MILITARY COURTS AND THE ALL WRITS ACT

Stephen I. Vladeck

WHEN IT COMES TO THE ROLE of the federal courts in the federal system, few statutes play as significant a role – or are as routinely misunderstood – as the All Writs Act. The Act, which traces its origins to sections 13 and 14 of the Judiciary Act of 1789, empowers federal courts to issue all writs that are "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1] Thus, it is the All Writs Act that rounds Article III's sharp jurisdictional edges by investing courts of limited subject-matter jurisdiction with a species of common-law authority; as Justice Stevens has explained, "The Act was, and is, necessary because federal courts are courts of limited jurisdiction having only those powers expressly granted by Congress, and the statute provides these courts with the procedural tools – the various historic common-law writs – necessary for them to exercise their limited jurisdiction."[2]

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[1] Judiciary Act of 1789, ch. 20, §§ 13-14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 1651).

[2] United States v. N.Y. Tel. Co., 434 U.S. 159, 186-87 (1977) (Stevens, J., dissenting in part) (footnotes omitted).

Although the All Writs Act applies on its terms to "all courts established by Act of Congress," two recent opinions in high-profile military justice cases have rejected the power of non-Article III military courts to grant relief that is routinely available from civilian courts under the All Writs Act. In the Bradley Manning court-martial proceedings, for example, the highest court in the military justice system – the Court of Appeals for the Armed Forces (CAAF) – held that it lacked the authority under the All Writs Act to grant extraordinary relief to protect the First Amendment right of public access to criminal trials identified by the Supreme Court in *Richmond Newspapers* and its progeny.[3] Similar reasoning was also offered by one of the judges of the Court of Military Commission Review (CMCR), in explaining why the CMCR lacked jurisdiction to provide analogous relief in the context of the military commission trial of the 9/11 defendants.[4]

It is easy enough to identify the analytical errors common to these two opinions, and I do so in Part II. But as Part III explains, there is more behind such analysis than a mere misreading of precedent. Ultimately, both have at their core misplaced and outdated understandings of the military justice system's exceptionalism and relationship to the civilian courts. The flawed understanding common to these two opinions has the ironic – and surely unintended – effect of *weakening* arguments for a separate system of military justice insofar as such crabbed understandings of the All Writs Act only bolster the need for increased Article III oversight of the military justice system through actions for collateral review.

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[3] Ctr. for Const'l Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013); *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *see also* ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997) (applying *Richmond Newspapers* to court-martial proceedings).

[4] *See* ACLU v. United States, No. 13-003, slip op. at 2-5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (Silliman, J., concurring); The Miami Herald v. United States, No. 13-002, slip op. at 3-5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (Silliman, J., concurring). The CMCR is the intermediate military appellate court established by Congress in the Military Commissions Act of 2006, which hears authorized appeals from military commission trial court proceedings (and is itself reviewable in some cases by the D.C. Circuit). *See* 10 U.S.C. §§ 950d, 950f, 950g.

I.
THE ALL WRITS ACT AND THE MILITARY

It is familiar doctrine that the All Writs Act does not create jurisdiction; it merely empowers courts to issue those extraordinary writs necessary to protect the jurisdiction that *other* laws confer.[5] Although this distinction is central to the jurisprudence of the All Writs Act, it is not as significant as it might at first seem. Consider one of the most common examples of All Writs Act authority: Federal appeals courts may issue writs of mandamus to confine lower courts to the lawful exercise of their jurisdiction *at any point* in the lower-court proceedings, even though the circuits' appellate jurisdiction over district courts is carefully circumscribed, and generally only available after a "final" judgment.[6] Because the appellate courts will *eventually* have the power to review the lower court's actions, the All Writs Act authorizes what is effectively (if not formally) appellate review at an interlocutory stage in order to correct those errors that would otherwise not receive meaningful appellate review – typically because the alleged injury caused by such errors would be irreparable after the fact. In this regard, although the All Writs Act does not create jurisdiction, it does promote the vindication of jurisdiction that already exists at points other than those expressly provided for by statute – to protect the court's "potential" jurisdiction, as a 1966 Supreme Court decision put it,[7] or to vindicate jurisdiction that it already exercised.

A. The All Writs Act and Non-Article III Courts

Because the All Writs Act applies in its terms to "*all* courts established by Act of Congress," examples of non-Article III federal courts (*e.g.*, the Tax Court and bankruptcy courts) relying upon the authority it provides in appropriate cases are legion. And whereas most

[5] *See, e.g.*, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32-34 (2002).

[6] *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25-31 (1943) (describing in detail the relationship between mandamus and the final judgment rule).

[7] FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966).

Article III and non-Article III federal courts only exercise limited subject-matter jurisdiction, even non-Article III federal territorial courts – which are courts of *general* jurisdiction, and therefore possess common-law powers – have the authority to issue extraordinary writs under § 1651(a).[8]

Thus, from shortly after the modern military justice system was established in 1950, military courts have recognized their authority to utilize the All Writs Act in comparable fashion to their civilian counterparts.[9] And as early as 1969, the Supreme Court ratified that understanding. As Justice Harlan wrote for the Court in *Noyd v. Bond*, "we do not believe that there can be any doubt as to the power of the Court of Military Appeals [under the All Writs Act] to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court."[10]

B. Clinton v. Goldsmith

The next sentence of Justice Harlan's opinion in *Noyd* was prophetic, for, as he explained, "A different question would . . . arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes."[11] Three decades later, that question was presented in *Clinton v. Goldsmith*, in which CAAF relied upon the All Writs Act to enjoin the Air Force from the purely administrative action of dropping a servicemember from its rolls.[12]

On the government's appeal, the Supreme Court unanimously reversed, holding that CAAF's exercise of authority under the All Writs Act was *not* "in aid of its jurisdiction." As Justice Souter explained,

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[8] *See, e.g.*, Magnus v. United States, 11 A.3d 237, 245 (D.C. 2011); *In re* Richards, 213 F.3d 773, 780-81 (3d Cir. 2000); Cox v. West, 149 F.3d 1360, 1363 (Fed. Cir. 1998); Apusento Garden (Guam), Inc. v. Super. Ct. of Guam, 94 F.3d 1346, 1349 (9th Cir. 1996).

[9] *See, e.g.*, United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

[10] Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969).

[11] *Id.*

[12] *See* Goldsmith v. Clinton, 48 M.J. 84 (C.A.A.F. 1998), *rev'd*, 526 U.S. 529 (1999).

> Since the Air Force's action to drop respondent from the rolls was an executive action, not a "findin[g]" or "sentence" that was (or could have been) imposed in a court-martial proceeding, the elimination of Goldsmith from the rolls appears straightforwardly to have been beyond the CAAF's jurisdiction to review and hence beyond the "aid" of the All Writs Act in reviewing it.[13]

Goldsmith was easily distinguishable from a case in which "a military authority attempted to alter a judgment by revising a court-martial finding and sentence to increase the punishment . . . . In such a case, as the Government concedes, the All Writs power would allow the appellate court to compel adherence to its own judgment."[14] Thus, *Goldsmith* simply reiterated what the Court had already made clear: "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."[15]

C. Denedo v. United States

In one sense, *Goldsmith* might therefore have been understood as nothing more than the Supreme Court bringing the military courts back into line with its All Writs Act jurisprudence. The question *Goldsmith* implicitly raised, but did not answer, was whether the military courts might have even *less* authority under the Act than civilian courts. That question remained open for nearly a decade, until the Supreme Court granted certiorari in *Denedo v. United States* to review a divided CAAF decision over the power of the military courts to issue post-conviction writs of error *coram nobis*.[16]

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[13] 526 U.S. at 535 (alterations in original; citations and footnote omitted).

[14] *Id.*

[15] Pa. Bureau of Corrs. v. U.S. Marshal's Serv., 474 U.S. 34, 43 (1985).

[16] *See* Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009). Technically, since Denedo sought such relief from an appellate court, he was pursuing a writ of error *coram vobis* – a distinction that, for these purposes, is without a difference.

Jacob Denedo was a non-citizen former serviceman whom the government sought to deport in light of his court-martial conviction and resulting dishonorable discharge. Denedo sought to challenge his conviction on the ground that he received ineffective assistance of counsel, a claim ordinarily pursued through a habeas petition. But because Denedo had already served his sentence, he was no longer "in custody" for purposes of the habeas statute.

In the civilian courts, such claims for post-release relief are usually pursued as petitions for writs of error *coram nobis* under the All Writs Act, as sanctioned by *United States v. Morgan*.[17] The question in *Denedo* was whether, after and in light of *Goldsmith*, the military courts had the same power to issue such relief as their civilian counterparts.

Writing for a 5-4 Court, Justice Kennedy answered that question in the affirmative: "Because [Denedo's] request for *coram nobis* is simply a further 'step in [his] criminal' appeal, the [military appellate court's] jurisdiction to issue the writ derives from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review. . . ."[18] *Goldsmith* was distinguishable, in other words, because the All Writs Act was being used in Denedo's case merely in furtherance of the appellate jurisdiction that the military courts already possessed over Denedo's court-martial – to revise the judgment below.

In his dissent, Chief Justice Roberts suggested that the flaw in the majority's analysis was its assumption that the authority of military courts should be coextensive with that of their civilian counterparts. In fact, as he wrote, "The military courts are markedly different. They are Article I courts whose jurisdiction is precisely limited at every turn."[19] Thus, although the Chief Justice also offered a contrary analysis of the relevant jurisdictional provisions in the UCMJ,[20]

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[17] 346 U.S. 502 (1954).

[18] *Denedo*, 556 U.S. at 914 (second alteration in original; citations omitted).

[19] *Id.* at 918 (Roberts, C.J., dissenting).

[20] *See id.* at 923-25. The Chief Justice's statutory argument focused on Articles 73 and 76 of the UCMJ, 10 U.S.C. §§ 873, 876. In his view, Article 73, which specifies

the unquestioned thrust of his opinion was the idea that the military is different: "military justice is a rough form of justice," and so jurisdictional formalities should be enforced even more vigorously against military courts than against all other federal tribunals.[21]

In that regard, then, the true significance of *Denedo* is perhaps best captured toward the end of Justice Kennedy's majority opinion: "[T]he jurisdiction and the responsibility of military courts to reexamine judgments in rare cases where a fundamental flaw is alleged and other judicial processes for correction are unavailable are consistent with the powers Congress has granted those courts under Article I and with the system Congress has designed."[22] That is to say, insofar as Congress has increasingly invested the military justice system with self-supervisory power, an essential attribute of that power is the ability to cure those defects that would otherwise have to be resolved via potentially invasive collateral review by the civilian courts. In other words, and despite the government's impassioned plea to the contrary, the potential availability of collateral review by civilian courts backstops military jurisdiction as a matter of last resort, rather than constraining it in the first instance. For All Writs

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the procedures for a petition for a new trial, provides the exclusive means for pursuing post-conviction review within the military justice system – a conclusion supported by Article 76, which deals with the "finality" of court-martial judgments.

The Chief Justice's reliance on Article 76 is belied by the Court's own jurisprudence, which had already established that, as in the civilian system, the "finality" of a military conviction does not create a jurisdictional bar to collateral review thereof. *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 749 (1975). The same flaw dooms his reading of Article 73, since, in the civilian courts, new-trial procedures are also not generally understood to displace collateral post-conviction remedies; they merely must be exhausted before collateral relief can usually be pursued. Narrower review in the military system is nevertheless permissible, the Chief Justice's dissent concluded, because "You're in the Army now." *Denedo*, 556 U.S. at 924 (Roberts, C.J., dissenting).

[21] *Denedo*, 556 U.S. at 918 (Roberts, C.J., dissenting) (quoting Reid v. Covert, 354 U.S. 1, 35-36 (1957) (plurality opinion)). *But see* Loving v. United States, 68 M.J. 1, 28 n.11 (C.A.A.F. 2009) (Ryan, J., dissenting) (disagreeing with the "rough form of justice" mentality).

[22] *Denedo*, 556 U.S. at 917.

Act purposes, at least, military courts should have the same authorities as their civilian counterparts.

II.
BRADLEY MANNING AND THE 9/11 MILITARY COMMISSION

Denedo therefore should have settled whether the scope of relief available under the All Writs Act differs as between military and civilian courts. And yet, opinions in two recent, high-profile cases not only appear to be more consistent with the *Denedo* dissent than with the majority, but also portend a far more dependent relationship between military and civilian courts than that envisaged by Justice Kennedy.

A. CAAF's Decision in the Manning Court-Martial

For decades, the Supreme Court has recognized that the Constitution protects two different rights regarding the public nature of judicial proceedings: a First Amendment right of access on the part of members of the public and the news media, and a Sixth Amendment right to a public trial on the part of criminal defendants.[23] Whether or not these rights are coextensive,[24] longstanding CAAF precedent holds that both protections attach not only to all civilian criminal proceedings, but to military criminal proceedings, as well.[25]

As importantly, because these rights arise out of the judicial proceedings – and not their outcome – their abridgement cannot be vindicated on post-conviction appeal. Thus, when a trial judge improperly restricts either of these rights, such a ruling requires interlocutory appellate intervention – through mandamus, if no other

[23] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (First Amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (same); *In re* Oliver, 333 U.S. 257 (1948) (Sixth Amendment).

