adjuncts may not resolve disputes; they may only make a report and recommendations to a district judge. For that reason, they are beyond the scope of most discussions of non-Article III federal adjudication—and this Article.

5. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in the judgment).

6. *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2611–15 (2011).

7. For example, successive editions of the leading Federal Courts casebook have devoted increasingly fewer pages to the relationship between the military justice system and Article III, culminating in a scant paragraph in the current version. *See, e.g.*, RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 340 (6th ed. 2009). The most recent detailed scholarly treatment of the subject is a 1990 student note. *See* Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909 (1990).

8. *N. Pipeline Constr. Co.*, 458 U.S. at 63–66 (plurality opinion); *see also id.* at 91 (Rehnquist, J., concurring in the judgment).

9. Under Justice White’s reasoning for the Court in *Palmore*, the territorial exception is simply a matter of congressional discretion: Congress is free to create non-Article III federal courts in any of the six federal territories. *Palmore v. United States*, 411 U.S. 389, 400–01 (1973). And other than minor alterations to the structure of Article III appellate review of territorial courts, *see, e.g.*, *Kendall v. Daily News Publ’g Co.*, 716 F.3d 82, 86–88 (3d Cir. 2013), the last substantial changes to the jurisdiction of these courts themselves were the 1982 abolition of the District Court for the Canal Zone pursuant to Article XI of the 1979 Panama Canal Treaty, *see* *Egle v. Egle*, 715 F.2d 999, 1009–11 (5th Cir. 1983), and modest statutory revisions to the jurisdiction of the Guam and Northern Mariana Islands district courts in 1984, *see* Act of Oct. 5, 1984, Pub. L. No. 98-454, §§ 801–904, 98 Stat. 1732, 1741–45 (codified as amended in scattered sections of 48 U.S.C.).

courts-martial, military commissions, and courts incident to military rule (for example, martial law or belligerent occupation).<sup>10</sup> Unfortunately, none of these rationales can possibly bear the weight that has been placed upon them.

Starting with the Constitution's text, even if one accepts the Court's conclusion that the express exception in the Grand Jury Indictment Clause for "cases arising in the land or naval forces"<sup>11</sup> was meant to exempt military cases from certain constitutional protections, the Justices have never explained why language in that provision of the Fifth Amendment also obviates (1) the separate petit jury protections of Article III and the Sixth Amendment; or (2) Article III's more basic requirement of a tenure- (and salary-) protected judge.<sup>12</sup> More fundamentally, if the Founders all agreed that the Constitution contemplated *some* form of military justice, it simply cannot be the case that the primary textual hook for that enterprise was provided by the Grand Jury Indictment Clause—which, along with the rest of the Bill of Rights, was ratified more than three years after the Constitution entered into force. The Court has nevertheless *assumed* these points to be settled since 1858,<sup>13</sup> but has never actually settled—*or defended*—them.

And wholly apart from its analytical and textual shortcomings, the Court's defense of the military exception has also failed to account for the seismic changes to the nature and structure of American military justice after and in light of World War II. That shortcoming is especially telling given the fundamental shift from entirely nonjudicial disciplinary processes to a self-contained, three-tiered system of trial and appellate courts supervised by independent civilian judges exercising the full range of judicial power.<sup>14</sup> Thus, the military

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10. This reality is one of the two reasons why it is something of a misnomer to refer to a unitary "military exception" to Article III. In addition, it is worth emphasizing that military courts have not typically been viewed as "exceptions" to Article III so much as they have been viewed as existing wholly *apart* from Article III. For the sake of descriptive simplicity, however, this Article will nevertheless use the term "military exception" to describe the permissible scope of non-Article III military adjudication.

11. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger . . . ." (emphasis added)); *see also infra* note 129.

12. As Professor Stephen Siegel has ably demonstrated, the Supreme Court's problematic relationship with the Constitution's three jury-trial clauses is not limited to the military justice context. *See, e.g.*, Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89 (2013); Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373 (2012).

13. *See N. Pipeline Constr. Co.*, 458 U.S. at 66 (plurality opinion) (citing *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78–79 (1858)).

14. For a rare counterexample, consider the deeply contrasting positions of the majority and the dissent in *United States v. Denedo*, 556 U.S. 904 (2009), with respect to whether military courts have the power to issue extraordinary writs comparable to their civilian brethren. *See generally*, Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, in *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 163 (Fionnuala Ní Aoláin & Oren Gross eds., 2013).

exception to Article III has for quite some time been, in fact, an incoherent mess.

But what is perhaps most remarkable about the military exception is that it has only become *more* incoherent in recent years, thanks to a trio of subtle but potentially dramatic expansions in the scope of military jurisdiction: (1) the Supreme Court's 1987 holding that Congress has the power to subject service-members to court-martial for any offense, and not just those that are "service connected";<sup>15</sup> (2) Congress's 2006 expansion of court-martial jurisdiction to encompass civilian contractors "serving with or accompanying an armed force in the field" during a "contingency operation";<sup>16</sup> and (3) the Military Commissions Act of 2006, which authorizes military commissions to try war crimes *not* recognized by international law—at least so long as they are established violations of the "U.S. common law of war."<sup>17</sup> Given these expansions, the litigation that they have provoked, and the tension that they have placed upon the already untidy military exception, it is long past time for a reassessment of where and how military courts fit into our understanding of Article III—and the exceptions thereto.

Thus, after introducing the origins and various iterations of the military exception in Part I, Part II turns to these recent expansions and uses them to illustrate how the military exception has increasingly become untethered from any textual or analytical moorings. By focusing on the quiet expansions of both court-martial and military commission jurisdiction in recent years, Part II concludes not only that these expansions cannot be reconciled with the underlying justifications for the military exception in the first place, but that they also illuminate a series of deeper analytical puzzles besetting the military exception with which the Supreme Court has never truly grappled.

Part III asks whether these expansions might be defended on other grounds by pivoting to the Supreme Court's jurisprudence regarding other forms of non-Article III federal adjudication. As Part III demonstrates, however, the rationales ultimately seized upon by the Supreme Court in defending the constitutionality of other forms of non-Article III federal adjudication prove either too little or too much as applied to the military exception. At the same time, the Court has increasingly stressed the importance of construing departures from Article III *narrowly*. As such, these recent expansions in military jurisdiction demonstrate not only that the military exception has diverged from *its* founda-

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15. *Solorio v. United States*, 483 U.S. 435, 449–51 (1987).

16. 10 U.S.C. § 802(a)(10) (2012); *see also* *United States v. Ali*, 71 M.J. 256, 268–69 (C.A.A.F. 2012) (upholding that expansion as applied to a noncitizen tried outside the United States), *cert. denied*, 133 S. Ct. 2338 (2013).

17. *See, e.g.*, *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238, 1246 n.6, 1252 (D.C. Cir. 2012) (Kavanaugh, J.); *see also* *Al Bahlul v. United States*, 767 F.3d 1, 22–27 (D.C. Cir. 2014) (en banc). *See generally* Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 287 (John T. Parry & L. Song Richardson eds., 2013).

tions, but that it has increasingly diverged from any coherent understanding of Article III.

The question then becomes whether *any* satisfying theory exists that at once supports and coherently cabins the military justice system as a whole. Of course, the answer may—and perhaps should—be no. But before settling on that conclusion, Part IV offers one alternative possibility—a theory grounded not in the elusive, multifactor balancing test the Court has deployed in its public rights cases,<sup>18</sup> but in established norms of foreign and international practice. As Part IV explains, one possible approach to reconciling the military exception with Article III—and the way it has been reconciled at times in the Court’s military jurisdiction cases—is by loose analogy to the Supreme Court’s venerable decision in *Missouri v. Holland*<sup>19</sup> and situations in which the United States shares some of its judicial authority with multinational or international tribunals. Under this view, departures from Article III are constitutionally permissible when specifically grounded in *supranational* bodies of law, that is, the law of nations or common foreign practices that have become norms of customary international law. Thus, Part IV concludes, those searching for a coherent principle unifying the disparate threads of the military exception could view it as encompassing cases in which clear foreign or international practice supports subjecting the offender and offense to trial before a military, rather than civilian, tribunal.

As much as this suggestion may seem counterintuitive, it is already reflected in at least some elements of the Supreme Court’s jurisprudence concerning the military exception. For example, *Ex parte Quirin* upheld military commissions on the view that Article III and the jury-trial protections of the Fifth and Sixth Amendments did not apply to “offenses committed by enemy belligerents *against the law of war.*”<sup>20</sup> In other words, military commissions did not have to comply with Article III when they were tasked with enforcing norms established by *international*, rather than domestic, law. To be sure, the current proceedings before the D.C. Circuit in the Guantánamo military commission cases are testing *Quirin*’s limits in this regard,<sup>21</sup> but for the time being, international law continues to operate as the principal jurisdictional constraint on the Guan-

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18. As Part IV explains, this was the approach proposed by a 1990 *Harvard Law Review* note—to date, the only comprehensive attempt at reconceptualizing the military exception, as such. *See generally* Note, *supra* note 7.

19. 252 U.S. 416, 434–35 (1920) (holding that Congress, in enforcing a treaty, may exercise regulatory powers not otherwise enumerated in Article I); *cf.* *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (interpreting a federal statute narrowly to avoid revisiting the constitutional scope of Congress’s regulatory authority under *Holland*).

20. 317 U.S. 1, 41 (1942) (emphasis added).

21. *See, e.g., Al Bahlul*, 767 F.3d at 69–73 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

tánamo commissions.<sup>22</sup>

After unpacking what an international law-based view of the military exception could look like, Part IV outlines how grounding the military exception in international law and practice might thereby reorient the shape of both court-martial and military commission jurisdiction going forward. As it concludes, not only could such an approach largely resolve the puzzles plaguing contemporary understandings of the military exception, it could also provide a far more defensible textual and philosophical basis for reconciling at least one aspect of a body of cases that Professor Bator once rightly described as “troubled, arcane, confused and confusing as could be imagined.”<sup>23</sup>

### I. MILITARY JUSTICE AND ARTICLE III: ORIGINS AND CASE LAW

Perhaps the most important point to understand about the military exception to Article III is that it is the departure from Article III with the strongest historical pedigree. Indeed, American military justice predates the Constitution. In 1775, the Second Continental Congress codified the first American Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses.<sup>24</sup> The 1775 Articles were reaffirmed (as amended) in 1776 and 1786.<sup>25</sup> And there was little question at the Constitutional Convention that such authority would be preserved under the new Constitution—that is, there would be federal military justice separate and apart from Article III.<sup>26</sup> What is far more opaque from Founding-era sources was the shape that system would take—or whether such a departure from what Article III would soon prescribe only encompassed the exceedingly narrow parameters of eighteenth-century military discipline.<sup>27</sup>

22. See, e.g., Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681 (describing normative and practical justifications for tying the jurisdiction of military commissions to international law).

23. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 239 (1990).

24. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 378 (Worthington Chauncey Ford ed., 1905) (entry for Nov. 28, 1775) (creating rules for the “Regulation of the Navy”); 2 *id.* at 111–12 (entry for June 30, 1775) (creating articles of war for the Army). After ratification of the Constitution, Congress formally readopted the Articles of War in 1789. See Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 95, 96; see also Act of July 1, 1797, ch. 7, § 8, 1 Stat. 523, 525 (applying the 1775 Articles of War to sailors and marines).

25. See 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 953–75 (2d ed. 1920).

26. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 330 (2005). Such consensus stands in marked contrast to the disagreement over whether lower federal *civilian* courts would be needed, which helped to precipitate the Madisonian Compromise. See, e.g., Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39.

27. For more on the complications arising from imputing constitutional significance to the pre-1787 practice, see Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 6–8 (1958); see also *id.* at 8 (“We are seeking to discover common understanding at a time when the scope of federal military law was exceedingly limited. It applied to a mere handful of individuals, all of whom were soldiers by choice, and for the most part it denounced only offenses that were not punishable in courts of common law.” (footnote omitted)).

Part of the reason for such opacity can be directly traced to the fundamental difference in Founding-era understandings of military justice. Eighteenth- and nineteenth-century American military justice bore very little resemblance to the courts-martial of today: courts-martial were far more administrative than judicial (indeed, the title of military “judge” was not created by Congress until 1968);<sup>28</sup> there was no appellate review (and judicial review through a collateral challenge was only available to attack the military’s assertion of jurisdiction);<sup>29</sup> and the inconsistent (and, at times, Spartan) procedures were subsequently decried by Justice Black as providing little more than a “rough form of justice.”<sup>30</sup> Thus, as Professor Frederick Bernays Wiener wrote, “[W]e must be circumspect in examining the Continental articles of war when seeking to ascertain the constitutional rights of the officers and soldiers subject thereto.”<sup>31</sup> The same should follow for efforts to draw sweeping conclusions from Founding-era sources about the permissible scope of the departure from Article III that the Constitution authorizes in military cases.

Instead, it is far more useful to study the evolving justifications that would later emerge for such a separate system of federal judicial review. After providing an overview of the structure and scope of U.S. military courts today in section A—in order to illuminate both the key points of departure from Article III civilian courts and the decisive expansions in the scope and structure of military adjudication as compared to its modest preconstitutional origins—this Part turns to such an examination. To that end, section B introduces the normative justifications for military justice before sections C and D turn to the separate textual justifications that the Supreme Court has identified in the Constitution for courts-martial and military commissions respectively. As this Part demonstrates, the permissible scope of military jurisdiction may have been *descriptively* settled when Justice Brennan so described it in 1982, but its analytical underpinnings left a lot to be desired.

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28. See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. See generally Andrew S. Effron, *United States v. Dubay and the Evolution of Military Law: The Fourth George S. Prugh Lecture in Military Legal History*, 207 MIL. L. REV. 1, 79–80 (2011) (summarizing the significance of the 1968 Act).

29. See, e.g., *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (citing *In re Grimley*, 137 U.S. 147 (1890)). In 1953, the Supreme Court would broaden the scope of collateral review of military proceedings to any claim that did not receive “full and fair consideration” from the military courts. See *Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); see also *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670–71 (10th Cir. 2010); *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 407–08 (D.C. Cir. 2006). But see *Burns v. Wilson*, 346 U.S. 844 (1953) (Frankfurter, J., dissenting from the denial of rehearing) (questioning whether collateral review of military convictions should be at least as broad as the collateral review available for civilian convictions—which, at that time, was effectively *de novo*).

30. *Reid v. Covert*, 354 U.S. 1, 35–36 (1957) (plurality opinion) (“Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. . . . [T]here has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.”).

31. Wiener, *supra* note 27, at 7–8 (footnote omitted).

## A. A BRIEF INTRODUCTION TO U.S. MILITARY COURTS

## 1. Courts-Martial

Notwithstanding its checkered procedural past, the U.S. military justice system has increasingly come to resemble ordinary civilian courts in recent years,<sup>32</sup> at least in criminal cases (the military courts generally lack the power to entertain noncriminal proceedings).<sup>33</sup> Enacted in 1950,<sup>34</sup> the Uniform Code of Military Justice (UCMJ) today recognizes three types of court-martial proceedings.<sup>35</sup> First, a “summary” court-martial provides a straightforward (and essentially nonjudicial) procedure for resolution of relatively minor misconduct charges against enlisted members of the military (who must consent to such summary proceedings).<sup>36</sup> Second, a “special” court-martial, which is presided over by a military judge and can include three or more members serving in place of the more conventional “jury,” exercises jurisdiction over cases in which the maximum punishment is twelve months imprisonment, along with a bad-conduct discharge.<sup>37</sup> Third, “general” courts-martial are for all more serious charges, featuring a military judge and not fewer than five members (in noncapital cases),<sup>38</sup> or twelve members in all nonexigent cases in which the possible sentence includes the death penalty.<sup>39</sup>

Under Article 17 of the UCMJ, courts-martial may exercise jurisdiction over any offense proscribed by the UCMJ<sup>40</sup>—which defines approximately fifty distinct crimes,<sup>41</sup> along with a “General article” (Article 134) that subjects to trial by court-martial “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty.”<sup>42</sup> The third clause of Article 134, in turn,

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32. *See, e.g.*, *United States v. Denedo*, 556 U.S. 904, 910–16 (2009); *Loving v. United States*, 88 M.J. 1, 28 n.11 (C.A.A.F. 2009) (Ryan, J., dissenting). *See generally* Vladeck, *supra* note 17 (documenting the normalization—and “civilianization”—of military justice).

33. *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 540 (1999) (holding that the military courts lack the power to stop the Secretary of the Air Force from dropping a servicemember from the rolls); *Parisi v. Davidson*, 405 U.S. 34, 44 (1972) (holding that the military courts lack the authority to resolve a servicemember’s claim for discharge based on conscientious objector status).

34. For a capsule summary of the pre-1950 evolution of U.S. military justice, see CHARLES A. SHANOR & L. LYNN HOGUE, *MILITARY LAW IN A NUTSHELL* 1–29 (4th ed. 2013).

35. *See* 10 U.S.C. § 816 (2012) (delineating the different classes of courts-martial).

36. *See id.* § 820.

37. *See id.* § 819.

38. *See id.* § 818.

39. *See id.* § 825a (“[U]nless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified.”).

40. *Id.* § 817.

41. *See id.* §§ 877–933.

42. *Id.* § 934.

has been held to encompass both civilian federal criminal offenses<sup>43</sup> and those violations of state law that fall within the scope of the federal Assimilative Crimes Act—the statute that applies the criminal laws of states in which federal installations are located to offenses committed *on* such federal property.<sup>44</sup>

As elaborated upon below, although the Supreme Court had for a time required that offenses be “service-connected” in order to fall within the constitutional scope of court-martial jurisdiction,<sup>45</sup> the Justices retreated from that requirement in 1987, categorically holding that servicemembers may be tried for any offense recognized by Congress, regardless of its connection (or lack thereof) to their military service.<sup>46</sup>

With regard to *who* may be tried by courts-martial, Article 2(a) identifies thirteen categories of individuals subject to military jurisdiction, most of which focus on current servicemembers, those in a reserve component, or those former servicemembers who are still receiving pay or other benefits from the military (or still serving sentences arising out of prior court-martial convictions).<sup>47</sup> Controversially, Article 2(a)(10), as amended in 2006, also extends court-martial jurisdiction “[i]n time of declared war or a contingency operation,<sup>[48]</sup> [to] persons serving with or accompanying an armed force in the field,”<sup>49</sup> and was recently upheld by lower courts as applied to noncitizen civilian contractors in Iraq<sup>50</sup>—despite earlier Supreme Court decisions appearing to disclaim the

43. See, e.g., *United States v. Barberi*, 71 M.J. 127, 134 (C.A.A.F. 2012) (Baker, J., dissenting). See generally GREGORY E. MAGGS & LISA M. SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS* 439–40 (2012).

44. See, e.g., *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999). See generally 18 U.S.C. § 13 (2012) (assimilating into federal law all state law offenses “which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which [the relevant federal installation at which the offense took place] is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment”).

45. See *O’Callahan v. Parker*, 395 U.S. 258, 272–74 (1969).

46. See *Solorio v. United States*, 483 U.S. 435, 449–51 (1987). Since *Solorio*, four Justices have suggested that the Constitution may still require a service connection in *capital* cases. See *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring). This issue has not been squarely presented, however, as there has not yet been a post-*Solorio* military capital case without a clear service connection. See, e.g., *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999).

47. See 10 U.S.C. § 802(a) (2012).

48. A “contingency operation” is any military operation that, *inter alia*, “is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.” *Id.* § 101(a)(13)(A).

49. *Id.* § 802(a)(10); see also John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, § 552, 120 Stat. 2083, 2217 (adding the “contingency operation” language). Prior to 2006, the statute only authorized such proceedings “in time of war,” which CAAF’s predecessor—the Court of Military Appeals—had interpreted during Vietnam to require a *declaration* of war in order to avoid constitutional questions. See *United States v. Averette*, 19 C.M.A. 363, 365 (1970). Thus, in addition to adding the “contingency operation” language, the 2006 amendment also codified *Averette*.

50. See *United States v. Ali*, 71 M.J. 256, 268–69 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013); see also *infra* text accompanying notes 146–52 (discussing the *Ali* decision).

constitutionality of military jurisdiction over civilians.<sup>51</sup>

Prior to the 1950 enactment of the UCMJ, the only means of obtaining judicial review of a court-martial conviction was through a collateral proceeding (usually habeas) in the civilian courts—and even then, the only issue that could be challenged was whether the military court properly exercised jurisdiction.<sup>52</sup> One of the UCMJ's central innovations was the formalization of an appellate structure within the military justice system, which today features Courts of Criminal Appeals (CCAs) established by the Judge Advocate General of each service branch to hear appeals from general (and some special) courts-martial,<sup>53</sup> and a civilian Court of Appeals for the Armed Forces (CAAF) with largely discretionary jurisdiction over the four service-branch CCAs.<sup>54</sup>

Unlike their civilian counterparts, the CCAs are empowered to review *de novo* both the legal *and* factual conclusions of the court-martial and may overturn convictions and sentences.<sup>55</sup> And since 1983, this structure has included Supreme Court appellate jurisdiction via certiorari to review CAAF in a range of circumstances,<sup>56</sup> although the current statute appears (controversially) to preclude such authority in most cases in which CAAF itself denied a request for discretionary review.<sup>57</sup>

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51. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960) (no military jurisdiction over civilian employees of the military for noncapital offenses committed during peacetime); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (no military jurisdiction over civilian employees of the military for capital offenses committed during peacetime); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (no military jurisdiction over civilian dependents of military servicemembers for noncapital offenses committed during peacetime); *Reid v. Covert*, 354 U.S. 1, 40–41 (1957) (no military jurisdiction over civilian dependents of military servicemembers for capital offenses committed during peacetime); cf. *Averette*, 19 C.M.A. 363.

