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## Justice at War: Military Tribunals and Article III

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*The interaction of Article III of the U.S. Constitution and military tribunals has inspired debate since the Supreme Court's landmark decision in Ex parte Milligan. Today, debate swirls around whether Article III bars military commissions from trying suspected terrorists on charges of inchoate conspiracy. That debate rages against the backdrop of the thorny jurisprudence on non-Article III tribunals generally, which Chief Justice Roberts recently acknowledged has failed to provide "sufficient guidance."*

*The military commission debate and a parallel conversation about courts-martial and Article III pit a protective camp against a functionalist approach. The protective camp, driven by classic opinions by Justices Brennan and Black, sees any step away from Article III's safeguards of judicial independence as a long slide down a slippery slope. In contrast, the functionalist camp, exemplified by Justices Harlan and O'Connor, stresses the practicalities of adjudication and the need to defer to Congress's Article I power.*

*The functional arguments are more persuasive, in part because protective theorists, despite their salutary concern for judicial independence, fail to recognize the structural arguments for non-Article III tribunals. For example, English history well-known to the Framers demonstrates that courts-martial kept the military in check, thus preserving civilian control. Both courts-martial and military commissions*

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can serve a similar structural function today, if their creation is governed by a limiting principle. A limiting principle for military commissions would require that any charge be reasonably related to violations of international law. Court-martial jurisdiction should be limited to service-members and contractors who purposefully affiliate with the armed forces. These limiting principles will enable Congress to exercise its Article I war powers while preserving the core value of judicial independence.

#### TABLE OF CONTENTS

|  |     |
|--|-----|
| INTRODUCTION .....   | 307 |
| I. GIVING THE PROTECTIVE PRINCIPLE ITS DUE: THE RATIONALE FOR ARTICLE III COURTS .....   | 313 |
| II. A RIDDLE WRAPPED INSIDE AN ENIGMA: THE COURT'S ARTICLE III JURISPRUDENCE .....       | 317 |
| A. <i>Protective and Functional Approaches</i> .....                                     | 317 |
| B. <i>Into the Labyrinth: Conundrums and Common Ground in Article III Case Law</i> ..... | 320 |
| 1. Territorial Courts .....  | 320 |
| 2. Public Rights Cases .....   | 323 |
| 3. Military Tribunals.....   | 325 |
| 4. Current Disputes About Other Forums: Agency and Bankruptcy Adjudication .....         | 326 |
| 5. The Continued Importance of Limiting Principles....                                   | 328 |
| III. MILITARY JUSTICE AND THE PROTECTIVE-FUNCTIONAL DIVIDE.....                          | 330 |
| A. <i>English History and the Separate Sphere of Military Justice</i> .....              | 331 |
| B. <i>The Framers' Perspective</i> .....   | 333 |
| C. <i>The Founding Era and Beyond</i> .....  | 335 |
| D. <i>Military Justice and Former Service-Members</i> .....                              | 337 |
| E. <i>Solorio Remedies the Failed Experiment of Service-Connected Crimes</i> .....       | 340 |
| F. <i>Civilian Contractors</i> .....   | 344 |
| G. <i>Military Justice and Article III Appellate Review</i> .....                        | 347 |
| IV. MILITARY COMMISSIONS AND ARTICLE III.....  | 349 |
| A. <i>A Typology of Military Commissions</i> .....                                       | 350 |
| B. <i>Law of War Commissions</i> .....   | 351 |
| C. <i>The Define and Punish Clause and the Deference That Is Congress's Due</i> .....    | 352 |
| D. <i>Ex parte Quirin and the World War II Jurisprudence</i> .....                       | 356 |
| E. <i>Post-9/11 Issues: Conspiracy and Article III</i> .....                             | 362 |

|  |     |
|--|-----|
| 1. Forfeiture of Article III Challenges to Military Commissions .....            | 362 |
| 2. Understanding Conspiracy in International Law.....                            | 368 |
| 3. International Tribunals on Conspiracy as a Form of Liability.....             | 369 |
| 4. Analyzing Conspiracy in <i>al Bahlul</i> .....                                | 370 |
| 5. The Flaws in <i>al Bahlul II</i> 's Rejection of the Functional Approach..... | 375 |
| CONCLUSION.....  | 379 |

#### INTRODUCTION

Striking a blow for judicial candor, Chief Justice Roberts acknowledged in *Stern v. Marshall* that the Court's analysis of when Congress can establish non-Article III tribunals "has not been entirely consistent" and has inspired "some debate."<sup>1</sup> Recent developments regarding military tribunals have confirmed these insights. Debates about the compatibility of both courts-martial and military commissions with Article III<sup>2</sup> pit a protective camp against a functional approach. The protective camp, driven by classic opinions by Justices Brennan<sup>3</sup> and Black,<sup>4</sup> sees any step away from Article III's safeguards of judicial independence, such as lifetime tenure, as a long slide down a slippery slope. In contrast, the functionalist camp, exemplified by Justices Harlan<sup>5</sup> and O'Connor,<sup>6</sup> stresses the

<sup>1</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011). Thirty years earlier, Justice Rehnquist had used more vivid language, acknowledging that some knowledgeable observers, including colleagues on the Court, might perceive the relevant precedents as "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring) (paraphrasing Justice White's dissent); see also *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (expressing "suspicion that something is seriously amiss with our jurisprudence in this area"); *Northern Pipeline*, 458 U.S. at 90 (citing "frequently arcane distinctions and confusing precedents").

<sup>2</sup> U.S. CONST. art. III, § 1.

<sup>3</sup> *Northern Pipeline*, 458 U.S. at 74 (warning that congressional expansion of bankruptcy jurisdiction risked "encroachment upon powers reserved to the Judicial Branch").

<sup>4</sup> *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) (warning of "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III").

<sup>5</sup> *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962) (noting historical flexibility in construing scope of Article III regarding tribunals such as territorial courts "outside the normal context of the federal system").

<sup>6</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (cautioning that an unduly strict reading of Article III could "unduly constrict Congress'").

practicalities of adjudication and the need to defer to Congress's Article I power. This Article argues for the functional approach on two current issues regarding the propriety of military tribunals under Article III.

Military tribunals do not provide a grand or petit jury. Nor do they include judges with the lifetime tenure of Article III judges.<sup>7</sup> Therefore, suspected terrorists tried in military commissions have argued that Article III bars trials on charges of material support and inchoate conspiracy.<sup>8</sup> Such charges, critics insist, belong in an Article III forum that features an independent judge and more elaborate procedural safeguards. In a recent case, a panel of the D.C. Circuit took this view. The Court vacated the inchoate conspiracy of Ali Hamza al Bahlul,<sup>9</sup> a former propaganda aide to Osama bin Laden.<sup>10</sup> In

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ability to take needed and innovative action pursuant to its Article I powers").

<sup>7</sup> *Toth*, 350 U.S. at 17.

<sup>8</sup> Inchoate conspiracy entails mere agreement to commit a criminal act, but does not require a completed act. See *Al Bahlul v. United States (Al Bahlul I)*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc) (remanding to panel on the Article III issue); *Al Bahlul v. United States (Al Bahlul II)*, 792 F.3d 1, 22 (D.C. Cir. 2015) (holding that Article III precludes a military commission trial on charges of inchoate conspiracy and that al Bahlul did not forfeit his Article III challenge to his conviction by failing to raise it below); en banc rehearing granted, 2015 U.S. App. Lexis 16967 (D.C. Cir. Sept. 25, 2015) (granting rehearing on both Article III and forfeiture issues).

<sup>9</sup> *Al Bahlul II*, 792 F. 3d at 22. In *Al Bahlul II*, Judge Rogers wrote for the panel and Judge Tatel issued a concurrence. *Id.* at 7. Judge Henderson dissented, adopting a functional approach like the one advanced in this Article. *Id.* at 27-28 (Henderson, J., dissenting). In her dissent, Judge Henderson cited an earlier article of mine outlining a functional approach to military commissions and the Ex Post Facto Clause. *Id.* at 44, 47 (citing Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 *FORDHAM INT'L L.J.* 1, 27 (2013)).

<sup>10</sup> *Al Bahlul I*, 767 F.3d at 5-6; see Stephen I. Vladeck, *Military Courts and Article III*, 103 *GEO. L.J.* 933, 965-66 (2015) (arguing that military commissions violate Article III if they do not fit into narrowly circumscribed categories, including trial of recognized international law violations); cf. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 *VA. J. INT'L L.* 5, 74-75 (2005) (asserting that international law would bar military commission trial of conspiracy charges). For commentary on this issue, compare Peter Margulies, *Detained Suspected Terrorists: Trial in Military Courts or Civilian Courts?*, 2 *HARV. J.L. & PUB. POL'Y (FEDERALIST EDITION)* 157, 167-68 (2015), available at [http://www.harvard-jlpp.com/wp-content/uploads/2015/02/Marguiles\\_Final.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2015/02/Marguiles_Final.pdf) (arguing that case law on Article III supports military commissions that try belligerents in armed conflicts for conduct reasonably related to violations of international law), with Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 *WIS. L. REV.* 681, 693-713 (acknowledging that precedents on Article III can be read to permit military commissions, but arguing that this authority should be read narrowly to allow only military commission prosecutions based on

the military justice area, involving proceedings to discipline U.S. service-members, critics insist that an Article III court is the only suitable forum for charges against civilian contractors who work alongside U.S. troops abroad. Courts-martial, these critics insist, lack the independence and procedural safeguards necessary to protect the rights of civilians.<sup>11</sup> In both settings, critics of the functionalist approach fail to show adequate deference to Congress's exercise of its Article I powers.

Examining these questions requires consulting the challenging case law on non-Article III tribunals, which then Justice Rehnquist had characterized as defying "easy synthesis."<sup>12</sup> The conventional view, acknowledged in somewhat sardonic tones by Justice Rehnquist as "a general proposition and three tidy exceptions,"<sup>13</sup> is that matters involving criminal responsibility or claims for damages should generally be entertained in either state courts or Article III tribunals, with three exceptions: territorial courts,<sup>14</sup> courts-martial,<sup>15</sup> and the most elusive category of all, "public rights."<sup>16</sup> However, these three categories are anything but tidy,<sup>17</sup> and may not even be exceptions.

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universally recognized violations of international law).

<sup>11</sup> *United States v. Ali*, 71 M.J. 256, 281 (C.A.A.F. 2012); cf. Vladeck, *supra* note 10 (questioning such jurisdiction).

<sup>12</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). For leading scholarly efforts to attempt the task, see generally Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233 (1990) (proposing flexible approach that largely defers to Congress's Article I powers); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *HARV. L. REV.* 915 (1988) [hereinafter *Legislative Courts and Article III*] (arguing that appellate review by Article III court cures most Article III infirmities); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *HARV. L. REV.* 643 (2004) (arguing that bankruptcy courts and similar tribunals that are adjuncts of Article III courts do not present intractable Article III issues).

<sup>13</sup> *Northern Pipeline*, 458 U.S. at 91.

<sup>14</sup> *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

<sup>15</sup> *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82-83 (1857).

<sup>16</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (noting "firmly established historical practice" regarding these categories, while narrowing the third category to "true 'public rights' cases"). In *Stern*, Chief Justice Roberts conceded that the Court's public rights jurisprudence lacked clarity. *Id.* at 2615 ("recent cases . . . fail[] to provide concrete guidance."). The foundational case on public rights is *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283-85 (1856) (holding that federal government could use summary administrative procedure to recover outstanding tax revenues from federal customs collector).

<sup>17</sup> See Vladeck, *supra* note 10, at 951-54.

Take the case of federal bankruptcy jurisdiction. As Justice White noted in a landmark case<sup>18</sup> and Chief Justice Roberts tacitly acknowledged in *Stern*, the vast majority of claims worked out in the course of a bankruptcy proceeding are *state law claims* between private parties.<sup>19</sup> By their terms, therefore, such claims do not fit within the “public rights” exception to Article III, which in its origins entailed disputes between the government as a whole and the government’s own officials.<sup>20</sup> Those seeking an answer about why most bankruptcy jurisdiction survives need to look beyond these supposedly “tidy” exceptions.<sup>21</sup>

Moreover, as the Court demonstrated in affirming the convictions of Nazi saboteurs in military commissions,<sup>22</sup> the military justice category is also untidy — it can include not only courts-martial, but also military commissions that dispense justice to enemy belligerents in an armed conflict with the United States.

As for territorial courts, commentators both recent and past have questioned what special attributes justify the use of non-Article III

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<sup>18</sup> *Northern Pipeline*, 458 U.S. at 96 (White, J., dissenting) (noting that “in the ordinary bankruptcy proceeding the great bulk of creditor claims . . . have accrued under state law . . . [including] claims for goods sold, wages, rent, utilities, and the like”).

<sup>19</sup> *Stern*, 131 S. Ct. at 2614 (referring approvingly to “creditors’ hierarchically ordered claims to a pro rata share of the bankruptcy res”) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989)).

<sup>20</sup> See *Murray’s Lessee*, 59 U.S. at 279-85.

<sup>21</sup> In *Stern*, Chief Justice Roberts suggested that the Court had expanded public rights cases to those involving specialized federal agencies. See *Stern*, 131 S. Ct. at 2613 (limiting public rights cases to those “in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 852 (1986) (upholding the agency’s adjudication of both the customer’s complaint against the broker and the broker’s counterclaim); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (upholding binding arbitration in disputes between (a) companies that had filed data to support an initial pesticide registration and (b) other firms that had used this data to support later registration efforts for related products); cf. *Stern*, 131 S. Ct. at 2614-15 (suggesting that consent may supply the rationale for a bankruptcy court’s resolution of creditors’ claims based on state law, while indicating that the party contesting bankruptcy court jurisdiction over the counterclaim in *Stern* had not consented). The immediate problem presented by *Stern*’s challenge to bankruptcy court jurisdiction was alleviated by *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014) (holding that Article III was not violated when the bankruptcy judge submitted proposed findings of fact to a federal district court for de novo review).

<sup>22</sup> *Ex parte Quirin*, 317 U.S. 1, 43-44 (1942).

tribunals there, especially since some territories such as Puerto Rico have readily accommodated Article III tribunals.<sup>23</sup>

Adding to the puzzlement, the Supreme Court has declined to view tribunals such as military commissions as “exceptions” to Article III, instead opining that commissions are not “courts” at all (at least in the Article III sense).<sup>24</sup> In *Quirin*, the Court sought to distinguish courts-martial, which enjoy an express exception from the Fifth Amendment right to a grand jury,<sup>25</sup> from military commissions, which lack any such express exception. Commissions, the Court opined, were an entirely different type of tribunal that relied on the lessons of history and Congress’s Article I powers.<sup>26</sup> Viewed in this light, commissions did not require the installation of Article III safeguards, even though commissions were also outside the “tidy exceptions” Justice Rehnquist wryly invoked.

Sorting out these puzzles is not merely a matter of academic interest. It also entails a real human stake. Military courts and commissions adjudicate matters of life and death.<sup>27</sup> They affect the reputation of the United States, both by controlling the conduct of U.S. forces and by holding foreign nationals accountable. At the same time, military tribunals represent an important “incident” of Congress’s power to initiate wars.<sup>28</sup> A turn in the doctrine that makes military tribunals too easy to convene, or too difficult, has stakes for the individuals involved and for national security. These puzzles also tell us much about constitutional method; it is to these methodological questions that I now turn.

In this battle about military tribunals, there are two opposing schools of thought: the protective and functional perspectives. The protective camp regards even the most isolated incursions on the jurisdiction of Article III courts as a slippery slope with a steep downward trajectory for both individual liberty and the separation of powers.<sup>29</sup> For the protective camp, even “[s]light encroachments” on the protections built into Article III can pave the way for fresh

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<sup>23</sup> See Vladeck, *supra* note 10, at 934 n.3, 945.

<sup>24</sup> *Quirin*, 317 U.S. at 39 (observing that military commissions “are not courts in the sense of the Judiciary Article” of the Constitution).

<sup>25</sup> U.S. CONST. amend. V.

<sup>26</sup> *Quirin*, 317 U.S. at 29-30, 39.

<sup>27</sup> *Al Bahlul*, for example, was sentenced to life in prison. See *Al Bahlul I*, 767 F.3d 1, 5 (D.C. Cir. 2014) (en banc).

<sup>28</sup> See *Quirin*, 317 U.S. at 26.

<sup>29</sup> See Hafetz, *supra* note 10, at 698-99; Vladeck, *supra* note 10, at 965-66.

onslaughts that eventually undermine the bulwark of judicial review.<sup>30</sup> In the area of military tribunals, the protective camp, modeled sixty years ago by Justice Black, views jurisdiction over any civilians (including ex-service-members charged with crimes committed during their period of service) as a precursor of “military rule.”<sup>31</sup> Champions of the protective camp discount the importance of Congress’s Article I power, and view Article III as trumping congressional efforts to efficiently fulfill regulatory objectives. Just as protective theorists define congressional Article I powers narrowly, they narrowly construe bodies of law such as international law<sup>32</sup> or bankruptcy law,<sup>33</sup> which provide a basis for Congress’s use of its Article I powers. Protective theorists would regard Article III as prohibiting Congress from prospectively authorizing military commissions to try suspected terrorists on either inchoate conspiracy or material support charges.<sup>34</sup> They would also regard Article III as barring court-martial jurisdiction over civilian contractors accompanying U.S. armed forces abroad.<sup>35</sup>

This Article argues that functionalists have a better way of cutting through the tangled thickets of precedent. Functionalists take to heart Justice Jackson’s view in *Youngstown* that the Framers contemplated a “workable government.”<sup>36</sup> As pragmatists, champions of a functional perspective reject a “doctrinaire reliance on formal categories.”<sup>37</sup> In cases involving military justice, territorial administration, and administrative adjudication, functionalists believe that the Framers wished to harmonize Article III’s protection of judicial independence and Article I’s enumeration of the powers of Congress.<sup>38</sup> To restrain the political branches, functionalists demand a limiting principle that preserves checks and balances. Moreover, functionalists argue that non-Article III tribunals can *reinforce*, not dismantle, constitutional structures. Non-Article III tribunals can strengthen Article III courts by shielding the latter from contexts that would challenge their

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<sup>30</sup> See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (citing *Reid v. Covert*, 354 U.S. 1, 39 (1957)).

<sup>31</sup> *Reid v. Covert*, 354 U.S. 1, 26-27 (1957).

<sup>32</sup> See Hafetz, *supra* note 10, at 730.

<sup>33</sup> See *Stern*, 131 S. Ct. at 2620-21 (Scalia, J., concurring).

<sup>34</sup> See Vladeck, *supra* note 10, at 970-73.

<sup>35</sup> See *id.* at 972-74.

<sup>36</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>37</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586-87 (1985).

<sup>38</sup> Justice O’Connor exemplified the functional approach; my efforts here seek to distill and refine the pragmatic approach she outlined. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986); *Thomas*, 473 U.S. at 589.



capacity and credibility. Functionalists are therefore willing to forego Article III tribunals in specialized or exigent situations when the formal safeguards of Article III are “impracticable and anomalous.”<sup>39</sup> Non-Article III tribunals can also serve the checking function so important to the Framers. Functionalists cite the Framers’ belief that efficient military justice ensures civilian control over the military.<sup>40</sup> Based on these premises, functionalists will support expanded jurisdiction for military tribunals as long as those expansions serve Congress’s Article I authorities, enforce structural norms, and furnish a limiting principle that prevents a congressional take-over of the judiciary. This flexible stance, I argue, allows courts to fulfill their “responsibility to see the Constitution work.”<sup>41</sup>

The Article is in four Parts. Part I discusses the virtues of judicial independence under Article III, as well as the Framers’ cautionary notes on the limits of Article III tribunals. Part II discusses the protective and functional camps, and analyzes the Supreme Court’s perplexing case law on when non-Article III tribunals are permissible. Part III discusses military justice, centering on the protective theorists’ misreading of the structural rationale for courts-martial. It argues that courts-martial should have jurisdiction over civilian contractors abroad. Part IV takes up military commissions, arguing that Article III is satisfied by a rule limiting commissions to charges reasonably related to international law.

#### I. GIVING THE PROTECTIVE PRINCIPLE ITS DUE: THE RATIONALE FOR ARTICLE III COURTS

Acolytes of the protective approach are correct in noting Article III’s importance to the separation of powers. Hamilton wrote in *Federalist No. 78* about the need for an independent judiciary.<sup>42</sup> In Hamilton’s scheme, the judiciary would be a crucial “intermediate body between

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<sup>39</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) (explaining why the Fourth Amendment does not require a warrant for a search abroad of the property of a person with no previous ties to the United States). See generally *Ex parte Quirin*, 317 U.S. 1, 38-39 (1942) (noting that the Framers appreciated the difficulty of setting up Article III tribunals in the midst of armed conflict).

<sup>40</sup> See Justice Kennedy’s opinion for the Court in *Loving v. United States*, 517 U.S. 748, 760-63 (1996) (discussing the English experience with military justice in the 17th and 18th centuries and its influence on the Framers).

<sup>41</sup> *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962) (explaining Chief Justice John Marshall’s rationale for permitting non-Article III territorial courts).

<sup>42</sup> See *THE FEDERALIST NO. 78*, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the people and the legislature.”<sup>43</sup> In this capacity, the courts would “keep [the legislature] within the limits assigned to [its] authority” under the Constitution.<sup>44</sup>

For Hamilton, this need to police legislative limits derived from a psychology of political majorities that underlay the Framers’ concern for separation of powers. Hamilton, following Enlightenment psychology, believed that the political branches were prone to short-term thinking, largely because their dependence on the people would make them subject to the deficits that afflict political majorities.<sup>45</sup> As Hamilton put it, “ill humors” such as fear, bias, envy, or avarice can produce “serious oppressions” of minorities.<sup>46</sup> Such “momentary inclination[s]” could place the Constitution at risk, if judicial review was not available to ensure that the political branches act on “better information” and “more deliberate reflection.”<sup>47</sup> While the passions of the moment could sway the political branches, the judiciary would be independent from these branches. The judiciary would therefore have the distance and disinterest to supply the “deliberation” that the political branches sometimes sadly lacked.<sup>48</sup> By conferring lifetime

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Hamilton refined these concepts in the course of the practice of law prior to the constitutional convention, as he argued successfully in the celebrated New York case of *Rutgers v. Waddington* for judicial review of a New York statute that violated international law. See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393, 400 n.\* (Julius Goebel, Jr. et al. eds., 1964) (criticizing the impulse toward “revenge” against Britain that had driven enactment of the challenged law); cf. Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 962-66 (2010) (discussing *Rutgers*’ importance); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT’L L.J. 1, 11-21 (2013) [hereinafter *Defining and Punishing*] (discussing political psychology outlined by international law publicists such as Pufendorf and Vattel and development of these ideas by Hamilton).