[24] *See* Presley v. Georgia, 558 U.S. 209, 213 (2010).

[25] *See* ABC, Inc. v. Powell, 47 M.J. 363, 365 (C.A.A.F. 1997).

vehicle is available – and therefore by dint of the All Writs Act.[26]

Nevertheless, when a coalition of public interest groups, journalists, and others sought to use the All Writs Act to challenge categorical closures of various of the pre-trial proceedings in the Bradley Manning court-martial (in which the accused was tried for his role in leaking thousands of classified documents to WikiLeaks), CAAF held that it lacked jurisdiction to issue the requested relief. Writing for a 3-2 majority, Judge Stucky observed that the critical consideration was the fact that the petitioners were not parties entitled to invoke the appellate jurisdiction of the military courts – and that the accused (who *was* so entitled) had not joined in their request for relief.[27] Thus, CAAF distinguished its earlier decision in *ABC*, which had granted such relief to media organizations, by noting that (1) it predated *Goldsmith* (which did not compel a contrary result, but did call into question the scope of the All Writs Act); and (2) in any event, "We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief – expedited access to certain documents – that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial."[28]

Dissenting, Chief Judge Baker pointed out the obvious flaw in Judge Stucky's reasoning – that "the writ before this Court appeals a specific ruling of a specific Rule for Courts-Martial in a specific and ongoing court-martial. . . . Appellate review of military judges' rulings in courts-martial is at the core of this Court's jurisdiction. That is what we do."[29] Indeed, the majority's crabbed reading of

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[26] *See, e.g.*, *In re* Application of the United States, 707 F.3d 283, 288-89 (4th Cir. 2013); *In re* Boston Herald, Inc., 321 F.3d 174, 177 (1st Cir. 2003).

[27] *See* Ctr. for Const'l Rights v. United States, 72 M.J. 126, 129 (C.A.A.F. 2013).

[28] *Id*. There is, in fact, a vibrant academic debate over whether "strangers" to judicial proceedings are entitled to obtain extraordinary relief as against those proceedings. But there's little question, as the *Richmond Newspapers* line of cases demonstrates, that members of the public and press are not in fact "strangers" with regard to First Amendment challenges to the openness of trial proceedings, and therefore have standing to pursue such relief (at least in the civilian courts).

[29] *CCR*, 72 M.J. at 130-31 (Baker, C.J., dissenting).

Article 67 of the UCMJ, which provides that CAAF "may act only with respect to the findings and sentence as approved by the convening authority," was not just inconsistent with *Denedo*, but would also apply with equal force even when the accused *was* pursuing similar relief (which he was not in *CCR*).

In any event, Chief Judge Baker explained, the whole point of *Richmond Newspapers* is to recognize the First Amendment right of access held by *non*-parties to criminal proceedings – a right that would be impossible to vindicate without extraordinary relief. As he concluded, insofar as ensuring compliance with the First and Sixth Amendments was part of CAAF's responsibility on post-conviction review of a court-martial, the All Writs Act provided the authority to intercede at an interlocutory stage where such intervention was necessary.[30]

More than just highlighting the majority's lack of fealty to precedent, Chief Judge Baker's dissent also stressed the perverse consequences that the decision would yield – that the same litigants would be forced into the Article III system, to pursue the same relief collaterally. As he explained, *first*, the military judge will face the prospect that an unknown collateral court will have the final say on trial procedures – including access to the trial and "when and whether any documents, including evidence, are disclosed to the parties or to the public," thereby placing the military courts in a necessarily subservient role to their Article III civilian counterparts. *Second*, the collateral court's interlocutory decision will itself be subject to post-conviction review by the military courts, raising a difficult question concerning whether the intermediate military

[30] *See id.* at 131-32. Indeed, just three months after *CCR*, CAAF held – again, by a 3-2 vote – that it *did* have the power to grant relief under the All Writs Act when a named victim in a sexual assault prosecution sought a writ of mandamus to challenge her lawyer's exclusion from pre-trial evidentiary proceedings. *See* LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013). The *LRM* majority "distinguished" *CCR* on the ground that, "unlike 'strangers to the courts-martial,' LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence . . . ." *Id.* at 368; *see also id.* ("There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege.").

appeals courts have the power to disagree with civilian Article III courts. *Third*, he warned, "collateral courts might exercise comity and wisely avoid the prospect of interfering in an ongoing court-martial," thereby frustrating the purpose of the First Amendment right articulated in *Richmond Newspapers*.[31]

And yet, because of a quirk in the Supreme Court's appellate jurisdiction vis-à-vis CAAF, CAAF's decision was not subject to review via certiorari.[32] Instead, the focus shifted, as Chief Judge Baker feared, to an Article III district court, which found itself stuck between the First Amendment's constitutional rock and comity's prudential hard place.[33]

B. Judge Silliman's Concurrence in the 9/11 Trial

CAAF's decision in the Manning case was the second significant opinion to so construe the All Writs Act in less than a month. Just three weeks earlier, the Court of Military Commission Review had summarily denied similar motions for extraordinary relief in the context of the Guantánamo military commission trial of the 9/11 defendants, where some of the same civil liberties groups and media organizations sought to object to the protective order governing the trial on First Amendment grounds. Although the majority held that such claims were not yet ripe, Judge Silliman's concurrence argued that, ripeness aside, the court lacked jurisdiction.[34]

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[31] *See CCR*, 72 M.J. at 132.

[32] Under 28 U.S.C. § 1259 and 10 U.S.C. § 867(c), the Supreme Court may only exercise certiorari to review specific decisions by CAAF – not including decisions, such as *CCR*, in which CAAF concludes that it lacks jurisdiction to reach the merits. This defect does not prevent the Supreme Court from issuing its own extraordinary writ to review a decision by CAAF, *see, e.g.*, U.S. Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945), but it has been decades since the last time the Court so acted.

[33] *See, e.g.*, Ctr. for Const'l Rights v. Lind, 954 F. Supp. 2d 389 (D. Md. 2013).

[34] *See* ACLU v. United States, No. 13-003, slip op. at 2-5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (Silliman, J., concurring); The Miami Herald v. United States, No. 13-002, slip op. at 3-5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (Silliman, J., concurring).

Unlike CAAF's analysis, Judge Silliman's logic was Guantánamo-specific, seizing upon the remaining jurisdiction-stripping provision of the Military Commissions Act of 2006:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States . . . as an enemy combatant . . . .[35]

Because the D.C. Circuit (which supervises the CMCR) had already upheld the constitutionality of this provision (albeit in a materially different context),[36] Judge Silliman would have held that it also divested the CMCR of jurisdiction to issue an extraordinary writ relating to the trial of a Guantánamo detainee – the very relief sought before the CMCR.[37]

Two distinct issues arise from Judge Silliman's analysis: *First*, and ironically, it rests on the very reading of the All Writs Act that the Supreme Court has time and again repudiated – that the Act *creates* jurisdiction. After all, Judge Silliman's reading of § 2241(e)(2) would also divest the CMCR of *post-conviction* appellate jurisdiction – even though that jurisdiction is provided by the same statute that created § 2241(e)(2). Insofar as § 2241(e)(2) does *not* affect the CMCR's appellate jurisdiction, then, it must follow that "any other action" under § 2241(e)(2) does *not* include exercises of appellate, as opposed to original, jurisdiction. And, as noted above, requests for writs of mandamus to confine lower courts to the lawful exercise of their jurisdiction are exactly that – they are not freestanding assertions of jurisdiction, but rather a means of perfecting appellate

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[35] 28 U.S.C. § 2241(e)(2).

[36] *See* Al-Zahrani v. Rodriguez, 669 F.3d 315 (D.C. Cir. 2012) (holding that § 2241(e)(2) validly divests the federal courts of jurisdiction over *Bivens* claims brought by Guantánamo detainees); *see also* Kiyemba v. Obama, 561 F.3d 509, 512 & n.1 (D.C. Cir. 2009).

[37] *See ACLU*, slip op. at 4-5 (Silliman, J., concurring); *Miami Herald*, slip op. at 5 (Silliman, J., concurring).

jurisdiction provided by other statutes. Put another way, so long as a writ of mandamus along the lines sought before the CMCR is "in aid of" the CMCR's post-conviction appellate jurisdiction, it can only fall within § 2241(e)(2)'s bar if *all* of the CMCR's appellate jurisdiction is also so affected – a conclusion that would raise a bevy of serious constitutional questions about § 2241(e)(2).

Second, and related, Judge Silliman wholly neglected the extent to which Congress in 2009 had repealed a far-more-specific jurisdiction-stripping provision that might well have applied to the relief sought before the CMCR. That provision, which had been codified at 10 U.S.C. § 950j(b), barred review of provided that "any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission under this chapter."[38]

Although one could still have made the same argument as that outlined above – *i.e.*, that § 950j(b) did not also affect applications for writs of mandamus in aid of the appellate jurisdiction provided by the MCA – it certainly would have been more difficult given the specific focus on "any claim or cause of action whatsoever" (as opposed to § 2241(e)(2)'s more general "any other action" phraseology). But the Military Commissions Act of 2009 repealed this section without comment, a move that, even under ordinary principles of statutory interpretation, would ordinarily be given at least *some* meaning.

Finally, even if the above arguments are not dispositive in their own right, they are backstopped by another point neglected by Judge Silliman – the constitutional avoidance canon, and the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[39] Given that § 2241(e)(2) may also bar collateral actions in Article III district courts, a petition for extraordinary relief of the kind pursued before the CMCR may be the only available means of vindicating the First Amendment right of public access. So long as there is a plausible alternative reading of § 2241(e)(2), then, that reading should have governed.

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[38] 10 U.S.C. § 950j(b) (2006).

[39] Webster v. Doe, 486 U.S. 592, 603 (1988) (citation omitted).

III.
THE PARADOX OF CONTEMPORARY MILITARY JUSTICE

Separate from the analytical shortcomings of these two opinions, their larger view of the appropriate role of military vs. civilian courts bespeaks a troubling step back from decades of evolution in U.S. military justice. It is now settled that recent years have witnessed a marked "civilianization" of the military justice system – shifts in U.S. military law to incorporate and otherwise observe most of the procedural and substantive safeguards typical of civilian criminal proceedings.[40] And whether intentionally or not, this trend has had at its core not just procedural and substantive alignment, but *structural* harmonization of the military justice system with our ordinary courts – especially the codification of civilian appellate oversight of the court-martial system, and, later, Supreme Court supervision via certiorari.

Reasonable people will surely dispute the overall fairness of the military justice system today, especially as compared to civilian prosecutions. At a minimum, though, these advancements have dramatically increased the independence of the military justice system – both by eliminating at least some of the substantive objections to military convictions and by further empowering the military courts to resolve those challenges that remain, rather than leaving such claims for collateral Article III review. As *Denedo* underscores, the court-martial system has become a self-contained judicial apparatus – whether as cause or effect (or both) of the perceived increase in the protections that military defendants have today compared to their predecessors.

But the All Writs Act plays a vital role in preserving such independence. Under Judge Stucky's and Judge Silliman's logic, the only way to vindicate claims like the First Amendment access rights at

[40] *See, e.g.*, Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL LAW IN AMERICA 287, 287-88 & 303 n.7 (John T. Parry & Song Richardson eds., 2013).

issue in the Manning court-martial and the 9/11 military commission is through potentially invasive collateral review in the Article III courts. Chief Judge Baker's dissent identified several of the more pernicious consequences of such an arrangement, but one more bears mention: It will undercut one of the core arguments in *favor* of a separate military justice system – that, because of the differences inherent in needing to discipline our own servicemembers, courts-martial can and should be allowed to function *separately* from the civilian courts.

Of course, this is not to say that Article III oversight is not important; it is, but as a *backstop*. What the opinions in the Manning and 9/11 cases portend is increased Article III intervention in (and interference with) ongoing trial proceedings, not just on these issues, but on any claim where interlocutory appellate relief is necessary and no statute expressly provides for such review within the military justice system. Chief Judge Baker was at pains in his *CCR* dissent to suggest – rightly – that such a result cannot possibly be what Congress intended. It would also only reinforce the idea that military justice truly is a "rough form of justice,"[41] and that military courts are *not* generally capable of vindicating constitutional rights.

GJB

[41] Reid v. Covert, 354 U.S. 1, 35-36 (1957) (plurality opinion).