52. See *supra* note 29 and accompanying text.

53. See 10 U.S.C. § 866 (2012).

54. See *id.* § 867.

55. See *id.* § 866(c) (“[T]he Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”); see also *id.* § 866(d).

56. See *id.* § 867a; 28 U.S.C. § 1259 (2012).

57. See 10 U.S.C. § 867a(a) (2012) (“The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.”); see also 28 U.S.C. § 1259 (2012) (identifying four specific circumstances in which CAAF decisions may be reviewed via certiorari). See generally Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in *EVOLVING MILITARY JUSTICE* 149 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

Even in cases in which CAAF denied review, habeas corpus remains available in the civilian courts to collaterally attack military convictions, at least where the military court failed to give “full and fair consideration” to the defendant’s constitutional claims. See *supra* note 29. Moreover, the Supreme Court retains its “original” habeas jurisdiction, which it could presumably exercise to review a court-martial were an appropriate case to arise in which CAAF denied review and no other adequate appellate remedy was available. See, e.g., *Felker v. Turpin*, 518 U.S. 651 (1996); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869); see also 28 U.S.C. § 2241(a) (2012); SUP. CT. R. 20.

As for military judges, the Military Justice Act of 1968 formalized the position,<sup>58</sup> providing that such jurists preside over special or general courts-martial,<sup>59</sup> rule on all legal questions,<sup>60</sup> and instruct the court-martial members regarding the law and procedures to be followed.<sup>61</sup> By statute, military judges must be commissioned officers of the Armed Forces<sup>62</sup>—which necessarily means that they are already appointed by the President and confirmed by the Senate<sup>63</sup>—and they must be members of the bar of a federal court or a state’s highest court.<sup>64</sup> As active-duty servicemembers, the salaries of military judges are based on their military rank and station, rather than their judicial service. And in important distinction to their civilian counterparts, the roughly eighty active-duty and fifty reserve trial-level military judges do not serve for fixed terms—and only perform judicial duties when assigned to do so by their service branch’s Judge Advocate General.<sup>65</sup> The primary difference between the trial-level military judges and those appointed to the CCAs is that the latter category may—in at least some cases—include civilians.<sup>66</sup> Otherwise, however, the CCA judges are also assigned by their service branch’s Judge Advocate General to perform specific judicial duties during a (usually) unspecified term of service.<sup>67</sup>

By design, CAAF is a different story. Pursuant to statute (Article 142 of the UCMJ), the highest court in the military justice system is to be staffed by five judges “appointed from civilian life by the President” and confirmed by the Senate,<sup>68</sup> who serve roughly fifteen-year terms,<sup>69</sup> subject to removal only for “neglect of duty,”<sup>70</sup> “misconduct,”<sup>71</sup> or “mental or physical disability”<sup>72</sup> (and not “any other cause”),<sup>73</sup> and whose salaries are pegged by statute to those of Article III circuit judges.<sup>74</sup> Article 142 also authorizes the Chief Justice of the

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58. See sources cited *supra* note 28.

59. 10 U.S.C. § 826 (2012).

60. *Id.* § 851(b).

61. *Id.* § 851(c).

62. *Id.* § 826(b).

63. *Id.* § 531; see also *Weiss v. United States*, 510 U.S. 163, 168 & n.2 (1994).

64. 10 U.S.C. § 826(b).

65. See *Weiss*, 510 U.S. at 168. *Weiss* itself held that the Due Process Clause did not require military judges to hold fixed terms of office. *Id.* at 181.

66. See 10 U.S.C. § 866(a). But see *Edmond v. United States*, 520 U.S. 651, 666 (1997) (holding that civilian judges on the Coast Guard CCA must be appointed by the Secretary of Transportation, not the Coast Guard JAG, in order to avoid a serious Appointments Clause question that is not implicated by servicemember judges).

67. See *Weiss*, 510 U.S. at 176 (“[T]he Appointments Clause by its own force does not require a second appointment before military officers may discharge the duties of such a judge.”).

68. 10 U.S.C. § 942(b)(1).

69. *Id.* § 942(b)(2). To ensure that the terms all expire on the same date (September 30), the statute technically allows for terms from between fourteen and one-half to fifteen and one-half years. See *id.*

70. *Id.* § 942(c)(1).

71. *Id.* § 942(c)(2).

72. *Id.* § 942(c)(3).

73. *Id.* § 942(c).

74. See *id.* § 942(d). Curiously, the UCMJ also provides that “[n]ot more than three of the judges of the court may be appointed from the same political party.” *Id.* § 942(b)(3).

United States to appoint Article III judges (at the request of the Chief Judge of CAAF) to temporarily fill vacancies on CAAF when no senior judges are available,<sup>75</sup> even though such mixed panels might raise constitutional concerns.<sup>76</sup>

## 2. Military Commissions

“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”<sup>77</sup> Unlike courts-martial, military commissions have historically been irregular courts with carefully circumscribed jurisdiction. One species of commissions has served as martial-law or occupation courts exercising general criminal jurisdiction in exceptional situations.<sup>78</sup> The other has entertained prosecutions of enemy belligerents for violations of the international laws of war—such as the body that convicted the Nazi saboteurs in *Ex parte Quirin*<sup>79</sup> and the numerous war crimes tribunals convened by the United States after World War II.<sup>80</sup> Whether these courts operated with express congressional authorization,<sup>81</sup> their procedures, rules, and judges were entirely controlled by the Executive Branch (and basically unregulated by statute).<sup>82</sup> Judicial review was only available collaterally via habeas

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75. See, e.g., *United States v. Schneider*, 38 M.J. 387, 389 n.1, 397 nn.8–9 (C.M.A. 1993) (three Article III judges sitting by designation). See generally EUGENE R. FIDELL, *GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES* 48 (13th ed. 2010) (citing other cases).

76. Cf. *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (interpreting statute to bar non-Article III federal judge from sitting on Ninth Circuit panel otherwise comprised of Article III judges in order to avoid question of whether such an assignment was constitutional). Insofar as the constitutional concern arises from potential oversight of Article III lower courts by non-Article III appellate judges (which would presumably violate the ban on extrajudicial revision of Article III judgments, see generally *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)), it is possible that this practice would not raise similar concerns in the military context because CAAF never reviews Article III judgments. But whether mixed panels are by themselves unconstitutional is the precise constitutional question the *Nguyen* Court ducked.

77. *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557, 590 (2006).

78. See, e.g., *Madsen v. Kinsella*, 343 U.S. 341, 346–48 (1952).

79. 317 U.S. 1 (1942); see also *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956).

80. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); see also Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 *Geo. L.J.* 1497, 1505–11 (2007) (summarizing the post-World War II war crimes tribunals and the attempts by various defendants to have their proceedings reviewed in the Article III courts).

81. To distinguish the Supreme Court’s earlier decision in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court in *Ex parte Quirin* held that Congress had authorized military commissions through then-Article 15 of the Articles of War, even though that provision only specified 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.” 317 U.S. at 27 (emphasis added); 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)). The Court would later describe such a characterization of Article 15 as “controversial,” albeit without revisiting it. See *Hamdan I*, 548 U.S. at 593.

82. Other than limiting the jurisdiction of commissions to “offenders or offenses that by statute or by the law of war may be tried by military commissions,” 10 U.S.C. § 821 (2012), the only other statutory requirement that arguably applied to commissions prior to 2006 was the mandate in Article 36 of the

corpus<sup>83</sup>—and even then, only for challenges to the commissions’ “jurisdiction.”<sup>84</sup>

In its 2006 decision in *Hamdan v. Rumsfeld (Hamdan I)*, the Supreme Court struck down military commissions established by President Bush after September 11 to try noncitizens detained at Guantánamo, holding that the Bush Administration’s tribunals departed too substantially from that which Congress (according to the Court’s reading of its prior jurisprudence) had authorized.<sup>85</sup> The decision in *Hamdan I* precipitated the Military Commissions Act of 2006 (MCA),<sup>86</sup> in which Congress for the first time created a general statutory foundation for (and arguably sought to “regularize”) military commissions. Although the MCA (as amended in 2009)<sup>87</sup> did not abolish the pre-2006 authority for commissions (which might be called “Chapter 47” commissions, after the relevant subsection of Title 10 of the U.S. Code),<sup>88</sup> it created a new set of courts (“Chapter 47A” commissions) with a detailed framework of statutory rules.<sup>89</sup>

As relevant here, the MCA vests jurisdiction in military commissions to try “alien unprivileged enemy belligerents”<sup>90</sup> for any violation of the international laws of war,<sup>91</sup> violations of Articles 104 or 106 of the UCMJ,<sup>92</sup> or any of thirty-two distinct substantive offenses prescribed by the MCA.<sup>93</sup> The MCA

UCMJ that “[a]ll rules and regulations made under this article shall be uniform insofar as practicable,” *id.* § 836(b); *see also Hamdan I*, 548 U.S. at 617–20.

83. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253–54 (1864) (holding that the Supreme Court could not review a military commission directly via certiorari).

84. *See, e.g., Yamashita*, 327 U.S. at 8 (“If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.”).

85. *Hamdan I*, 548 U.S. at 593–94.

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

87. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–614 (codified in scattered sections of 10 U.S.C.).

88. Indeed, one provision of the MCA expressly clarifies that Article 21 of the UCMJ (the authorization for the commission in *Ex parte Quirin*) “does not apply to a military commission established under [the MCA].” Military Commissions Act of 2006 § 4(a)(2) (codified at 10 U.S.C. § 821 (2012)).

89. *See* 10 U.S.C. §§ 948q–948s (2012) (pre-trial procedures); *id.* §§ 949a to 949p-7 (trial procedures); *id.* §§ 949s–950j (sentencing and post-trial procedures).

90. An “unprivileged enemy belligerent” is defined as an individual who is not a privileged belligerent, *see id.* § 948a(6), 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.* § 948a(7). The MCA only authorizes trial by military commission of *alien* unprivileged enemy belligerents. *See id.* § 948c. Privileged enemy belligerents who violate the laws of war are subject to trial by court-martial. *See id.* § 802(a)(13); *id.* § 948a(6). There is no provision under the MCA for military trials—by court-martial or military commission—of unprivileged belligerents who are U.S. citizens; if anything, such individuals are only subject to military trial in a Chapter 47 commission, as in *Ex parte Quirin*, 317 U.S. 1 (1942).

91. 10 U.S.C. § 948d.

92. *Id.*; *see also id.* § 904 (aiding the enemy); *id.* § 906 (spying).

93. *Id.* § 950t.

requires that a military judge already certified to preside over general courts-martial under Article 26 of the UCMJ preside over commission proceedings,<sup>94</sup> and the statute invests the Secretary of Defense with the authority to prescribe rules governing the detailing of military judges to the commissions.<sup>95</sup>

In addition to providing for a host of additional procedural and evidentiary rules, the MCA also provides for direct appellate review of military commission proceedings, first in the newly created Article I Court of Military Commission Review (CMCR),<sup>96</sup> and then in the Article III D.C. Circuit<sup>97</sup> (the decisions of which are—unnecessarily—made expressly reviewable by the Supreme Court via certiorari).<sup>98</sup>

Thanks to a series of amendments pushed by the Obama Administration in 2009, the CMCR today exercises both final and interlocutory jurisdiction that is largely equivalent to that exercised by the CCAs in the court-martial context.<sup>99</sup> In contrast, the D.C. Circuit only has appellate jurisdiction with respect to final decisions of the CMCR; there is no provision for interlocutory appeal from the CMCR to the D.C. Circuit.<sup>100</sup> Finally, although the 2006 MCA appeared to foreclose collateral review of military commissions in the Article III courts,<sup>101</sup> that provision was eliminated by the 2009 MCA<sup>102</sup>—which, together with the Supreme Court’s invalidation of the 2006 MCA’s habeas-stripping provision in *Boumediene v. Bush*,<sup>103</sup> arguably restores collateral review of commissions at least to the same extent as such collateral review is available for courts-martial.<sup>104</sup>

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94. *Id.* § 948j(b).

95. *Id.* § 948j(a).

96. *Id.* § 950f(a).

97. *Id.* § 950g.

98. *Id.* § 950g(e); *see also* 28 U.S.C. § 1254(1) (2012).

99. *See, e.g.*, 10 U.S.C. § 950f(d); *see also id.* § 950d (providing for interlocutory appeals by the United States). For a detailed explanation of how the 2009 MCA improved the deeply problematic scope of appellate review in the military commissions under the 2006 MCA, *see* Vladeck, *supra* note 14.

100. *See* 10 U.S.C. § 950g(a); *see also* *Khadr v. United States*, 529 F.3d 1112, 1115–17 (D.C. Cir. 2008) (holding that the D.C. Circuit may not entertain a defendant’s statutory appeal from an interlocutory decision by the CMCR).

101. *See* 10 U.S.C. § 950j(b) (2006) (“Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”).

102. *See* 10 U.S.C. § 950j (Supp. III 2009).

103. 553 U.S. 723, 792 (2008).

104. *See, e.g.*, *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014); Steve Vladeck, *Habeas and the Military Commissions After Aamer*, LAWFARE (Mar. 21, 2014, 9:36 AM), <http://www.lawfareblog.com/2014/03/habeas-and-the-military-commissions-after-aamer>. *But cf.* *ACLU v. United States*, No. 13-003, slip op. at 2–5 (C.M.C.R. Mar. 27, 2013) (Silliman, J., concurring) (arguing that a separate provision of the MCA, codified at 28 U.S.C. § 2241(e)(2), bars collateral review of military commissions via mandamus); *Miami Herald v. United States*, No. 13-002, slip op. at 3–5 (C.M.C.R. Mar. 27, 2013).

As with the appointment of commission trial judges, the MCA also empowers the Secretary of Defense to assign appellate military judges in the court-martial system to sit on the CMCR.<sup>105</sup> Finally, the MCA authorizes the President to make additional appointments to the CMCR “with the advice and consent of the Senate,” albeit with no statutory provisions governing the salary, tenure, or removal of such appointees.<sup>106</sup>

#### B. THE NORMATIVE JUSTIFICATIONS FOR MILITARY JUSTICE

In explaining why the Constitution permits all of the non-Article III military adjudication described in section A, the Supreme Court has relied upon textual justifications that will be more fully discussed in sections C and D. Before getting to those, however, it is worth taking a moment to focus on the Justices’ explanations for why there *should* be a military justice system separate from the Article III federal civilian courts. Unfortunately, the Court has focused almost exclusively on normative defenses of courts-martial and not of commissions. Thus, as Chief Justice Burger wrote for the Court more than thirty years ago:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.<sup>107</sup>

Building off of that basic sentiment, arguments have typically rested on some combination of four distinct—but related—normative justifications: what might be described as “physical” separation, “philosophical” separation, “legal” separation, and “remedial” separation.

Physical separation, as Professor Ed Sherman has explained, was one of the earliest justifications for separate military courts: “Military justice developed as a separate legal system under command control because military units were often isolated from both civilians and each other. Commanders needed the power to convene a court-martial staffed with their own officers so that a quick

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(Silliman, J., concurring) (same). For a critique of Judge Silliman’s analysis, see Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191, 201–03 (2014).

105. See 10 U.S.C. § 950f(b)(2) (2012). One of the commission defendants has brought a constitutional challenge to this structure, claiming that it violates both Article II’s Commander-in-Chief and Appointments Clauses. See *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. argued Feb. 10, 2015). In particular, because the CMCR is reviewed by the D.C. Circuit and not the CAAF, its judges are almost certainly “principal” officers for purposes of the Appointments Clause—and the validity of reassigning military judges to serve on it is therefore not covered by the Supreme Court’s decision in *Weiss v. United States*, 510 U.S. 163 (1994). For more discussion of the merits of that challenge, see Steve Vladeck, *al-Nashiri Argument Preview: The CMCR’s Appointments Clause Problem*, LAWFARE (Feb. 3, 2015, 8:17 AM), <http://www.lawfareblog.com/2015/02/al-nashiri-preview>.

106. 10 U.S.C. § 950f(b)(3).

107. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

determination of guilt could be made.”<sup>108</sup> Of course, “modern transportation and communication have ended the isolation of military units, and trial of servicemen in civilian courts is now feasible in most situations,”<sup>109</sup> as exemplified in specific statutes such as the War Crimes Act of 1996<sup>110</sup> and the Military Extraterritorial Jurisdiction Act of 2000 (MEJA),<sup>111</sup> and the more general movement to apply a growing array of criminal statutes extraterritorially.<sup>112</sup>

Although the relevance of the physical separation argument has waned over time, the other three grounds for a separate military system are still often invoked today. For example, philosophical separation is the more subjective concern that “civilian officials antagonistic to the military”<sup>113</sup> might distort—if not outright thwart—the underlying goals of military justice. To similar effect, if more innocuously, philosophical separation is also reflected in arguments that civilian jurors might not apply the same legal standards to the same facts in the same way as their military counterparts, owing to their innate experiential and philosophical differences. To be sure, properly tailored jury instructions might alleviate this concern by properly instructing jurors on the relevant distinctions—just as they are routinely instructed on elements of criminal statutes with which they are not already familiar.

Related to physical separation are arguments based upon legal separation, that is, “the military is a society apart from civilian life which requires *different* legal standards the civilian courts cannot appreciate or adequately enforce.”<sup>114</sup> To be sure, recent years have witnessed a dramatic “civilianization” of military justice—a convergence, on multiple levels, of the relevant legal standards applicable to civilian and military criminal prosecutions alike.<sup>115</sup> But it is still very much the case today that there are at least some procedural rules (such as

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108. Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973).

109. *Id.*

110. Pub. L. No. 104-192, § 2(a), 110 Stat. 2104, 2104 (codified as amended at 18 U.S.C. § 2441 (2012)).

111. Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–67 (2012)).

112. Although the Supreme Court has taken increasingly narrow views of the extraterritorial application of federal statutes, *see, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), those cases invariably involve provisions that do not expressly apply overseas. At the same time, Congress has amended a number of criminal statutes (especially in the terrorism and national security spheres) to make them *expressly* extraterritorial in their scope. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d) (2012)); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 805(a)(1)(F), 115 Stat. 272, 377 (amending 18 U.S.C. § 2339A(a) (2012)). *See generally* Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SECURITY J. 115 (2014) (discussing the implications of these expansions).

113. Sherman, *supra* note 108, at 1401.

114. *Id.* (emphasis added).

115. *See, e.g.*, Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT L. REV. 265, 273 & n.78 (1994); *see also* Vladeck, *supra* note 17, at 287–88.

the very different pretrial process required by Article 32 of the UCMJ),<sup>116</sup> substantive offenses (for example, conduct unbecoming an officer),<sup>117</sup> and constitutional protections (grand jury indictment being the most obvious)<sup>118</sup> that differ materially as between these two systems.<sup>119</sup>

Finally, and perhaps most significantly, remedial separation is the idea that the underlying *goals* of the civilian and military justice system differ. Unlike the punitive and rehabilitative goals undergirding civilian criminal justice, “military justice has traditionally been viewed as partly judicial and partly disciplinary,”<sup>120</sup> as existing as much to preserve “good order and discipline” within military units as to punish and rehabilitate individual offenders.<sup>121</sup> Thus, even if civilian courts applied the same legal principles in the exact same manner as their military counterparts, the mere *fact* that such adjudication is undertaken by civilians outside the military command structure would arguably dilute the utility and efficacy of the prosecution with respect to preserving such “good order and discipline.”

At various points, each of these arguments has surfaced in Supreme Court decisions concerning the separateness of the military justice system—whether in explaining why specific civilian norms should not be applied to military proceedings<sup>122</sup> or in justifying deference to military decisionmaking that would not normally be appropriate in the civilian sphere.<sup>123</sup> But, perhaps tellingly, they have rarely (if ever) been deployed as *constitutional* justifications for the military justice system—that is, as part of legal analysis in support of the conclusion that military courts may operate outside of Article III. For those arguments, the Court has instead looked, however unsatisfyingly, to constitutional text.

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116. 10 U.S.C. § 832 (2012) (requiring a far more rigorous pre-trial hearing to assess the sufficiency of the charges before a case can be referred to a general court-martial).

117. *Id.* § 933 (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”).

118. *See* U.S. CONST. amend. V (exempting “cases arising in the land or naval forces” from the requirement of a grand jury indictment or presentment).

119. *See, e.g.*, *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) (“[T]his Court has consistently applied the Bill of Rights to members of the Armed Forces, *except in cases where the express terms of the Constitution make such application inapposite.*” (emphasis added)). For a side-by-side comparison of the applicability of specific constitutional safeguards in the civilian courts as compared to courts-martial, see R. CHUCK MASON, CONG. RESEARCH SERV., R41739, *MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW* 9–15 tbl.1 (2013).

120. *Sherman, supra* note 108, at 1402.

121. *See id.*

122. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 744 (1974); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); *see also Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). *See generally Parker*, 417 U.S. at 749 (“While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.”).

123. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 300–01 (1983); *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981); *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973).