<sup>46</sup> THE FEDERALIST NO. 78, *supra* note 42, at 469.

<sup>47</sup> *Id.*

<sup>48</sup> See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1524-30 (1988) (explaining how a “process-based, republican-not-pluralist constitutional jurisprudence” could avoid the problem of subordination to popular politics); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564-71 (1988) (explaining how republican approaches call for deliberation in the political process); cf. Richard H. Fallon, Jr., *Commentary: What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1703-20 (1989) (arguing that republicanism’s critique of liberalism’s stance on deliberation is incomplete and exaggerated but provides a useful challenge to liberal premises such as neutrality).

tenure on judges, Article III guarded against the “encroachments and oppressions of the representative body.”<sup>49</sup> Hamilton warned that any lesser protection for judges, including the prospect of renewable terms at the pleasure of the political branches, would “be fatal to [the courts’] necessary independence.”<sup>50</sup> A judiciary that held office subject to political considerations would be “unwilling[] to hazard the displeasure” of the political branches,<sup>51</sup> and would decide cases based on the perceived “popularity”<sup>52</sup> of the outcome to be selected, rather than its soundness on the merits.

Chief Justice Marshall’s groundbreaking opinion in *Marbury v. Madison*<sup>53</sup> implicitly invoked this same premise. *Marbury* shares with Federalist No. 78 the view that, in founding moments, people formulate fundamental principles to guide their future.<sup>54</sup> Principles selected through the “great exertion” of founding moments,<sup>55</sup> like the Framers’ convening in the long, hot summer in Philadelphia in 1787, should be engineered to withstand passing impulses.<sup>56</sup> Chief Justice Marshall implied that the judiciary is the only branch capable of vindicating the Framers’ vision of abiding limits, since it is insulated from the passing political winds.

In addition to the structural argument about the need for judicial independence made by both Hamilton and (more indirectly) by Marshall, Hamilton added a pragmatic argument about the *quality* of personnel that lifetime tenure would yield. Hamilton recognized that few individuals would possess the thirst for “long and laborious study” of precedents required of the judge and the “integrity” that was also necessary for such special service.<sup>57</sup> Lifetime tenure would attract individuals who had displayed such virtues in their legal practice, while a more uncertain term of office would “naturally discourage such characters.”<sup>58</sup>

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<sup>49</sup> See THE FEDERALIST NO. 78, *supra* note 42, at 465.

<sup>50</sup> *Id.* at 471.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>54</sup> See *id.* at 176.

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* at 174 (doubting that the Framers intended rule solely by “the discretion of the legislature”); *cf. id.* at 176-77 (expressing skepticism that Framers could have intended, in crafting a written constitution designed to be permanent, that Congress would be free “at any time” to exceed the limits the Constitution set).

<sup>57</sup> THE FEDERALIST NO. 78, *supra* note 42, at 471.

<sup>58</sup> *Id.*

Hamilton also wrote of the importance of ensuring that the benefits of federal judicial power were available in disputes between a U.S. citizen or state and “foreign States, Citizens, or Subjects.”<sup>59</sup> As Hamilton put it, the “denial or perversion of justice” in a judicial decisions in one nation affecting a foreign state’s citizens is a prime cause for war.<sup>60</sup> Bringing the capacity for deliberation of the federal judiciary to bear on controversies dealing with foreign nationals was a sure way to minimize such causes of hostilities. Hence, Hamilton concluded, the federal courts should “have cognizance of all causes in which the citizens of other countries are concerned.”<sup>61</sup> One can interpret both the Constitution’s language of “Controversies” and Hamilton’s of “causes” as referring only to civil suits or proceedings, not to criminal prosecutions. Indeed, Article III has never been read to require that federal courts preside over the criminal trials of foreign nationals who have allegedly violated state criminal laws, as long as foreign nationals like all other criminal defendants can have recourse to the federal courts to address state violations of the federal constitution. However, Hamilton’s discussion of the nature of national interests here suggests that any forum besides the federal judiciary should be on a sound legal footing.

At the same time, those carving out a role for Article III tribunals should be mindful of Hamilton’s reminder that the judiciary is the “least dangerous” branch.<sup>62</sup> The judiciary, Hamilton observed, compared with the political branches, “has no influence over either the sword or the purse.”<sup>63</sup> Arrayed against the “force” and political “will” of the political branches, it has only “judgment” to commend it.<sup>64</sup> Indeed, as Hamilton conceded, to render those “judgments” effective in the world, the judiciary requires the “aid of the executive arm,” through the executive branch’s collaboration in the mutual project of self-government and the more tangible assistance provided by federal marshals.<sup>65</sup> Nurturing that mutual project requires the cultivation of second-order judgment about the circumstances in which the court can best play its role. That second-order judgment,

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<sup>59</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>60</sup> THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>61</sup> *Id.*

<sup>62</sup> THE FEDERALIST NO. 78, *supra* note 42, at 465.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Hamilton implied, may in turn call for some reticence in pronouncing judgments about matters of “the sword [and] the purse.”<sup>66</sup>

With this background in mind on the institutional and structural importance of Article III protections, we turn to the evolution of the Court’s jurisprudence.

## II. A RIDDLE WRAPPED INSIDE AN ENIGMA: THE COURT’S ARTICLE III JURISPRUDENCE

The Supreme Court’s Article III case law has inspired widespread puzzlement, including chagrin among the Justices themselves. This section first looks at the two principal camps interpreting this case law. Then it turns to the case law itself.

### A. *Protective and Functional Approaches*

The two dominant strands in the case law on non-Article III tribunals are the functional and protective perspectives. The functional view, which this Article favors, seeks to reconcile Article III protections with Congress’s Article I prerogatives, the President’s status under Article II as Commander in Chief, and the practical challenges posed by specialized or exigent situations. The protective view views Article III as trumping both Articles I and II, and regards mention of practicalities the way the occupant of a tent views the proverbial camel’s nose: as a signal that an inner sanctum is about to be invaded.

During the last sixty years, Justices Brennan and Black served as the most eloquent proponents of the protective approach.<sup>67</sup> They focused on the benefits of an independent judiciary for both constitutional structure and rights. On rights, Justice Brennan cited Hamilton for the proposition that an independent judiciary would be in a position to “guarantee that the process of adjudication itself remained impartial.”<sup>68</sup> On this view, any detour from Article III’s strictures

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<sup>66</sup> Alexander M. Bickel, *The New Supreme Court: Prospects and Problems*, 45 TUL. L. REV. 229, 229 (1971).

<sup>67</sup> See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60, 76 (1982) (plurality opinion by Brennan, J.) (noting Hamilton’s views in *Federalist* No. 78 in holding that Article III barred bankruptcy court jurisdiction over tort and contract action brought by bankruptcy petitioner against another entity that was not claimant in the bankruptcy proceeding); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18-23 (1955) (Black, J., for majority) (holding that court-martial lacked jurisdiction over individual discharged from the service, even regarding acts committed while in the armed forces).

<sup>68</sup> *Northern Pipeline*, 458 U.S. at 58.

(such as lifetime tenure), would imperil the fair hearing of individual claims. Moreover, non-Article III tribunals lack attributes of the more formal forum, including provisions for a jury trial<sup>69</sup> and, in criminal cases, presentment to a grand jury.

Alarmed by this prospect, protective theorists turn to that favorite metaphor for legal anxiety: the slippery slope.<sup>70</sup> For acolytes of the protective approach, a momentary diversion from the mainstream path of Article III tribunals is never an idle frolic. Instead, as Justice Black warned, “Slight encroachments create new boundaries from which legions of power can seek new territory to capture.”<sup>71</sup> Protective theorists, ever wary of incursions on Article III’s guarantees, view even a modest expansion of non-Article III tribunals as an existential threat. For example, Justice Black, authoring a plurality opinion in a decision holding that military courts could not try dependents of service-members for crimes committed on U.S. bases, warned that the result of a different decision would be the rise of “military rule.”<sup>72</sup> “Policing the line,” as Professor Hafetz characterizes this stance, is not merely a choice among competing models; it is a solemn duty at the core of constitutional governance.<sup>73</sup>

Protective theorists also perceive Article III courts as able to vindicate the Framers’ scheme of checks and balances. Non-Article III tribunals, in contrast, threaten to undermine that scheme, granting either Congress or the President untrammelled power. Because of this fear, protective theorists tend to systematically discount Congress’s interest in exercising its Article I authority, including the authority to address military discipline,<sup>74</sup> abusive trade practices,<sup>75</sup> and territorial governance.<sup>76</sup> Protective theorists also unduly discount the practical

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<sup>69</sup> See U.S. CONST. art. III, § 2, cl. 3.

<sup>70</sup> Cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 852 (1986) (in upholding non-Article III tribunal’s adjudication of counterclaim by broker against customer, Justice O’Connor noted that “we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical ‘slippery slope’ may deposit us”).

<sup>71</sup> *Reid v. Covert*, 354 U.S. 1, 39 (1957), cited in *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

<sup>72</sup> *Reid*, 354 U.S. at 26-27.

<sup>73</sup> See Hafetz, *supra* note 10, at 682-85 (describing the role of international law in defining the constitutional limits of military commissions); cf. Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 612-16 (expressing concern about the sources of commission jurisdiction to try crimes such as conspiracy and material support).

<sup>74</sup> See Vladeck, *supra* note 10, at 962-64.

<sup>75</sup> See *Schor*, 478 U.S. at 859 (Brennan, J., dissenting).

<sup>76</sup> See *Glidden Co. v. Zdanok*, 370 U.S. 530, 599 (1962) (Douglas, J., dissenting).

difficulties entailed in requiring the formal appurtenances of Article III courts for all of these specialized contexts. Moreover, protective theorists ignore the role of non-Article III tribunals since the Framers' day in *promoting* checks and balances. The English experience, for example, suggested that military courts imposed swift and sure discipline that was necessary to the preservation of civilian control.<sup>77</sup> The case law and commentary espousing the protective approach does not acknowledge this key development, well-known to the Framers.<sup>78</sup>

Protective theorists do not wish to do away with all non-Article III tribunals. However, they want to narrowly construe both the scope and rationale of these tribunals. For example, protective theorists want to strictly limit military commissions to trying suspected terrorists on charges that international law has expressly recognized.<sup>79</sup>

Functionalists take a different tack, centering on Justice Jackson's view that the Framers contemplated a "workable government." Consistent with this premise, functionalists<sup>80</sup> read Article III in light of the importance of Congress exercising its Article I powers.<sup>81</sup> Functionalists are willing to accept innovations that promote Congress's goals, as long as those innovations have a limiting principle that preserves checks and balances. Moreover, functionalists are more willing to view non-Article III tribunals as reinforcing the structural values served by Article III courts and other constitutional checks and balances. Taking a pragmatic perspective, functionalists are more attuned to contexts when Article III courts are "impracticable and anomalous."<sup>82</sup> In these situations, functionalists contend, the greater informality and adaptability of non-Article III tribunals saves Article III tribunals from ineffectiveness, embarrassment, and error, preserving the special authority of those tribunals. Similarly,

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<sup>77</sup> *Loving v. United States*, 517 U.S. 748, 760-62 (1996).

<sup>78</sup> See *Reid v. Covert*, 354 U.S. 1, 24-30 (1957) (offering account of English experience that recounts only cautionary experiences with military justice); *infra* notes 150-60 and accompanying text (analyzing the historical question).

<sup>79</sup> See *Al Bahlul II*, 792 F.3d 1, 8-11 (D.C. Cir. 2015).

<sup>80</sup> See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 507 (1987) (noting that the non-Article III tribunal in *Schor* "promoted an appropriate congressional purpose").

<sup>81</sup> See *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011) (indicating support in case law for non-Article III tribunals "integrally related to particular federal government action"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985).

<sup>82</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990).

functionalists argue based on English and U.S. history that military justice aids in the subordination of military to civilian authority.<sup>83</sup>

*B. Into the Labyrinth: Conundrums and Common Ground in Article III Case Law*

While an absolutist preference for Article III tribunals may have been a fair reading of the Constitution's text, functional concerns have tempered that preference from the earliest precedents.<sup>84</sup> This subsection argues that functionalism has figured prominently in Article III questions since the era of Chief Justice Marshall. As a general matter, the Supreme Court has taken a functional turn, requiring three factors: (1) a reasonable nexus between a non-Article III tribunal and Congress's Article I powers; (2) evidence that non-Article III tribunals will reinforce, rather than erode, constitutional structure; and 3) a limiting principle that will prevent Congress from using its Article I power to eviscerate Article III adjudication and the jurisdiction of state courts. Where the Court could not identify a limiting principle, it has held that a non-Article III tribunal violated the separation of powers. The following discussion examines the interplay of these factors in the areas that have drawn the most sustained judicial attention: territorial courts, public rights, military tribunals, and bankruptcy.

*I. Territorial Courts*

Chief Justice Marshall recognized that Congress's power to make "all needful rules and regulations respecting the territory belonging to the United States" authorized Congress to establish non-Article III tribunals in those territories.<sup>85</sup> As Chief Justice Marshall explained, these courts were incidents of the "general right of sovereignty, which exists in the government" to ensure law, order, and efficient administration in territories abroad.<sup>86</sup> Subsequently, Justice Harlan

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<sup>83</sup> *Loving v. United States*, 517 U.S. 748, 760-62 (1996). For an argument that the advice of military attorneys on international law can sometimes be required to keep civilian officials honest, see Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 809-11 (2012).

<sup>84</sup> See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828). In *Glidden Co. v. Zdanok*, 370 U.S. 530, 547 (1962), Justice Harlan read *Canter* as reflecting Chief Justice Marshall's vision of a workable government that would allow the Framers' scheme to endure over time.

<sup>85</sup> *Canter*, 26 U.S. at 546 (citing U.S. CONST. art. IV, § 3, cl. 2).

<sup>86</sup> *Id.*



explained that Marshall's opinion owed much to the "practical problems" of territorial administration.<sup>87</sup> In territories such as Florida that were headed to statehood, requiring that a court be an Article III tribunal would have deprived Congress of needed flexibility.

Tellingly, requiring Article III tribunals would also have ultimately damaged the continued standing and reputation of federal courts and impaired self-government in the territories. Prior to statehood, a territory needed courts for "general jurisdiction" over matters of strictly local and territorial interest that elsewhere belongs in state courts.<sup>88</sup> Appointing Article III judges to hear such matters, while it might have been constitutionally permissible, would have been wasteful. The need for such tribunals would have ceased at statehood, when a former territory would be able to establish its own judiciary to handle torts, property, contracts, and other traditional state law issues.<sup>89</sup> Moreover, Congress generally left the territories to devise their own "municipal law," without requiring the separation of powers that the Constitution required of the federal government.<sup>90</sup> Instead of requiring the separation of powers, which would have proven unwieldy in dealing with disparate legal cultures, Congress retained a veto over territorial self-government measures.<sup>91</sup> Requiring strict adherence to Article III in this setting would have diminished self-government in the territories. Arraying Article III against self-government in the territories would have imposed significant strain on structural values.

Justice Harlan, reading Chief Justice Marshall's opinion, contended that reading Article III to impair Congress's exercise of constitutional power and damage structural values would have been "dogmatic" and "doctrinaire in the extreme."<sup>92</sup> Justice Marshall, Justice Harlan explained, "conscious . . . of his responsibility to see the Constitution work," read the Constitution as providing the "flexibility" necessary to deal with these special challenges.<sup>93</sup> This reading also contained a limiting principle. Congress's power to administer territories supplied the rationale for the non-Article III tribunals in *Canter*. Therefore, the non-Article III tribunals upheld there would not be permissible within the states, where Congress had no need (and no power) to establish

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<sup>87</sup> *Zdanok*, 370 U.S. at 545.

<sup>88</sup> *Id.* at 545-46.

<sup>89</sup> *See id.* at 545-46.

<sup>90</sup> *Id.* at 546.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 547 (emphasis added).

courts of general jurisdiction, and congressionally created courts were not needed for self-government.

In *Palmore v. United States*,<sup>94</sup> the Court again cited *Canter* in upholding Congress's creation of non-Article III District of Columbia courts with jurisdiction over "strictly local" civil and criminal matters.<sup>95</sup> Justice White, writing for the majority, cited Congress's power under Article I to "exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia.<sup>96</sup> Pursuant to this provision, Congress, according to Justice White, can exercise "plenary" power over governmental power in the District of Columbia.<sup>97</sup> The Framers gave Congress that power to fulfill the Framers' goal of carving out a discrete geographic area outside the sovereign authority of any of the several states to serve as the seat of the national government. Establishing non-Article III courts for the District of Columbia fit snugly within this grant of constitutional power to Congress. To buttress his analysis, Justice White analogized congressional power to create courts in the District of Columbia to the power to make rules regarding U.S. territories.<sup>98</sup> As in *Canter*, requiring lifetime tenure for judges who in essence served the same function as state court judges elsewhere in the nation would have made administration of laws in the District less "workable and efficient."<sup>99</sup> Second-guessing Congress's exercise of its power would have unduly discounted the "practical considerations" that Justice Harlan in *Zdanok* viewed as central.<sup>100</sup>

Justice White appeared to concede that *Palmore* might have been decided differently if the government had not offered a coherent limiting principle for Congress's power. According to Justice White, Congress's power to create non-Article III courts in the District of Columbia extended only to courts adjudicating "strictly local" issues pertaining to governance within the District.<sup>101</sup> The result might have been quite different, Justice White hinted, had Congress sought to create non-Article III courts to adjudicate matters of "constitutional and . . . general concern."<sup>102</sup> Deferring to Congress in that event would

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<sup>94</sup> 411 U.S. 389 (1973).

<sup>95</sup> *Id.* at 407.

<sup>96</sup> *Id.* at 397 (citing U.S. CONST. art. I, § 8, cl. 17).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 402-03.

<sup>99</sup> *Id.* at 409.

<sup>100</sup> *Id.* at 404.

<sup>101</sup> *Id.* at 407.

<sup>102</sup> *See id.*

have raised the specter of wholesale congressional displacement of Article III tribunals.

Tellingly, Congress's channeling of local matters to non-Article III courts also had structural benefits for Article III tribunals. According to Justice White, Congress established the courts at issue in *Palmore* to free Article III courts from the "smothering responsibility" of proliferating civil and criminal local litigation.<sup>103</sup> Relieved of this burden, Article III courts would have more time available for the weighty federal questions where their expertise is most needed.

## 2. Public Rights Cases

Congress's Article I powers, the reinforcement of other structural virtues, and a robust limiting principle also informed the Court's first "public rights" case, *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>104</sup> In *Murray's Lessee*, the Court upheld a summary warrant issued by Treasury Department officials for recovery of a balance owed to the government by a customs collector. According to the Court, English practice, well-known to the Framers of the U.S. Constitution, had been to employ a summary procedure.<sup>105</sup> The Court found a similar trend in U.S. practice since the first quarter-century of the new republic's existence.<sup>106</sup> Crafting a summary procedure to ensure the due diligence of customs collectors was a crucial adjunct of the power to tax, which the Constitution granted to Congress in Article I.<sup>107</sup> The summary remedy endorsed by the Court made tax collectors more accountable and ensured that revenues collected from taxpayers would serve appropriate public purposes. As the Court observed in finding that such summary administrative procedures did not violate Article III, there was an "[i]mperative necessity"<sup>108</sup> in ensuring that collectors of tax revenue would promptly convey that revenue to the government, which would otherwise risk defaulting on its own obligations.<sup>109</sup>

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<sup>103</sup> *Id.* at 408-09.

<sup>104</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856).

<sup>105</sup> *Id.* at 277 (consulting "settled usages and modes of proceeding" in England, and concluding that "there has been no period, since the establishment of the English monarchy, when there has not been . . . a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues").

<sup>106</sup> *Id.* at 279 (noting that Treasury officials had enjoyed this authority in some form since 1813).

<sup>107</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>108</sup> *Murray's Lessee*, 59 U.S. at 282.

<sup>109</sup> *See id.* at 281 (noting that the purpose of the tax collector's receipt of tax

The summary procedure endorsed in *Murray's Lessee* also served the values underlying Article III. Enlisting the courts as the first line of defense against tax collectors going rogue would have set up the courts to fail, since the delay occasioned by a full-dress “judicial controversy”<sup>110</sup> made the courts an institution ill-suited to the time-sensitive task at hand. Sparing the courts this burden conserved their legitimacy for cases better suited to their skill set. Moreover, a limiting principle regulated the summary administrative procedures that the Court upheld. Private individuals seeking to collect on debts would not have recourse to the summary procedure; they would need to seek a judicial resolution of their disputes.

Cases like *Canter* and *Murray's Lessee* reinforced the constitutional structure, even as they departed from the formalities of Article III tribunals. Imposing formalities that do not fit the situation does not merely frustrate Congress's efforts to exercise its Article I powers; it also degrades the virtues embodied in Article III. As Justice Kennedy observed in *Verdugo-Urquidez*, explaining why the Fourth Amendment did not require a warrant for a search abroad of the premises of a person with no ties to the U.S., we should not require the exercise of judicial power when use of that power would be “impracticable and anomalous.”<sup>111</sup> Federal judicial power would not be a practical measure for searches abroad, Justice Kennedy explained, where it is not clear that foreign officials would obey the terms of a warrant, and shifting exigencies might make those terms irrelevant prior to execution of the search. In far-flung U.S. territories, Article III courts might become a white elephant, displaying minimal utility but requiring extensive maintenance. Similarly, requiring the government to jump through Article III's hoops to recover tax revenue from an obdurate tax collector could result in a Dickensian spectacle of protracted justice that would bring courts in general into disrepute. Avoiding these kinds of self-inflicted wounds is crucial to the Bickelian notion of “passive virtues”<sup>112</sup> and to Justice Frankfurter's

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revenue is to “use it in payment of the debts of the government” and that this purpose contemplated the power to use “appropriate means to secure” the availability of revenue collected).

<sup>110</sup> *Id.* at 282.

<sup>111</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

<sup>112</sup> See generally Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (arguing that courts in exercise of prudence should often decline to hear cases that might insert courts into political and social disputes that courts are ill-equipped to address).

vision of judicial restraint.<sup>113</sup> It also plays a role in the crafting of standing doctrine to restrict courts to “cases and controversies”<sup>114</sup> and in the canon disfavoring extraterritorial application of statutes.<sup>115</sup> Citing practicality as a justification for non-Article III tribunals should not permit the jettisoning of Article III’s protections; however, it acts as a counterweight to the protective camp’s contention that Article III’s safeguards are an unalloyed good and that universal application of those safeguards necessarily serves Article III’s underlying values.