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MILITARY COURTS AND ARTICLE III

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Few areas of the Supreme Court's federal courts jurisprudence raise as many questions—and as few coherent answers—as the permissible scope of Congress's power to invest the "judicial power of the United States" in federal[1] tribunals unencumbered by Article III's jurisdictional constraints,[2] and staffed by judges who lack Article III's tenure and salary protections.[3] Historically, the Court has identified three categories in which such "non-Article III" federal adjudication is permissible: all adjudication by federal "territorial" courts;[4] criminal prosecutions before military judges;[5] and resolution of "public rights" disputes by non-Article

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Although the views expressed herein are mine alone, readers should know that I was co-counsel to the Petitioner in *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), and co-authored an amicus brief in support of the appellant in *Al Bahlul* v. *United States*, No. 11-1324 (D.C. Cir. argued Sept. 30, 2013) (en banc), both of which figure prominently herein.

1. The ability of state courts to entertain (most) federal questions was the linchpin of the Madisonian Compromise. *See, e.g.*, Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39.

2. *See* U.S. CONST. art. III, § 2, cl. 1.

3. *See id.* § 1.

4. *See, e.g.*, Palmore v. United States, 411 U.S. 389 (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); 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(a). The U.S. District Court for the District of Puerto Rico is an Article III court, *see* 28 U.S.C. § 119, and there is no "federal" court in American Samoa, *see* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 383–85 (D.C. Cir. 1987).

5. Along with courts-martial (to try U.S. personnel) and military commissions (to try war crimes by enemy belligerents), this category also includes "occupation" courts, as discussed in

III federal courts or federal administrative agencies.[6] But whereas the Court will revisit the permissible scope of the "public rights" exception to Article III during its current Term,[7] it has been decades since it has reconsidered either the territorial or military exceptions. The same period has seen a concomitant decline in academic attention to these categories,[8] perhaps reflecting widespread agreement with the sentiment expressed by then-Justice Rehnquist in 1982—that these are "tidy" exceptions to Article III, reexamination of which is therefore unwarranted.[9]

Even if the territorial exception could properly be described as "tidy,"[10] though, the military exception is anything but—and has been for some time. For starters, there has never been a truly unitary exception to Article III for "military" courts. Instead, in different cases, the Court has articulated different philosophical and legal rationales to justify three different forms of military adjudication: courts-martial, military commissions, and occupation courts. The text of the Constitution only

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more detail below. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341 (1952); *cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

6. 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 is exclusively public rights disputes—such cases may also be resolved by U.S. bankruptcy courts and administrative adjudicators. *See generally* Crowell v. Benson, 285 U.S. 22 (1932).

7. *See* Exec. Benefits Ins. Agency, Inc. v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013) (No. 12-1200) (argued Jan. 14, 2014); *see also* Stern v. Marshall, 131 S. Ct. 2594 (2011).

8. 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., HART & 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).

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

10. Under *Palmore* v. *United States*, 411 U.S. 389 (1973), the territorial exception is simply a matter of congressional discretion: Congress is free to create non-Article III federal courts of general or specific jurisdiction in any of the six federal territories. And other than minor alterations to the structure of Article III appellate review of territorial courts, 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 statutory revisions to the jurisdiction of the Guam and CNMI 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.).

complicates matters further, with the Court purporting to rely upon provisions that can't possibly bear such weight. How, for example, can an express exception to the Grand Jury Indictment Clause of the Fifth Amendment[11] justify an *in pari materia* (but atextual) exception not just to the petit jury protections of Article III and the Sixth Amendment, but to Article III itself? More basically, if the Founders all agreed that the Constitution contemplated *some* form of military justice, how can the constitutional justification come only from the Bill of Rights—ratified three years after the Constitution entered into force? The Court has assumed these points since 1858,[12] but has never explained *why*. And wholly apart from its philosophical and textual shortcomings, the Court's defense of the military exception has utterly failed to account for the seismic changes to the nature and structure of American military justice after and in light of World War II—and the fundamental shift from entirely non-judicial disciplinary processes to a self-contained, three-level system of courts supervised by independent civilian judges.[13]

As untidy as the military exception was at the time of the *Northern Pipeline* decision, it has only become that much more so in the ensuing decades, thanks to a trio of subtle but dramatic expansions in the scope of military jurisdiction to encompass offenses and offenders not previously thought to be amenable to military, rather than civilian, trials: (1) the Supreme Court's 1987 holding that Congress's power to subject servicemembers to court-martial for any offense, and not just those that are "service-connected";[14] (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

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 117.

12. *See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

13. *See* Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVE 163 (Fionnuala D. Ní Aoláin & Oren Gross eds., 2013).

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

operation";[15] and (3) the Military Commissions Act of 2006, which authorizes military commissions to try war crimes not recognized by international law, so long as they are established violations of the "U.S. common law of war."[16] Given these expansions, the litigation that they have provoked, and the tension they have placed upon the already untidy military exception, the time has long since passed for a reassessment of where and how military courts fit into our understanding of Article III—and the exceptions thereto.[17]

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 demonstrate how the military exception has increasingly become untethered from its textual and philosophical moorings. By focusing on the quiet expansions of both court-martial and military commission jurisdiction in recent years, Part II concludes not just that these expansions cannot be reconciled with the underlying justifications for the military exception, but that they also illuminate a series of deeper analytical puzzles besetting the military exception with which cases upholding it have never truly grappled.

Part III pivots to the Supreme Court's jurisprudence regarding other forms of non-Article III federal adjudication, exploring whether the expansions outlined in Part II might instead be reconciled with broader trends in the Court's approach in this field. As Part III demonstrates, however, the rationales ultimately seized upon by the Supreme Court in

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

16. *See, e.g.*, United States v. Hamdan, 696 F.3d 1238, 1246 n.6 (D.C. Cir. 2012) (solo opinion of Kavanaugh, J.). *See generally* Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL LAW IN AMERICA 287 (John T. Parry & Song Richardson eds., 2013).

17. Although it is beyond the scope of this article, it is also worth noting the serious questions that have arisen from the controversy surrounding perceived abuses of the court-martial system in sexual assault cases. *See, e.g.*, Barbara Salazar Torreon, Cong. Res. Serv., Military Sexual Assault: Chronology of Activity in Congress and Related Resources, Report No. R43168, July 30, 2013, *available at* http://www.fas.org/sgp/crs/natsec/R43168.pdf. Responding to these questions, Secretary of Defense Hagel has established a Military Justice Review Group, chaired by Senior CAAF Judge Andrew Effron, and directed to recommend potential statutory changes by October 20, 2014, and changes to the *Manual for Courts-Martial* by April 20, 2015. Eugene R. Fidell, *Military Justice Review Group*, GLOBAL MIL. JUST. REFORM, Mar. 12, 2014, 2:07 p.m., http://globalmjreform.blogspot.com/2014/03/military-justice-review-group.html.

defending the constitutionality of other non-Article III adjudication prove either too little or too much as applied not only to these recent expansions in military jurisdiction, but to the military exception, writ large. The military exception, Part III concludes, has not just diverged from *its* foundations; it has increasingly diverged from any coherent theory of non-Article III adjudication.

If the military exception cannot be grounded solely in textual or philosophical considerations, as Part II demonstrates, or in other justifications for non-Article III adjudication, as Part III explains, then the question becomes whether *any* satisfying theory exists that at once supports and circumscribes the military justice system as a whole. Of course, the answer may well be no. But Part IV offers one possibility—a theory grounded not in the elusive, multifactor balancing test the Court has deployed in its public rights cases, but in international law. Indeed, one coherent way to explain the military exception to Article III—and the way it has been understood at times in the Court's military jurisdiction cases—is by loose analogy to the Supreme Court's venerable decision in *Missouri* v. *Holland*[18] and to situations in which the United States cedes some of its judicial authority to multinational or international tribunals. Under this view, departures from Article III are constitutionally permissible when specifically grounded in *super*national bodies of law, *e.g.*, the law of nations. Thus, Part IV suggests, a potentially more coherent approach to the military exception would view it as encompassing those cases in which clear norms of international law support subjecting the offender to trial for the charged offense by a domestic military court.

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 not just because Congress had the power to

18. *See* Missouri v. Holland, 252 U.S. 416 (1920) (holding that Congress, in enforcing a treaty, may exercise regulatory powers not otherwise enumerated in Article I).

Although the Supreme Court is set to revisit *Missouri* during the October 2013 Term, the question presented in *Bond* v. *United States*, No. 12-158, is not *whether* Congress may exercise powers beyond those enumerated in Article I when implementing a treaty, but to what it extent it may do so. An analogous question, as Part IV explains, should be the key to understanding the scope of the military exception to Article III going forward.

authorize such trials under Article I's Define and Punish Clause,[19] but because, as *Quirin* held, 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*."[20] In other words, military commissions did not have to comply with Article III entirely because of their support in *international*, rather than domestic, law. To be sure, the current proceedings before the en banc D.C. Circuit in the Guantánamo military commission cases have tested *Quirin*'s limits in this regard,[21] but for the time being, international law continues to operate as the principal jurisdictional constraint on the Guantánamo commissions.

After unpacking what an international law-based view of the military exception would look like, Part IV outlines how grounding the military exception in international law might thereby reorient the shape of both court-martial and military commission jurisdiction going forward. As it concludes, not only would such an approach largely resolve the puzzles plaguing contemporary understandings of the military exception, but it would 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."[22]

I. THE MILITARY EXCEPTION TO ARTICLE III: ORIGINS AND CASE LAW

American military justice pre-dates the Constitution. In 1775, the Second Continental Congress codified the first Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses.[23] The 1775 Articles were reaffirmed (as amended) in 1776 and

19. *See* U.S. CONST. art. I, § 8, cl. 10 (empowering Congress "To define and punish . . . Offences against the Law of Nations").

20. *Ex parte* Quirin, 317 U.S. 1, 41 (1942) (emphasis added).

21. *See, e.g.*, Hamdan v. United States, 696 F.3d 1238, 1246 n.6 (D.C. Cir. 2012) (solo opinion of Kavanaugh, J.) (suggesting that Congress may prospectively subject violations of the *domestic* common law of war to trial by military commission, without addressing the Article III questions such an approach would raise).

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

23. *See* 3 JOURNALS OF THE CONTINENTAL CONGRESS 378, 378 (Worthington Chauncey Ford ed., 1905) (entry for Nov. 28, 1775) (creating rules for the "Regulation of the Navy"); 2 *id.* at 111, 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,

1786.[24] And there was little question at the Constitutional Convention that such authority would be preserved under the new Constitution—*i.e.*, that there would be a federal military justice system separate and apart from Article III.[25] What is far more opaque from Founding-era sources was the shape that system would take—or whether such a departure from Article III only encompassed the exceedingly narrow jurisdiction of eighteenth-century military discipline.[26]

Part of the reason for such opacity can be directly tied to the fundamental difference in Founding-era understandings of military justice. Eighteenth- (and nineteenth-)century American military justice looked very little like the courts-martial of today: courts-martial were more administrative than judicial (indeed, the title of military "judge" wasn't created by Congress until 1968);[27] there was no appellate review (and judicial review through a collateral challenge was only available to attack the military's assertion of jurisdiction);[28] and the inconsistent (and, at times, Spartan) procedures were subsequently decried by Justice Black

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1789, ch. 25, § 4, 1 Stat. 95; *see also* Act of July 1, 1797, ch. 7, § 8, 1 Stat. 523, 525 (applying the 1775 Articles of War to sailors and marines).

24. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953–75 (2d ed. Beard Books 2000) (1896); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 330 (2005).

25. 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.*, Collins, *supra* note 1.

26. 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* (pt. 1), 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)).

27. *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*, 207 MIL. L. REV. 1, 79–80 (2011) (summarizing the significance of the 1968 Act).

28. *See, e.g.*, Hiatt v. Brown, 339 U.S. 103, 110–11 (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 (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 (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 review available for civilian convictions—which, at that time, was effectively *de novo*).

as providing little more than a "rough form of justice."[29] Thus, as Professor Frederick Bernays Wiener wrote, "we must be circumspect in examining the Continental articles of war when seeking to ascertain the constitutional rights of the officers and soldiers subject thereto."[30] 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 authorized in military cases.

Instead, it is far more useful to study the evolving philosophical and constitutional justifications that would later emerge for such a separate system of federal judicial review. This Part turns to such an examination after providing an overview of the structure and scope of U.S. military courts today—in order to illuminate the points of departure from Article III and the decisive expansions in both the scope and structure of military adjudication as compared to its humble pre-constitutional origins.

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 its civilian cousin over the past 64 years,[31] at least in criminal cases (the military courts generally lack the power to entertain non-criminal proceedings).[32] First enacted in 1950,[33] the Uniform Code of Military Justice (UCMJ) today recognizes three types of court-martial proceedings:[34] A "summary" court-

29. *See, e.g.*, 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.").

30. Wiener, *supra* note 26, at 7–8 (footnote omitted).

31. *See, e.g.*, United States v. Denedo, 556 U.S. 904, 910–16 (2009); Loving v. United States, 68 M.J. 1, 28 n.11 (C.A.A.F. 2009) (Ryan, J., dissenting). *See generally* Vladeck, *supra* note 13 (documenting the normalization—and "civilianization"—of military justice).