And although the discussion in this section has focused on philosophical justifications for courts-martial, the same conclusion—that the Court has never relied on these justifications as *the* basis for departing from Article III—applies to military commissions. Even in *Ex parte Quirin*, Chief Justice Stone’s normative defense of trying war crimes by military commission was tied to text—that the drafters of the Bill of Rights could not have “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.”<sup>124</sup> There are certainly other normative justifications for military commissions,<sup>125</sup> but none that, thus far, have made their way into constitutional doctrine.

### C. THE SUPREME COURT’S CONSTITUTIONAL DEFENSE OF COURTS-MARTIAL

It has been assumed since the Founding that the source of Congress’s power to govern the military is the Make Rules Clause of Article I, which empowers Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>126</sup> And yet, since before the Civil War, the Supreme Court has suggested that the constitutional validity of military *adjudication* outside of Article III courts cannot be explained entirely by Congress’s regulatory power.

As Justice Wayne noted in *Dynes v. Hoover*,<sup>127</sup> the first case in which the Justices had reason to reflect on the relationship between the Constitution and military justice,<sup>128</sup> military jurisdiction did not depend solely upon Congress’s Article I powers (after all, Congress enumerated criminal offenses pursuant to a number of its regulatory authorities under Article I; that fact alone has never

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124. 317 U.S. 1, 44 (1942).

125. Separate from Chief Justice Stone’s argument in *Quirin*, one might also defend military commissions on the grounds that (1) the defendants usually—if not always—are individuals lacking substantial voluntary connections to the United States and therefore are not entitled to the ordinary panoply of constitutional protections that we associate with civilian criminal prosecutions; (2) there are practical and logistical reasons to conduct the proceedings in remote, secure facilities lacking Article III’s hallmarks; or (3) trying these defendants and offenses in regular courts, be they courts-martial or civilian courts, might encourage judges to reach doctrinal accommodations to facilitate the defendant’s conviction that would have deleterious consequences in non-terrorism cases, among others. *See, e.g.*, Stephen I. Vladeck, *Foreword: National Security’s Distortion Effects*, 32 W. NEW ENG. L. REV. 285 (2010). Needless to say, each of these arguments suffers from separate shortcomings, especially given the track record of Article III courts in contemporary war crimes and counterterrorism prosecutions. *See* Steve Vladeck, *The National Security Courts We Already Have*, JOTWELL (Sept. 23, 2013), <http://courtslaw.jotwell.com/the-national-security-courts-we-already-have> (reviewing ROBERT TIMOTHY REAGAN, FED. JUD. CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (2013)).

126. U.S. CONST. art. I, § 8, cl. 14; *see also id.* cl. 16 (empowering Congress “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States”).

127. 61 U.S. (20 How.) 65 (1858).

128. *Dynes* was not the first military justice case to reach the Supreme Court. *See, e.g.*, *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). But none of the other cases appeared to raise any specific question about the constitutional validity of federal military justice, as such.

been viewed as sufficient to justify *trial* of such offenses outside Article III courts). Instead, the President's Article II authority as Commander-in-Chief and the text of the Fifth Amendment—which expressly exempts from the Grand Jury Indictment Clause “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”<sup>129</sup>—were also key ingredients to the constitutionality of adjudication by non-Article III federal military courts: “These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations . . . .”<sup>130</sup> Moreover, “the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.”<sup>131</sup>

To be sure, *Dynes* stressed that such non-Article III adjudication was only permissible when the court-martial properly exercised jurisdiction over the charge and the defendant—and that, without such jurisdiction, court-martial proceedings were void and necessarily subject to collateral attack (whether via habeas or other remedies) in the civilian courts.<sup>132</sup> But where courts-martial exercised constitutionally valid jurisdiction, it was the combination of Congress's police power over the military *and* the exception to the Grand Jury Indictment Clause that justified such non-Article III federal adjudication. Thus, *Dynes* assumed *sub silentio* that, between them, the Make Rules Clause and an exception to the Grand Jury Indictment Clause also absolved the military justice system of the need to comply with Article III's requirements of a life-tenured, salary-protected judge and the petit jury requirements of Article III and the Sixth Amendment.<sup>133</sup>

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129. U.S. CONST. amend. V. The text of the Grand Jury Indictment Clause is worth lingering over for a moment, for one could certainly argue that the last clause—“when in actual service in time of War or public danger”—modifies *both* of the preceding clauses (and not just the militia provision). Such a reading would mean that the Grand Jury Indictment Clause would only exempt “cases arising in the land or naval forces . . . when in actual service in time of War or public danger.” Nevertheless, the Supreme Court has held that, while “[t]hat construction is grammatically possible . . . it is opposed to the evident meaning of the provision, taken by itself, and still more so when it is considered together with the other provisions of the constitution.” *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *see also* *O'Callahan v. Parker*, 395 U.S. 258, 272 n.18 (1969). So construed, the last clause exempts from the Grand Jury Indictment Clause only those cases arising in the militia when it has been validly “call[ed] forth” to “execute the Laws of the Union, suppress Insurrections [or] repel Invasions.” U.S. CONST. art. I, § 8, cl. 15. *But see* *Solorio v. United States*, 483 U.S. 435, 453 n.2 (1987) (Marshall, J., dissenting) (“I am not convinced this reading of the Fifth Amendment is correct . . . .”).

130. *Dynes*, 61 U.S. (20 How.) at 79.

131. *Id.*

132. *See id.* at 81–82. That convictions by military courts could be attacked collaterally in the civilian courts for lack of jurisdiction was already well settled. *See, e.g.*, sources cited *supra* note 128.

133. A contemporaneous opinion by Attorney General Cushing also reflected this view. *See* *Civil Responsibility of the Army*, 6 Op. Att'y Gen. 413, 425 (1854) (suggesting that the Grand Jury Indictment Clause “expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law”).

Eight years later, in *Ex parte Milligan*, the Court articulated what *Dynes* had only assumed—that the petit jury trial provisions of Article III and the Sixth Amendment necessarily include an atextual exception that is *in pari materia* with the textual exception embedded within the Fifth Amendment’s Grand Jury Indictment Clause.<sup>134</sup> As Justice Davis explained in striking down the military tribunals unilaterally established under President Lincoln’s authority, the Constitution’s drafters, “doubtless, meant to limit” the Sixth Amendment’s jury-trial requirement to “those persons who were subject to indictment or presentment in the fifth,”<sup>135</sup> and to thereby atextually exempt from the Sixth Amendment’s Jury Trial Clause those cases exempted from the Fifth Amendment’s Grand Jury Indictment Clause. Unfortunately, *Milligan*, which nevertheless held that such an exception was inapplicable in that case,<sup>136</sup> never elaborated upon its source.

Although *Dynes* and *Milligan* were light on analysis, their understanding only became more ingrained in the Court’s jurisprudence over time, whether as a matter of stare decisis, agreement with their undefended conclusions, or both. Such reliance became especially pronounced after World War II, when the Justices were confronted with a host of new challenges to the constitutional limits of military jurisdiction.<sup>137</sup> In *United States ex rel. Toth v. Quarles*, for example, the Justices held that *former* servicemembers could not constitutionally be subjected to court-martial for offenses committed while in the military.<sup>138</sup>

Writing for a 6–3 majority, Justice Black explained that the exception in the Grand Jury Trial Clause “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>139</sup> That power, in turn, could not extend to *former* servicemembers because “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.”<sup>140</sup> Moreover, Black explained, “[A]ny expansion of court-martial jurisdiction like that in the 1950 Act [to former servicemembers] necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitu-

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134. See 71 U.S. (4 Wall.) 2, 123 (1866).

135. *Id.*; see also *Ex parte Quirin*, 317 U.S. 1, 40–41 (1942).

136. See *Middendorf v. Henry*, 425 U.S. 25, 33–34 (1976) (referring to this discussion in *Milligan* as dicta).

137. See generally Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295, 301–12 (2010) (summarizing the legal and factual origins of the uptick in the Supreme Court’s military jurisdiction jurisprudence after World War II).

138. 350 U.S. 11, 22–23 (1955). Subsequent statutory and judicial developments have somewhat diluted the practical significance of *Toth*, with courts upholding the military’s power to recall at least some former servicemembers to active duty for the sole purpose of trying them for offenses committed while on active duty. See, e.g., *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998); see also *Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009).

139. *Toth*, 350 U.S. at 14 n.5.

140. *Id.* at 15.

tional safeguards than in military tribunals.”<sup>141</sup>

Because *Toth* seemed to suggest that the constitutional authority of courts-martial was thereby confined only to active-duty servicemembers, it necessarily raised a host of questions about Congress’s power to subject to court-martial civilian dependents and employees of the military accompanying the armed forces overseas. Thus, two years after *Toth*, a 6–3 majority in *Reid v. Covert* held that Congress lacks the authority to empower the military to court-martial civilian dependents for capital offenses committed during peacetime,<sup>142</sup> with Justice Black’s opinion for a four-Justice plurality again relying on the jury-trial provisions as one of the key constitutional constraints:

Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, [§] 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. 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.<sup>143</sup>

In *Covert* itself, the Court only invalidated the military’s power to court-martial a civilian dependent in a capital case during “peacetime”—and no single rationale commanded more than a plurality of the Justices.<sup>144</sup> But just three years later, a majority of the Court extended *Covert*’s rationale to preclude the trial by court-martial of *all* civilians during peacetime—even for noncapital offenses.<sup>145</sup> To justify the departure from Article III, courts-martial had to involve “cases arising in the land or naval forces.” Put another way, the validity

141. *Id.*

142. 354 U.S. 1, 40–41 (1957). Famously, the Court in *Covert* had initially come out the other way, *see Reid v. Covert*, 351 U.S. 487, 491–92 (1956); *Kinsella v. Krueger*, 351 U.S. 470, 479–80 (1956), only to reverse course after an extraordinarily unusual grant of rehearing (over three dissents), *see Reid v. Covert*, 352 U.S. 901 (1956) (mem.). *See generally* Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial*, 212 *MIL. L. REV.* 133 (2012) (extensively recounting the background to *Covert*).

143. *Covert*, 354 U.S. at 21 (plurality opinion) (footnote omitted).

144. Although Justice Black’s analysis would have categorically foreclosed military jurisdiction over civilians, Justices Frankfurter and Harlan concurred in the judgment on the narrower ground that they believed military jurisdiction was foreclosed for capital offenses committed by civilian dependents during peacetime. *See id.* at 45–49 (Frankfurter, J., concurring in the result); *id.* at 65–77 (Harlan, J., concurring in the result).

145. *See McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960) (no military jurisdiction over civilian employees of the military for noncapital offenses committed during peacetime); *Grisham v. Hagen*, 361 U.S. 278, 280 (1960) (no military jurisdiction over civilian employees of the military for capital offenses committed during peacetime); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (no military jurisdiction over civilian dependents of military servicemembers for noncapital offenses committed during peacetime).

of non-Article III federal adjudication did not *just* turn on Congress's power to proscribe the relevant conduct (typically through its police power over the military); it also turned on the applicability, or lack thereof, of the jury-trial provisions of Article III and the Fifth and Sixth Amendments.

With this understanding in mind, consider CAAF's 2012 decision in *United States v. Ali*.<sup>146</sup> There, the question was the constitutionality of a 2006 amendment to the UCMJ that authorized the trial by court-martial of civilian contractors "serving with or accompanying an armed force in the field" during "time of declared war *or* a contingency operation,"<sup>147</sup> a statutory term that encompasses any number of peacetime deployments.<sup>148</sup> Writing for three of the court's five judges, Judge Erdmann upheld the 2006 amendment not because Article I clearly authorized the exercise of military jurisdiction over civilian contractors like Ali,<sup>149</sup> or because the jury-trial exception for "cases arising in the land or naval forces" applied, but because, as a noncitizen arrested and detained outside the territorial United States, Ali was categorically not *protected* by the Fifth and Sixth Amendments—including the jury-trial provisions therein.<sup>150</sup>

CAAF's analysis of the applicability of the jury-trial provisions was problematic, at best. Among other things, (1) it summarily dismissed Ali's substantial voluntary connections to the United States, including his pre-deployment training in Georgia, which should have been sufficient to trigger constitutional protections; (2) even if such connections were insufficient, it failed to analyze Ali's entitlement to extraterritorial constitutional rights under the new framework articulated in *Boumediene v. Bush*;<sup>151</sup> (3) it never considered whether, even if the Fifth and Sixth Amendments do not apply to Ali, *Article III's* jury-trial protections might; and (4) it did not explain how, even if all three of the jury-trial provisions did not apply, the Make Rules Clause (or some other Article I authority) affirmatively empowered Congress to subject civilians to military jurisdiction.<sup>152</sup> But whatever the merits of CAAF's analysis of Ali's jury-trial rights, Judge Erdmann's view that the propriety of non-Article III

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146. 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

147. 10 U.S.C. § 802(a)(10) (2012) (emphasis added); *see also* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, § 552, 120 Stat. 2083, 2217 (adding the "contingency operation" language).

148. *See supra* note 48.

149. The two concurring opinions focused more on the Article I question. *See Ali*, 71 M.J. at 272–79 (Baker, C.J., concurring in part and in the result); *id.* at 279–82 (Effron, J., concurring in part and in the result).

150. *See id.* at 266–69 & n.25 (majority opinion).

151. 553 U.S. 723, 766–71 (2008). *See generally* Hernandez v. United States, 757 F.3d 249 (5th Cir.) (discussing *Boumediene's* general impact on analyses of extraterritorial constitutional rights), *reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014).

152. *See* Vladeck, *supra* note 17; *see also* Steve Vladeck, *Analysis of U.S. v. Ali: A Flawed Majority, Conflicting Concurrences, and the Future of Military Jurisdiction*, LAWFARE (July 19, 2012, 8:09 PM), <http://www.lawfareblog.com/2012/07/analysis-of-caaf-decision-in-ali>. To drive at least one of the critiques home, since *Ali* was decided, the Fourth Circuit in an analogous case held that contacts with the United States even *less* significant than Ali's were sufficient to *justify* the assertion of civilian criminal jurisdiction over a noncitizen civilian contractor for assault of another noncitizen outside the

military jurisdiction turns on the existence of an exception to those provisions—whether a specific one for “cases arising in the land or naval forces” or the more general one relied upon in *Ali*—seems at least superficially consistent with the methodology of the Supreme Court’s jurisprudence discussed above.

Finally, although the discussion thus far has focused on how the Constitution constrains *who* may be tried by courts-martial, the Court had also long hewed to this understanding of the permissible scope of non-Article III court-martial jurisdiction in its analysis of the range of triable *offenses*. For instance, when the majority in *O’Callahan v. Parker* held that the Constitution only authorizes non-Article III courts-martial of servicemembers for offenses connected to their service,<sup>153</sup> the crux of Justice Douglas’s analysis was the role of the jury-trial provisions. In his words, offenses tried by courts-martial “must be service connected, lest [the Grand Jury Indictment Clause exception] be expanded to deprive every member of the armed services of the benefits on an indictment by a grand jury and a trial by a jury of his peers.”<sup>154</sup>

The Court unceremoniously overruled *O’Callahan* eighteen years later, all but categorically holding in *Solorio v. United States* 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>155</sup> But even though *Solorio* paid less overt attention to the role of the jury-trial provisions,<sup>156</sup> Chief Justice Rehnquist’s analysis still turned on the related conclusions that (1) the Constitution invested Congress with police power over the military—the authority to make rules for the “Government” of such persons; and (2) as a result, the textual exception in the Grand Jury Indictment Clause necessarily encompassed the full range of offenses Congress could constitutionally proscribe pursuant to the Make Rules Clause.<sup>157</sup> In short, “the proper exercise of court-martial jurisdiction” turns on “the military status of the accused,” a conclusion that at once expands the scope of court-martial jurisdiction over servicemembers and arguably contracts it decisively as applied to those *without* such status.<sup>158</sup>

Thus, the Supreme Court’s validation of non-Article III federal adjudication in the court-martial context has historically turned on *both* Congress’s police power over the military *and* its construction of the jury-trial exception in

territorial United States. See *United States v. Brehm*, 691 F.3d 547 (4th Cir.), *cert. denied*, 133 S. Ct. 808 (2012).

153. 395 U.S. 258, 272–74 (1969).

154. *Id.* at 272–73 (footnote omitted).

155. 483 U.S. 435, 450–51 (1987); see also *supra* note 46 (noting the open question about whether *Solorio* overrules the service-connection requirement in capital cases).

156. Justice Marshall’s dissent was primarily focused on the claim that it was the jury-trial provisions, and not Article I, that compelled *O’Callahan*’s “service connection” test—that the jury-trial exception was narrower than the scope of Congress’s regulatory power. See *Solorio*, 483 U.S. at 452–62 (Marshall, J., dissenting).

157. *Id.* at 441–51 (majority opinion).

158. See Vladeck, *supra* note 137, at 310 (quoting *Solorio*, 483 U.S. at 439).

the Fifth Amendment's Grand Jury Indictment Clause—as implicitly read into the petit jury trial provisions of Article III and the Sixth Amendment. As Justice Black explained in *Covert*, “[T]he exception in [the Fifth] Amendment for ‘cases arising in the land or naval forces’ was undoubtedly designed to *correlate* with the power granted Congress to provide for the ‘Government and Regulation’ of the armed services.”<sup>159</sup>

#### D. THE SUPREME COURT'S CONSTITUTIONAL DEFENSE OF MILITARY COMMISSIONS

Although there has been far less jurisprudence concerning the constitutional scope of military commission jurisdiction, the Supreme Court has nevertheless followed an analogous methodological understanding of the permissible scope of non-Article III federal adjudication by such bodies.

For example, whereas the rhetoric of the Court's 1866 decision in *Ex parte Milligan*—which invalidated military tribunals unilaterally established under the authority of President Lincoln to try suspected Confederate sympathizers during the Civil War—focused on the relationship between civilian and military rule,<sup>160</sup> the actual constitutional analysis in the majority opinion focused on the right to jury trial guaranteed by Article III and the Fifth and Sixth Amendments.<sup>161</sup> As Justice Davis explained, “[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.”<sup>162</sup> Whether Congress *could* constitutionally authorize trial by military commissions when the civilian courts were open and functioning (a question on which the otherwise unanimous *Milligan* Court divided 5–4),<sup>163</sup> the jury-trial provisions still militated against military jurisdiction absent congressional intervention.

Perhaps because the jury-trial provisions formed the crux of the *Milligan* Court's analysis, they were also one of the focal points when the Supreme Court in *Ex parte Quirin* purported to distinguish *Milligan* in upholding military tribunals established by President Roosevelt to try eight Nazi saboteurs during World War II.<sup>164</sup> After holding that, unlike in *Milligan*, Congress *had* provided statutory authorization for the proceedings pursuant to its power to define and punish offenses against the law of nations,<sup>165</sup> Chief Justice Stone proceeded to explain why the petitioners' commission did not raise the same jury-trial concerns that the *Milligan* majority had invoked:

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159. *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality opinion) (emphasis added).

160. *See, e.g.*, 71 U.S. (4 Wall.) 2, 121–22 (1866) (“[N]o usage of war could sanction a military trial there for any offence [sic] 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.”).

161. *See id.* at 123.

162. *Id.* (emphasis omitted).

163. *See, e.g., id.* at 136–42 (Chase, C.J., concurring).

164. *See Ex parte Quirin*, 317 U.S. 1, 48 (1942).

165. *See supra* note 81.

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>166</sup>

*Quirin* thus held that the jury-trial provisions of Article III and the Fifth and Sixth Amendments simply did not apply to “‘offenses committed by enemy belligerents against the law of war,’ a carve out the existence of which, however normatively persuasive, Stone traced to precisely one isolated statutory authority.”<sup>167</sup> And yet, whether or not its reasoning on this point was persuasive,<sup>168</sup> *Quirin* thereby embraced a methodology that at least loosely resembled that which the Court had seized upon in the context of courts-martial: adjudication by non-Article III military courts is permitted when the Constitution’s jury-trial provisions do not apply.

Although the Court decided a handful of additional military commission cases in the years after *Quirin*,<sup>169</sup> none substantially revisited or otherwise revised this understanding of the constitutional justifications for military commissions. In *Madsen v. Kinsella*, for example, the Court considered the validity of a conviction of a U.S. citizen for the murder of her servicemember husband, obtained in a U.S. military court applying German law in occupied Germany.<sup>170</sup> Although Madsen was not being tried for war crimes, the Court sustained the exercise of military jurisdiction based upon its conclusion that “[t]he ‘law of war’ in [Article 15] includes at least that part of the law of nations which defines the powers and duties of beligerent [sic] powers occupying enemy territory pending the establishment of civil government.”<sup>171</sup> In other words,

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

167. Vladeck, *supra* note 137, at 317–18 (emphasis omitted) (footnote omitted) (quoting *Quirin*, 317 U.S. at 41).

168. *See, e.g., Quirin*, 317 U.S. at 44 (“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.”).

169. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341 (1952); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *cf. Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam).

170. 343 U.S. at 342–43.

171. *Id.* at 354–55.

*Madsen* shoehorned military commissions qua occupation courts into the same analytical framework as the commission upheld in *Quirin*.

And even after September 11, when the Court in *Hamdan v. Rumsfeld* (*Hamdan I*) invalidated military commissions established by President Bush to try noncitizen “enemy combatants” detained at Guantánamo Bay,<sup>172</sup> the gravamen of Justice Stevens’s analysis was that the commissions were inconsistent with the constitutional structure envisaged by *Quirin*.<sup>173</sup> Indeed, because the authority that *Quirin* read into Article 21 of the UCMJ (the successor to Article 15 of the Articles of War)<sup>174</sup> only encompassed offenders or offenses triable by military commissions under the international laws of war, the question never arose whether the jury-trial exception identified in *Quirin* swept any broader; a commission consistent with Article 21 would necessarily be one trying “offenses committed by enemy belligerents against the law of war.”