### 3. Military Tribunals

Bearing out the salience of this structure-reinforcing strand, the teachings of practicality soon added another category to join the territorial courts and public rights cases: military justice. Here, the important factors were the exigency of the situations in which military justice was necessary and the practical difficulty of more formal alternatives. The Articles of War commissioned by the Continental Congress and drafted by John Adams cited the “dangerous and critical situation” created by the British effort to suppress “by force of arms” the colonists’ opposition to taxation without representation.<sup>116</sup> To field an armed force capable of resisting the British, the colonists felt it necessary to ensure military discipline by adapting the British system of courts-martial.<sup>117</sup> More formal mechanisms including staples of

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<sup>113</sup> See Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 UC DAVIS L. REV. 343, 367-69 (2013) (discussing Frankfurter’s view that to serve their proper purpose, courts needed humility and a sense of the limits of judicial competence).

<sup>114</sup> See *Baker v. Carr*, 369 U.S. 186, 210-12 (1962); cf. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 n.158 (2002) (discussing the doctrine in foreign affairs and arguing for greater reliance); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1417-18, 1422-23 (1999) (arguing that frank deference on the merits is superior to applying the political question doctrine); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 605-06 (1976) (arguing that the political question doctrine, which some have argued is required by Article III, is best understood as a variant of deference on the merits applied to the political branches). My goal here is not to suggest that questions resolved by non-Article III tribunals are political questions or that the issue of the constitutionality of such tribunals fits under that rubric. I aim only to note courts’ awareness that expansive use of judicial power can undermine courts as institutions.

<sup>115</sup> See *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013).

<sup>116</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 111 (1905).

<sup>117</sup> See *id.* at 112 (providing that a “general court-martial” would be convened to try and punish insubordination). Over 150 years after enactment of the Articles of War, the Supreme Court in *Ex parte Quirin* noted the practical impediments to civilian courts trying participants in an armed conflict, asserting that military commissions typically

civilian courts such as trial by jury would have made the discipline of delinquent troops less efficient. As we shall see, the Articles of War also served to subordinate the military to civilian control. The Articles accomplished this by authorizing convening of a general court-martial to try and punish any member of the armed forces who participated in “mutiny or sedition,”<sup>118</sup> or was present during any episode of same and failed to “use his utmost endeavours to suppress” such activity.<sup>119</sup>

Congress’s power under Article I of the Constitution made the military justice category even more compelling. As the Court noted in *Dynes v. Hoover*,<sup>120</sup> Congress has the power under Article I to “make rules for the government of the land and naval forces,”<sup>121</sup> which brings with it the power to maintain discipline in the ranks through the “trial and punishment of military . . . offences in the manner . . . practiced by civilized nations.”<sup>122</sup> Military justice also served Article III values, by ensuring that federal courts, who as Hamilton had noted in Federalist No. 78 lacked acquaintance with “the sword,” did not have to expend their “judgment” on matters foreign to their experience and training. Courts-martial could therefore be established with a rationale that was “entirely independent” of and “without any connection to” the values served by “the 3d article of the Constitution.”<sup>123</sup> Here, too, a limiting principle was conveniently at hand: tribunals authorized for the trial of members of the armed forces could not be used to try persons with no ties to the armed forces of the United States.

#### 4. Current Disputes About Other Forums: Agency and Bankruptcy Adjudication

Although some view the tripartite scheme of military justice, territorial courts, and public rights as “tidy,”<sup>124</sup> recent cases suggests that structural and practical considerations may temper Article III in a

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operate in exigent circumstances that are not conducive to the formalities that attend criminal proceedings in civilian venues. *Ex parte Quirin*, 317 U.S. 1, 39 (1942).

<sup>118</sup> JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 116, at 113.

<sup>119</sup> *Id.*; cf. John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 614 (2011) (observing that “[t]hrough the Articles, Congress exercised detailed control over the day-to-day discipline and operation of the armed forces”).

<sup>120</sup> 61 U.S. (20 How.) 65 (1857).

<sup>121</sup> *Id.* at 78 (citing U.S. CONST. art. 1, § 8, cl. 14).

<sup>122</sup> *Id.* at 79.

<sup>123</sup> *Id.*

<sup>124</sup> *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

broader range of cases involving Congress's Article I powers. For example, in *Commodity Futures Trading Commission v. Schor*,<sup>125</sup> the Court upheld a statute that provided for an agency's adjudication of both a customer's complaint against a commodities broker *and* the broker's state law counterclaim against the customer regarding a shortfall in the customer's account balance. The latter claim was clearly one that arose under state law, and would therefore typically be adjudicated either in a state forum or in a federal Article III court exercising diversity jurisdiction. Nevertheless, the Court, in an opinion by Justice O'Connor, upheld the statutory scheme, citing Congress's aim to create an "effective . . . regulatory scheme."<sup>126</sup> To accomplish this goal, Justice O'Connor posited, Congress had to establish an "inexpensive and expeditious alternative forum" for customers asserting grievances against brokers,<sup>127</sup> in a setting that was both independent of politics and aided by expertise.<sup>128</sup> Barring jurisdiction over common law counterclaims like those of the dealer in *Schor* would have frustrated that aim, since customers would have been reluctant to make complaints to the agency if those complaints triggered their exposure to counterclaims made in a different forum.<sup>129</sup> In honoring this congressional goal, Justice O'Connor rejected reliance on "formalistic and unbending rules."<sup>130</sup>

In addition, the decision served Article III values, by promoting judicial economy, instead of casting the federal courts as citadels of redundant litigation. Moreover, the Court observed, restricting the forum to counterclaims related to customer complaints imposed a limiting principle that forestalled any danger of a wholesale congressional take-over of state law adjudication.<sup>131</sup>

The Court recognized this danger in cases involving bankruptcy courts. In *Northern Pipeline Construction Co. v. Marathon Pipe Line*

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<sup>125</sup> 478 U.S. 833 (1986).

<sup>126</sup> *Id.* at 855.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 856.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 851; *cf.* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (rejecting "doctrinaire reliance on formal categories" in upholding a statutory provision that required binding arbitration to resolve certain disputes); *Crowell v. Benson*, 285 U.S. 22, 37, 53, 62 (1932) (in opinion by Chief Justice Hughes, the Court warned against fixating on "mere matters of form" and focused on the "substance of what is required," and upheld agency adjudication of a claim for injuries suffered in maritime employment, if the claim was subject to review of questions of law and mixed questions of fact and law by an Article III court).

<sup>131</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-52 (1986).

Co.,<sup>132</sup> the Court invoked Hamilton's praise of judicial independence in striking down a provision of federal bankruptcy law. That provision had permitted the bankruptcy court to adjudicate fraud or other state law claims arising from conduct by a person or entity that was not a claimant in the bankruptcy proceeding. While the regulation of bankruptcy is of course a congressional power,<sup>133</sup> the Court was unmoved by this, decrying the absence of a "limiting principle."<sup>134</sup> According to the Court, if the scheme at issue passed muster, Congress could undermine much of state law adjudication in civil cases by expanding bankruptcy jurisdiction. Congress would also then be able to take over state courts' jurisdiction over criminal cases by citing the federal interest in interstate commerce.<sup>135</sup>

##### 5. The Continued Importance of Limiting Principles

The presence of a limiting principle, as well as the long pedigree of Congress's power over territorial courts and federal enclaves, played a key role in the Fifth Circuit's decision in *United States v. Hollingsworth*.<sup>136</sup> In *Hollingsworth*, the court upheld Congress's grant of power to federal magistrates, who do not possess Article III protections, to try defendants for petty crimes in federal enclaves such as military bases.<sup>137</sup> Judge Edith Brown Clement's opinion for the court cited Congress's power under Clause 17 of Article I, Section 8, which supplied the basis for the Supreme Court's decision in

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<sup>132</sup> *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>133</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>134</sup> *Northern Pipeline*, 458 U.S. at 73.

<sup>135</sup> *Id.* at 73-74; *see also* *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (striking down a statute allowing the bankruptcy court to hear tort counterclaims "independent of the federal bankruptcy law"); *cf.* *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1940, 1943-4445 (2015) (holding that a petitioner in bankruptcy's implied consent to adjudication of claims by bankruptcy court resolved any Article III issue raised by such adjudication, but issuing this holding in case where asset over which dispute arose was part of bankruptcy estate and therefore could in any case be subject of adjudication by bankruptcy judge); *id.* at 1950 (Roberts, C.J., dissenting) (arguing that adjudication by a bankruptcy judge did not violate Article III because the asset at issue was part of the bankruptcy estate, and arguing that the majority erred by asserting that consent would allow adjudication of claims *outside* the bankruptcy estate that were protected by Article III).

<sup>136</sup> *United States v. Hollingsworth*, 783 F.3d 556 (5th Cir. 2015).

<sup>137</sup> *See* 18 U.S.C. § 113(a)(5) (2012) (listing petty offense under which *Hollingsworth* was convicted); 18 U.S.C. § 3401(b) (2012) (giving magistrates jurisdiction over trials for petty offenses).



*Palmore*.<sup>138</sup> Judge Clement also cited the extensive history of Congress's grant to magistrates of power to try non-felony offenses committed on some federal lands.<sup>139</sup> Judge Clement expressly linked her reasoning to the Supreme Court's territorial courts jurisprudence, which has deferred to Congress's streamlining of judicial authority in areas not within the jurisdiction of any state.<sup>140</sup>

Over a vigorous dissent by Judge Stephen Higginson, who argued that criminal cases required the independent adjudication that only Article III judges could provide,<sup>141</sup> Judge Clement suggested that limiting magistrates to trial of offenses committed on federal land prevented a wholesale supplanting of Article III courts by Congress.<sup>142</sup> However, Judge Clement also hinted at a stricter limiting principle, relied on by Judge Higginbotham in his concurrence: defendants, like Hollingsworth, charged with petty offenses lack a right to a jury trial.<sup>143</sup> Judge Clement thus limited the court's holding to trial of petty offenses committed on federal enclaves.<sup>144</sup> Viewed in this light, trial before a magistrate was a modest incremental deprivation, since a jury trial would not have been available to the defendant, even if he had been tried before an Article III judge. Limiting the holding to petty offenses preserved Article III adjudication over felonies and certain misdemeanors.<sup>145</sup>

In sum, teasing out the strands in the Article III jurisprudence, we are left with something more coherent than the "clash[] by night" that

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<sup>138</sup> *Hollingsworth*, 783 F.3d at 559-61.

<sup>139</sup> *Id.* at 560-61.

<sup>140</sup> *Id.* at 561-63 (citing *Northern Pipeline*, 458 U.S. at 64 (plurality opinion) (affirming that Congress has latitude in disclaiming Article III safeguards for tribunals in a "geographical area[] . . . in which no State operate[s] as a sovereign")). *But see id.* at 568-69 (Higginson, J., dissenting) (asserting that the legislative history of the statute conferring jurisdiction on magistrates to try petty offenses committed on federal enclaves provides no indication that trials for minor offenses have clogged Article III courts).

<sup>141</sup> *Hollingsworth*, 783 F.3d at 567 (Higginson, J., dissenting) (arguing, citing Pfander, *supra* note 12, at 672, that Congress's power to delegate tasks to magistrates extends only to contexts in which magistrates make recommendations subject to final determinations by Article III judges).

<sup>142</sup> *Id.* at 564 (plurality opinion) (noting that, after *Palmore* upheld congressional power over the adjudication of ordinary crimes in the District of Columbia, non-Article III tribunals regularly tried charges involving "serious felonies").

<sup>143</sup> *Id.* at 560, 546.

<sup>144</sup> *Id.* at 559-60.

<sup>145</sup> Reinforcing the importance of a constraining principle, Judge Patrick Higginbotham's concurrence expressly relied on the cabined nature of the court's holding. *Id.* at 564 (citing *Lewis v. United States*, 518 U.S. 322, 325-26 (1996)).

Justice Rehnquist described but something less than the “tidy” synthesis that Justice Rehnquist disclaimed.<sup>146</sup> The presence of a substantial Article I interest clearly weighs heavily in the balance. It also matters whether the provision at issue, viewed through the prism of practicality, reinforces constitutional structure. Finally, the Court has sought a limiting principle that safeguards Article III and federalism values.<sup>147</sup>

### III. MILITARY JUSTICE AND THE PROTECTIVE-FUNCTIONAL DIVIDE

As noted in the previous section, the Supreme Court has long held that military justice is not subject to the requirements of Article III.<sup>148</sup> However, that mainstay of black letter law has merely ushered in a host of questions about the defendants and offenses that are amenable to trial in military tribunals. The Court has addressed whether civilian dependents can be tried in military tribunals, whether former service-members can be tried for offenses committed while in the military, and whether military courts can try current service-members for *any* offense, or merely for those that are “service-connected.” In addition, debate continues on whether civilians who serve with the military — for example, as contractors — are ever triable in military courts. As we shall see, functionalism is more persuasive than the protective camp in providing answers to these questions. This is in large part because functionalism treats differences between military and civilian justice as not merely related to the need for an effective fighting force, but as necessary to serve other structural values, such as the subordination of

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<sup>146</sup> Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

<sup>147</sup> *Id.* at 90 (noting that the Framers would have been wary of allowing Congress to unilaterally designate a non-Article III forum for state law claims that are the “stuff of the traditional actions at common law tried by the courts at Westminster in 1789”), cited in *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). In *Stern*, the Court also rejected the argument made by several scholars, see Fallon, *Legislative Courts and Article III*, *supra* note 12, at 922, that appellate review by an Article III court would cure any constitutional defects with non-Article III tribunals. See *Stern*, 131 S. Ct. at 2611 (noting that appellate review was insufficient because “usual limited appellate standards . . . [would] require[] marked deference to . . . the bankruptcy judges’ findings of fact”). *But see* *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 n.10 (2015) (citing Fallon for the proposition that consent by parties curbs the risk that an adjudicator is undermining Article III values by engaging in arbitrary decision-making or other conduct that compromises “[j]udicial integrity”).

<sup>148</sup> *Cf.* Hafetz, *supra* note 10, at 687-88 (discussing judicial deference to military courts-martial jurisdiction).

the armed forces to civilian authority.<sup>149</sup> Functionalists also discern limiting principles in military justice that, compared with the protective impulse, better reconcile Article I and Article III.

A. *English History and the Separate Sphere of Military Justice*

The English embraced a separate sphere of military justice warily but willingly because political circumstances in the late 17th century made that sphere a prerequisite for the survival of constitutionalism itself. As freedom-loving English citizens revolted against the tyranny of James II with the “Glorious Revolution” that invited in the benign rulers, William of Orange and his wife Mary, some Scottish army units loyal to the deposed Stuart king mutinied. This mutiny coincided with the rise of external threats, including the threat from France. At this moment of “extreme danger,”<sup>150</sup> the English elected to make “an important change in [the] polity.”<sup>151</sup> That change, as Macaulay explained, involved “a *legal distinction between the soldier and the citizen*.”<sup>152</sup> The distinction emerged from the understanding that a standing army was necessary to cope with danger in an uncertain world.<sup>153</sup> With the standing army came the danger of military encroachment on civil and political rights. A separate sphere of military justice was necessary to forestall this risk. Since there must be “regular soldiers,” Macaulay explained,

[I]t must be indispensable, both to their efficiency, and the security of every other class, that they should be kept under a strict discipline . . . . For the sake of public freedom, they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code, and to a more stringent code of procedure, than are administered by the ordinary tribunals.<sup>154</sup>

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<sup>149</sup> See *Loving v. United States*, 517 U.S. 748, 762-63 (1996).

<sup>150</sup> See 3 THOMAS MACAULAY, *HISTORY OF ENGLAND* 35 (2012).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> *Id.* at 37 (observing that, in an era of external threats, “the country could not . . . be secure without professional soldiers”).

<sup>154</sup> *Id.* at 36, cited in *Loving*, 517 U.S. at 763 (citing earlier edition); cf. *id.* at 37 (warning that “professional soldiers must be worse than useless unless they were placed under a rule more arbitrary and severe than that to which other men were subject”). Justice Kennedy, writing for the Court in *Loving*, cited Macaulay in the course of upholding Presidential authority to prescribe the death penalty for certain military offenses, even absent congressional authorization. See *Loving*, 517 U.S. at 764-70.

Parliament accordingly passed a Mutiny Act, which provided that members of the armed forces that, “[m]utiny . . . stir up sedition, or . . . desert Her Majesty’s Service” were subject to a “more exemplary and speedy punishment than the usual forms of law will allow.”<sup>155</sup> The English came to this perception reluctantly. In simpler times, a standing army was “regarded by every party . . . with strong and not unreasonable aversion.”<sup>156</sup> However, changing times required changing measures: the consensus view in England during this period was that “what at one stage in the progress of society is pernicious may at another stage be indispensable.”<sup>157</sup> As the Mutiny Act was regularly renewed by Parliament, “[b]y slow degrees familiarity reconciled the public mind to the names, once so odious, of standing army and court martial.”<sup>158</sup> This sea change occurred not as a displacement of regular governance by emergency measures, but as a structural paradigm shift that preserved both the state *and* civilians’ liberties. It was this structural choice that influenced the Framers.

Blackstone, whose writings the Framers read eagerly,<sup>159</sup> echoed this structural understanding. The great English scholar noted the importance of “keeping up a regular discipline” in the armed forces.<sup>160</sup> Blackstone did not challenge the ability of the military, even in times of peace, to impose discipline on members of the armed forces. He added only the modest caveat that, in times of peace, “a little relaxation of military rigour would not, one would hope, be productive of much inconvenience.”<sup>161</sup> While Blackstone cited the earlier jurist Matthew Hale in criticizing the “arbitrary” nature of martial law,<sup>162</sup> the best reading of Blackstone is that this barb referred to the routine assertion of military jurisdiction over British *civilians* with no military affiliations. In this sense, Blackstone presaged the concern voiced by the U.S. Supreme Court more than a century later

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<sup>155</sup> MACAULAY, *supra* note 150, at 37.

<sup>156</sup> *Id.* at 35.

<sup>157</sup> *Id.* at 38.

<sup>158</sup> *Id.*

<sup>159</sup> See *Loving*, 517 U.S. at 765-66 (discussing Blackstone’s influence on the Framers).

<sup>160</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*408, available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch13.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch13.asp).

<sup>161</sup> *Id.* at \*402. Blackstone did strongly recommend that Parliament revise the articles of war governing courts-martial in the army to emulate what he already praised for the navy, namely the express mention of offenses which subject an individual to trial and punishment. See *id.* at \*403 (praising English naval law’s “advantage[]” that both crime and punishment were “ascertained and notorious,” without being consigned to “arbitrary discretion”).

<sup>162</sup> *Id.* at \*400.

in *Ex parte Milligan*,<sup>163</sup> in which the Court held that military commissions lacked jurisdiction to try a U.S. citizen who had not been a belligerent in the Civil War. In U.S. jurisprudence, this assertion of control over the civilian population became known as “martial law,” as distinguished from forms of *military justice* applicable to service-members and certain civilians connected to the military.<sup>164</sup>

### B. The Framers’ Perspective

The Framers clearly shared this view that a separate sphere for military justice was a structurally sound approach that functioned not only to ensure military effectiveness but also to underline and enforce the subordination of the military to civilian control. As Justice Harlan put it in his influential dissent in *O’Callahan v. Parker*,<sup>165</sup> the structural preoccupations of recent English history were “not lost on the Framers . . . who doubtless feared the Executive’s assertion of an *independent* military authority unchecked by the people acting through the Legislature.”<sup>166</sup>

The prospect of a standing army that required ongoing discipline was not enticing for the Framers, but it was a necessity. In Federalist No. 41, Madison conceded that a standing army would be necessary to protect U.S. interests.<sup>167</sup> Responding to opponents of the Constitution who feared a standing army, Madison pointed out an important structural limit to a standing army’s power: the fixed two-year term for members of the House of Representatives, who had to initiate revenue bills, and the fixed period for budgetary appropriations.<sup>168</sup> These features curbed the power and resources that a standing army could command.

Demonstrating their comfort level with military justice, the Framers provided an abundance of sources of congressional authority over this

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<sup>163</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>164</sup> See *Ex parte Reed*, 100 U.S. 13, 21 (1879) (observing, in the course of holding that the court-martial had jurisdiction over the clerk of a navy paymaster, that “[t]he difference between military law and martial law is too well known to require any remark”).

<sup>165</sup> 395 U.S. 258 (1969).

<sup>166</sup> *Id.* at 277 (emphasis added).

<sup>167</sup> See THE FEDERALIST NO. 41, at 257-58 (James Madison) (Clinton Rossiter ed., 1961). Hamilton also discussed the need for structural provision for U.S. defense. See *id.* NO. 23, at 153 (Alexander Hamilton) (noting that “it is impossible to foresee or to define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them”) (italics omitted).

<sup>168</sup> *Id.* at 259-60.

domain. Congress is authorized to “provide for the common Defence,”<sup>169</sup> “make Rules for the Government and Regulation of the land and naval forces,”<sup>170</sup> “declare War . . . and make Rules concerning Captures on Land and Water,”<sup>171</sup> and “define and punish . . . Offences against the Law of Nations.”<sup>172</sup> The Congress may also make “all Laws which shall be necessary and proper” for executing these powers.<sup>173</sup> In *Ex parte Quirin*, the Court read these authorities broadly, as conferring upon Congress the authority to create military commissions for belligerents fighting the U.S. as an incident of the “power to wage war”;<sup>174</sup> the power to discipline U.S. service-members is no less essential. Furthermore, the drafters of the Bill of Rights underlined the distinctive treatment of military justice by providing that the Grand Jury Clause of the Fifth Amendment does not apply to any matter “arising in the land or naval forces” of the United States.<sup>175</sup>

This did not make the Framers credulous about the risk of military abuses. Nor did it make their handiwork indifferent to that risk. However, key provisions of the Constitution codified the English understanding. Here, as well, structure and function were the touchstones. Constitutional norms were to be safeguarded in the military sphere largely by legislative action, not by undue judicial intrusions.

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<sup>169</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>170</sup> *Id.* cl. 14.

<sup>171</sup> *Id.* cl. 11.

<sup>172</sup> *Id.* cl. 10.

<sup>173</sup> *Id.* cl. 18.