32. *See, e.g.*, Clinton v. Goldsmith, 526 U.S. 529 (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 (1972) (holding that the military courts lack the authority to resolve a servicemember's claim for discharge based on conscientious objector status).

33. 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).

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

martial provides a straightforward (and essentially non-judicial) procedure for resolution of relatively minor misconduct charges against enlisted members of the military (who must consent to such summary proceedings).[35] 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 six months' imprisonment.[36] And "general" courts-martial are for all more serious charges, featuring a military judge and not fewer than five members (in non-capital cases),[37] or 12 members in most cases in which the possible sentence includes the death penalty.[38]

Under Article 17 of the UCMJ,[39] courts-martial may exercise jurisdiction over any offense prescribed in the UCMJ—which defines approximately 50 distinct crimes,[40] 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."[41] The third clause of Article 134, in turn, has been held to encompass both civilian federal criminal offenses[42] 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.[43]

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35. *See id.* § 820.

36. *See id.* § 819.

37. *See id.* § 818.

38. *See id.* § 825a; *see also id.* ("[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.").

39. *Id.* § 817.

40. *See id.* §§ 877–933.

41. *Id.* § 934.

42. *See, e.g.*, United States v. Barbieri, 71 M.J. 127, 134 (C.A.A.F. 2012). *See generally* GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 440 (2012).

43. *See, e.g.*, United States v. Robbins, 52 M.J. 159 (C.A.A.F. 1999). *See generally* 18 U.S.C. § 13 (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

As elaborated upon below, although the Supreme Court had long required that offenses be "service-connected" in order to fall within the constitutional scope of court-martial jurisdiction,[44] 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.[45]

With regard to *who* may be tried by courts-martial, Article 2(a) identifies 13 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).[46] Controversially, Article 2(a)(10), as amended in 2006, also extends court-martial jurisdiction "[i]n time of declared war or a contingency operation,[47] [to] persons serving with or accompanying an armed force in the field,"[48] and was recently upheld by lower courts as applied to non-citizen civilian contractors in Iraq—despite earlier Supreme Court decisions appearing to disclaim the constitutionality of military jurisdiction over civilians.[49]

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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.").

44. *See* O'Callahan v. Parker, 395 U.S. 258 (1969); *see also* 1776

45. *See* Solorio v. United States, 483 U.S. 435, 450–51 (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 in the judgment). 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).

46. *See* 10 U.S.C. § 802(a).

47. 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." 10 U.S.C. § 101(a)(13)(A).

48. *See 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, 41 C.M.R. (19 U.S.C.M.A.) 363 (1970). Thus, in addition to adding the "contingency operation" language, the 2006 amendment also codified *Averette*.

49. *See* United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013); *see also infra* text accompanying notes 133–138 (discussing the *Ali* decision).

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.[50] One of the UCMJ's central innovations was the completion 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,[51] and a civilian Court of Appeals for the Armed Forces (CAAF) with largely discretionary jurisdiction over the four service-branch CCAs.[52] Unlike their civilian counterparts, the CCAs are empowered to review both the legal *and* factual conclusions of the court-martial, and may overturn convictions and sentences.[53] And since 1983, this structure has included Supreme Court jurisdiction via certiorari to review CAAF in a range of circumstances,[54] although the current statute appears (problematically) to preclude such authority in cases in which CAAF itself denied a request for discretionary review.[55]

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50. *See supra* note 28.

51. *See* 10 U.S.C. § 866.

52. *See id.* § 867.

53. *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).

54. *See id.* § 867a; 28 *id.* § 1259.

55. *See* 10 *id.* § 867a(a) ("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 generally* Eugene R. Fidell, *Review of Decisions of the United States Courts 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 28. 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 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); SUP. CT. R. 20.

As for the military judges, the Military Justice Act of 1968 formalized the position,[56] under which such judges preside over special or general courts-martial,[57] rule on all legal questions,[58] and instruct the court-martial members regarding the law and procedures to be followed.[59] By statute, military judges must be commissioned officers of the Armed Forces[60]—which necessarily means that they are already appointed by the President and confirmed by the Senate[61]—and they must be members of the bar of a federal court or a state's highest court.[62] As active-duty servicemembers, the salaries of military judges are based on their military rank, rather than their judicial service. And in important distinction to their civilian counterparts, the roughly 80 active-duty and 50 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.[63] 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.[64] 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.

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,[65] who serve roughly 15-year terms,[66] subject to

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56. *See* sources cited *supra* note 27.

57. 10 U.S.C. § 826.

58. *Id.* § 851.

59. *Id.*

60. *Id.* § 826(a).

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

62. 10 U.S.C. § 826(b).

63. *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. *See id.* at 181.

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

65. 10 U.S.C. § 942(b)(1).

66. *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 14 and one-half to 15 and one-half years. *See id.*

removal only for "neglect of duty,"[67] "misconduct,"[68] or "mental or physical disability"[69] (and not "any other cause"),[70] and whose salaries are pegged by statute to those of Article III circuit judges.[71] Article 142 also authorizes the Chief Justice of the 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,[72] even though such mixed panels may well raise serious constitutional concerns.[73]

2. Military Commissions

Prior to 2006, the only military commissions upheld by the U.S. Supreme Court were those convened as martial-law or occupation courts,[74] or those established to try enemy belligerents for violations of the international laws of war—such as the body that convicted the Nazi saboteurs in *Ex parte Quirin*,[75] and the various war crimes tribunals convened by the United States after World War II.[76] Whether or not these courts operated with express congressional authorization,[77] their

67. *Id.* § 942(c)(1).

68. *Id.* § 942(c)(2).

69. *Id.* § 942(c)(3).

70. *Id.* § 942(c).

71. *See id.* § 942(d). Curiously, the UCMJ also provides that "Not more than three of the judges of the court may be appointed from the same political party." *Id.* § 942(b)(3).

72. *See, e.g.*, United States v. Schneider, 38 M.J. 387 (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 48–49 (13th ed. 2010) (citing other cases).

73. *Cf.* Nguyen v. United States, 539 U.S. 69 (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).

74. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341 (1952).

75. 317 U.S. 1 (1942); *see also* Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956).

76. *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).

77. 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*, 317 U.S. 1 (1942), 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

procedures, rules, and judges were entirely controlled by the Executive Branch (and basically unregulated by statute).[78] Judicial review was only available collaterally via habeas corpus[79]—and even then, only for challenges to the commissions' "jurisdiction."[80]

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 non-citizens detained at Guantánamo, holding that the Bush Administration's tribunals departed too substantially from that which Congress (according to the Court's prior jurisprudence) had authorized.[81] The decision in *Hamdan I* precipitated the Military Commissions Act of 2006 (MCA),[82] in which Congress for the first time created a general statutory foundation for military commissions. Although the MCA (as amended in 2009)[83] did not abolish the pre-2006 commissions (which might be called "Chapter 47" commissions),[84] it

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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 v. Rumsfeld ("*Hamdan I*"), 548 U.S. 557, 593 (2006).

78. Other than the limiting the jurisdiction of commissions to "offenders or offenses that by statute or by the law of war may be tried by military commissions," the only other statutory requirement that arguably applied to commissions prior to 2006 was the requirement in Article 36 of the UCMJ that "All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b); *see also Hamdan I*, 548 U.S. at 617–20.

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

80. *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.").

81. *Hamdan I*, 548 U.S. at 593.

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

83. 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.).

84. Indeed, one provision of the MCA expressly clarifies that Article 21 of the UCMJ (the authorization for the commission in *Quirin*) "does not apply to a military commission established under [the MCA]." MCA of 2006, § 4(a)(2), 120 Stat. at 2631 (codified at 10 U.S.C. § 821).

created a new set of courts ("Chapter 47A" commissions) with a detailed framework of statutory rules.[85]

As relevant here, the MCA invests military commissions with jurisdiction to try "alien unprivileged enemy belligerents"[86] for any violation of the international laws of war,[87] violations of Articles 104 or 106 of the UCMJ,[88] or any of 32 distinct substantive offenses prescribed by the MCA.[89] The MCA requires that a military judge already certified to preside over general courts-martial under Article 26 of the UCMJ preside over commission proceedings,[90] and the statute invests the Secretary of Defense with the authority to prescribe rules governing the detailing of military judges to the commissions.[91]

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),[92] and then in the Article III D.C. Circuit[93] (the decisions of which are—unnecessarily—made expressly reviewable by the Supreme Court via certiorari).[94]

Thanks to a series of amendments pushed by the Obama Administration in 2009, the CMCR today exercises both final and

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

86. An "unprivileged enemy belligerent" is defined as individuals who aren't privileged belligerents, *see* 10 U.S.C. § 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* 10 U.S.C. § 802(a)(13). 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 *Quirin*.

87. *See id.* § 948d.

88. *See id.*; *see also* 10 U.S.C. § 904 (aiding the enemy); *id.* § 906 (spying).

89. *See* 10 U.S.C. § 950t.

90. *See id.* § 948j(b).

91. *See id.* § 948j(a).

92. *See id.* § 950f(a).

93. *See id.* § 950g.

94. *See id.* § 950g(e); *see also* 28 *id.* § 1254(1).

interlocutory jurisdiction comparable to that exercised by the CCAs in the court-martial context,[95] whereas the D.C. Circuit hears appeals as of right only from final decisions of the CMCR.[96] Finally, although the 2006 MCA appeared to foreclose collateral review of military commissions in the Article III courts,[97] that provision was eliminated by the 2009 MCA,[98] which, together with the Supreme Court's invalidation of the 2006 MCA's habeas-stripping provision in *Boumediene* v. *Bush*,[99] presumably restores collateral review of commissions at least to the same extent as such collateral review is available for courts-martial.[100]

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.[101] 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.[102]

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95. *See, e.g.*, 10 *id.* § 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 scope of appellate review in the military commissions, see Vladeck, *supra* note 13.

96. *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).

97. *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.").

98. *See id.* § 950j (2010).

99. 553 U.S. 723 (2008).

100. *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 a.m., http://www.lawfareblog.com/2014/03/habeas-and-the-military-commissions-after-aamer/. *But see, e.g.*, ACLU v. United States, No. 13-003, slip op. at 2–5 (Ct. Mil. Comm'n Rev. 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); The Miami Herald v. United States, No. 13-002, slip op. at 3–5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (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).

101. *See id.* § 950f(b)(2).

102. *Id.* § 950f(b)(3).

B. The Normative Justifications for Military Justice

With regard to *why* there should be a military justice system separate from the Article III federal civilian courts, the Supreme Court has explained that "[t]he 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."[103] 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 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 determination of guilt could be made."[104] Of course, "modern transportation and communication have ended the isolation of military units, and civilian trials of offenses traditionally subject to military jurisdiction is now feasible in far more situations,"[105] as exemplified in statutes such as the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).[106]

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"[107] 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

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

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

105. *Id.*

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

107. Sherman, *supra* note 104, at 1401.

military counterparts, owing to their innate experiential and philosophical differences.

Related to physical separation are arguments based upon legal separation, *i.e.*, "that the military is a society apart from civilian life which requires *different* legal standards the civilian courts cannot appreciate or adequately enforce."[108] 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.[109] But it is still very much the case today that there are at least some procedural rules, substantive offenses, and constitutional protections that differ materially as between these two systems.[110]

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,"[111] *i.e.*, as existing as much to preserve "good order and discipline" within military units as to punish and rehabilitate individual offenders. 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

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108. *Id.* (emphasis added).

109. *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 16, at 287–88.

110. *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. RES. SERV., MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 9–15 tbl.1 (2013), http://www.fas.org/sgp/crs/natsec/R41739.pdf.

111. Sherman, *supra* note 104, at 1402.

system—whether in explaining why specific civilian norms should not be applied to military proceedings[112] or in justifying deference to military decisionmaking that would not normally be appropriate in the civilian sphere.[113] 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 unconvincingly, to constitutional text.

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 "To make Rules for the Government and Regulation of the land and naval Forces."[114] And yet, since before the Civil War, the Supreme Court has suggested that the constitutional validity of military *courts* stems not *only* from Congress's regulatory power.

As Justice Wayne explained in *Dynes* v. *Hoover*,[115] the first case in which the Justices had reason to reflect on the relationship between the Constitution and the military justice system,[116] military jurisdiction did not just depend upon Congress's Article I powers. 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

112. *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.").

113. *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 (1973).

114. U.S. CONST. art. I, § 8, cl. 14; *see also id.* cl. 16 (empowering Congress "To 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 . . . .").

115. 61 U.S. (20 How.) 65 (1858).

116. *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 the federal military justice system.

actual service in time of War or public danger"[117]—were also key ingredients to the constitutionality of adjudication by non-Article III federal military courts. As Justice Wayne explained, "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."[118] 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."[119]

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.[120] 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 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; or with the petit jury requirements of

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117. 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 and 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). *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 . . . .").