After *Hamdan I*, however, that dynamic changed. In the 2006 MCA, Congress specifically authorized the trial by military commission of at least some substantive offenses that the government concedes are not recognized under the international laws of war,<sup>175</sup> including conspiracy<sup>176</sup> and “providing material support [to] terrorism.”<sup>177</sup> The MCA thereby raised—for the first time—the permissible scope of military commissions’ departure from Article III *beyond* that which was sanctioned in *Quirin*.

At first, the military commission trial courts and CMCR nevertheless concluded that such offenses *were* international war crimes,<sup>178</sup> and so necessarily (if implicitly) satisfied the jury-trial exception recognized in *Quirin*.<sup>179</sup> On

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172. 548 U.S. 557, 635 (2006).

173. *See id.* at 592–95 & n.23.

174. *See* 10 U.S.C. § 821 (2012) (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”).

175. *See supra* notes 86–95 and accompanying text (discussing and citing the Military Commissions Acts of 2006 and 2009).

176. *See* 10 U.S.C. § 950t(29) (2012). *But see Hamdan I*, 548 U.S. at 595–613 (plurality opinion) (concluding that conspiracy is not recognized as a war crime under international law).

177. *See id.* § 950t(25).

178. *See* *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1190–242 (C.M.C.R. 2011), *aff’d in part on other grounds, rev’d in part*, 767 F.3d 1 (D.C. Cir. 2014) (en banc); *United States v. Hamdan (Hamdan II)*, 801 F. Supp. 2d 1247, 1264–313 (C.M.C.R. 2011) (per curiam), *rev’d*, 696 F.3d 1238 (D.C. Cir. 2012); *see also* *United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto) 6 (Mil. Comm’n July 14, 2008).

179. Although this understanding necessarily settled the applicability of the jury-trial exception recognized in *Quirin*, it raised the (as-yet unresolved) question of whether Congress’s Article I power “[t]o define and punish . . . Offences against the Law of Nations” (or its other Article I war powers) allows it to prospectively define offenses specifically *not* recognized as violations of international law. *See Al Bahlul*, 767 F.3d at 72–73 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (arguing that Congress may do so under its other Article I powers); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1808–10 (2009) (arguing that Congress may use the Define and Punish Clause to proscribe conduct not prohibited under international law). *See generally* Vladeck, *supra* note 137 (analyzing this question).

appeal to the D.C. Circuit, however, the government fundamentally shifted the focus of its argument, contending instead that the commissions may constitutionally exercise jurisdiction because Congress has defined offenses against the “U.S. common law of war,” as *distinct* from the international laws of war. And unlike international law, the government argued, such a “U.S. common law of war” has historically recognized conspiracy and material support as war crimes subject to trial by military commission.<sup>180</sup>

As a result, the question arises whether the jury-trial exception articulated in *Quirin* applies only to *international* war crimes. If so, the logic of both the courts-martial and military commission cases surveyed above suggests that the adjudication of such “U.S. common law of war” offenses by non-Article III military commissions (as opposed to by Article III civilian courts) would be unconstitutional—at least where the substantive offenses do not overlap with international law, the civilian courts are open, and the defendants are not U.S. servicemembers.<sup>181</sup>

Thus far, at least, the D.C. Circuit has skirted this question, focusing only on whether the MCA impermissibly authorized *retroactive* application of its “new” offenses.<sup>182</sup> Thus, in *Al Bahlul v. United States*, the en banc Court of Appeals *only* resolved a defendant’s *ex post facto* challenge to his convictions (based upon pre-MCA conduct) for conspiracy, material support, and solicitation.<sup>183</sup> Applying deferential “plain error” review, the Court of Appeals unanimously held that the convictions on the latter two charges violated the Ex Post Facto Clause, whereas a 6–1 majority held that the conspiracy conviction did not. In the process, the Court of Appeals expressly teed up the Article III issue for the original three-judge panel on remand,<sup>184</sup> which heard oral argument on October 22, 2014.

In a solo opinion concurring in the en banc court’s judgment though, Judge Kavanaugh argued that Article III does *not* forbid military commission trials of “U.S. common law of war offenses.” In his words:

There is no textual reason to think that the exception to the jury trial protections for military commissions is somehow confined to international law of war offenses. That exception, as the Supreme Court has explained,

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180. See Brief for the United States at 47–48, *Al Bahlul*, 767 F.3d 1 (No. 11-1324) (en banc); Brief for the United States at 23–29, *Hamdan II*, 696 F.3d 1238 (No. 11-1257).

181. It is also possible that, like CAAF in *Ali*, see *supra* notes 146–52 and accompanying text, courts might eventually conclude that the defendants, as noncitizens held outside the United States for offenses committed overseas, are categorically unprotected by the jury-trial provisions of the Fifth and Sixth Amendments, cf. *Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) (holding that the Guantánamo detainees do not have rights under the Fifth Amendment’s Due Process Clause), *vacated*, 559 U.S. 131 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1631 (2011). For a host of reasons, this approach seems unlikely.

182. See, e.g., *Hamdan II*, 696 F.3d at 1246–53 & n.10.

183. *Al Bahlul*, 767 F.3d at 5.

184. See *id.* at 31.

stems from the various war powers clauses in Article I and Article II. And those war powers clauses are not defined or constrained by international law. Moreover, Bahlul's novel theory contravenes precedent: It is inconsistent with the Lincoln conspirators and Nazi saboteurs conspiracy convictions, and it cannot be squared with *Quirin*.<sup>185</sup>

Although Judge Kavanaugh's analysis of precedent is debatable at best,<sup>186</sup> his methodological approach is consistent with that which the Supreme Court has deployed in outlining the contours of the military exception to Article III. For courts-martial, the exception is generally defined by a combination of Congress's plenary regulatory power under the Make Rules Clause of Article I and the text of the Grand Jury Indictment Clause (as incorporated into Article III and the Sixth Amendment), which exempts "cases arising in the land or naval forces." And for military commissions, the exception is generally defined by a combination of Congress's regulatory power under the Define and Punish Clause and the atextual jury-trial exception enunciated by the Supreme Court in *Ex parte Quirin* for "offenses committed by enemy belligerents against the law of war."

But the Court has never paused to actually *explain* (1) why the language of the Grand Jury Indictment Clause, standing alone, also exempts courts-martial from Article III judges or Article III and the Sixth Amendment's petit jury protections; (2) why violations of the laws of war are similarly exempted from Article III and the jury provisions despite the absence of *any* constitutional language to that effect; or (3) why there is no stronger connection between these two disparate sets of cases. Simply put, it is relatively easy to *describe* the current doctrinal state of the military exception; it is exceedingly difficult to explain *why* it is so. And even if the Supreme Court's constitutional defenses of courts-martial and military commissions bear at least some structural resemblance to each other, what should be clear from the above analysis is that the Court has in fact embraced very *different* constitutional explanations for these two most common forms of military courts—and, in the process, has implicitly suggested that the military exception is not tidy, after all.

## II. RECENT EXPANSIONS TO MILITARY JURISDICTION

As Part I demonstrated, the Supreme Court by the end of the 1950s had appeared to coalesce around two guiding principles for the scope of the military exception: courts-martial could only try servicemembers for "cases arising in the land or naval forces," and commissions could only exercise jurisdiction over law-of-war offenses triable by military courts under international law. After

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185. *Id.* at 74 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (citation omitted).

186. *See* Brief of the National Institute of Military Justice as Amicus Curiae in Support of the Petitioner at 27–30, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Aug. 18, 2014).

introducing three recent departures from these principles, this Part demonstrates that these developments cannot be reconciled with, and have therefore destabilized, whatever justifications might have supported the military exception to Article III circa 1960.

A. *SOLORIO* AND THE SERVICE-CONNECTION TEST

By far, the most significant U.S. military justice development of the past half-century came in 1987, when the Supreme Court in *Solorio v. United States* held that servicemembers may be court-martialed for *any* offense, whether or not the crime had any relationship to their military service.<sup>187</sup>

In so holding, the Court overruled *O'Callahan v. Parker*, the 1969 decision in which Justice Douglas had relied on the text of the Grand Jury Indictment Clause to articulate what was subsequently described as the “service-connection test.”<sup>188</sup> As Douglas had explained, the service-connection requirement filled the gap between the Make Rules Clause, which empowers Congress to “make Rules for the Government and Regulation of the land and naval Forces,” and the Fifth Amendment, which excepts from the Grand Jury Indictment Clause only those cases *arising in* the land or naval forces.<sup>189</sup> Thus, Douglas concluded, cases that do not “arise in” the land or naval forces cannot be tried by military courts whether or not they fall within the regulatory ambit of the Make Rules Clause.<sup>190</sup>

In reaching the contrary conclusion for the *Solorio* Court, Chief Justice Rehnquist focused his analysis on flaws in Justice Douglas’s historical analysis and on the plain language of the Make Rules Clause.<sup>191</sup> In the process, *Solorio* all but ignored *O'Callahan*’s textual argument—grounded in the narrower scope of the Grand Jury Indictment Clause’s exception vis-à-vis the broader Make Rules Clause. Thus, Chief Justice Rehnquist asserted, “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>192</sup> The problem with Rehnquist’s analysis is that he used cases concerning the scope of the Make Rules Clause to reach an implicit conclusion about the scope of the Grand Jury Indictment Clause—when there was plenty of countervailing evidence for the proposition that the scope of the two provisions was not identical. As Justice Marshall observed:

[T]he exception contained in the Fifth Amendment is expressed—and applies by its terms—only to *cases arising in* the Armed Forces. *O'Callahan* ad-

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187. 483 U.S. 435, 449–51 (1987).

188. 395 U.S. 258, 272–74 (1969).

189. *Id.* at 272–73.

190. *Id.*

191. *See Solorio*, 483 U.S. at 438–48.

192. *Id.* at 439.

dressed 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>193</sup>

*Solorio* thereby used the language of the Make Rules Clause to countenance a broadening of the Article III exception as compared to that which could have been tied directly to the text of the Grand Jury Indictment Clause—and with dramatic consequences, holding that “determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen [is] a matter reserved for Congress.”<sup>194</sup> And because of the scope of the UCMJ, especially Article 134, servicemembers therefore became subject to trial by court-martial by dint of *Solorio* for virtually *any* offense, anytime, anywhere.

At the same time, although *Solorio* thereby put serious pressure on the scope of the military exception, that pressure may have come with a silver lining. After all, “the logic of *Solorio*,” by shifting focus from the Grand Jury Indictment Clause to the Make Rules Clause, “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.”<sup>195</sup> In other words, *Solorio* may have undermined the existing textual basis for the military exception to Article III, but it at least replaced it with an alternative bright line—those cases falling within the scope of the Make Rules Clause.

#### B. ALI AND CHIEF JUDGE BAKER’S BLURRING OF *SOLORIO*’S BRIGHT LINE

This understanding of *Solorio* helps to explain the significance of CAAF’s 2012 decision in *United States v. Ali*, upholding the constitutionality of the court-martial of a noncitizen civilian contractor in Iraq.<sup>196</sup> As noted above, in the first case to test the constitutionality of a 2006 amendment to the UCMJ, the majority concluded that Ali, as a noncitizen lacking substantial voluntary connections to the United States, lacked the constitutional entitlement to jury-trial protections that would otherwise constrain military jurisdiction.<sup>197</sup> Leaving aside the flaws in the majority’s analysis of Ali’s constitutional rights,<sup>198</sup> the CAAF majority also completely ignored the Article I question, that is, why Ali’s

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193. *Id.* at 454 (Marshall, J., dissenting); see also *id.* at 461 (“Instead of acknowledging the Fifth Amendment limits on the crimes triable in a court-martial, the Court simply ignores them.”).

194. *Id.* at 440 (majority opinion).

195. Vladeck, *supra* note 137, at 311–12.

196. *United States v. Ali*, 71 M.J. 256, 268–69 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

197. See *supra* text accompanying notes 145–52.

198. See *supra* notes 151–52 and accompanying text.

case fit within the Make Rules Clause and thereby satisfied *Solorio*.<sup>199</sup>

In his opinion concurring in the judgment, Chief Judge Baker paid far more attention to the Article I question—and the source of Congress’s power that allowed it to provide for the court-martial of a civilian contractor. As he explained, “In the current legal context, I do not find sufficient positive authority to reach this result on the authority implied from [the Make Rules Clause] alone.”<sup>200</sup> Instead, he traced Congress’s power to its “enumerated and implied war powers,”<sup>201</sup> and then proceeded to articulate a series of five principles that would illuminate the permissible scope of such legislative authority—explaining why they supported Congress’s power to subject Ali to a military trial.<sup>202</sup> And because Ali’s offense occurred while he was accompanying the troops in the field, it also fell within the Fifth Amendment’s exception for “cases arising in the land or naval forces,” even if he was not himself a member thereof.<sup>203</sup>

The merits of Chief Judge Baker’s analysis aside,<sup>204</sup> the larger point to take away from his opinion is the extent to which it rested the constitutionality of Ali’s court-martial conviction *not* on the defendant’s citizenship-based lack of jury-trial rights, but on the extent to which his *was* a “case[] arising in the land or naval forces,” even though Congress, in Baker’s view, did not have the power to proscribe his conduct pursuant to the Make Rules Clause. In other words, whereas *Solorio* justified a departure from the textual constraints of the Grand Jury Indictment Clause by focusing on the Make Rules Clause, *Ali* justified a departure from *Solorio*’s reading of the Make Rules Clause by focusing on the plain text of the Grand Jury Indictment Clause—completing the vitiation of the hitherto-essential relationship between those provisions.

If, as seems likely, Chief Judge Baker’s analysis comes to be seen as the more defensible explanation for the result in *Ali*,<sup>205</sup> then it could yield dramatic (if

199. See *Ali*, 71 M.J. at 271 (Baker, C.J., concurring in part and in the result) (“Congress must have an enumerated and positive authority to act, even if its actions would not otherwise run afoul of the Bill of Rights.”).

200. *Id.* at 273.

201. *Id.*

202. See *id.* at 274–76.

203. See *id.* at 276–77.

204. At its core, the central analytical objection to Chief Judge Baker’s approach is his effectively undefended assumption that the “war powers” *beyond* the Make Rules Clause provided Congress with the authority to regulate the conduct of a private military contractor serving as a translator in Iraq in 2008. For starters, one would at least have expected some analysis of the assumption that the United States was still “at war” in Iraq by that late date. Cf. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 179 (4th Cir. 2013) (assessing when the war in Iraq “ended” for purposes of the Wartime Suspension of Limitations Act), *cert. granted*, 134 S. Ct. 2899 (2014). And in any event, the statute authorizing Ali’s court-martial does not turn in any way on whether the underlying conduct occurred during “war,” however defined. See *supra* note 48; see also Vladeck, *supra* note 17, at 293–94. Even on Chief Judge Baker’s view, then, Article 2(a)(10) of the UCMJ would raise serious constitutional concerns in at least some of the cases to which it applies.

205. In its brief in opposition to certiorari in *Ali*, the United States gravitated toward Chief Judge Baker’s constitutional analysis—all but abandoning the analysis of the majority. See Brief for the

subtle) consequences for the scope of the military exception to Article III. After all, by his logic, cases could properly be tried in military courts whenever they “arise in the land or naval forces,” regardless of the status of the offender, the substantive nature of his conduct, or the specific enumerated power of Congress pursuant to which that conduct has been proscribed. So long as Congress is acting pursuant to its “war powers,” Chief Judge Baker’s analysis would conceivably allow it to subject to trial by court-martial any offense committed by any individual accompanying U.S. armed forces for any purpose anywhere in the world. And while reasonable minds may dispute the wisdom of such expansive military jurisdiction, what cannot be gainsaid is the fairly dramatic expansion of the military exception to Article III that such a result would portend.

### C. THE MCA AND THE “U.S. COMMON LAW OF WAR”

One can also find in recent developments a similarly subtle—but crucial—shift in the perceived scope of the military exception as applied to military commissions. Recall from above that the Supreme Court in *Quirin* upheld the use of commissions based on the conclusions that (1) Congress had authorized military trials for violations of the laws of war pursuant to Article I’s Define and Punish Clause; and (2) the jury-trial provisions were never meant to apply to “offenses committed by enemy belligerents against the laws of war.” And although this understanding was at the heart of the commissions created by the Bush Administration in November 2001 to try noncitizen terrorism suspects believed to be affiliated with al Qaeda,<sup>206</sup> the Supreme Court in *Hamdan I* identified three flaws with those tribunals: (1) insofar as they exercised jurisdiction over nonwar crimes like conspiracy, they exceeded the authority Congress had provided in Article 21; (2) they failed to comply with the procedural “regularity” requirement of the UCMJ; and (3) they were inconsistent with Common Article 3 of the Geneva Conventions.<sup>207</sup>

As previously noted, Congress responded in the MCA by enumerating specific substantive offenses triable by military commissions,<sup>208</sup> including conspiracy<sup>209</sup> and “providing material support [to] terrorism,”<sup>210</sup> which the government concedes are not violations of the international laws of war. Because of that concession, the power of military commissions to try these offenses necessarily turns on whether the military exception to Article III could

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United States in Opposition at 13–17 & n.1, *Ali v. United States*, 133 S. Ct. 2338 (2013) (mem.) (No. 12-805).

206. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001); see also Legality of the Use of Military Commissions to Try Terrorists, 25 Op. O.L.C. 238 (2001).

207. *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557, 567 (2006) (plurality opinion).

208. See *supra* text accompanying note 93.

209. 10 U.S.C. § 950t(29) (2012).

210. *Id.* § 950t(25).

be broadened to encompass military commission trials of at least some domestic offenses (the government's position is that the exception should extend to offenses against the "U.S. common law of war," that is, offenses for which there is U.S. historical precedent for military commission trials).<sup>211</sup> Although that issue is soon to be resolved by the original three-judge panel in *Al Bahlul*, Judge Kavanaugh has already suggested—however unconvincingly—that such offenses do *not* fall outside *Quirin*'s framework because the jury-trial exception identified in *Quirin*—for offenses committed by enemy belligerents against the laws of war—*also* encompasses offenses against the *domestic* law of war.<sup>212</sup>

Although Judge Kavanaugh's reading of *Quirin* is deeply problematic, the more significant point for present purposes is that it is certainly not how *Quirin* was understood prior to the enactment of the MCA. Thus, even if it is correct, Judge Kavanaugh's reasoning would still portend a dramatic expansion in the scope of the military exception, for it would suggest that military commission jurisdiction has been untethered from the only constraint to which it has historically been subjected—that is, that the offense be a violation of international law.

#### D. ARTICLE III AND THE CIVILIANIZATION OF MILITARY JURISDICTION

Between them, *Solorio*, Chief Judge Baker's concurrence in *Ali*, and Judge Kavanaugh's solo en banc concurrence in *Al Bahlul* thereby produce (or at least envision) three specific expansions in the military exception as compared to the pre-*Solorio* status quo: (1) the expansion of court-martial jurisdiction to encompass non-service-connected offenses by servicemembers; (2) the expansion of court-martial jurisdiction to encompass offenses by at least some civilian contractors serving with or accompanying the armed forces in the field; and (3) the

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211. Another possibility is that Congress is entitled to broad deference under the Define and Punish Clause in codifying what *it believes* to be international war crimes, and so *Quirin* is satisfied so long as Congress provides that a specific offense *is*, in its view, a violation of the laws of war, whether there is any support for that conclusion in international law. *See, e.g.*, Paulsen, *supra* note 179, at 1808 ("Congress must define the 'Offences'; the regime of international law may not dictate to Congress what those offenses may or must be." (emphasis omitted)); *see also id.* at 1809 ("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." (emphasis omitted)). *See generally* *Al Bahlul v. United States*, 767 F.3d 1, 53–62 (D.C. Cir. 2014) (en banc) (Brown, J., concurring in the judgment in part and dissenting in part).

It should certainly follow that, *where* Congress is legislating validly pursuant to the Define and Punish Clause, offenses committed by enemy belligerents against the laws of war as Congress has defined them are triable by a military commission under *Quirin*. Unlike Judge Brown and Professor Paulsen, though, I believe Congress is entitled to very little interpretive deference under the Define and Punish Clause when it is using that power to subject individuals to military, rather than civilian, trial. *See* Vladeck, *supra* note 137. After all, it cannot be the case that Congress could respond to decisions such as *United States v. Lopez*, 514 U.S. 549 (1995), simply by asserting that possession of a gun near a school zone is a war crime—and thus triable not just in a federal civilian court, but in a military commission, as well.

212. *Al Bahlul*, 767 F.3d at 73–74 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

expansion of military commission jurisdiction to encompass offenses against the U.S.—but not international—common law of war, an amorphous category that could be far broader than its international analogue. And although these developments might each be questioned in their own right, the far more significant point is the extent to which they cannot be reconciled with either the legal or philosophical justifications for the military exception.