<sup>174</sup> *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

<sup>175</sup> See U.S. CONST. amend. V. Citing the Framers’ understanding of the special purposes and background of military justice, the Court has consistently read the Fifth Amendment Grand Jury Clause’s exclusion of military justice as also applying to the petit jury rights in Article III and the Sixth Amendment. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). According to Justice Davis’s opinion for the Court in *Milligan*, the Grand Jury Clause provided strong evidence of the Framers’ belief that military discipline called for “other and swifter modes of trial” than those available in civilian courts. *Id.* Convening a civilian petit jury for a military infraction would be just as cumbersome as convening a grand jury, requiring time for jury selection that would be in short supply under battlefield conditions. Justice Davis therefore inferred that the Framers also intended to exempt military discipline from the petit jury requirement; omitting the latter safeguard was functionally consistent with the rationale for omission of the former. *Id.*; see also *Quirin*, 317 U.S. at 39-41 (noting long history of exempting military justice from petit jury requirement). But see Vladeck, *supra* note 10, at 952-53 (asserting that the Supreme Court has not provided persuasive support for its longstanding view of this issue).

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C. *The Founding Era and Beyond*

Demonstrating this view that military justice was a separate sphere, the Framers and executive branch officials in the Founding Era — including those from the Framers' ranks — permitted procedural informality in military tribunals that would have been jarring in state or Article III forums. The accused often lacked counsel, and indeed court-martial rules often barred counsel from appearing on a defendant's behalf.<sup>176</sup> However, that did not mean executive branch officials were indifferent to the quality of justice provided in military tribunals. Just the opposite: Both courts-martial and military commissions, once lawfully established, were tempered by executive action which was well known to contemporary students of governance.<sup>177</sup> For example, Madison reviewed the individual records in courts-martial before determining whether to uphold a sentence, and occasionally disapproved sentences he felt were too harsh or not supported by evidence.<sup>178</sup> Monroe did the same,<sup>179</sup> followed in this respect by John Quincy Adams, who scrutinized court-martial proceedings with the demanding eye he brought to every task, including the review of Articles of War initially drafted by his father, John Adams.<sup>180</sup>

This background suggests that the Framers would not have viewed a requirement that federal courts assume jurisdiction over charges as the only guarantee of a fair and just result. The Framers were familiar with historical practice in which decisions within the executive branch had achieved these virtues without undue judicial intervention. Indeed, the Framers would have viewed the involvement of federal courts as a threat to Article III values, inserting federal courts into matters in which they had little experience or expertise.

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<sup>176</sup> See Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 20-21 (1958).

<sup>177</sup> See *Loving v. United States*, 517 U.S. 748, 765-68 (1996).

<sup>178</sup> Wiener, *supra* note 176, at 45.

<sup>179</sup> *Id.* at 46-47 (noting that President Monroe sometimes discussed courts-martial proceedings at Cabinet meetings).

<sup>180</sup> *Id.* at 47-49. President Lincoln followed this practice during the Civil War, commuting sentences in a substantial percentage of military commission cases. See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 86-90 (1990) (recounting President Lincoln's review of military commission dispositions concerning members of the Dakota Native American nation who had allegedly abused captives and targeted civilians); Margulies, *Defining and Punishing*, *supra* note 45, at 44 (noting that executive review by President Lincoln tempered military commission rulings).

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Historical practice since the early years of the republic harmonizes with this understanding. Lincoln's Attorney General opined that,

[T]he President, in passing upon the sentence of a court-martial . . . acts judicially. The whole proceeding, from its inception, is judicial . . . [The court-martial] sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice . . . which must be adjudged *according to law* . . . . When the president . . . performs this duty . . . his act has all the solemnity and significance of the judgment of a court of law.<sup>181</sup>

Nothing in the Attorney General's opinion suggested that the judicial character of a court-martial conflicted with Article III. The Supreme Court took a similar view, explaining in *Runkle v. United States* that,

The action [in reviewing a court-martial disposition] required of the president is judicial in its character, not administrative . . . . His personal judgment is required, as . . . if he had been one of the members of the court-martial itself . . . . [H]e is the person, and the only person, to whom has been committed the important judicial power of finally determining, upon an examination of the whole proceedings of a court-martial, whether an officer . . . shall be dismissed from service as a punishment for an offence . . . .<sup>182</sup>

As U.S. military justice has developed, it has ensured procedural fairness to the accused and insulated judges and fact-finders from command influence. In establishing procedures governing courts-martial in the Uniform Code of Military Justice, Congress assured that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."<sup>183</sup> That commitment to fairness dovetailed with military justice's structural value as a means of assuring civilian control.

More than 150 years after the Constitution's enactment, the Supreme Court during the otherwise salutary Warren Court departed from this established wisdom about the benefits to constitutionalism of military justice. While the Warren Court's articulations of principle

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<sup>181</sup> Attorney General Bates, to Pres. Lincoln, March 12, 1864, 11 Op. Att'y Gen. 21, cited in *Runkle v. United States*, 122 U.S. 543, 558 (1887).

<sup>182</sup> *Runkle*, 122 U.S. at 557.

<sup>183</sup> *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).



on the Equal Protection Clause<sup>184</sup> and privacy<sup>185</sup> were on-target, its protective impulses led it astray in the military justice realm.

#### D. Military Justice and Former Service-Members

Justice Black's opinion for the Court in *United States ex rel. Toth v. Quarles*<sup>186</sup> exemplified the problems with the protective approach. In *Toth*, the Court held that Article III and the right to a jury trial barred a court-martial of the defendant, an ex-service-member, for the alleged murder of a Korean civilian while the defendant was serving abroad in the armed forces. Justice Black could have found that these charges, which involved alleged conduct implicating the global reputation of the U.S., fit within Congress's authority to "make Rules for the Government and Regulation of the land and naval Forces."<sup>187</sup> Instead, Justice Black held that, since the defendant had been discharged from the armed forces before his deed was detected, court-martial jurisdiction was unconstitutional. According to Justice Black, invocation of Article III in *Toth* and related cases was a bulwark against "military rule."<sup>188</sup> Court-martial jurisdiction over ex-service personnel, even for acts committed while in the service, would invite a military dictatorship that the Framers would have abhorred, given the millions of U.S. citizens subject to the draft.<sup>189</sup>

In *Toth* and his plurality opinion in *Reid v. Covert*,<sup>190</sup> Justice Black fundamentally mischaracterized both the English experience with military justice and the Framers' understanding of that experience. Justice Black ignored the structural aspect of military justice that had inspired the English adoption of this approach: its utility in preserving civilian control of the military. Instead, Justice Black reframed history to his liking, casting military justice as a categorical threat to civilian control.<sup>191</sup> This led Justice Black to exaggerate the dangers of military

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<sup>184</sup> See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down racial segregation in public schools as violation of Equal Protection Clause of Fourteenth Amendment).

<sup>185</sup> See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding right to privacy under Due Process Clause of Fourteenth Amendment that barred government from precluding adults' access to contraception).

<sup>186</sup> 350 U.S. 11 (1955).

<sup>187</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>188</sup> *Reid v. Covert*, 354 U.S. 1, 27 (1957).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 39 (holding that the military could not try the dependent of a service-member for the alleged murder of her husband).

<sup>191</sup> *Id.* at 23 (viewing court-martial here as a threat to the "tradition of keeping the

justice and discount the policies favoring military justice in this context. His eyes unalterably fixed on the slippery slope, Justice Black put the matter starkly: “Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.”<sup>192</sup>

In taking this tack, Justice Black badly misread Blackstone. Instead of recognizing that Blackstone had regarded the Mutiny Act’s establishment of military justice as an essential *check* on military encroachment, Black wrongly characterized Blackstone as a critic of military justice.<sup>193</sup> Justice Black compounded this misreading by mischaracterizing the intellectual environment that shaped the Framers. While the power of the military to try soldiers for offenses during periods short of hostilities had been firmly established since the Glorious Revolution,<sup>194</sup> Justice Black wrongly stated that England had turned to this model during the Framers’ lifetimes.<sup>195</sup> Driven by this misreading, Justice Black then extended to the present day his anxiety about military justice’s domination of civilian authority.

Justice Black’s Manichaean vision played out on the slippery slope that has haunted protective theorists before and since. Justice Black never explained in concrete terms how the military would charge substantial numbers of veterans with crimes. Justice Black’s dire scenario would have been plausible only if virtually all service-members plotted to commit crimes at the very conclusion of their tours of duty, *and* if the military knowingly *waited* to initiate prosecution until after such individuals returned to civilian life. Justice Black never clarified why recruits or draftees would display such bad timing, or why military justice officials would delay prosecution until

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military subordinate to civilian authority”). The holding in *Reid* itself derives support from both the functional and protective approaches. A functional analysis would argue that a service-member’s spouse lacks the job-related affiliation with the military that supplies a basis for court-martial jurisdiction. Moreover, trying military spouses in military courts and incarcerating them in military prisons might bring discredit to such institutions, undermining Congress’s exercise of its Article I power.

<sup>192</sup> *Id.* at 21.

<sup>193</sup> *Id.* at 23; *cf.* *O’Callahan v. Parker*, 395 U.S. 258, 276 (1969) (Harlan, J., dissenting) (noting, in dissent from the holding that courts-martial could only try current service-members for offenses committed while in the service that were deemed to be “related” to their service, that “English constitutional history provides scant support for the Court’s novel interpretation . . . and the pertinent American history proves, if anything, quite the contrary”). The holding in *O’Callahan* was later overruled in *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>194</sup> See MACAULAY, *supra* note 150, at 35-38.

<sup>195</sup> See *Reid*, 354 U.S. at 23.

after wrongdoers left the service. Perhaps Justice Black believed that the military would fabricate claims of wrongdoing in an insidious scheme to imprison millions of veterans. This hypothetical scheme would have a lot of moving parts. For example, military judges would have to knowingly collude with military prosecutors in finding probable cause to prosecute in each of these myriad matters.<sup>196</sup> The elaborate machinations baked into this scenario show the weakness of Justice Black's arguments.

Justice Black failed to acknowledge the Article I and other structural interests served by courts-martial in this context. Under the Necessary and Proper Clause, Congress is allowed to take steps that are "conducive" or "convenient" for achievement of goals under Article I.<sup>197</sup> Those goals include deterring crimes by service-members. Black baldly asserted that the military's interest was not served by prosecuting ex-service-members. That view failed to reckon with the ex ante calculations that deterrence seeks to affect. Deterrence works before the fact; the crucial time for deterrence purposes comes *before* an individual commits an act. While deterrence had obviously not worked for the defendant in *Toth*, it could well affect the calculations of others.

Moreover, the prosecutions routed to the federal courts by *Toth* were singularly unsuited for such fora. Black's protective stance obscured the difficulty of reconstructing events in a "disorganized" theater of war.<sup>198</sup> Military justice can be more expeditious, and could therefore locate evidence while it is still fresh. A civilian trial, in contrast, builds in delays that frustrate accountability. Those Dickensian delays discredit federal courts.

In addition, the accountability offered by military commissions is also consistent with contemporary human rights initiatives. Holding military forces worldwide accountable for atrocities is a significant human rights goal.<sup>199</sup> A workable military justice system fulfills that purpose.

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<sup>196</sup> See Robinson O. Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366, 381 (arguing that Justice Black "exaggerated" the risks of military justice).

<sup>197</sup> *United States v. Comstock*, 560 U.S. 126, 133-34 (2010).

<sup>198</sup> See Everett, *supra* note 196, at 377.

<sup>199</sup> See generally Emmanuel Decaux (Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights), *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006) [hereinafter *Principles*], available at <http://www1.umn.edu/humanrts/instree/DecauxPrinciples.html> (presenting principles for the proper administration of military justice); Gabriela Knaul, (Special Rapporteur on the Independence of Judges and Lawyers), *Independence of Judges and Lawyers*, U.N. Doc. A/68/285 (Aug. 7, 2013) [hereinafter *Independence*], available at <http://www.law.yale.edu/documents/pdf/>

Justice Black also ignored the limiting principle that Congress had imposed by preserving court-martial jurisdiction only for serious crimes.<sup>200</sup> This rule deterred the government from enforcing its will by ginning up petty charges to intimidate domestic opponents among ex-service personnel. Congress's rule also preserved accountability of ex-service personnel for serious crimes that can place the armed forces in disrepute, undermine U.S. relationships with allies, and violate the United States' international law obligations as an occupying power. Foregoing military jurisdiction would impede accountability; even if a U.S. civilian court had jurisdiction over such acts, getting evidence from abroad would be exceptionally difficult. A foreign country might not have the resources to mount such an effort. Moreover, securing extradition of the suspect might also be problematic, depending on the nature of agreements between the U.S. and the country where the alleged conduct occurred. In other words, rejecting non-Article III tribunals would not ensure the availability of an Article III forum, or indeed of any court. In this sense, the Court's zeal to protect Article III courts elevated form over substance.

*E. Solorio Remedies the Failed Experiment of Service-Connected Crimes*

In contrast to the misguided application of the protective approach in *Toth*, the Court in *Solorio v. United States*<sup>201</sup> displayed a functionalist focus that dialed back an impractical restriction on military justice. *Solorio* overruled the Warren Court's *O'Callahan v. Parker*,<sup>202</sup> in which Justice Black's close ally, Justice William O.

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conference/UN\_A68-285.pdf (proposing solutions to concerns surrounding the administration of justice through military tribunals). Professor Vladeck, in his original and provocative look at military justice, argues that these two reports manifest a preference for civilian trials of military personnel. See Vladeck, *supra* note 10, at 997-1000. That view of these international law positions does not adequately consider their context, particularly the fear that military dictatorships abroad will permit their forces to violate human rights with impunity. The U.S. military justice system, driven by the importance of civilian control, is a safeguard against impunity. The Decaux and Knaul efforts actually demonstrate the *appropriateness* of U.S. military justice, as long as the U.S. ensures that its soldiers are accountable.

<sup>200</sup> See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 27 (Reed, J., dissenting). Courts have found a partial "fix" for the problem caused by *Toth* by upholding the military's power to recall some former service-members to active duty to prosecute them for past offenses. See *Willenbring v. Neurater*, 48 M.J. 152, 169-70 (C.A.A.F. 1998); Vladeck, *supra* note 10, at 953 n. 138. However, this fix took some time to work, leaving a significant gap in accountability.

<sup>201</sup> *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>202</sup> 395 U.S. 258 (1969).

Douglas, had written for the Court. *O'Callahan* held that courts-martial lacked jurisdiction to try current service-members for offenses that were not “service connected.”<sup>203</sup> Justice Douglas’s opinion repeated the mischaracterization of English history and the Framers’ views that Justice Black had outlined more than a decade earlier.<sup>204</sup> This mischaracterization drew Justice Harlan’s ire. It produced a cumbersome test that undermined accountability and frustrated Congress’s intent that members of the armed forces uphold the military’s good name.<sup>205</sup> *Solorio* squared the ledger.

The *Solorio* Court, in an opinion by Chief Justice Rehnquist, abolished the service-connection rule, holding that a court-martial had jurisdiction over the conduct of a member of the Coast Guard who had sexually abused two young daughters of fellow Coast Guard members.<sup>206</sup> Channeling Justice Harlan’s robust dissent in *O'Callahan*, Chief Justice Rehnquist asserted that *O'Callahan* was a failed experiment based on a misreading of English and American legal history.<sup>207</sup> *Solorio* read Article III as permitting court-martial jurisdiction where a restrictive rule unduly discounted legitimate government interests and failed to provide clear guidance.<sup>208</sup>

The military, Chief Justice Rehnquist realized in *Solorio*, had a legitimate interest in signaling that it would hold service personnel accountable for any crime committed during their service as long as — consistent with *Toth* — defendants were still in the service when charged. Common sense suggests that even crimes that do not directly concern military discipline have negative indirect effects that Congress could legitimately wish to deter through the processes of military justice. For example, drug offenses committed by service personnel

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<sup>203</sup> *Id.* at 272.

<sup>204</sup> *See id.* at 269-71.

<sup>205</sup> *See id.* at 281 (Harlan, J., dissenting) (asserting that the U.S. “has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services”).

<sup>206</sup> *See Solorio*, 483 U.S. at 436.

<sup>207</sup> *See id.* at 442-44 (finding that *O'Callahan*’s “representation of English history . . . is less than accurate” and that “[i]he history of early American practice furnishes even less support to *O'Callahan*’s historical thesis”).

<sup>208</sup> *See id.* at 448 (noting that the “service connection approach . . . has proved confusing and difficult for military courts to apply”); cf. Geoffrey S. Corn & Chris Jenks, *A Military Justice Solution in Search of a Problem: A Response to Vladeck*, 104 GEO. L.J. ONLINE 29, 36-38 (2015) (noting that *Solorio* in fact reverted to historical practice after difficulties engendered by *O'Callahan*’s narrowing of court-martial jurisdiction).

while on leave can undermine the reputation of the armed forces and subject service-members to blackmail. Drug trafficking or gambling can create financial pressures that precipitate illicit attempts to gain funds through service connections.<sup>209</sup> Viewed in this light, any attempt to neatly separate out service connected from non-service connected crimes was a futile enterprise.<sup>210</sup> Moreover, a service-connection rule was actually difficult to administer. The need to make a threshold determination of service connection necessitated wasteful mini-trials on factual issues that had to be rehashed later in either military or civilian tribunals. The service-connection test also led to vexing line-drawing problems that obscured the clear guidance required for effective discipline.<sup>211</sup> Doing away with the service-connection rule served the government's legitimate interest in preserving its reputation and promoting accountability for its own agents. *Solorio* suggested that a rigid interpretation of Article III unduly interfered with those goals and with the Framers' vision of a workable government.

Protective theorists have mounted a counter-attack on *Solorio* by invoking international law.<sup>212</sup> However, the protective theorists have misread international law's teachings. That misreading echoes Justice Black's misreading of English history and the Framers' intent. Recent reports on military justice commissioned by United Nations bodies have performed a valuable service in outlining best practices for military justice around the world. Those reports respond to serious problems reflected in many nations that lack the subordination of the military to civilian control typified by the United States. In countries characterized by military domination of civilian authority, military justice lacks fair procedures and accountability for human rights

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<sup>209</sup> See *United States v. Trotter*, 9 M.J. 337, 350 (C.M.A. 1980) (noting that "almost every involvement of service personnel with the commerce in drugs is 'service connected'"), cited in *Solorio*, 483 U.S. at 450 n.17.

<sup>210</sup> See *Solorio*, 483 U.S. at 448-50.

<sup>211</sup> See *id.* Admittedly, in some cases lines were relatively easy to draw. For example, as Justice Stevens noted in his concurrence in *Solorio*, a service member's sexual abuse of a fellow service member's children surely qualified as service-connected. See *id.* at 451. Chief Justice Rehnquist's opinion for the Court remedied the systemic issues with the service connection rule, even though a narrower holding would have been sufficient to uphold *Solorio*'s conviction. Cf. Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 752-53 (2002) (noting the possibility of a narrower holding in *Solorio* and suggesting problems with Chief Justice Rehnquist's broader vision of civilian-military relations, while conceding the appropriateness of deference to military judgments on the scope of court-martial jurisdiction over active-duty military personnel).

<sup>212</sup> See Hafetz, *supra* note 10, at 712; Vladeck, *supra* note 10, at 997-1000.

abuses.<sup>213</sup> Moreover, in some states military tribunals regularly try civilians,<sup>214</sup> such as dissidents who oppose military rule. To remedy these problems, the recent reports recommend fair procedures, limits on the military trial of civilians, and — to ensure accountability for human rights abuses — non-military trials for members of the armed forces accused of violations of human rights. Limits built into U.S. military justice, including the overarching principle of civilian control, deal with these issues.

While each of the U.N. reports recommends that civilian courts try charges of “[o]rdinary criminal offences” by military personnel,<sup>215</sup> the more detailed of the two reports concedes that this recommendation is *lex ferenda* — a hope expressed for the law’s future trajectory — rather than *lex lata* — law that is currently binding. These recommendations claim no support in treaties, and the more detailed of the reports acknowledges that customary international law (“CIL”) similarly offers no support.<sup>216</sup> As students of international law know, CIL requires support from two sources: *opinio juris* (state opinion that a given norm is binding) and state practice (actions that implement these norms).<sup>217</sup> The 2013 Knaul report commissioned by the U.N. Human Rights Council concedes that “many military justice systems” regard an ordinary crime committed by a service-member, such as “a rape or a theft,” as “no less a breach of discipline than a purely military offence such as insubordination or disobedience.”<sup>218</sup> That concession showed that state practice favors broad military tribunal jurisdiction over active-duty personnel. Knaul rightly noted a trend in state practice toward limiting military tribunals to “criminal offences

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<sup>213</sup> See Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors by Military Courts*, 50 S. TEX. L. REV. 845, 847-48 (2009) (quoting U.N. body as implying that military tribunals in some countries lack fair procedures).

<sup>214</sup> *Id.*

<sup>215</sup> Knaul, *Independence*, *supra* note 199, ¶ 99; see Decaux, *Principles*, *supra* note 199, Principle No. 8, Functional Authority of Military Courts (“[J]urisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel.”).

<sup>216</sup> See Knaul, *Independence*, *supra* note 199, ¶¶ 60–61.

<sup>217</sup> See Vijay M. Padmanabhan, *Separation Anxiety? Rethinking the Role of Morality in International Human Rights Lawmaking*, 47 VAND. J. TRANSNAT’L L. 569, 576 (2014) (“[C]ustomary law exists where there is demonstration of uniform, extensive, and widespread state practice and evidence of a sense of legal obligation.”).

<sup>218</sup> Knaul, *Independence*, *supra* note 199, ¶ 61.

and breaches of military discipline.”<sup>219</sup> That state practice is squarely in line with *Solorio*’s holding.<sup>220</sup>

The U.N.-sponsored reports also reveal a concern with accountability for human rights abuses that is largely irrelevant to the U.S. experience, given the United States’ structural commitment to civilian control. To “combat impunity,”<sup>221</sup> the reports recommend that civilian authorities try service personnel accused of human rights abuses.<sup>222</sup> In countries dominated by the military, bolstering the civilian justice system in this fashion is sensible, since military tribunals may cover up human rights violations. However, in a system like the U.S. characterized by civilian control and robust constitutional guarantees of individual rights, these concerns are less germane. Despite the protective school’s efforts to marshal U.N.-sponsored reports, the U.S. commitment to civilian control and swift, sure, and fair military justice is largely consistent with the U.N.-sponsored reports’ tone and tenets.