118. 61 U.S. (20 How.) at 79.

119. *Id.*

120. *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 116.

Article III and the Sixth Amendment.[121]

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.[122] 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,"[123] 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,[124] never explained its source.

Although *Dynes* and *Milligan* were light on analysis, their understanding only became more ingrained in the Court's jurisprudence over time, especially after World War II, when the Justices were confronted with a host of new challenges to the constitutional limits of military jurisdiction.[125] 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.[126]

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121. A contemporaneous opinion by Attorney General Cushing also reflected this view. *See* Civil Responsibility of the Army, 6 OP. ATT'Y GEN. 413, 425 (1856) (suggesting that the Grand Jury Indictment Clause "expressly excepts [sic] the trial of cases arising in the land or naval service from the ordinary provisions of law").

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

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

124. *See* Middendorf v. Henry, 425 U.S. 25, 33 (1976) (referring to this language as "dicta").

125. *See generally* Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. 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).

126. 350 U.S. 11 (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. Neurater, 48 M.J. 152 (C.A.A.F. 1998); *see also* Willenbring v. United States, 559 F.3d 225 (4th Cir. 2009).

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."[127] 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. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.[128]

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* struck down the power of the military to court-martial civilian dependents for capital offenses committed during peacetime,[129] 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

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

128. *Id.* at 15.

129. 354 U.S. 1 (1957). Famously, the Court in *Covert* had initially come out the other way, *see* Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (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*).

> 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.[130]

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.[131] 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 non-capital offenses.[132] To justify the departure from Article III, courts-martial had to involve "cases arising in the land or naval forces," and the underlying conduct had to be proscribed by Congress pursuant to the Make Rules Clause. Put another way, the validity of non-Article III federal adjudication did not *just* turn on Congress's police power over the military; it also turned on the applicability *vel non* of the jury-trial provisions of Article III and the Fifth and Sixth Amendments.

With this understanding in mind, consider CAAF's recent decision in *United States* v. *Ali*.[133] There, the question was the constitutionality of a 2006 amendment to the UCMJ that authorized the trial by court-martial of civilian contracts "serving with or accompanying an armed force in the

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

131. 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, e.g.*, *id.* at 45–49 (Frankfurter, J., concurring in the result); *id.* at 65–77 (Harlan, J., concurring in the result).

132. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (no military jurisdiction over civilian employees of the military for non-capital offenses committed during peacetime); Grisham v. Hagen, 361 U.S. 278 (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 (1960) (no military jurisdiction over civilian dependents of military servicemembers for non-capital offenses committed during peacetime).

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

field" during "time of declared war *or* a contingency operation,"[134] a statutory term that encompasses any number of peacetime deployments.[135] Writing for a three-judge majority, Judge Erdmann upheld the 2006 amendment not because Article I clearly authorized the exercise of military jurisdiction over civilian contractors like Ali,[136] or because the exception for "cases arising in the land and naval forces" applied, but because, as a non-citizen 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.[137] Whatever the merits of CAAF's analysis of the applicability of the jury-trial provisions,[138] the view that the propriety of non-Article III military jurisdiction turns on the existence of an exception to those provisions—whether a specific one for "cases arising in the land and naval forces" or the more general one relied upon in *Ali*—seems at least methodologically consistent with the Supreme Court's jurisprudence discussed above.

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134. 10 U.S.C. § 802(a)(10) (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).

135. *See supra* note 47 (quoting 10 U.S.C. § 101(a)(13)).

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

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

138. For a critique of the majority's reasoning, see Vladeck, *supra* note 13; *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, http://www.lawfareblog.com/2012/07/analysis-of-caaf-decision-in-ali/.

In particular, the CAAF majority's holding that Ali is categorically unprotected by the Fifth and Sixth Amendments suffers from four distinct flaws: (1) it summarily dismisses Ali's substantial voluntary connections to the United States, which should have triggered such constitutional protections; (2) even if such connections were insufficient, it fails to analyze the extraterritorial scope question under the framework articulated in *Boumediene* v. *Bush*, 553 U.S. 723 (2008); (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.

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 non-citizen civilian contractor for assault of another non-citizen outside the territorial United States. *See* United States v. Brehm, 691 F.3d 547 (4th Cir.), *cert. denied*, 133 S. Ct. 808 (2012).

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*, as well. 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,[139] the crux of Justice Douglas's analysis was the role of the jury-trial provisions. In his words,

> the crime to be under military jurisdiction must be service connected, lest "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.[140]

The Court unceremoniously overruled *O'Callahan* 18 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."[141] But even though *Solorio* paid less overt attention to the role of the jury-trial provisions,[142] Chief Justice Rehnquist's analysis still turned on the related conclusions that (1) the Constitution invested Congress with police power over the military; and (2) as a result, the textual exception to the Grand Jury Indictment Clause necessarily encompassed the full range of offenses Congress could constitutionally proscribe pursuant to the Make Rules Clause. In short, "the proper exercise of court-martial jurisdiction" turns on "the military status of the accused," a conclusion that at once expands

139. *See* 395 U.S. 258 (1969).

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

141. 483 U.S. 435, 450–51 (1987); *see also supra* note 45 (noting the open question about whether *Solorio* overrules the service-connection requirement in capital cases).

142. 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 id.* at 452–62 (Marshall, J., dissenting).

the scope of court-martial jurisdiction over servicemembers and arguably contracts it decisively as applied to those *without* such status.[143]

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 the jury-trial exception in 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*, "the 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.'"[144] If one conceives of the Make Rules Clause and Fifth Amendment exception as forming a Venn diagram, military jurisdiction is appropriate only in cases in which they overlap.

C. 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,[145] the actual constitutional analysis focused on the right to jury trial guaranteed by Article III and the Fifth and Sixth Amendments.[146] As Justice Davis explained, "if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is

143. *See* Vladeck, *supra* note 125, at 311–12.

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

145. *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 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.").

146. *See id.* at 123.

preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service."[147] Whether or not 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),[148] 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.[149] After controversially finding 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,[150] Chief Justice Stone proceeded to explain why the saboteurs' commission did not raise the same jury-trial concerns that had barred military jurisdiction in *Milligan*:

> 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

147. *Id.*

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

149. *See* 317 U.S. 1 (1942).

150. *See id.* at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."); *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)). On the "controversial" nature of Chief Justice Stone's reading of Article 15, see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 593 (2006).

> 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.[151]

Quirin therefore held that the jury-trial provisions of Article III and the Fifth and Sixth Amendments "included a categorical exception for 'offenses committed by enemy belligerents against the law of war,' a carve-out the existence of which, however normatively persuasive, Stone traced to precisely one isolated statutory authority."[152] And yet, whether or not its reasoning on this point was persuasive,[153] *Quirin* thereby embraced the same methodology that the Court had seized upon in the context of courts-martial: adjudication by non-Article III military courts is permitted when (1) the Constitution empowers Congress to define the particular offenses; and (2) 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*,[154] none substantially revisited or otherwise revised this understanding of the relevant justifications for non-Article III military adjudication. In *Madsen* v. *Kinsella*, for example, the Court considered the constitutionality of a conviction of a U.S. citizen for the murder of her servicemember husband, obtained in a U.S. military

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151. *Id.* at 41.

152. Vladeck, *supra* note 125, at 317–18 (footnote omitted).

153. *See, e.g.*, *Quirin*, 317 U.S. at 44–45 ("We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death.").

154. *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).

court applying German law in occupied Germany.[155] Although Madsen was not being tried for war crimes, the Court upheld 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 belligerent powers occupying enemy territory pending the establishment of civil government."[156] In other words, *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 non-citizen "enemy combatants" detained at Guantánamo Bay,[157] the gravamen of Justice Stevens's analysis was that the commissions were inconsistent with the constitutional structure envisaged by *Quirin*.[158] Indeed, because the authority that *Quirin* read into Article 21 (Article 15's successor) only encompassed offenders or offenses triable by military commissions under the 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 arguably unrecognized under the international laws of war,[159] including conspiracy[160] and "providing material support to terrorism."[161] 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

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155. 343 U.S. 341.

156. *Id.* at 354–55.

157. 548 U.S. 557 (2006).

158. *See id.* at 592–92 & n.23.

159. *See supra* notes 82–83 and accompanying text (discussing and citing the Military Commissions Acts of 2006 and 2009).

160. *See* 10 U.S.C. § 950t(29). *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).

161. *See* 10 U.S.C. § 950t(25).

concluded that such offenses *were* international war crimes,[162] and so necessarily (if implicitly) satisfied the jury-trial exception recognized in *Quirin*.[163] On 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" recognizes conspiracy and material support as war crimes subject to trial by military commission.[164]

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 and the defendants are not U.S. servicemembers.[165] Thus far, at least, the D.C.

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162. *See* United States v. Al-Bahlul, 820 F. Supp. 2d 1141 (Ct. Mil. Comm'n Rev. 2011), *appeal docketed*, No. 11-1324 (D.C. Cir. argued en banc Sept. 30, 2013); United States v. Hamdan ("*Hamdan II*"), 801 F. Supp. 2d 1247 (Ct. Mil. Comm'n Rev. 2011), *rev'd*, 696 F.3d 1238 (D.C. Cir. 2012); *see also* United States v. Hamdan, 2 M.C. 1 (Mil. Comm'n July 14, 2008).

163. 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 to "To 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 Hamdan II*, 696 F.3d at 1246 n.6 (Kavanaugh, J.) (arguing in a solo footnote 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. 1774, 1820–21 (2009) (arguing that Congress may use the Define and Punish Clause to proscribe conduct not prohibited under international law). *See generally* Vladeck, *supra* note 125 (analyzing this question).

164. *See* Brief for the United States, *Hamdan*, 696 F.3d 1238 (No. 11-1257), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/01/Hamdan-Brief-for-US-As-Filed.pdf. For more discussion of the change in position—and its implications—see Steve Vladeck, *Government Brief in* Hamdan*: The Looming Article III Problem*, LAWFARE, Jan. 17, 2012, http://www.lawfareblog.com/2012/01/government-brief-in-hamdan-the-looming-article-iii-problem/.

165. It is also possible that, like CAAF in *Ali*, *see supra* notes 133–138 and accompanying text, courts might eventually conclude that the defendants, as non-citizens 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.

Circuit has skirted this question, holding only that the MCA did not authorize *retroactive* application of its "new" offenses—and that the preexisting authority for commissions recognized in *Quirin* did not encompass offenses—such as material support—that are not clearly recognized as *international* war crimes.[166] In other words, whether or not violations of the "U.S. common law of war" *could* be subject to trial by military commissions prospectively, the court of appeals has concluded that they were not so triable based upon conduct that pre-dated the MCA's enactment. If the en banc D.C. Circuit affirms this conclusion in *al Bahlul*, then the question will not arise until and unless a defendant is convicted of material support or conspiracy (or any other offense not recognized under international law) based upon *post*-MCA conduct.[167]

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Historically, then, the Supreme Court's constitutional analysis of the scope of the military exception to Article III has been at least methodologically analogous: 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

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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.

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

167. Virtually all of the current detainees have been in U.S. custody since before the MCA was enacted, and so their prosecution for conspiracy or material support would raise the same ex post facto issue. *See* Jennifer Daskal, Hamdan *v.* United States*: A Death Knell for Military Commissions?*, 11 J. INT'L CRIM. JUST. 875, 898 (2013). In February 2014, the government filed new charges against one detainee for conspiracy where at least some of the overt acts were alleged to have post-dated the MCA's enactment—thereby raising a potential test case for *prospective* military commission prosecutions for conspiracy or material support. *See* Steve Vladeck, *The* al Iraqi *Case and the Future of Military Commissions*, JUST SECURITY, Feb. 15, 2014, 9:20 a.m., http://justsecurity.org/2014/02/15/al-iraqi-case-future-military-commissions/.

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's 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.

II. THE MILITARY EXCEPTION AND MODERN 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 those offenses triable by military courts under international law. After introducing three recent departures from these principles, this Part demonstrates that these developments cannot be reconciled with, and have therefore destabilized, whatever legal or philosophical justifications might have supported the military exception 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.[168]

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."[169] 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

168. 483 U.S. 435 (1987).

169. 395 U.S. 258 (1969).

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.[170] 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.[171]

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.[172] 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 that, "In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused."[173] 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,

> the exception contained in the Fifth Amendment is expressed—and applies by its terms—only to *cases arising in* the Armed Forces. *O'Callahan* addressed not whether [the Make Rules Clause] empowered Congress to create court-martial jurisdiction over all crimes committed by service members, but rather whether Congress, in exercising that power, had encroached upon the rights of members of Armed Forces whose cases did not "arise in" the Armed Forces.[174]

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170. *Id.* at 272–73.

171. *See id.*

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

173. *Id.* at 439.

174. *See 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.").