Taking the constitutional justifications first, whether or not one accepts Chief Justice Rehnquist's interpretation of the Make Rules Clause in *Solorio* as encompassing non-service-connected offenses,<sup>213</sup> the more significant issue arises from his implicit sidestepping of the text of the Fifth Amendment's Grand Jury Indictment Clause,<sup>214</sup> which only exempts cases "arising in the land or naval forces."<sup>215</sup> It is possible, of course, that the *Solorio* Court was of the view that any case involving a member of the land or naval forces necessarily "arises" therein, but that is not only a strained parsing of the constitutional text, it is also wholly inconsistent with prior precedent. As Justice Harlan explained in 1960, "The Fifth Amendment excepts from its protection 'cases arising,' not persons, 'in the land or naval forces.'"<sup>216</sup> And insofar as *Solorio* held that a servicemember could be tried by a court-martial even for a case that did *not* arise in the land or naval forces, that too would have been foreclosed by case law.<sup>217</sup>

Whereas *Solorio* thereby ignored the constraints the Court had previously read into the Grand Jury Indictment Clause, *Ali* ignored the constraints that had been read into the Make Rules Clause. The majority upheld the court-martial of a civilian contractor based upon the (debatable) proposition that he categorically fell outside the scope of the Fifth and Sixth Amendments,<sup>218</sup> and Chief Judge Baker's far-more-persuasive concurrence nevertheless assumed—contra prior precedent—that Congress could subject offenses to trial by court-martial pursuant to "war" powers *other than* the Make Rules Clause, at least in some circumstances.<sup>219</sup>

And although it arose in a different context, Judge Kavanaugh's solo concurrence in *Al Bahlul* reflected versions of *both* of those analytical shortcomings. It not only asserted that Congress could use authorities other than the Define and Punish Clause to codify "domestic" war crimes triable by military commission, it also asserted (without much in the way of analysis) that the jury-trial

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213. This question, in turn, largely reduces to the historical debate between Chief Justice Rehnquist in *Solorio* and Justice Douglas in *O'Callahan* about the scope of Parliament's power to regulate nonmilitary offenses at the time of the Founding. See generally FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA (1967).

214. See *supra* text accompanying note 193.

215. U.S. CONST. amend. V (emphasis added).

216. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 253 n.9 (1960) (opinion of Harlan, J.).

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

218. See *supra* note 150.

219. See *supra* text accompanying notes 200–05.

exception identified in *Quirin* actually encompasses such noninternational law offenses as well.<sup>220</sup>

Taken together, all three of these jurisprudential developments represent a fundamental departure from the principles that had previously constrained the military exception—that there are specific links between Congress’s enumerated powers and jury-trial exceptions justifying each assertion of non-Article III adjudicatory authority. In the process, these developments also open the door to an expanding civilianization of military jurisdiction, where a far broader scope of offenses and offenders become subject to military, rather than civilian, trials.<sup>221</sup> And as the above analysis underscores, such developments come at the cost of doctrinal stability—opening the door to the revisiting of questions concerning expansions in military jurisdiction that had long been viewed as settled.

#### E. RECONCILING THE MILITARY EXCEPTION WITH CIVILIANIZATION

It is also difficult to defend on philosophical grounds such expansions of the military exception to encompass traditionally nonmilitary offenses or offenders. The Article III courts are both available and able today to entertain prosecutions for virtually all of the nonmilitary offenses or offenders implicated in these three expansions of the military exception—a point that cuts decisively against any defenses of such expansions grounded in legal or political imperative. And such an expansion of the jurisdiction of civilian courts over offenses that previously have been the exclusive purview of military tribunals has come concomitantly with the civilianization of military law described above—wherein military courts have increasingly harmonized their own procedural, evidentiary, and substantive rules with those of their civilian counterparts. As this section explains, although some might view this development as ameliorating concerns about military trials, it militates at least as much in the opposite direction insofar as it undercuts the normative justifications for military, rather than civilian, justice.

As a matter of logic and practice, civilian offenses or offenders necessarily raise far fewer concerns about the need for separation between the military and civilian justice systems. Typically, such offenders and offenses *are* within the purview of civilian courts,<sup>222</sup> at least absent compelling evidence that civilian—as opposed to military—prosecutions have negatively impacted the military’s

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220. See *supra* text accompanying note 185.

221. See generally Vladeck, *supra* note 17 (summarizing the “civilianization” trend).

222. *Ali* is an unusual exception in this regard because *Ali*’s unique status as a “host-country national” exempted him from prosecution in a U.S. civilian court under MEJA. See 18 U.S.C. § 3267(1)(C) (2012); *United States v. Ali*, 71 M.J. 256, 279–82 (C.A.A.F. 2012) (Effron, J., concurring in part and in the result) (arguing that the constitutionality of *Ali*’s court-martial turned on his not being subject to prosecution under MEJA), *cert. denied*, 133 S. Ct. 2338 (2013).

ability to preserve “good order and discipline” within the ranks.<sup>223</sup>

Relatedly, although arguments could have been made in the past that the inability of civilian courts formally to handle these cases was *itself* a justification for military jurisdiction,<sup>224</sup> such claims have been overtaken by subsequent events. With regard to courts-martial, for example, the Military Extraterritorial Jurisdiction Act of 2000<sup>225</sup> has closed most of the “jurisdictional gap” that the Second Circuit famously decried with respect to nonmilitary offenses committed by civilians or former servicemembers outside the territorial United States.<sup>226</sup> And MEJA’s implementing regulations have gone a long way toward ameliorating the logistical and procedural difficulties that might otherwise arise in such cases.<sup>227</sup>

And with regard to prosecutions for war crimes, two analogous developments support a similar conclusion: Congress’s enactment of the War Crimes Act of 1996,<sup>228</sup> which paved the way for prosecution in *civilian* courts of international war crimes committed by both our own servicemembers and enemy belligerents,<sup>229</sup> and the post-September 11 expansion of most of our major civilian terrorism offenses to encompass *extraterritorial* conduct, including “material support”—the offense at the heart of most of the MCA prosecutions, including *Hamdan II*.<sup>230</sup>

In short, military courts today look far less “separate” from civilian courts than they used to, separation that is only further mitigated by the ability of the civilian courts to entertain historically “military” cases. As a result, given their potentially destabilizing effects on existing Article III doctrine and the absence of convincing justifications for the benefits that would justify such costs, the three expansions in the scope of the military exception to Article III outlined above cannot be defended solely by reference to the preexisting military courts jurisprudence.

### III. MILITARY JUSTICE AND THE NON-ARTICLE III CANON

Another possibility, of course, is that the expansions in military jurisdiction documented above might be justified by reference to *other* permissible ex-

223. Cf. DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 190–99 (2010).

224. Such an argument failed to convince the Supreme Court in cases such as *Toth*, *Covert*, and the 1960 trilogy, in all of which the unavailability of military jurisdiction meant there was *no* forum in which those defendants could be tried.

225. Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–67 (2012)).

226. See *United States v. Gatlin*, 216 F.3d 207, 223 (2d Cir. 2000) (holding that the federal courts lacked jurisdiction to try civilians for criminal conduct undertaken on overseas U.S. military installations absent criminal statute that specifically applied outside territorial United States).

227. See 32 C.F.R. §§ 153.1–153.5 (2013).

228. Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2012)).

229. The War Crimes Act creates criminal liability for war crimes if “the person committing such war crime *or* the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States.” 18 U.S.C. § 2441(b) (2012) (emphasis added).

230. See *supra* note 112 and accompanying text.

amples of non-Article III federal adjudication. But as this Part demonstrates, the doctrinal and academic justifications that have emerged over time for these other exceptions to Article III would prove either far too little or far too much as applied to military adjudication. As significantly, the Supreme Court's more recent forays into these other areas of non-Article III federal adjudication have only reiterated the significance of construing these exceptions narrowly. Thus, sections A through C explain why the Supreme Court's other non-Article III jurisprudence is of little help in explaining either the military exception or these recent expansions, and sections D and E reach similar conclusions about how academic efforts to reconcile these cases cannot reasonably be mapped onto the military exception.

#### A. TERRITORIAL COURTS AND CONGRESS'S POLICE POWERS

Superficially, at least, the closest analogy to the constitutional justifications the Supreme Court has articulated for military courts is the Court's jurisprudence respecting non-Article III "territorial" courts—federal courts operating in federal territory where there is no state government. To understand why this analogy fails to hold on a deeper level, though, it is necessary to rehash the evolution of that body of cases.

The fountainhead Supreme Court precedent upholding Congress's power to invest non-Article III federal territorial courts with the "judicial power of the United States" is Chief Justice Marshall's enigmatic 1828 opinion in *American Insurance Co. v. 356 Bales of Cotton* (known to history as *Canter*).<sup>231</sup> *Canter*, which dealt formalism "a blow from which it has never recovered,"<sup>232</sup> addressed whether an admiralty dispute could be heard by a salvage court in Key West established by Florida's territorial legislature—or whether it had to be brought before the federal territorial court that Congress had established in Florida.<sup>233</sup> Although no party contested the constitutional authority of the federal territorial court to entertain such a dispute, Chief Justice Marshall nevertheless went out of his way to uphold its validity (and, arguably, the validity of the entire Louisiana Purchase).

Thus, because of Congress's police power over the territories, and because, at least according to Marshall, Congress could not create Article III courts *in* the territories, Congress was free to create tribunals in the territories wholly unencumbered with Article III's jurisdictional constraints and staffed by judges wholly unprotected by Article III's tenure and salary guarantees.<sup>234</sup> At the same time, however, Marshall concluded that, because such courts were not Article III

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231. 26 U.S. (1 Pet.) 511, 546 (1828). David Canter was arguably the real party in interest. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 887–93 (1990) (summarizing the background).

232. Lawson, *supra* note 231, at 887.

233. See 26 U.S. (1 Pet.) at 541. See generally DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 119–22 (1985).

234. As Chief Justice Marshall explained:

tribunals, they did not exercise the same exclusive jurisdiction over admiralty suits that Congress had vested in Article III courts. Thus, the actual holding of *Canter* was that the Key West salvage court had the power to resolve the relevant dispute entirely because Florida did not have an Article III court with exclusive jurisdiction over such disputes.

Whether or not Professor Gary Lawson is correct that Marshall's discussion of Congress's power to create territorial courts was unnecessary to the result,<sup>235</sup> it is hard to disagree with him (and virtually every other sustained discussion of the decision) that it fails to persuade.<sup>236</sup> After all, and contra Chief Justice Marshall, Congress does have (and has exercised) the power to create Article III courts in the territories;<sup>237</sup> the concerns over judicial independence motivating Article III's tenure and salary protections have at least some salience in the territories as well;<sup>238</sup> and even laws Congress enacts *for* the territories are still *federal* law for purposes of Article III's grant of "arising under" jurisdiction.<sup>239</sup> To similar effect, it cannot be the case that the Constitution draws a bright line between those suits that may be heard by Article III courts and those suits that may be heard by non-Article III courts; the Madisonian Compromise necessarily assumes the possibility of at least *some* concurrent jurisdiction between such

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The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

*Canter*, 26 U.S. (1 Pet.) at 546.

235. One modest defense of Marshall's methodology—if not his reasoning—is that it would have been an odd result to hold that the *local* courts in Florida lacked jurisdiction to entertain the salvage dispute if the federal territorial court lacked such power as well. Similarly, if the Florida territorial court had to be an Article III court, it would presumably have followed that the exclusive admiralty jurisdiction of Article III courts would have divested the jurisdiction of the Key West salvage court. Thus, Marshall may have viewed it as rhetorically—if not analytically—necessary to explain why there could be a federal non-Article III court in Florida.

236. See Lawson, *supra* note 231, at 892; see also CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 49 (6th ed. 2002) (referring to *Canter* as a "doctrine of doubtful soundness").

237. The U.S. District Courts for the District of Columbia and the District of Puerto Rico are both Article III courts in federal territories.

238. See CURRIE, *supra* note 233, at 122 ("[F]rom his irreproachable statement that in legislating for a territory Congress has both general and local powers it does not follow that the Framers were unconcerned about the independence of territorial judges." (footnote omitted)).

239. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

tribunals.<sup>240</sup>

Even the most ringing defense of *Canter*—the second Justice Harlan’s plurality opinion in *Glidden Co. v. Zdanok*<sup>241</sup>—asserts that Chief Justice Marshall could not have “meant” to imply that territorial courts may not receive Article III jurisdiction.<sup>242</sup> Notwithstanding its analytical shortcomings, though, as both the spirit and letter of Justice Harlan’s controlling opinion in *Zdanok* suggests, *Canter* has become the unassailable bedrock of the Supreme Court’s jurisprudence concerning territorial courts notwithstanding its analytical shortcomings. By 1872, the Justices would explain that the general validity of non-Article III territorial courts “was decided long [ago] in [*Canter*].”<sup>243</sup>

More recently, when the Supreme Court in *Palmore v. United States* upheld the power of the D.C. local courts to entertain federal prosecutions after the 1970 bifurcation of the D.C. judicial system,<sup>244</sup> *Canter* was at the heart of the Court’s explanation for why such prosecutions need not be brought before Article III judges. As Justice White summarized, territorial courts “have not been deemed subject to the strictures of Art. III, even though they characteristically enforced not only the civil and criminal laws of Congress applicable throughout the United States, but also the laws applicable only within the boundaries of the particular territory.”<sup>245</sup> The critical steps the Court took in *Palmore* were in applying *Canter* (1) to a territory not then (if ever) likely to be on the precipice of statehood; and (2) more importantly, to the power of non-Article III territorial courts to entertain *criminal* prosecutions, and not just civil litigation as in *Canter* itself. This latter step may have seemed innocuous to the *Palmore* Court at least in part because there was no question that criminal defendants in the D.C. Superior Court (unlike defendants in at least *some* of the “insular” territories<sup>246</sup>) *would* be afforded the full array of Fifth and Sixth Amendment jury-trial protections.

Thus, as Justice Brennan put it a decade after *Palmore*, the Court’s jurisprudence upholding non-Article III courts “dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to

240. Although the Supreme Court appeared at one time to embrace such a rigid dichotomy, see *Williams v. United States*, 289 U.S. 553 (1933), it has since come to its senses, see, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63 n.14 (1982) (plurality opinion). See generally James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705–73 (1998).

241. 370 U.S. 530 (1962).

242. See *id.* at 544–45 (plurality opinion); see also *id.* at 545 n.13 (“Far from being ‘incapable of receiving’ federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so.”).

243. *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 447 (1872).

244. 411 U.S. 389, 410 (1973).

245. *Id.* at 403.

246. See *infra* notes 294–96 and accompanying text.

exercise the general powers of government.”<sup>247</sup> The principal analytical defense of Congress’s power to create non-Article III federal territorial courts was thus—and remains—the fact that Congress acts as a general government over the territories.<sup>248</sup>

Whatever its merits as a matter of first impression, the Justices have acquiesced in deferring to the weight of history and to the view that Congress’s “police” power is the sum total of the constitutional defense of non-Article III federal territorial courts.<sup>249</sup> Congress is allowed to create non-Article III federal courts in the territories entirely because the territories are subject to plenary and exclusive federal regulatory power under Article I (for the District of Columbia),<sup>250</sup> or Article IV (for the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands).<sup>251</sup> And whatever the merits of the police-power-only explanation as applied to civilian territorial courts, it should be clear, in light of the cases surveyed in Part I, that Congress’s police power over the military is neither a necessary condition (see military commissions and the

247. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion).

248. As for why this fact militates in favor of non-Article III federal courts instead of Article III tribunals, perhaps the best argument was the one offered by the younger Justice Harlan:

[C]ourts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.

*Zdanok*, 370 U.S. at 545–46 (plurality opinion) (footnote omitted); *see also id.* at 546 (“[T]he realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by [Article III]. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto.”).

To be sure, the Supreme Court has never explained why such pragmatic concerns could not be resolved as they have been in Puerto Rico—with a local court controlled by the territorial legislature acting pursuant to a delegation of power from Congress, and a federal Article III court created and controlled directly by Congress. If the Puerto Rico example is any guide, it simply cannot follow that non-Article III federal territorial courts are necessary to allow for quasi-local tribunals exercising general jurisdiction in the territories. Harlan’s defense is also anachronistic; if it was not already clear in 1828, it certainly was apparent by the time Harlan wrote in 1962 that not all territories were destined for statehood—and thereby raised the “no place to put them” concern. *See id.* at 548 n.19.

249. *See, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (noting that “Article III judges are not required in the context of territorial courts” because of the “firmly established historical practice to the contrary”).

250. *See U.S. CONST.* art. I, § 8, cl. 17 (empowering Congress “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States”).

251. *See id.* art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

Define and Punish Clause) nor a sufficient one (see courts-martial and civilian contractors) for adequately explaining the current law justifying non-Article III *military* adjudication. Indeed, if it were, then Congress's police power over federal territories should also support non-Article III *military* adjudication of any and all nonmilitary offenses there as well.<sup>252</sup>

#### B. PUBLIC RIGHTS ADJUDICATION AND "BALANCING"

Although the Supreme Court has never acknowledged as much, the above discussion illuminates how there has been at least *some* overlap between the justifications the Court has seized upon in upholding adjudication by non-Article III territorial courts and by non-Article III military courts. But in the context of why non-Article III courts may resolve public rights disputes, the Court has historically looked to wholly different—and increasingly contested—rationales. And although these rationales (and these classes of cases) are widely divergent from those at issue in the military context, a proper unpacking of the evolution of these rationales is necessary to understand why, contra an otherwise compelling 1990 student note,<sup>253</sup> the Court's public rights jurisprudence is *not* a better lens through which to understand the relationship between military courts and Article III.

The forerunner of the Court's public rights jurisprudence is its 1856 decision in *Murray's Lessee v. Hoboken Land & Improvement Co.*, which upheld the power of an Executive Branch official to audit the accounts of a federal employee and, where a deficit was found, summarily attach the funds.<sup>254</sup> As Justice Curtis explained, there is a category of public rights disputes "which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."<sup>255</sup>

Although *Murray's Lessee* first suggested the idea that public rights disputes might be resolved by non-Article III adjudicators, it was only in later cases that the Court sought to explain in detail *why* permitting such non-Article III adjudication would not raise constitutional concerns. Thus, in *Ex parte Bakelite*

252. In light of the contemporary significance to the military exception of *Solorio* (a decision driven by a police power rationale much like that in *Palmore*), this point bears some elaboration. Even if *Palmore* was correct that non-Article III adjudication can be justified solely by the exclusiveness of Congress's regulatory power over a particular class of cases, then all that would explain with regard to the Make Rules Clause is why offenses defined thereunder need not be tried in Article III courts. *Palmore* does nothing to explain why Congress's police power over the military also allows it to have cases tried before military—rather than civilian—non-Article III federal judges, or why those trials need not come with the jury-trial protections of the Fifth and Sixth Amendment (which *do* apply to the D.C. Superior Court).

253. See Note, *supra* note 7.

254. 59 U.S. (18 How.) 272, 284–86 (1856).

255. *Id.* at 284. See generally Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 791–94 (1986).

*Corp.*, Justice Van Devanter tied the constitutionality of non-Article III adjudication of such disputes to the federal government's sovereign immunity:

[C]laims against the United States . . . may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, ana [sic] yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.<sup>256</sup>

In other words, because Congress could simply deny litigants *any* forum for the resolution of claims against the United States by declining to waive the government's sovereign immunity, it should follow that Congress may dictate the forum in (and conditions under) which such disputes—when allowed—should be resolved.<sup>257</sup> This precise logic appeared at the heart of *Crowell v. Benson*—the Court's landmark decision three years after *Bakelite*—which involved a dispute over whether a federal agency could resolve workers compensation claims brought by a longshoreman.<sup>258</sup> In upholding the authority of federal administrative adjudicators to engage in preclusive fact-finding, *Crowell* emphasized both the limited nature of the role the agency was performing and the substantial efficiency such administrative decisionmaking would provide.<sup>259</sup> In the process, *Crowell* provided the constitutional foundation for modern federal administrative adjudication.

Related but distinct from sovereign immunity, the Justices have also traced the authority of non-Article III federal adjudication of public rights disputes to more amorphous separation-of-powers considerations, that is, “a historical understanding that certain prerogatives were reserved to the political Branches of Government.”<sup>260</sup> But whether it comes from sovereign immunity specifically or the separation of powers generally, “[t]he understanding of these cases,” as Justice Brennan would later recount, “is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determina-

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256. 279 U.S. 438, 452 (1929).

257. Of course, the idea that the greater power includes the lesser ignores the extent to which the Constitution might nevertheless constrain *how* Congress chooses to waive the federal government's sovereign immunity, for example, if it imposed unconstitutional conditions on the waiver. See Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 212 (offering reasons why “[i]n the present context the ‘greater-includes-the-lesser’ argument simply does not work”).

258. *Crowell v. Benson*, 285 U.S. 22, 36–37 (1932).

259. *Id.* at 65.

260. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (plurality opinion).

tion to a legislative court or an administrative agency.”<sup>261</sup>

Indeed, the controversy surrounding non-Article III federal adjudication of public rights disputes has not focused on *why* such adjudication is permissible in the abstract, but rather its permissible *extent*. This in turn has provoked two distinct sets of questions: First, what, exactly, *is* a public rights dispute? Second, how much authority may non-Article III federal adjudicators exercise over *other* legal questions that arise in a manner that is ancillary to such disputes?