#### F. Civilian Contractors

Today’s military justice bone of contention concerns military contractors. Contractors have purposefully affiliated themselves with the military and obtained benefits from that affiliation. When contractors provide assistance abroad during wars or occupations, they implicate the same reputational interests as service-members:

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<sup>219</sup> *Id.* ¶ 62.

<sup>220</sup> To their credit, protective theorists concede that the recent U.N.-sponsored reports are *not* a “comprehensive summary of existing international law norms.” Vladeck, *supra* note 10, at 999; *see also* Hafetz, *supra* note 10, at 712 (acknowledging that recent U.N.-sponsored reports “may not yet embody customary international law”).

<sup>221</sup> Knaul, *Independence*, *supra* note 199, ¶ 64.

<sup>222</sup> *Id.* ¶¶ 64–66. The European Court of Human Rights has suggested that military tribunals require safeguards against command influence that may be more robust than those provided in U.S. courts-martial. *See* *Martin v. United Kingdom*, App. No. 40426/98, ¶ 49 (Eur. Ct. H.R. Oct. 24, 2006) (noting problem that finders of fact in United Kingdom military tribunal were subordinate to officer who ordered that tribunal be convened), *available at* <http://hudoc.echr.coe.int/fre?i=001-77661#>. However, as the court acknowledged, its concerns occurred in the context of the trial of a civilian dependent of a service member, in which, as in *Reid v. Covert*, 354 U.S. 1, 39 (1957), concerns about independence of the military tribunal are at their zenith. *Cf. Martin*, App. No. 40426/98, ¶ 44 (observing that such cases required “particularly careful scrutiny”). Whatever the concerns in *Martin* about a military tribunal’s independence, the court did not suggest that military tribunals lacked jurisdiction to try service-members for all criminal offenses allegedly committed while the defendant was in the armed forces. In this sense, *Martin* is consistent with the U.S. Supreme Court’s decision in *Solorio*.



populations abroad expect the U.S. to deter misconduct and hold contractors accountable just as would be done for ordinary service-members.<sup>223</sup> Indeed, the capacity to deter misconduct abroad by individuals who serve alongside the U.S. military is also an indispensable element of the United States' compliance with international law: a nation engaged in armed conflict or occupation abroad must ensure that it avoids purposely inflicting harm on civilian persons or property abroad.<sup>224</sup> It must also punish its agents for infliction of such harm.

History provides evidence that courts-martial can try sutlers and others who accompany and take direction from armed forces in the field.<sup>225</sup> The Continental Congress passed such a law,<sup>226</sup> as did legislatures after the Constitution's enactment.<sup>227</sup> In a recent case,<sup>228</sup> the Court of Appeals for the Armed Forces ("CAAF") found that a court-martial could try a contract interpreter who was a dual Canadian and Iraqi citizen for an assault on another Iraqi interpreter committed while both were assisting U.S. forces in Iraq.

The protective approach would reject this holding. For the protective camp, the civilian status of the contractors is determinative, regardless of the national interests furthered by court-martial jurisdiction. Here again, the protective camp unduly discounts legislative interests in holding contractors to the same standards as U.S. troops, and exaggerates the danger of civilian courts in allowing court-martial jurisdiction.

While Congress may have other means available for enforcing discipline among contractors, these means are flawed. The Military Extraterritorial Justice Act ("MEJA"),<sup>229</sup> has an important exception: it does not permit jurisdiction over nationals of the country hosting the

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<sup>223</sup> See generally GEOFFREY CORN, JIMMY GURULE, ERIC JENSEN & PETER MARGULIES, NATIONAL SECURITY LAW: PRINCIPLES AND POLICY 323 (Aspen Press, 2015).

<sup>224</sup> See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 585-87 (2006).

<sup>225</sup> See Glazier, *supra* note 10, at 19 (indicating that sutlers were merchants who sold liquor, coffee, and similar items to troops in the field during wartime); cf. Reid v. Covert, 354 U.S. 1, 33 (1957) (acknowledging precedent for court-martial of sutlers and others accompanying military in time of war); Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945) (upholding court-martial of civilian contractor for theft during wartime operations in Africa).

<sup>226</sup> See Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 89 (1920).

<sup>227</sup> See *id.* at 90.

<sup>228</sup> United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012).

<sup>229</sup> 18 U.S.C. §§ 3261-67 (2012).

military.<sup>230</sup> Courts-martial are necessary for filling that gap. Moreover, even if MEJA were available, the extra layer of deterrence provided by the availability of a Uniform Code of Military Justice (“UCMJ”) proceeding would still support Congress’s power to provide for courts-martial. If only one type of proceeding were available to prosecute an alleged wrongdoer, that individual might bet on his or her odds for evading punishment. However, jurisdictional “redundancy” — the availability of multiple sources of prosecution — narrows the odds of impunity. This decreased chance at impunity might well shape a prospective wrongdoer’s *ex ante* calculus, making it more likely that the prospective wrongdoer would comply with legal norms.<sup>231</sup> As an exercise of Congress’s power under the Necessary and Proper Clause, this added layer of deterrence would certainly be “conducive” to Congress’s achievement of its Article I goals, and would therefore be appropriate under the Necessary and Proper Clause.<sup>232</sup>

To understand the stakes in court-martial jurisdiction over contractors, it is worth noting disagreement among members of the CAAF panel on the rationale for upholding court-martial jurisdiction. The majority of the panel, in an opinion by Judge Erdmann, upheld court-martial jurisdiction on the sweeping ground that Ali was not a U.S. citizen.<sup>233</sup> In contrast, Judge Baker relied on a functional factor: a contractor’s purposeful affiliation with the U.S. military.<sup>234</sup> According

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<sup>230</sup> *Ali*, 71 M.J. at 280 (citing 18 U.S.C. § 3267(1)(C), (2)(C)).

<sup>231</sup> Professor Huq has argued that a regime characterized by jurisdictional redundancy in fact *reduces* marginal deterrence. See Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1491-92 (2012). Professor Huq analogized the provision of multiple forums for adjudication of wrongdoing to the failure to employ graduated penalties that rise with the severity of wrongdoing. See *id.* However, Professor Huq’s argument lacks empirical support on its own terms, and may in any case be faulty as an analogy. In some cases, lawmakers may believe that a wrongful act above a certain threshold merits severe punishment, with additional wrongdoing above that point leading to only marginal increases in punishment. For example, lawmakers typically provide severe penalties for premeditated murder, and prosecutors add counts in the case of multiple homicides. Lawmakers in this situation may believe that murder of a single person merits severe punishment, or they may believe that an individual sufficiently depraved to commit a single murder will not be deterred even if the penalty for multiple murders is materially greater. Moreover, it is far from clear that jurisdictional redundancy functions in the same way as uniformly severe penalties. A prospective wrongdoer may view jurisdictional redundancy as increasing the odds of a successful prosecution, and may be deterred because of this increase in the *likelihood*, rather than the *degree*, of punishment. Professor Huq’s analysis did not address this possibility.

<sup>232</sup> *United States v. Comstock*, 560 U.S. 126, 133-34 (2010).

<sup>233</sup> See *Ali*, 71 M.J. at 266-68.

<sup>234</sup> See *id.* at 272-75.

to Judge Baker, Congress's war powers were ample to support court martial jurisdiction, in light of the importance of maintaining discipline among both members of the armed forces and contractors accompanying them.<sup>235</sup> The outcome was right, and Judge Baker's rationale appropriately stressed the functional element in his analysis.

Here, too, protective theorists seek to brandish international law to resist the functional view. However, international law provides even less support here than it does on the question of military tribunals' jurisdiction over service-members' ordinary crimes.<sup>236</sup> One of the U.N.-sponsored reports cited by protective theorists actually *supports* military tribunals' jurisdiction over civilian contractors in wartime, given contractors military "function."<sup>237</sup> The other report acknowledges that the accountability of civilians is appropriate in "exceptional" circumstances<sup>238</sup> and recommends that "thought . . . be given" to accountability for personnel "assimilated" into the military such as contractors.<sup>239</sup> Neither report supports the rigid distinction between service-members and contractors insisted on by protective theorists.

### G. Military Justice and Article III Appellate Review

One of the most prominent academic commentators on non-Article III tribunals, Professor Richard Fallon, has suggested that appellate review by an Article III court would cure any constitutional defects.<sup>240</sup> Professor Fallon's appellate review model is an appealing paradigm. It permits Congress wide discretion in initial procedures for adjudicating claims outside Article III, as long as determinations in non-Article III forums are reviewed by Article III courts. Highlighting the virtues of Professor Fallon's approach, Justice O'Connor asserted in *Thomas v. Union Carbide Agricultural Products Co.* that appellate review by an

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<sup>235</sup> See *id.* at 276.

<sup>236</sup> See *supra* notes 212–22 and accompanying text.

<sup>237</sup> See Knaul, *Independence*, *supra* note 199, ¶ 102. However, Knaul read necessity more strictly than a functional analysis would. See *id.*

<sup>238</sup> See Decaux, *Principles*, *supra* note 199, ¶ 20.

<sup>239</sup> *Id.* ¶ 31. In *Martin*, the European Court of Human Rights expressed "doubts" about military jurisdiction over service-members' dependents, where the functional justifications for such jurisdiction are far less compelling. See *Martin v. United Kingdom*, App. No. 40426/98, ¶ 45 (Eur. Ct. H.R. Oct. 24, 2006). However, *Martin* also favorably cited a British House of Lords decision finding such jurisdiction lawful. *Id.* *Martin* did not purport to address the issue of jurisdiction over military contractors abroad, where the functional position is strongest. *But see* Fidell, *supra* note 213, at 856–57 (arguing that courts-martial should rarely, if ever, try civilian contractors, and expressing strong preference for use of civilian tribunals).

<sup>240</sup> See Fallon, *Legislative Courts and Article III*, *supra* note 12, at 916.

Article III court is one factor among several that may validate a legislative scheme.<sup>241</sup> Unfortunately, Professor Fallon's model is not well-suited to the singular demands of military justice.

As Justice Kennedy indicated in *Loving v. United States*, the Framers, many of whom had acquired military experience in the Revolutionary War and elsewhere, appreciated the importance of military discipline.<sup>242</sup> That appreciation extends to both members of the political branches, who exercise command and oversight responsibilities over the military, and uniformed commanders. An Article III judge may be insufficiently attuned to the need for military discipline, precisely because of the protections that insulate the judge from the gritty realities of the purse and the sword. That remoteness may injure the cause of civilian control over military affairs.

Consider the question of accountability for sexual assaults in the military.<sup>243</sup> An Article III appellate judge might emphasize the rights of the accused, to the detriment of victims' welfare and overall discipline. If a non-Article III judge sitting on the CAAF makes this mistake, the political branches and commanders know that the judge will be replaced after a maximum of fifteen years. However, the political branches and commanders have no such assurance for Article III judges. As a result, it may be more difficult to dislodge a harmful or oppressive status quo.

These costs may seem diffuse in contrast with the ready appeal of the appellate review model, but the costs are real. Nothing in Article III requires Congress to forego the flexibility provided by non-Article III tribunals in implementing Congress's war powers. Indeed, this flexibility echoes the virtues that Justice Harlan praised in territorial courts.<sup>244</sup> In addition, as the sexual assault example illustrates,

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<sup>241</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (noting that the statute "limits but does not preclude review . . . by an Article III court"). Proceedings under the Uniform Code of Military Justice ("UCMJ") are reviewable by the Court of Appeals for the Armed Forces ("CAAF"), a respected court that nonetheless does not meet Article III requirements, since its members receive only a fifteen-year term. Parties losing before the CAAF may appeal via certiorari to the Supreme Court, but the Court can deny certiorari and typically does in CAAF cases. On the other hand, military commission proceedings are appealable first to a non-Article III court, the Court of Military Commissions Review ("CMCR"), and then directly appealable as of right to the D.C. Circuit Court of Appeals. So, military commission cases satisfy the appellate review test. Protective theorists would view appellate review as necessary, but not sufficient. See Vladeck, *supra* note 10, at 1000.

<sup>242</sup> See *Loving v. United States*, 517 U.S. 748, 765 (1996).

<sup>243</sup> See Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 269-71 (2013).

<sup>244</sup> See *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-47 (1962); *supra* notes 85-93

appellate review by a non-Article III tribunal can better equip the civilian sector to impose its policies on the military. Civilian control over the levers of power sends a strong structural message that reinforces constitutionalism.

#### IV. MILITARY COMMISSIONS AND ARTICLE III

The law on military commissions and Article III is more uncertain than the law on military justice. However, military commissions also clearly implicate Congress's war powers, including the Make Rules Clause and the Define and Punish Clause. Moreover, commissions are appropriate in situations where more formal Article III proceedings would be "impracticable and anomalous."<sup>245</sup> As a limiting principle, we can require that military commissions try only charges based on conduct that is reasonably related to violations of international law.<sup>246</sup>

Military commissions borrow the same functional rationale that legitimates courts-martial. While courts-martial can occur with respect to our forces at any time, war or peace, commissions hold belligerents accountable for conduct in an armed conflict with the United States. The more formal appurtenances of a civilian trial are especially inappropriate in this setting. Military commissions, as we shall see, often occur where civilian courts would be manifestly anomalous: in the course of conflicts abroad, involving foreign nationals with no previous connection to the United States. One can also argue that the structural rationale for commission jurisdiction is derivative of the structural rationale for courts-martial: U.S. armed forces need a system of military justice with streamlined procedures to keep them in check.

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and accompanying text.

<sup>245</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990).

<sup>246</sup> Compare Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 613-20 (2002) (arguing that military tribunals comply with international law), and Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT'L L. 289, 294-97 (2009) (arguing that commissions are a practical alternative to Article III courts), with David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1033 (2009) (arguing that military commissions cannot lawfully try defendants for certain offenses not recognized under international law), Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1308 (2002) (arguing against the legality of the Bush administration's unilateral creation of military commissions), and Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 656-57 (2002) (expressing concerns about command influence in commissions).

It would be anomalous to provide foreign enemies with greater legal protections.

A. *A Typology of Military Commissions*

The history of military commissions dates back at least as far as the war for independence against Great Britain. In the Revolutionary War, General Washington convened a military commission to try Major John André, who had been captured behind American lines in civilian garb after a meeting with General Benedict Arnold, whom André was persuading to defect to the British.<sup>247</sup> In his opinion for the Court in *Quirin*, Chief Justice Stone cited the commission that tried and convicted Major André as a building block in the Framers' functional view of the need for swift justice in wartime.

Commissions come in three varieties, which have different implications for Article III. André's commission was a "law of war" commission, which tries enemy belligerents in an armed conflict for violations of the law governing such conflicts.<sup>248</sup> In contrast, a martial law commission supplants civilian courts in the U.S. by trying ordinary crimes in areas riven by an armed conflict, such as the Civil War. An occupation commission serves in place of civilian tribunals abroad, in an area occupied by U.S. forces. The three factors cited in this Article — Congress's Article I powers, structural concerns, and limiting principles — play out differently in the martial and occupation settings on the one hand, and the law of war commission on the other.

The presence *vel non* of a limiting principle is salient for martial law commissions, which by their nature would occur within U.S. territory and thus could adversely affect U.S. citizens. As the Supreme Court recognized in the landmark case of *Ex parte Milligan*,<sup>249</sup> martial law commissions pose the greatest dangers for Article III. Without a strict limiting principle, a martial law commission could try U.S. citizens for virtually any crime, thus eviscerating the protections of judicial independence written into Article III, the jury trial right included in that Article, and the grand and petit jury guaranteed respectively by

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<sup>247</sup> *Ex parte Quirin*, 317 U.S. 1, 31 n.9 (1942); 1 HALLECK'S INTERNATIONAL LAW: OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 574 (Sherston Baker ed., 3d ed. 1893), available at <http://archive.org/stream/hallecksinterna00sirgoog#page/n5/mode/lup>.

<sup>248</sup> See Vladeck, *supra* note 10, at 945.

<sup>249</sup> 71 U.S. (4 Wall.) 2 (1866).

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the Fifth and Sixth Amendments.<sup>250</sup> In deriving a limiting principle, *Milligan* noted that the petitioner was a civilian residing in Indiana. The petitioner was not a participant in the Civil War, even though he had been accused of conspiracy to overthrow Indiana's lawful government.<sup>251</sup> *Milligan's* civilian status precluded the exercise of jurisdiction by a "law of war" commission. A martial law commission was out of bounds, the Court opined, because its jurisdiction was predicated on strict necessity, and in Indiana the civilian courts were open.<sup>252</sup> Under the circumstances, the Court ruled, depriving *Milligan* of a grand jury, jury trial, and the independence of an Article III tribunal would violate the Constitution.

*Milligan's* limiting principles of belligerency and necessity substantially defused the systemic threat to Article III posed by military commissions. Barring the recurrence of an epic domestic conflict like the Civil War, it would seem unlikely that masses of U.S. citizens or residents would serve as belligerents opposed to the U.S. government. Military commissions for civilians would therefore be barred as long as civil courts were open and functioning.<sup>253</sup> However, dissipation of the wholesale threat of military government across vast stretches of the U.S. does not eliminate the threat of incursions on Article III that are smaller in scope. For example, U.S. citizens or residents could enlist as belligerents for a foreign power. Addressing those situations requires a more searching look at "law of war" commissions.

### B. Law of War Commissions

With law of war commissions, it is best to start with our first factor: Congress's Article I powers. The power of Congress to establish law of war of commissions involves three separate sources of constitutional power and limitation. We have already identified the first two: Article III and Congress's Article I war powers, including its power under the Define and Punish Clause<sup>254</sup> to define and punish violations of international law. This particular source of authority is important

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<sup>250</sup> See *id.* at 119.

<sup>251</sup> See *id.* at 121-22 (noting that *Milligan* was a "citizen in civil life, in nowise connected with the military service").

<sup>252</sup> See *id.* at 121.

<sup>253</sup> See Michael W. Lewis & Peter Margulies, *Interpretations of IHL in Tribunals of the United States*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 415, 422 (Philip Van Tongeren ed., 2014).

<sup>254</sup> U.S. CONST. art. I, § 8, cl. 10.

because the Supreme Court, in *Ex parte Quirin*, suggested without conclusively deciding that the “law of war” was largely international in character.<sup>255</sup> An express constitutional limit on Congress also plays a role: the Ex Post Facto Clause,<sup>256</sup> which requires that Congress provide fair warning through a duly enacted statute that certain conduct is criminal. The D.C. Circuit’s decision in *al Bahlul II* is the first decision to hold that a law of war military commission conviction that is valid under the Ex Post Facto Clause is barred by Article III.<sup>257</sup> Before we grapple with how both Article III and the Ex Post Facto Clause play out in *al Bahlul*’s case, some background is useful on the Framers’ understanding of Congress’s power under the Define and Punish Clause.

C. *The Define and Punish Clause and the Deference That Is Congress’s Due*

The Framers inserted the Define and Punish Clause in the Constitution because unredressed violations of international law by individual states had been a prime weakness in the Articles of Confederation period.<sup>258</sup> The Define and Punish Clause gave Congress the power to enact laws that criminalized conduct such as violations of the international law principle of diplomatic immunity, which had sparked tensions with European powers prior to the Constitution’s enactment.<sup>259</sup> The Framers were also well aware of the commentary by Vattel and other publicists on international law, which had emerged as a check on the arbitrary power of European monarchs and therefore

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<sup>255</sup> The Court’s language is ambiguous about the precise source of the authority to establish military commissions: it alluded to “Congress . . . making rules for the government of our Armed Forces,” but also highlighted the Define and Punish Clause and the relationship between the “rules and precepts” of the law of nations and the content of the law of war. *Ex parte Quirin*, 317 U.S. 1, 28 (1942). As we shall see, those “precepts” of international law could include a measure of deference to states in how they define international law.

<sup>256</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>257</sup> *Al Bahlul II*, 792 F.3d 1, 3-22 (D.C. Cir. 2015).

<sup>258</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-17 (2004); Golove & Hulsebosch, *supra* note 45, at 934; Margulies, *Defining and Punishing*, *supra* note 45, at 19-20; cf. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 640-41 (2002) (questioning importance of incidents such as Philadelphia attack on French diplomat Marbois); J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874-88 (2007) (same).

<sup>259</sup> See *Sosa*, 542 U.S. at 716-17.



dovetailed with the Framers' interest in building a sound constitutional republic.<sup>260</sup>

At that time, most international law was not codified in treaties; rather it was customary in nature, evolving in accordance with state opinion and practice. This capacity for change and development was a virtue of international law, but also required fine-tuning to ensure that the new republic's interests dovetailed with its legal obligations. As Judge Janice Rogers Brown pointed out in her concurrence in the D.C. Circuit's en banc opinion in *Al Bahlul v. United States*,

[T]he Framers were distinctly aware of the undefined and adaptable nature of international law. They also recognized the concomitant flexibility inherent in that law. And they understood that the United States could, and indeed should, make use of that flexibility to advance its own national security interests . . . . [T]he Framers intended the United States — like other nations — to act in its own self-interest, albeit within the flexible constraints of international law.<sup>261</sup>

Carving out that space for flexibility within constraints required some measure of deference for Congress's determinations. The Necessary and Proper Clause<sup>262</sup> provided additional authority for Congress to legislate with flexibility in this area, without undue fear of judicial second-guessing.

The Framers' consigning to Congress of the task of defining and punishing violations of international law had functional roots.<sup>263</sup> The

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<sup>260</sup> See 3 EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* ch. 8, § 137 (1758), available at <http://www.lonang.com/exlibris/vattel/vatt-308.htm>; Golove & Hulsebosch, *supra* note 45, at 967; Margulies, *Defining and Punishing*, *supra* note 45, at 12-14.

<sup>261</sup> *Al Bahlul I*, 767 F.3d 1, 54 (D.C. Cir. 2014); *cf. id.* at 59, 62 (citing Margulies, *Defining and Punishing*, *supra* note 45). Judge Henderson made a similar point in her insightful dissent in *al Bahlul II* about the deference the Framers believed was owed to Congress. See *Al Bahlul II*, 792 F.3d at 44 (observing that, under Define and Punish Clause, “Congress was not reflexively to follow other nations’ lead in formulating [international law] offenses but instead to contribute to their formulation” (citing Margulies, *Defining and Punishing*, *supra* note 45, at 27)); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 734 (2008) (observing that “Congress’s power to ‘define and punish . . . Offences against the Law of Nations’ gives the legislature substantial authority to decide what conduct violates international law”).