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."[175] 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."[176] 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 non-citizen civilian contractor in Iraq.[177] 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 non-citizen lacking substantial voluntary connections to the United States, lacked the constitutional entitlement to jury-trial protections that otherwise constrained military jurisdiction.[178] Leaving aside the flaws in the majority's analysis of Ali's constitutional rights,[179] the CAAF majority also completely ignored the Article I question, *i.e.*, why Ali's case fit

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

176. Vladeck, *supra* note 125, at 311–12.

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

178. *See supra* text accompanying notes 133–138.

179. *See supra* note 138.

within the Make Rules Clause—and thereby satisfied *Solorio*.[180]

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."[181] Instead, he traced Congress's power to its "enumerated and implied war powers,"[182] 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.[183] 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.[184]

The merits of Chief Judge Baker's analysis aside,[185] 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

180. *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.").

181. *Id.* at 273.

182. *Id.*

183. *See id.* at 274–76.

184. *See id.* at 276–77.

185. 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. And in any event, the statute authorizing Ali's court-martial does not turn in any way on whether or not the underlying conduct occurred during "war," however defined. *See supra* note 47 (quoting 10 U.S.C. § 101(a)(13)); *see also* Vladeck, *supra* note 16, at 293–94.

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*,[186] then it could yield dramatic (if 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 Non-International War Crimes

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 include an implicit exception for "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 non-citizen terrorism suspects believed to be affiliated with al Qaeda,[187] the Supreme Court in *Hamdan I* identified

186. 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 United States in Opposition at 13–17 & n.1, Ali v. United States, 133 S. Ct. 2338 (2013) (mem.) (No. 12-805), *available at* http://www.justice.gov/osg/briefs/2012/0responses/2012-0805.resp.pdf.

187. *See* Military Order of Nov. 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001); *see also* Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal

three flaws with the Bush Administration commissions: (1) insofar as they authorized trials for non-war 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.[188]

As previously noted, Congress responded in the MCA by enumerating specific substantive offenses triable by military commissions,[189] including conspiracy[190] and "providing material support to terrorism."[191] In *Hamdan II*, the D.C. Circuit held that the MCA did not in fact authorize retroactive imposition of liability for offenses that were not international war crimes at the time of their commission, lest Congress provoke grave constitutional questions under the Ex Post Facto Clause.[192]

In the process, *Hamdan II* necessarily sidestepped the question of whether the military exception to Article III could be broadened to encompass *prospective* military commission trials of offenses not recognized as international war crimes—and therefore outside the scope of the framework articulated in *Quirin*.[193] In a solo footnote, though,

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Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001), *available at* http://www.justice.gov/olc/2001/pub-millcommfinal.pdf.

188. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

189. *See supra* text accompanying note 89.

190. 10 U.S.C. § 950t(29).

191. *Id.* § 950t(25).

192. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012). For pre-MCA offenses that *were* recognized violations of the international laws of war when committed, application of the MCA would not be retroactive, since a separate statute—Article 21 of the UCMJ, 10 U.S.C. § 821—already subjected such offenses to trial by military commission.

193. 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 or not there is any support for that conclusion in international law. *See, e.g.*, Paulsen, *supra* note 163, at 1820 ("Congress must define the 'Offences'; the regime of international law may not dictate to Congress what those offenses may or must be."); *see also id.* at 1821 ("It is worth pausing for a moment to absorb just how sweeping this legislative power may be. Congress may define what it understands to be a violation of 'the Law of Nations' and use this judgment as the basis for legislative enactments.").

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 Professor Paulsen,

Judge Kavanaugh suggested that such an expansion would be permissible, noting that he:

> would conclude that Congress has authority under Article I, § 8 to establish material support for terrorism as a war crime that, when committed by an alien, may be tried by military commission. Although material support for terrorism is not yet an international-law war crime, Congress's war powers under Article I are not defined or constrained by international law. The Declare War Clause and the other Article I war powers clauses do not refer to international law, unlike the Define and Punish Clause.[194]

Of course, even if Congress has the authority to articulate war crimes pursuant to enumerated powers other than the Define and Punish Clause, that does not answer the Article III question, nor does it even *identify* the exception to Article III that allows the trial of such offenses before non-Article III military commissions. Presumably, though, the idea behind Judge Kavanaugh's analysis is that the jury-trial exception identified in *Quirin*—*i.e.*, for offenses committed by enemy belligerents against the laws of war—also encompasses offenses against the *domestic* law of war. If so, that, too, would portend a dramatic expansion in the scope of the military exception, for it would untether military commission jurisdiction from the one constraint to which it has historically adhered, *i.e.*, international law.[195]

D. Article III and the Civilianization of Military Jurisdiction

Between them, *Solorio*, Chief Judge Baker's concurrence in *Ali*, and Judge Kavanaugh's concurrence in *Hamdan II* thereby produce (or at least envision) three specific expansions in the military exception as

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though, I believe Congress is entitled to very little interpretive deference under the Define and Punish Clause, *especially* when it is using that power to subject individuals to military, rather than civilian, trial. *See* Vladeck, *supra* note 125. 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.

194. *Hamdan II*, 696 F.3d at 1246 n.6 (solo opinion of Kavanaugh, J.).

195. *See supra* note 167 (discussing the *al-Iraqi* case, which raises this question).

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 civilian contractors serving with or accompanying the armed forces in the field; and (3) the expansion of military commission jurisdiction to encompass offenses not recognized as international war crimes. 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,[196] the more significant issue arises from his—largely implicit—sidestepping of the text of the Fifth Amendment's Grand Jury Indictment Clause,[197] which only exempts cases "*arising in* the land or naval forces."[198] 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, "[t]he Fifth Amendment excepts from its protection 'cases arising,' not persons, 'in the land or naval forces."[199] 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.[200]

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

196. 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 non-military 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).

197. *See supra* text accompanying note 174.

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

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

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

(debatable) proposition that he categorically fell outside the scope of the Fifth and Sixth Amendments;[201] 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.[202]

And although it arose in a different context, Judge Kavanaugh's solo footnote in *Hamdan II* reflected versions of *both* of those analytical shortcomings. After all, 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 assumed that an as-yet-unidentified exception to the jury-trial provisions would support such non-Article III federal trials.[203]

Taken together, all three of these jurisprudential developments represent a fundamental departure from the principle 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.[204] 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. 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, since such offenders and offenses *are* typically within the purview of civilian courts,[205] at least absent compelling evidence that civilian—as opposed to

201. *See supra* note 138.

202. *See supra* text accompanying notes 181–186.

203. *See supra* text accompanying note 194.

204. *See generally* Vladeck, *supra* note 16 (summarizing the "civilianization" trend).

205. *Ali* is an unusual exception in this regard, since Ali's unique status as a "host-country national" exempted him from prosecution under MEJA. *See* 18 U.S.C. § 3267(1)(C). *See generally*

military—prosecutions have negatively impacted the military's ability to preserve "good order and discipline" within the ranks.[206]

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,[207] such claims have been overtaken by subsequent events. With regard to courts-martial, for example, the Military Extraterritorial Jurisdiction Act of 2000[208] 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.[209] And MEJA's implementing regulations have gone a long way toward ameliorating the logistical and procedural difficulties that might otherwise arise in such cases.[210]

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,[211] which paved the way for prosecution in *civilian* courts of international war crimes committed by both our own servicemembers and enemy belligerents;[212] 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*.[213]

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).

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

207. 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.

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

209. *See* United States v. Gatlin, 216 F.3d 207 (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).

210. 32 C.F.R. §§ 153.1–153.5 (2013).

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

212. 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).

213. *See* Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d)); USA PATRIOT Act of 2001 § 805(a)(1)(F), 115 Stat. at 377 (amending 18 U.S.C. § 2339A(a)). *See generally* Jennifer

Simply put, 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 rather 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. Thus, 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 pre-existing military courts jurisprudence.

III. THE MILITARY EXCEPTION AND NON-ARTICLE III COURTS

Another possibility, of course, is that the expansions in military jurisdiction documented above might be justified by reference to *other* permissible examples of non-Article III federal adjudication. But as this Part demonstrates, the 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.

A. Territorial Courts and Congress's Police Powers

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

Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115 (2014) (discussing the implications of these expansions).

history as "*Canter*").[214] *Canter*, which dealt formalism "a blow from which it has never recovered,"[215] 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.[216] 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):

> 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 the 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.[217]

In other words, simply because of Congress's police power over the territories, and because, according to Marshall, Congress could not create

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214. 26 U.S. (1 Pet.) 511 (1828). David Canter was arguably the real party in interest. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 887–93 (1990) (summarizing the background).

215. Lawson, *supra* note 214, at 887.

216. *See* 26 U.S. (1 Pet.) 511. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 119–22 (1985).

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

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. At the same time, however, Marshall concluded that, because such courts were not Article III 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,[218] it is hard to disagree with him (and virtually every other sustained discussion of the decision) that it fails to persuade.[219] After all, and contra Chief Justice Marshall, Congress does clearly have (and has exercised) the power to create Article III courts in the territories;[220] the concerns over judicial independence motivating Article III's tenure and salary protections have at least some salience in the territories, as well;[221] and even laws Congress enacts *for* the territories are still *federal* law for purposes of Article III's grant of "arising under" jurisdiction.[222] 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

218. 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.

219. *See* Lawson, *supra* note 214, at 892; *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS 49 (6th ed. 2002) (referring to *Canter* as a "doctrine of doubtful soundness").

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

221. *See* CURRIE, *supra* note 216, 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)).

222. *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 . . . .").

courts; the Madisonian Compromise necessarily assumes the possibility of at least *some* concurrent jurisdiction between such tribunals.[223]

Even the most ringing defense of *Canter*—the younger Justice Harlan's plurality opinion in *Glidden Co.* v. *Zdanok*[224]—asserts that Chief Justice Marshall couldn't have "meant" to imply that territorial courts may not receive Article III jurisdiction. Instead, in Justice Harlan's words,

> All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.[225]

Indeed, 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*]."[226] 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,[227] *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

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223. 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).

224. 370 U.S. 530 (1962).

225. *Id.* at 544–45 (plurality opinion) (footnote omitted); *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.").

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

227. 411 U.S. 389 (1973).

throughout the United States, but also the laws applicable only within the boundaries of the particular territory."[228]

To similar effect, as Justice Brennan put it a decade later, 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 exercise the general powers of government."[229] 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. As for why this fact militated in favor of non-Article III federal courts instead of Article III tribunals, perhaps the best argument was the one offered by 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.[230]

Moreover, Harlan continued,

> the 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

228. *Id.* at 402–03 (citation and footnotes omitted).

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

230. *Zdanok*, 370 U.S. at 545–46 (plurality opinion) (footnote omitted).

> be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto.[231]

To be sure, there is both an internal tension in Harlan's defense of non-Article III territorial courts and an obvious anachronism. With regard to the former, the idea that the territories were left largely to govern themselves presumably reflected a belief that they would also be competent to create *local* courts of general jurisdiction (as Florida already had in *Canter*) to ensure that a proper judicial forum was available for disputes of purely local significance. Put another way, neither *Canter* nor any subsequent Supreme Court decision 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.[232] 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.

As for the anachronism, if it wasn't already clear in 1828, it certainly was apparent by the time Harlan wrote in 1962 that not all territories were destined for statehood—and would thereby raise the "no place to put them" concern. As Harlan himself concluded, "We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them."[233]

Ultimately, though, the key point for present purposes is not the shortcomings of Harlan's defense, but rather the continuing deference to the weight of history, and to the view that Congress's "police" power—and its practical implications—is the focal point in the constitutional defense of non-Article III federal territorial courts.[234] Even as the analytical justifications have evolved, the basic constitutional analysis articulated by Chief Justice Marshall in *Canter*, and reaffirmed by Justice White in *Palmore*, remains the guiding rule for territorial courts: Congress is

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231. *Id.* at 546.

232. *See supra* note 4.

233. *Zdanok*, 370 U.S. at 548 n.19.

234. *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").

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),[235] or Article IV (for the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands).[236] 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) nor a sufficient one (see courts-martial) for non-Article III military courts.

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 shifting—rationales.

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.[237] 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."[238]

Although *Murray's Lessee* first suggested the idea that "public rights"

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235. *See* U.S. CONST. art. I, § 8, cl. 17 (empowering Congress "To 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 . . . .").

236. *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 . . . .").

237. 59 U.S. (18 How.) 272 (1856).

238. *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).

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 Corp.*,[239] Justice Van Devanter tied the constitutionality of non-Article III adjudication to the federal government's sovereign immunity:

> claims 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, and 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.[240]

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.[241] This precise logic appeared at the heart of *Crowell* v. *Benson*—the Court's landmark decision three years after *Bakelite* in which it upheld the authority of federal administrative adjudicators to engage in preclusive factfinding,[242] thereby providing the fountainhead for modern federal administrative law.