For a long time, the Justices understood the answer to the first question on narrow terms—as only encompassing matters arising “between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>262</sup> That is to say, public rights did not include *all* claims by citizens against the government, but rather only those claims against the government other than one “which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”<sup>263</sup>

That understanding began to shift in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, even as the Court invalidated the authority given to bankruptcy courts under the Bankruptcy Reform Act of 1978.<sup>264</sup> Although Justice Brennan’s plurality opinion suggested that *no* issues in bankruptcy cases implicate public rights,<sup>265</sup> Justice Rehnquist, concurring in the judgment (and joined by Justice O’Connor), was more circumspect.<sup>266</sup> In his view, it was clear that state law claims that were only “related to” bankruptcy cases were *not* public rights,<sup>267</sup> but it was not clear that the same could be said of claims based on federal bankruptcy law—even though the federal government was not (necessarily) a party to such proceedings, and so such claims in no way turned upon a waiver of sovereign immunity.<sup>268</sup> Congress’s response to *Northern Pipeline* reflected this precise dichotomy, with bankruptcy judges empowered to issue final decisions with respect to “core” bankruptcy matters (some of which were not public rights under the traditional understanding), but only to act as adjuncts for “non-core” matters.<sup>269</sup>

261. *Id.* at 68.

262. *Crowell*, 285 U.S. at 50.

263. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

264. 458 U.S. at 87 (plurality opinion).

265. *See id.* at 71.

266. *See id.* at 90–91 (Rehnquist, J., concurring in the judgment).

267. *See id.* at 90 (“[T]he lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.”).

268. *See id.* at 91.

269. Under 28 U.S.C. § 1334 (2012), the district courts are vested with “original and exclusive jurisdiction of all cases under title 11,” and with “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” In turn, the district courts are empowered to delegate that authority to bankruptcy courts in each district, who are authorized by statute (if not by Article III) to resolve to final judgment all “core” proceedings along with “non-core” proceedings in which the parties consent to such authority; and to make recommenda-

The Court took a decisive step away from Justice Brennan's formalistic view of public rights in *Thomas v. Union Carbide Agricultural Products Co.*, in the course of holding that Congress could subject adjudication of a particular administrative dispute between private parties under federal law to binding arbitration.<sup>270</sup> As Justice O'Connor wrote for the Court, "Insofar as appellees interpret [*Northern Pipeline*] and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree."<sup>271</sup>

Instead, *Thomas* concluded that courts should embrace a more functional approach when assessing whether particular claims are public rights appropriate for non-Article III adjudication. Echoing Justice White's *Northern Pipeline* dissent, *Thomas* suggested that, because "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced."<sup>272</sup>

To that end, Justice O'Connor noted that (1) the claim in *Thomas* rested on federal law, as opposed to the state law claims in *Northern Pipeline*;<sup>273</sup> (2) the federal claim did not displace a preexisting state law right to compensation;<sup>274</sup> (3) the claim implicated a complex federal administrative scheme that itself represented "a pragmatic solution" to a difficult public policy question;<sup>275</sup> (4) the non-Article III adjudication relies on its own internal sanctions and does not generally require Article III courts for enforcement;<sup>276</sup> and (5) limited Article III review was available in extreme cases, including review for constitutional error.<sup>277</sup> Concurring in the judgment, Justice Brennan—who gave such a narrow compass to public rights in *Northern Pipeline*—appeared to agree with the majority's bottom line, reasoning that non-Article III adjudication was permissible because the dispute in *Thomas* "involves not only the congressional prescription of a federal rule of decision to govern a private dispute but also the active participation of a federal regulatory agency in resolving the dispute."<sup>278</sup>

Whatever else may be said about the evolution of the distinction between private and public rights, it is clear at a minimum that the Court's functional approach in *Thomas* necessarily decoupled non-Article III federal adjudication

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tions to the district court in other "non-core" proceedings. See *id.* § 157(a)–(c); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2603–04 (2011). On the different role played—and constitutional questions raised—by non-Article III "adjuncts," see *supra* note 4.

270. See 473 U.S. 568, 593–94 (1985).

271. *Id.* at 586.

272. *Id.* at 589.

273. See *id.* at 589–90.

274. See *id.*

275. *Id.* at 590.

276. See *id.* at 591.

277. See *id.* at 592–93.

278. *Id.* at 600 (Brennan, J., concurring in the judgment).

of public rights disputes from sovereign immunity; there is no sovereign immunity for the federal government to waive in disputes between private parties. Instead, the theory animating the public rights doctrine today is more generally grounded in the separation of powers—and the idea that, where a federal right to a civil remedy exists only by virtue of legislative grace, non-Article III adjudication raises far fewer constitutional concerns.

To that end, the bulk of litigation over the permissible scope of non-Article III public rights adjudication since *Thomas* has focused on the power of Congress to allow for indisputably private rights to be resolved as part of otherwise permissible non-Article III public rights adjudication—the constitutional flaw in the 1978 Bankruptcy Reform Act that had commanded a majority in *Northern Pipeline*. Thus, in *CFTC v. Schor*, the Court upheld the power of the Commodity Futures Trading Commission to entertain a state-law counterclaim in reparations proceedings.<sup>279</sup>

Two distinct considerations drove Justice O'Connor's analysis for the majority: First, in the Court's view, Schor had effectively waived his right to have the state-law counterclaim against him adjudicated in an Article III federal (or state) court by choosing the CFTC's administrative procedure with knowledge of the agency's power to resolve counterclaims in lieu of filing for relief in the district court—and thereby consenting to such a non-Article III procedure.<sup>280</sup> Second, allowing the CFTC to adjudicate counterclaims like the one at issue in *Schor* did not implicate Article III concerns because:

The CFTC, like the agency in *Crowell*, deals only with a “particularized area of law,” whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly “all civil proceedings arising under title 11 or arising in or related to cases under title 11.” CFTC orders, like those of the agency in *Crowell*, but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court.<sup>281</sup>

Non-Article III adjudication was permissible, in other words, because “the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.”<sup>282</sup> Echoing Justice White's dissent from *Northern Pipeline*, *Schor* suggested that courts should balance three factors in assessing the validity of non-Article III public rights adjudication: (1) “the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,” (2) “the origins and

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279. 478 U.S. 833, 857 (1986).

280. *See id.* at 848–50.

281. *Id.* at 852–53 (emphasis omitted) (citations omitted).

282. *Id.* at 854.

importance of the right to be adjudicated,” and (3) “the concerns that drove Congress to depart from the requirements of Article III.”<sup>283</sup>

But inasmuch as *Thomas* and *Schor* were read by many as ushering in a liberalization of the Court’s jurisprudence concerning public rights adjudication (and one that might therefore have also extended to other species of non-Article III federal courts), the Justices’ most recent foray into the field—their 2011 decision in *Stern v. Marshall*<sup>284</sup>—cut rather sharply in the opposite direction. Like *Northern Pipeline*, *Stern* concerned the proper scope of the adjudicatory power of non-Article III bankruptcy courts. After Anna Nicole Smith filed for bankruptcy, her stepson, Pierce Marshall, filed a complaint in the bankruptcy proceedings alleging defamation. Smith counterclaimed for tortious interference with her expectancy of an inheritance from her late husband and ultimately prevailed before the bankruptcy court. Although the district court confirmed the bankruptcy court’s decision, in the interim, a Texas probate court had ruled for Pierce on an analogous question—a ruling that would have been entitled to preclusive effect if the bankruptcy court had lacked the authority to previously and conclusively decide Smith’s counterclaim.<sup>285</sup>

After concluding that the bankruptcy court clearly had statutory authority to resolve Smith’s counterclaim, Chief Justice Roberts wrote for a 5–4 Court that it transcended the bounds of Article III for Congress to empower the bankruptcy court to do so:

It is not a matter that can be pursued only by grace of the other branches, as in *Murray’s Lessee*, or one that “historically could have been determined exclusively by” those branches. The claim is instead one under state common law between two private parties. It does not “depend[] on the will of congress”; Congress has nothing to do with it.

In addition, [Smith’s] claimed right to relief does not flow from a federal statutory scheme, as in *Thomas* . . . . It is not “completely dependent upon” adjudication of a claim created by federal law, as in *Schor*. And in contrast to the objecting party in *Schor*, [Marshall] did not truly consent to resolution of [Smith’s] claim in the bankruptcy court proceedings.<sup>286</sup>

As Chief Justice Roberts succinctly put it, “The ‘experts’ in the federal system at resolving common law counterclaims such as [Smith’s] are the Article III courts, and it is with those courts that her claim must stay.”<sup>287</sup>

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283. *Id.* at 851.

284. 131 S. Ct. 2594 (2011).

285. *See id.* at 2601–02 (recounting the relevant facts).

286. *Id.* at 2614 (alteration in original) (citations omitted).

287. *Id.* at 2615 (emphasis added). Of course, there is no particular reason why Article III judges are more “expert” at resolving state-law claims than their bankruptcy counterparts; both are equally bound by the Rules of Decision Act, 28 U.S.C. § 1652 (2012), to look to how the highest court of the relevant state would resolve the issue. *See, e.g., In re Coudert Bros. LLP*, 673 F.3d 180, 187 (2d Cir. 2012)

What is remarkable about this reasoning is how closely it resembles the categorical and formalistic approach embraced by Justice Brennan's plurality opinion in *Northern Pipeline*, rather than the far more functionalist multifactor balancing approach subsequently adopted by Justice O'Connor for the Court in *Thomas* and *Schor*. There are ways to rationalize either pair of decisions with each other, but no remotely satisfying explanation that unites all four. Moreover, Chief Justice Roberts's analysis appeared to call into question the power of bankruptcy courts to resolve *any* state-law counterclaims no matter their relationship to the bankrupt estate—analysis that “is causing enormous confusion and litigation concerning its scope,”<sup>288</sup> as Dean Chemerinsky has explained, if not the scope of permissible non-Article III federal adjudication in general.<sup>289</sup>

The uncertainty surrounding the Court's inconsistent approach to the public rights exception also undermines arguments such as those made in a 1990 *Harvard Law Review* note—that public rights balancing could be utilized as a basis for either understanding or reframing the scope of the military exception to Article III.<sup>290</sup> Leaving aside the more general objections that have been leveled against the public rights balancing approach,<sup>291</sup> its application is especially difficult to fathom in the military context both because the factors identified by Justice O'Connor in *Schor* would virtually always *support* assertions of military jurisdiction and because it is exceedingly difficult to conceive of criminal prosecutions as public rights under almost any definition of the term.

Unlike in the public rights context, where the concern is allowing non-Article III resolution of *legal questions* typically litigated in Article III courts, the concern in the military context arises instead from allowing non-Article III trials of *individuals* who are otherwise entitled to the protections of an Article III court. Thus, as with territorial courts, the law that has emerged to justify the public rights exception to Article III does little to illuminate the current or proper scope of the military exception thereto. If anything, the only aspect of *Stern* that is truly relevant to a discussion of the scope of the military exception to Article III is the Chief Justice's repeated focus on the constitutional significance of the question presented in that case—and the reasons why departures

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(“*Erie* made clear that state law provides the rules of decision for the merits of state law claims in bankruptcy court.” (emphasis omitted)).

288. Erwin Chemerinsky, *Formalism Without a Foundation: Stern v Marshall*, 2011 SUP. CT. REV. 183, 212.

289. In one particularly vexing decision, for example, the Fifth Circuit saw it as an exceedingly close question whether Chief Justice Roberts' opinion in *Stern* called into question the consent jurisdiction of federal magistrate judges—and only resolved that question in the negative because of the “rule of orderliness.” See *Technical Automaton Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–07 (5th Cir. 2012). The Supreme Court has since granted certiorari twice to resolve this issue—ducking it in *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014), before confronting it this Term in *Wellness Int'l Network, Ltd. v. Sharif*, No. 13-935 (U.S. argued Jan. 14, 2015). See *supra* note 4.

290. See generally Note, *supra* note 7.

291. See, e.g., *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

from Article III ought to be construed narrowly.<sup>292</sup>

### C. THE JURY-TRIAL THESIS

Another possibility is to frame the question in the reverse direction—whether the permissible scope of non-Article III territorial or public rights adjudication might be better understood through the lens of the existing military exception surveyed above. That is to say, could the jury-trial provisions, which have figured so prominently in the Supreme Court’s defense of non-Article III military courts, also help to resolve existing inconsistencies in the Court’s justifications for non-Article III territorial and public rights adjudication?

At first blush, such an approach seems at least superficially promising. At least at the Founding, the Constitution’s jury-trial protections did not apply in the most common forum for non-Article III adjudication: state courts.<sup>293</sup> And for better or worse,<sup>294</sup> the so-called *Insular Cases* continue to stand for the proposition that the grand- and petit-jury trial rights do not apply on their own in the “unincorporated territories”—including Guam, the CNMI, and the U.S. Virgin Islands.<sup>295</sup> Instead, the jury-trial protections that apply in the insular territories are a matter of legislative grace; there are provisions in the Organic Acts for each of the territories that have incorporated these constitutional rights by statute.<sup>296</sup>

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292. *Id.* at 2620 (“We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.”). Perhaps tellingly, this quotation followed shortly on the heels of a quotation from Justice Black’s anti-military jurisdiction plurality opinion in *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion).

293. Although the Supreme Court has incorporated the Sixth Amendment right to jury trial against the states, *see* *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968), it has yet to incorporate *either* the Grand Jury Indictment Clause of the Fifth Amendment or the jury-trial right of the Seventh Amendment, *but see* *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 27 F. Supp. 3d 265, 267 (D.P.R. 2014) (holding that the Seventh Amendment *does* apply “within the states, commonwealths, and territories of the United States”).

294. It is worth emphasizing that there are two strong arguments against the continuing force of the *Insular Cases* today, at least with respect to the Constitution’s jury-trial rights. First, the decisions in the *Insular Cases* all predated the Supreme Court’s recognition in *Duncan* that the Sixth Amendment right to trial by jury is fundamental and should therefore be incorporated against the states. 391 U.S. at 149. Indeed, one might well analogize the Court’s modern Fourteenth Amendment incorporation doctrine to its older territorial incorporation doctrine. *See, e.g.*, *Echevarria v. Robinson Helicopter Co.*, 824 F. Supp. 2d 275, 282 n.8 (D.P.R. 2011); *United States v. Pollard*, 209 F. Supp. 2d 525, 540 (D.V.I. 2002). Second, and in any event, discussions of the *Insular Cases* tend to neglect the Jury Trial Clause of Article III *itself*, which presumably binds Article III courts *wherever* they operate, *cf.* *Vladeck, supra* note 80, at 1541–42, including the territories. In other words, Congress’s choice to create an Article III (as opposed to an Article IV) court in unincorporated territories itself—and not the *Insular Cases*—should control the applicability of at least a constitutional right to trial by petit jury in criminal cases.

295. *See generally* BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006); Christina Duffy Burnett, *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

296. *See* *N. Mariana Islands v. Atalig*, 723 F.2d 682, 688–91 (9th Cir. 1984).

Thus, as Congress explained in 1976 when it enacted the CNMI iteration of the jury-trial language and gave jurisdiction to the CNMI district court over certain non-diverse disputes arising under local law:

The subsection exempts proceedings in the local courts—except where required by local law—from the requirements [of] indictment by grand jury and trial by jury. Similar provisions exist with respect to Guam and the Virgin Islands. They are supported by decisions such as *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Puerto Rico*, 258 U.S. 298 (1922), holding that the Constitution does not require jury trials in the local courts of unincorporated territories which do not have the common-law tradition.<sup>297</sup>

That said, there is one obvious example of a non-Article III federal territorial court that does not comport with this understanding: the D.C. Superior Court. Although that tribunal has clearly been an Article I court since its creation in 1970,<sup>298</sup> defendants before the D.C. courts are unquestionably protected by the Fifth Amendment's right to grand jury indictment<sup>299</sup> and the petit-jury rights conferred by the Sixth Amendment<sup>300</sup> because D.C. is not an “unincorporated territory” in the archaic vernacular of the *Insular Cases*.

It is possible, of course, that D.C. is the exception that proves the rule; it would not be the first time.<sup>301</sup> As was the case in the *Tidewater Transfer* decision, perhaps the constitutional uniqueness of the nation's capital justifies an accommodation that would not be permissible elsewhere or otherwise.<sup>302</sup>

Of course, it is also possible that the current structure of the D.C. court system raises serious constitutional concerns; *Palmore*, the 1973 Supreme Court decision upholding the current incarnation of the D.C. courts,<sup>303</sup> has been widely criticized on a host of grounds<sup>304</sup> and might charitably be described as

297. COMM. ON INTERIOR AND INSULAR AFFAIRS, THE COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, S. REP. NO. 94-433, at 74 (1975) (citations omitted).

298. See D.C. CODE §§ 11-701(a), 11-901 (2012). See generally District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (establishing the current D.C. court system).

299. See, e.g., *United States v. Moreland*, 258 U.S. 433, 434–435 (1922).

300. See, e.g., *District of Columbia v. Colts*, 282 U.S. 63, 71 (1930); *Callan v. Wilson*, 127 U.S. 540, 549–50 (1888).

301. See generally *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (holding, through a fractured Court, that Congress may constitutionally provide for diversity jurisdiction between citizens of a state and citizens of D.C. even though six Justices held that D.C. was not a “state” for purposes of the Diversity Clause and seven Justices held that Congress could not enlarge the jurisdiction of Article III courts beyond that provided for by the Diversity Clause; the different dissenters from each of the two holdings formed a majority in support of such jurisdiction).

302. See generally James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925 (2004).

303. See *Palmore v. United States*, 411 U.S. 389, 408–10 (1973).

304. See, e.g., *id.* at 410–22 (Douglas, J., dissenting); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 62–64 (2d ed. 1990); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 295 (2011).

failing to persuade.<sup>305</sup> Moreover, prior to the bifurcation of the then-unitary D.C. court system in the early 1970s, virtually all of the major civil and criminal adjudication in the District was handled by the *Article III* D.C. courts,<sup>306</sup> which undermines at least to some degree any argument that *some* non-Article III tribunal in the nation's capital is either formally or functionally necessary.<sup>307</sup> But whatever one makes of these arguments, they suggest that, unless the current D.C. court system is unconstitutional, the jury-trial provisions cannot provide the unifying theory for non-Article III federal adjudication.

That conclusion is only reinforced if the analysis of the jury-trial provisions is expanded to encompass the public rights context, even though the Supreme Court has suggested at least *some* overlap between the applicability of the *Seventh* Amendment's jury-trial right and the permissible scope of non-Article III federal adjudication.<sup>308</sup> There, at least, a jury-trial-based exception would prove far too much, for it would suggest that there is no constitutional problem with non-Article III federal adjudication of *all* civil cases falling outside the scope of the *Seventh* Amendment (including all cases arising in equity or admiralty), regardless of whether they raise a public right.<sup>309</sup>

Finally, as a more normative matter, if the animating concern in non-Article III federal adjudication is the power of Congress to dilute the role of Article III

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305. Whether Congress may constitutionally create non-Article III federal courts in the District of Columbia, the answer cannot simply follow (as *Palmore* held that it did) from Congress's police power over the district; otherwise, Congress could presumably create non-Article III federal courts in any area in which federal regulation was meant to be exclusive.

306. See, e.g., *O'Donoghue v. United States*, 289 U.S. 516 (1933); cf. *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 713 (C.C.D.C. 1837) (No. 15,517) (holding that, as an Article III court with hybrid local-federal jurisdiction, the D.C. courts had the unique authority to issue common-law relief against federal officers), *aff'd*, 37 U.S. (12 Pet.) 524 (1838). Before 1970, the modest D.C. local courts had jurisdiction to prosecute at least some "petty" criminal offenses. See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617 (1937). But such offenses themselves fall outside of the *Sixth* Amendment's right to trial by jury, see, e.g., *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975); see also *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541–43 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 159–62 (1968), suggesting once again that there may well be a connection between the scope of the jury-trial rights and of non-Article III adjudication.

307. I plan to more thoroughly explore the constitutional problems with non-Article III federal courts in the District of Columbia (which, as I will explain, are different in both kind and degree from those besetting the "other" territorial courts) in a subsequent paper, "The District of Columbia and Article III."

308. For example, in *Granfinanciera, S.A. v. Nordberg*, Justice Brennan appeared to define "public right" by negative reference to the *Seventh* Amendment jury-trial right, concluding that "[i]f a claim that is legal in nature asserts a 'public right,' . . . then the *Seventh* Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity." 492 U.S. 33, 42 n.4 (1989); see also *id.* at 51 ("Congress may devise novel causes of action involving public rights free from the strictures of the *Seventh* Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.").

309. Among other things, reading too much into *Granfinanciera* would also suggest that the Court's malleable and evolving understanding of "public rights" could drive whether particular claims are or are not covered by the *Seventh* Amendment—and that, as a result, that definition can be manipulated to reach outcome-oriented results. See generally Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995).

courts by subjecting particular disputes to resolution before judges who lack Article III's salary and tenure protections—and who as a result are presumably more subject to pressure from the political branches and the public—then it is difficult to see how those concerns are *mitigated* by not requiring the additional checks on the political branches of either grand-jury indictment or petit-jury trial, either. If anything, the converse is more convincing—that is, that constitutionally mandated jury protections might alleviate the concerns that prosecution before a non-Article III judge would otherwise raise.

In all, then, it is difficult to see the jury-trial provisions as having any broader utility, outside the specific context of the military exception, in giving content to the permissible scope of non-Article III federal adjudication. As such, none of the existing explanations for why non-Article III adjudication is permissible in the three specific contexts in which it has been upheld appear to bear in any meaningful way on the others.