<sup>262</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>263</sup> The discussion in the next two paragraphs relies heavily on the account provided in Margulies, *Defining and Punishing*, *supra* note 45, at 24-28.

Framers repeatedly acknowledged that international law was fluid and reliant on a bewilderingly vast constellation of state opinion and practice.<sup>264</sup> Indeed, Madison observed, even the “most enlightened legislators” could not state its boundaries with precision.<sup>265</sup> Reinforcing the need for deference to Congress’s judgments, Madison invoked the language of the Necessary and Proper Clause, maintaining that the need for uniformity and predictability made it “in every respect necessary and proper” to afford Congress a measure of discretion in carving out international law’s contours.<sup>266</sup> Heavy-handed attempts by the courts to curb this flexibility would make it more difficult to navigate the ship of state. Viewed in this light, judicial restraint would serve structural values, keeping courts out of the turbulent waters of diplomacy and statecraft.<sup>267</sup>

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<sup>264</sup> See THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 45, at 361 (predicting, in notes for a brief in *Rutgers v. Waddington*, the gradual extension of the “principle of . . . amnesty” in international law that would resolve property disputes after peace treaty in favor of bona fide purchasers).

<sup>265</sup> See THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961) (describing difficulty of “delineating the several objects and limits of different codes of laws . . . [including] common law . . . [and] maritime law”). Deference is also a staple of tribunals, such as the European Court of Human Rights, when interpreting transnational human rights agreements. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 47, 52 (1976) (furnishing a “margin of appreciation” to a state ban of a book on sexuality that publishers had marketed to teenagers); see also Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. Rev. 975, 983 (2010) (explaining that the measure of deference provided by the margin of appreciation grants states the flexibility to “implement or interpret human rights in ways that may be sensitive or responsive to prevailing social, cultural, and other norms within their polities”).

<sup>266</sup> See THE FEDERALIST NO. 42, at 266 (James Madison) (Clinton Rossiter ed., 1961).

<sup>267</sup> This wariness about judicial intrusion in foreign affairs has led the Supreme Court to curb human rights litigation in U.S. courts concerning overseas conduct unrelated to the United States. See *Kiobel v. Royal Dutch Petrol Petroleum Co.*, 133 S. Ct. 1659, 1664-65 (2013) (construing the Alien Tort Statute (“ATS”) under the canon of statutory interpretation disfavoring extraterritorial application of statutes). Scholars have disagreed on the judicial role under the ATS. Cf. Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 606-12 (2013) (analyzing the opinions of the Justices in *Kiobel*). Compare Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1041-43 (2015) (discussing the potential disruption of foreign affairs caused by ATS litigation and other uses of universal jurisdiction), with Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2399 (1991) (arguing for a heightened judicial role in vindicating human rights norms). In *Kiobel*, the Supreme Court put Congress in the driver’s seat, since Congress can enact legislation giving the federal courts a larger role in human rights lawsuits. Since Congress is accountable to the people, it is appropriate to give

The Framers' intent to neutralize the risk of uncertainty in international law through reliance on Congress also influenced the drafting of the Define and Punish Clause. At the Constitutional Convention, Gouverneur Morris of New York successfully argued that the language of the Clause should expressly empower Congress to "define," as well as punish, offenses against the law of nations.<sup>268</sup> Morris explained that the writings of philosophers and accounts of state opinion and practice that made up the law of nations would prove "too vague and deficient to be a rule."<sup>269</sup> Congress would remedy this problem by not merely defining the law of nations in a mechanical fashion, but refining that occasionally turgid and murky stream of disparate sources. When the operation of a rule lacked predictability and manageability, Congress could supply those attributes. Moreover, if parties with parochial agendas, including foreign states or other entities, precipitously claimed that the law of nations had changed, relying on Congress to set a rule would prevent an unduly hasty shift in abiding principles.<sup>270</sup>

By the same token, allowing Congress a measure of flexibility promotes growth and change in international law itself. Customary international law is not static; it evolves through state practice.<sup>271</sup> Giving Congress a voice in that evolution is consistent with the Framers' wish that the U.S. take its place among the community of nations.

Nineteenth-century precedents echoed this tendency to defer to Congress's Article I power. Echoing Madison, Justice Story suggested in

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Congress power over a matter impinging on the nation's sovereign prerogatives. In one recent case, the Supreme Court has ruled that a statute concerning foreign affairs was invalid because it conflicted with the constitutional power over recognition exercised by the executive branch. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2080 (2015); *cf. id.* at 2086 (recognizing that "functional considerations," including the President's ability to act with "dispatch," undergird viewing President's recognition power as exclusive, not shared with Congress (citing THE FEDERALIST NO. 70, at 424 (Alexander Hamilton))). However, *Zivotofsky* concerned a dispute between the two political branches over foreign affairs. In contrast, curbing Congress's flexibility under the Define and Punish Clause expands judicial power at the expense of both political branches.

<sup>268</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614-15 (Max Farrand ed., 1966); *cf. Kent, supra* note 258, at 899 (discussing exchange).

<sup>269</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 268, at 615.

<sup>270</sup> *Cf. Kent, Congress's Under-Appreciated Power, supra* note 258, at 899 (arguing that Morris might have thought that "Congress should not be bound by anyone else's view but its own as to whether an offense [against the law of nations] had been committed by another state").

<sup>271</sup> See Wuerth, *supra* note 267, at 621 (citing the continuing role of state practice in the development of international human rights litigation).

*United States v. Smith*<sup>272</sup> that the Framers lodged in Congress the power to define offenses against the law of nations because they recognized that the law of nations could not be “completely ascertained and defined.”<sup>273</sup> In *United States v. Arjona*,<sup>274</sup> the Court upheld Congress’s power under the Define and Punish Clause to prohibit the counterfeiting of foreign currencies. The Court did not cite any treaties or state practice on this issue, which in fact had drawn a conspicuous silence from these sources.<sup>275</sup> Instead, the Court reasoned from the structure and purpose of international relations, citing the need to maintain the integrity of the global financial system.<sup>276</sup>

#### D. Ex parte Quirin and the World War II Jurisprudence

The Supreme Court did not address the impact of the Define and Punish Clause on law of war commissions until the World War II case of *Ex parte Quirin*.<sup>277</sup> In *Quirin*, Chief Justice Stone wrote for the Court in upholding military commission convictions of Nazi saboteurs. Central to Chief Justice Stone’s analysis was Congress’s authorization of military commissions in that case.<sup>278</sup> Chief Justice Stone listed all of Congress’s Article I war powers as well as the President’s Commander in Chief authority under Article II.<sup>279</sup> He acknowledged that

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<sup>272</sup> 18 U.S. 153 (1820).

<sup>273</sup> *Id.* at 159. The Supreme Court declined to defer to Congress in another piracy case decided contemporaneously with *Smith*. See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 194-99 (1820) (holding that although Congress had the power to criminalize robbery on the high seas as piracy, it lacked the power to criminalize murder on the high seas not involving a U.S. national or vessel). However, *Furlong*’s rejection of congressional power to criminalize the more serious offense of murder is an outlier in both the jurisprudence of the Define and Punish Clause and international law. See *infra* notes 373-78 and accompanying text.

<sup>274</sup> *United States v. Arjona*, 120 U.S. 479 (1887).

<sup>275</sup> Cf. Thomas H. Lee & David L. Sloss, *International Law as an Interpretive Tool in the Supreme Court, 1861-1900*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 124, 147-48 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (noting that the *Arjona* Court relied largely on Vattel and policy arguments, and did not cite treaties, state practice, or other publicists besides Vattel).

<sup>276</sup> *Arjona*, 120 U.S. at 484.

<sup>277</sup> *Ex parte Quirin* 317 U.S. 1 (1942).

<sup>278</sup> See *id.* at 26. It is arguable that Congress had not expressly authorized commissions, since the provision cited by the Court was best viewed as a savings clause stating only that the legislation did not *preclude* military commissions that were otherwise lawful. See Margulies, *Defining and Punishing*, *supra* note 45, at 49; Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295, 315-16 (2010) (discussing ambiguities in the statute).

<sup>279</sup> See *Quirin*, 317 U.S. at 25-26.

Congress's power to establish military commissions is an "important incident to the conduct of war."<sup>280</sup> Citing the Define and Punish Clause in particular, he noted that Congress had established military commissions to try belligerents who, "in their attempt to thwart or impede our military effort have violated the law of war."<sup>281</sup>

Chief Justice Stone did not venture a comprehensive or precise definition of the "law of war." He included references to international law<sup>282</sup> and examples from U.S. practice, including Major André's proceeding during the Revolutionary War,<sup>283</sup> General Winfield Scott's convening of commissions during the Mexican-American War,<sup>284</sup> and the holding of commissions during the Civil War.<sup>285</sup> Given Congress's involvement, Chief Justice Stone disavowed an unduly "meticulous" demarcation of the law of nations' "ultimate boundaries."<sup>286</sup>

This deferential stance toward Congress suggests that the Court favored a broad definition of the "law of war" in determining Congress's power to establish military commissions. Defining that term was crucial to determining whether the defendants' convictions were legal under the Ex Post Facto Clause, since the Articles of War then in effect did not specify particular conduct that was prohibited, but simply authorized commissions to try violations of the "law of war." The Court's articulation of the law of war violation in *Quirin* supplies further evidence of its deference to Congress. The defendants had in fact made little if any concrete progress in their aim to destroy military objectives within the United States.<sup>287</sup> The Court could have

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<sup>280</sup> *Id.* at 28.

<sup>281</sup> *Id.* at 28-29.

<sup>282</sup> *See id.* at 29-30.

<sup>283</sup> *See id.* at 31 n.9.

<sup>284</sup> *See id.* at 31 n.10.

<sup>285</sup> *See id.* at 31 & n.10; cf. JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012) (discussing military commissions); Haridimos V. Thravalos, *History, Hamdan, and Happenstance: "Conspiracy by Two or More to Violate the Laws of War by Destroying Life or Property in Aid of the Enemy,"* 3 HARV. NAT'L SEC. J. 223, 252-63 (2012) (discussing the William Murphy military commission).

<sup>286</sup> *Quirin*, 317 U.S. at 45-46.

<sup>287</sup> *Id.* at 38. Ultimately, two of the defendants — those who had sought to alert the FBI of their plans — were pardoned; the rest were executed. Adding to the controversy around the decision, the executions occurred *before* the Court's full decision explaining its rationale, although the Court had earlier issued a *per curiam* decision that allowed the commissions to proceed. For different views of the case, compare A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309 (contending that *Quirin*, along with changes in the law of habeas corpus, provides significant protection for defendants in military tribunals), with Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a*

found that a law of war violation required the actual destruction of property or harming of persons. Instead, the Court found that the defendants' offense was "complete" and therefore triable under the law of war once the defendants entered and remained in the U.S. without enemy uniforms for the purpose of committing acts of sabotage.<sup>288</sup>

The Court's need in *Quirin* to address the Ex Post Facto issue created ambiguity about the relationship of Article III to law of war commissions. Chief Justice Stone did not clarify whether Article III imposed any requirements *beyond* those imposed by the Ex Post Facto Clause. Language from the opinion and material from Chief Justice Stone's personal papers suggests that Article III's role had to be read in light of the importance of Congress's Article I interests, the President's Article II interests as Commander in Chief, and the exigencies surrounding the convening of commissions.<sup>289</sup>

According to the *Quirin* Court, the exigent circumstances surrounding military commissions' use suggested their structural virtues and the risks to federal courts of undertaking a similar task. Chief Justice Stone alluded to the practical impediments to civilian courts trying participants in the midst of an armed conflict. He observed that military commissions established to try members of an adversary's forces are "in the natural course of events . . . usually called upon to function under conditions" that ruled out "familiar parts of the machinery for criminal trials in the civil courts."<sup>290</sup> Because commissions have often been conducted under exigent circumstances, Chief Justice Stone indicated that such circumstances "preclud[ed] resort" to juries and other attributes of civilian trials.<sup>291</sup> Based on this factor and historical practice, the Court declared that military commissions were simply not "courts in the sense of the Judiciary Article" of the Constitution.<sup>292</sup> This invocation of practical factors suggests the need for a measure of deference under Article III to Congress's determination of what conduct is triable in military commissions.

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*Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 735-39 (2002) (criticizing *Quirin*).

<sup>288</sup> *Quirin*, 317 U.S. at 38; cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 559 (2006) (plurality opinion) (citing the holding in *Quirin* with approval). Importantly, the *Quirin* Court did not find that the defendants could be charged with treason, which would require a trial in federal court. See U.S. CONST. art. III, § 3, cl. 1.

<sup>289</sup> *Quirin*, 317 U.S. at 26-27; see also *infra* notes 293-96 and accompanying text (discussing Chief Justice Stone's papers).

<sup>290</sup> *Quirin*, 317 U.S. at 26-27.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

Unpublished exchanges between the Justices also indicate that the Court intended to take a deferential stance toward both Congress and the President for reasons rooted in practicality and exigency. Chief Justice Stone and Justice Frankfurter engaged in correspondence on the President's compliance with the appellate procedures in Article 46 of the Articles of War.<sup>293</sup> Both Stone and Frankfurter appeared to acknowledge that President Roosevelt had not complied with the literal commands of the statute. The statute required review of a verdict and sentence by the Judge Advocate General or some delegate of the President prior to review by the President himself. The latter had occurred, but not the former. Justice Frankfurter pronounced himself willing to grant the President, working in partnership with Congress, some discretion to interpret a statute on wartime tribunals. This discretion, according to Justice Frankfurter, was squarely based on functional factors such as the importance of military commissions to the war effort, and the prospect that an unduly rigid judicial reading of authority for commissions could undermine commissions' effectiveness. Justice Frankfurter argued that courts had routinely deferred to the President on mundane matters such as "tariff legislation and land laws."<sup>294</sup> If that were true, Frankfurter continued,

[B]y much greater and controlling reason should the Presidential construction of a military code reasonably or historically permitting such construction be accepted as binding upon the courts. The ultimate Constitutional basis of the President's right in utilizing an instrument like the . . . Military Commission is his power as Commander-in-Chief to conduct the war. In the very nature of things, therefore, legislation bearing on the exercise of this military power — the actual combative aspect of war — is peculiarly outside the expectancies of judicial review.<sup>295</sup>

A suggested insertion by Chief Justice Stone does not rely as heavily as Frankfurter on deference to the President, but suggests that Stone would defer in the appropriate case to the combined judgment of the President and Congress. The insertion observed that, "it would be gratuitous . . . to inquire whether Congress could restrict the authority of the Commander in Chief to discipline enemy belligerents, or to

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<sup>293</sup> See Papers of Chief Justice Harlan Fiske Stone, Box 69, Library of Congress [hereinafter Stone Papers] (copy on file with the author).

<sup>294</sup> Felix Frankfurter, Sept. 14 Letter to Harlan Fiske Stone at 5-6, Stone Papers, *supra* note 293.

<sup>295</sup> *Id.*

consider the role of the courts if he were to ignore such restriction.”<sup>296</sup> The published opinion took a minimalist stance that did not contradict Justice Frankfurter’s view, explaining that the President’s “[o]rder convening the Commission was a lawful order and . . . the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge.”<sup>297</sup> At the very least, this minimalist account suggests no disagreement with the proposition that the Court should defer to the combined judgment of the political branches.

The teachings of practicality are even more evident in another case based on belligerents’ conduct during World War II, *Johnson v. Eisentrager*.<sup>298</sup> Justice Jackson, perhaps the Court’s most influential analyst of the separation of powers,<sup>299</sup> wrote for the Court. In upholding commission convictions based on the defendant German nationals’ continuing to fight for Japan in the Pacific theater after Germany had surrendered, Justice Jackson relied in part on the need, in a former theater of war outside of the territorial U.S., to try defendants who were “nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.”<sup>300</sup> Justice Jackson cautioned against providing “enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.”<sup>301</sup> While Justice Jackson’s argument may be seen as turning on the petitioner’s legal status *vel non* under U.S. immigration and nationality law, the argument at its core sounds in the key of practicality. Justice Jackson stressed the difficulty of enforcing the full array of U.S. legal protections for a foreign national when a panoply of factors counseled against that move. For Justice Jackson, the factors counseling judicial restraint included the following: the foreign national had engaged in armed conflict with the U.S. under the direction of a foreign power, “has never been or resided in the United States . . . was captured outside of our territory and there held in

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<sup>296</sup> See Preliminary Version of *Quirin* Opinion at 30, Stone Papers, *supra* note 293. In a letter to Frankfurter, Stone expressed tempered approval of Frankfurter’s position on deference to the President. See Letter from Chief Justice Stone to Justice Felix Frankfurter, Sept. 16, 1942, at 1-2, in Stone Papers, *supra* note 293. Stone agreed with Frankfurter that the President had “pre-existing power” to decide on the procedure for executive review of commission verdicts, and that Congress had not clearly stated that it was restricting the President’s power. *Id.* at 2.

<sup>297</sup> *Quirin*, 317 U.S. at 48.

<sup>298</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>299</sup> See Barron & Lederman, *supra* note 261, at 693.

<sup>300</sup> *Eisentrager*, 339 U.S. at 769.

<sup>301</sup> *Id.* at 777.



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military custody as a prisoner of war . . . tried and convicted by a Military Commission sitting outside the United States . . . for offenses against laws of war committed outside the United States . . . and is at all times imprisoned outside the United States.”<sup>302</sup>

In *Eisentrager*, the practical difficulties of access to evidentiary proceedings in U.S. civilian courts were a special concern. Justice Jackson noted that,

[Such access] might mean that our army must transport [foreign nationals without U.S. ties] across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.<sup>303</sup>

Justice Jackson warned that because this broad right of access to U.S. civilian courts “would be . . . available to enemies during active hostilities . . . [s]uch trials would hamper the war effort and bring aid and comfort to the enemy.”<sup>304</sup> Regarding such a prospect as injurious to the war effort, Jackson stressed the difficulties such wartime proceedings might pose for a U.S. commander, who would be “effectively fetter[ed]” by a reading of the Constitution that would “allow the very enemies [the commander] is ordered to reduce to submission to call [the commander] to account in . . . civil courts and divert . . . efforts and attention from the military offensive abroad to the legal defensive at home.”<sup>305</sup>

Justice Jackson’s analysis made two points, one express and one implied, regarding the need for deference to Congress’s power to establish commissions. First, because of the practicalities that Jackson identified, resort to more formal tribunals could impair the war effort. Second, Jackson implied that the federal courts’ undertaking of this task would disserve structural values, because Article III tribunals’ stumbling would redound to their discredit.<sup>306</sup> Both Jackson and Stone

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 779.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> While both Chief Justice Stone and Justice Jackson discussed the difficulties with Article III adjudication, it is fair to say that military commissions after 9/11 have also encountered difficulties. See Hafetz, *supra* note 10, at 721-22. One can attribute some of those difficulties to the “false start” commissions encountered when the Supreme Court rightly found that President George W. Bush’s unilateral establishment

left ambiguity on the role in Article III analysis of international law and the law of war. It is to that question that we now turn, in search of a limiting principle.

E. *Post-9/11 Issues: Conspiracy and Article III*

In *Al Bahlul v. United States*, a panel of the D.C. Circuit addressed the question that *Quirin* and *Eisentrager* left for future cases: whether Article III imposes any requirements on law of war commissions. We will assume that a law of war commission, to be true to its category, can only adjudicate cases involving belligerents in armed conflicts.<sup>307</sup> The next question is whether that is a sufficient restraint, or whether Article III requires a nexus between commission charges and international law. This section argues that because Congress is entitled to deference under Article III, commissions can try charges with a reasonable relationship to international norms. The conspiracy charges in *al Bahlul*'s case met that standard. In holding that Article III required more literal adherence to the letter of international law, the D.C. Circuit in *al Bahlul II* failed to afford Congress the appropriate deference due under the Necessary and Proper Clause. To reach that point, however, the court had to address the issue of whether *al Bahlul* had forfeited his right to de novo review of his Article III challenge. Since the issue of forfeiture also sheds light on the importance of Article III challenges, I turn to that issue first.

1. Forfeiture of Article III Challenges to Military Commissions

There are strong competing arguments on whether *al Bahlul* forfeited his right to raise his Article III argument. The full D.C. Circuit had earlier found that he had forfeited his right to de novo review of his Ex Post Facto Clause challenge to his conviction.<sup>308</sup> *Al Bahlul* argued that his objection dealt with the underlying structure of the tribunal, and thus was always reviewable de novo at a court's option, even if he had failed to make the argument below. On remand from the en banc court, a D.C. Circuit panel agreed, with Judge Rogers

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of commissions conflicted with congressional intent. *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 (2006). However, at some point in the near future, military commissions will need to demonstrate that they can produce dispositions in an effective, fair, and just manner.

<sup>307</sup> *Ex parte Quirin*, 317 U.S. 1, 45 (1942). *Milligan* tells us that this is true for commissions that deal with a domestic conflict, such as the Civil War, at least if those commissions operate when civilian courts are open.

<sup>308</sup> *Al Bahlul I*, 767 F.3d 1, 8-10 (D.C. Cir. 2014).

writing the majority opinion.<sup>309</sup> Judge Henderson, in dissent, argued that al Bahlul's objection was not to a commission's subject matter jurisdiction, which an appellate court may always review, but was instead to *Congress's power* to establish commissions and authorize commissions to try certain offenses.<sup>310</sup> Typically, Judge Henderson noted, parties can forfeit their right to de novo review of such issues, allowing the court to dispose of them under a far more deferential plain error standard. Although the arguments are almost in equipoise, Judge Rogers was correct: the presence of structural factors and the importance of guidance on the type of tribunal that will try conspiracy cases in the future weigh against forfeiture and favor de novo review.

The argument for forfeiture here is that al Bahlul attempted to boycott his military commission proceeding and failed to articulate his Article III-based objection. Generally, such a failure would be a forfeiture of this right to assert this point on appeal. A reviewing court would thus forego de novo review, and uphold the conviction unless it constituted plain error.<sup>311</sup> Finding a forfeiture stems from two related policies: (1) the failure to object deprives the court below of the opportunity to consider the legal issue, reducing judicial economy, and, (2) enforcing forfeitures prompts diligence by parties below, who might otherwise give less than their "all" in the knowledge that they could always raise new issues on appeal.<sup>312</sup>

To preserve his or her rights, a defendant must object with sufficient specificity to alert the trial court about the nature of his objection, and allow the trial court to analyze the objection concretely.<sup>313</sup> While al Bahlul did object to the proceedings before the military commission, his objection was arguably too vague to satisfy the specificity standard. Al Bahlul argued that the military commission was an illegitimate tribunal.<sup>314</sup> However, al Bahlul did not specifically raise the Article III point before the military commission. His objection was more amorphous, and could well have extended to trial before *any* U.S. court, including an Article III forum. An objection that broad would ordinarily be considered a forfeiture that precluded de novo review.