Related but distinct from sovereign immunity, the Justices have also traced the authority of non-Article III federal adjudication of public rights

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239. 279 U.S. 438 (1929).

240. *Id.* at 452.

241. 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, *e.g.*, 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").

242. 285 U.S. 22 (1932).

disputes to more amorphous separation-of-powers considerations, *i.e.*, "a historical understanding that certain prerogatives were reserved to the political Branches of Government."[243] 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 determination to a legislative court or an administrative agency."[244]

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."[245] That is to say, not *all* claims by citizens against the government, but rather any claim 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."[246]

That understanding began to shift in *Northern Pipeline*, in which the Court invalidated the authority given to bankruptcy courts under the Bankruptcy Reform Act of 1978.[247] Although Justice Brennan's plurality opinion suggested that *no* issues in bankruptcy cases implicate public rights,[248] Justice Rehnquist, concurring in the judgment (and joined by

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

244. *Id.* at 68.

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

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

247. 458 U.S. 50.

248. *See id.* at 71.

Justice O'Connor), was more circumspect.[249] In his view, it was clear that state law claims that were only "related to" bankruptcy cases were *not* public rights,[250] but it wasn't 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.[251] Congress's response to *Northern Pipeline* reflected this precise dichotomy, with bankruptcy judges empowered to decide as a matter of finality "core" bankruptcy matters (some of which were not "public rights" under the traditional understanding), but only to act as adjuncts for "non-core" matters.[252]

The Court took a decisive step away from a categorical view of public rights in *Thomas* v. *Union Carbide*, in the course of holding that Congress could subject adjudication of a particular administrative dispute between private parties under federal law to binding arbitration.[253] 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."[254]

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

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

250. *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.").

251. *See id.* at 91.

252. Under 28 U.S.C. § 1334, 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 recommendations 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).

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

254. *Id.* at 586.

Branches,' the danger of encroaching on the judicial powers is reduced."[255]

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*;[256] (2) the federal claim did not displace a pre-existing state law right to compensation;[257] (3) the claim implicated a complex federal administrative scheme that itself represented "a pragmatic solution" to a difficult public policy question;[258] (4) the non-Article III adjudication relies on its own internal sanctions and does not generally require Article III courts for enforcement;[259] and (5) limited Article III review *was* available in extreme cases, including review for constitutional error.[260] 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."[261]

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 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 Act that

255. *Id.* at 589.

256. *See id.* at 589–90.

257. *See id.*

258. *Id.* at 590.

259. *See id.* at 591.

260. *See id.* at 592–93.

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

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.[262]

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.[263] *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. CFTC orders are also reviewed under the same "weight of the evidence" standard sustained in *Crowell*, rather than the more deferential standard found lacking in *Northern Pipeline*. The legal rulings of the CFTC, like the legal determinations of the agency in *Crowell*, are subject to *de novo* review. Finally, the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise "all ordinary powers of district courts," and thus may not, for instance, preside over jury trials or issue writs of habeas corpus.[264]

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

262. 478 U.S. 833 (1986).

263. *See id.* at 848–50.

264. *Id.* at 852–53 (citations omitted).

threat to the separation of powers."[265] But inasmuch as *Thomas* and *Schor* seemed to portend a liberalization of the Court's jurisprudence concerning "public rights" adjudication, its most recent foray—its 2011 decision in *Stern* v. *Marshall*[266]—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 decide Smith's counterclaim.[267]

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 courts to resolve Smith's counterclaim:

> 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 Vickie's claim in the bankruptcy court proceedings. . . .[268]

265. *Id.* at 854.

266. 131 S. Ct. 2594 (2011).

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

268. *Id.* at 2614–15 (alteration in original; citations and footnote omitted).

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."[269]

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 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' 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,"[270] as Dean Chemerinsky has explained, if not the scope of permissible non-Article federal adjudication in general.[271]

Moreover, 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.[272] Leaving aside the more general objections that have been leveled against the public rights balancing approach,[273] its application is especially difficult to fathom in the military context because the factors identified by Justice O'Connor in *Schor* would virtually always *support* assertions of military jurisdiction.

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269. *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 to look to how the highest court of the relevant *state* would resolve the issue. *See, e.g.*, Statek Corp. v. Dev. Specialists, Inc. (*In re* Coudert Bros. LLP), 673 F.3d 180, 187 (2d Cir. 2012) ("*Erie* made clear that state law provides the rules of decision for the merits of state law claims in bankruptcy court.").

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

271. In one particularly alarming 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* Tech. Automaton Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 404–07 (5th Cir. 2012).

272. *See* Note, *supra* note 8.

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

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.

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 context of non-Article III military courts, also help to resolve existing inconsistencies in the Court's justification of non-Article III territorial and public rights adjudication?

At first blush, such an approach seems at least superficially promising. After all, for better or worse,[274] 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.[275] Instead, the jury-trial

274. 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 jury-trial provisions. First, the decisions in the *Insular Cases* all predated the Supreme Court's recognition in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), that the Sixth Amendment right to trial by jury is fundamental, and should therefore be incorporated against the states. 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*, which presumably binds Article III courts *wherever* they operate, *cf.* Vladeck, *supra* note 76, at 1541–42, including the territories. In other words, Congress's choice to create an Article III or Article IV court in unincorporated territories itself controls the applicability of at least a right to trial by petit jury in criminal cases.

275. *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).

protections that apply in the federal territorial courts 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.[276]

Thus, as Congress explained in 1976 when it enacted the CNMI iteration of the jury-trial language,

> The subsection exempts proceedings in the local courts—except where required from 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.[277]

That said, there is one obvious example of a non-Article III federal territorial court that doesn't comport with this understanding: The D.C. Superior Court. Although that tribunal has clearly been an Article I court since its creation in 1970,[278] defendants before the D.C. courts are unquestionably protected by the Fifth Amendment's right to grand jury indictment[279] and the petit-jury rights conferred by the Sixth Amendment,[280] since 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 wouldn't be the first time.[281] As was the case in the *Tidewater Transfer*

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276. *See generally* Com. of the N. Mar. I. v. Atalig, 723 F.2d 682, 688–91 (9th Cir. 1984).

277. The Covenant To Establish a Commonwealth of the Northern Mariana Islands, S. REP. NO. 94-433, at 74 (1975).

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

279. *See* United States v. Moreland, 258 U.S. 433 (1922).

280. *See* District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540 (1888).

281. *See* Nat'l Mut. Ins. Co. of D.C. 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

decision, perhaps the constitutional uniqueness of the national capital justifies an accommodation that would not be permissible elsewhere or otherwise.[282]

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,[283] has been widely criticized on a host of grounds,[284] and might charitably be described as failing to persuade.[285] Moreover, prior to the 1970 bifurcation, virtually all of the major civil and criminal adjudication in the District was handled by the *Article III* unitary D.C. court system,[286] 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.

But whatever one makes of these arguments, they suggest that, unless the current D.C. court system is unconstitutional, the jury-trial provisions can't provide the unifying theory for non-Article III federal adjudication. And that conclusion is only reinforced by reference to the public rights context, even though the Supreme Court has suggested *some* overlap

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different dissenters from each of the two holdings formed a majority in support of such jurisdiction).

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

283. *See* Palmore v. United States, 411 U.S. 389 (1973).

284. *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 (2011).

285. Whether or not 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.

286. *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.D.C. 1837) (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, 633 (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. North Las Vegas, 489 U.S. 538, 541–43 (1989); Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968).

between the applicability of the *Seventh* Amendment's jury-trial right and the scope of non-Article III adjudication.[287] There, at least, a jury-trial-based exception would prove far too much, for it would suggest that there is no constitutional problem with trying cases falling outside the scope of the Seventh Amendment (including cases arising in equity or admiralty) regardless of whether they raise a "public right."[288]

Finally, as a more philosophical matter, if the animating concern in non-Article III federal adjudication is the power of Congress to dilute the role of Article III 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—then it is difficult to see how those concerns are *mitigated* by not requiring either grand-jury indictment or petit-jury trial, either. If anything, the converse is more convincing, *i.e.*, 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

287. For example, in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), Justice Brennan appeared to define "public right" by negative reference to the Seventh Amendment jury-trial right, concluding that "If 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." *Id.* at 42 n.4; *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.").

288. 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* 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).

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 the tortious interference counterclaim could not constitutionally be adjudicated by a non-Article III bankruptcy judge.[289] 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."[290] 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."[291]

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*,[292] Fallon summarized what he termed the "appellate review theory" as a substitute for the Court's "vague balancing approach."[293]

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,"[294] and that, so long as it exists, "the decision whether to use non-article III bodies to make initial determinations even of constitutional

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

290. *Id.*

291. *Id.*

292. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988).

293. *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, "[s]imilar 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 (explaining the differences between Fallon's view and that of the other "appellate review" adherents); *see also* 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).

294. Fallon, *supra* note 292, at 918.

law should be largely discretionary with Congress."[295] 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.[296] 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."[297]

In addition, the appellate review theory runs into both textual and practical difficulties, as well. 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.[298] And practically, the appellate review theory appears difficult to reconcile with existing (and in many cases, longstanding) 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.[299]

Indeed, military courts prove some of the toughest cases for the appellate review model, given the historical bar on direct supervision by

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295. *Id.*

296. *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).

297. *Id.* at 640.

298. *See, e.g.*, Pfander, *supra* note 293, at 668 & n.130.

299. *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 clearly fall within the scope of Article III.

the Supreme Court; the continuing gaps in the Court's authority over CAAF and the military justice system since it was created in 1983;[300] and the lack of *any* mechanism for appellate review (or for *de novo* collateral review) of the decisions of military commissions prior to 2005.[301] 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 the currently the case with the D.C. local courts and courts-martial, the increasingly discretionary review by the Justices is the *only* generally available mechanism for Article III oversight.[302] 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 is an unsatisfying justification for the military exception.

E. Military Courts as "Inferior Tribunals"

Responding specifically to these shortcomings in the appellate review model, a more recent attempt at a cross-cutting explanation for non-Article III federal adjudication was undertaken by Professor Pfander in a 2004 article in the *Harvard Law Review*,[303] which he expanded upon in a subsequent book.[304] 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,"[305] and Article I's grant of

300. *See supra* text accompanying notes 54–55 (discussing 10 U.S.C. § 867a(a)).

301. *See supra* notes 79–80 and accompanying text (discussing the limits on appellate and collateral review of military commissions).

302. *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).

303. *See* Pfander, *supra* note 293.

304. JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL DEPARTMENT 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*].

305. U.S. CONST. art. III, § 1 (emphasis added). Indeed, Pfander finds significance in the fact that Article III uses a lowercase "s" to refer to the Court—suggesting that "supreme" was not

power to Congress "To constitute Tribunals inferior to the supreme Court."[306] 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,"[307] a distinction that should not be dismissed as semantic.[308] Tying these two textual threads together, Pfander posits that

> the 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.[309]

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."[310] 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,"[311] and, if not, whether "Congress has provided some form of review sufficient to preserve the tribunal's inferiority in relation to the judicial department."[312]

So construed, the "inferior tribunals" account departs from the "appellate review" model in at least two respects: First, the former

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the *name* of the body, but rather an adjective. *See* Pfander, *Jurisdiction-Stripping*, *supra* note 304, at 1455 n.88; *see also* David A. Engdahl, *What's In a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 463 (2000).

306. U.S. CONST. art. I, § 8, cl. 9.

307. *See* Pfander, *supra* note 293, at 650.

308. *See id.* at 677–89.

309. *Id.* at 651.

310. *See id.* at 652.

311. *Id.* at 747.

312. *Id.* at 748.

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 the "traditional core" of federal judicial power,[313] recall that courts-martial have increasingly come to apply generally applicable federal statutory and constitutional law in their proceedings,[314] and so *should* require the same supervision as their civilian counterparts.[315]

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.[316] 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*.

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313. *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 140 (1946) (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 its development; we have exerted no supervisory power over the courts which enforce it . . . ."), *with* 28 U.S.C. § 1259.

314. In particular, Pfander's central claim is that "local" federal law doesn't 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 doesn't explain courts-martial, which don't 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 42–43 and accompanying text.

315. For more on this argument, see Brief of *Amicus Curiae* Nat'l Ass'n of Crim. Def. Lawyers in Support of Petitioner, Behenna v. United States, 133 S. Ct. 2765 (2013) (mem.) (No. 12-802), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/02/Behenna-NACDL-Amicus.pdf.

316. *See generally* Pfander, *Federal Supremacy*, *supra* note 304.

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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, are ultimately unavailing. The Court's explanations for territorial and public rights courts do not map onto courts-martial and military commissions, and the jury-trial oriented justification for those bodies doesn't map onto territorial courts and public rights disputes. Nor do academic efforts to rationalize non-Article III adjudication bridge the gap. Instead, they only appear to reinforce the conclusion that the military exception is *sui generis*, only further underscoring the serious problems raised by the expansions documented in Part II.