#### D. THE APPELLATE REVIEW MODEL

If the Supreme Court's other approaches to non-Article III adjudication are of marginal utility in reassessing the military exception, it is also worth considering academic efforts to reconcile these cases. In his solo concurring opinion in *Stern*, Justice Scalia objected to what he identified as the seven different factors in the majority's explanation for why Anna Nicole Smith's tortious interference counterclaim could not constitutionally be adjudicated by a non-Article III bankruptcy judge.<sup>310</sup> As he put it, "The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area."<sup>311</sup> But, "the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III."<sup>312</sup>

Unlike the contemporary Court, which, beyond Justice Scalia, appears wholly disinterested in the project of rationalizing its jurisprudence in this field, a number of the leading students and scholars of the federal courts have attempted to do just that, perhaps none more elegantly than Professor Fallon. In *Of Legislative Courts, Administrative Agencies, and Article III*,<sup>313</sup> Fallon summarized what he termed the "appellate review theory" as a substitute for the Court's "vague balancing approach."<sup>314</sup>

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310. *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

311. *Id.*

312. *Id.*

313. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

314. See *id.* at 917. Fallon was neither the first nor the most recent scholar to focus on Article III appellate review as a more coherent theoretical defense of non-Article III adjudication; as Professor Pfander has pointed out, "Similar suggestions appear in the work of Professors Bator, Redish, Saphire, and Solimine." James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 666 (2004); see also *id.* at 647 & n.10. But Fallon's 1988 article is perhaps the most thoroughgoing—and convincing—explication of this view. See *id.* at 667 n.123

At the heart of the appellate review theory is the idea that, at least at this stage in the development of the federal courts, “adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III,”<sup>315</sup> and that, so long as it exists, “the decision whether to use non-article III bodies to make initial determinations even of constitutional law should be largely discretionary with Congress.”<sup>316</sup> In other words, nothing specifically unites the three categories of cases in which non-Article III federal adjudication has been sustained other than what comes *after* such adjudication: appellate review by Article III courts, including ultimate supervision by the Supreme Court itself.

But the elegant simplicity of the appellate review model also provides one of the central charges against it, for it would thereby endorse *all* non-Article III federal adjudication so long as provision is made for searching Article III appellate review *at some point*. As Professor Resnik has argued, such an approach could end up insulating most initial non-Article III federal adjudications—whether by agencies or legislative courts—from meaningful appellate review, especially to the extent that the proliferation of intermediate non-Article III appellate courts might further distort the role of Article III appellate courts and/or *Crowell* would allow Congress to insulate the non-Article III adjudicator’s factual findings from meaningful appellate review.<sup>317</sup> So construed, “the idea that ‘Article III values’ are served by providing litigants access through appellate review to life-tenured judges has more theoretical power than practical application.”<sup>318</sup>

In addition, the appellate review theory runs into both textual and practical difficulties. Textually, the theory provides little solace to formalists who still struggle to understand how the Constitution contemplates the investiture of federal judicial power in *any* non-Article III courts—but especially those operating under federal, rather than state, authority.<sup>319</sup> And practically, the appellate review theory appears difficult to reconcile with existing (and in many cases, Founding-era) statutory limits on Article III appellate jurisdiction over a host of non-Article III bodies, including the historical constraints on the Supreme Court’s appellate jurisdiction vis-à-vis state courts, which has never come close to encompassing anywhere near the nine sets of cases over which the Constitu-

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(explaining the differences between Fallon’s view and that of the other “appellate review” adherents). See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (exhaustively documenting the origins of the appellate review model in early-20th century administrative law).

315. Fallon, *supra* note 313, at 918.

316. *Id.* at 917.

317. See Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 638–40 (2002).

318. *Id.* at 640.

319. See, e.g., Pfander, *supra* note 314, at 668 & n.130.

tion recognizes federal judicial power.<sup>320</sup>

Indeed, military courts prove some of the toughest cases for the appellate review model, given the historical bar on direct supervision of courts-martial and military commissions by the Supreme Court; the continuing gaps in the Court's post-1983 authority over CAAF and the military justice system,<sup>321</sup> and the lack of *any* mechanism for appellate review (or for de novo collateral review) of the decisions of military commissions prior to the Detainee Treatment Act of 2005.<sup>322</sup> One might also quibble with a theory the salience of which rests on equating the Supreme Court's current certiorari jurisdiction with meaningful appellate review, when, as is currently true for D.C. local courts and courts-martial, the increasingly discretionary review by the Justices is the *only* generally available mechanism for Article III oversight.<sup>323</sup> Thus, as with the explanations offered by the Supreme Court for the three existing categories of permissible non-Article III adjudication, the appellate review model provides an unsatisfying justification for the military departure from Article III.

#### E. MILITARY COURTS AS "INFERIOR TRIBUNALS"

Responding specifically to these shortcomings in the appellate review model, a more recent attempt at a crosscutting explanation for non-Article III federal adjudication was undertaken by Professor Pfander in a 2004 article in the *Harvard Law Review*,<sup>324</sup> which he expanded upon in a subsequent book.<sup>325</sup> Pfander's account starts with the Constitution's text, including Article III's declaration that "[t]he judicial Power of the United States[] shall be vested in *one* supreme Court,"<sup>326</sup> and Article I's grant of power to Congress "[t]o

320. *See, e.g.*, Ann Woolhandler, *Powers, Rights, and Section 25*, 86 NOTRE DAME L. REV. 1241 (2011) (summarizing the historical evolution of the Supreme Court's incomplete appellate jurisdiction over state courts). To take one obvious example, the Supreme Court has *never* possessed the power to entertain appeals from state courts in diversity cases, even though such cases fall within the scope of Article III.

321. *See supra* text accompanying notes 56–57 (discussing 10 U.S.C. § 867a(a)).

322. *See supra* notes 83–84 and accompanying text (discussing the limits on appellate and collateral review of military commissions).

323. *See, e.g.*, Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioner, *Behenna v. United States*, 133 S. Ct. 2765 (2013) (mem.) (No. 12-802) [hereinafter *Behenna* Brief]; *cf.* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008) (noting the increased pressure that limitations on other forms of post-conviction review have placed on the Court's supervision of state criminal convictions via certiorari).

324. *See* Pfander, *supra* note 314.

325. JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* (2009); *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007) [hereinafter Pfander, *Federal Supremacy*]; James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*].

326. U.S. CONST. art. III, § 1 (emphasis added). Indeed, Pfander finds it significant that Article III uses a lowercase "s" to refer to the Court—suggesting that "supreme" was not the *name* of the body, but rather an adjective. *See* Pfander, *Jurisdiction-Stripping*, *supra* note 325, at 1455 n.88; *see also*

constitute Tribunals inferior to the supreme Court.”<sup>327</sup> As Pfander notes, although the Constitution is replete with references to “courts,” especially in Article III, this latter provision is its sole reference to “tribunals,”<sup>328</sup> a distinction that should not be dismissed as semantic.<sup>329</sup> Tying these two textual threads together, Pfander posits:

[T]he Inferior Tribunals Clause may empower Congress to create inferior “tribunals” with judges who lack Article III protections. While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States.<sup>330</sup>

At once, then, Pfander’s “inferior tribunals” account provides textual support for the appellate review theory, but also supplies the missing top-down substantive principle to cabin the permissible scope of non-Article III federal adjudication: the underlying justification for non-Article III federal adjudication is to resolve disputes “thought to lie beyond the judicial power of the United States.”<sup>331</sup> On this theory, the two questions courts must ask in assessing the permissible scope of non-Article III federal adjudication are whether “the work of the Article I tribunal does not, as structured by Congress, lie at the traditional core of the judicial power of the United States,”<sup>332</sup> and, if not, whether “Congress has provided some form of review sufficient to preserve the tribunal’s inferiority in relation to the judicial department.”<sup>333</sup>

So construed, the inferior tribunals account departs from the appellate review model in at least two respects. First, the former approach limits non-Article III adjudication to claims typically falling outside the judicial power of the United States—and not just to any claim that can adequately be reviewed by Article III appellate courts. Second, even then, Article III appellate review must be searching and not just *theoretically* available.

Although Pfander’s account thereby alleviates at least some of the shortcomings in the appellate review model, it raises some of its own as well. For starters, it turns on a relatively subjective understanding of the “traditional core” of federal judicial power as compared to those claims that fall sufficiently outside that core to justify non-Article III adjudication. After all, even if one were inclined to believe that questions of federal military law do not implicate

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David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 463, 475–76 (1991).

327. U.S. CONST. art. I, § 8, cl. 9.

328. See Pfander, *supra* note 314, at 650.

329. See *id.* at 672–89.

330. *Id.* at 651.

331. See *id.* at 652.

332. *Id.* at 747.

333. *Id.* at 748.

the traditional core of federal judicial power,<sup>334</sup> recall that courts-martial have increasingly come to apply generally applicable federal statutory and constitutional law in their proceedings,<sup>335</sup> and so *should* require the same supervision as their civilian counterparts.<sup>336</sup>

Second, and perhaps more controversially, Pfander's approach compels the counterintuitive result that Congress is necessarily conscripting *state* courts as inferior "federal" tribunals whenever it "allows" them to entertain federal question suits.<sup>337</sup> And even then, there is still the previous question concerning claims implicating the "traditional core of the judicial power," which, per the Madisonian Compromise, state courts were clearly intended to have at least some authority to resolve *ab initio*.

Ultimately, efforts to situate the Supreme Court's exposition of the military exception to Article III within the Court's broader non-Article III doctrine, or even within less doctrinal academic theories, fail to persuade. The Court's explanations for territorial and public rights courts do not map well onto courts-martial and military commissions, and the jury-trial oriented justification for military tribunals does not map onto territorial courts or public rights disputes. Nor do academic efforts to rationalize non-Article III adjudication meaningfully bridge the gap. Instead, they only appear to reinforce the conclusion that the military exception is *sui generis*, only further underscoring the dearth of justifications for the expansions documented in Part II.

#### IV. RETHINKING MILITARY JUSTICE AND ARTICLE III

Parts II and III sought to demonstrate that the three recent expansions in the scope of the military exception to Article III cannot be reconciled with the pre-*Solorio* status quo or justified on non-doctrinal grounds. But while that conclusion is significant in its own right, these analyses have also underscored two fundamental weaknesses in the pre-*Solorio* status quo: the incompleteness of the Constitution's text in explaining the scope of the exception; and, to that end, the lack of any obvious link between the independent strands of the

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334. See, e.g., *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."). Since 1983, the Supreme Court *has* possessed the very supervisory power over military courts, the absence of which undergirded the *Burns* plurality's approach. Compare *id.* ("This Court has played no role in [military law's] development; we have exerted no supervisory power over the courts which enforce it . . . ."), with 28 U.S.C. § 1259 (2012) (conferring upon the Supreme Court appellate jurisdiction—via certiorari—over the Court of Appeals for the Armed Forces in most, albeit not all, cases).

335. In particular, Pfander's central claim is that "local" federal law does not implicate the same separation of powers concerns as federal laws of general applicability. Even if that were true (which is not immediately obvious given their constitutional equivalency), it does not explain courts-martial, which do not just enforce federal criminal laws generally applicable to the *military*, but also, via Article 134 of the UCMJ, federal criminal laws generally applicable to *everyone* (and some state laws, too). See *supra* notes 43–44 and accompanying text.

336. For more on this argument, see *Behenna* Brief, *supra* note 323.

337. See generally Pfander, *Federal Supremacy*, *supra* note 325.

military exception—between the constitutional permissibility of courts-martial and of military commissions.

As noted above, there appears to be no specific explanation, other than happenstance, for why the military exception encompasses *both* courts-martial based upon the correlation between the Make Rules Clause and the text of the Grand Jury Indictment Clause *and* military commissions based upon a similar (if less textual) relationship between the Define and Punish Clause and the jury-trial provisions. Nor is there any explanation for how a narrow textual exception to one jury-trial provision could plausibly be understood to exempt a broad swath of proceedings from *all* jury-trial protections, along with any right to an Article III (or other civilian) judge; or why the Founders—on the Court’s logic—left military justice entirely out of the pre-Bill of Rights Constitution. This Part explores whether the military exception might be resituated not in constitutional text, but in more analytically coherent constitutional principles.

Any such effort to reconceive the military exception should begin with Justice Black, who, in concluding his opinion for the Court in *Toth*, wrote that, “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>338</sup> The quotation—to Justice Johnson’s 1821 opinion in *Anderson v. Dunn*—was more than just an accident; the “least possible power” mentality has been deployed in any number of contexts (including in *Anderson* itself<sup>339</sup>) to stand for the proposition that “[a]s necessity creates the rule, so it limits its duration.”<sup>340</sup> To similar effect, the Court’s most recent foray into non-Article III federal adjudication underscored the importance of carefully circumscribing such departures—because “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.”<sup>341</sup>

With those principles in mind, the most modest—and perhaps correct—reaction to the analysis provided above is that there is not *one* exception to Article III for military courts, but rather two narrow but independent exceptions—one for courts-martial based upon the relationship between the Make Rules Clause and the Grand Jury Indictment Clause, and one for commissions based upon the distinct relationship between the Define and Punish Clause and the atextual exception to the jury-trial clauses articulated in *Quirin*. Even that

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

339. The issue in *Anderson* was whether Congress had the implicit power, in the absence of an express statute, to hold an individual in contempt. Although the Court answered that question in the affirmative, it stressed the significance of narrowly construing the scope of such atextual power. *See generally Anderson*, 19 U.S. (6 Wheat.) 204.

340. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

341. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

conclusion, though, requires a reassessment of at least some of the Supreme Court's jurisprudence because the Justices have upheld instances of *both* forms of military adjudication in cases at least appearing to fall outside even these proffered justifications.

A. RECONCEIVING THE MILITARY EXCEPTION: FROM *MADSEN* TO *DYNES*

For example, recall that the Supreme Court in *Madsen* indirectly but necessarily shoehorned occupation courts into the Fifth Amendment Grand Jury Indictment Clause's exception.<sup>342</sup> And yet, in upholding the jurisdiction of a U.S. military tribunal in occupied Germany to try a civilian dependent for the murder of her husband under German law, Justice Burton found statutory authority in the very same provision upon which the Court had relied in *Ex parte Quirin*—even though the earlier case involved a law-of-war commission.<sup>343</sup> In his words, Article 15 authorized military commissions to try offenses that, by the “law of war,” may be triable by military commission. And, “[t]he ‘law of war’ includes at least that part of the law of nations which defines the powers and duties of belligerent [sic] powers occupying enemy territory pending the establishment of civil government.”<sup>344</sup> Indeed, Burton continued, “The jurisdiction exercised by our military commissions in the examples previously mentioned extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress.”<sup>345</sup>

*Madsen* thereby suggested that the underlying principle uniting occupation courts and law-of-war commissions is international practice *under* the laws of war; the justification for both departures from Article III is the practice and precedents not of other nations under their own laws in their own domestic forums, but of the international community in its enunciation and enforcement of supervening norms of criminal responsibility. And *Quirin* itself justified its articulation of a previously unrecognized exception to the jury-trial provisions by looking to the Founding-era state of international law,<sup>346</sup> including an 1806 Act of Congress (itself derived from a 1776 Resolution of the Continental Congress) authorizing capital punishment for alien spies “according to the law and usage of nations, by sentence of a general court martial.”<sup>347</sup> As Chief Justice Stone explained, “Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury . . . because they had violated the law of war by committing offenses constitutionally triable by military tribunal.”<sup>348</sup>

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342. See *supra* text accompanying notes 170–71.

343. See *Madsen v. Kinsella*, 343 U.S. 341, 351–52 (1952).

344. *Id.* at 354–55.

345. *Id.* at 355.

346. *Ex parte Quirin*, 317 U.S. 1, 41–42 (1942).

347. *Id.* at 41.

348. *Id.* at 44.

Thus, at least in the context of occupation courts and law-of-war commissions, the unifying theme appears to be the amenability of such offenses to military trial under prevailing norms of international practice—that is to say, military jurisdiction is permissible if and only if (1) there is widespread evidence that other nations subject such offenders and offenses to military, rather than civilian, trials; and (2) there is no freestanding prohibition on such an assertion of military jurisdiction in either domestic or international law. To that end, recall that *Quirin* cast the jury-trial exception that justified trial by military commission as encompassing “offenses committed by enemy belligerents against the law of war.”<sup>349</sup> But Madsen was not an enemy belligerent and did not commit a war crime. Perhaps what *Quirin* meant—and should have said—is that the Constitution exempts from the jury-trial provisions “offenses triable by military tribunal under prevailing norms of international practice.” In *Quirin*, that would have been a distinction without a difference; in *Madsen*, it was anything but.<sup>350</sup>

Among other things, such a reconceptualization of the *Quirin* exception could also resolve one of *Quirin*'s most troubling analytical puzzles: its recognition of the historical use of military commissions to try spying and aiding the enemy, even though neither is recognized today as a war crime under international law—and arguably were not so recognized at the time *Quirin* was decided.<sup>351</sup> As Judge Kavanaugh pointed out in his solo opinion concurring in the *Al Bahlul* en banc decision, theories of Article III that view the *Quirin* exception as exhaustive struggle with spying—and with explaining how such *non-war* crimes can also be tried by military tribunal.<sup>352</sup> But while many (including this author in prior writings) have simply dismissed the jurisdiction of military courts to try spying and aiding the enemy as an “enigmatic statutory precedent,”<sup>353</sup> there are two additional (and potentially compelling) explanations that Judge Kavanaugh neglected: either these offenses *were* recognized as international war crimes at the Founding and just are not *anymore* (and so were triable in military courts then but not now); or, even if they were *never* recognized as international war crimes, they are rare examples of noninternational war crimes that widespread international practice have nevertheless subjected to military jurisdiction since the Founding—and therefore fit quite comfortably within such a reconceived military exception to Article III.<sup>354</sup>

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349. *Id.* at 41; see *supra* text accompanying notes 166–68.

350. See *Madsen*, 343 U.S. at 371–72 (Black, J., dissenting).

351. See Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 333 (1951).

352. *Al Bahlul v. United States*, 767 F.3d 1, 73 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

353. *E.g.*, Brief of the National Institute of Military Justice, *supra* note 186, at 15 & n.7.

354. By contrast, offenses against the “U.S. common law of war” are only those that have historically been subject to trial by military courts *within the United States*.

If either of these approaches is correct, a view of the military exception that turns on both the existence of widespread international practice for trying the offense and offender before a military court and the absence of a prohibition on such an assertion of military jurisdiction in domestic or international law would, if nothing else, introduce a degree of analytical stability to the permissible scope of military *commission* jurisdiction. In the process, such an approach would drive home the stakes of the pending panel decision in *Al Bahlul*, which may finally have to resolve whether the jury-trial exception recognized in *Quirin* truly *does* (or should be expanded to) encompass noninternational war crimes. And if nothing else, this international law and practice-based approach would reconcile *Quirin*, *Madsen*, and spying, and thereby bring at least a modicum of coherence to the constitutional defense of non-Article III military commissions.

The far harder question is whether it would also make sense to apply this approach to the *other* major strand of the military exception: courts-martial. After all, courts-martial and military commissions have historically been understood as entirely distinct—if not hermetically sealed—entities,<sup>355</sup> with different legal and normative justifications. And unlike commissions, courts-martial have seldom been understood by reference to international law—if for no other reason than because there is no such thing as an international law of military jurisdiction. Thus, one could certainly conclude that the best defense of the military exception is as two different carve-outs: one for commissions based upon prevailing norms of international practice; and one for courts-martial based (mostly) upon constitutional text.

And yet, although it may initially seem as if such an international law-based reorientation of the military exception cannot be reconciled with the historical evolution of court-martial jurisdiction, recall Justice Wayne's view in *Dynes v. Hoover*:

Congress has the power to provide for the trial and punishment of military and naval offences *in the manner then and now practiced by civilized nations*; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States . . . .<sup>356</sup>

Justice Wayne did not elaborate, and his allusion to the law of nations has been all but lost to subsequent jurisprudence, but the argument could potentially be analogized to the revised understanding of *Quirin* outlined above: the exemption from Article III for military courts does not *derive* from the Constitu-

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355. *See, e.g.*, 10 U.S.C. § 948b(c) (2006) (“Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.”) (amended 2009); *see also id.* § 948b(e) (providing that decisions by military commissions may not be “introduced,” “considered,” or “form the basis” of any decision by a court-martial).

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

tion's text; it derives from international law and practice, as *reflected* in several scattershot textual clues. And insofar as international law and practice has historically recognized the power of sovereigns to subject their own soldiers to military jurisdiction at least for military offenses, and the Supreme Court had never endorsed courts-martial of civilians, there would never have been any reason to ask, at least prior to *Solorio*, what role international law played in justifying (and/or constraining) courts-martial. Analogous authorities were already provided by the text of the Make Rules and Grand Jury Indictment Clauses, at least as interpreted by successive generations of Justices.