Courts will typically enforce forfeitures of this kind unless the challenge goes to the trial court's subject matter jurisdiction,<sup>315</sup>

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<sup>309</sup> *Al Bahlul II*, 792 F.3d 1, 3 (D.C. Cir. 2015).

<sup>310</sup> *Id.* at 27-28.

<sup>311</sup> *United States v. Cotton*, 535 U.S. 625, 631-32 (2002).

<sup>312</sup> *See Puckett v. United States*, 556 U.S. 129, 134 (2009).

<sup>313</sup> *See United States v. Bolla*, 346 F.3d 1148, 1152 (D.C. Cir. 2003).

<sup>314</sup> *Al Bahlul I*, 767 F.3d 1, 7 (D.C. Cir. 2014).

<sup>315</sup> *See Cotton*, 535 U.S. at 631.

retroactive interference by Congress with final judicial decisions,<sup>316</sup> or the composition of a tribunal that presided over the hearing below.<sup>317</sup> Forfeiture is *per se* inappropriate *only* in cases concerning subject matter jurisdiction. In such cases, a trial court must always consider objections *sua sponte*, if a party fails to raise them, since the court lacks authority to adjudicate the case. In the other situations described above, a court *may* engage in *de novo* review, although it could also rule that a party had forfeited the right to mount a challenge. In that event, a court would review only for plain error.

Here, the military commission clearly had subject matter jurisdiction. Congress had conferred jurisdiction over members of Al Qaeda engaged in armed conflict with the United States.<sup>318</sup> Al Bahlul clearly fit under this rubric, given undisputed evidence that he had been a close aide to Osama bin Laden and al Bahlul's statements when acting as his own counsel that he had sought to kill Americans on Al Qaeda's behalf.<sup>319</sup> A commission would have lacked subject matter jurisdiction if al Bahlul had been in Milligan's shoes — a U.S. citizen who was not a belligerent in the armed conflict. In contrast, al Bahlul's status as a belligerent aiding Al Qaeda sufficed to provide the commission with subject matter jurisdiction.<sup>320</sup>

Since Congress had not attempted to retroactively interfere with final judicial decisions, the next question would be whether al Bahlul's challenge concerned the composition of a tribunal. The propriety of a tribunal's composition, including the role of non-Article III judges sitting in an Article III forum, is often called "structural" in nature.<sup>321</sup> The Court has engaged in *de novo* review of decisions in the course of exercising its supervisory power over Article III courts. For example, the Court has reviewed decisions by *Article III* courts regarding which official can perform adjudicative functions. In *Nguyen v. United States*,<sup>322</sup> the Court held that it would violate Article III to have a non-Article III territorial court judge sit on a panel reviewing a criminal conviction, when that conviction had occurred in an Article III forum.

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<sup>316</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

<sup>317</sup> See *Nguyen v. United States*, 539 U.S. 69, 78 (2003).

<sup>318</sup> See Military Commissions Act, 10 U.S.C. § 948b(a) (2015) (providing that MCA grants military commissions power to "try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission"); *In re Al-Nashiri*, 791 F.3d 71, 73-75 (D.C. Cir. 2015) (discussing the statute).

<sup>319</sup> *Al Bahlul I*, 767 F.3d at 5, 21-22.

<sup>320</sup> *Al Bahlul II*, 792 F.3d 1, 27-28 (D.C. Cir. 2015) (Henderson, J., dissenting).

<sup>321</sup> *Id.* at 3-4 (majority decision).

<sup>322</sup> *Nguyen*, 539 U.S. at 80.

Since such issues can recur, providing guidance to lower courts promotes the sound functioning of the federal court system. A party's forfeiture of the right to seek de novo review does not reduce the value of the Court playing its supervisory role. The supervisory rationale may also account for the Court's decision in *Wellness Int'l Network, Ltd. v. Sharif*,<sup>323</sup> in which the Court appeared to review de novo whether a party's consent to bankruptcy court adjudication helped to cure a possible Article III problem. The Court took this step, even though the party challenging the adjudication had arguably forfeited his challenge to bankruptcy court adjudication.<sup>324</sup>

However, the Court is not obliged to take this course. One fair reading of the majority's decision in *Sharif* is that a party can both waive and forfeit structural objections. Justice Sotomayor, who wrote for the Court, indicated that a party could "waive" structural objections.<sup>325</sup> The *Sharif* Court's primary analysis distinguished between a waiver, which it viewed as an affirmative consent to an adjudication,<sup>326</sup> and a forfeiture, which could result from the failure to timely raise an issue.<sup>327</sup> However, other passages from the opinion blurred this distinction. For example, Justice Sotomayor approvingly cited a passage from Justice Scalia's opinion in *Plaut v. Spendthrift Farm, Inc.*,<sup>328</sup> in which Scalia observed in the context of the affirmative defense of res judicata that, "the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases."<sup>329</sup> Justice Scalia's logic permitting structural waivers also applies to forfeitures, since in analyzing res judicata issues waiver and forfeiture are largely interchangeable: a court will construe a failure to timely assert the defense as a waiver.<sup>330</sup>

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<sup>323</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1941, 1947, 1949 (2015).

<sup>324</sup> *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 755 (7th Cir. 2013).

<sup>325</sup> *Sharif*, 135 S. Ct. at 1947 n.11 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995)).

<sup>326</sup> *Id.* at 1942-44.

<sup>327</sup> *Id.* at 1941 & n.5.

<sup>328</sup> 514 U.S. 211, 231 (1995).

<sup>329</sup> *Id.*

<sup>330</sup> See *Daubert v. McCollum*, No. CIV-14-555-D, 2015 U.S. Dist. LEXIS 53489, at \*23 (W.D. Okla. Feb. 25, 2015) (noting that under state law, failure to timely assert claims in direct appeal of criminal conviction constitutes waiver in petition for habeas corpus); *North East Marine, Inc. v. Boody*, No. 09-CV-5600 (CBA), 2012 U.S. Dist. LEXIS 139607, at \*51 (E.D.N.Y. July 5, 2012) (failure to file timely objection may constitute waiver); *Whallon v. City of Houston*, No. 01-11-00333-CV, 2015 Tex. App. LEXIS 1157, at \*11 (Ct. App. 1st Dist. Feb. 5, 2015) (noting that res judicata is an

Justice Sotomayor's opinion in *Sharif* contains another hint that the Court regarded structural claims as forfeitable. The *Sharif* Court remanded to the lower court to determine "whether" Sharif had forfeited his objection to bankruptcy adjudication of his adversary's claim.<sup>331</sup> If Article III objections are per se non-forfeitable, this remand would have been superfluous, since Sharif as a matter of law could not have forfeited his objection. A remand to assess whether a party's omissions amounted to forfeiture makes sense only if, on some set of facts, forfeiture would have been possible as a matter of law.<sup>332</sup> Moreover, one can argue that the Article III challenge here is actually a challenge to Congress's *power* to legislate. A party can forfeit the right to de novo review of such a challenge, just as a party can forfeit the right to challenge other claims about the power of Congress.<sup>333</sup>

The judicial economy and party diligence-promoting rationales of forfeiture rules are at their height where, as in *al Bahlul*, the defendant largely boycotted the proceedings below.<sup>334</sup> In such a case, the lower court has been deprived of *any* opportunity to consider the defendant's arguments. That obliges the appellate court to do all the work — a burden that the defendant could have spared the court if the defendant had asserted his arguments below. In addition, in "boycott" cases, courts promote their institutional interest in an adversarial process by sending a clear message to litigants about the adverse impact of a failure to participate in proceedings below.

Having noted this, it remains true that the Supreme Court has usually opted to engage in de novo review of structural arguments, even when defendants arguably forfeited the right to de novo review. A critical mass of Justices often feels that addressing these issues provides institutional guidance that is valuable, even when individual

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affirmative defense that is considered waived unless pleaded in timely fashion).

<sup>331</sup> *Sharif*, 135 S. Ct. at 1948-49. The Court remanded on both forfeiture and "knowing and voluntary consent" to bankruptcy adjudication. *Id.*; see also *Al Bahlul II*, 792 F.3d 1, 33-34 (D.C. Cir. 2015) (Henderson, J., dissenting) (arguing that *Sharif* stands for the proposition that a party can forfeit structural argument); *Sharif*, 135 S. Ct. at 1949 (Alito, J., concurring) (arguing that Sharif had forfeited his claim by failing to present it below).

<sup>332</sup> See, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304 (2015) (holding that a party forfeited its right to claim an Article III violation by conceding the point earlier in the litigation); see also *infra* notes 339-43 and accompanying text (further discussing *B & B Hardware* and suggesting that the Court actually reached the merits).

<sup>333</sup> See *Al Bahlul II*, 792 F.3d at 27-28 (Henderson, J., dissenting). For example, a criminal defendant could by the failure to make a timely objection forfeit the right to de novo appellate review of whether a statute violated the First Amendment.

<sup>334</sup> *Id.* at 41.

parties raising the issues have been nonchalant regarding their rights. In *Nguyen v. United States*,<sup>335</sup> the Court held that a defendant's failure to lodge a timely objection did not preclude review of the defendant's argument that the presence of a non-Article III judge on a panel reviewing his conviction violated Article III.<sup>336</sup> Justice Stevens, writing for the Court, drew support from Justice Harlan's opinion in *Glidden Co. v. Zdanok*.<sup>337</sup> In *Zdanok*, Justice Harlan pressed on to the merits despite the absence of a timely Article III objection to trials in the District of Columbia presided over by retired judges of the Court of Claims and the Court of Customs and Patent Appeals.<sup>338</sup> Justice Harlan's example suggests that functionalists should grapple with structural questions de novo, instead of relying on the plain error standard. The Court's decision in *Sharif* echoes this practice, by reaching the merits of the Article III argument de novo, although the Court also suggested that such an argument is forfeitable.

Another recent decision, *B & B Hardware, Inc. v. Hargis Indus., Inc.*,<sup>339</sup> appeared to enforce a forfeiture, but still reached the merits after a fashion and thus provided sufficient guidance for future cases. In *B & B Hardware*, Justice Alito wrote for the Court, asserting that a company had forfeited the right to de novo review of an Article III challenge to a statute that gave collateral estoppel effect to decisions by an administrative agency.<sup>340</sup> However, although Justice Alito found that the party had forfeited this argument, his finding that the avoidance canon did not apply in essence addressed the Article III issue. The avoidance canon holds that a court should interpret a statute to resolve serious questions about the statute's constitutionality.<sup>341</sup> In finding that the avoidance canon did not require reading the statute to avoid giving agency decisions issue-preclusive effect, Justice Alito cited Supreme Court precedent presuming that Congress intended that a party can invoke collateral estoppel based on an agency decision.<sup>342</sup> That line of precedent

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<sup>335</sup> 539 U.S. 69 (2003).

<sup>336</sup> *Id.* at 78.

<sup>337</sup> 370 U.S. 530, 547 (1962).

<sup>338</sup> *Id.* at 535-36 (citing the "strong policy concerning the proper administration of judicial business"). After exhaustive analysis, the Court concluded that the courts in question were actually Article III courts with the judicial protections befitting that label. *Id.* at 556-61.

<sup>339</sup> 135 S. Ct. 1293 (2015).

<sup>340</sup> *Id.* at 1304.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 1304-05 (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796-99 (1986)).

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discussed at length the efficiency achieved by lending agency decisions preclusive effect and the folly of a formalistic rule that limited issue preclusion to court decisions.<sup>343</sup> While Justice Alito did not purport to definitively resolve the Article III objection to granting agency decisions preclusive effect, his discussion indicated that such objections would face an uphill battle.

In light of this judicial bent for addressing structural questions, the *al Bahlul II* majority was correct to engage in de novo review of the Article III challenge. Judge Rogers was right that setting the contours of military commission authority is a vital task in ascertaining the role of the judiciary as an institution.<sup>344</sup> Addressing whether Congress can provide an alternative to Article III adjudication of certain criminal charges is surely as important as determining whether a federal court can allow a judge of the federal Court of Claims to try federal criminal cases, which the Court ruled on in *Zdanok*, or allow a judge of a territorial court to hear appeals from an Article III trial court, as the Court declined to do in *Nguyen*. The system works best if military commissions have that guidance in future cases. A de novo standard is most appropriate in light of that need.

## 2. Understanding Conspiracy in International Law

Conspiracy charges can arise in two ways.<sup>345</sup> First, international tribunals recognize that a plot resulting in a completed, unlawful act of violence, such as murder, amounts to conspiracy. Here, conspiracy is not a crime in and of itself. It is merely a *theory of responsibility* supporting a murder charge.<sup>346</sup> The prosecutor's theory is that an individual who plots a killing is as guilty as the individual who pulls the trigger.

International law views conspiracy as criminal only when it constitutes a theory of responsibility for a completed war crime. In contrast, international law does not recognize conspiracy as a separate, inchoate offense entailing a mere *agreement* between individuals. The murder of civilians is a completed act that would suffice as a matter of law. In the United States, however, a defendant can be guilty of conspiracy to rob a bank if that individual and others agree to commit the robbery and that individual then takes even a minor step in furtherance of that agreement,

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<sup>343</sup> *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797 (1986).

<sup>344</sup> *Al Bahlul II*, 792 F.3d 1, 8-9 (D.C. Cir. 2015).

<sup>345</sup> This subsection relies on CORN ET AL., *supra* note 223, at 313-14.

<sup>346</sup> See *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber Judgment, ¶¶ 393-95 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).



such as visiting the bank to assess its security.<sup>347</sup> Conversely, international tribunals do not recognize an agreement without a completed act as a war crime, reasoning that such an offense would be too vague.<sup>348</sup> No international tribunal has tried an individual who merely plotted to kill civilians unless others have *killed* the civilians and the individual's plot has aided or facilitated the killing.<sup>349</sup>

### 3. International Tribunals on Conspiracy as a Form of Liability

In cases where the killing of civilians *has* occurred, international tribunals will broadly construe the assistance, including conspiracies among individuals, that supports the charge of murder. One of international criminal law's prime objectives is the elimination of impunity — a wrongdoer's evasion of punishment. Courts recognize that the murder of civilians often entails assistance in varying forms provided by many individuals, each eager to minimize or deny his or her role. A broad definition of culpable assistance promotes accountability for those who aid in the commission of such serious crimes.

For example, treaties and case law indicate that a conviction for murder of civilians could be based on a defendant's aiding and abetting the killing or participation in a Joint Criminal Enterprise (JCE) to commit the killing. To be guilty of the murder of civilians based on a JCE theory, an individual need only serve as a "cog in the wheel" for a common plan.<sup>350</sup> To be guilty of aiding and abetting, a defendant need not have prior knowledge of a specific act of violence. A defendant need only provide help, including moral encouragement, with the knowledge that those receiving the help are targeting civilians.<sup>351</sup>

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<sup>347</sup> For a landmark federal case on conspiracy doctrine, see *Kotteakos v. United States*, 328 U.S. 750, 773-74 (1946) (holding that defendants can be guilty of conspiracy if they agreed to commit acts that were unlawful and acted to further that goal, even if each defendant did not know all or even most of the other defendants in the alleged conspiracy).

<sup>348</sup> See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1162 (2009); Margulies, *Defining and Punishing*, *supra* note 45, at 87.

<sup>349</sup> See CORN, ET AL., *supra* note 223, at 314.

<sup>350</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 199 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); see Prosecutor v. Taylor, Case No. 03-01-T, P6910-11, ¶ 464 (Special Ct. for Sierra Leone 2012).

<sup>351</sup> Prosecutor v. Šainović, Case No. IT-05-87-A, Appeals Chamber Judgment, ¶ 1629 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

JCE is substantially equivalent to conspiracy as a theory of liability for completed war crimes.<sup>352</sup> Similarly, aiding and abetting, JCE, and conspiracy overlap. Suppose an individual recruits others with the intention that the recruits will murder civilians. If the murder actually occurs, the recruiter would be guilty of that murder on either a JCE or aiding and abetting theory.<sup>353</sup> An individual who drives a truck that transports civilians to a killing site with the intent that such killing will occur is similarly guilty of murdering civilians, on either a JCE or aiding and abetting theory.<sup>354</sup>

#### 4. Analyzing Conspiracy in *al Bahlul*

We can analyze conspiracy for Article III purpose in *al Bahlul*'s case in two ways. First, we can look at the underlying conduct in the case. The en banc D.C. Circuit took this step in finding that *al Bahlul*'s conviction did not violate the Ex Post Facto Clause, while the panel of the D.C. Circuit that decided on remand that his conviction violated Article III ignored *al Bahlul*'s conduct. As the en banc D.C. Circuit recognized, while the initial charge in *al Bahlul*'s case was based on his agreement and did not require a completed act, overt acts cited in the charges "directly relate[d]" to the 9/11 attacks.<sup>355</sup> Members of the

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<sup>352</sup> See *Prosecutor v. Brđanin*, Case No. IT-99-36-A, at ¶¶ 393-404 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (discussing Nuremberg conspiracy cases brought under Control Council Law No. 10); *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, ¶ 24 (Int'l Crim. Trib. for Rwanda Oct. 22, 2004) (also discussing Nuremberg conspiracy cases under Council Law No. 10); cf. Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 703 (2011) (describing "close connection" between conspiracy and JCE).

<sup>353</sup> See Rome Statute of the International Criminal Court art. 25(3)(b)–(d), July 17, 1998, 2187 U.N.T.S. 105 (describing types of criminal liability, including soliciting, aiding and abetting, and any other knowing or intentional contribution to the actual or attempted commission of a crime by a group of persons acting with a common purpose).

<sup>354</sup> See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 298 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (stating that aiding and abetting would only require knowledge, not intent).

<sup>355</sup> *Al Bahlul I*, 767 F.3d 1, 22 (D.C. Cir. 2014); Margulies, *Defining and Punishing*, *supra* note 45, at 83-84, 86-87. Similarly, the instructions of the military judge to the members of *al Bahlul*'s military commission allowed the members to find that *al Bahlul* had participated in acts related to September 11. The judge first informed the members that they did not need to find that the conspiracies with which *al Bahlul* had been charged, such as plotting to murder civilians during an armed conflict, had actually resulted in the deaths of civilians. See Transcript of Record at 848, *United States v. Al Bahlul*, 803 R.M.C., Office of Military Comm'n, Dep't of Defense, *available*

military commission found that al Bahlul had committed those acts. Those findings, confirmed by al Bahlul's own admissions, supplied the one element — relationship to a *completed* war crime — that separated the stand-alone conspiracy charge in al Bahlul's case from internationally recognized conspiracy as a theory of responsibility for the murder of civilians.<sup>356</sup>

The undisputed evidence includes the following: Although al Bahlul did not have advance knowledge of the attacks, a letter from al Bahlul introduced into evidence admitted that his conduct was related — albeit in a “simple” and “indirect” way — to 9/11. In the letter, al Bahlul admitted one of the overt acts cited in the charges: administering an al Qaeda loyalty oath to two key participants in the 9/11 plot — Mohamed Atta, the plot's ringleader in the United States, and Ziad Jarrah, one of the pilots.<sup>357</sup> Evidence also showed that al

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at <http://www.mc.mil/Portals/0/pdfs/alBahlul/Bahlul%20Transcript.pdf>. However, the judge also instructed the members that they needed to find that al Bahlul had committed at least one of the overt act acts specified. Several of those acts dealt with September 11, such as the specifications that al Bahlul had prepared martyr wills for two of the key 9/11 hijackers, Mohamed Atta and Ziad Jarrah. *Id.* at 847. In addition, the military judge's instructions on each of the specific charges appeared to allude to completed acts, such as the actual murder of civilians. In his instructions on overt acts, the judge noted that an overt act “must be a clear indication that the conspiracy is being carried out.” *Id.* at 849 (emphasis added). The phrase, “being carried out,” suggests a plot that was at least partially consummated. Moreover, six times during instructions on the specific charges, the judge informed that the members of the commission that they had to find that the “intended killing” or other violation “took place” during an armed conflict. *See id.* at 850 (discussing charges of murder of and attack on civilians) (emphasis added); *id.* at 852 (giving instructions on attacking civilian objects); *id.* at 852-53 (providing instructions on murder in violation of the law of war); *id.* at 854 (providing instructions on conspiracy to destroy property in violation of the law of war); *id.* at 856 (providing instructions on conspiracy to commit terrorism). The phrase, “took place,” would be incongruous if the judge's instructions dealt only with un consummated plots. By the same token, the phrase fits actions, such as the September 11 attacks, that in fact occurred. Those completed violations of international law were integral to the conspiracy charges against al Bahlul, just as they would have been in an international tribunal determining al Bahlul's guilt.

<sup>356</sup> *Al Bahlul I*, 767 F.3d at 21 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002) (describing evidence as “essentially uncontroverted”). The Military Commissions Act provides the accused with robust protections regarding access to evidence. *See* Military Commissions Act, 10 U.S.C. § 949a(b)(2)(A) (2012) (allowing the accused to present evidence in his or her defense, cross-examine adverse witnesses, and “examine and respond to” evidence introduced by the prosecution). In capital cases, the statute also provides that the accused will be represented by at least one lawyer “learned in applicable law relating to capital cases.” *Id.* § 949a(b)(2)(C)(ii).

<sup>357</sup> Gov't's Motion for Preadmission of Evidence (Letters of the Accused) at 4,

Bahlul administered the oath with the intent that Atta and Jarrah would kill American civilians.<sup>358</sup> Moreover, acting as his own attorney during the trial, al Bahlul acknowledged that his administration of the loyalty oath linked him to the 9/11 plot. The members of the military commission specifically found that al Bahlul had administered the loyalty oath.<sup>359</sup> That finding would support JCE and aiding and abetting liability for murder, given the broad definitions used in international tribunals. In this respect, al Bahlul's conduct fit within the acts that international law authorizes for trial in military commissions.<sup>360</sup> That link to conduct that violates international law should be sufficient to satisfy Article III.