IV. RETHINKING THE MILITARY EXCEPTION

Parts II and III demonstrated 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 two independent strands of the military exception—between the constitutional permissibility of courts-martial and of military commissions. As noted, 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 Constitution as initially drafted.

In concluding his opinion for the Court in *Toth*, Justice Black 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.'"[317] 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[318]) to stand for the proposition that, "As necessity creates the rule, so it limits its duration."[319] So framed, one animating principle of a reconstructed military exception to Article III would be to begin with the narrowest terms possible to encompass the core military justice cases.

As should by now be familiar, that core historically has involved three categories of disputes: military offenses by servicemembers; international war crimes by enemy belligerents; and all crimes in an area under military occupation and/or martial law. Thus, the question becomes whether any one principle can unite these three related but distinct classes of cases.

A. Reconceiving the Military Exception: From *Madsen* to *Dynes*

At the outset, recall that the Supreme Court in *Madsen* itself conflated the latter two categories.[320] 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.[321] In his words, the "law of war" the violations of which could be tried in a military commission pursuant to Article 15 of the Articles of War "includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government."[322] Indeed, Burton continued, "The jurisdiction exercised by our military commissions in the

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

318. 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.

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

320. *See supra* text accompanying notes 155–156.

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

322. *Id.* at 354–55.

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."[323]

Madsen thereby suggested that the underlying principle uniting occupation courts and law-of-war commissions is international law; the justification for both departures from Article III is the practice and precedents not of other nations in their own domestic forums, but of the international community in its enunciation and enforcement of supervening norms of accountability. And *Quirin* itself justified its articulation of a previously unrecognized exception to the jury-trial provisions by looking to the state of international law at the time of the Founding,[324] 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."[325] 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."[326]

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 *international law*. 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."[327] Nevertheless, 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 international law." In *Quirin*, that would have been a distinction without a difference; in *Madsen*, it was anything but.[328]

Among other things, such a reconceptualization of the *Quirin* exception also resolves one of *Quirin*'s most troubling analytical puzzles:

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323. *Id.* at 355.

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

325. *See id.* at 41 & n.13.

326. *Id.* at 44.

327. *Id.* at 41; *see supra* text accompanying notes 151–153.

328. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 371–72 (1952) (Black, J., dissenting).

its recognition of the historical use of military commissions to try spying and aiding the enemy, even though neither is recognized as a war crime under international law—whether today or at the time *Quirin* was decided.[329] As Judge Kavanaugh pointed out in *Hamdan II*, theories of Article III that view the *Quirin* exception as exclusive therefore struggle to explain how such *non*-war crimes can also be tried by military tribunal.[330] But while many (including me in prior writings) have simply dismissed the jurisdiction of military courts to try spying and aiding the enemy as an "enigmatic statutory precedent,"[331] perhaps the better explanation is that spying and aiding the enemy are rare examples of non-war crimes that have nevertheless been subject historically to military jurisdiction under international law—and therefore fit quite comfortably within such a reconceived military exception to Article III.

Thus, a view of the military exception grounded in international law would, if nothing else, introduce a degree of coherence and analytical stability to the permissible scope of military *commission* jurisdiction. In the process, such an approach would drive home the stakes of the current litigation over whether the commissions can retroactively try non-international war crimes—since the answer may be the same *prospectively*, as well.

Inasmuch as an international law-based theory would tidily reconcile *Quirin*, *Madsen*, and spying, the far harder question is whether it would also make sense to apply it to the *other* major strand of the military exception, *i.e.*, courts-martial. After all, courts-martial and military commissions have historically been understood as entirely distinct—if not hermetically sealed—entities, with different legal and philosophical 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 the international law of military jurisdiction.

And yet, although it may initially seem as if such an international law-

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

330. Hamdan v. United States ("*Hamdan II*"), 696 F.3d 1238, 1246 n.6 (D.C. Cir. 2012) ("Congress has long prohibited war crimes beyond those specified by international law."); *see also id.* at 1245 & n.4 (summarizing the history and scope of "aiding the enemy").

331. *E.g.*, Brief of the National Institute of Military Justice as *Amicus Curiae* in Support of Petitioner at 18, Al Bahlul v. United States, No. 11-1324 (D.C. Cir. argued en banc Sept. 30, 2013).

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*—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*; 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 . . . .[332]

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 easily be analogized to the revised understanding of *Quirin* outlined above: The military exception does not *derive* from the Constitution's text; it derives from international law, as *reflected* in several scattershot textual clues. And in the court-martial context, at least, insofar as international law has historically recognized the power of sovereigns to subject their own soldiers to military jurisdiction at least for military offenses, and insofar as the Supreme Court had never endorsed courts-martial of civilians, there would never have been any reason to ask, at least prior to *Solorio*, whether international law could do any work in this field that was not already accomplished 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"[333] by any means—had the right idea, but the wrong formulation: One coherent, cross-cutting explanation for the scope of the military exception, which would tie together the exception's seemingly disparate strands and resolve most of its puzzles, would be an exception from Article III for all cases properly subject to military jurisdiction under clearly established norms of international law. That is to say, such norms at once provide the constitutional justification for—and outer limits on—the departure from the Article III paradigm.

B. An International Law Exception to Article III?

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

333. *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).

Looking to international law to interpret the Constitution is often a fraught proposition. But in one sense, an Article III exception 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,[334] 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.[335] Although Professor Monaghan rested much of his argument on an analogy to the public rights doctrine,[336] 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.[337]

An obvious analogy in that regard is Congress's power to implement duly enacted treaties under the Necessary and Proper Clause of Article I.[338] Per Justice Holmes' opinion in *Missouri* v. *Holland*,[339] Congress may enact statutes to implement the United States' treaty obligations even if no enumerated power would have authorized the same legislation in the absence of the treaty.[340] In other words, international law—in *Missouri*, as reflected in bilateral treaties—provides an independent source of federal regulatory power that would otherwise exceed the limits imposed by the Constitution—including the Tenth Amendment.[341] Of course, exactly how far Congress may go in implementing a treaty is the question currently before the Supreme Court in the *Bond* case.[342] But whatever the

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

335. *See, e.g.*, FALLON ET AL., *supra* note 8, 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).

336. *See* Monaghan, *supra* note 334, at 866–75.

337. 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).

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

339. 252 U.S. 416 (1920).

340. *See id.* at 431–34.

341. *See id.* at 432.

342. *See* United States v. Bond, 681 F.3d 149 (3d Cir. 2012), *cert. granted*, No. 12-158 (U.S. argued Nov. 5, 2013).

Court ends up holding in *Bond*, the underlying principle—that international law 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 exception grounded in international law would play a comparable role by both authorizing and circumscribing military-specific departures from Article III.

To be sure, an exception to Article III grounded in international law might 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 imposed upon the use of 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.[343] Even though decisions by the Rwandan and Yugoslavian war crimes tribunals and the International Criminal Court don't *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,[344] alongside an ever-growing body of treaty-based legal rules to govern armed conflict situations.[345]

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 properly to assess and apply such loosely defined norms. Indeed, the central question that has arisen under the *Hamdan II* panel's construction of the 2006 MCA is whether "conspiracy" and "material support to terrorism" are defined with enough specificity in customary international law such that defendants could have been on notice *prior* to

343. *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).

344. *See id.* at 49.

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

the MCA's enactment that conduct amounting to those offenses rendered them subject to trial by military commission.[346] 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.

In *Hamdan II*, at least, the D.C. Circuit not only looked to international law, but suggested the appropriate standard of review.[347] As Judge Kavanaugh wrote for the unanimous three-judge panel,

> the 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.[348]

If norms must be firmly grounded in international law before they can provide the basis for *liability* before a military tribunal, it seems only natural to require that norms be similarly grounded in international law before they can provide the basis for the *jurisdiction* of a military tribunal. And as *Hamdan II* illustrates, so construed, international law can therefore serve as both a powerful source of and constraint upon the scope of military jurisdiction—whether retrospectively or prospectively. In *Hamdan II*, such a result followed as a matter of 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 international law actually provides useful illumination of the permissible scope of military jurisdiction

346. *See supra* text accompanying notes 159–164.

347. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012).

348. *Id.* at 1250 n.10 (citations omitted); *see also* Hamdan v. Rumsfeld ("*Hamdan I*"), 548 U.S. 557, 602–03 & n.34 (2006) (plurality opinion); Sosa v. Alvarez-Machain, 542 U.S. 692, 723–38 (2004).

through clear examples of authorizations or constraints upon military trials. Obviously, even if it was possible, a full accounting of the international law 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 could ever provide sufficiently coherent principles to circumscribe Article III. At the same time, although there is no body of international treaty 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, so long as such trials take place in the same courts in which the detaining power's soldiers are tried; and Article 66 of the Fourth Geneva Convention specifically authorizes "non-political" military courts to try civilian offenses in areas under lawful military occupation.

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 non-military offenses, and to otherwise constrain the permissible scope of domestic military jurisdiction.[349] These rulings "may be the inter-American system's most significant contribution to the evolution of the rule of law in the Americas."[350]

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."[351] Based on that test,

349. *See* Christina M. Cerna, International Decision, 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.

350. *Id.*

351. 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).

the European Court has, among other things, invalidated the United Kingdom's assertion of military jurisdiction over a civilian because the military court wasn't sufficiently independent, and may in any event have lacked any kind of compelling justification.[352]

These more specific anecdotes 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.[353] There continue to be examples to the contrary, of course, but it would hardly behoove the government to argue that an international norm of military jurisdiction is clearly 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,"[354] 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,[355] 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."[356] To that end, Principle No. 5 discourages military jurisdiction over civilians, except in

352. *See* Martin v. United Kingdom, App. No. 40426/98, Eur. Ct. H.R. (2006), ¶ 44, *available at* http://cmiskp.echr.coe.int.

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

354. United Nations Economic and Social Council, Commission on Human Rights, 62nd Sess., 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, UN Doc. E/CN.42006/58 (Jan. 13, 2006) [hereinafter Decaux Principles].

355. United Nations General Assembly, 68th Sess., Independence of Judges and Lawyers, UN Doc. A/68/285 (Aug. 7, 2013) [hereinafter Knaul Report].

356. Decaux Principles, *supra* note 354, ¶ 10.

cases of occupation or martial law in which no other forum is available.[357] 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."[358] Principle No. 9 articulates a preference for civilian, rather than military, trials in all cases alleging serious human rights violations.[359] Principle No. 17 underscores the importance of having plenary appellate review of military convictions in civilian courts.[360] 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.[361]

Of course, one could certainly object that the Decaux Principles are an aspirational set of forward-looking ideals, rather than a comprehensive summary of existing international law norms—or that, much as a drunk might use a lamppost, they provide support, rather than illumination.[362] 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. Even if 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

357. *See id.* ¶¶ 20–21.

358. *Id.* ¶ 29.

359. *See id.* ¶¶ 32–35.

360. *Id.* ¶¶ 55–57.

361. *Id.* ¶ 61.

362. *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).

departing from Article III is the existence of a 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.[363]

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 previously unsanctioned exercises of military jurisdiction.[364] Per the Knaul Report, the burden of justifying the assertion of military jurisdiction "rests with the State."[365] And if Judge Kavanaugh's reasoning is adopted, "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.'"[366]

If the government could not provide such evidence to rebut the Decaux Principles, then this thesis would yield three significant effects for U.S. military jurisdiction: *First*, it would compel the conclusion that *Solorio* is wrongly decided—and that the Constitution only permits a departure from Article III for *military* offenses when the civilian courts are otherwise available. *Second*, it would also likely require the invalidation (or, at least, dramatic narrowing) of Article 2(a)(10) insofar as it authorizes the military trial of civilian contractors, even those who are serving with or accompanying the armed forces in the field. *Third*, it

363. Other constitutional constraints will still be relevant, inasmuch as they apply. Thus, the fact 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 First, Fourth, Fifth, Sixth, and Eighth Amendments.

364. 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 "Exceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel." Knaul Report, *supra* note 355, ¶ 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.

365. *Id.* ¶ 103.

366. Hamdan v. United States, 696 F.3d 1238, 1250 n.10 (D.C. Cir. 2012).

would likely prevent the government from asserting military jurisdiction over offenses framed as purely "domestic" war crimes, even prospectively. *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.[367]

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 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.[368] Difficult questions would undoubtedly continue to arise at the margins,[369] but at least the margins would be drawn.

CONCLUSION

Ultimately, the two-part thesis of this article is relatively modest (especially in proportion to its length): that the military exception to Article III has increasingly diverged from a single unifying textual or analytical justification; and that international law would provide a coherent, defensible, and perhaps even normatively desirable ground on which to reconceive the military exception to Article III. Given that such a rejiggering 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.

At the same time, CAAF's July 2012 decision in *Ali* and the D.C. Circuit's pending en banc 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

367. *See supra* note 55 and accompanying text.

368. 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.

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

generally. 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.[370]

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 the military exception can—and should—be placed on firmer analytical footing.

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