If so, then perhaps *Quirin*—"not a happy precedent"<sup>357</sup> by any means—had the right idea but the wrong formulation: one coherent, crosscutting explanation for the scope of the military exception, which would tie together the seemingly disparate threads of non-Article III military adjudication and resolve most of its puzzles, would be an exception from Article III for all cases in which there is clear precedent in foreign and international practice for subjecting the offender and offense to military jurisdiction, and no prohibition on such an assertion of military jurisdiction in domestic or international law. That is to say, such precedents provide the constitutional justification for the departure from the Article III default rule—and, in their absence, fail to displace Article III's mandate.<sup>358</sup>

#### B. AN INTERNATIONAL LAW EXCEPTION TO ARTICLE III?

Looking to international law and practice to interpret the Constitution is often a fraught proposition.<sup>359</sup> But in one sense, an Article III carve out grounded in international law is not as novel an idea as it may seem. As Professor Monaghan documented in an influential 2007 *Columbia Law Review* article,<sup>360</sup> there are already any number of respects in which international tribunals may themselves be said to exercise the judicial power of the United States, and yet not offend the strictures of Article III, especially insofar as the conduct of U.S. government actors is still subject to Article III oversight.<sup>361</sup> Although Professor Monaghan

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357. See Carlos M. Vázquez, "Not a Happy Precedent": The Story of Ex Parte Quirin, in *FEDERAL COURTS STORIES* 219 (Vicki C. Jackson & Judith Resnik eds., 2010).

358. Of course, as noted below, international law and practice will have nothing to say about Article III, specifically. But that is not the point. Instead, the domestic constitutional law (to wit, Article III) question is solely whether international law and practice affirmatively support—and do not prohibit—trial of the offense and offender in a military, as opposed to civilian, court. If they do, then Article III would not bar the trial of the same offense and class of offender by a U.S. military court under this approach. If they do not, then it would.

359. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting). See generally Ryan C. Black et al., *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine*, 103 *GEO. L.J.* 1 (2014).

360. Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 *COLUM. L. REV.* 833 (2007).

361. See, e.g., FALLON ET AL., *supra* note 7, at 370 (summarizing Monaghan's argument). Justice O'Connor, among others, has offered a more skeptical view. See, e.g., Sandra Day O'Connor, *Federalism of Free Nations*, 28 *N.Y.U. J. INT'L L. & POL.* 35, 42 (1995–96).

rested much of his argument on an analogy to the public rights doctrine,<sup>362</sup> it is in many ways a different variation on the same theme—that supranational legal arrangements can justify departures from the Constitution’s national norms.<sup>363</sup>

One historical—albeit imperfect—analogy in that regard is Congress’s power to implement duly enacted treaties under the Necessary and Proper Clause of Article I.<sup>364</sup> Per Justice Holmes’ opinion in *Missouri v. Holland*, Congress may enact statutes under the Necessary and Proper Clause to implement the United States’ treaty obligations even if no enumerated power would have authorized the same legislation in the absence of the treaty.<sup>365</sup> In other words, international law—in *Holland*, as reflected in bilateral treaties, but perhaps as also reflected in customary international law—triggers an independent font of federal regulatory power that would otherwise exceed the limits imposed by the Constitution, including the Tenth Amendment.<sup>366</sup> Of course, exactly how far Congress may go in implementing a treaty remains unresolved (especially after the Supreme Court sidestepped the issue in the *Bond* case).<sup>367</sup> But the underlying principle—that international law and practice may in some cases support exercises of federal authority lacking a more specific hook in the text of the Constitution—is almost certain to survive. In the context of military courts, an argument for understanding Article III as exempting those offenses and offenders the military trials of which are well-supported in international practice would play a comparable role by authorizing military-specific departures from Article III (and by circumscribing such departures absent clear precedent in foreign and international practice).

To be sure, international practice has nothing to say about the constitutionally vital—and U.S.-specific—distinction between Article III and non-Article III federal adjudication. But the relevant Article III question is not whether a specific type of *civilian* adjudication has clear precedent in foreign and international practice; it is whether any *military* adjudication has such precedent. So understood, efforts to ground the military exception in prevailing international law and practice would therefore conclude that Article III’s general requirement that federal adjudication be undertaken by judges with constitutional salary and tenure protections can be overcome in circumstances in which foreign and

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362. See Monaghan, *supra* note 360, at 866–75.

363. Additional examples of this principle abound. For another variation especially relevant to the military, see Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007).

364. See U.S. CONST. art. I, § 8, cl. 18.

365. See 252 U.S. 416, 431–34 (1920).

366. See *id.* at 432.

367. See *Bond v. United States*, 134 S. Ct. 2077 (2014) (construing an Act of Congress implementing a treaty to not apply to Petitioner’s conduct in order to avoid resolving the constitutional question that would arise if it did). *But see id.* at 2098–102 (Scalia, J., concurring in the judgment) (disagreeing with the majority’s statutory interpretation, and concluding that *Holland* should be narrowed); *id.* at 2103–11 (Thomas, J., concurring in the judgment) (same); *id.* at 2111 (Alito, J., concurring in the judgment) (same).

international practice supports the assertion of military, rather than—or, at least, in addition to—civilian jurisdiction of any form. That is to say, the distinction between military and civilian jurisdiction under foreign and international practice would be dispositive of Congress's power to distinguish between non-Article III military and Article III civilian jurisdiction.

An exception to Article III grounded in international law and practice might also be criticized as being too amorphous and ephemeral to actually serve as a meaningful constraint. But such objections are arguably belied by both the crystallization of at least some aspects of international criminal law and the constraints current litigation arising out of the Guantánamo military commissions have articulated by reference to customary international law. With regard to crystallization, it is a familiar refrain that the creation of ad hoc (and now permanent) international criminal tribunals has helped to generate a greater volume of positive law concerning the scope of international humanitarian law.<sup>368</sup> Even though decisions by the Rwandan and Yugoslavian war crimes tribunals and the International Criminal Court do not *bind* other courts, they are certainly relevant—if not persuasive—authority on the scope of legal principles previously left to the vagaries of customary international law,<sup>369</sup> alongside an ever-growing body of treaty-based legal rules to govern armed conflict situations.<sup>370</sup>

And even where the relevant norms of international practice can only be divined from *customary* international law (as opposed to interpretations of international treaties), the very cases that have helped to provoke this discussion have also demonstrated the ability of U.S. courts to properly assess and apply such loosely defined norms. Indeed, the central question that the D.C. Circuit panel considered in *Hamdan II* was whether “material support to terrorism” is defined with enough specificity in customary international law such that defendants could have been on notice *prior* to the MCA's enactment that conduct amounting to those offenses rendered them subject to trial by military commission.<sup>371</sup> In other words, courts are *already* asking whether specific offenses and offenders are triable by military tribunals even under customary international law, albeit to answer a putatively different question than the one that would arise under this framework.

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

369. See *id.* at 49; see also, e.g., *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557, 611 n.40 (2006) (plurality opinion) (citing two ICTY decisions).

370. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. See generally SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* (2012); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010).

371. See *supra* text accompanying notes 175–80.

In *Hamdan II*, at least, the D.C. Circuit not only looked to international law, but suggested the appropriate standard of review.<sup>372</sup> As Judge Kavanaugh wrote for the unanimous three-judge panel:

[T]he imprecision of customary international law calls for significant caution by U.S. courts before permitting civil or criminal liability premised on violation of such a vague prohibition. . . . Therefore, . . . imposing liability on the basis of a violation of “international law” or the “law of nations” or the “law of war” generally must be based on norms firmly grounded in international law.<sup>373</sup>

If norms must be firmly grounded in international law and practice before they can provide the basis for *liability* before a military tribunal, it should follow *a fortiori* that norms be similarly grounded in international law and practice before they can provide the basis for the *jurisdiction* of a military tribunal.<sup>374</sup> And as *Hamdan II* illustrates, so construed, international law and practice can therefore serve as both a powerful source for—and constraint upon—the scope of military jurisdiction. In *Hamdan II*, of course, such a result was produced by statutory interpretation. But even if the inquiry were instead grounded in constitutional considerations, the ability of courts to assess whether such norms exist—and are sufficiently well established—should be no different.

#### C. THE INTERNATIONAL LAW OF MILITARY JURISDICTION

It remains, then, to assess whether current international law and practice actually provide useful illumination of the permissible scope of military jurisdiction through clear examples of authorizations or constraints upon military trials. Even if it was possible, a full accounting of the international law and practice of military jurisdiction is beyond the ambit of this Article. It must also be said that many will fail to be persuaded that such a body of international law and practice

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372. *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238, 1248–53 (D.C. Cir. 2012).

373. *Id.* at 1250 n.10 (citation omitted); *see also Hamdan I*, 548 U.S. at 602–03 & n.34 (plurality opinion); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–38 (2004). In a curious footnote in his solo en banc concurrence in *Al Bahlul*, Judge Kavanaugh sought to dismiss at least some of his analysis from *Hamdan II* as unnecessary dicta. *See Al Bahlul v. United States*, 767 F.3d 1, 68 n.5 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part). As I have explained elsewhere, however, this part of *Hamdan II* not only was *not* dicta, but it also necessarily survived the en banc court’s decision in *Al Bahlul*—part of which overruled one of *Hamdan II*’s other holdings. *See* Steve Vladeck, *What’s Left of Hamdan II? Quite a Lot, Actually . . .*, JUST SECURITY (July 17, 2014, 9:50 AM), <http://justsecurity.org/12989/left-hamdan-ii-lot-actually>. Moreover, and in any event, even the en banc majority in *Al Bahlul* concluded that Bahlul’s convictions for solicitation and material support were “plainly” a violation of the Ex Post Facto Clause—by reference to the absence of examples of military trials for such offenses under domestic *or* international law and practice. *Al Bahlul*, 767 F.3d at 27–31.

374. To that end, courts applying the Ex Post Facto Clause have held that it can be violated simply by subjecting offenders to trial in a military, rather than civilian, court—even if the same conduct was triable by a civilian court at the time of the offense. At least with regard to material support and solicitation, *Al Bahlul* is a case squarely on point. *See generally* 767 F.3d 1.

could ever provide sufficiently coherent principles to circumscribe Article III—in which case, the best possible outcome for the military exception is to recognize the dispositive role of international law at least with respect to commissions, if not courts-martial.

At the same time, although there is no body of positive international law generally dealing with military jurisdiction, there are two critical (and specific) *authorizations* for military jurisdiction in the 1949 Geneva Conventions: Article 84 of the Third Geneva Convention contemplates military trials for enemy belligerents detained as prisoners of war, so long as such trials take place in the same courts in which the detaining power's soldiers are tried;<sup>375</sup> and Article 66 of the Fourth Geneva Convention specifically authorizes “non-political” military courts to try civilian offenses in areas under lawful military occupation. Thus, positive international law expressly supports the assertions of military jurisdiction sustained by the Supreme Court in *Quirin* (and its progeny) and *Madsen*.

Militating in the opposite direction, albeit no less salient, is the dramatic uptick in recent years in judicial application of more general principles of international human rights law—as embodied in both positive-law treaties and customary-law norms—to produce results specific to military jurisdiction. Thus, for example, the Inter-American Court of Human Rights has issued a series of decisions interpreting the fair trial protections of the American Convention on Human Rights to bar military trials of military personnel for nonmilitary offenses, and to otherwise constrain the permissible scope of domestic military jurisdiction.<sup>376</sup> These rulings “may be the inter-American system’s most significant contribution to the evolution of the rule of law in the Americas.”<sup>377</sup>

The same pattern has played out under the fair trial provision (Article 6) of the European Convention on Human Rights, which the European Court of Human Rights has interpreted to foreclose military jurisdiction over civilians except “when the proceedings are objectively fair, when there are compelling reasons for the assertion of such jurisdiction, and when there is a clear and foreseeable legal basis.”<sup>378</sup> Based on that test, the European Court has, among other things, invalidated the United Kingdom’s assertion of military jurisdiction

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375. To that end, consider Article 2(a)(13) of the UCMJ, which subjects to court-martial “[i]ndividuals belonging to one of the eight categories enumerated in Article 4 of the [Third Geneva Convention], who violate the law of war.” 10 U.S.C. § 802(a)(13) (2012); *see also id.* § 802(a)(9) (subjecting to courts-martial “[p]risoners of war in custody of the armed forces”).

376. *See generally* Christina M. Cerna, *Unconstitutionality of Article 57, Section II, Paragraph A) of the Code of Military Justice and Legitimation of the Injured Party and His Family to Present an Appeal for the Protection of Constitutional Rights*, 107 AM. J. INT’L L. 199 (2013). As Cerna notes, in addition to the Mexican Supreme Court decision prompting her note, “Argentina, Colombia, and Peru, to cite the most dramatic examples, have all seen the jurisdiction of their military courts radically reduced as a result of decisions of the inter-American system.” *Id.* at 204.

377. *Id.*

378. Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (“UCMJ”) over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT’L & COMP. L. 59, 90 (2009).

over a civilian because the military court was not sufficiently independent and may in any event have lacked any kind of compelling justification.<sup>379</sup>

I do not mean to make more of these anecdotes than they are worth, but these more specific examples are emblematic of a far larger trend—one in which even those countries with long-established and generally fair military justice systems have had to scale back some of their more marginal exercises of military authority in order to square domestic practice with international human rights law.<sup>380</sup> There continue to be examples to the contrary, of course, but it would hardly behoove the U.S. government to argue that an international norm of military jurisdiction is established by domestic practice in countries such as Brunei, North Korea, or Somalia.

Supplementing these specific decisions are the more general assessments undertaken by the United Nations in recent years. For example, the U.N. Commission on Human Rights in 2006 promulgated “Draft Principles Governing the Administration of Justice Through Military Tribunals,”<sup>381</sup> known as the “Decaux Principles” after Emmanuel Decaux, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights. And in August 2013, the U.N. Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, produced her own report summarizing the administration of justice through military tribunals in a wide range of jurisdictions<sup>382</sup> and offering a series of conclusions largely in line with the Decaux Principles.

In introducing the Decaux Principles, the Commission described them as “a minimum system of universally applicable rules, leaving scope for stricter standards to be defined under domestic law.”<sup>383</sup> To that end, Principle No. 5 discourages military jurisdiction over civilians, except in cases of occupation or martial law in which no other forum is available.<sup>384</sup> Principle No. 8 provides that, “The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.”<sup>385</sup> Principle No. 9 articulates a preference for civilian, rather than military, trials in all cases alleging serious human rights violations.<sup>386</sup> Principle No. 17 underscores the importance of having plenary appellate review

379. See *Martin v. United Kingdom*, App. No. 40426/98, para. 44 (Eur. Ct. H.R. Oct. 24, 2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77661>.

380. See generally PETER ROWE, *THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES* (2006).

381. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity: Issue of the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) [hereinafter Decaux Principles].

382. Special Rapporteur on the Independence of Judges and Lawyers, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, transmitted by Note of the Secretary-General*, U.N. Doc. A/68/285 (Aug. 7, 2013) (by Gabriela Knaul) [hereinafter Knaul Report].

383. Decaux Principles, *supra* note 381, ¶ 10.

384. See *id.* ¶¶ 20–21.

385. *Id.* ¶¶ 29–31.

386. See *id.* ¶¶ 32–35.

of military convictions in civilian courts.<sup>387</sup> And, Principle No. 19 reflects the “international trend towards the gradual abolition of the death penalty” by discouraging its use—and prohibiting it for offenses committed by (1) individuals under the age of 18; (2) pregnant women or mothers of young children; or (3) persons suffering from any mental or intellectual disabilities.<sup>388</sup>

To be sure, the Decaux Principles are an aspirational set of forward-looking ideals, rather than a comprehensive summary of existing international law norms. One could therefore object that, much as a drunk might use a lamppost, they provide support, rather than illumination.<sup>389</sup> But even a modest perusal of more concrete foreign practice provides at least *some* support for these conclusions. As noted above, an ever-increasing number of domestic and international courts are relying upon fair-trial protections in human rights treaties to create comparable constraints upon military jurisdiction—to limit servicemember liability to military offenses and civilian liability to cases of overriding necessity. Although the United States is not a party to these human rights treaties, such emerging jurisprudence certainly appears to bespeak a growing international consensus against the exercise of military jurisdiction in such contexts.

But even if the Decaux Principles are, at best, a species of soft law, they would at least provide specific data points, which the government would presumably have to rebut in order to justify assertions of military jurisdiction inconsistent therewith. And so long as the justification for departing from Article III is the existence of clearly established foreign or international practice of subjecting such offenders and offenses to military jurisdiction, then the assertion of military jurisdiction in such cases would not violate Article III’s requirement of a tenure- and salary-protected judge.<sup>390</sup>

Thus, the point is not that the Decaux Principles would instantly transmogrify into constitutional constraints; far more modestly, they would merely underscore the difficulty the government might encounter in identifying countervailing examples that would support assertions of military jurisdiction.<sup>391</sup> Per the

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387. *See id.* ¶¶ 55–57.

388. *See id.* ¶¶ 61–63.

389. *See, e.g.,* Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. INT’L L. & INT’L REL. 1 (2008).

390. Other constitutional constraints will still be relevant, inasmuch as they apply. Thus, that international law authorizes courts-martial for military offenses does not absolve the government of the need to vindicate whatever rights a military defendant may still possess under the First, Fourth, Fifth, Sixth, and Eighth Amendments. And it should also follow that the government may not sidestep the requirements of Article III’s Treason Clause—that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,” U.S. CONST. art. III, § 3, cl. 1, simply by conducting the trial in a non-Article III military tribunal.

391. In that regard, the Knaul Report, which is based upon a more specific study of individual national judicial systems, largely supports the conclusions reflected in the Decaux Principles. For example, it stressed that “military tribunals should have jurisdiction only over military personnel who commit military offences or breaches of military discipline,” and that “[e]xceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.”

Knaul Report, the burden of justifying the assertion of military jurisdiction “rests with the State.”<sup>392</sup> And if Judge Kavanaugh’s reasoning from *Hamdan II* is followed, “imposing liability on the basis of a violation of ‘international law’ or the ‘law of nations’ or the ‘law of war’ generally must be based on norms firmly grounded in international law.”<sup>393</sup>

If the government could not provide such evidence, then reconceptualizing the military exception as one that turns upon settled international law and practice would yield four visible effects for U.S. military jurisdiction. First, it would compel the conclusion that *Solorio* is wrongly decided—and that, when the civilian courts are otherwise available, the Constitution only permits a departure from Article III for *military* offenses. Second, it would also likely require the invalidation (or at least the dramatic narrowing) of Article 2(a)(10) insofar as it authorizes the military trial of civilian contractors who are serving with or accompanying the armed forces in the field without regard to exigency or necessity. Third, it would likely prevent the government from asserting military commission jurisdiction over nonmilitary offenses framed as purely “domestic,” rather than international, war crimes. Fourth, it would also require the broadening of the Supreme Court’s appellate jurisdiction vis-à-vis CAAF to encompass *all* cases over which CAAF may exercise jurisdiction, whether or not it chose to do so.<sup>394</sup>

In other words, other than the necessary (and long-sought) filling out of the Supreme Court’s appellate jurisdiction over courts-martial, a reconstruction of the military exception to Article III grounded in international law and practice would at first blush largely return U.S. law in the field to the pre-*Solorio* status quo, albeit with a far more satisfying theoretical and analytical explanation for how we got there—and why it will be exceedingly difficult for Congress to expand military jurisdiction any further absent dramatic shifts in foreign and international practice.<sup>395</sup> Difficult questions would undoubtedly continue to arise at the margins,<sup>396</sup> but at least the margins would (finally) be drawn.

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Knaul Report, *supra* note 382, ¶ 89; *see also id.* ¶ 102 (“The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.”). Even then, the Knaul Report offered a series of recommendations for better ensuring the impartiality and fairness of military justice proceedings. *See id.* ¶¶ 93–97.

392. *Id.* ¶ 103.

393. *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238, 1250 n.10 (D.C. Cir. 2012); *see also supra* note 373 (explaining why this aspect of *Hamdan II* survived the en banc decision in *Al Bahlul*).

394. *See supra* note 57 and accompanying text.

395. To that end, such a measure would suggest that the line the Supreme Court drew in 1960—between military jurisdiction over civilians during *peacetime* as opposed to *wartime*—is moot.

396. Such questions often arose under the pre-*Solorio* “service connection” test. *See, e.g., Relford v. Commandant*, 401 U.S. 355 (1971).

## CONCLUSION

Ultimately, the two-part thesis of this Article is relatively modest (especially in proportion to its length): that the relationship between military justice and Article III has increasingly diverged from a single unifying textual or analytical justification; and that international law and practice could provide a coherent, defensible, and perhaps even normatively desirable ground on which to reconceive the military exception to Article III. Given that such a rejigging of existing doctrine would call into question exactly one Supreme Court decision and arguments offered in a pair of solo concurring opinions by federal appellate judges, one may well ask whether the enterprise is really worth it, especially given the unease with which many will approach a constitutional test that turns so heavily on what other nations do and have done.

At the same time, CAAF's July 2012 decision in *Ali* and the D.C. Circuit's impending panel decision in *Al Bahlul* provide a ripe opportunity for reassessing the scope of the military exception—not just because these cases sit right on the margins of that exception, but because the difficulties courts have confronted in these cases at once underscore and derive from the incoherence pervading non-Article III doctrine more generally. Indeed, whether consciously or not, the existing incoherence of the military exception may well have helped to precipitate these expansions—or at the very least the judicial decisions upholding them. And as Chief Justice Roberts eloquently explained in *Stern*:

Although “[i]t may be that it is the obnoxious thing in its mildest and least repulsive form,” we cannot overlook the intrusion: “illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.” We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.<sup>397</sup>

From both a doctrinal and theoretical perspective then, the *Ali* and *Al Bahlul* cases provide an especially propitious opportunity for revisiting the underpinnings of the military exception to Article III and for considering whether American military courts can—and should—be placed on firmer constitutional footing. The answer may well be no—but if so, that result should come after reasoned deliberation and not just because of the weight of history and stare decisis.

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397. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (alteration in original) (citation omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).