One can also argue that for Article III purposes, even an inchoate conspiracy to murder civilians is reasonably related to international law. Here, we would look to the Necessary and Proper Clause, which would permit Congress to enact legislation "conducive" to exercise of its Article I powers.<sup>361</sup> There is no doubt that Congress could punish an internationally recognized war crime, such as the murder of civilians. Under the Necessary and Proper Clause, Congress could also punish plots that could have led to the murder of civilians or another recognized war crime, even when authorities thwarted such plots before their completion. Congress could reasonably find that waiting for a completed act poses too great a risk, and that the prospect of military commission prosecution would enhance deterrence.<sup>362</sup>

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United States v. Al Bahlul, Before the Military Commission, available at [http://www.mc.mil/Portals/0/pdfs/alBahlul/Al%20Bahlul%20\(AE035\).pdf](http://www.mc.mil/Portals/0/pdfs/alBahlul/Al%20Bahlul%20(AE035).pdf); see Margulies, *Defining and Punishing*, *supra* note 45, at 86.

<sup>358</sup> *Al Bahlul I*, 767 F.3d at 21.

<sup>359</sup> *Id.* at 22.

<sup>360</sup> *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79 (1857). The same analysis would apply to the material support charges in al Bahlul's case. The D.C. Circuit found that these charges violated the Ex Post Facto Clause. *Al Bahlul I*, 767 F.3d at 29. One can argue, *pace* the D.C. Circuit, that an appropriately tailored charge of material support would include only conduct that constituted JCE or aiding and abetting under international law, and would thus be entirely appropriate for trial in commissions.

<sup>361</sup> *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (citing *McCulloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)); *cf.* *McCulloch*, 17 U.S. at 413 (defining necessary as "convenient . . . or useful").

<sup>362</sup> Congress's power to prospectively (as opposed to retroactively) designate crimes as triable in military commissions is also at issue in the case of Abd al Hadi al-Iraqi, who allegedly engaged in a range of pre-MCA conduct but also is accused of conspiracy for post-MCA events. In al-Iraqi's case, that alleged post-MCA conduct involved making false statements to Turkish officials and in immigration documents in 2006 to enable the defendant to enter Iraq to plan attacks on U.S. troops there. See Charge Sheet at 12, Abd al Hadi al-Iraqi (June 2, 2014), available at <http://www.mc.mil/Portals/0/pdfs/alIraqi/Hadi%20Al%20Iraqi%20Referred%20Charge>

In addition to promoting Congress's exercise of its Article I powers, this formulation serves other structural ends. Trying such cases will often involve defendants, evidence, and witnesses located abroad, challenging the capacities of Article III courts. Trying such charges in a military commission makes sense.

This functional approach is also consistent with *Ex parte Quirin*. As noted above, Chief Justice Stone's opinion in *Quirin* stressed Congress's war powers.<sup>363</sup> Moreover, Chief Justice Stone expressly declined to offer an unduly "meticulous" analysis of the interaction between Congress's authority to establish military commissions and the parameters of the law of war.<sup>364</sup> In furnishing examples of offenses against the law of war, Chief Justice Stone cited to both international law scholars and U.S. history.<sup>365</sup> Chief Justice Stone also stressed the practical difficulties with requiring that a civilian court, with its more elaborate procedures, adjudicate conduct that occurred in the fluid realm of an armed conflict.<sup>366</sup> Finally, the *Quirin* Court's holding is consistent with a deferential view of Congress's authority under the Necessary and Proper Clause. A military commission trial was not strictly "necessary" for the *Quirin* defendants, whom U.S. authorities had apprehended within the U.S. for acts committed here. In 1942, despite the United States's entry in World War II, civilian courts in the U.S. were open. Nonetheless, the Court clearly viewed a military commission trial as more efficient and therefore more "conducive" and "useful" to Congress's exercise of its war powers.<sup>367</sup>

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%20Sheet.pdf. According to the U.S., participants in those attacks would have feigned civilian status, thus violating the international law prohibition on perfidy. The alleged conspiracy involved mere agreement, not a completed act, since al-Iraqi was captured before the plan could be consummated. Al Iraqi's commission prosecution would also satisfy Article III, as being reasonably related to an acknowledged war crime.

<sup>363</sup> *Ex parte Quirin*, 317 U.S. 1, 25-28 (1942).

<sup>364</sup> *Id.* at 45-46.

<sup>365</sup> *Id.* at 30-31.

<sup>366</sup> *Id.* at 39.

<sup>367</sup> *United States v. Comstock*, 560 U.S. 126, 133-34 (2010). While Judge Tatel's concurrence in *Al Bahlul II* suggested that Article III courts are also capable of adjudicating cases of transnational terrorism involving defendants with no previous ties to the U.S., *Al Bahlul II*, 792 F.3d 1, 23, 27 (D.C. Cir. 2015) (Tatel, J., concurring), his analysis compared apples and oranges. A substantial number of the cases successfully prosecuted in Article III courts involved defendants arrested in the U.S. through sting operations. CTR. ON LAW AND SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2011 26 (Karen J. Greenberg ed., 2011) (stating that fully 41 percent of criminal prosecutions involved informants to recruit individuals in the U.S. for terrorist "plots" created by law enforcement), available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue>.

The Supreme Court's latest decision on military commissions, *Hamdan v. Rumsfeld*,<sup>368</sup> is also consistent with a functional analysis that would defer to Congress's war powers and uphold al Bahlul's conviction. Justice Stevens wrote for a plurality in asserting that inchoate conspiracy was not a war crime.<sup>369</sup> This section of Stevens' opinion stressed the perils of unilateral executive establishment of military commissions. The distrust of executive unilateralism dominated the portions of the opinion that a majority of the Justices endorsed. In keeping with this focus on executive unilateralism, Justice Stevens expressly reserved whether Congress — as opposed to the President acting in the face of legislation to the contrary — could designate conspiracy for trial in commissions.<sup>370</sup> Highlighting the *Hamdan* Court's hesitancy to tie Congress's hands, Justice Kennedy declined to join Justice Stevens's plurality opinion on conspiracy. Instead, Justice Kennedy highlighted the role of Congress, noting that, "Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or with international justice.'"<sup>371</sup>

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pdf. Sting operations are a legitimate law enforcement tactic, but they do not present the logistical and evidentiary difficulties of prosecuting a member of Al Qaeda located abroad. Prosecuting transnational terrorists in federal court is a complex enterprise with many moving parts. See Jennifer Steinhauer & Charlie Savage, *U.S. Defends Prosecuting Benghazi Suspect in Civilian Rather than Military Court*, N.Y. TIMES, June 18, 2014, at A10, available at <http://www.nytimes.com/2014/06/18/world/middleeast/us-defends-prosecuting-benghazi-suspect-in-civilian-rather-than-military-court.html> (noting the use of U.S. personnel abroad to capture Ahmed Abu Khattala, who was subsequently arraigned in federal court in Washington, D.C. on charges of leading the 2012 attack on the U.S. diplomatic mission in Benghazi, Libya); see also *In re Terrorist Bombings of U.S. Embassies in E. Africa v. Odeh*, 552 F.3d 93, 104 (2d Cir. 2008) (in the course of upholding the convictions of the defendants on charges based on the 1998 bombings of the U.S. embassies in Kenya and Tanzania, court noted that one defendant was arrested by Pakistani authorities, sent to Kenya, where he was questioned by U.S. and Kenyan officials, and eventually transferred to U.S.). Because of the challenges of prosecuting transnational terrorists, there have been relatively few such cases in U.S. civilian courts. Indeed, Judge Tatel mentioned only *two* — the cases cited above involving Benghazi and the East Africa embassy bombings. See *Al Bahlul II*, 792 F.3d at 27. That number is roughly comparable to the number of military commission prosecutions. Military commission cases are even more complex, because they involve the additional dimension of occurrence during an armed conflict. Military commission cases such as al Bahlul's and Article III trials are not mutually exclusive; rather, they are complementary approaches to seeking accountability for terrorists.

<sup>368</sup> 548 U.S. 557 (2006).

<sup>369</sup> *Id.* at 599-601.

<sup>370</sup> *Id.* at 601.

<sup>371</sup> *Id.* at 655 (Kennedy, J., concurring) (citing *Banco Nacional de Cuba v. Sabbarino*, 367 U.S. 398, 428 (1964)).

The reasonable relationship to international law test also provides an effective limiting principle. Without this principle in place, the U.S. could try individuals in the U.S. in military commissions for sedition, as long as the government could show that such individuals were belligerents. That would have allowed the government to use commissions to try virtually *all* Confederate soldiers. This gambit would have clashed with the spirit, if not the letter, of Article III's reservation of treason prosecutions for the federal courts. The reasonable relationship test would foreclose this kind of overreaching.<sup>372</sup> It would also ensure that commissions could not try defendants on charges more remote from international law, such as providing material support in the form of funds to a terrorist group.<sup>373</sup>

##### 5. The Flaws in *al Bahlul II*'s Rejection of the Functional Approach

In contrast with this functional analysis, the D.C. Circuit panel striking down *al Bahlul*'s conviction on Article III grounds took a mechanical, formalistic view of both Supreme Court precedent and Congress's power. Illustrating this formalist turn, neither Judge Rogers' opinion nor Judge Tatel's concurrence addressed the undisputed facts concerning *al Bahlul*'s conduct, which the en banc D.C. Circuit had described as "directly relate[d]" to the 9/11 attacks.<sup>374</sup> The panel majority's failure to reckon with the facts of the case dovetailed with its narrow view of *Quirin*, *Hamdan*, and *Crowell v. Benson*.

Discussing *Quirin*, Judge Rogers maintained that Chief Justice Stone had not considered Congress's Article I powers in his analysis of the Article III issue.<sup>375</sup> However, Judge Rogers' account of this section of Chief Justice Stone's opinion failed to acknowledge the Chief Justice's extended earlier discussion of Congress's war powers, and his description of military commissions as "an important incident" of the

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<sup>372</sup> In this sense, the reasonable relationship test also improves on Judge Kavanaugh's suggestion that Congress's power to prospectively designate charges to be tried in commissions was not limited by the Define and Punish Clause at all, and could be based on Congress's full range of war powers. See *Hamdan v. United States*, 696 F.3d 1238, 1246 n.6 (D.C. Cir. 2012). Judge Kavanaugh's approach would not sufficiently restrain Congress.

<sup>373</sup> See Margulies, *Defining and Punishing*, *supra* note 45, at 58-59 (noting that "acts such as low-level financial support . . . have never been considered violations of the law of war").

<sup>374</sup> *Al Bahlul I*, 767 F.3d 1, 22 (D.C. Cir. 2014).

<sup>375</sup> *Al Bahlul II*, 792 F.3d 1, 1431 (D.C. Cir. 2015) (citing *Ex parte Quirin*, 317 U.S. 1, 38-46 (1942)).

conduct of armed conflict.<sup>376</sup> That aspect of Chief Justice Stone's analysis was an integral building block for his treatment of Article III. In addition, Judge Rogers ignored Chief Justice Stone's express reluctance to rigidly demarcate the scope of Congress's authority regarding military commissions. Chief Justice Stone's disavowal of the need to use "meticulous care" in addressing that question<sup>377</sup> suggested flexibility that the *al Bahlul II* majority failed to embrace.<sup>378</sup>

Judge Rogers' opinion also leaned far too heavily on *United States v. Furlong*,<sup>379</sup> a piracy case with an idiosyncratic rationale.<sup>380</sup> In *Furlong*, the Court held that although Congress, exercising its power under the Define and Punish Clause, could punish a robbery committed in the course of a pirate ship's raid on another vessel, it could not punish a murder committed in the course of that raid. Justice Johnson, writing for the *Furlong* Court, labored mightily to explain why Congress could not punish a murder committed in the course of piracy, while it could punish a mere robbery committed under similar circumstances. Justifying this peculiar result, Justice Johnson asserted that international law punished robbery on the high seas as piracy, since preying on international trade injured all nations.<sup>381</sup> The absence of an international norm against piracy might have permitted piracy to proceed with impunity, since the particular nation victimized by a specific act of piracy might lack the motivation or the resources to pursue the wrongdoer. Making robbery on the high seas an international law offense and establishing universal jurisdiction over prosecutions would close this gap.<sup>382</sup>

This portion of Justice Johnson's explanation is unimpeachable. However, Justice Johnson went off course, at least by today's

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<sup>376</sup> *Quirin*, 317 U.S. at 28.

<sup>377</sup> *Id.* at 45-46.

<sup>378</sup> Indeed, the willingness of Chief Justice Stone, Justice Frankfurter, and the rest of the *Quirin* Court to overlook the President's lack of compliance with the literal terms of the Articles of War regarding the *Quirin* defendants' appeal demonstrates a flexibility and capaciousness that contrasts with the *al Bahlul* panel's parsimonious reading of Congress's power. See *supra* notes 293-97 and accompanying text. President Roosevelt had reviewed the verdict directly, instead of first allowing review by the Judge Advocate General, as the Articles of War appeared to require.

<sup>379</sup> *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

<sup>380</sup> See *Al Bahlul II*, 792 F.3d at 15-16; see also Margulies, *Defining and Punishing*, *supra* note 45, at 69-70.

<sup>381</sup> *Furlong*, 18 U.S. at 197 (noting that robbery on the high seas "is against all, and punished by all").

<sup>382</sup> *Id.* (noting that "robbery on the high seas is considered as an offence within the criminal jurisdiction of all nations").



standards, in arguing that an international law norm was not needed to hold accountable individuals who committed murder in the course of a pirate raid. According to Justice Johnson, murder was so “abhorrent” that any state whose nationals were victimized would opt to prosecute the offense under its own law.<sup>383</sup> This convoluted rationale clashes with current understandings of the basis for international prohibitions on war crimes, such as the murder of civilians. The modern understanding is that such offenses are punishable by international tribunals precisely because they are regarded as especially heinous.<sup>384</sup> While *Furlong* stands for the truism that Congress’s power is not unlimited, the decision’s idiosyncratic and obsolete rationale reduces its value as a guide to the contours of Congress’s authority.

In determining the degree of deference due Congress’s exercise of its authority under the Define and Punish Clause, the *al Bahlul* panel majority would have been better served by relying on *United States v. Arjona*.<sup>385</sup> In *Arjona*, as noted above, the Court deferred to Congress’s exercise of its power under the Define and Punish Clause to criminalize the manufacturing of counterfeit foreign currencies within the United States. Justifying its deference, the Court relied solely on a policy rationale: counterfeiting foreign currencies undermined the integrity of the international financial system.<sup>386</sup> The *Arjona* Court deferred readily to Congress, despite the absence of any international treaty or scholarship classifying transnational counterfeiting as a violation of the law of nations.<sup>387</sup> Although, as Judge Rogers noted in her opinion,<sup>388</sup> the *Arjona* Court acknowledged that Congress’s power had limits,<sup>389</sup> the Court’s reference to limits was a passing nod that did not alter *Arjona*’s deferential stance. The *al Bahlul II* court should have taken *Arjona*’s deference as its lodestar, instead of micromanaging legislative judgments about foreign affairs and national security.

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<sup>383</sup> *Id.*

<sup>384</sup> Margulies, *Defining and Punishing*, *supra* note 45, at 69-70; see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 230-36 (2004) (explaining and critiquing the development of international law).

<sup>385</sup> *United States v. Arjona*, 120 U.S. 479 (1887); see also Margulies, *Defining and Punishing*, *supra* note 45, at 47 (discussing *Arjona*); *supra* notes 274-76 (also discussing *Arjona*).

<sup>386</sup> *Arjona*, 120 U.S. at 484 (citing Vattel on the need for “wise and equitable commercial laws”).

<sup>387</sup> See Lee & Sloss, *supra* note 275, at 147-48.

<sup>388</sup> *Al Bahlul II*, 792 F.3d 1, 15 (D.C. Cir. 2015).

<sup>389</sup> See *Arjona*, 120 U.S. at 488.

The *al Bahlul II* court's grudging treatment of Congress's power was most salient in its assertion, offered with no support whatsoever, that no deference was due Congress unless the legislature specifically articulated its intent to codify the law of nations.<sup>390</sup> Apparently, according to the *al Bahlul II* majority, Congress cannot merely legislate pursuant to the Define and Punish Clause. Instead, to be worthy of deference, Congress must add a magical incantation to satisfy its judicial overseers. Judge Henderson, in her perceptive dissent, described the majority as requiring that Congress ask, "Mother, may I?"<sup>391</sup> before legislating with the full breadth of its Article I powers.<sup>392</sup> Forcing Congress to jump through such hoops seems inappropriate for a measure that the *Quirin* Court described as an "important incident" of the conduct of war. As Judge Henderson made clear, deference to Congress was the wiser course.

Judge Henderson was also insightful in noting the *al Bahlul II* majority's misbegotten reliance on the Supreme Court's landmark decision in *Crowell v. Benson*.<sup>393</sup> In *Crowell*, the Court upheld an administrative agency's adjudication of a dispute and determination of facts, subject to deferential judicial review of agency fact-finding and review of legal questions.<sup>394</sup> While the *al Bahlul II* majority suggested that the MCA provided for less robust appellate review than the regime at issue in *Crowell*,<sup>395</sup> Judge Henderson accurately observed that the review contemplated by the MCA was at least equal to the review that the Supreme Court upheld in *Crowell*.<sup>396</sup> The MCA provides for de novo appellate review of legal questions, including the sufficiency of the evidence.<sup>397</sup> In military commission cases, members of the commission make specific findings of fact.<sup>398</sup> If those findings were wholly unsupported by evidence in the record, a reviewing court could vacate the conviction. In practice, therefore, there is little daylight between appellate review under the MCA and the review

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<sup>390</sup> *Al Bahlul II*, 792 F.3d at 16.

<sup>391</sup> *Id.* at 49.

<sup>392</sup> *Id.* at 51-52 (citing *Arjona*, 120 U.S. at 488 (contending that there was no greater need for clear statement by Congress in military commission context than in enactment of ordinary criminal law, as in *Arjona*)).

<sup>393</sup> *Id.* at 66 (citing *Crowell v. Benson*, 285 U.S. 22, 54 (1932)).

<sup>394</sup> *Crowell*, 285 U.S. at 56-58.

<sup>395</sup> *Al Bahlul II*, 792 F.3d at 20.

<sup>396</sup> *Id.* at 66 (Henderson, J., dissenting).

<sup>397</sup> Military Commissions Act, 10 U.S.C. § 950g(d) (2012).

<sup>398</sup> *See Al Bahlul I*, 767 F.3d 1, 22. (D.C. Cir. 2014).

contemplated by *Crowell*. Here, too, the *al Bahlul II* majority relied on a tendentious reading of relevant precedent.

Judge Henderson's dissent, like Judge Brown's concurrence in *al Bahlul I*, provides a far more convincing account of Congress's power. Tracking the functional conception, Judge Henderson discussed the importance of deference to Congress on the definition of international law.<sup>399</sup> Judge Henderson also noted the practical national security concerns, including the risk of disclosure of sensitive national security information, that impelled Congress to provide for military commissions.<sup>400</sup> In addition, Judge Henderson cited the limiting principle in *al Bahlul* that precluded any wholesale congressional takeover of Article III courts. Prosecutions based on a plot to commit a clear international war crime such as the murder of civilians, Judge Henderson observed,<sup>401</sup> add only a "narrow class of claims" to "unchallenged" commission jurisdiction over charges arising from completed war crimes.<sup>402</sup> In short, Judge Henderson's dissent addressed the interaction of Article I and Article III in a fashion that furnished a workable template for future developments in the law. Orderly development that respects Congress's prerogatives while cabining the risk of abuse achieves the key goals of the functional conception.

#### CONCLUSION

If, as then Justice Rehnquist suggested over thirty years ago, one could view the jurisprudence of non-Article III tribunals as a bleak and unforgiving expanse where "ignorant armies have clashed by night," military tribunals have been a perennial battlefield. The protective camp has fought hard to keep Article III courts off the slippery slope where a small slide could lead to disaster. Functionalists have fought back, rejecting the formalism of the protective camp's position.

The contest over military tribunals illustrates the high stakes in this debate. If the protective camp prevails, an avowed terrorist like Ali Hamza al Bahlul may escape accountability, and civilian contractors with U.S. forces abroad may experience fewer constraints. On the other hand, if the functionalist camp emerges victorious, officials may

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<sup>399</sup> *Al Bahlul II*, 792 F.3d at 45-46 (Henderson, J., dissenting).

<sup>400</sup> *Id.* at 67-68.

<sup>401</sup> *See id.* at 67 (observing that military commission trials involving conspiracies to commit internationally recognized war crimes "deal only with a particularized area of law" (citing *Schor*, 478 U.S. at 852)).

<sup>402</sup> *Id.* at 67 (citing *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1945 (2015)).

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turn to non-Article III tribunals as a quick and easy answer, making the gold standard of Article III seem like a luxury we can no longer afford. Each scenario has its risks.

Despite the attractiveness of the protective camp's vision, this Article has argued that the functionalists have the better case. In part this conclusion is the verdict of history, in two senses. First, as Justice Rehnquist acknowledged in his *Northern Pipeline* concurrence, we have found it impossible to maintain unquestioning allegiance to Article III's strictures. Territorial courts have become part of our system, even though a territory like Puerto Rico shows that Article III courts can take root. Courts-martial have followed suit. Public rights doctrine has grown, although no one seems to know exactly what it is.

History also favors the functionalists in the domain of military tribunals. The protective camp has substituted a stark narrative of military rule for the complexities of the historical record. The absolutism of the protective camp's foremost champion, Justice Black, served him well during the Cold War's challenges to free speech. However, it was less useful in navigating the nuances of Article III. In particular, Justice Black's refusal to acknowledge the pivot in English constitutional history toward military justice as a means to secure civilian control cast a pall on the protective camp's analysis of these issues.

Fearful of the slippery slope, the protective camp fails to recognize that although the not-so-tidy examples of territorial courts, military justice, and public rights do not provide all of the answers, they do help point us toward the right questions. Considering unifying themes, functionalists can derive three crucial elements that support non-Article III tribunals: (1) the importance of the tribunal to Congress's exercise of Article I power; (2) the promotion of other structural values, such as civilian control of the military; and, (3) the presence of a limiting principle. Applying these elements leads to the conclusion that courts-martial can try civilian contractors, while military commissions can hear charges with a reasonable relationship to international law brought against belligerents in an armed conflict.

Members of the protective camp will view each proceeding as a treacherous first step down the slippery slope. However, the functional position will appeal to those of practical bent who view the world's exigencies as too intractable for Article III courts' formal combat. Of course, informality also has its limits. Due process is a meaningful constraint on any adjudicative enterprise under the Constitution, whether that enterprise is military or civilian in character. Following the functionalists' lead merely creates an opportunity for adjudication

that is both fair and efficient. Both within and beyond Article III tribunals, realizing that opportunity is the most formidable challenge.